F. Discrimination Against Particular Religions

GILLETTE v. UNITED STATES

401 U.S. 437 (1971)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from military training and service.

In No. 85, petitioner Gillette was convicted of wilful failure to report for induction into the armed forces. Gillette defended on the ground that he should have been ruled exempt from induction as a conscientious objector to war. In support of his unsuccessful request for classification as a conscientious objector, this petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as "unjust." Gillette's view of his duty to abstain from involvement in a war seen as unjust is, in his words, "based on a humanist approach to religion," and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.

In No. 325, petitioner Negre, after induction into the Army, completion of basic training, and receipt of orders for Vietnam duty, commenced proceedings looking to his discharge as a conscientious objector to war. Application for discharge was denied because Negre "objects to the war in Vietnam, not to all wars," and therefore does "not qualify as a conscientious objector." No question is raised as to the sincerity or the religious quality of this petitioner's views. In line with religious counseling and numerous religious texts, Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between "just" and "unjust" wars, and to forswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and "all that I had been taught in my religious training."

I

Each petitioner claims a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples. Both claims turn on the proper construction of § 6 (j) of the Military Selective Service Act of 1967 which provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[1]

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[1] Section 6 (j) provides further: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely

For purposes of determining the statutory status of conscientious objection to a particular war, the focal language of § 6 (j) is the phrase, "conscientiously opposed to participation in war in any form." This language can bear but one meaning; that conscientious scruples must implicate "war in any form," and an objection involving a particular war would plainly not be covered by § 6 (j). A different result cannot be supported by reliance on legislative history. We hold that Congress intended to exempt persons who oppose participating in all war and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is "religious" in character.

II

Both petitioners argue that § 6 (j), construed to cover only objectors to all war, violates the First Amendment. Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature. While the two religious clauses overlap and interact in many ways, it is best to focus first on petitioners' other contention, that § 6 (j) is a law respecting the establishment of religion. For despite free exercise overtones, the gist of the constitutional complaint is that § 6 (j) impermissibly discriminates among types of religious belief and affiliation.

On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature, petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6 (j), properly construed, has this effect. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion.

An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause -- ensuring governmental neutrality in matters of religion. Here there is no claim that exempting conscientious objectors to war amounts to an overreaching of secular purposes and an undue involvement of government in affairs of religion. To the contrary, petitioners ask for greater "entanglement" by judicial expansion of the exemption. Necessarily the constitutional value at issue is "neutrality." And as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. The Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.

A

The critical weakness of petitioners' establishment claim arises from the fact that § 6 (j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specified

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personal moral code."

objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required.

Thus, there is no occasion to consider the claim that when Congress grants a benefit expressly to adherents of one *religion*, courts must either nullify the grant or somehow extend the benefit to cover all religions. For § 6 (j) does not single out any religious organization or religious creed for special treatment. Rather petitioners' contention is that since Congress has recognized one sort of conscientious objection concerning war, the Establishment Clause commands that another, different objection be protected by the courts.

Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths -- and individuals whose personal beliefs of a religious nature include the distinction -- cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course, this contention of de facto religious discrimination, rendering § 6 (j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6 (j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality as well as obvious abuses. Still a claimant must be able to show the absence of a neutral, secular basis for the lines government has drawn. For the reasons that follow, we believe that petitioners have failed to make the requisite showing with respect to § 6 (j).

Section 6 (j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, but no doubt the section reflects as well congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.

Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values. "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

In this state of affairs it is impossible to say that the congressional purpose in enacting § 6

(j) is to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war. A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6 (j) encourages membership in putatively "favored" religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations.

B

We conclude not only that the affirmative purposes underlying § 6 (j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." The Government argues that the interest in fairness would be jeopardized by expansion of § 6 (j) to include conscientious objection to a particular war. The contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice.

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. The difficulties of sorting the two, with a sure hand, are considerable. There is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results" To view the problem of fairness and evenhanded decisionmaking, in the present context, as merely a commonplace chore of weeding out "spurious claims," is to minimize substantial difficulties of real concern to a responsible legislative body.

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled. There is even a danger of unintended religious discrimination -- a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. At any rate, it is true that "the more discriminating and complicated the basis of classification for an exemption -- even a neutral one -- the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a

conscientious objection of indeterminate scope were honored in theory.

Tacit at least in the Government's view of the instant cases is the contention that the limits of § 6 (j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance. Some have perceived a danger that exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would "open the doors to a general theory of selective disobedience to law" and jeopardize the binding quality of democratic decisions. It is undoubted that the nature of conscription requires the personal desires and perhaps the dissenting views of those who must serve to be subordinated in some degree to the pursuit of public purposes. The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict.

Real dangers -- dangers of the kind feared by the Commission -- might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government. In short, the considerations mentioned in the previous paragraph, when seen in conjunction with the central problem of fairness, are without question properly cognizable by Congress. In light of these valid concerns, we conclude that it is supportable for Congress to have decided that the objector to all war has a claim that is distinct enough to justify special status, while the objector to a particular war does not.

Of course, we do not suggest that Congress would have acted unreasonably had it decided to exempt those who object to particular wars. Our analysis is undertaken to determine the existence of a neutral, secular justification for the lines Congress has drawn. We find that justifying reasons exist and therefore hold that the Establishment Clause is not violated.

III

Petitioners' remaining contention is that Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion. This complaint does not implicate problems of comparative treatment of different sorts of objectors. And our holding that § 6 (j) comports with the Establishment Clause does not automatically settle the issue. The Free Exercise Clause no doubt has a reach of its own.

Nonetheless, our analysis of § 6 (j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.

Since petitioners' statutory and constitutional claims to relief from military service are without merit, it follows that in Gillette's case there was a basis in fact to support administrative denial of exemption, and that in Negre's case there was a basis in fact to support the Army's denial of a discharge.

LARSON v. VALENTE

456 U.S. 228 (1982)

JUSTICE BRENNAN delivered the opinion of the Court.

The principal question presented by this appeal is whether a Minnesota statute, imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers, discriminates against such organizations in violation of the Establishment Clause of the First Amendment.

I

Appellants are, by virtue of their offices, responsible for the implementation and enforcement of the Minnesota charitable solicitations Act, Minn. Stat. §§ 309.50-309.61 (1969 and Supp. 1982). This Act, in effect since 1961, provides for a system of registration and disclosure respecting charitable organizations, and is designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions. A charitable organization subject to the Act must register with the Minnesota Department of Commerce before it may solicit contributions within the State. § 309.52. With certain specified exceptions, all charitable organizations registering under § 309.52 must file an extensive annual report with the Department, detailing their total income from all sources, their costs of management, fundraising, and public education, and their transfers of property or funds out of the State, along with a description of the recipients and purposes of those transfers. § 309.53. The Department is authorized to deny or withdraw the registration of any charitable organization if the Department finds that it would be in "the public interest" to do so and if the organization is found to have engaged in fraudulent, deceptive, or dishonest practices. Further, a charitable organization is deemed ineligible to maintain its registration if it expends an "unreasonable amount" for management and fund-raising costs, with those costs being presumed unreasonable if they exceed thirty per cent of the organization's total income.

From 1961 until 1978, all "religious organizations" were exempted from the requirements of the Act. But effective March 29, 1978, the Minnesota Legislature amended the Act so as to include a "fifty per cent rule" in the exemption provision covering religious organizations. § 309.515, subd. 1(b). This fifty per cent rule provided that only religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the Act.[1]

[1] The amended exemption provision read in relevant part:

Shortly after the enactment of § 309.515, subd. 1(b), the Department notified appellee Holy Spirit Association for the Unification of World Christianity (Unification Church) that it was required to register under the Act because of the newly enacted provision.

II

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III

A

Since *Everson* v. *Board of Education*, this Court has adhered to the principle that no State can "pass laws which aid one religion" or that "prefer one religion over another." This principle of denominational neutrality has been restated on many occasions. In *Zorach* v. *Clauson*, we said that "[the] government must be neutral when it comes to competition between sects." In *Epperson* v. *Arkansas*, we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion. The State may not adopt programs or practices which 'aid or oppose' any religion. This prohibition is absolute." In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.

B

The fifty per cent rule of § 309.515, subd. 1(b), clearly grants denominational preferences of the sort deprecated in our precedents.[2] Consequently, that rule must be invalidated unless it

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"309.515 Exemptions

"Subdivision 1. . . . [Sections] 309.52 and 309.53 shall not apply to . . .:

. . . .

"(b) A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term 'member' shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation."

[2] Appellants urge that § 309.515, subd. 1(b), does not grant such preferences, but is merely "a law based upon secular criteria which may not identically affect all religious organizations." We reject the argument. Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen to have a "disparate impact" upon different religious organizations. On the contrary, § 309.515, subd. 1(b), makes explicit and deliberate distinctions between different religious organizations. The provision effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support

is justified by a compelling governmental interest, and unless it is closely fitted to further that interest. With that standard of review in mind, we turn to an examination of the governmental interest asserted by appellants.

Appellants assert, and we acknowledge, that the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization. We thus agree that the Act, "viewed as a whole, has a valid secular purpose," and we will therefore assume, *arguendo*, that the Act generally is addressed to a sufficiently "compelling" governmental interest. But our inquiry must focus more narrowly, upon the distinctions drawn by § 309.515, subd. 1(b), itself: Appellants must demonstrate that the challenged fifty per cent rule is closely fitted to further the interest that it assertedly serves.

Appellants argue that § 309.515, subd. 1(b)'s distinction between contributions solicited from members and from non-members is eminently sensible. They urge that members are reasonably assumed to have significant control over the solicitation of contributions from themselves to their organization, and over the expenditure of the funds that they contribute, as well. Further, appellants note that as a matter of Minnesota law, members of organizations have greater access than nonmembers to the financial records of the organization. Appellants conclude: "Where the safeguards of membership funding do not exist, the need for public disclosure is obvious. As public contributions increase as a percentage of total contributions, the need for public disclosure increases. The point at which public disclosure should be required is a determination for the legislature. In this case, the Act's 'majority' distinction is a compelling point, since at this point the organization becomes predominantly public-funded."

We reject the argument, for it wholly fails to justify the only aspect of § 309.515, subd. 1(b), under attack -- the selective fifty per cent rule. Appellants' argument is based on three distinct premises: that members of a religious organization can and will exercise supervision and control over the organization's solicitation activities when membership contributions exceed fifty per cent; that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public by the organization; and that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions. Acceptance of all three of these premises is necessary to appellants' conclusion, but we find no substantial support for any of them in the record.

Regarding the first premise, there is simply nothing suggested that would justify the assumption that a religious organization will be supervised and controlled by its members

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from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members," on the other hand.

Appellants also argue that reversal of the Court of Appeals is required by *Gillette* v. *United States*, 401 U.S. 437 (1971). *Gillette* is readily distinguishable from the present case. As we noted in *Gillette*, the "critical weakness of petitioners' establishment claim" arose "from the fact that § 6(j), on its face, simply [did] not discriminate on the basis of religious affiliation." In contrast, the statute before us focuses precisely and solely upon religious organizations.

simply because they contribute more than half of the organization's solicited income. Even were we able to accept appellants' doubtful assumption that members will *supervise* their religious organization under such circumstances, the record before us is wholly barren of support for appellants' further assumption that members will effectively *control* the organization if they contribute more than half of its solicited income. Appellants have offered no evidence whatever that members of religious organizations exempted by § 309.515, subd. 1(b)'s fifty per cent rule in fact control their organizations. Indeed, the legislative history of § 309.515, subd. 1(b), indicates precisely to the contrary.[3] In short, the first premise of appellants' argument has no merit.

Nor do appellants offer any stronger justification for their second premise -- that membership control is an adequate safeguard against abusive solicitations of the public by the organization. This premise runs directly contrary to the central thesis of the entire Minnesota charitable solicitations Act -- namely, that charitable organizations soliciting contributions from the public cannot be relied upon to regulate themselves, and that state regulation is accordingly necessary. Appellants offer nothing to suggest why religious organizations should be treated any differently in this respect. And even if we were to assume that the members of religious organizations have some incentive, absent in nonreligious organizations, to protect the interests of nonmembers solicited by the organization, appellants' premise would still fail to justify the fifty per cent rule: Appellants offer no reason why the members of religious organizations exempted under § 309.515, subd. 1(b)'s fifty per cent rule should have any *greater* incentive to protect nonmembers than the members of nonexempted religious organizations have. Thus we also reject appellants' second premise as without merit.

Finally, we find appellants' third premise -- that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions -- also without merit. The flaw in appellants' reasoning here may be illustrated by the following example. Church A raises $ 10 million, 20 per cent from nonmembers. Church B raises $ 50,000, 60 per cent from nonmembers. Appellants would argue that although the public contributed $ 2 million to Church A and only $ 30,000 to Church B, there is less need for public disclosure with respect to Church A than with respect to Church B. We disagree; the need for public disclosure more plausibly rises in proportion with the *absolute amount*, rather than with the *percentage*, of

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[3] An early draft of that provision allowed an exemption only for a religious organization that solicited "substantially more than half of the contributions it received from persons *who have a right to vote as a member* of the organization." The italicized language was later amended to read, "who are members." Since § 309.515, subd. 1(b), as enacted deliberately omits membership voting rights as a requirement for a religious organization's exemption, it clearly permits religious organizations that are not subject to control by their membership to be exempted from the Act. Of course, even if § 309.515, subd. 1(b), exempted only those religious organizations with membership voting rights, the provision obviously would not ensure that the membership actually exercised its voting rights so as to control the organization.

nonmember contributions.[4]

We accordingly conclude that appellants have failed to demonstrate that the fifty per cent rule is "closely fitted" to further a "compelling governmental interest."

C

In *Lemon* v. *Kurtzman*, we announced three "tests" that a statute must pass in order to avoid the prohibition of the Establishment Clause. The *Lemon* "tests" are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions, like § 309.515, subd. 1(b)'s fifty per cent rule, that discriminate *among* religions. Although application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny to § 309.515, subd. 1(b)'s fifty per cent rule. We view the third of those tests as most directly implicated. Justice Harlan well described the problems of entanglement in his separate opinion in *Walz*, where he observed that governmental involvement in programs concerning religion "may be so direct or in such degree as to engender a risk of politicizing religion. . . . Yet history cautions that political fragmentation on sectarian lines must be guarded against. . . . [Government] participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation."

The Minnesota statute challenged here is illustrative of this danger. It is plain that the principal effect of the fifty per cent rule in § 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that the burden of compliance is certainly not *de minimis*."[5] We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per cent rule effects the *selective* legislative imposition of burdens and advantages upon particular denominations. The "risk of politicizing religion" that inheres in such legislation is obvious, and indeed is confirmed by the provision's legislative history. For the history of § 309.515, subd. 1(b)'s fifty per cent rule demonstrates that the provision was

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[4] We do not suggest, however, that an exemption provision based upon the absolute amount of nonmember contributions would necessarily satisfy the standard set by the Establishment Clause for laws granting denominational preferences.

[5] The registration statement required by § 309.52 calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization. The organization must disclose the "[general] purposes for which contributions . . . will be used," the "[board], group or individual having final discretion as to the distribution and use of contributions received," and "[such] other information as the department may . . . require" -- and these are only three of sixteen enumerated items of information required by the registration statement. The annual report required by § 309.53 is even more burdensome intrusive. Further, a religious organization that must register under the Act may have its registration withdrawn if the Department or the Attorney General concludes that the religious organization is spending "an unreasonable amount" for management and fund-raising costs.

drafted with the explicit intention of including particular religious denominations and excluding others. For example, the second sentence of an early draft of § 309.515, subd. 1(b), read: "A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention *that elects and controls the governing board of the religious society or organization* is exempt from the requirements of Sections 309.52 and 309.53." The legislative history discloses that the legislators perceived that the italicized language would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act. On the other hand, there were certain religious organizations that the legislators did not want to exempt from the Act. One State Senator explained that the fifty per cent rule was "an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in our state." Another Senator said, "what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations." Still another Senator, who apparently had mixed feelings about the proposed provision, stated, "I'm not sure why we're so hot to regulate the Moonies anyway."

In short, the fifty per cent rule's express design to burden or favor selected religious denominations led the Legislature to discuss the characteristics of various sects with a view towards "religious gerrymandering." As THE CHIEF JUSTICE stated in *Lemon*: "This kind of state inspection of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of churches."

IV

In sum, we conclude that the fifty per cent rule of § 309.515, subd. 1(b), is not closely fitted to the furtherance of any compelling governmental interest, and that the provision therefore violates the Establishment Clause. Indeed, we think that § 309.515, subd. 1(b)'s fifty per cent rule sets up precisely the sort of official denominational preference that the Framers of the First Amendment forbade. Accordingly, we hold that appellees cannot be compelled to register and report under the Act on the strength of that provision.[6]

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[6] In so holding, we by no means suggest that the State must allow appellees to remain exempt from the provisions of the Act. Appellees may be required to prove that the Unification Church is a religious organization within the meaning of the Act. Further, nothing in our opinion disables the State from denying exemption from the Act, or from refusing registration and licensing, to organizations proved to have engaged in frauds upon the public. We simply hold that because the fifty per cent rule violates the Establishment Clause, appellees cannot be compelled to register and report on the strength of that provision. [Note: In a footnote to Justice Steven’s concurring opinion not addressing the Establishment Clause issue, he argues that the State likely would be unable to show that the Unification Church is not a religious organization within the meaning of the Minnesota Act: “The Church has been incorporated in California as a religious corporation and has been treated as a religious organization for tax purposes by the

JUSTICE STEVENS, concurring.

I agree with the Court's resolution of the Establishment Clause issue. Accordingly, I join the Court's opinion.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

I concur in the dissent of JUSTICE REHNQUIST with respect to standing. I also dissent on the merits. I have several difficulties with this disposition of the case. First, the Court employs a legal standard wholly different from that applied in the courts below. The premise for the Court's standard is that the challenged provision is a deliberate and explicit legislative preference for some religious denominations over others. If this case is to be judged by a standard not employed by the courts below and if the new standard involves factual issues that have not been addressed by the District Court, the Court should not itself purport to make these factual determinations. It should remand to the District Court.

Second, the Court disposes in a footnote of the State's claim that the 50-percent rule is a neutral, secular criterion that has disparate impact among religious organizations. The limitation, it is said, makes "explicit and deliberate distinctions between different religious organizations." The rule, however, names no churches or denominations that are entitled to or denied the exemption. It neither qualifies nor disqualifies a church based on the kind or variety of its religious belief. Some religions will qualify and some will not, but this depends on the source of their contributions, not on their brand of religion.

To say that the rule on its face represents an explicit and deliberate preference for some religious beliefs over others is not credible. The Court offers no support for this assertion other than to agree with the Court of Appeals that the limitation might burden the less well organized denominations. This conclusion is contrary to what the State insists is readily evident from a list of those charitable organizations that have registered under the Act and of those that are exempt. It is claimed that both categories include not only well-established, but also not so well-established, organizations. The Court appears to concede that the Minnesota law at issue does not constitute an establishment of religion merely because it has a disparate impact. An intentional preference must be expressed. To find that intention on the face of the provision at issue here seems to me to be patently wrong.

Third, I cannot join the Court's easy rejection of the State's submission that a valid secular purpose justifies basing the exemption on the percentage of external funding. The Court, preferring its own judgment of the realities of fundraising by religious organizations to that of the state legislature, rejects the State's submission that organizations depending on their members for more than half of their funds do not pose the same degree of danger as other religious organizations. In the course of doing so, the Court expressly disagrees with the notion that members in general can be relied upon to control their organizations.

Federal Government and by the State of Minnesota. The Church was treated as a religious organization by the State prior to the enactment of the 50-percent rule in 1978.“]

I do not share the Court's view of our omniscience. If the State determines that its interest in preventing fraud does not extend to those who do not raise a majority of their funds from the public, its interest in imposing the requirement on others is not thereby reduced in the least. Furthermore, the legislature thought it made good sense, and the courts, including this one, should not so readily disagree.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined, dissented on the ground that appellees lacked standing to challenge the Minnesota statute: “Appellees have never proved that the Association is a "religious organization" for purposes of the fifty percent rule. If the appellees fail in this proof, this Court will have rendered a purely advisory opinion.”

HERNANDEZ v. COMMISSIONER OF INTERNAL REVENUE.

490 U.S. 680 (1989)

JUSTICE MARSHALL delivered the opinion of the Court.

Section 170 of the Internal Revenue Code of 1954, 26 U. S. C. § 170, permits a taxpayer to deduct from gross income the amount of a "charitable contribution." The Code defines that term as a "contribution or gift" to certain eligible donees, including entities organized and operated exclusively for religious purposes. We granted certiorari to determine whether taxpayers may deduct as charitable contributions payments made to branch churches of the Church of Scientology in order to receive services known as "auditing" and "training." We hold that such payments are not deductible.

Scientology was founded in the 1950's by L. Ron Hubbard. Scientologists believe that an immortal spiritual being exists in every person. A person becomes aware of this spiritual dimension through a process known as "auditing." Auditing involves a one-to-one encounter between a participant (known as a "preclear") and a Church official (known as an "auditor"). An electronic device, the E-meter, helps the auditor identify the preclear's areas of spiritual difficulty by measuring skin responses during a question and answer session. The preclear gains spiritual awareness by progressing through sequential levels of auditing, provided in short blocks of time known as "intensives."

The Church also offers members courses known as "training." Participants in these sessions study the tenets of Scientology and seek to attain the qualifications necessary to serve as auditors. Training courses, like auditing sessions, are provided in sequential levels. Scientologists are taught that spiritual gains result from such courses.

The Church charges a "fixed donation," also known as a "price" or a "fixed contribution," for participants to gain access to auditing and training sessions. These charges are set forth in schedules, and prices vary with a session's length and level of sophistication. This system of mandatory fixed charges is based on a central tenet of Scientology known as the "doctrine of exchange," according to which any time a person receives something he must pay something back. Petitioners in these consolidated cases each made payments to a branch church for

auditing or training sessions. They sought to deduct these payments on their income tax returns. Respondent Commissioner, the head of the IRS, disallowed these deductions, finding that the payments were not charitable contributions within the meaning of § 170.

Section 170 was enacted in 1954; it requires a taxpayer claiming the deduction to satisfy a number of conditions. The Commissioner's stipulation in this case has narrowed the statutory inquiry to one such condition: whether petitioners' payments for auditing and training sessions are "contribution[s] or gift[s]" within the meaning of § 170.

The legislative history of the "contribution or gift" limitation, though sparse, reveals that Congress intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services. Only the former were deemed deductible. The gift characterization would apply only if there were no expectation of any quid pro quo. In ascertaining whether a given payment was made with "the expectation of any quid pro quo," the IRS has customarily examined the external features of the transaction in question.

In light of this understanding of § 170, it is readily apparent that petitioners' payments to the Church do not qualify as "contribution[s] or gift[s]." These payments were part of a quintessential quid pro quo exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions.

Petitioners argue that denying their requested deduction violates the Establishment Clause in two respects. First, § 170 is said to create an unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices. Second, § 170 allegedly threatens governmental entanglement with religion because it requires the IRS to engage in "supervision of religious beliefs and practices" and "valuation of religious services."

Our decision in *Larson v. Valente*, 456 U.S. 228 (1982), supplies the analytic framework for evaluating petitioners' contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*.

Thus analyzed, § 170 easily passes constitutional muster. Section 170 makes no "explicit and deliberate distinctions between different religious organizations," applying instead to all religious entities.

Section 170 also comports with the *Lemon* test. First, there is no allegation that § 170 was born of animus to religion in general or Scientology in particular. The provision is neutral both in design and purpose.

Second, the primary effect of § 170 -- encouraging gifts to charitable entities, including but not limited to religious organizations -- is neither to advance nor inhibit religion. It may be that a consequence of the quid pro quo orientation of the "contribution or gift" requirement is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fundraising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect

does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions."

Third, § 170 threatens no excessive entanglement between church and state. To be sure, ascertaining whether a payment to a religious institution is part of a quid pro quo transaction may require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information. But routine regulatory interaction does not of itself violate the nonentanglement command.

We turn, finally, to petitioners' assertion that disallowing their claimed deduction is at odds with the IRS' longstanding practice of permitting taxpayers to deduct payments made to other religious institutions in connection with certain religious practices. The Commissioner's periodic revenue rulings have stated the IRS' position rather clearly. A 1971 ruling states: "Pew rents, building fund assessments, and periodic dues paid to a church are all methods of making contributions to the church, and such payments are deductible as charitable contributions within the limitations set out in section 170." We also assume that the IRS also allows taxpayers to deduct "specified payments for attendance at High Holy Day services, for tithes, for torah readings and for memorial plaques." The development of the present litigation, however, makes it impossible for us to resolve petitioners' claim that they have received unjustifiably harsh treatment compared to adherents of other religions. The relevant inquiry in determining whether a payment is a "contribution or gift" is whether the transaction is structured as a quid pro quo exchange. To make such a determination in this case, the Tax Court heard testimony and received documentary proof as to the terms and structure of the auditing and training transactions.

Perhaps because the theory of administrative inconsistency emerged only on appeal, petitioners did not endeavor at trial to adduce from the IRS or other sources any specific evidence about other religious faiths' transactions. The IRS' revenue rulings, which merely state the agency's conclusions as to deductibility, also provide no specific facts about the nature of these other faiths' transactions. In the absence of such facts, we simply have no way to appraise accurately whether the IRS' revenue rulings have correctly applied a quid pro quo analysis with respect to any or all of the religious practices in question. Absent such a record, we must reject petitioners' administrative consistency argument.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, dissenting.

The Court today acquiesces in the decision of the IRS to manufacture a singular exception to its 70-year practice of allowing fixed payments indistinguishable from those made by petitioners to be deducted as charitable contributions. Because the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings, I respectfully dissent.

It must be emphasized that the IRS' position here is not based upon the contention that a portion of the knowledge received from auditing or training is of secular, commercial, nonreligious value. Thus, the denial of a deduction in these cases bears no resemblance to the denial of a deduction for religious-school tuition up to the market value of the secularly useful

education received. Here the IRS denies deductibility solely on the basis that the exchange is a quid pro quo, even though the quid is exclusively of spiritual or religious worth. Respondent cites no instances in which this has been done before, and there are good reasons why.

When a taxpayer claims as a charitable deduction part of a fixed amount given to a charitable organization in exchange for benefits that have a commercial value, the allowable portion of that claim is computed by subtracting from the total amount paid the value of the physical benefit received. It becomes impossible, however, to compute the "contribution" portion of a payment to a charity where what is received in return is not bought and sold except in donative contexts so that the only "market" price against which it can be evaluated is a market price that always includes donations.

Confronted with this difficulty, and with the standard of equality of treatment among religions that the First Amendment imposes, the Government has only two options with regard to distinctively religious quids pro quo: to disregard them all, or to tax them all. Over the years it has chosen the former course. There can be no doubt that at least some of the fixed payments which the IRS has treated as charitable deductions are as "inherently reciprocal" as the payments for auditing at issue here. In exchange for their payment of pew rents, Christians receive particular seats during worship services. Similarly, in some synagogues attendance at the worship services for Jewish High Holy Days is often predicated upon the purchase of a general admission ticket or a reserved seat ticket. Religious honors such as publicly reading from Scripture are purchased or auctioned periodically in some synagogues of Jews from Morocco and Syria. Mormons must tithe their income as a necessary but not sufficient condition to obtaining a "temple recommend," the right to be admitted into the temple. A Mass stipend -- a fixed payment given to a Catholic priest, in consideration of which he is obliged to apply the fruits of the Mass for the intention of the donor -- has similar overtones of exchange.

This is not a situation where the IRS has explicitly and affirmatively reevaluated its longstanding interpretation of § 170 and decided to analyze all fixed religious contributions under a quid pro quo standard. There is no indication whatever that the IRS has abandoned its 70-year practice with respect to payments made by those other than Scientologists.

Given the IRS' stance in these cases, it is an understatement to say that with respect to fixed payments for religious services "the line between the taxable and the immune has been drawn by an unsteady hand." Rather, it involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions. As such, it is best characterized as a case of the Government "put[ting] an imprimatur on [all but] one religion." *Gillette v. United States*, 401 U.S. 437, 450 (1971). That the Government may not do.

In my view, the IRS has misapplied its longstanding practice of allowing charitable contributions under § 170 in a way that violates the Establishment Clause. Just as the Minnesota statute at issue in *Larson v. Valente*, 456 U.S. 228 (1982), discriminated against the Unification Church, the IRS' application of the quid pro quo standard here -- and only here -- discriminates against the Church of Scientology. I would reverse the decisions below.

G. Preferential Treatment of Religions

ESTATE OF THORNTON v. CALDOR, INC.

472 U.S. 703 (1985)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause.

In early 1975, petitioner's decedent Donald E. Thornton[1] began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law.

In 1977, following the state legislature's revision of the Sunday-closing laws, respondent opened its Connecticut stores for Sunday business. In order to handle the expanded store hours, respondent required its managerial employees to work every third or fourth Sunday. Thornton, a Presbyterian who observed Sunday as his Sabbath, initially complied with respondent's demand and worked a total of 31 Sundays in 1977 and 1978. In October 1978, Thornton was transferred to a management position in respondent's Torrington store; he continued to work on Sundays during the first part of 1979. In November 1979, however, Thornton informed respondent that he would no longer work on Sundays because he observed that day as his Sabbath; he invoked the protection of Conn. Gen. Stat. § 53-303e(b) (1985), which provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[2]

Thornton rejected respondent's offer either to transfer him to a management job in a Massachusetts store that was closed on Sundays, or to transfer him to a nonsupervisory position in the Torrington store at a lower salary. In March 1980, respondent transferred Thornton to a clerical position in the Torrington store; Thornton resigned two days later and filed a grievance with the State Board of Mediation and Arbitration alleging that he was discharged from his manager's position in violation of Conn. Gen. Stat. § 53-303e(b) (1985).

After holding an evidentiary hearing the Board evaluated Thornton's claim and concluded it was based on a sincere religious conviction. The Board held that respondent had violated the statute by "[discharging] Mr. Thornton as a management employee for refusing to work [on] Thornton's Sabbath." The Superior Court, in affirming that ruling, concluded that the

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[1] Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

[2] Thornton had learned of this statutory protection by consulting with an attorney.

statute did not offend the Establishment Clause. The Supreme Court of Connecticut reversed, holding the statute did not have a "clear secular purpose."

In setting the appropriate boundaries in Establishment Clause cases, the Court has frequently relied on our holding in *Lemon* for guidance, and we do so here.

The Connecticut statute challenged here guarantees every employee, who "states that a particular day of the week is observed as his Sabbath," the right not to work on his chosen day. The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers. The statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath.

In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.

There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule -- a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.[3] Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." The statute goes beyond having an incidental or remote effect of advancing religion. The statute

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[3] Section 53-303e(b) gives Sabbath observers the valuable right to designate a particular weekly day off -- typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.

has a primary effect that impermissibly advances a particular religious practice.

We hold that the Connecticut statute, which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, concurring.

The Court applies the test enunciated in *Lemon* v. *Kurtzman*, and concludes that Conn. Gen. Stat. § 53-303e(b) (1985) has a primary effect that impermissibly advances religion. I agree, and I join the Court's opinion and judgment. In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.

All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers -- the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny.

I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably accommodate the religious practices of employees unless to do so would cause undue hardship to the employer's business. Like the Connecticut Sabbath law, Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause. The provisions of Title VII must therefore manifest a valid secular purpose and effect to be valid under the Establishment Clause. In my view, a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. AMOS

483 U.S. 327 (1987)

JUSTICE WHITE delivered the opinion of the Court.

Section 702 of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-1, exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. [1] The question presented is whether applying the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause.

I

The Deseret Gymnasium (Gymnasium) in Salt Lake City, Utah, is a nonprofit facility, open to the public, run by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB), and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP). The CPB and the COP are religious entities associated with The Church of Jesus Christ of Latter-day Saints (Church), an unincorporated religious association sometimes called the Mormon or LDS Church.[2]

Appellee Mayson worked at the Gymnasium for some 16 years as an assistant building engineer and then as building engineer. He was discharged in 1981 because he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.[3]

Mayson and others brought an action against the CPB and the COP alleging discrimination on the basis of religion in violation of § 703 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2.[4] The defendants moved to dismiss this claim on the ground that § 702

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[1] Section 702 provides in relevant part:

"This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

[2] The CPB and the COP are organized under Utah law to perform various activities on behalf of the Church. Both corporations are tax-exempt, nonprofit religious entities. Appellees do not contest that the CPB and the COP are religious organizations for purposes of § 702.

[3] Temple recommends are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.

[4] The other plaintiffs below, whose claims are not at issue in this appeal, initially included former employees of Beehive Clothing Mills, which manufactures garments with

shields them from liability. The plaintiffs contended that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, § 702 violates the Establishment Clause.

The District Court first considered whether these cases require a decision on the plaintiffs' constitutional argument. Starting from the premise that the religious activities of religious employers can be exempted under § 702, the court developed a test to determine whether an activity is religious. Applying this test to Mayson's situation, the court found that there is no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon Church;[5] and that none of Mayson's duties at the Gymnasium are "even tangentially related to any conceivable religious belief or ritual of the Mormon Church." The court concluded that Mayson's case involves nonreligious activity.

The court next considered the constitutional challenge to § 702. Applying the test set out in *Lemon* v. *Kurtzman*, the court first held that § 702 has the permissible secular purpose of "assuring that the government remains neutral and does not meddle in religious affairs."[6] The court concluded, however, that § 702 fails the second part of the *Lemon* test because the provision has the primary effect of advancing religion.[7] Among the considerations mentioned by the court were: that § 702 singles out religious entities for a benefit, rather than benefitting a broad grouping of which religious organizations are only a part; that § 702 is not supported by long historical tradition; and that § 702 burdens the free exercise rights of employees of religious institutions who work in nonreligious jobs.[8] Finding that § 702 impermissibly

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religious significance for Church members. The complaint was amended to add as plaintiff a former employee of Deseret Industries, a division of the Church's Welfare Services Department.

[5] The court found that "nothing in the running or purpose of [the Gymnasium] suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." The court emphasized that no contention was made that the religious doctrines of the Mormon Church either require religious discrimination in employment or treat physical exercise as a religious ritual.

[6] The court examined in considerable detail the legislative history of the 1972 amendment of § 702. Prior to that time, § 702 exempted only the religious activities of religious employers from the statutory proscription against religious discrimination in employment. The 1972 amendment extending the exemption to all activities of religious organizations was sponsored by Senators Allen and Ervin. Senator Ervin explained that the purpose of the amendment was to "take the political hands of Caesar off of the institutions of God, where they have no place to be."

[7] The court rejected the defendants' arguments that § 702 is required both by the need to avoid excessive governmental entanglement with religion and by the Free Exercise Clause.

[8] A plaintiff added by amendment of the complaint, Ralph Whitaker, claimed impermissible religious discrimination in his discharge from the position of truckdriver by

sponsors religious organizations by granting them "an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices," the court declared the statute unconstitutional as applied to secular activity.

II

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." It is well established, too, that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." At some point, accommodation may devolve into "an unlawful fostering of religion," but these are not such cases, in our view.

The appellants contend that we should not apply the three-part *Lemon* approach, which is assertedly unsuited to judging the constitutionality of exemption statutes. The argument is that an exemption statute will always have the effect of advancing religion and hence be invalid under the second (effects) part of the *Lemon* test. We need not reexamine *Lemon* as applied in this context, for the exemption here is in no way questionable under *Lemon*.

Lemon requires first that the law at issue serve a "secular legislative purpose." This does not mean that the law's purpose must be unrelated to religion -- that would amount to a requirement "that the government show a callous indifference to religious groups." Rather, *Lemon*'s "purpose" requirement aims at preventing the governmental decisionmaker from acting with the intent of promoting a particular point of view in religious matters.

Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. Appellees argue that there is no such purpose here because § 702 provided adequate protection for religious employers prior to the 1972 amendment, when it exempted only the religious activities of such employers from the statutory ban on religious discrimination. We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not

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Deseret Industries (Industries) based on his failure to qualify for a temple recommend. Industries, a division of the Church's Welfare Services Department, runs a workshop program for the handicapped, retarded, and unemployed, who sort and assemble items and refurbish donated goods for sale in Industries' thrift stores. Relying on the Church's emphasis on charity and work, the court held that Industries is a religious activity because "there is an intimate connection between the primary function of Industries and the religious tenets of the Church." Finding no Establishment Clause violation in applying the § 702 exemption to Industries, the court granted summary judgment against Whitaker, who did not appeal.

understand its religious tenets and sense of mission.[9] Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental "interfer[ence] with the decision-making process in religions." We agree with the District Court that this purpose does not violate the Establishment Clause.

The second requirement under *Lemon* is that the law have "a principal or primary effect that neither advances nor inhibits religion." Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to § 702. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz* or the loans of schoolbooks upheld in *Allen*. A law is not unconstitutional simply because it *allows* churches to advance religion. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities.

The District Court appeared to fear that sustaining the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world. The cases before us, however, involve a nonprofit activity instituted over 75 years ago in the hope that "all who come for the benefit of their health [may] feel that they are in a house dedicated to the Lord." These cases therefore do not implicate the apparent concerns of the District Court. Moreover, we find no persuasive evidence in the record that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964. In such circumstances, we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church.[10]

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[9] The present cases are illustrative of the difficulties: the distinction between Deseret Industries and the Gymnasium is rather fine. Both activities are run on a nonprofit basis, and the CPB and the COP argue that the District Court failed to appreciate that the Gymnasium as well as Deseret Industries is expressive of the Church's religious values.

[10] Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church, and not the Government, who put him to the choice of changing his religious practices or losing his job. This is a very different case than *Estate of Thornton* v. *Caldor, Inc*., 472 U.S. 703 (1985). In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. In the present cases, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute. We find no merit in appellees' contention that § 702 "impermissibly delegates governmental power to religious employees and conveys a message of governmental endorsement of religious discrimination."

We find unpersuasive the District Court's reliance on the fact that § 702 singles out religious entities for a benefit. Although the Court has given weight to this consideration, it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

We are also unpersuaded by the District Court's reliance on the argument that § 702 is unsupported by long historical tradition. There was simply no need to consider the scope of the § 702 exemption until the 1964 Civil Rights Act was passed, and the fact that Congress concluded after eight years that the original exemption was unnecessarily narrow is a decision entitled to deference, not suspicion.

Appellees rely on *Larson* v. *Valente*, 456 U.S. 228, 246 (1982), for the proposition that a law drawing distinctions on religious grounds must be strictly scrutinized. But *Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws "affording a uniform benefit to *all* religions" should be analyzed under *Lemon*. In cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test.

It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.[11]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I write separately to emphasize that my concurrence rests on the fact that these cases involve the application of § 702's exemption to a *nonprofit* organization. I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.

These cases present a confrontation between the rights of religious organizations and those of individuals. Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in these cases, employment itself.[1]

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[11] We have no occasion to pass on the argument of the COP and the CPB that the exemption to which they are entitled under § 702 is required by the Free Exercise Clause.

[1] The fact that a religious organization is permitted, rather than required, to impose this burden is irrelevant; what is significant is that the burden is the effect of the exemption. An

At the same time, religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause."

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular. This is because the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community's self-definition. Furthermore, the authorization of discrimination in such circumstances puts at the disposal of religion the added advantages of economic leverage in the secular realm. As a result, the authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause.

What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission,

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exemption by its nature merely permits certain behavior, but that has never stopped this Court from examining the *effect* of exemptions that would free religion from regulations placed on others. In these cases, "the Church had the power to put [appellee] Mayson to a choice of qualifying for a temple recommend or losing his job because the *Government* had lifted from religious organizations the general regulatory burden imposed by § 702."

a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular. A nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty.

Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain. This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee free exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition. While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.[2]

Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns. As a result, I concur in the Court's judgment that the nonprofit Deseret Gymnasium may avail itself of an automatic exemption from Title VII's proscription on religious discrimination.

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[2] It is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases. The cases before us, however, involve a nonprofit organization; I believe that a *categorical* exemption authorizing discrimination is particularly appropriate for such entities, because claims that they possess a religious dimension will be especially colorable.

JUSTICE BLACKMUN, concurring in the judgment.

Essentially for the reasons set forth in JUSTICE O'CONNOR's opinion, I too, concur in the judgment of the Court. I fully agree that the distinction drawn by the Court seems "to obscure far more than to enlighten," and that the "question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open."

JUSTICE O'CONNOR, concurring in the judgment.

Although I agree with the judgment of the Court, I write separately to note that this action once again illustrates difficulties inherent in the Court's use of the test articulated in *Lemon* v. *Kurtzman*. As a result of this problematic analysis, while the holding of the opinion for the Court extends only to nonprofit organizations, its reasoning fails to acknowledge that the amended § 702 raises different questions as it is applied to profit and nonprofit organizations.

In *Wallace* v. *Jaffree*, I noted a tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion:

"On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights."

In my view, the opinion for the Court leans toward the second of the two unacceptable options described above. While acknowledging that "religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to § 702," the Court seems to suggest that the "effects" prong of the *Lemon* test is not implicated as long as the government action can be characterized as "allowing" religious organizations to advance religion, in contrast to government action directly advancing religion. This distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply "allowing" a religion to better advance itself, unless perhaps it involved actual proselytization by government agents. In nearly every case of a government benefit to religion, the religious mission would not be advanced if the religion did not take advantage of the benefit. It is for this reason that there is little significance to the Court's observation that it was the Church rather than the Government that penalized Mayson's refusal to adhere to Church doctrine. The Church had the power to put Mayson to a choice of qualifying for a temple recommend or losing his job because *the Government* had lifted from religious organizations the general regulatory burden imposed by § 702.

The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of

assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute. Of course, in order to perceive the government action as a permissible accommodation of religion, there must be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action. The determination whether the objective observer will perceive an endorsement of religion "is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is in large part a legal question to be answered on the basis of judicial interpretation of social facts."

The above framework, I believe, helps clarify why the amended § 702 raises different questions as it is applied to nonprofit and for-profit organizations. These cases involve a Government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of religion. Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of religion rather than as a Government endorsement of religion.

It is not clear, however, that activities conducted by religious organizations as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization. While I express no opinion on the issue, I emphasize that the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open.

TEXAS MONTHLY, INC. v. BULLOCK

489 U.S. 1 (1989)

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL and JUSTICE STEVENS join.

Texas exempts from its sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." The question presented is whether this exemption violates the Establishment Clause or the Free Press Clause of the First Amendment when the State denies a like exemption for other publications. We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Free Press Clause as well.

I

Appellant Texas Monthly, Inc., publishes a general interest magazine of the same name.

Appellant is not a religious faith, and its magazine does not contain only articles promulgating the teaching of a religious faith. In 1985, appellant paid sales taxes of $ 149,107.74 under protest and sued to recover those payments in state court.

The District Court of Travis County, Texas, ruled that an exclusive exemption for religious periodicals had "no basis other than the promotion of religion, a prohibited reason" under the Establishment Clause. The court struck down the tax as applied to nonreligious periodicals. The Court of Appeals, Third Supreme Judicial District of Texas, reversed.

II

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III

The core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion" is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

It does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. Nor have we required that legislative categories make no explicit reference to religion. Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other.

Thus, in *Mueller* v. *Allen*, we upheld a state income tax deduction for the cost of tuition, transportation, and nonreligious textbooks paid by a taxpayer for the benefit of a dependent. To be sure, the deduction aided parochial schools and parents whose children attended them, as well as nonsectarian private schools and their pupils' parents. We did not conclude, however, that this subsidy deprived the law of an overriding secular purpose or effect. And in the case most nearly on point, *Walz* v. *Tax Comm'n of New York City*, we sustained a property tax exemption that applied to religious properties no less than to real estate owned by a wide array of nonprofit organizations, despite the sizable tax savings it accorded religious groups.

In these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down.

In *Mueller* v. *Allen*, we deemed it "particularly significant" that "the deduction is available for educational expenses incurred by *all* parents." We emphasized in *Walz* that the State "has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasipublic corporations which include hospitals, libraries, play-grounds,

scientific, professional, historical, and patriotic groups." The breadth of New York's property tax exemption was essential to our holding that it was "not aimed at establishing, sponsoring, or supporting religion," but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone."[1]

Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.'" Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community. This is particularly true where, as here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths. It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief.

How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption. If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved

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[1] The dissent's accusation that we have distorted the Court's holding in Walz, is simply mistaken. The Court expressly stated in *Walz* that the purpose of New York's property tax exemption was *not* to accommodate religion. Rather, "New York has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes." Churches, we found, were reasonably classified among a diverse array of nonprofit groups that promoted this end. But it was only because churches, along with numerous other groups, produced these public benefits that we approved their exemption from property tax.

Nor is our reading of *Walz* by any means novel. Indeed, it has been the Court's accepted understanding of the holding in *Walz* for almost 20 years. Our opinion today builds on established precedents; it does not repudiate them.

for publications dealing solely with religious issues without signaling an endorsement of religion that is offensive to the Establishment Clause.

Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and it effectively endorses religious belief.[2]

IV

A

In defense of its sales tax exemption for religious publications, Texas claims that it has a compelling interest in avoiding violations of the Free Exercise and Establishment Clauses. Without such an exemption, Texas contends, its sales tax might trammel free exercise rights, as did the flat license tax this Court struck down as applied to proselytizing by Jehovah's Witnesses in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). In addition, Texas argues that an exemption for religious publications neither advances nor inhibits religion, and that its elimination would entangle church and state to a greater degree than the exemption itself.

We reject both parts of this argument. Although Texas may widen its exemption consonant with some legitimate secular purpose, nothing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications. In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity. The State therefore cannot claim persuasively that its tax exemption is compelled by the Free Exercise Clause.[3]

B

Texas' further claim that the Establishment Clause mandates, or at least favors, its sales tax exemption for religious periodicals is equally unconvincing. Not only does the exemption seem a blatant endorsement of religion, but it appears to produce greater state entanglement with religion than the denial of an exemption. The prospect of inconsistent treatment and

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[2] In light of this holding, we need not address Texas Monthly's contention that the sales tax exemption also violates the Free Press Clause.

[3] Contrary to the dissent's claims, we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause. Our decisions in *Zorach* and *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos* offer two examples. These cases, however, involve legislative exemptions that did not impose substantial burdens on nonbeneficiaries, or alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause. Texas' tax exemption, by contrast, does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause. Moreover, it burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.

government embroilment in controversies over religious doctrine seems especially baleful where, as in the case of Texas' sales tax exemption, a statute requires that public officials determine whether some message or activity is consistent with "the teaching of the faith."

While Texas is correct in pointing out that compliance with government regulations by religious organizations and the monitoring of their compliance would itself enmesh the operations of church and state to some degree, we have found that the "routine and factual inquiries" commonly associated with the enforcement of tax laws "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

On the record before us, neither the Free Exercise Clause nor the Establishment Clause prevents Texas from withdrawing its current exemption for religious publications if it chooses not to expand it to promote some legitimate secular aim.

C

Our conclusion today is admittedly in tension with some unnecessarily sweeping statements in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944). To the extent that language in those opinions is inconsistent with our decision here, based on the evolution in our thinking about the Religion Clauses over the last 45 years, we disavow it.

In *Murdock*, the Court ruled that a city could not impose a flat license tax payable by "all persons canvassing for or soliciting . . . orders for goods, paintings, pictures, wares, or merchandise of any kind" on Jehovah's Witnesses who "went about from door to door . . . distributing literature and soliciting people to 'purchase' certain religious books and pamphlets." In *Follett*, the Court ruled similarly that a Jehovah's Witness who "went from house to house distributing certain books" was exempt under the Free Exercise Clause from payment of a flat business and occupation tax on booksellers. In both cases, the majority stated that the "sale" of religious pamphlets by itinerant evangelists was a form of preaching, and that imposing a license or occupation tax on such a preacher was tantamount to exacting "a tax from him for the privilege of delivering a sermon." The Court acknowledged that imposing an income or property tax on preachers would not be unconstitutional. It emphasized, however, that a flat license or occupation tax poses a greater threat to the free exercise of religion than do those other taxes, because it is "collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment."

If one accepts the majority's characterization of the critical issues in *Murdock* and *Follett*, those decisions are easily compatible with our holding here. There is no doubt that the First Amendment prevents the Government from imposing a special occupation tax exclusively on those who devote their days to spreading religious messages. Moreover, it is questionable whether, consistent with the Free Exercise Clause, government may exact a facially neutral license fee designed for commercial salesmen from religious missionaries whose principal work is preaching and who only occasionally sell religious tracts for small sums." In such a case, equal treatment of commercial and religious solicitation might result in an

unconstitutional imposition on religious activity warranting judicial relief.[4]

Insofar as the Court's holdings in *Murdock* and *Follett* are limited to these points, they are plainly consistent with our decision today. The sales tax that Texas imposes is not an occupation tax levied on religious missionaries. Nor is it a flat tax that "restrains in advance" the free exercise of religion. On the contrary, because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications, and in view of its generality it can hardly be viewed as a covert attempt to curtail religious activity. We therefore see no inconsistency between our former decisions and our present holding.

To the extent that our opinions in *Murdock* and *Follett* might be read, however, to suggest that the Government may never tax the sale of religious or other publications, we reject those dicta. Our intervening decisions make clear that even if the denial of tax benefits "will inevitably have a substantial impact" on religious groups, the refusal to grant such benefits does not offend the Free Exercise Clause when it does not prevent those groups "from observing their religious tenets." In *Murdock* and *Follett*, the application of a flat license or occupation tax to Jehovah's Witnesses arguably did prevent adherents of that sect from acting in accordance with some of their central religious beliefs, in the absence of any overriding government interest in denying them an exemption. In the much more common circumstances exemplified by this case, however, taxes or regulations would not subject religious organizations to undue burdens and the government's interest in their uniform application is far weightier. Hence, there is no bar to imposing a general sales tax on religious publications.

JUSTICE WHITE, concurring in the judgment.

The Texas law at issue here discriminates on the basis of the content of publications. This is plainly forbidden by the Press Clause of the First Amendment.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

The Texas statute at issue touches upon values that underlie three different Clauses of the

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[4] In *Murdock* v. *Pennsylvania*, the Court noted that Seventh-day Adventist missionaries, who sold religious literature while proselytizing door to door earned on average only $ 65 per month in 1941, half of which they were permitted to keep in order to pay their traveling and living expenses. The license fee amounted to $ 1.50 for one day, $ 7 for one week, $ 12 for two weeks, and $ 20 for three weeks. If towns were permitted to levy such fees from itinerant preachers whose average earnings totaled only $ 32.50 per month before income taxes because their sales of religious literature were merely incidental to their primary evangelical mission, then they could easily throttle such missionary work. A Seventh-day Adventist who spent each day in a different town would have to pay $ 45 in fees over the course of a 30-day month; if his income were only $ 32.50, he could not even afford the necessary licenses, let alone support himself once he had met his legal obligations.

First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause. Harmonizing these several values is not an easy task.

The Free Exercise Clause value suggests that a State may not impose a tax on spreading the gospel. The Establishment Clause value suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion. The Press Clause value suggests that a State may not tax the sale of some publications, but not others, based on their content, absent a compelling reason for doing so.

It perhaps is fairly easy to reconcile the Free Exercise and Press Clause values. If the Free Exercise Clause suggests that a State may not tax the sale of religious literature by a religious organization, this fact alone would give a State a compelling reason to exclude this category of sales from an otherwise general sales tax. In this respect, I agree generally with what Justice Scalia says in Part II of his dissenting opinion.

I find it more difficult to reconcile in this case the Free Exercise and Establishment Clause values. The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden. This tension between mandated and prohibited religious exemptions is well recognized. Of course, identifying the problem does not resolve it. Justice Brennan's opinion would resolve the tension simply by subordinating the Free Exercise value. Justice Scalia's opinion, conversely, would subordinate the Establishment Clause value.

Perhaps it is a vain desire, but I would like to decide the present case without necessarily sacrificing either value. It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong. Such a statute, moreover, should survive Press Clause scrutiny because its exemption would be narrowly tailored to meet the compelling interests that underlie both the Free Exercise and Establishment Clauses.

To recognize this possible reconciliation of the competing First Amendment considerations is one thing; to impose it upon a State as its only legislative choice is something else. Justice Scalia rightly points out that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them. The Press Clause adds yet a third hazard to a State's safe passage through the legislative waters concerning the taxation of books and journals. We must be wary of interpreting these three Clauses in a manner that negates the legislative role altogether.

I believe we can avoid most of these difficulties with a narrow resolution of the case before us. We need decide here only whether a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

As a judicial demolition project, today's decision is impressive. The machinery employed

by the opinions of Justice Brennan and Justice Blackmun is no more substantial than the antinomy that accommodation of religion may be required but not permitted, and the bold but unsupportable assertion that government may not "convey a message of endorsement of religion." With this frail equipment, the Court topples an exemption of a sort that expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes.

When one expands the inquiry to sales taxes on items other than publications and to other types of taxes such as property, income, amusement, and motor vehicle taxes -- all of which are likewise affected by today's holding -- the Court's accomplishment is even more impressive. At least 45 States provide exemptions for religious groups without analogous exemptions for other types of nonprofit institutions. For over half a century the federal Internal Revenue Code has allowed "minister[s] of the gospel" (a term interpreted broadly enough to include cantors and rabbis) to exclude from gross income the rental value of their parsonages. In short, religious tax exemptions of the type the Court invalidates today permeate the state and federal codes, and have done so for many years.

I dissent because I find no basis in the text of the Constitution, the decisions of this Court, or the traditions of our people for disapproving this longstanding and widespread practice.

I

The opinions of Justice Brennan and Justice Blackmun proceed as though this were a matter of first impression. It is not. Nineteen years ago, in *Walz* v. *Tax Comm'n of New York City*, we considered and rejected an Establishment Clause challenge that was in all relevant respects identical. *Walz,* which we have reaffirmed on numerous occasions in the last two decades, is utterly dispositive of the Establishment Clause claim before us here.

Justice Brennan explains away *Walz* by asserting that "[t]he breadth of New York's property tax exemption was essential to our holding that it was 'not aimed at establishing, sponsoring, or supporting religion.'" This is not a plausible reading of the opinion. If the Court had intended to rely upon a "breadth of coverage" rationale, it would have had to identify some characteristic that rationally placed religion within the same policy category as the other institutions. Justice Brennan's concurring opinion in *Walz* conducted such an analysis. Justice Harlan's opinion conducted a similar analysis. The Court's opinion in *Walz,* however, not only failed to conduct such an analysis, but -- seemingly in reply to the concurrences -- *explicitly and categorically disavowed reliance upon it,* concluding its discussion of legislative purpose with a paragraph that begins as follows: "We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others." This should be compared with today's rewriting of *Walz:* "[W]e concluded that the State might reasonably have determined that religious groups generally contribute to the cultural and moral improvement of the community, perform useful social services, and enhance a desirable pluralism of viewpoint and enterprise, just as do the host of other nonprofit organizations that qualified for the exemption." This is a marvellously accurate description of what Justices Brennan and Harlan believed, and what the Court specifically rejected. The Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion *as* an exemption for religion.

Today's opinions go beyond misdescribing *Walz*. In repudiating what *Walz* approved, they achieve a revolution in our Establishment Clause jurisprudence, effectively overruling other cases that were based, as *Walz* was, on the "accommodation of religion" rationale. According to Justice Brennan's opinion, no law is constitutional whose "benefits [are] confined to religious organizations" -- except, of course, those laws that are unconstitutional *unless* they contain benefits confined to religious organizations. Our jurisprudence affords no support for this unlikely proposition. *Walz* is just one of a long line of cases in which we have recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."

We applied the accommodation principle, to permit special treatment of religion that was not required by the Free Exercise Clause, in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), where we found no constitutional objection to a New York City program permitting public school children to absent themselves one hour a week for "religious observance and education outside the school grounds." We applied the same principle only two Terms ago in *Corporation of Presiding Bishop*, where, citing *Zorach* and *Walz*, we upheld a section of the Civil Rights Act of 1964 exempting religious groups (and only religious groups) from Title VII's antidiscrimination provisions. We specifically rejected the conclusion that invalidity followed from the fact that the exemption "singles out religious entities for a benefit, rather than benefitting a broad grouping of which religious organizations are only a part." We stated that the Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid."

The novelty of today's holding is obscured by Justice Brennan's citation and description of many cases in which "breadth of coverage" *was* relevant to the First Amendment determination. Breadth of coverage is essential to constitutionality whenever a law's benefitting of religious activity is sought to be defended not specifically (or not exclusively) as an accommodation of religion, but as merely the incidental consequence of seeking to benefit *all* activity that achieves a particular secular goal. But that is a different rationale. Where accommodation of religion is the justification, by definition religion is being singled out. The same confusion of rationales explains the facility with which Justice Brennan's opinion can portray the present statute as violating the first prong of the *Lemon* test. That is an entirely accurate description of the governing rule when, as in *Lemon* and most other cases, government aid to religious institutions is sought to be justified on the ground that it is not religion *per se* that is the object of assistance, but rather the secular functions that the religious institutions, along with other institutions, provide. But as I noted earlier, the substance of the *Lemon* test was first roughly set forth in *Walz* -- and in *that* context, the "accommodation of religion" context, the purpose was said to be valid so long as it was "neither the advancement nor the inhibition of religion; . . . neither sponsorship nor hostility." Of course rather than reformulating the *Lemon* test in "accommodation" cases, one might instead simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as "secular purpose and effect," since they are a purpose and effect approved, and indeed to some degree mandated, by the Constitution. However the reconciliation with the *Lemon* terminology is achieved, our cases make plain that it is permissible for a State to act with the purpose and effect of "limiting governmental

interference with the exercise of religion."

It is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism, but the withholding of a tax upon the dissemination of religious materials is not even a close case. If there is any close question, it is not whether the exemption is permitted, but whether it is constitutionally compelled in order to avoid "interference with the dissemination of religious ideas." *Murdock* and *Follett* are not as readily distinguishable as Justice Brennan suggests.

I am willing to acknowledge, however, that *Murdock* and *Follett* are narrowly distinguishable. But what follows from that is not the facile conclusion that therefore the State has no "compelling interest in avoiding violations of the Free Exercise and Establishment Clauses," and thus the exemption is invalid. This analysis is yet another expression of Justice Brennan's repudiation of the accommodation principle. By saying that what is not required cannot be allowed, Justice Brennan would completely block off the already narrow "channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids] through which any state or federal action must pass in order to survive constitutional scrutiny." The proper lesson to be drawn from the narrow distinguishing of *Murdock* and *Follett* is quite different: If the exemption comes so close to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one.

Although Justice Brennan's opinion places almost its entire reliance upon the "purpose" prong of *Lemon*, it alludes briefly to the second prong as well, finding that § 151.312 has the impermissible "effect of sponsoring certain religious tenets or religious belief in general." Once again, *Walz* stands in stark opposition to this assertion. Quite obviously, a sales tax exemption aids religion, since it makes it less costly for religions to disseminate their beliefs. But that has never been enough to strike down an enactment under the Establishment Clause. The Court has consistently rejected "the argument that any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. To be sure, we have set our face against the subsidizing of religion -- and in other contexts we have suggested that tax exemptions and subsidies are equivalent. We have not treated them as equivalent, however, in the Establishment Clause context. "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." In *Walz* we pointed out that the *primary* effect of a tax exemption was to "restric[t] the fiscal relationship between church and state" and to "reinforce the desired separation insulating each from the other."

Finally, and least persuasively of all, Justice Brennan suggests that § 151.312 violates the "excessive government entanglement" aspect of *Lemon*. A State does not excessively involve itself in religious affairs merely by examining material to determine whether it is religious or secular in nature. In *Mueller*, for instance, we held that state officials' examination of textbooks to determine whether they were "books and materials used in the teaching of religious tenets, doctrines or worship" did not constitute excessive entanglement. I see no material distinction between that inquiry and the one Texas officials must make in this case. Moreover, here as in *Walz*, it is all but certain that elimination of the exemption will have the

effect of *increasing* government's involvement with religion.

II

Today's decision introduces a new strain of irrationality in our Religion Clause jurisprudence. I have no idea how to reconcile it with *Zorach*, with *Walz*, and with *Corporation of Presiding Bishop*. It is not right that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law. I dissent.

Note: A year after the decision in *Texas Monthly*, the Court revisited the free exercise issue that was left without a clear resolution by that case. In *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), the Court rejected a Free Exercise Clause challenge to California's general sales and use tax as applied to the sale of religious publications and other religious merchandise. The tax was "not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California." The Court concluded that "the collection and payment of the generally applicable tax imposes no constitutionally significant burden on appellant's religious practices or beliefs. The Free Exercise Clause accordingly does not *require* the State to grant appellant an exemption from its generally applicable sales and use tax." The Court also rejected an Establishment Clause challenge that claimed that the collection of the tax involved an excessive entanglement with religion. The Court found that the collection and payment of the tax did not either impose a substantial administrative and recordkeeping burden on the religious organization, involve "state employees in, nor on-site continuing inspection of, appellant's day-to-day operations," or require "' official and continuing surveillance' by government auditors."

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT v. GRUMET

512 U.S. 687 (1994)

JUSTICE SOUTER delivered the opinion of the Court, except as to Parts II and II-A.

The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. The village fell within the Monroe-Woodbury Central School District until a special state statute passed in 1989 carved out a separate district, following village lines, to serve this distinctive population. The question is whether the Act creating the separate school district violates the Establishment Clause. Because this unusual Act is tantamount to an allocation of political power on a religious criterion, we hold that it violates the prohibition against establishment.

I

The Satmar Hasidic sect takes its name from the town near the Hungarian and Romanian border where, in the early years of this century, Grand Rebbe Joel Teitelbaum molded the group into a distinct community. After World War II and the destruction of much of European

Jewry, the Grand Rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York. Then, 20 years ago, the Satmars purchased an undeveloped subdivision in the town of Monroe and began assembling the community that has since become the village of Kiryas Joel. When a zoning dispute arose, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties. Neighbors who did not wish to secede with the Satmars objected strenuously, and after arduous negotiations the proposed boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today.

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. Starting in 1984 the Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to our decisions in *Aguilar* v. *Felton* and *School Dist. of Grand Rapids* v. *Ball*. Children from Kiryas Joel who needed special education were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."

By 1989, only one child from Kiryas Joel was attending Monroe-Woodbury's public schools; the village's other handicapped children received privately funded special services or went without. It was then that the New York Legislature passed the statute at issue in this litigation, which provided that the village of Kiryas Joel "is constituted a separate school district, . . . and shall have and enjoy all the powers and duties of a union free school district. The statute thus empowered a locally elected board of education to take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations. In signing the bill, Governor Cuomo recognized that the residents of the new school district were "all members of the same religious sect," but said that the bill was "a good faith effort to solve the unique problem" associated with providing special education services to handicapped children in the village.

Although it enjoys plenary legal authority over the elementary and secondary education of all school-aged children in the village, the Kiryas Joel Village School District currently runs only a special education program for handicapped children. The other village children

have stayed in their parochial schools, relying on the new school district only for transportation, remedial education, and health and welfare services. If any child without a handicap in Kiryas Joel were to seek a public-school education, the district would pay tuition to send the child into Monroe-Woodbury or another school district nearby. Under like arrangements, several of the neighboring districts send their handicapped Hasidic children into Kiryas Joel, so that two thirds of the full-time students in the village's public school come from outside. In all, the new district serves just over 40 full-time students, and two or three times that many parochial school students on a part-time basis.

II

"A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion," favoring neither one religion over others nor religious adherents collectively over nonadherents. Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.

Larkin v. *Grendel's Den, Inc.* provides an instructive comparison with the litigation before us. There, the Court was requested to strike down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses. The Court found that the statute brought about a "'fusion of governmental and religious functions'" by delegating "important, discretionary governmental powers" to religious bodies." Comparable constitutional problems inhere in the statute before us.

A

Larkin presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America. The Establishment Clause problem presented by Chapter 748 is more subtle, but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State, and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group. What makes this litigation different from *Larkin* is the delegation here of civic power to the "qualified voters of the village of Kiryas Joel," as distinct from a religious leader, or an institution of religious government like the formally constituted parish council in *Larkin*. In light of the circumstances of these cases, however, this distinction turns out to lack constitutional significance.

It is, first, not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group's leaders or officers. Although some school district franchise is common to all voters, the State's manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision. In the circumstances of these cases, the difference between thus vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance. If New York were to delegate civic authority to "the Grand Rebbe," *Larkin* would obviously require invalidation, and the same is true if New

York delegates political authority by reference to religious belief.

Of course, Chapter 748 delegates power not by express reference to the religious belief of the Satmar community, but to residents of the "territory of the village of Kiryas Joel." Thus the second (and arguably more important) distinction between these cases and *Larkin* is the identification here of the group to exercise civil authority in terms not expressly religious. But our analysis does not end with the text of the statute at issue, and the context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly. We find this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative Act.

It is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it adopted Chapter 748. The significance of this fact to the state legislature is indicated by the further fact that carving out the village school district ran counter to customary districting practices in the State. Indeed, the trend in New York is not toward dividing school districts but toward consolidating them. The Kiryas Joel Village School District, in contrast, has only 13 local, full-time students in all (even including out-of-area and part-time students leaves the number under 200), and in offering only special education and remedial programs it makes no pretense to be a full-service district.

Because the district's creation ran uniquely counter to state practice, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of governmental and religious functions."

B

The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups. This is the second malady the *Larkin* Court identified in the law before it, the absence of an "effective means of guaranteeing" that governmental power will be and has been neutrally employed. But whereas in *Larkin* it was religious groups the Court thought might exercise civic power to advance the interests of religion (or religious adherents), here the threat to neutrality occurs at an antecedent stage.

The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one.

The general principle that civil power must be exercised in a manner neutral to religion is one the *Larkin* Court recognized, although it did not discuss the specific possibility of

legislative favoritism along religious lines. Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole, and we are forced to conclude that the State of New York has violated the Establishment Clause.

C

In finding that Chapter 748 violates the requirement of governmental neutrality by extending the benefit of a special franchise, we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. The fact that Chapter 748 facilitates the practice of religion is not what renders it an unconstitutional establishment.

But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance. Petitioners' proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.

This conclusion does not, however, bring the Satmar parents, the Monroe-Woodbury school district, or the State of New York to the end of the road in seeking ways to respond to the parents' concerns. There are several alternatives here for providing special education to Satmar children. Such services can be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive instruction at a public school already run by the Monroe-Woodbury district. Or if the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars.

III

Justice Cardozo once cast the dissenter as "the gladiator making a last stand against the lions." JUSTICE SCALIA's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining. We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion. Nor do we impugn the motives of the New York Legislature, which no doubt intended to accommodate the Satmar community without violating the Establishment Clause; we simply refuse to ignore that the method it chose is one that aids a particular religious community, as such, rather than all groups similarly interested in separate schooling. The dissent protests it is novel to insist "'up front'" that a statute not tailor its benefits to apply only to one religious group, but if this were so, *Texas Monthly* would have turned out differently, and language in *Walz* and *Bowen* v. *Kendrick*, purporting to rely on the breadth of the statutory schemes, would have been mere surplusage. Indeed, under the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law. And to end on the point with which JUSTICE SCALIA begins, the license he takes in suggesting that the Court holds

the Satmar sect to be New York's established church is only one symptom of his inability to accept the fact that this Court has long held that the First Amendment reaches more than classic, 18th-century establishments.

Our job, of course, would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment Clause diminished to the dimensions acceptable to JUSTICE SCALIA could be enforced by a few simple rules, and our docket would never see cases requiring the application of a principle like neutrality toward religion as well as among religious sects. But that would be as blind to history as to precedent, and the difference between JUSTICE SCALIA and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates courts to exercise the judgment necessary to apply it. In these cases we are clearly constrained to conclude that the statute before us fails the test of neutrality. It therefore crosses the line from permissible accommodation to impermissible establishment.

JUSTICE BLACKMUN, concurring.

For the reasons stated by JUSTICE SOUTER and JUSTICE STEVENS, whose opinions I join, I agree that the New York statute under review violates the Establishment Clause. I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon* v. *Kurtzman*. The opinion of the Court (and of the plurality with respect to Part II-A) relies upon several decisions, including *Larkin* v. *Grendel's Den, Inc.*, that explicitly rested on the criteria set forth in *Lemon*. Indeed, the two principles on which the opinion bases its conclusion that the legislative Act is constitutionally invalid essentially are the second and third *Lemon* criteria.

I have no quarrel with the observation of JUSTICE O'CONNOR, that the application of constitutional principles, including those articulated in *Lemon*, must be sensitive to particular contexts. But I remain convinced of the general validity of the basic principles stated in *Lemon*, which have guided this Court's Establishment Clause decisions in over 30 cases.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE GINSBURG join, concurring.

New York created a special school district for the members of the Satmar religious sect in response to parental concern that children suffered "'panic, fear and trauma'" when "'leaving their own community and being with people whose ways were so different.'" To meet those concerns, the State could have taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns.

Instead, the State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State

provided official support to cement the attachment of young adherents to a particular faith. It is telling, in this regard, that two-thirds of the school's full-time students are Hasidic handicapped children from *outside* the village; the Kiryas Joel school thus serves a population far wider than the village -- one defined less by geography than by religion.

Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, or a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion. For this reason, as well as the reasons set out in JUSTICE SOUTER's opinion, I am persuaded that the New York law violates the Establishment Clause.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*. This emphasis on equal treatment is, I think, an eminently sound approach. Absent unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits. The Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."

That the government is acting to accommodate religion should generally not change this analysis. What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect. A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews. A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief. The Constitution permits "*nondiscriminatory* religious-practice exemptions," not sectarian ones.

III

I join Parts I, II-B, II-C, and III of the Court's opinion because I think this law, rather than being a general accommodation, singles out a particular religious group for favorable treatment.

Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group. I do not think the Court's opinion

holds the contrary.

I also think there is one other accommodation that would be entirely permissible: the 1984 scheme, which was discontinued because of our decision in *Aguilar*. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government funded special education. If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well. I thought this to be true in *Aguilar*, and I still believe it today. The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track -- government impartiality, not animosity, toward religion.

IV

One aspect of the Court's opinion in these cases is worth noting: the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon* v. *Kurtzman*. It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause. But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless.

Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like these, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law. Government delegations of power to religious bodies may make up yet another category. As *Larkin* itself suggested, government impartiality towards religion may not be enough in such situations. Of course, there may well be additional categories, or more opportune places to draw the lines between the categories.

As the Court's opinion today shows, the slide away from *Lemon*'s unitary approach is well

under way. A return to *Lemon*, even if possible, would likely be futile. I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test. And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

Perhaps eventually under this structure we may indeed distill a unified, or at least a more unified, Establishment Clause test from the cases. But it seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

JUSTICE KENNEDY, concurring in the judgment.

The Court's ruling that the Kiryas Joel Village School District violates the Establishment Clause is in my view correct, but my reservations about what the Court's reasoning implies for religious accommodations in general are sufficient to require a separate writing. As the Court recognizes, a legislative accommodation that discriminates among religions may become an establishment of religion. But the Court's opinion can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group. The real vice of the school district, in my estimation, is that New York created it by drawing political boundaries on the basis of religion. I would decide the issue we confront upon this narrower theory, though in accord with many of the Court's general observations about the State's actions in this litigation.

I

This is not an action in which the government has granted a benefit to a general class of recipients of which religious groups are just one part. It is rather an action in which the government seeks to alleviate a specific burden on the religious practices of a particular religious group. I agree that a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment. I disagree, however, with the suggestion that the Kiryas Joel Village School District contravenes these basic constitutional commands. But for the forbidden manner in which the New York Legislature sought to go about it, the State's attempt to accommodate the special needs of the handicapped Satmar children would have been valid.

"Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." And since the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices. New York's object in creating the Kiryas Joel Village School District -- to accommodate the religious practices of the handicapped Satmar children -- is validated by the

principles that emerge from these precedents. First, by creating the district, New York sought to alleviate a specific and identifiable burden on the Satmars' religious practice. The Satmars' way of life, which springs out of their strict religious beliefs, conflicts in many respects with mainstream American culture. They do not watch television or listen to radio; they speak Yiddish in their homes and do not read English-language publications; and they have a distinctive hairstyle and dress. Attending the Monroe-Woodbury public schools, where they were exposed to much different ways of life, caused the handicapped Satmar children understandable anxiety and distress. New York was entitled to relieve these significant burdens, even though mainstream public schooling does not conflict with any specific tenet of the Satmars' religious faith.

Second, by creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the district as a genuine accommodation. In *Gillette*, the Court upheld a military draft exemption, even though the burden on those without religious objection to war (the increased chance of being drafted and forced to risk one's life in battle) was substantial. And in *Corporation of Presiding Bishop*, the Court upheld the Title VII exemption even though it permitted employment discrimination against nonpractitioners of the religious organization's faith. There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment. See, *e. g., Estate of Thornton* v. *Caldor, Inc.* This action has not been argued, however, on the theory that non-Satmars suffer any special burdens from the existence of the Kiryas Joel Village School District.

Third, the creation of the school district to alleviate the special burdens born by the handicapped Satmar children cannot be said, for that reason alone, to favor the Satmar religion to the exclusion of any other. "The clearest command of the Establishment Clause," of course, "is that one religious denomination cannot be officially preferred over another." I disagree, however, with the Court's conclusion that the school district breaches this command. The Court insists that religious favoritism is a danger here "[b]ecause the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law.

This reasoning reverses the usual presumption that a statute is constitutional and, in essence, adjudges the New York Legislature guilty until it proves itself innocent. No party has adduced any evidence that the legislature has denied another religious community like the Satmars its own school district under analogous circumstances. We have no reason to presume that the New York Legislature would not grant the same accommodation in a similar future case. The fact that New York singled out the Satmars for this special treatment indicates nothing other than the uniqueness of the handicapped Satmar children's plight. It is normal for legislatures to respond to problems as they arise -- no less so when the issue is religious accommodation. Most accommodations cover particular religious practices. See, *e. g.*, 21 CFR § 1307.31 (1993) ("The listing of peyote as a controlled substance . . . does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church"); 25 CFR § 11.87H (1993) ("It shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native

American Church"); Dept. of Air Force, Reg. 35-10, P2-28(b)(2) (Apr. 1989) ("Religious head coverings are authorized for wear while in uniform when military headgear is not authorized. . . . Religious head coverings may be worn underneath military headgear if they do not interfere with the proper wearing, functioning, or appearance of the prescribed headgear. . . . For example, Jewish yarmulkes meet this requirement if they do not exceed 6 inches in diameter"). They do not thereby become invalid.

II

The Kiryas Joel Village School District thus does not suffer any of the typical infirmities that might invalidate an attempted legislative accommodation. In the ordinary case, the fact that New York has chosen to accommodate the burdens unique to one religious group would raise no constitutional problems. Without further evidence that New York has denied the same accommodation to religious groups bearing similar burdens, we could not presume from the particularity of the accommodation that the New York Legislature acted with discriminatory intent.

This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause," and in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial. I agree with the Court insofar as it invalidates the school district for being drawn along religious lines. There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause.

III

This is an unusual action, for it is rare to see a State exert such documented care to carve out territory for people of a particular religious faith. It is also unusual in that the problem to which the Kiryas Joel Village School District was addressed is attributable in no small measure to what I believe were unfortunate rulings by this Court. But for *Grand Rapids* and *Aguilar*, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described.

One misjudgment is no excuse, however, for compounding it with another. We must confront this litigation as it comes before us, without bending rules to free the Satmars from a predicament into which we put them. The Establishment Clause forbids the government to draw political boundaries on the basis of religious faith. For this reason, I concur in the judgment of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students. The superintendent of the school, who is not Hasidic, is a 20-year veteran of the New York City public school system, with expertise in the area of bilingual, bicultural, special education. The teachers and therapists at the school all live outside the village of Kiryas Joel. While the village's private schools are profoundly religious and strictly segregated by sex, classes at the public school are co-ed and the curriculum secular. The school building has the bland appearance of a public school, unadorned by religious symbols or markings; and the school complies with the laws and regulations governing all other New York State public schools. There is no suggestion, moreover, that this public school has gone too far in making special adjustments to the religious needs of its students. In sum, these cases involve only public aid to a school that is public as can be. The only thing distinctive about the school is that all the students share the same religion.

None of our cases has ever suggested that there is anything wrong with that. In fact, the Court has specifically *approved* the education of students of a single religion on a neutral site adjacent to a private religious school. See *Wolman* v. *Walter*, 433 U.S. 229, 247-248 (1977). If a State can furnish services to a group of sectarian students on a neutral site adjacent to a private religious school, or even *within* such a school, how can there be any defect in educating those same students in a public school? As the Court noted in *Wolman*, the constitutional dangers of establishment arise "from the nature of the institution, not from the nature of the pupils." There is no danger in educating religious students in a public school.

For these very good reasons, JUSTICE SOUTER's opinion does not focus upon the school, but rather upon the school district and the New York Legislature that created it. His arguments, though sometimes intermingled, are two: that reposing governmental power in the Kiryas Joel school district is the same as reposing governmental power in a religious group; and that in enacting the statute creating the district, the New York State Legislature was discriminating on the basis of religion, *i. e.*, favoring the Satmar Hasidim over others. I shall discuss these arguments in turn.

II

For his thesis that New York has unconstitutionally conferred governmental authority upon the Satmar sect, JUSTICE SOUTER relies extensively, and virtually exclusively, upon *Larkin* v. *Grendel's Den, Inc.* JUSTICE SOUTER believes that the present litigation "resembles" *Grendel's Den* because that case "teaches that a State may not delegate its civic authority to a group *chosen according to a religious criterion."* That misdescribes both what that case taught (which is that a State may not delegate its civil authority *to a church*), and what these cases involve (which is a group chosen according to cultural characteristics).

JUSTICE SOUTER concedes that *Grendel's Den* "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." The uniqueness of the case stemmed from the grant of governmental power

directly to a religious institution. Astonishingly, however, JUSTICE SOUTER dismisses the difference between a transfer of government power to citizens who share a common religion as opposed to "the officers of its sectarian organization" -- the critical factor that made *Grendel's Den* unique and "rare" -- as being "one of form, not substance." JUSTICE SOUTER's position boils down to the quite novel proposition that any group of citizens can be invested with political power, but not if they all belong to the same religion. Of course such *disfavoring* of religion is positively antagonistic to the purposes of the Religion Clauses

III

I turn, next, to JUSTICE SOUTER's second justification for finding an establishment of religion: his facile conclusion that the New York Legislature's creation of the Kiryas Joel school district was religiously motivated. But in the Land of the Free, democratically adopted laws are not so easily impeached by unelected judges. To establish the unconstitutionality of a facially neutral law on the mere basis of its asserted religiously preferential (or discriminatory) effects -- or at least to establish it in conformity with our precedents -- JUSTICE SOUTER "must be able to show the absence of a neutral, secular basis" for the law.

There is of course no possible doubt of a secular basis here. The New York Legislature faced a unique problem in Kiryas Joel: a community in which all the nonhandicapped children attend private schools, and the physically and mentally disabled children who attend public school suffer the additional handicap of cultural distinctiveness. The handicapped children suffered sufficient emotional trauma from their predicament that their parents kept them home from school. Surely the legislature could target this problem, and provide a public education for these students, in the same way it addressed, *by a similar law*, the unique needs of children institutionalized in a hospital. See, *e. g.*, 1970 N. Y. Laws, ch. 843 (authorizing a union free school district for the area owned by Blythedale Children's Hospital).

Since the obvious presence of a neutral, secular basis renders the asserted preferential effect of this law inadequate to invalidate it, JUSTICE SOUTER is required to come forward with direct evidence that religious preference was the objective. His case could scarcely be weaker. It consists, briefly, of this: New York created the School District to further the Satmar religion because (1) they created the district by special Act of the legislature, rather than under the general laws governing school-district reorganization; (2) the creation of the district ran counter to a state trend toward consolidation of school districts; and (3) the district includes only adherents of the Satmar religion. On this indictment, no jury would convict.

One difficulty with the first point is that it is not true. There was really nothing so "special" about the formation of a school district by an Act of the New York Legislature. The State has created both large school districts and small specialized school districts for institutionalized children through these special Acts. But in any event all that the first point proves, and the second point as well (countering the trend toward consolidation), is that New York regarded Kiryas Joel as a special case, requiring special measures. I should think it *obvious* that it did, and obvious that it *should have*. But it is not logical to suggest that when there *is* special treatment there is *proof* of religious favoritism.

JUSTICE SOUTER's case against the statute comes down to nothing more, therefore, than his third point: the fact that all the residents of the Kiryas Joel Village School District are

Satmars. But all its residents also wear unusual dress, have unusual civic customs, and have not much to do with people who are culturally different from them. On what basis does JUSTICE SOUTER conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision? The normal assumption would be that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children. JUSTICE SOUTER not only does not adopt the logical assumption, he does not even give the New York Legislature the benefit of the doubt.

I have little doubt that JUSTICE SOUTER would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that *are* accompanied by religious belief.

At various times JUSTICE SOUTER intimates, though he does not precisely say, that the boundaries of the school district were intentionally drawn on the basis of religion. There is no evidence of that. The special district was created to meet the special educational needs of distinctive handicapped children, and the geographical boundaries selected for that district were (quite logically) those that already existed for the village. There is *no* evidence (indeed, no plausible suspicion) of the legislature's desire to favor the Satmar religion, as opposed to meeting distinctive secular needs or desires of citizens who happened to be Satmars. If there were, JUSTICE SOUTER would say so; instead, he must merely insinuate.

IV

But even if Chapter 748 were intended to create a special arrangement for the Satmars *because of* their religion, it would be a permissible accommodation. When a legislature acts to accommodate religion, particularly a minority sect, "it follows the best of our traditions."

In today's opinion, however, the Court seems uncomfortable with this aspect of our constitutional tradition. "We have never hinted," the Court says, "that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation." If this statement is true, it is only because we have never hinted that delegation of political power to citizens who share a particular religion could be unconstitutional.

The second and last reason the Court finds accommodation impermissible is, astoundingly, the mere risk that the State will not offer accommodation to a similar group in the future. The Court's demand for "up front" assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role. Moreover, most efforts at accommodation seek to solve a problem that applies to members of only one or a few religions. Not every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, without any suggestion that some "up front" legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The necessary guarantee can and will be provided, after the fact, *by the courts*.

Contrary to the Court's suggestion, I have always believed that the Establishment Clause prohibits the favoring of one religion over others. In this respect, it is the Court that attacks lions of straw. It is presumptuous for this Court to impose -- *out of nowhere* -- an unheard-of prohibition against proceeding in this manner upon the Legislature of New York State.

The Court's decision today is astounding. Chapter 748 involves no public aid to private schools and does not mention religion. In order to invalidate it, the Court casts aside, on the flimsiest of evidence, the strong presumption of validity that attaches to facially neutral laws, and invalidates the present accommodation because it does not trust New York to be as accommodating toward other religions (presumably those less powerful than the Satmar Hasidim) in the future. This is unprecedented -- except that it continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration. I dissent.