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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER V - THE ESTABLISHMENT CLAUSE: DISCRIMINATION AGAINST AND PREFERENTIAL TREATMENT OF PARTICULAR RELIGIONS

Introduction

The Supreme Court has decided a number of cases under the Establishment Clause that raise the issue of how to analyze cases where a specific religion is either discriminated against or given preferential treatment. In these cases, while the Court has sometimes applied the *Lemon* test to analyze the government action, it has also employed an alternative analysis. This is true where the government has singled out a particular religion by name or description for discriminatory treatment. In that situation, the Court has applied, at least in addition to *Lemon*, a strict scrutiny standard. Under that standard, the government must be acting to promote a compelling governmental interest and must show that it has is no alternative means available that would promote that interest without its reliance on discriminatory means. This standard is borrowed from cases involving interference with fundamental rights and is sometimes used in Free Exercise Clause analysis. The subject of discrimination against the members of a religion is an area where the Establishment and Free Exercise Clauses provide similar protection.

A. Discrimination Against Particular Religions

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 responsible for the enforcement of the Minnesota charitable solicitations Act, Minn. Stat. §§ 309.50-309.6. 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.

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 *Epperson* v. *Arkansas*, we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion." 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.[1] Consequently, that rule must be invalidated unless it is

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[1] 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

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 members of organizations have greater access than nonmembers to the financial records of the organization. Appellants conclude: "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; 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 simply because they contribute more than half of the organization's 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. 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

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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.

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 nonmember contributions.[2]

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

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[2] 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.

also plain that the burden of compliance is certainly not *de minimis*." 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 drafted with the explicit intention of including particular religious denominations and excluding others. 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.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

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. 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.

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.

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.

Professor's Note: In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), the Court described its decision in *Larson* in the following way: "*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*." This explanation as to why *Larson* applied the strict scrutiny test seems to equate laws that single out some religions because of a characteristic they share (such as raising most of their money from non-members) with laws that single out particular religions by naming them. *Larson* and subsequent interpretations of that decision, however, fail to identify specific criteria to use to determine that facial discrimination exists so that the strict scrutiny test should be applied.

B. Preferential Treatment of Religions

1. 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

[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.

Presbyterian who observed Sunday as his Sabbath, initially complied 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 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 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

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

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 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 absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. An objective observer would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief. 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

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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 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.

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. 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.

2. 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]

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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] Appellees do not contest that the CPB and the COP are religious organizations for purposes of § 702.

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

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 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] Finding that § 702 impermissibly sponsors religious organizations by granting them "an exclusive authorization to engage in

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[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 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.

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 understand its religious tenets and sense of mission.[8] 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

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[8] 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.

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. 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.[9]

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.

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

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[9] 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."

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.[10]

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]

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."

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 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

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[10] 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 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."

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, a court may disagree. 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, nonprofits historically have been organized 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. 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]

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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.

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.

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

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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.

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. 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. 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 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.

3. 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 become the village of Kiryas Joel. When a zoning dispute arose, the Satmars presented the Town Board 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. After arduous negotiations the boundaries of the village of Kiryas Joel were drawn to include 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. 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. 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 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.

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." 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.*, 459 U.S. 116 (1982), 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. 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. 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 are religious individuals united by common doctrine, not the group's leaders or officers. 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, the difference between vesting state power in the members of a religious group instead of the officers of its sectarian organization is one of form not substance.

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 drew them to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar when it adopted Chapter 748. The significance of this fact to the legislature is indicated by the further fact that carving out the school district ran counter to customary practices. Indeed, the trend 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 (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. The fundamental source of constitutional concern here is that the legislature 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. 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. But accommodation is not a principle without limits. 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.

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. 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.

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. 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.

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*. 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 remain convinced of the general validity of the basic principles stated in *Lemon*.

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 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. 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 defined less by geography than by religion. Affirmative state action in aid of segregation of this character is unlike a decision to grant an exemption from a burdensome general rule. It is fairly characterized as establishing, rather than accommodating, religion.

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

"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 an eminently sound approach. Absent unusual circumstances, one's religion ought not affect one's legal rights or duties.

That the government is acting to accommodate religion should generally not change this analysis. Accommodations may justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect. A law prohibiting the

consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews. The Constitution permits "*nondiscriminatory* religious-practice exemptions," not sectarian ones.

Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated so long as it is implemented through generally applicable legislation. New York may, for instance, set forth neutral criteria that a village must meet to have a school district of its own. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was created by its voters as an enclave for their religious group.

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 Court should, in a proper case, be prepared to reconsider *Aguilar*.

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

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 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.

JUSTICE KENNEDY, concurring in the judgment.

The Court's ruling 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 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 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.

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.

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. Attending the Monroe-Woodbury public schools caused the handicapped Satmar children understandable anxiety and distress. New York was entitled to relieve these significant burdens.

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 *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 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"). They do not thereby become invalid.

The Kiryas Joel Village School District thus does not suffer any of the typical infirmities that might invalidate an attempted legislative accommodation. Without further evidence that New York has denied the same accommodation to religious groups bearing similar burdens, we could not presume 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. I agree with the Court insofar as it invalidates the school district for being drawn along religious lines. This explicit religious gerrymandering violates the First Amendment Establishment Clause.

The problem to which the Kiryas Joel Village School District was addressed is attributable 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 their own school district. One misjudgment is no excuse, however, for compounding it with another. The Establishment Clause forbids the government to draw political boundaries on the basis of religious faith.

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. Classes are co-ed and the curriculum secular. The school building has the bland appearance of a public school, unadorned by religious symbols; and the school complies with the laws governing all other New York State public schools. There is no suggestion, moreover, that this public school has gone too far in making 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.

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. 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 antagonistic to the purposes of the Religion Clauses.

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 to establish the unconstitutionality of a facially neutral law, 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.

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.

All that the first point proves, and the second point as well, 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.

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 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 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 of the legislature's desire to favor the Satmar religion. 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."

The second 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 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 permissible, without any suggestion that some "up front" guarantee of equal treatment for sacramental substances used by other sects must be provided.

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 in the future. This is unprecedented. I dissent.