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*Jeremy Patrick-Justice**

INTRODUCTION

Of all the contentious and divisive issues the United States Supreme Court has ruled on, few have provoked as much criticism, both internally and from the public, as the Court's rulings on religious freedom and the proper relationship between religion and government.[1] The criticism spans the political spectrum. During the past fifteen years, the Court has issued decisions that forbid official prayer at high school graduations and football games,[2] permit public funds to be spent on vouchers for religious school students,[3] and sometimes allow, but sometimes prohibit, government-sponsored religious symbolism such as creches.[4]

The internal division within the Court has led to frequent adoption, rejection, and revision of the proper "test" to be applied when considering Establishment Clause challenges.[5] Underlying

* LL.M., University of Toronto (2004). The author welcomes feedback at jhaeman@hotmail.com and wishes to thank Jennifer Nedelsky and Daniel Justice.

1 *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT xviii (Univ. N.C. Press 1994) (1986) ("The establishment clause is a perennially disputatious topic, fraught with emotion."); Wallace v. Jaffree, 472 U.S. 38, 107 n.6 (1985) (Rehnquist, J., dissenting) ("Many of our other Establishment Clause cases have been decided by bare 5-4 majorities."). Indeed, the Court's most recent Establishment Clause decision was decided by a 5-4 count, and involved an issue which had split public opinion. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding constitutionality of school vouchers).

2 *See* Lee v. Weisman, 505 U.S. 577 (1992) (graduations); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (football games).

3 *See Zelman*, 536 U.S. at 644.

4 *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989) (upholding display of menorah but striking down display of creche); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of creche).

5 *See* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 38 (1995) ("[T]he existing state of governing legal standards is both greatly in flux and riddled with major defects and inconsistencies."); LEVY, *supra* note 1, at 220 ("The Supreme Court has been inexcusably inconsistent in its interpretation of the establishment clause."). As will be discussed in Section III, the Court applied a three-pronged test for several years; under the test, a government statute or practice would be held invalid under the Establishment Clause if it lacked a secular purpose, had the effect of advancing religion, or created an excessive entanglement with religion. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The test met with substantial criticism. *See infra* note 268. In 1984, Justice O'Connor suggested that an "endorsement" inquiry ("whether the government intends to convey a

this debate is a similarly divisive debate over the core principles embodied in the Establishment Clause. Because judges and scholars frequently appeal to history to validate their positions,[6] much of the scholarship in this area has focused on whether or not the Establishment Clause was intended to forbid promotion of religion over nonreligion.[7]

However, there is an important and often-overlooked area of consensus. Judges and commentators nearly unanimously agree that the Establishment Clause forbids the government from preferring some religious denominations over *other* religious denominations.[8] This principle has strong historical roots and is often

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message of endorsement or disapproval of religion") should be part of the "effects" prong. *See Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Today, the "entanglement" aspect of *Lemon* has been officially incorporated into the "effects" prong. *See* Agostini v. Felton, 521 U.S. 203, 232-33 (1997).

6 *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.2, at 1160 (4th ed. 1991) ("There is a seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413 (1990) ("Interpretations of the establishment clause, then as well as now, are replete with extensive analyses of the historical context and meaning."). Of course, understanding the history behind a constitutional provision does not commit one to the position that it is the *only* permissible factor to consider. *See, e.g., id.* at 1415 ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.").

7 *Compare* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) (arguing that aid to religion generally was not forbidden by Establishment Clause) *with* Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) (arguing that even nondiscriminatory aid to religion was forbidden).

8 *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring) ("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."); *Allegheny*, 492 U.S. at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . . ."); *Lynch*, 465 U.S. at 723 (Brennan, J., dissenting) ("As we have repeatedly observed, the Religion Clauses were intended to ensure a benign regime of competitive disorder among all denominations, so that each sect was free to vie against the others for the allegiance of its followers without state interference."); *Everson*, 330 U.S. at 15 ("Neither a state nor the Federal Government . . . can pass laws which aid one religion . . . or prefer one religion over another."); CHOPER, *supra* note 5, at 15 ("Discrimination by government based on one's possessing (or not having) a certain faith imposes a penalty on religious prerogative and interferes with true religious freedom . . ."); David C. Williams & Susan H. Williams, *Volitionism and Religious Liberty*, 76 CORNELL L. REV. 769, 889 (1991) ("Preservation of government neutrality toward, and avoidance of official discrimination between, religions is one recurring concern in religion clause cases."); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1693 (1987) [hereinafter *Developments*]

considered one of the most fundamental guarantees of religious freedom.[9] Even Justices Rehnquist and Scalia, two of the Supreme Court's most conservative members and frequent critics of the idea of "separation of church and state," explicitly agree that denominational preferences are impermissible.[10]

In *Larson v. Valente*,[11] the Supreme Court gave independent force to the principle of denominational neutrality. In holding that laws granting denominational preferences must be closely fitted to a compelling governmental interest,[12] the Court stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[13] The Court's holding replaced the standard test[14] with a new strict scrutiny test. It appeared that the Court had committed itself to a new method of uncovering and eliminating religious discrimination.

However, the initial promise of *Larson* never clearly materialized. The case has not been overruled or explicitly doubted, yet

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("The vigor and clarity with which the Court has expounded the value of equal treatment of religions suggest that, if directly implicated, this value would outweigh most other considerations."). One of the earliest scholars of the religion clauses took a different view, in what are now oft-quoted passages. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES at 631-32 (5th ed. 1891) ("The real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment . . . ."), *quoted in* CORD, *supra* note 7, at 13. *Id.* at 630-31 ("An attempt to level all religions would have created universal disapprobation, if not universal indignation.") *quoted in* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 5 (2000).

9 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (2d ed. 1988) ("A growing body of evidence suggests that the Framers principally intended the establishment clause to perform two functions: to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions."); CORD, *supra* note 7, at 161 ("[I]t is historically clear that the First Amendment was intended not only to preclude the establishment of a national religion but also to prohibit Congress from giving any special significance to any one religion or sect.").

10 *See Kiryas Joel*, 512 U.S. at 748 (Scalia, J., dissenting) ("I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."); *Wallace*, 472 U.S. at 113 (1985) (Rehnquist, J., dissenting) ("The Framers intended the Establishment Clause . . . to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

11 456 U.S. 228 (1982).

12 *See id.* at 247.

13 *Id.* at 244.

14 The Court held that *Lemon* applied to laws benefiting *all* religions, whereas strict scrutiny would henceforth apply to laws preferring certain religious denominations over others. *See id.* at 252.

the Supreme Court rarely applies the strict scrutiny test,[15] lower courts apply it in an inconsistent manner,[16] and the meaning and correct application of the case are still unclear over twenty years after it was decided.[17] Only one law review article is devoted to *Larson*, and it was published just a year after the decision.[18] Further, the case is not included in most casebooks on religious freedom or general constitutional law[19] and is therefore not well known to most emerging legal scholars.

This Article analyzes the meaning of the *Larson* denominational preference test and discusses its current place in Establishment Clause jurisprudence. Section II explains the methodology employed in this analysis, while Section III provides a general background of the law prior to *Larson*. Section IV examines the *Larson* decision at length and describes how the Supreme Court has applied it since the case was decided. The current meaning of *Larson* and its application to Free Exercise and Equal Protection jurisprudence is discussed in Section V with an examination of how the test relates to the Court's normal Establishment Clause test. Finally,

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15 *See infra* Section IV.

16 *See infra* Section VI.

17 *See* TRIBE, *supra* note 9, § 14-7 at 1192 ("The *Larson* Court failed to explain when the new strict scrutiny approach applies."); Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 966 n.115 (1997) ("The Court's precedents do not make clear when *Larson* strict scrutiny or the *Lemon* test applies."); Enid Trucios-Haynes, *Religion and the Immigration and Nationality Act: Using Old Saws on New Bones*, 17 IMMIGR. & NAT'LITY L. REV. 161, 204 (1996) ("The Court did not set forth any guiding criteria to find a denominational preference . . . ."); Joshua D. Zarrow, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 489-90 (1986) ("Although the *Larson* decision appears to create a stricter establishment clause review, it further obfuscates the application of establishment clause analysis.") (footnote omitted); Nancy Blyth Hersman, Note, Lynch v. Donnelly*: Has the* Lemon *Test Soured?*, 19 LOY. L.A. L. REV. 133, 164 (1986) ("[T]here is confusion in the courts as to when to use the *Lemon* or strict scrutiny tests[.]").

18 *See* Daniel W. Evans, Note, *Another Brick in The Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 NEB. L. REV. 359 (1983). A short summary of *Larson* is included in NOWAK & ROTUNDA, *supra* note 6, § 17.16 at 1257-58, while a slightly more in-depth discussion is included in TRIBE, *supra* note 9, § 14-7 at 1191-93.

19 Most casebooks specifically on religious liberty do not include *Larson*. *Compare* 1 ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 154-164 (5th ed. 1996) (*Larson* included) *with* THE CONSTITUTION AND RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE (Robert S. Alley, ed., 1999) (*Larson* not included); MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY (2d ed. 2002) (*Larson* mentioned, but not discussed); RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE (Terry Eastland ed., 1993) (same).

Section VI examines how inferior federal courts and state courts apply the *Larson* strict scrutiny test in practice.

Taken at face value, the Supreme Court in *Larson* created a powerful new method for striking down legislation that prefers one religious denomination over another.[20] Because lawyers and judges continue to raise and examine *Larson*-based challenges to government conduct,[21] an inquiry into the meaning of the case is not a mere exercise in academic curiosity; indeed, it may help to shed an important light on the future of American Establishment Clause jurisprudence.

II. METHODOLOGY

This Article examines the meaning and application of the *Larson* denominational preference test through a descriptive approach by focusing on the interpretation and effect given to *Larson* by the Supreme Court and lower courts, while avoiding normative judgments as to whether those cases were "correctly" decided or whether the Establishment Clause "really" means one thing or another.[22] However, attention will be given to whether the various

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[20] *See, e.g.*, TRIBE, *supra* note 9, § 16-6, at 1453-54 ("[T]he device of strict scrutiny is most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle."); Zarrow, *supra* note 17, at 489 n.76 ("Strict scrutiny appears to be a more stringent standard for establishment clause analysis in view of the malleable nature of the *Lemon* criteria. The *Lemon* test requires merely that state action have a secular purpose, whereas strict scrutiny requires that state action have a compelling state purpose.") (citation omitted).

[21] *See, e.g.*, Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1090 (8th Cir. 2000) ("[W]e initially must determine whether [the challenged activity] discriminates among religious sects. If so, we apply strict scrutiny review under [*Larson*]. If not, we administer the three-part test set forth by the Supreme Court in [*Lemon*.]") (footnote omitted) (citations omitted); ACLU Neb. Found. v. Plattsmouth, 186 F. Supp. 2d 1024, 1031 n.7 (D. Neb. 2002), *aff'd*, 358 F.3d 1020 (8th Cir. 2004), *reh'g granted and opinion vacated*, No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004).

[22] Judgments of this type are plentiful in the literature, but to be useful require a careful, robust, and coherent framework for analyzing Establishment Clause cases. *See generally* Mitchell v. Helms, 530 U.S. 793, 869-70 (2000) (Souter, J., dissenting) (stating that the Establishment Clause "eludes elegant conceptualization simply because the prohibition applies to such distinct phenomena as state churches and aid to religious schools . . . . Any criteria, moreover, must not only define the margins of the establishment prohibition, but must respect the succeeding Clause of the First Amendment guaranteeing religion's free exercise. It is no wonder that the complementary constitutional provisions and the inexhaustibly various circumstances of their applicability have defied any simple test and have instead produced a combination of general rules often in tension at their edges.") (citation omitted). *See also* Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of*

interpretations of *Larson* provided in different cases are consistent and coherent.

Sources used in this Article include the standard collection of cases, articles, and books, as well as briefs and oral argument transcripts from leading Supreme Court cases. The latter category of sources help to determine whether the *Larson* test has been willfully ignored by the Supreme Court or whether parties have simply not raised it as controlling authority.

Finally, although extensive attention will be given to doctrine and language, this Article adopts a version of the classical legal realist approach:[23] particular linguistic formulations of rules and principles are not entirely without importance, but legal decision-making is heavily influenced by the values of the individual decision-maker, the pressures brought to bear by society, and the sympathy (or lack thereof) engendered by the parties before the court. For example, in the related context of the Free Exercise Clause, many commentators bemoaned[24] the Supreme Court's adoption of a "neutral and generally applicable test" in 1990 which was doctrinally less protective of religious liberty than the former strict scrutiny test.[25] However, subsequent analysis demonstrates that even under the apparently robust strict scrutiny test, plaintiffs rarely succeed in their Free Exercise claims before the Supreme Court.[26]

Equality, Subsidy, Endorsement, and Church Autonomy, 75 MARQ. L. REV. 903, 907 n.13 (1992) (listing various proposals to "fix" the Establishment Clause). The ambitious task of adopting or creating such an analytical framework is outside the scope of this Article.

23 *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932).

24 *See, e.g.,* Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 753 n.40 (1993) (citing examples).

25 *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

26 *See* John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the* Peyote Way Church of God *Case*, 22 AM. INDIAN L. REV. 475, 480 (1998) ("While the pre-*Smith* test appeared highly protective of religious liberty, it clearly was not . . ."); Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 252 (1998) ("Commentators generally share the view that strict scrutiny pre-*Smith* was anything but strict."); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU. L. REV. 117, 121-22 (discussing pre-*Smith* cases). As has been noted by other commentators, although different formulations of the Free Exercise Clause test may not have affected decision-making at the Supreme Court level, varied test formulations have resulted in different outcomes in the lower courts. Lower courts face a far greater number of constitutional claims and have less leeway to ignore or manipulate Supreme Court precedent. For that reason, Section VI examines state and lower federal courts' use of *Larson*. Finally, it is worth

Thus, in discussing the *Larson* strict scrutiny test in the context of the Establishment Clause, close attention will be paid to whether application or omission of the test would have made a difference in outcome.

III. PRE-*LARSON* ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion . . . ."[27] The Establishment Clause has only played an important role in the Supreme Court's religious freedom jurisprudence since the middle part of the twentieth century,[28] even though it is part of the original Bill of Rights. Modern Establishment Clause doctrine can largely be traced to the Court's 1947 decision in *Everson v. Board of Education*.[29] *Everson*, which dealt with the constitutionality of publicly-funded transportation of children to religious schools, was significant for three reasons. First, it was the first time that the Court struggled with substantive issues requiring an analysis of the Establishment Clause.[30] Second, it officially held that the Establishment Clause applied to the states through the Fourteenth Amendment under the Court's doctrine of incorporation.[31] Third, the justices unanimously agreed with this oft-quoted passage:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government

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noting that reported decisions are not the only measure of a doctrine's effect. For example, looking solely at reported caselaw does not reveal some of the other possible affects of *Larson*, such as whether the decision has deterred Congress from enacting legislation containing denominational preferences and whether attorneys have become more likely to advise their clients to challenge such legislation.

27 U.S. CONST. amend. I.

28 *See* CORD, *supra* note 7, at 108 ("[I]t is accurate to say that prior to the *Everson* 'Bus Transportation' Case [in 1947], the U.S. Supreme Court cases that involved the Establishment of Religion Clause were minute in number and none were of any significant value in determining just what legislation that Clause constitutionally prohibited."). *See also* Lee v. Weisman, 505 U.S. 577, 599 n.2 (1992) (Blackmun, J., concurring) (summarizing pre-*Everson* Establishment Clause cases).

29 330 U.S. 1 (1947).

30 *See* CORD, *supra* note 7 and accompanying text.

31 *See Everson*, 330 U.S. at 8. The Establishment Clause, as part of the First Amendment, was held in dicta to be applicable to the states in earlier cases such as Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) and Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). There is now some mounting (and unprecedented) internal criticism of the Court's decision to incorporate the Establishment Clause. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring). *See generally* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990).

> can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[32]

As comprehensive and clear as this passage appears, it proved much harder to apply in practice. Indeed, the Court in *Everson* split 5-4, with the majority voting to uphold the subsidized busing of religious school students.[33]

Over the next two decades, the Court did not apply the Establishment Clause frequently; however, when it did, important issues were at stake.[34] In 1971, the Court in *Lemon v. Kurtzman*[35] distilled several principles from its previous cases and announced a three-prong test for adjudicating Establishment Clause claims. Under the *Lemon* test, legislation would be upheld if all three of the following conditions were satisfied: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[36] The flexible *Lemon* test[37] continues to be the primary method of evaluating conduct under the Establishment Clause[38] even though it has met frequent criticism and revision.

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[32] *Everson*, 330 U.S. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[33] *Id.* at 18.

[34] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (mandatory school prayers); Abington v. Schempp, 374 U.S. 203 (1963) (mandatory Bible reading); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption for churches and other places of worship).

[35] 403 U.S. 602 (1971).

[36] *Id.* at 612-13 (quoting *Walz*, 397 U.S. at 674).

[37] *See infra* Part V.F.

[38] *See Zelman*, 536 U.S. at 648-49 (applying *Lemon*). *See also* NOWAK & ROTUNDA, *supra* note 6, § 17.3 at 1162 ("The Supreme Court applies the three part test . . . in virtually all establishment clause cases."); Glenn S. Gordon, Note, Lynch v. Donnelly: *Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185, 192 (1985)

Understanding the Court's Establishment Clause jurisprudence is a difficult task because the cases reveal a muddle of conflicting holdings and inconsistent reasoning.[39] However, one consistent concern among both liberal and conservative justices is preserving the principle of neutrality.[40] The principle of neutrality can be as vague a concept[41] as "equality" or "liberty," but in the context of the Establishment Clause, the principle has been used in one of three ways: "'Neutrality' has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate even-handedness in distributing it."[42]

Often implicit in the discussion of neutrality between religion and secularism is the principle of neutrality between denominations;[43] a principle that many see as the original and fundamental purpose of the Establishment Clause.[44] For instance, many of the original English colonists fled to North America to escape laws forcing them to support and take part in religions other than their

("[T]he *Lemon* test, with its separationist tenor, has served as the cornerstone of establishment clause analysis.").

39 *See* Alison Wheeler, *Separatist Religious Groups and the Establishment Clause*—Board of Education of Kiryas Joel Village School District v. Grumet, 30 HARV. C.R.-C.L. L. REV. 223, 223 (1995) ("The Court's application of the *Lemon* test in the ensuing twenty-three years has prompted an increasing volume of criticism from both academics and jurists complaining of inconsistency, unpredictability and ad hoc decisionmaking.") (footnotes omitted).

40 *See* TRIBE, *supra* note 9, § 14-7 at 1188-1201 (discussing four kinds of neutrality toward religion: strict, political, denominational, and free exercise); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1987); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986). *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

41 *See* CHOPER, *supra* note 5, at 20 ("[T]he principle of neutrality may be formulated in a variety of ways, and the abstract notion of equality demands further content.") (footnote omitted); Laycock, *supra* note 40, at 994 ("We can agree on the principle of neutrality without having agreed on anything at all. From benevolent neutrality to separate but equal, people with a vast range of views on church and state have all claimed to be neutral.") (footnotes omitted); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) ("'Neutrality' like 'equality,' is a principle of relationship, not of content. A statement such as 'the state should be neutral' is completely vacuous . . . .") (footnote omitted).

42 Mitchell v. Helms, 530 U.S. 793, 878 (2000) (Souter, J., dissenting).

43 *See* Conkle, *supra* note 8, at 8 ("The requirement of denominational equality demands that all religions be treated equally. The broader notion of religious neutrality includes the requirement of denominational equality, but it also goes one step further, demanding that the government neither favor nor disfavor religion in general, as compared to nonreligion.").

44 *See supra* note 8.

own.[45] However, the new settlers quickly replicated the very same establishments of religion they had fled. Before the Revolutionary War:

> Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted . . . . And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches . . . .[46]

However, by the time the Bill of Rights was ratified, no state had an establishment of religion that effectually preferred one denomination over another,[47] although seven states still had establishments of religion.[48] Even so, Protestant dominance in law and society continued throughout the eighteenth century and most of the nineteenth.[49] Indeed, one commentator argues that it was not until the 1960s that American society "firmly embraced" the concept of denominational neutrality.[50] Today the United States is home to more than one thousand religious faiths[51] and has a "soci-

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45 *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947). *See also* McConnell, *supra* note 6, at 1421 ("During the early settlement of the colonies in the seventeenth century, England suffered from chronic religious strife and intolerance.").

46 *Everson*, 330 U.S. at 10 (footnotes omitted). *See also* LEVY, *supra* note 1, at 1 ("On the eve of the American Revolution most of the colonies maintained establishments of religion. Those colonies . . . discriminated against Roman Catholics, Jews, and even dissenting Protestants who refused to comply with local laws benefiting establishments of religion."); McConnell, *supra* note 6, at 1422-30 (discussing different approaches of colonies to religious freedom).

47 *See id.* at 10-11 ("An establishment of Christianity or of Protestantism in the American states that permitted an establishment in about 1790 would have been, for practical purposes, a comprehensive or nonpreferential establishment, permitting government aid to all churches or to religion generally. No American state at the time maintained an establishment in the European sense of having an exclusive or state church designated by law."); Laycock, *supra* note 7, at 898 ("It is anachronistic to view aid to all denominations of Christians as preferential in 1786. There were hardly any Jews in the United States at that time, and no other non-Christians to speak of . . . . [A]id to all Christians was viewed as nonpreferential in the late eighteenth century."); McConnell, *supra* note 6, at 1466 ("The American colonies were peopled almost entirely by adherents of various strains of Protestant Christianity. The Protestant moral code and mode of worship was, for the most part, harmonious with the mores of the larger society.") (footnote omitted).

48 *See* LEVY, *supra* note 1, at xxii.

49 *See* Conkle, *supra* note 8, at 4 ("[T]hroughout most of our country's history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life.").

50 *See id.* at 6. Conkle also notes that the Civil Rights Acts of 1964 and 1968 were the first Federal statutes prohibiting religious discrimination in public accommodations.

51 According to J. GORDON MELTON, THE ENCYCLOPEDIA OF AMERICAN RELIGIONS

etal norm of religious toleration."[52]

It is not clear why a law that prefers some denominations over others is necessarily worse than a law that prefers religion over nonreligion. In either case, a small minority (whether of atheists and agnostics, or of unpopular religious believers) may be compelled to practice or support a government policy that violates their most fundamental beliefs. On the other hand, laws that endorse religion of general or specific denominations may not actually influence religious belief. One commentator notes:

> Statutes classifying along religious lines often may have virtually no discernible effect on the actual exercise or nonexercise of religion. Surprisingly enough, this might even be said of an officially established, but completely liberal and tolerant, national religion. The establishment clauses's text itself, however, commands the presumption that such arrangements have deleterious effects on religious freedom, even when they are extremely subtle.[53]

Although the Supreme Court first held in 1982 that laws which prefer some denominations over others would be subject to strict scrutiny, the *Larson* case was not the first time that the Court faced a claim that a law preferred some religions over others and was therefore invalid under the Establishment, Free Exercise, or Equal Protection Clauses.[54] Because *Larson* relied in part on these cases,

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(3d ed. 1989) there are at least 1,588 religious groups in the United States and Canada. *See also* JOHN F. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE 47 (1979) ("Empirically speaking, not only is the United States extraordinary among the modernized societies of the world in the *degree* of religious activity and affiliation within it, it is also extraordinary in the *number* of different religions which are vital within it.")

52 Conkle, *supra* note 8, at 8.

53 Paulsen, *supra* note 41, at 341 n.130.

54 As we shall see, the statement in Evans, *supra* note 18, at 377, that "prior to *Larson*, the Court was never confronted with a case framed as discrimination among religions" and similar remarks in Gordon, *supra* note 38, at 191 (relying on Evans), are not precisely accurate, especially when the Free Exercise Clause is considered. It should also be noted that in many of the cases framed as whether religion was being advanced over nonreligion, the existence of denominational preferences were implicit and may have influenced the result. For example, in his dissent in *Everson v. Bd. of Educ.*, Justice Jackson noted that the school board resolution authorizing public transportation for private school students applied only to Catholic schools. *See* Everson v. Bd. of Educ., 330 U.S. 1, 25 (Jackson, J., dissenting) ("if the school is a Catholic one [school authorities] may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld."). Similarly, the Bible readings struck down in *Abington v. Schempp*, 374 U.S. 203, 207 (1963), were usually from the Protestant King James version rather than the Catholic Douay version, and the plurality in *Roemer v. Maryland Public Works Bd.,* 426 U.S. 736, 744 (1976) noted that four of the five religious institutional recipients of a public educational funding scheme were Roman Catholic Church-affiliated colleges. In the Free Exercise context, Justice

understanding them is an important part of understanding the denominational preferences test.

Just four years after *Everson* was decided, the Supreme Court in *Niemotko v. Maryland*[55] heard a discrimination case brought by a group of Jehovah's Witnesses who claimed that they were discriminated against in the use of a public park because city officials repeatedly denied them a permit to hold religious services in the park even though such permits had been issued for *other* religious organizations.[56] The Court held the city's refusal unconstitutional, stating that "[t]he conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views."[57]

Two years later, *Niemotko* was used as the basis to strike down a municipal by-law in *Fowler v. Rhode Island*.[58] The circumstances were similar in that Jehovah's Witnesses were arrested for holding religious services in a public park. The challenged law in *Fowler* provided that:

> No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.[59]

Because the law appeared neutral on its face, the parties devoted most of their briefing and argument to the issue of whether the law complied with Supreme Court precedent on prior restraint

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Brennan noted in *McDaniel v. Paty*, 435 U.S. 618, 632 n.4 (1978) (Brennan, J., concurring), that a statute disqualifying "ministers" from holding political office may "discriminate among religions by depriving ministers of faiths with established, clearly recognizable ministries from holding elective office, while permitting the members of nonorthodox humanistic faiths having no 'counterpart' to ministers, similarly engaged to do so.") (citation omitted). In *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam), the Court reversed the lower court's determination that religious discrimination in prisons could not be the basis for a Free Exercise claim. *See id.* at 322 ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion . . . . If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments.").

55 340 U.S. 268 (1951).

56 *See id.* at 272-73.

57 *Id.* at 272. The exact constitutional guarantee implicated in *Niemotko* is not clear from the case, as free speech, free exercise of religion, and equal protection language is used in various places in the Court's opinion. *See id.* at 272-73.

58 345 U.S. 67 (1953).

59 *Id.* at 67.

of speech.[60] However, at oral argument the attorney for the city admitted that the ordinance had been interpreted in the past to allow other religious groups to meet and hold worship services in the park.[61] This concession was fatal to the city's case, "[f]or it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one."[62] As in *Niemotko*, the majority found the law invalid under the First Amendment, while Justice Frankfurter concurred under the Fourteenth Amendment's Equal Protection Clause.[63]

The case most clearly and viscerally implicating discrimination between religious beliefs is *Gillette v. United States*.[64] Although *Gillette* would eventually serve as an important, but ambiguous, precedent for *Larson* and other denominational preference cases,[65] the case had immediate impact as well. In the middle of national turmoil over the Vietnam War, the Supreme Court examined the constitutionality of a federal statute providing exemptions from compulsory military service for some religious conscientious objectors, but not others.[66] The statute provided exemptions from the draft for persons opposed "to participation in war in any form," but not to persons with religious objections only to "particular" wars.[67] Accordingly, the district courts denied the plaintiffs' draft exemptions because they did not object to war in every form, even though the sincerity of their religious beliefs was conceded by the government.[68]

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60 *See id.* at 69.

61 *See id.* ("Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance.").

62 *Id.* at 69.

63 *Id.* at 70 (Frankfurter, J., concurring); *Nietmotko*, 340 U.S. at 284 (Frankfurter, J., concurring). It is not clear in either *Niemotko* or *Fowler* whether the portion of the First Amendment referred to is the Free Exercise Clause or the Establishment Clause. Regardless, the analyses and holdings are relevant as background to *Larson*. *See, e.g.*, TRIBE, *supra* note 9, § 14-2 at 1157 ("[T]o the extent that the two [religion] clauses are understood as reinforcing one another, doctrines developed under one are relevant to the other as well."). The two cases are still cited occasionally by the Supreme Court in the context of religious discrimination. *See, e.g.*, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533 (1993) (citing both *Fowler* and *Niemotko*).

64 401 U.S. 437 (1971).

65 *See infra* Section IV. As will be discussed, *Gillette* has been used to undermine the *Larson* strict scrutiny test.

66 *See* 50 U.S.C.A. app. § 456(j) (Supp. V 1964). *See generally* Michael S. Satow, *Conscientious Objectors: Their Status, the Law and Its Development*, 3 GEO. MASON U. CIV. RTS. L.J. 113 (1992).

67 *Gillette*, 401 U.S. at 443.

68 *Id.* at 439-40.

Unlike other cases framed as religious discrimination, this was not an issue of unintentional disparate impact on certain religious groups.[69] Rather, Congress specifically legislated that certain religious beliefs would be grounds for an exemption and others would not. Nor was it a case involving religiously-motivated *conduct* as opposed to mere *belief*.[70] Instead, *Gillette* involved two classes of sincere religious believers: those who believed that the Vietnam War was wrong, and that some but not all other wars were wrong; and those who believed that the Vietnam War and all other wars were wrong. Thus, the religious belief directly implicated by the exemptions sought at the time (objection to the Vietnam War) was the same in both cases; the difference was that one class of persons had an *additional* religious belief. Finally, to make the issue even more pointed, the consequences to the plaintiffs and others lacking the particular religious beliefs Congress required were the most severe the Court ever adjudicated in the context of the Establishment Clause: war and possible death.

Eight of the nine justices voted to uphold the exemption against the Establishment Clause challenge. Under the reasoning of the majority, although the Establishment Clause forbids even "subtle departures from neutrality,"[71] laws that categorize persons according to religious belief need only be justified by showing that the lines drawn have "neutral, secular reasons"[72] and are "neither arbitrary nor invidious."[73] The Court held that the draft exemption could be limited to persons with the religious belief that all war is wrong because it "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions,"[74] chief among them being the ability to gather manpower and to administer exemption claims easily and fairly.[75]

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69 *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961).

70 *See, e.g.,* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

71 *Gillette*, 401 U.S. at 452.

72 *Id.* at 449 n.14.

73 *Id.* at 452.

74 *Id.*

75 *See id.* at 455-56. The Court also found that this formed a compelling interest sufficient to defeat the plaintiffs' Free Exercise Clause claims. *See id.* at 461-62. Although the *Gillette* Court states that the burdens are "strictly justified by a substantial governmental interest[,]" I understand this language to be equivalent to the traditional strict scrutiny test, which requires the government's interest to be "compelling." This reading is justified because the Court discussed the Free Exercise challenge with reference to *Sherbert v. Verner*, 374 U.S. 402 (1963), which established the strict scrutiny test for Free Exercise challenges. I do not believe that the Court was attempting to create a new, lower standard in *Gillette*. This reading is further supported by subse-

Taken as a whole, *Gillette* seems to stand for the proposition that laws distinguishing between religious beliefs or denominations need only be justified by demonstrating a secular purpose and showing some sort of rational basis between that purpose and the classification. As discussed in the next two sections, *Gillette* was distinguished in *Larson* when the Court announced the strict scrutiny test. Although the holding in *Gillette* is probably sound considering the traditional deference the Court pays to military affairs,[76] the reasoning of the case seems to conflict with the rule announced in *Larson*.

IV. *LARSON* IN THE SUPREME COURT

A. Larson v. Valente

Although analyzing the meaning and limits of the *Larson* denominational preferences test is a difficult task, the facts of the case itself are relatively straightforward. In 1961, Minnesota created a comprehensive scheme to regulate charitable organizations within the state.[77] The legislation imposed a variety of registration and record-keeping requirements, including detailed annual reports on income, costs of administration, fundraising, and transfers of funds.[78] For the first several years of the Charitable Solicitations Act's existence, religious groups were exempted from the requirements.[79] However, in 1978 the Minnesota Legislature made several changes to the Act, including one amendment that made the Act applicable to certain religious groups. Under the new amendment, religious organizations were presumed to be covered by the statute unless they received more than half of their contributions from members.[80]

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quent caselaw, including *Valente*. *See infra* note 89 ("Such preference is in conflict with the amendment prohibiting establishment of religion by law, in the absence of compelling secular justification like those sustained in *Gillette*.").

76 *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

77 *See* MINN. STAT. §§ 309.50-309.61 (2004) for the current version of this statute.

78 *See* Valente v. Larson, 637 F.2d 562, 569 (8th Cir. 1981). The Eighth Circuit noted that "such an audit does not spring full blown without considerable expense and administrative coordination" (quoting Heritage Vill. & Missionary Fellowship, Inc. v. North Carolina, 263 S.E.2d 726, 733 (N.C. 1980), *aff'd*, 456 U.S. 228 (1982)).

79 *See* Valente, 637 F.2d at 564 n.3.

80 *See id.* at 564. The Act provided an exemption for 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)." *Id.* (quoting MINN. STAT. § 309.515(1)(b) (1982)).

In October of 1978, four individual members of the Unification Church[81] filed suit in federal district court, alleging that they often solicited funds for the Church from the public, and that the Act's new amendments burdened their individual rights to freedom of speech, religion, and equal protection of the laws.[82] In an unreported decision,[83] the trial judge granted summary judgment for the plaintiffs and held the Act's provisions unconstitutional as applied to religious organizations[84] because they discriminated against certain religious groups, and thus violated the "effects" prong of *Lemon*.[85] The result of the court's ruling was that the law returned to its pre-1978 form, exempting all religious organizations from the registration, record-keeping, and reporting requirements.[86]

A unanimous panel of the Eighth Circuit affirmed the trial court's decision.[87] The Court of Appeals focused on the Establishment Clause question, stating that "[a]ll parties agree that the major legal issue in this case is whether the classification made in a religious exemption contained in the Act is invalid because of its unequal application to different religious organizations."[88] The Court agreed with the district court's ruling that the classification

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81 The official name for the Unification Church is the Holy Spirit Association for the Unification of World Christianity, while a disparaging nomenclature for the group is "Moonies," coined from the name of the religion's founder, Sun Myung Moon. The guiding principle of the religion is that Jesus Christ's mission on Earth went unfulfilled, and that the Unification Church should undertake the task of restoring the world after the initial fall from divine grace. *See generally* J. GORDON MELTON, ENCYCLOPEDIC HANDBOOK OF CULTS IN AMERICA 195-96 (1986). It should be noted that the word "cult" in the title of Melton's book, and throughout this article, is used in the sociological sense of a small religious group and not as a normative judgment as to the group's validity. *See, e.g.,* David A. Nock, *The Organization of Religious Life in Canada*, *in* THE SOCIOLOGY OF RELIGION: A CANADIAN FOCUS 56-57 (W.E. Hewitt ed., 1993) ("Most sociologists use a definition of cult that is quite different. This definition simply refers to religious movements that are new to the conventional religious tradition of a society.").

82 *See* Complaint for Injunction and Declaratory Judgment, Joint Appendix at A-2, Larson v. Valente, 456 U.S. 228 (1982) (No. 80-1666), *available at* LEXIS 1980 U.S. Briefs 1666. Because Minnesota had already initiated litigation in state court against the Unification Church to bring it into compliance with the Act, the parties stipulated that the Church would be re-aligned as a plaintiff alongside the original four plaintiffs in the federal action. *See* Stipulation and Order, Joint Appendix at A-14, Larson v. Valente, 456 U.S. 228 (1982) (No. 80-1666), *available at* LEXIS 1980 U.S. Briefs 1666.

83 Brief for Appellants at 2, *Larson* (No. 80-1666), *available at* 1981 WL 390107.

84 *See* Valente v. Larson, 637 F.2d 562, 564 (8th Cir. 1981).

85 Brief for Appellants at 5, *Larson* (No. 80-1666), *available at* 1981 WL 390107.

86 *See* Brief of Appellees at 9, *Larson* (No. 80-1666), *available at* LEXIS 1980 U.S. Briefs 1666.

87 *See Valente*, 637 F.2d at 564.

88 *Id.*

violated the effects prong of *Lemon*,[89] but based its holding on the test's "purpose" prong.[90] Although neither the district court nor the appellate court received evidence of the Minnesota Legislature's purpose in passing the legislation,[91] the Eighth Circuit inferred from the nature of the statutory classification that an intentional "religious gerrymander" was probably at work because the State was unable to adequately explain why traditional religious organizations were usually exempt from the Act, while new or less traditional religions generally had to comply.[92]

On appeal before the United States Supreme Court, Minnesota focused its defense of the Act on three grounds. First, it argued that the plaintiffs simply did not have standing to challenge the constitutionality of a partial exemption for religious organizations because the Unification Church had not established that it was a religious organization.[93] Second, the State suggested that both the district court and the Court of Appeals had improperly

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89 *See id.* at 568-69 (noting that religious organizations subject to the Act "will suffer material burdens" while others "will enjoy complete exemption"). Although mentioned only in passing and not discussed, this portion of the court's ruling may be the first suggestion that laws preferring some religions over others should be subject to strict scrutiny under the Establishment Clause. *See id.* at 569 ("We must conclude that the Minnesota statute prefers some religions over others. Such preference is in conflict with the amendment prohibiting establishment of religion by law, in the absence of compelling secular justifications like those sustained in *Gillette*."). Under traditional Supreme Court precedent, the purpose and effects prong of *Lemon* do not, at least officially, involve a consideration of whether or not the State had a compelling interest in passing the law. *See* Evans, *supra* note 18, at 368 n.51. In *Gillette*, the Supreme Court discussed the compelling interest test in the context of a Free Exercise Clause challenge; the Eighth Circuit's importation of this language into an Establishment Clause challenge would be noted and criticized by Minnesota on appeal before the Supreme Court. *See* Brief for Appellants at 23, *Larson* (No. 80-1666), *available at* 1981 WL 390107 ("The compelling secular justification in *Gillette* was pertinent only to the free exercise claim adjudicated therein, and there is no free exercise claim before this Court.").

90 *See Valente*, 637 F.2d at 567-68. The Court did not reach the entanglement prong of *Lemon*. *See id.* at 569.

91 Brief for Appellants at 12-13, 16 *Larson* (No. 80-1666), *available at* 1981 WL 390107.

92 *See Valente*, 637 F.2d at 566 ("[I]t may be inferred that the draftsmen of this legislation wished to reduce the burdens otherwise imposed on well-established churches which had achieved strong but not total financial support from their members; the draftsmen have exhibited less concern for easing regulations applicable to 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."). The Court found this failure to articulate a secular reason for the religious classification to be sufficient grounds for ruling that the *Gillette* "neutral, secular" criteria rule had not been met. *See id.* at 567-68.

93 *See* Brief for Appellants at 31-34 *Larson* (No. 80-1666), *available at* 1981 WL 390107.

considered legislative motive.[94] Finally, and most importantly, Minnesota rested its defense of the statute on the Supreme Court's prior ruling in *Gillette* that a religious classification need only be justified by showing a "neutral, secular" purpose.[95] The State argued that the classification was justified because members who give to their religious organizations are more aware of how their funds are used than non-members who give to religious organizations, and also have a statutory right to inspect the records of these organizations.[96] In the State's view, the fact that the classification had a disparate impact on some religious groups did not make it unconstitutional under the *Gillette* rule.[97]

The Unification Church made a bold move in its argument before the Supreme Court. The Church argued that even though the *Lemon* test had been applied in every Establishment Clause challenge since it was announced,[98] it should not be applied because:

> This case invokes the fundamental strand of establishment clause doctrine of government neutrality as among groups of religious organizations. The three-fold test of [*Lemon*], which is of greatest utility in sorting out the subtle constitutional problems involved in the provision of government aid to all religions, is therefore unnecessary to apply here.[99]

Instead, the Church urged a rule that would only uphold a religious classification "upon a convincing showing that it is substantially related to a significant governmental interest."[100] Further, the Church met Minnesota's *Gillette* argument by making a distinction between laws which have a *de facto* disparate impact on religious groups because of secular rules, and laws which have a *de*

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94 *Id.* at 15-17.

95 *Id.* at 20-30.

96 *Id.* at 11.

97 *Id.* at 21-22. *See also* Evans, *supra* note 18, at 366 ("The state's principal contention was that a law may have a disparate impact on religious organizations without offending the establishment clause as long as the differentiating criteria were neutral and secularly based.").

98 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting that, as of 1984, the only two occasions that the Court had not applied the *Lemon* test were *Larson* and a case decided subsequent to it, *Marsh v. Chambers*, 463 U.S. 783 (1983)).

99 Brief of Appellees at 12, *Larson* (No. 80-1666), *available at* LEXIS 1980 U.S. Briefs 1666. The Church argued in the alternative that even if *Lemon* did apply, the Act failed all three prongs of the test. *Id.*

100 *Id.* at 11. Interestingly, this suggested rule ("substantial" relation to a "significant" interest) would require intermediate scrutiny, not the strict scrutiny that the Court eventually adopted in *Larson*. *See, e.g.,* NOWAK & ROTUNDA, *supra* note 6, § 14.3 at 575-78 (comparing strict scrutiny and intermediate scrutiny tests).

jure disparate impact on religious groups because of the use of a religious classification in the statute itself.[101] Because the challenged Act created the latter form of disparate impact, the Church argued, it should be subject to greater scrutiny than the mere "neutral, secular" rule of *Gillette*.[102]

The State countered that the Church's proposed test "has never been an aspect of establishment clause analysis"[103] and that the Church failed to show how such a test "even remotely relates to establishment clause principles."[104] Further, the State argued that the distinction between *de jure* and *de facto* religious classifications was irrelevant insofar as each could be saved under *Gillette* by demonstrating a neutral, secular basis for the differing treatment.[105]

Although Minnesota was the sole defender of the Act's constitutionality, six different amicus briefs were filed in support of the Unification Church.[106] Only two amici supported the Church's claim that some form of stricter review should be applied to laws creating religious classifications,[107] but all of them argued, at least

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101 *See* Brief of Appellees at 17, *Larson* (No. 80-1666), *available at* LEXIS 1980 U.S. Briefs 1666. The Church argued that *de jure* disparate impacts were worse than *de facto* disparate impacts because the former are "symbolically inappropriate under the establishment clause," are more susceptible to the religious biases of legislators, and are far more "readily avoidable." *Id.* at 19.

102 *See id.* at 18 ("[T]here is a much greater danger of improper legislative motivation, in the form of either favoritism or hostility, where a law speaks expressly in terms of religion than where it is neutral on its face but has only a disparate religious impact. The more a law focuses expressly upon so constitutionally sensitive a consideration, the more likely it is that legislators, consciously or unconsciously, will be affected in their deliberations by their expectations as to the likely impact of the legislation."). *Id.* at 20.

103 Reply Brief at 9, *Larson* (No. 80-1666), *available at* 1981 WL 390109.

104 *Id.*

105 *See id.* at 4.

106 *See* Brief of Amicus Curiae Greater Minneapolis Association of Evangelicals, *Larson* (No. 80-1666), *available at* 1981 WL 390118; Brief of Amici Curiae General Conference of Seventh-Day Adventists, et al., *Larson* (No. 80-1666), *available at* 1981 WL 390115; Brief of Amicus Curiae the Center for Law and Religious Freedom of the Christian Legal Society in Support of Appellees, *Larson* (No. 80-1666), *available at* 1981 WL 390114; Brief of Amicus Curiae Americans United for Separation of Church and State Fund, Inc., *Larson* (No. 80-1666), *available at* 1981 WL 390113; Brief of Amici Curiae American Civil Liberties Union, et al., *Larson* (No. 80-1666), *available at* 1981 WL 390110; Brief of Amicus Curiae American Jewish Congress, *Larson* (No. 80-1666), *available at* 1981 WL 390112.

107 Both amici followed the lead of the Unification Church and suggested that the heightened scrutiny should consist of the type of intermediate scrutiny embodied in cases such as *Reed v. Reed*, 404 U.S. 71 (1971), and *Craig v. Boren*, 429 U.S. 190 (1976). *See* Brief of Amicus Curiae Greater Minneapolis Association of Evangelicals at 15, *Larson* (No. 80-1666), *available at* 1981 WL 390118 (arguing for stricter scrutiny under the Equal Protection Clause); Brief of Amicus Curiae the Center for Law and Religious Freedom of the Christian Legal Society at 7-8, *Larson* (No. 80-1666), *available at* 1981

in part, that the Act was unconstitutional for preferring some religions over others.[108]

Justice Brennan wrote the opinion for a five-justice majority in *Larson*.[109] Brennan began the opinion by disposing of the threshold standing question, stating that it was logically inconsistent for Minnesota to argue that the Unification Church was not a religious organization subject to the Act since it had attempted to enforce the Act's religious organization provisions against the Church in the district court.[110]

The opinion immediately turned to a brief summary of denominational preference precedents, beginning and ending with the two most frequently quoted passages from *Larson*: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another[,]"[111] and "[i]n 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."[112] However, as the earliest commentator on *Larson* noted,[113] the precedents cited by the Court in support of the strict scrutiny rule were not framed as cases where one religion was being preferred over another, nor did any of them involve the application of strict scrutiny.[114]

WL 390114 (also arguing for stricter Equal Protection scrutiny). Unfortunately, I was unable to obtain transcripts of the oral arguments in *Larson* in order to determine to what degree the question of heightened scrutiny was discussed.

108 *See* Brief of Amici Curiae General Conference of Seventh-Day Adventists, et al. at 11, *Larson* (No. 80-1666), *available at* 1981 WL 390115 ("[T]his religious gerrymander violates the Establishment Clause . . . ."); Brief of Amicus Curiae Americans United for Separation of Church and State Fund, Inc. at 19, *Larson* (No. 80-1666), *available at* 1981 WL 390113 ("The error committed by the Minnesota legislature, however, was the failure to observe the principle of neutrality when granting the exemption."); Brief of Amici Curiae American Civil Liberties Union, et al. at 4, *Larson* (No. 80-1666), *available at* 1981 WL 390110 (focusing on entanglement prong of *Lemon*, but agreeing that the Act "has the improper purpose and effect of favoring exempted religions over unexempted religions."); Brief of Amicus Curiae American Jewish Congress at 8, *Larson* (No. 80-1666), *available at* 1981 WL 390112 ("The exemption from regulation of religious organizations which raise more than half of their funds from members violates this neutrality principle, and therefore violates the Establishment Clause.").

109 456 U.S. 228 (1982). He was joined by Justices Marshall, Blackmun, Powell, and Stevens. Justice Stevens also wrote a concurring opinion, in which he "agree[d] with the Court's resolution of the Establishment Clause issue," Larson, 456 U.S. at 258 (Stevens, J., concurring), and focused on the standing argument.

110 *See id.* at 240. *See also* Evans, *supra* note 18, at 367.

111 *Id.* at 244. *See also* Evans, *supra* note 18, at 367.

112 *Id.* at 246.

113 Evans, *supra* note 18.

114 *See id.* at 377. The Court cited *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), *Zorach*

In the course of the discussion, the Court acknowledged that "[t]he constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause[,]"[115] helping to explain why it was, for the first time, applying the traditional Free Exercise test of strict scrutiny under the Establishment Clause.[116]

After announcing the new test, the Court held that the Act "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents[,]"[117] relegating a discussion of Minnesota's *Gillette v. United States* defense to a footnote.[118] In the footnote, the Court states that the case at bar is different than the situation in *Gillette* and other disparate impact cases for two reasons. First, the exemption provision of the Act "is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary, [the exemption] makes explicit and deliberate distinctions between different religious organizations."[119] Second, the Court held that *Gillette* itself was inapplicable because the distinction there was made between religious beliefs, in contrast to the Act's distinction on the basis of religious affiliation.[120]

The Court immediately proceeded to consider whether Minnesota had satisfied the strict scrutiny inquiry. The Court began by noting that, although the Act as a whole clearly furthered a compelling interest, the particular exemption for only some religious groups had to be examined independently to determine if it was closely fitted to further that compelling interest.[121] The Court quickly disposed of Minnesota's purported justification for the religious classification, stating that there was no evidence that an organization would be better supervised simply because it received more funds from members than nonmembers.[122] Additionally, and, in contrast, the Court found the need for public disclosure more plausibly rises with the *absolute* amount of contributions an organization receives, as opposed to the *proportion* of funds it re-

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v. Clauson, 343 U.S. 306 (1952*), Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Abington v. Schempp*, 374 U.S. 203 (1963). *Larson v. Valente*, 456 U.S. 228, 246 (1982).

115 *Larson*, 456 U.S. at 245.

116 *See infra* Section V.D.

117 *Larson*, 456 U.S. at 246.

118 *See id.* at 246 n.23.

119 *Id.*

120 *Id.*

121 *Id.* at 248. *See also* Evans, *supra* note 18, at 369.

122 *See Larson,* 456 U.S. at 249-50. *See also* Evans, *supra* note 18, at 367.

ceives from members compared to nonmembers.[123]

The final portion of the Court's opinion is clearly dicta. The Court stated that the *Lemon* test is "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions, like [the Act] that discriminate *among* religions[,]"[124] but it proceeded to apply the *Lemon* test anyway. In the course of invalidating the Act under *Lemon*'s entanglement prong, the Court noted that the Act had politicized religion in the Minnesota Legislature because the legislative history demonstrated that individual legislators had crafted the law narrowly and purposefully to include groups like the Unification Church while excluding more mainstream religious groups like the Catholic Church.[125]

In two separate opinions, four justices dissented in *Larson*. All four dissenters joined Justice Rehnquist's dissenting opinion that argued the Unification Church lacked standing.[126] Justice White, joined by Justice Rehnquist, issued a dissenting opinion on the merits of the Establishment Clause issue.[127] He agreed with Minnesota that neither the Supreme Court nor the court of appeals should have entertained arguments regarding the Legislature's motivation in enacting the exemption, since the district court had received no evidence or made any findings of fact on the issue.[128] Related to this argument was his criticism of the majority's ruling that the exemption constituted a denominational preference. White noted that:

> The rule itself . . . 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.[129]

Because the subjective motivation of the Minnesota Legislature was not properly before the Court, and because the face of the

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123 *See Larson,* 456 U.S. at 251. *See also* Evans, *supra* note 18, at 369-70.

124 *Larson*, 456 U.S. at 252 (footnote omitted).

125 *See id.* at 253-255. *See also* Evans, *supra* note 18, at 370-71; Neal Devins, *Religious Symbols and the Establishment Clause*, 27 J. CHURCH & STATE 19, 22 (1985) ("Apparently, this legislation was drafted in order to impose reporting requirements on so-called 'cult religions' such as the Unification Church and the Hare Krishnas."). Today, Minnesota provides an exemption from charitable regulation for all religious groups that are tax-exempt under Federal law. *See* MINN. STAT. § 309.515(b) (2003).

126 *Larson*, 456 U.S. at 264-72.

127 *Id.* at 258-63 (White, J., dissenting).

128 *Id.* at 260-61 (White, J., dissenting).

129 *Id.* at 261 (White, J., dissenting).

statute itself did not make explicit distinctions between religions, White concluded a violation of the Establishment Clause had not been demonstrated.[130] In a strict sense then, White did not explicitly disagree with the idea of a compelling interest test for denominational preferences; however, he did not clearly support the idea either. Instead, his dissent was premised on a belief that the plaintiffs had not even demonstrated the existence of a denominational preference.

Taken squarely at face value, and without the benefit of gloss by subsequent courts and commentators, *Larson* seems to stand for a simple proposition: laws creating denominational preferences are subject to strict scrutiny. Further, from the Court's discussion of the statute, one could deduce that statutes can create denominational preferences without explicitly naming different religions for different treatment and that discrimination on the basis of religious affiliation incurs strict scrutiny whereas discrimination on the basis of religious belief still incurs only the *Gillette* neutral, secular purpose test.

However, even this apparently clear formulation of the *Larson* test creates enormous ambiguity.[131] For example, does "preference" include only tangible benefits or does it also include more subtle forms of preference such as endorsement and religious symbolism? By *denominational* preference, does the Court mean only distinctions between sects within a particular religion (such as Christianity), distinctions between religions (such as Christianity and Judaism), or even between different *kinds* of religions (such as theistic and non-theistic religions)? When does a law *create* a denominational preference? We know at one extreme that completely secular laws having a disparate impact on religions are not included, and at the other extreme laws explicitly classifying according to religious affiliation are included, but there is a broad middle ground between the two extremes that is left unclear. What is the role of legislative purpose in finding a denominational preference? Can it simply be inferred from the statute itself or must there be independent evidence of invidious intent? Why would discrimination on the basis of religious belief be more acceptable than discrimination on the basis of religious affiliation? And finally, is this all simply another way of stating the already-developed rule under the Equal Protection Clause[132] that laws dis-

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130 *Id.* at 261-62 (White, J., dissenting).

131 This fact was recognized just a year after *Larson*. *See* Evans, *supra* note 18, at 378.

132 *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (stating that

criminating on the basis of religion are suspect? The following section discusses how subsequent Supreme Court decisions have interpreted *Larson*, while subsequent sections attempt to provide answers to some of these questions.

B. Subsequent Construction of Larson

In the more than twenty years since *Larson* was decided, the Supreme Court has cited it in just nineteen cases,[133] and five of those citations were made in cases not involving the Establishment or Free Exercise Clauses.[134]

Just two weeks after the *Larson* decision was released, the Supreme Court, without opinion, vacated a decision of the Supreme Court of Washington and remanded it for consideration in light of *Larson*.[135] In the vacated decision, Washington's highest court had upheld the constitutionality of a statute that required public employees who objected to union membership because of their religious beliefs to belong to a religious organization in order to gain an exemption from paying union dues.[136] In a strict sense, the challenged statute did not create a denominational preference since it did not favor some religious organizations over others; instead, it created a preference for persons belonging to *any* religious organization over persons who were unaffiliated with a religious group, even though believers in each category could be sincerely opposed to union membership.[137] The Court's motiva-

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classifications that "trammel[] fundamental personal rights" or are "drawn upon inherently suspect distinctions such as race, religion, or alienage" receive higher scrutiny under the Equal Protection Clauses).

133 *See* Westlaw KeyCite for *Larson v. Valente*, 456 U.S. 228 (1982) (examined December 13, 2004).

134 *See* Davis v. Minnesota, 511 U.S. 1115, 1117 (1994) (mem.) (Thomas, J., dissenting) (citing *Larson* for proposition that if Equal Protection Clauses prohibit peremptory challenges on basis of race and gender, they logically prohibit peremptory challenges on basis of religion); J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 161 (1994) (Scalia, J., dissenting) (same); Jean v. Nelson, 472 U.S. 846, 854 (1985) (citing *Larson* for proposition that questions of constitutionality should not be discussed unless unavoidable); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citing *Larson* for the proposition that First Amendment rights include rights to associate with others in pursuit of a wide variety of religious ends); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 944 n.2 (1982) (citing *Larson* in relation to standing issue).

135 *See* Grant v. Wash. Pub. Employment Relations Comm'n, 456 U.S. 955 (1982) (mem.), *vacating* Grant v. Spellman, 635 P.2d 1071 (Wash. 1981).

136 *See Grant*, 635 P.2d 1071 (Wash. 1981).

137 This point assumes that the concept of "denomination" necessarily includes an associational element. To illustrate, an aggregate of isolated and unrelated individuals who coincidentally share the same religious status do not constitute a denomination. This is especially true when the very status they have in common is lack of

tion for using *Larson* to vacate and remand *Washington* is not obvious.[138] However, it is likely that the Court chose *Larson* because the decision discusses the fact that it is unacceptable to discriminate on the basis of religious affiliation.[139]

The next term, in *Marsh v. Chambers*,[140] the Court upheld Nebraska's custom of having a paid chaplain begin each legislative session with a prayer. There was conflicting evidence on whether the practice actually preferred one religion over another. For example, the same Presbyterian minister had been chaplain for sixteen years,[141] and some of his prayers explicitly invoked Jesus Christ[142] until a Jewish legislator complained about the content of the prayers.[143] On the other hand, the chaplain had made a sincere effort to write nondenominational prayers since receiving the complaint[144] and the weight of the evidence indicated he was chosen for his personal abilities, not because of his religion.[145]

The parties paid some attention to the question of whether the *Larson* strict scrutiny test applied,[146] but the bulk of their briefs

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membership in a religious association. *See infra* Section V.A. (discussion of different definitions of "denomination").

138 On remand, the Washington Supreme Court opined that the statement of remand in light of *Larson* was "delphic at best" and had elicited "varied and contradictory" opinions from the parties on how it should proceed. Grant v. Spellman, 664 P.2d 1227, 1229 (Wash. 1983). Accordingly, the Washington court decided to simply reinterpret the statute to allow the exemptions rather than "go astray in the uncertainties of the First Amendment and engender further confusion . . . ." *Id.* at 1229. In contrast, two of the court's justices argued that "[*Larson*] presents a sound and easily manageable basis upon which to decide this case." *Id.* at 1231 (Williams, C.J., concurring). One difficulty in interpreting the remand is that the Washington Supreme Court had already applied a compelling interest test (under the Free Exercise Clause) in the original case. *See Grant*, 635 P.2d at 1075. However, if *Larson* simply stands for the proposition that strict scrutiny applies to denominational preferences, the most the Washington Supreme Court could do is apply the exact same test as before; assuming that "compelling state interests" are not more difficult to demonstrate under the Establishment Clause than under the Free Exercise Clause, the results should be the same. Several years later, the Sixth Circuit relied on *Larson* to invalidate a provision of the National Labor Relations Act that was almost identical to the provision at issue in *Grant*. *See* Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990).

139 *See Larson*, 456 U.S. at 246 n.23.

140 463 U.S. 783 (1983). *See* Robert M. Slovek, Note, *Legislative Prayer and the Establishment Clause: An Exception to the Traditional Analysis*, 17 CREIGHTON L. REV. 157 (1983).

141 *Marsh*, 463 U.S. at 794.

142 *Id.* at 794 n.14.

143 *Id.*

144 *Id.*

145 *See id.* at 793.

146 *Compare* Brief for the Respondent at 49-50, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23 (citing *Larson* and stating that "Nebraska has dramatically advanced religion, Christianity in general, and the

was devoted to arguing about whether Nebraska's paid chaplaincy was constitutional under *Lemon*.[147] The majority opinion upholding Nebraska's practice made no mention of either *Larson* or *Lemon*,[148] yet it is clear the majority did not feel a denominational preference was at issue: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[149]

Although it was not the focus of his dissent, Justice Brennan did note that "the appointment of a single chaplain for 16 years, and the evident impossibility of a Buddhist monk or Sioux Indian religious worker being appointed for a similar period might well justify application of the *Larson* test"[150] and that if strict scrutiny *were* applied, the Nebraska practice would fail.[151] Similarly, Justice Stevens argued in dissent that designating a member of a single religion as a state's only chaplain for several years constituted a denominational preference.[152]

The majority's decision not to cite or discuss *Larson* is not con-

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Presbyterian Church in particular" in course of discussion of *Lemon* effects prong), *with* Petitioners' Reply Brief at 4, *Marsh* (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23 (arguing that *Larson* does not apply because chaplaincy legislation is concerned only with procuring the personal service of an individual, and makes no religious classifications). Two amicus briefs made clear arguments for applying *Larson*. *See* Brief of Amicus Curiae Anti-Defamation League of B'nai B'rith at 8, *Marsh* (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23; Brief of Amicus Curiae American Jewish Congress at 16, 45-47 *Marsh* (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23.

147 *See* Petitioners' Brief on the Merits at 16-17, 21-26, *Marsh* (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23; Brief for the Respondent at 21-54, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23; Petitioners' Reply Brief, *supra* note 146.

148 *See Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."). Ironically, the United States, as amicus curiae, argued that the Court's decision not to apply *Lemon* in *Larson* had precedential value when deciding to apply neither case in *Marsh*, and that a simple "historical analysis" was sufficient. *See* Brief of the United States at 13, *Marsh* (No. 82-23), *available at* LEXIS 1982 U.S. Briefs 23. This approach was adopted by the majority. *See, e.g.,* Bannon, *supra* note 26, at 506 ("The [*Marsh*] majority, however, ignored the *Lemon* and [*Larson*] tests because the Nebraska chaplaincy practice represented a two-hundred-year old historical practice, an historical practice as old as the Nation.").

149 *Marsh*, 463 U.S. at 794-95.

150 *Id.* at 801 n.11 (Brennan, J., dissenting) (citation omitted).

151 *Id.*

152 *Id.* at 823 (Stevens, J., dissenting) ("Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.").

clusive as to the meaning of the test, since the majority resolved conflicting evidence to find that there simply was no denominational preference. Indeed, the Court's decision to ignore *Lemon* demonstrates an intent to depart from standard Establishment Clause doctrine.[153] However, the decision does clarify that, in the Court's mind, practices that prefer theism over non-theism do not indicate a "denominational preference." Less certain, but implied in the decision is that practices that promote a generalized, nonsectarian Christianity do not constitute a denominational preference. This second interpretation of *Marsh* received support in the Court's next major Establishment Clause case, *Lynch v. Donnelly*.[154]

Lynch embroiled the Supreme Court in a passionate debate as to whether a city's Christmas nativity scene violated the Constitution.[155] The First Circuit, relying principally on *Larson*, held that "the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions"[156] and found that it failed the strict scrutiny test.[157] On appeal, litigants and amici devoted considerable space to whether *Larson* applied. The city, for example, argued that a denominational preference did not exist because the city had a secular purpose in erecting the nativity scene.[158] In contrast, the plaintiffs argued that

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153 Indeed, *Marsh* has come to stand for some sort of vaguely defined "historical validation test." *See, e.g.,* Laycock, *supra* note 7, at 913 (stating that *Marsh* is based on the claim that "the establishment clause does not forbid anything analogous to a practice that was common in 1791," and criticizing that claim).

154 465 U.S. 668 (1984). *See generally* Zarrow, *supra* note 17 at 495-98; Gordon, *supra* note 38; Devins, *supra* note 125; Hersman, *supra* note 17.

155 *See* Lynch v. Donnelly, 465 U.S. 668, 671 (1984) ("The creche . . . consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals . . . .").

156 Donnelly v. Lynch, 691 F.2d 1029, 1034 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

157 *Id.* at 1035 ("If one is unable to demonstrate *any* legitimate purpose or interest, it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown."). The potential for *Larson* to invalidate public displays of religious symbols was noted by Evans, *supra* note 18, at 381 n.121 ("Local governments would do well to take note of the *Larson* decision. Religiously oriented Christmas observances, including governmental promotion of Christianity by erecting a creche, necessarily discriminate against those who do not share a belief in Christ.").

158 *See* Brief of the Petitioners at 13-14, Lynch v. Donnelly, 465 U.S. 668 (1984) (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256. Unlike *Larson* and *Marsh*, the clear weight of amici in *Lynch* supported the constitutionality of the challenged practice; most of them argued forcefully against application of a strict scrutiny test. *See* Brief of the Amicus Curiae Coalition for Religious Liberty, et al. at 5-6, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256 (arguing that *Larson* should not apply because if the strict scrutiny test were taken seriously, most ceremonial deisms would be invalidated); Brief of the United States at 10-11, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256 (stating that the creche is acknowledgment of religion,

the creche signified the city's official preference for Christianity over all other religions.[159]

In an increasingly familiar 5-4 split, a majority of the Supreme Court applied the *Lemon* test and found the city's display of the nativity scene to be permissible under Establishment Clause principles. The Court stated that, even if the nativity scene did promote a particular faith, it did so only in an "indirect, remote, and incidental"[160] fashion. The majority dispensed with the *Larson* controversy in a footnote, stating that "[i]t is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*."[161]

In an important and frequently-cited concurring opinion, Justice O'Connor first suggested that the "effects" prong of *Lemon* formally include a "reasonable observer" endorsement element.[162] Further, O'Connor suggested in a footnote that the *Larson* denominational preferences test could also be assimilated into the endorsement inquiry.[163] Under her version of the *Larson* test, "[p]lain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored."[164] Justice Brennan's dissent for the four-judge minority focused on *Lemon*, but he too referenced *Larson* in a footnote, stat-

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not a denominational preference); Brief of Amicus Curiae Washington Legal Foundation at 3-5, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256 (arguing that creche has neither a discriminatory purpose nor effect); Brief of Amicus Curiae Legal Foundation of America at 3-4, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256 (stating that *Larson* test applies only to cases of purposeful, invidious discrimination).

159 *See* Brief of the Respondents at 40, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256 (arguing that the crèche creates a denominational preference because it "celebrates the doctrinal beliefs of those who embrace the Divinity of Jesus Christ."). Two amici supported application of the *Larson* denominational preferences test. Brief of Amici Curiae Anti-Defamation League of B'nai B'rith, et al. at 13-15, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256; Brief of Amici Curiae American Jewish Committee, et al. at 10, *Lynch* (No. 82-1256), *available at* LEXIS 1982 U.S. Briefs 1256.

160 *Lynch*, 465 U.S. at 683 (citations omitted).

161 *Lynch*, 465 U.S. at 687 n.13. *See also* Hersman, *supra* note 17, at 135 n.19 ("The Supreme Court reversed *Lynch* based in part on the *Lemon* test and in part on an historical analysis. The Court did not apply strict scrutiny because it did not view the Christmas display as discriminatory.") (citation omitted).

162 *See Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).

163 *See id.* at 688 (O'Connor, J., concurring).

164 *Id.*

ing that he agreed with the Court of Appeals that the nativity scene failed the strict scrutiny test.[165]

Both *Lynch* and *Marsh* were decided primarily by judges who had dissented in *Larson*,[166] and each case implies that the strict scrutiny test does not apply to a preference for generalized Christianity or theism over other religions. Both cases embody a trend to dismiss allegations of denominational preference with little or no substantive analysis.[167] However, the majority opinion in *Lynch* did make clear that the *Larson* strict scrutiny test had become a settled part of Establishment Clause doctrine, even if available only in particular and limited situations—statutes or practices "explicitly" or "patently" discriminatory.[168]

The next time the Court examined a *Larson*-based claim,[169] it

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165 *See id.* at 704 n.11 (Brennan, J., dissenting).

166 Justices Rehnquist, O'Connor, White, and Chief Justice Burger dissented in *Larson* but were in the majority in both *Marsh* and *Lynch*.

167 *See* Hersman, *supra* note 17, at 158 ("[T]he Court should have at least explained its position more clearly for future actions."); Devins, *supra* note 125, at 44 ("[The Court's] comment concerning the inapplicability of *Larson* is opaque.").

168 *See Lynch*, 465 U.S. at 687 n.13. Indeed, the statement by the majority that *Larson* applies to discriminatory *practices* as well as discriminatory *statutes* could even be seen as an extension of the denominational preferences test. *See, e.g.,* Powell v. United States, 945 F.2d 374, 378 (11th Cir. 1991) ("The Establishment Clause of the First Amendment prohibits denominational preferences, including those created by discriminatory or selective application of a facially neutral statute against a particular denomination.").

169 There was at least one case during this time period when *Larson* was raised by the parties but not addressed by the Court. In 1985, the Court struck down legislation requiring employees to be given a day off work on their Sabbath. *See* Estate of Thornton v. Caldor, 472 U.S. 703 (1985). The Supreme Court did not discuss or even cite to *Larson*, even though the issue was raised in the litigants' briefs. *Compare* Brief for Caldor, Inc. at 32-33, *Thornton* (No. 83-1158), *available at* 1984 WL 566033 (arguing that the Connecticut law favors certain "traditional" religions over others that do not have a Sabbath requirement) *with* Brief of Amicus Curiae United States Supporting Petitioner at 19, *Thornton* (No. 83-1158), *available at* 1984 WL 566038 (arguing that law is "equally available to adherents of any of a multitude of religious denominations and sects"). Although the majority did not discuss denominational preferences, Justice O'Connor did note that "The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical religious beliefs and practices of other private employees . . . ." *Thorton*, 472 U.S. at 711 (O'Connor, J., concurring), thus implying that some sort of denominational preference may have been present. *See also* Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 77-78 (1996) (stating that in *Thornton*, "[o]ne argument that the Justices did not raise is that the [Sabbath] law comes close to advancing the majority's religion, since Christians would be the primary beneficiaries of the law."). There are seven minor occasions, not discussed in the text of this Article, when members of the Supreme Court have cited *Larson* in the context of a religious freedom claim. In his dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist cited *Larson* three times in his discussion of why he believed the *Lemon* test should be dispensed with. *See id.* at 107 n.6, 108,

was asked to invalidate a Federal statute that exempted religious employers from the reach of another Federal statute prohibiting discrimination on the basis of an employee's religious belief or affiliation.[170] Pressed only half-heartedly by the plaintiffs,[171] the Court easily disposed of the *Larson* claim by reiterating that strict scrutiny applies only to laws or practices preferring some religions over others, not to laws preferring religion over non-religion.[172] Because the Federal statute provided an exemption to *all* religious employers, *Larson* was simply inapplicable.

A much stronger claim was presented two years later in *Hernandez v. Commissioner*.[173] At issue was the deductibility of payments

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112 (Rehnquist, J., dissenting). In *Bowen v. Kendrick*, 487 U.S. 589, 598 n.5 (1988), the Court upheld legislation that provided grants to sex education providers only if they did not advocate abortion. The Court noted that a *Larson* claim was raised and subsequently rejected in the district court below, but that this ruling had not been challenged on appeal. *See* Kendrick v. Bowen, 657 F. Supp. 1547, 1557 (D. D.C. 1987) ("Although the prohibition against advocating abortion, like opposition to war in any form [in *Gillette*], may coincide or conflict with religious precepts, that fact does not require the Court to analyze the [statute] pursuant to a strict scrutiny analysis."), *rev'd on other grounds*, 487 U.S. 589 (1988). In the fractured and confusing set of opinions for County of Allegheny v. ACLU, 492 U.S. 573 (1989) (invalidating creche display but upholding menorah display), a majority twice cited *Larson* in the course of an argument against Justice Kennedy's "coercion" test. *Id.* at 605, 609. Interestingly enough, although the plaintiffs in *Allegheny* did not argue for application of the *Larson* denominational preferences test, one of the defendants argued that *Larson* required the presence of a menorah in addition to the creche. *See* Brief for Petitioner Chabad at 8, *Allegheny* (No. 88-90), *available at* LEXIS 1988 U.S. Briefs 90. In his concurring opinion in Lee v. Weisman, 505 U.S. 577 (1992), Justice Souter cited *Larson* for the proposition that "[s]ince *Everson*, we have consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others." *Id.* at 610 (Souter, J., concurring). Most recently, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), Chief Justice Rehnquist again referenced *Larson* in the course of an argument against applying *Lemon*. *Id.* at 320 (Rehnquist, C.J., dissenting). Finally, the Court has cited *Larson* twice in Free Exercise Clause cases, one of which clearly dealt with a law intended to burden a particular religious sect. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (citing *Larson* for proposition that government may not impose special disabilities on basis of religious affiliation); Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 560 (1993) (Souter, J., concurring) (applying strict scrutiny under Free Exercise Clause for law intentionally burdening one denomination). The relationship between denominational neutrality under the Free Exercise Clause and the *Larson* strict scrutiny test is discussed *infra* Section V.D.

170 *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987). The plaintiff was a Mormon employee of a Church-owned gymnasium, and was fired for failure to obtain a "temple recommend."

171 *See* Brief for Appellees at 33 n.35, *Presiding Bishop* (No. 86-179), *available at* 1987 WL 864785 (arguing that exemption favors traditional or formally organized groups over newer religious organizations).

172 *See Presiding Bishop*, 483 U.S. at 338-39.

173 490 U.S. 680 (1989). *See generally* Alison H. Eaton, Comment, *Can the IRS Overrule the Supreme Court?*, 45 EMORY L.J. 987 (1996).

made by members to the Church of Scientology for "auditing," a form of one-on-one religious counseling and training.[174] Because the Church of Scientology requires mandatory, fixed payments in a commercial manner for auditing, the Internal Revenue Service determined that auditing involved a quid pro quo transaction and therefore denied individual Scientologists a tax exemption for auditing under the general exemption for charitable gifts or donations.[175]

Members of the Church vigorously pressed a denominational preferences claim on appeal.[176] They argued that *Larson* had been violated in two ways: first, because the exemption on its face favored religions that raised funds without imposing fixed costs for religious services,[177] and second, because the IRS had a long-standing administrative practice of allowing deductions for similar fundraising customs by other, more traditional, religious groups.[178]

In denying the exemption, a majority of the Supreme Court held that the exemption statute itself "easily passes constitutional muster"[179] under *Larson* because it does not facially distinguish between religious sects and makes quid pro quo transactions by any religious entity non-deductible.[180] The Court addressed the Scientologists' second claim in a different portion of the opinion than the Establishment Clause analysis, characterizing it as an "administrative consistency" claim,[181] and holding that the record was not sufficiently developed to make such a finding.[182] In dissent,

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174 *See* Brief for the Petitioners at 4-5, Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680 (1989) (No. 87-963), *available at* 1987 WL 880088 (describing auditing).

175 *See Hernandez v. Comm'r,* 490 U.S. 680, 686 (1989). In other words, the statutory question was whether payments for religious services should be considered purchases or donations. Only under the latter interpretation would the Scientologists receive a tax deduction for auditing.

176 *See* Brief for Petitioners, at 14-31, 41-42, 46-48, *Hernandez*, 490 U.S. 680, *available at* 1987 WL 880088 (detailing history of IRS rulings regarding quid pro quo transactions for other religious groups and alleging existence of a denominational preference). *See also* Brief for the Respondent at 38-47, *Hernandez* (Nos. 87-963; 87-1616), *available at* 1988 WL 1025636 (responding).

177 *See* Brief for Petitioners, at 47, *Hernandez*, 490 U.S. 680, *available at* 1987 WL 880088 ("By artificially elevating the form over the religious nature of such payments, the courts below establish a tax preference for religious groups that do not specify membership costs").

178 *See id.* at 48 ("fixed payments that yield such benefits to adherents of other faiths traditionally have been deductible . . . [t]he IRS here attempts to discriminate among religions.").

179 *Hernandez*, 490 U.S. at 695.

180 *See id.* at 695-96.

181 *Id.* at 702.

182 *See id.* at 703.

Justices O'Connor and Scalia took issue with this move. They discussed at length several religious quid pro quo arrangements that the IRS had found deductible in the past,[183] and argued that:

> [T]he Court cannot abjure its responsibility to address serious constitutional problems by converting a violation of the Establishment Clause into an 'administrative consistency argument' with an inadequate record. It has chosen to ignore both longstanding, clearly articulated IRS practice, and the failure of respondent to offer any cogent, neutral explanation for the IRS' refusal to apply this practice to the Church of Scientology. Instead, the Court has pretended that whatever errors in application the IRS has committed are hidden from its gaze and will, in any event, be rectified in due time.[184]

O'Connor and Scalia concluded that "[j]ust as the Minnesota statute at issue in [*Larson*] discriminated against the Unification Church, the IRS' application of the *quid pro quo* standard here—and only here—discriminates against the Church of Scientology."[185]

Hernandez, decided almost fifteen years ago, was the last time a majority of the United States Supreme Court explicitly addressed the application of the *Larson* strict scrutiny test, and unfortunately it did not help resolve the test's many ambiguities. However, *Hernandez* was not the last time the Court examined a law that arguably constituted a denominational preference under the Establishment Clause.

In a 1994 case commonly referred to as *Kiryas Joel*,[186] the Court

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183 *See id.* at 710 (O'Connor, J., dissenting) (discussing deductibility for "a Christian who obtains the pew of his or her choice by paying a rental fee, a Jew who gains entrance to High Holy Day services by purchasing a ticket, a Mormon who makes the fixed payment necessary for a temple recommend, or a Catholic who pays a Mass stipend").

184 *Id.* at 713 (O'Connor, J., dissenting) (citation omitted).

185 *Id.* Interestingly, the IRS later retreated from its position and allowed Scientologists to deduct auditing payments after subsequent litigation threatened to establish such a record of administrative inconsistency. *See* Powell v. United States, 945 F.2d 374, 378 (11th Cir. 1991) (reversing dismissal of complaint for determination on the merits, and noting that "[t]he Establishment Clause . . . prohibits denominational preferences, including those created by discriminatory or selective application of a facially neutral statute against a particular denomination."). *See also* Eaton, *supra* note 173, at 1015 ("The arguable conclusion to be drawn from the IRS's retreat is that the IRS feared defeat on the administrative inconsistency claim and hoped to sidestep the issue by rendering the claim moot. If the IRS had litigated the issue in *Powell* and lost, it would have been forced to apply the law consistently to all religious organizations."). The Ninth Circuit later relied on *Larson* to cast doubt on the constitutionality of the IRS's decision to allow deductions for Scientologists. *See* Sklar v. Comm'r, 282 F.3d 610, 618-20 (9th Cir. 2002).

186 Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994). The purpose behind

examined a special act of the New York Legislature that granted a village comprised exclusively of members of one religious sect the power to create and administer a school district with public funds. Because the Chief Judge of New York's highest court had relied on *Larson* to find the statute unconstitutional in her concurring opinion,[187] the litigants devoted some space to the issue in their briefs and oral argument to the Supreme Court.[188]

Justice Souter wrote both a majority and a plurality opinion for the decision invalidating the special legislation. In the majority opinion, the Court struck down the law on a broad theory of religious neutrality.[189] Although it did not clearly apply the *Larson* compelling interest test,[190] *Larson* and denominational equality were clearly at work. The Court first cited *Larson* for the proposition that "the benefit [of the law] flows only to a single sect, but aiding

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the act was to allow members of the Satmar Hasidim, followers of a strict form of Judaism, to provide educational services to their handicapped children in an environment where the children would not be exposed to ridicule because of their distinctive modes of clothing, culture, and religion. *Id.* at 692-93. *See generally* Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996); LEVY, *supra* note 1, at 251-56; Greene, *supra* note 169; Susan E. Acklin, Note, Board of Education of Kiryas Joel Village School District v. Grumet: *Another Snub for* Lemon *Draws it Nearer to its Probable Demise*, 41 LOY. L. REV. 43 (1995); Wheeler, *supra* note 39.

187 *See* Grumet v. Board of Educ., 618 N.E.2d 94, 102 (N.Y. 1993) (Kaye, C.J., concurring) ("The law at issue is precisely the sort of legislation that should be strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system."). Kaye argued that "[a] forbidden denominational preference can result from a grant of benefits to one religious group as readily as discrimination among sects . . . ." *Id.* at 104. She found that although the statute had a compelling purpose, a less restrictive alternative existed. *Id.* at 105, 106.

188 *See* Brief for Petitioner Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. at 46-47, *Kiryas Joel* (No. 93-517), *available at* 1994 WL 761249 (arguing that the law is not discriminatory because no other religious sects in New York are similarly situated); Reply Brief for Petitioner Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. at 7-10, *Kiryas Joel* (No. 93-39), *available at* 1994 WL 86652 (arguing that *Larson* does not apply because law is not patently discriminatory); Reply Brief for Petitioner Att'y Gen. of New York at 8-9, *Kiryas Joel* (No. 93-39), *available at* 1994 WL 90591 (arguing that although law was aimed at particular group, it did not further or prefer that group's religious views). Oral argument also included some discussion of denominational neutrality. *See* Transcript of Oral Argument at 20-22, *Kiryas Joel* (No. 93-517), *available at* 1994 WL 665057.

189 *See* Wheeler, *supra* note 39, at 223. The plurality decision was focused on the principle from *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), that government cannot delegate political authority to religious groups. *See* Greene, *supra* note 169, at 18-20.

190 *See* Wheeler, *supra* note 39, at 245-46 (arguing the Court should have used *Larson*). *See also* Children's Healthcare is a Legal Duty v. Vladeck, 938 F. Supp. 1466, 1473 (D. Minn. 1996), *reh'g en banc denied*, Children's Healthcare v. DeParle, No. 98-3521MNMI 2000 U.S. App. LEXIS 22333 (8th Cir. Aug. 29, 2000), *cert. denied*, 532 U.S. 957 (2001) (noting that "*Larson* was cited but strict scrutiny was not explicitly applied").

this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members as a whole . . ."[191] and again for the proposition that "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."[192] Indeed, the majority found that one of the principal problems with the special legislation was that there was no guarantee that other religious sects in a similar situation would receive the same treatment in the future.[193] In a concurring opinion, Justice O'Connor, one of the members of the majority, stated that "it seems dangerous to validate what appears to [be] a clear religious preference."[194] In contrast, Justice Kennedy, also concurring, argued that the law was indeed invalid for being drawn along religious lines, but that denominational neutrality was not yet an issue since there was no evidence that other similarly situated religious groups had been denied accommodation.[195]

Kiryas Joel, although not an unambiguous case, seems to indicate that a law simply favoring one religion by name creates an unconstitutional denominational preference, even in the absence of evidence that other religious groups have been denied the same treatment.[196] However, the failure to clearly apply a strict scrutiny test further calls into question the continued validity of the *Larson* test.

Kiryas Joel was the last time the Court was faced with a question of denominational neutrality under the Establishment Clause. Relying solely on Supreme Court statements on *Larson*, we can glean only a few indications as to its meaning. First, the test simply does not apply to legislation favoring religion over nonreligion; discrimination between religions is required. Second, the promotion of

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191 *Kiryas Joel*, 512 U.S. at 705.

192 *Id.* at 706-07 (citations and footnote omitted).

193 *See* Greene, *supra* note 169, at 5 ("[T]he Court expressed the concern that other similarly situated groups would not receive the same benefit as the Satmars . . ."); Wheeler, *supra* note 39, at 229 ("The case-specific nature of the statute—which singled out Kiryas Joel by name—meant that neither the courts nor any other reviewing authority could ensure that the legislature did not assist one religion at the expense of another, or promote religion over irreligion.").

194 *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring).

195 *See id.* at 722 (Kennedy, J., concurring). After *Kiryas Joel*, the New York Legislature tried twice more to craft constitutional legislation for the Satmar Hasidim, but both statutes were struck down. *See also* Grumet v. Pataki, 720 N.E.2d 66 (N.Y. 1999), *cert. denied*, 528 U.S. 946 (1999).

196 Such sect-specific exemptions are surprisingly common, and many lower courts have used *Larson* to analyze their constitutionality. *See infra* Section VI.

theism or a generalized version of Christianity will rarely, if ever, be found in practice (as opposed to in formal doctrine) to elicit strict scrutiny. Third, government *conduct*, as well as legislation, fall under *Larson*'s reach. Finally, a law naming one religion for a benefit implicitly discriminates against religions not named, and probably implicates some form of heightened scrutiny.

However, in the twenty years since the *Larson* test was announced, its strict scrutiny test has never been used to strike down challenged legislation, nor has the Court ever explicitly held that the test was even applicable. Although Justice O'Connor has noted that "it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us . . ."[197] a "test" that is never applicable is probably better regarded as an artifact or an aberration than an important part of Supreme Court jurisprudence. On the other hand, one might also argue that the Court's reluctance to apply *Larson* may simply stem from the paucity of cases where a legislature has explicitly preferred one religious denomination over another. To help resolve whether *Larson* still has any independent force, the next section departs from the narrow confines of Supreme Court statements on the case, and analyzes it in a much broader way through comparisons with the Free Exercise Clause, the Equal Protection Clauses, the *Lemon* test, and more.

V. Analysis

This section takes a much broader view in attempting to understand the meaning of *Larson*. Thus, the discussion in this section is necessarily more tentative and theoretical.

A. Meaning of "Denomination"

As the essential difference between the *Larson* test and the more general *Lemon* approach is that the former applies only to discrimination between denominations, an important threshold step is determining the meaning of "denomination" for the purposes of the test. This inquiry is related to, but distinct from, the much-debated question of what constitutes a "religion" or "religious" belief under the First Amendment.[198] Although apparently

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[197] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring).

[198] Perhaps the best place to start is Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 Duq. L. Rev. 181 (2002). *See also* Tribe, *supra* note 9, § 14-6 at

obvious, the definition of denomination is not as settled as it may seem, and is in fact capable of both narrow and broad readings.

In the narrowest reading of "denomination," the word refers to different sects of *Christianity*, not to different sects of other religions.[199] A more expansive view defines the word as including competing sects within non-Christian religions,[200] while an even more expansive view uses the word "denomination" as simply a synonym for "religion."[201] Perhaps the broadest reading would apply the word to *kinds* of religions, such as theistic and non-theistic, or monotheistic and polytheistic.[202]

The first reading, limiting *Larson* to discrimination between Christian sects, could conceivably receive support from a strict originalist reading of the purposes of the Establishment Clause.[203]

1179-88; NOWAK & ROTUNDA, *supra* note 6, § 17.6 at 1212-14; Trucios-Haynes, *supra* note 17, at 201-03 nn.212-16.

199 Under this definition of "denomination," *Larson* would apply to discrimination between Catholics and Protestants, but not to discrimination between the Orthodox and Reformed branches of Judaism. *See, e.g.,* 1 FUNK & WAGNALLS NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE 343 (1995) ("A body of Christians having a distinguishing name; sect."); 1 ENCYCLOPEDIC DICTIONARY OF RELIGION 1027 (1979) ("Both the underlying idea and denominations themselves are particularly a feature of Christianity in the U.S. . . . .").

200 Under this definition, "denomination" would include discrimination by sects *within* any religion, but probably not to discrimination between religions themselves (such as discrimination between Christianity and Judaism). *See, e.g.,* THE CONCISE OXFORD DICTIONARY OF WORLD RELIGIONS 152 (2000) ("A religious group within a major religion, having the same faith and organization."); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 339 (1991) ("a religious organization uniting in a single legal and administrative body a number of local congregations"); THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 256 (Deluxe ed. 1990) ("a religious sect"); 4 THE OXFORD ENGLISH DICTIONARY 458-59 (2d ed. 1989) ("a religious sect or body having a common faith and organization, and designated by a distinctive name").

201 *See, e.g.,* DICTIONARY OF RELIGIOUS TERMS 147 (1967) ("A group with certain beliefs or principles."); BLACK'S LAW DICTIONARY 391(5th ed. 1979) ("A society of individuals known by the same name, usually a religious society.").

202 *See, e.g.,* Richard H. Jones, *"In God We Trust" and the Establishment Clause*, 31 J. CHURCH & ST. 381, 404 (1989) ("The God-references [on coins and in the Pledge of Allegiance] discriminate on their face between nontheistic and theistic religious traditions. Thus, the *Larson* strict scrutiny test should apply."). *Cf.* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 120 n.3 (1982) ("Appellee argues that the statute unconstitutionally differentiates between theistic and nontheistic religions. We need not reach that issue . . . and thereby avoid serious constitutional questions that would arise concerning a statute that distinguishes between religions on the basis of commitment to belief in a divinity.").

203 *See, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573, 589 (1989) ("Sectarian differences among various Christian denominations were central to the origins of our Republic."); CORD, *supra* note 7, at 161 ("Reflecting the religious reality of the early days of the Republic, Leo Pfeffer indicates in *Church, State, and Freedom* that the 'number of professed non-Christians' was minute. Consequently, because of this Christian

Non-legal sources tend to support the second reading that "denomination" includes sects within non-Christian faiths, but is not just another word for "religion."[204] The third interpretation, that *Larson* could apply to discrimination between entire religions, is probably the one that the Supreme Court would take if forced to define "denomination" for the purposes of strict scrutiny; after all, it's hard to imagine a majority of the Court saying that a statute explicitly discriminating between Islam and Judaism receives less scrutiny than a statute explicitly discriminating between Baptists and Methodists. This interpretation receives support from *Larson* itself (the only case actually applying strict scrutiny for a denominational preference), where the religious group involved was the Unification Church, an organization on the outer-most periphery of Christianity and not really a sect of any larger religion.[205]

The fourth interpretation, that different *types* of religions should be included in the term "denomination," could be premised on the virtually unassailable proposition that government preference for religion in a manner it has historically considered "nondiscriminatory" often infringes upon the beliefs of many nontraditional religious groups.[206] Although the Court could conceiv-

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universality, federal funds to aid Christian-affiliated schools were, in those days, not unconstitutional unless the Federal Government discriminated against some Christian denominations or sects and thus put one version of the Christian faith in a preferred status contrary to the First Amendment.") (quoting LEO PFEFFER, CHURCH, STATE, AND FREEDOM 141-42 (rev. ed. 1967)).

204 *See supra* note 200. One source aptly summarizes the debate over applying the word "denomination" to the sects of different faiths. FRANK S. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 31 (rev. by Samuel S. Hill, 10th ed. 1995) ("*Denomination* here is a catchall term. Judaism does not use the term, nor is it a felicitous expression to the Orthodox, the Old Catholics, and many Evangelicals. This term may simply be the best available label for the wide-ranging treatment of religious bodies in America that this book aims to provide.").

205 *See* MELTON, *supra* note 81. There are several examples where the Court has used the word "religion" instead of "denomination" when discussing *Larson*. *See, e.g., Allegheny County*, 492 U.S. at 605 (citing *Larson* for proposition that "Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other *religions*).") (emphasis added) (citations omitted); Hernandez v. Comm'r, 490 U.S. 680, 695 (1989) ("*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among *religions*.") (emphasis added); Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 706-07 (1994) (citing *Larson* for proposition that "whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among *religions* must be honored.") (citations omitted) (emphasis added). Of course, it may not be wise to place too much weight on the Court's use of the word "religion" in the place of "denomination" in these passages, as the distinction between the two terms was not an issue in the cases.

206 For example, the word "God" in the Pledge of Allegiance or on coins may not

ably apply *Larson* to a statute explicitly drawing distinctions between "theistic" and "non-theistic" religious organizations, the strict scrutiny test has not been used, and probably will not be used, in the context of a generalized promotion of certain religious concepts in this area.[207]

B. Belief/Affiliation Distinction

As mentioned previously,[208] the Court in *Larson* stated that the lesser "neutral, secular" test of the *Gillette* conscientious objector case did not apply because *Gillette* involved discrimination on the basis of individual religious *belief*, whereas the statute in *Larson* merited strict scrutiny because it created discrimination on the basis of religious *affiliation*.[209] As one commentator has noted:

> This distinction is, however, too absurd to be taken seriously. Surely the Court would find that a law discriminated between religions—despite the fact that it concerned only individual belief rather than group identification—if the law restricted a government benefit to those who had accepted Jesus Christ as their savior. Obviously, some beliefs are so closely associated with particular religions or sects that discrimination on the basis of those beliefs is equivalent to discrimination on the basis of religious

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coincide with religious organizations who believe in a Goddess, or in multiple gods. Similarly, "nondenominational prayer" may violate the tenets of religious organizations that do not believe in the efficacy of prayer. *See, e.g.,* Jones, *supra* note 202, at 405 ("There are no generic religious symbols or ceremonies common to all religions."); Laycock, *supra* note 7, at 920 ("For the issues that are most controversial, nonpreferential aid is plainly impossible. No prayer is neutral among all faiths . . . . Government-sponsored religious symbols or ceremonies . . . are inherently preferential."). This includes the broad category of so-called "ceremonial deisms." *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996); Jeremy Patrick, *Ceremonial Deisms*, HUMANIST, Jan.-Feb. 2002, at 42.

207 Lynch v. Donnelly, 465 U.S. 668, 687 n.13 (1984) (holding that display of Christian creche is not "explicitly discriminatory in the sense contemplated in *Larson*."), discussed *supra* Section IV.B., is probably the best example of the reluctance to apply *Larson* in this context. Some of the subsequent school prayer cases, such as *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) are also good examples, as is the legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983).

208 *See supra* text accompanying notes 117-20.

209 *See* Larson v. Valente, 456 U.S. 228, 246 n.23 (1982). *See also* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 960 (1985-1986) ("The Court [in *Gillette*] reasoned that this law did not discriminate on the basis of religious affiliation. That is true. The Selective Service Act did not say, for example, that Quakers are exempt and Catholics are not. The law, however, did plainly discriminate on the basis of the kind of religious beliefs one had—beliefs opposed to all wars rather than beliefs opposed only to unjust wars.").

group identity.[210]

The problem with the Court's statement in *Larson* is that the law challenged in *Gillette* was not simply a secular law that had an unintentional disparate impact on certain religious groups;[211] nor was it a law, like those exempting sacramental wine from Prohibition, or religious headgear from military dress rules, that involve a distinction only between persons who hold a relevant religious belief and those that do not.[212] In the absence of some kind of justification or further content, it may be wise to disregard this per se belief/affiliation distinction as simply a hasty rationalization that the Court did not think through carefully.

C. Meaning of "Preference"

Another ambiguity surrounding the *Larson* test is determining what forms of government action constitute a "preference" for a particular denomination. In other words, should "preference" be read broadly to include government action that falls under the general rubric of "endorsement," or should it be read in a more narrow fashion to include only government action that creates tangible benefits or burdens? The former interpretation would expand the possible scope of the *Larson* test to cases involving government-sponsored religious symbolism or non-coercive proselytization, while the latter would restrict the test to cases where the government conditions funding or services on the basis of denominational affiliation.[213]

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210 Williams & Williams, *supra* note 8, at 893. *See also* TRIBE, *supra* note 9, § 14-7 at 1192 n.25 ("Unless religious organizations are to receive greater protection than individual adherents, it is difficult to understand the relevance of the difference.").

211 *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (upholding federal law forbidding government funded private schools from discriminating on the basis of race, even though the rule had a disparate impact on religious segregationists); Kendrick v. Bowen, 657 F. Supp. 1547, 1557 (D. D.C. 1987) (upholding a statute restricting ability of federal grantees from advocating abortion, even though it had a disparate impact on certain religious groups), *rev'd on other grounds*, 487 U.S. 589 (1988).

212 *See* Williams & Williams, *supra* note 8, at 893-94 ("The second, related ambiguity concerns laws that extend special treatment to those who engage in a practice or activity in which not all religions participate. All religions that engage in the relevant activity receive the benefit, so there is no *Larson*-type discrimination between religions. The potential discrimination arises because religions that do not engage in the relevant activity receive no analogous benefit."); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1334 (1996) (discussing belief/affiliation distinction).

213 *See, e.g.,* Jones, *supra* note 202, at 404 (discussing Court's refusal to apply *Larson* in *Lynch* and stating that "Perhaps the justices did not think the *Larson* test should apply to symbolism but only to regulatory action."). *Larson* involved the imposition of

An argument for the restrictive view could be premised on the notion that the original purpose of the Establishment Clause was to forbid compulsory taxation for the financial support of particular denominations,[214] and that therefore the Court's most stringent test in the area should apply only to the framers' area of greatest concern: actual coercion. Although this view might command two or three members of the Court, a stable majority tends to equate "preference" with "endorsement" and goes to great lengths to note the evils of even non-denominational endorsement.[215] As a doctrinal matter, then, the *Larson* test probably applies to non-tangible government action that endorses a particular denomination, even if in practice such a law would be received more generously than one creating tangible consequences.[216]

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costly and burdensome record-keeping and reporting requirements on certain denominations. *See supra* note 78 and accompanying text.

214 *See* Mitchell v. Helms, 530 U.S. 793, 856 (2000) (O'Connor, J., concurring) ("[T]he most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."); LEVY, *supra* note 1, at 78 ("Spending tax monies for religion was an old and controversial issue that inspired considerable thought; other aids for religion had not been the subject of controversy in the colonies or states and tended to be taken for granted."); Laycock, *supra* note 7, at 878-79 ("The Framers' generation thought about establishment clause issues in the context of financial aid; they did not think about those issues in connection with nonfinancial aid.").

215 *See, e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 605-06 (1989) ("[T]he term 'endorsement' long has been another way of defining a forbidden 'preference' for a particular sect . . ."); *id.* at 593 (discussing history of Court's use of "endorsement," "preference," "favoritism," and "promotion" interchangeably). Importantly, these statements in *Allegheny County* were made in the course of rejecting Justice Kennedy's proposed "coercion" test, which would have limited the reach of the Establishment Clause to cases where the government compelled, directly or indirectly, religious conduct or belief. *See id.* at 660-663 (Kennedy, J., concurring in part and dissenting in part). *See generally* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934-936 (1986); Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991). O'Connor's frequently quoted statement on the evils of endorsement, that "government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community[,]" *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring), can be read in conjunction with an earlier statement she made equating "endorsement" with "preference" for the purposes of *Larson*. *See Allegheny*, 492 U.S. at 605-06.

216 After this section was written, a panel of the Eighth Circuit reached a very different conclusion. In *ACLU Neb. Found. v. Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), the court by a 2-1 margin struck down the erection of a Ten Commandments monument in a public park. The monument was alleged to create a denominational preference in two different ways. First, city officials were forced to choose between several different and highly contested versions of the language of the Ten Commandments, and second, the monument preferred Christianity and Judaism over other religions since

D. Relation to Free Exercise

Between 1963 and 1990, the Supreme Court applied a strict scrutiny test to government action challenged under the Free Exercise Clause.[217] A leading scholar on religious freedom summed up the doctrine:

> If the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs, the burden shifts to

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it contained Stars of David and the Greek letters for "Christ." Judge Bly, writing for the court, argued that "[m]ost courts having applied *Larson* did so when the challenged government action created a practical, tangible benefit or burden for adherents of a specific religion[,]" while on the other hand, "[w]here government action amounts to no more than religious expression, however, courts have applied *Lemon*." *Id.* at 1033. The first part of this novel argument relied on the fact that *Larson* itself and two other lower court decisions applying *Larson* involved tangible benefits, while the second part relied on the Supreme Court's decision in *Lynch* and lower court decisions involving other Ten Commandments monuments. As discussed more generally in the text, this argument has the virtue of acknowledging that historically, coercion through bequest or withdrawal of tangible benefits (whether through actual force of the criminal law or more indirectly through tax subsidies, for example) has been seen as far more problematic than endorsement. It is also an interpretation that explains *Lynch*'s cryptic language regarding *Larson* without the more unsavory interpretation that the Court thinks discrimination between theism and non-theism, or nondenominational Christianity and all other religions, does not merit strict scrutiny. However, the Supreme Court has on several occasions rejected the notion that coercion is an element of an Establishment Clause violation, and Judge Bly did not quote or refer to the language cited *supra* note 215 equating "endorsement" with "preference." His view that *Larson* does not apply to non-tangible preferences would lead to the position that a state-erected billboard saying "Got Religion?" is no more or less problematic than a state-erected billboard saying "Jesus Saves, Attend a Protestant Church Today!" or "Beware the Papist Conspiracy!" It may also be worth noting that the other Ten Commandments cases Judge Bly cites did not involve arguments that *Larson* was violated, as the litigants did not focus on the specifically denominational aspects of the monuments. Finally, the Court in *Lynch* seemed more interested in establishing that any endorsement by the creche was "indirect, remote, and incidental" because of its context among other secular displays. *See* Lynch v. Donnelly, 465 U.S. 668, 683 (1984). It did not clearly suggest that in a different context a much more proselytizing or clearly preferential display would be immune from Larson.

Judge Arnold, also in the majority in *Plattsmouth*, focused his concurrence solely on the fact that he thought *Larson was* applicable. He stated, "I believe this monument is also invalid under the *Larson* test. The words on the monument clearly prefer Christianity and Judaism[,]" *id.* at 1043, but unfortunately he did not discuss Judge Bly's tangible/intangible distinction. Although perhaps problematic, Judge Bly's position is not necessarily untenable, and this issue will probably remain unsettled until either the Supreme Court or a majority of the circuits are faced with cases involving clear government endorsement of specific denominations through non-tangible means. In the interests of disclosure, I note that I acted as counsel for a party in *Plattsmouth* before the district court and was responsible for addressing the *Larson* question. In the most recent development, on April 6, 2004, the full Eighth Circuit vacated the panel decision and ordered a hearing en banc.

217 *See* Sherbert v. Verner, 374 U.S. 398 (1963); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

> the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or "compelling") secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.[218]

Prevailing wisdom was that the Free Exercise Clause applied to *burdens* on religious belief, while the Establishment Clause applied to *benefits* to religious belief.[219]

The Court's 1982 *Larson* decision was seen as blurring the line between Free Exercise and Establishment Clause jurisprudence in two important respects. First, the Court imported, for the first time, a Free Exercise strict scrutiny test into an Establishment Clause analysis.[220] Second, the Court used this new Establishment Clause test to examine government conduct that *burdened* the religious belief of the plaintiff.[221] Indeed, the Court in *Larson* itself recognized the decision's relation to Free Exercise Clause values:

> The constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause . . . . Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.[222]

In 1990's *Employment Division v. Smith*,[223] however, the Su-

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[218] McConnell, *supra* note 6, at 1416-17 (footnotes omitted). Additionally, a plaintiff in a Free Exercise challenge must demonstrate the *sincerity* of his or her religious belief. *See* TRIBE, *supra* note 9, § 14-7 at 1191 n.19.

[219] *See, e.g.*, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993) (applying Free Exercise Clause instead of Establishment Clause because government was attempting to disfavor religion as opposed to preferring it); CHOPER, *supra* note 5, at 13-14 (discussing distinction); Evans, *supra* note 18, at 361 n.11 ("Since the religion clauses necessarily overlap, the traditional method used to distinguish between those factual scenarios that required analysis under the establishment clause and free exercise clause was that the former proved useful in adjudicating *aid* to religions while the latter was best suited to discern impermissible *burdens* on religions.").

[220] *See* Evans, *supra* note 18, at 368 n.51; Zarrow, *supra* note 17, at 489 n.74.

[221] *See* Evans, *supra* note 18, at 361 n.11.

[222] Larson v. Valente, 456 U.S. 228, 245 (1982). *See also* Conkle, *supra* note 8, at 7 ("The requirement of denominational equality also has played a powerful role in the Court's interpretation of the Free Exercise Clause.").

[223] 494 U.S. 872 (1990).

preme Court reformulated its Free Exercise Clause doctrine to hold that strict scrutiny applies only when the challenged law or conduct is not "neutral" or "generally applicable."[224] Although the meaning of the "neutral and generally applicable" test is not clear, it appears to apply to laws and practices that target religion for special burdens or that discriminate between religious denominations.[225]

If both the Free Exercise Clause and the *Larson* test apply equally to benefits and burdens, apply to discrimination between denominations, and require application of a strict scrutiny test, is there any real difference between them? In other words, should *Larson* simply be removed from Establishment Clause jurisprudence and integrated into Free Exercise Clause doctrine? For example, respected commentator Jesse Choper has stated that:

> *Larson* should be seen as a free exercise clause decision parading in an establishment clause disguise. This criticism of the basis for the Court's ruling is not just caused by a sense of aesthetics; rather, it further illustrates the confusion that the Court has created with respect to establishment clause and free exercise

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224 *Id.* at 886 n.3 ("Our conclusion [is] that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"). Laws that are challenged on the basis of the Free Exercise Clause and another constitutional provision may still receive strict scrutiny. *See id.* at 881. *See generally* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). Whether this was more a change in doctrine than in practice has been questioned by many scholars. *See supra* note 26 (collecting articles). In both *Smith* and *Lukumi Babalu*, a subsequent Free Exercise case, the Court cited *Larson* as embodying a parallel principle under the Establishment Clause. *See supra* note 169.

225 *See* Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 543 (1993) (suggesting that generally applicable tests are violated by laws that "in a selective manner impose burdens only on conduct motivated by religious belief"); *id.* at 557 (Scalia, J., concurring) ("In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion . . . whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.") (citations omitted); Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) ("Contrary to the Court's holding in [*Smith*], however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment."); Laycock, *supra* note 40, at 1009 ("The only remaining protection [after *Smith*] is that provided by formal neutrality; religious conduct cannot be singled out for facially discriminatory regulation."); Conkle, *supra* note 8, at 12 ("*Smith* essentially reduced the Free Exercise Clause to a prohibition on deliberate governmental discrimination against religion"). Interestingly, the Court's discussion of the plaintiffs' Free Exercise Clause challenge in *Gillette v. United States*, 401 U.S. 437, 461-2 (1971) suggested that discrimination was not particularly relevant in adjudicating the question of whether a compelling interest justified the burden on religion. *See supra* note 75.

clause doctrine.[226]

Although it's tempting to view *Larson* as simply another expression of the Free Exercise Clause's "neutral and generally applicable" test, a closer analysis shows two differences between them that could potentially affect the outcome of a case. First, Free Exercise Clause doctrine generally requires a finding that the plaintiff has a "sincere" religious belief, a requirement that does not formally exist under the Establishment Clause.[227] Second, the Free Exercise Clause requires the plaintiff to show that the legislation or conduct has "significantly burdened" his or her religious belief, a standard more restrictive than standing under the Establishment Clause which may be premised solely on one's status as a taxpayer.[228] At least theoretically then, each test could apply to conduct that the other does not—the "neutral and generally applicable" test could apply to conduct targeting all religious belief but not discriminating between denominations (thus placing it outside the scope of *Larson*), while *Larson* could apply to statutes providing aid to particular denominations without directly burdening anyone's religion (placing it outside the scope of the Free Exercise Clause). Still, these circumstances are probably not likely to occur with extreme frequency, making the *Larson* test and the "neutral and generally applicable" test largely equivalent.

A distinct question that implicates free exercise values, though not the Free Exercise Clause itself, is the extent to which government may *voluntarily* "accommodate" religion by granting exemptions from neutral and generally applicable laws.[229] The question implicates *Larson* because several of these accommodations are

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226 Choper, *supra* note 209, at 958. Choper further suggests that the Court's standard Establishment Clause analysis is not suited to discerning discrimination between religions, and should be reserved for aid to religion generally.

227 *See, e.g.*, TRIBE, *supra* note 9, § 14-7 at 1191 n.19 ("The Court [in *Larson*] did not explicitly consider the other elements of the free exercise test . . . [including] whether soliciting from nonmembers was based on a sincerely held religious belief. Thus, it appears that a religious adherent may face no hurdles (beyond standing) in challenging a statute that overtly discriminates among religions; an adherent who challenges a statute that is not overtly discriminatory, in contrast, must demonstrate his or her own sincerity.") (citation omitted).

228 *See, e.g.*, Eaton, *supra* note 173, at 1024-29 (discussing Establishment Clause standing); Bill Latham, Note, Valley Forge Christian College v. Americans United for Separation of Church and State: *Taxpayer Standing and the Establishment Clause*, 34 BAYLOR L. REV. 748 (1982) (same).

229 *See generally* Anjali Sakaria, Note, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483 (2002); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

sect-specific, limiting their application to particular named denominations. For example, until a few years ago a Federal statute gave Christian Scientists special exemptions from Medicare and Medicaid regulations.[230] Similarly, many states have "kosher-fraud" laws, which regulate the food preparation practices of certain restaurants and grocery stores according to the beliefs of a particular named denomination, Orthodox Judaism.[231] Challenges to statutes like these have so far arisen only in lower courts, and thus will be dealt with in more detail in the next section, but the point here is that these practices represent what is in many cases the paradigmatic "denominational preferences" case—especially since the statute struck down in *Larson* itself did not even name any denominations, and divided religious organizations according to an apparently secular criterion. Because the *Smith* decision severely limited the ability of courts to grant free exercise exemptions, the pressure placed on legislatures to voluntarily accommodate the needs of religious minorities has only increased.

The Supreme Court has frequently noted that a legislature's ability to accommodate religion is "by no means co-extensive with the noninterference mandated by the Free Exercise Clause."[232] In other words, there is an area of legislative discretion between the accommodation that the Free Exercise Clause mandates and the limitations on religious preference imposed by the Establishment Clause—a so-called "zone of permissible accommodation . . . ."[233] At the same time, however, a legislature cannot simply invoke the magic word "accommodation" to shield itself from all Establishment Clause scrutiny.[234] The legislation must operate to lift *discernible* burdens[235] and is still subject to the fundamental principle that it cannot discriminate between denominations.[236]

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230 *See supra* Section VI.A.

231 *See supra* Section VI.B.

232 Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

233 *See* TRIBE, *supra* note 9, § 14-4 at 1169.

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

235 *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 613 n.59 (1989) ("[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.'") (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 US. 327, 348 (1987) (O'Connor, J., concurring)) (emphasis omitted); LEVY, *supra* note 1, at 160 ("Generally, the justices agree that accommodation means relieving religion of an improper burden that restricts its free exercise.").

236 *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 706-07 (1994) ("whatever the limits of permissible legislative accommodations may be, it is clear that neutrality

The only time the Court has examined a purported legislative accommodation that was suspected of enacting a denominational preference was *Board of Education of Kiryas Joel v. Grumet*.[237] In *Kiryas Joel*, the Court struck down a statute creating a separate school district for a village populated entirely by members of a single religious sect.[238] One of the primary grounds for the Court's decision was the fear that similar "accommodations" might not be granted to other religious sects in the future.[239] A majority held that even accommodations must be denominationally neutral,[240] while Justice O'Connor explored the issue in more depth, stating that:

> 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 exemption[s],' not sectarian ones.[241]

The doctrine that voluntary government accommodation of religion must still respect the general prohibition against denominational preference seems well-settled in the caselaw.[242] Respected academics have questioned this rule, arguing that sect-specific exemptions "reflect . . . not biased favoritism, but rather an act of

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as among religions must be honored.") (citations omitted); TRIBE, *supra* note 9, § 14-7 at 1199 ("The problem of denominationally discriminatory accommodation may be posed as readily when government selectively lifts some (but not all) of the burdens on religion it has imposed, as when it selectively mandates some private accommodations."); NOWAK & ROTUNDA, *supra* note 6, § 17.6 at 1215 ("An exemption from [a] law of general applicability . . . that only provided an exemption to members of a specific religion or an exemption only for persons who held religious beliefs would establish a denominational preference that would violate the establishment clause.").

237 512 U.S. 687 (1994) (discussed in greater depth *supra* Section IV.B.).

238 *See id.*

239 *See supra* p. 134.

240 *Kiryas Joel*, 512 U.S. at 709.

241 *Id.* at 715-16 (O'Connor, J., concurring) (citations and internal quotations omitted).

242 *See* Sakaria, *supra* note 229, at 496 ("[T]he [Supreme] Court has . . . interpreted the denominational neutrality principle to mean that a legislature may not grant an accommodation to a specific religious group or sect."). An excellent and clear analysis of some of the issues discussed in this section can be found in Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990).

respect by a majority group toward a minority group."[243] Proponents of this view suggest that exemptions for particular minority sects generally do not create denominational favoritism because mainstream religions already have their religious preferences embedded in both custom and legislation.[244] Other supporters analogize sect-specific exemptions to race or sex-based affirmative action.[245]

The question is difficult, and in many cases could probably be avoided by careful statutory drafting that limits exemptions by reference to the relevant religious belief at issue, instead of by reference to denominational affiliation.[246] For example, consider a

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243 Greene, *supra* note 169, at 82. *See also* TRIBE, *supra* note 9, § 14-7 at 1193 ("One can say with greater confidence that *Larson*'s neutrality principle does not extend to cases where the state's denominational line is based on free exercise values. For where a burden falls with special weight on some religions, religious classifications are called for; religion blindness would produce only an illusory and hostile neutrality.").

244 *See* CHOPER, *supra* note 5, at 119-20 (discussing views of Marc S. Galanter in *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 291); McConnell, *supra* note 6, at 1419-20 ("The proponents of exemption . . . observe that powerful and influential religions will usually receive adequate protection in the political arena. One rarely sees laws that force mainstream Protestants to violate their consciences.") (footnote omitted); Sakaria, *supra* note 229, at 500 ("The views of a majority religious group are not likely to conflict with most laws since a democratically elected legislature is unlikely to pass a law that curtails the religious exercise of a large constituency."). One commentator is skeptical of the usefulness of this majority-minority dichotomy. *See* Lupu, *supra* note 186, at 117 ("In many instances, the question of who is benefitting from religious accommodations and who is bearing its costs defies simple majority-minority characterization. First, by what standards will religious groupings be made? Are all Christians to be lumped together, all Jews to be viewed as having common interests, all Muslims to be seen as equally benefitting from accommodations of the religious customs of some? If the groupings are more refined than this, taking into account sects and subgroups, there will rarely be a religious majority in any political community.").

245 *See, e.g.*, David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991); Greene, *supra* note 169, at 58-59. *See also* Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994). The analogy to affirmative action is an interesting one, as the Court currently applies strict scrutiny to racial affirmative action. *See* Grutter v. Bollinger, 539 U.S. 306 (2003). If accommodating religious minorities is akin to affirmative action, the *Larson* strict scrutiny test may well be the appropriate one to apply—the question would then become whether the government could provide a compelling interest the exemption serves, perhaps one analogous to the compelling interests of diversity or rectifying past discrimination articulated in the affirmative action context. *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

246 *See* Paulsen, *supra* note 41, at 345 n.152 ("In utilizing either religion-conscious remedies or race-conscious remedies, a legislature uses a suspicious basis of classification to attain what may well be permissible objectives. It is always preferable to attempt to obtain these objectives with classifications that do *not* use explicitly racial or religious criteria . . . .").

hypothetical high school cafeteria policy allowing members of a particular Hindu sect, and only those Hindus, to eat special, more expensive, meat-free meals. Such a sect-specific accommodation could be revised to apply to *any* students with sincere religious beliefs against eating meat (such as Catholics during Lent, for example). It is possible, of course, that this would broaden the scope of the exemption to such a degree that it simply becomes untenable.

As commentators suggest, an important corollary of this principle is that most legislative accommodation of religious belief will prefer *some* minority religions over *other* minority religions, rather than prefer minority religions over mainstream religions.[247] The *Larson* test would presumably prevent a legislature from discriminating between minority religions in the granting of exemptions unless a compelling reason existed.[248] Moreover, if a sect-specific exemption were found invalid under *Larson*, the court applying the test could theoretically either abolish the exemption altogether, or broaden it to include religious groups currently not included.[249] Thus, despite the fears of some commentators, a requirement of denominational neutrality is not *necessarily* baneful to religious freedom for sects and cults—it could be a powerful tool for unpopular minority religious groups to gain exemptions currently provided only to well-regarded ones.

The political and academic debate over sect-specific exemptions will certainly continue, and the Supreme Court will likely be faced with this issue again in the near future. Although government efforts to accommodate religion are made in the spirit of free

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247 *See* Lupu, *supra* note 186, at 118 ("[I]t is entirely possible that a minority will bear the brunt of the costs of accommodating another minority.").

248 The difficult issue here is determining when discrimination is present. If a statute names a particular denomination, the decision is easy; in other cases it may be much harder. A statute that is formally neutral, such as one that provides exemptions for religious headgear in the military, might effectually discriminate against denominations that seek exemptions for other religious clothing besides headgear. Greene, *supra* note 169, at 79. One response is that the government need not accommodate *all* religious belief in order to constitutionally accommodate *some* religious belief; that is, "underinclusive" legislation is permissible in this context, at least until a denomination "similarly situated" to the denomination currently receiving the exemption seeks the same benefit. *See id. at* 60-63. The question of when denominations are "similarly situated" for the purposes of receiving an exemption arises occasionally in the lower courts, and is discussed *infra* note 256 and accompanying text.

249 *See, e.g., Developments*, *supra* note 8, at 1693 ("[I]n theory, equal treatment of religions can be achieved either by making aid available on a facially neutral basis to all religions or by refusing aid to any religion."). An example of this distinction arose in *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989), where the question was whether federal exemptions from criminal liability for religious peyote use should be extended to religious marijuana use.

exercise and may be limited to prevent establishment, a third constitutional principle often comes into play: equal protection.

E. Relation to Equal Protection

Courts and scholars have long noted that the Free Exercise and Establishment Clauses embody an equal protection principle—that religions should not be treated differently by the government without good reason.[250] However, a neglected thread of jurisprudence posits the related but slightly different principle that the Constitution's independent guarantees of equal protection[251] limit a government's ability to affect religion, regardless of the application of the Free Exercise or Establishment Clauses.[252] For ex-

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250 The most famous statement was made in Justice Harlan's concurrence in *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970), where he stated, "Neutrality in its application requires an equal protection mode of analysis. The court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." Michael A. Paulsen discusses Justice Harlan's remark and states that "[e]ver since, the Court has tended to use the language of the equal protection clause in religion cases, but not its substantive methodology. Harlan's insight has been used as a rhetorical flourish for opinions, but never developed into a framework for deciding cases." Paulsen, *supra* note 41, at 327 (footnotes omitted). *See also* Christopher Parker, *A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use*, 16 BYU J. PUB. L. 89, 101 (2002) ("It seems that, despite their separate constitutional origins, the Establishment and the Equal Protection Clauses are related to one another in this context [of applying denominational neutrality]."); Steffey, *supra* note 22, at 904 ("Doctrinally, the restraining principles of religious equality have close analogs to equal protection principles that enforce a norm of racial equality."). *But see* McConnell, *supra* note 40, at 146 (criticizing "doctrinal imperialism" of attempts to use equal protection analysis in Establishment Clause jurisprudence).
The *Larson* denominational preferences test is often viewed as incorporating equal protection principles. *See* Jones, *supra* note 202, at 404 ("the Supreme Court [in *Larson*] employed an equal protection 'strict scrutiny' test."); Winslow, *supra* note 212, at 1303 ("[T]he Court [in *Larson*] invoked an equal protection test in applying the Establishment Clause . . ."); Jeffrey T. Lawrence, Note, *The War on Drugs and Denominational Preferences: Farewell to Strict Scrutiny Analysis*, 1990 BYU L. REV. 1083, 1087 (1990) ("*Larson*'s strict scrutiny analysis for laws that prefer one denomination over another is a logical extension of Justice Harlan's equal protection/neutrality analysis in *Walz*.").

251 The Constitution's independent guarantees of equal protection are located in the Fourteenth Amendment Equal Protection and the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Fifth Amendment Due Process Clause incorporates equal protection guarantees). *See, e.g.,* NOWAK & ROTUNDA, *supra* note 6, § 14.1 at 569 ("the standards for validity under the due process and equal protection clauses are identical.").

252 *See, e.g.,* Cruz v. Beto, 405 U.S. 319, 324 (1972) (per curiam) (Rehnquist, J., dissenting) ("Presumably prison officials are not obligated to provide facilities for any particular denominational services within a prison, although once they undertake to provide them for some they must make only such reasonable distinctions as may survive analysis under the Equal Protection Clause."); United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (stating that discriminating on the basis of

ample, the Court has unanimously held in dicta that religion is a suspect class under the Equal Protection Clause, and that therefore government legislation that classifies according to religious criteria merits strict scrutiny.[253] If both the Equal Protection Clause and the *Larson* test require strict scrutiny for laws that prefer some denominations over others, are there any circumstances in which a litigant would be wise to advance one argument over the other?

It appears that regardless of whether you are applying the equal protection doctrine or the *Larson* test, a mere showing of disparate impact is insufficient to prove a constitutional violation—some evidence of an impermissible legislative purpose is required.[254] While equal protection jurisprudence seems more con-

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religious belief for the purpose of granting conscientious objector status would "result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment"); Niemotko v. Maryland, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring) ("To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment.").

253 *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (citations omitted); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.") (emphasis added). The Supreme Court has developed a three-tiered system for review under the Equal Protection Clauses. Classifications based on "suspect" grounds such as race merit strict scrutiny, while classifications based on other grounds merit intermediate or rational basis scrutiny. *See generally* NOWAK & ROTUNDA, *supra* note 6, § 14.3 at 574-78 (discussing each tier of review). It should be noted that strict scrutiny requires challenged legislation to serve a compelling state interest and be the least restrictive means available to meet this purpose. Brownstein, *supra* note 242, at 104-05 provides an excellent analysis of whether religion should be considered a "suspect" class. I am assuming that when the Court states that laws classifying on the basis of religion receive strict scrutiny that the Court is referring to laws distinguishing between different types of religious believers. An interesting but yet unanswered question is what level of scrutiny under the Equal Protection Clause would apply to a law that distinguished between religious and non-religious persons—under Establishment Clause doctrine, such a classification would warrant application of the *Lemon* test. However, if strict scrutiny were to apply under the Equal Protection Clause, *Lemon* would become irrelevant.

254 *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."); *Smith*, 494 U.S. at 886 n.3 ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . . ."). *See also* Evans, *supra* note 18, at 372 ("*Larson* strongly implies that impermissible intent is a require-

cerned with establishing that a plaintiff claiming discrimination is "similarly situated" to persons benefited by the statute in question,[255] this requirement is sometimes mandated in lower courts deciding *Larson* claims as well.[256] It appears that the primary differ-

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ment for the invalidation of a challenged regulatory action."); Gordon, *supra* note 38, at 191 n.53 ("The *Larson* Court distinguished the statute in that case from laws with an incidental disparate impact among religions on the ground that the statute involved in *Larson* was not facially neutral."). Importantly, however, this impermissible intent can be *inferred* from the fact that a statute is not facially neutral or has severe disproportionate impact on certain races or religions. *See, e.g.*, *Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); Boerne v. Flores, 521 U.S. 507, 535 (1997) ("If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.").

255 *See* NOWAK & ROTUNDA, *supra* note 6, § 10.7 at 349 ("The equal protection guarantees require the government to treat similarly situated individuals in a similar manner."). Examples of cases that turned on a "similarly situated" analysis include *Rostker v. Goldberg*, 453 U.S. 57 (1981) and *Parham v. Hughes*, 441 U.S. 347 (1979).

256 The primary example is *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989). *Olsen* involved a *Larson* claim brought by the Ethiopian Zion Coptic Church to support their argument that their religious use of marijuana should be exempted from the federal criminal prohibition on marijuana on the same basis that the Native American Church's religious use of peyote was exempted from the general federal criminal prohibition on peyote. *Id.* at 1459. Although many cases involving the peyote exemption turned on the unique political status of Native Americans and thus sidestep the fundamental Establishment Clause issue, the *Olsen* Court decided not to rest its decision on this ground. *See id.* at 1464. Instead, the Court took the questionable step of deciding that the Ethiopian Zion Coptic Church was not "similarly situated" to the Native American Church because of the extent of the marijuana control problem and that therefore no *Larson* inquiry was needed. *Id.* at 1463-64. This move was heavily criticized by the dissent. *See id.* at 1468-69. *See also* Lawrence, *supra* note 250, at 1092 ("The judges disagreed over the 'label' given [the plaintiff's] constitutional challenge, the majority choosing 'equal protection' and the dissent 'denominational preference.' Theoretically, either label should have produced the same analysis. Although form should not supersede substance, the court's characterization proved critical.") (footnotes omitted). *See generally* Cynthia S. Mazur, *Marijuana as a "Holy Sacrament": Is the Use of Peyote Constitutionally Distinguishable From That of Marijuana in Bona Fide Religious Ceremonies?*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 693 (1991). The theoretical problem with importing a "similarly situated" test into a *Larson* analysis is that the *Larson* test implicitly carries with it a heavy presumption that any two religious groups are similarly situated; whether there are good grounds to distinguish between them is an inquiry that is made in deciding whether the statute has a compelling purpose and, more importantly, is closely fitted to that purpose. Put another way, the problem is that a "similarly situated" analysis is empty of content unless a particular criterion is used. *See generally* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 345 (1949) ("A reasonable classification is one which includes all who are similarly situated and none who are not. The question is, however, what does that ambiguous and crucial phrase 'similarly situated' mean?"); CHOPER, *supra* note 5, at 114-15 ("It is another matter, however, to permit accommodations that treat 'similarly situated' religious practices differently. The critical issue, of course, is how the Court should determine when the similarly situated criterion is met."); PETER HOGG, CONSTITUTIONAL LAW OF CANADA 52-14.15 (3d ed. 2002) ("The

ence between alleging a *Larson* violation and alleging an Equal Protection Clause violation is a procedural one: plaintiffs alleging an Establishment Clause violation under *Larson* will have an easier time establishing standing than plaintiffs alleging an Equal Protection violation, where the normal rules of standing apply.[257]

F. Relation to Lemon

From both a practical and a doctrinal point of view, the most important question concerning the *Larson* test is its relationship to the Supreme Court's Establishment Clause test, which was established in *Lemon v. Kurtzman*.[258] In its current form, the *Lemon* test applies to laws that prefer religion over nonreligion, and invalidates such laws if they have a primary purpose or effect of advancing religion.[259] The Court generally relies on four criteria to determine whether a law has the effect of advancing religion: whether it endorses religion, indoctrinates religious belief, catego-

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similarly situated test is not wrong in principle. Its vice is [in practice]: the test does not supply the crucial criteria that are required to determine who is similarly situated to whom, and what kinds of differences in treatment are appropriate to those who are not similarly situated."). The relevant criterion is the purpose of the legislation. *See* Tussman & tenBroek, *supra*, at 346 ("where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law."); Laycock, *supra* note 40, at 996 ("[T]here is the purpose of the classification. What it means to be similarly situated depends on why we are asking."). The *Larson* test requires that purpose to be a compelling one and the distinction between any two religious groups to be narrowly tailored to that purpose. By using a "similarly situated" analysis as a threshold qualifier, the Court in *Olsen* failed to articulate the relevant criterion and may have found the two religious groups not similarly situated on a basis other than one related to a compelling purpose.

257 An example of this is *Children's Healthcare is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084, 1089-90 n.4 (8th Cir. 2000), where the defendants argued at both the trial and appellate level that plaintiffs lacked standing to challenge a denominational preference on the ground that plaintiffs were not "similarly situated" because they had no particular religious beliefs. The Court found that traditional taxpayer standing was sufficient and that a similarly situated analysis was unnecessary. This issue is discussed in more detail in the next section. *See also* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 270 n.297 (1994) ("[T]he Establishment Clause may serve the sole function in a case like [*Kiryas Joel*] of supporting standing to sue for those other than the victims of this discrimination. A sect denied equal treatment would presumably have a good equal protection complaint, while a third party without equal protection standing would have Establishment Clause standing.").
Hypothetically speaking, should a doctrinal revolution occur and the Establishment Clause ever be un-incorporated, *see supra* note 31, the Fourteenth Amendment's Equal Protection Clause would still impose a *Larson*-like restriction on states' ability to discriminate against particular denominations. However, standing in such cases would be more difficult to obtain.

258 403 U.S. 602 (1971).

259 *Id.*

rizes according to religion, or creates an excessive entanglement with religion.[260] Laws that have the purpose or effect of advancing religion are per se invalid under *Lemon*, and there is no consideration of whether the law advances a compelling state interest.[261]

Disregarding the Court's repeated statements that *Lemon* applies to laws that prefer religion over non-religion and *Larson* applies to laws that prefer some religions over others, might there be any instance where application of the *Lemon* test would validate legislation that would be found invalid upon application of the *Larson* test?

It appears that a *Lemon* analysis and a *Larson* analysis would reach the same result in the vast majority, if not all, of cases. Laws that would warrant strict scrutiny under *Larson* because they create denominational preferences will frequently lack a primarily secular purpose under *Lemon*.[262] More importantly, a denominational preference almost by definition endorses the religious beliefs of that denomination, rendering the practice invalid under the endorsement inquiry of the "effects" prong of *Lemon*.[263] Other laws creating denominational preferences will also create an excessive government entanglement with religion under *Lemon*, such as the law at issue in *Larson* itself.[264]

Larson does have the virtue of not being saddled with *Lemon*'s long and tortuous history. That history has allowed the Court to find some support for virtually any interpretation of the *Lemon* test's meaning.[265] In this respect, *Larson* has less "play" in its terms than *Lemon*. At the same time, however, the Court has shown a

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260 *See* Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality).

261 *See* Evans, *supra* note 18, at 361 n.1 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 846-47 n.1 (1st ed. 1978)): "[N]otions of compelling justification have been employed only in free exercise cases; government actions have been deemed either violative of the anti-establishment principle or not—the balancing process in that setting has been incorporated into the definitions of the terms themselves."

262 The possible exception is government efforts to "accommodate" the religious beliefs of certain groups.

263 For example, a law that gave Catholics, and only Catholics, a tax break would probably be seen by an objective observer as government endorsement of Catholicism.

264 Larson v. Valente, 456 U.S. 228 (1982). It is worth mentioning the argument made briefly by Winslow, *supra* note 212, at 1304, that the application of *Larson* must be preceded by an analysis of entanglement. This seems doctrinally unsound, as the application of *Larson* does not have any effect if there is already a finding of entanglement under *Lemon*. Further, it is easy to imagine problematic denominational preferences that do not create traditional entanglements, such as direct monetary appropriations to a single religious sect.

265 *See supra* Section III.

willingness to not apply *Larson* when it wishes to uphold challenged legislation or conduct.[266] Lower courts occasionally adopt a similar tactic, and hold that even legislation that singles out a particular denomination does not warrant strict scrutiny because no other denominations are "similarly situated" to the favored religious group.[267]

The Court missed opportunities to apply *Larson*, or at least provide a clearer explanation as to when it does not apply, in the 1980s and early 1990s. This may have occurred because of the controversy surrounding *Lemon*. Opponents of the *Lemon* test mounted a steady campaign to have it overturned,[268] while supporters of the test tried to apply *Lemon* whenever possible in order to demonstrate its usefulness.[269] In effect, the jurisprudence which developed around *Larson* fell casualty in what both sides viewed as the more important battle over *Lemon*. However, now that a revised version of *Lemon* has received support from even the most conservative Justices on the Court,[270] attention could again turn to *Larson*. Practically speaking, whether the Court's aversion to denominational preferences leads it to apply a more stringent *Lemon* test or to use the *Larson* test may not affect the outcome in a particular case.

An analysis of *Larson* and other Supreme Court doctrine indicates that the test probably applies to discrimination between religions in the broadest terms, and prohibits both tangible and non-

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266 *See, e.g., Lynch*, 465 U.S. 668 (1984); *Marsh*, 463 U.S. 783; *Allegheny*, 492 U.S. 573.

267 *See* cases cited *supra* notes 256-57.

268 At various times, several currently sitting Justices have argued for *Lemon* to be overruled, including Justices Rehnquist, Scalia, Kennedy, Thomas, and O'Connor. The literature on *Lemon* is extensive. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 108-112 (1985) (Rehnquist, J., dissenting) (severely criticizing *Lemon*); Acklin, *supra* note 186, at 50 n.57 (collecting opinions from several Justices criticizing *Lemon*); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795, 799 (1993) ("Let the joyous word be spread, *Lemon v. Kurtzman* at last is dead!"); Steffey, *supra* note 22, at 903 ("*Lemon*'s influence is clearly waning, and its status as the principal constitutional gauge appears to be over.").

269 *See, e.g.,* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 710 (1994) (Blackmun, J., concurring) ("I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*"); Lynch, 465 U.S. at 696 (Brennan, J., dissenting) ("That the Court today returns to the settled analysis of our prior cases gratifies that hope. At the same time, the Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial."); Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865, 866 (1993) ("[W]here others see unworkable incoherence, I see the exercise of judgment.").

270 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (*Lemon* applied in opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas).

tangible preferences. The Court's prior distinction between discrimination on the basis of religious affiliation (*Larson*) and religious belief (*Gillette*) is likely unwarranted, and may be disregarded in the future. Considered in conjunction with the Free Exercise and Equal Protection Clauses, *Larson* seems to act principally as a guarantee of third-party standing. Furthermore, it is difficult to imagine instances where *Larson* would result in a different outcome than a fairly applied *Lemon* test. Given that cases involving denominational preferences are only a small sub-set of Establishment Clause cases, that occasions when the Free Exercise and Equal Protection Clauses would not lead to the same result are few, and that occasions when *Lemon* would not demand the same result are even fewer, the *Larson* doctrine probably merits the obscurity it has long received. However, several recent lower courts have applied *Larson*, and a close examination of these decisions will shed light on whether the test retains any relevance.

VI. *Larson* In the Lower Courts

Considering the paucity of Supreme Court cases applying the *Larson* test, it would be reasonable to infer that denominational preferences do not occur frequently.[271] After all, even the city council members in *Church of the Lukumi Babalu Aye v. Hialeah*[272] knew enough to craft their ordinances to *appear* neutral and not explicitly discriminatory towards practitioners of Santeria. Likewise, the New York State legislators in *Kiryas Joel* were careful to grant the village as a *legal entity* the power to form a school board instead of directly delegating authority to the village's religious leaders.[273] So, perhaps the *Larson* strict scrutiny test is rarely applied because its trigger, denominational preferences, are so rarely found?

A close look at lower court opinions demonstrates that explicit denominational preferences are still found in a wide variety of leg-

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[271] *Cf.* Choper, *supra* note 209, at 957 ("Statutes that on their face put one or all religions in a disadvantageous position are quite unusual.").

[272] 508 U.S. 520 (1993). *Hialeah* involved city ordinances nominally forbidding animal cruelty. The Supreme Court found instead that they were motivated by a desire to prevent practitioners of Santeria from conducting animal sacrifices. *Id.* at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). *See also* Lupu, *supra* note 257, at 266 ("[T]he language, history, structure of inclusions and exclusions, and inevitable operation of the [city] ordinances taken together convinced all nine Justices quite readily that they were confronting a blatant example of religious gerrymander.").

[273] *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 693 (1994).

islation. Although a discussion of all of these cases is impossible,[274] this section examines the impact and interpretation of *Larson* in state courts and inferior federal courts by looking at an especially clear example of a statutory denominational preference. This section also discusses kosher fraud laws because lower courts often focus their *Larson* analyses on these laws.

A discussion of *Larson* in the lower courts serves three main purposes. First, and perhaps most importantly, it demonstrates that the judicial examination of denominational preferences is not merely an academic exercise—the meaning of the *Larson* test has a significant impact in people's lives. Second, such a discussion illuminates the practical difficulties that courts have in applying *Larson*. This section will address why lower courts sometimes avoid

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274 This section focuses, for clarity of analysis, on laws that explicitly name a particular religious denomination for special treatment. As *Larson* held, of course, denominational preferences can also be created by facially neutral laws that are "religious gerrymanders," or by truly neutral laws that are *applied* selectively to create denominational preferences. *See supra* note 168. An excellent example of a lower court decision involving the former situation can be found in *Church of Scientology v. Clearwater*, 2 F.3d 1514 (11th Cir. 1993), where officials in the city of Clearwater, Florida crafted a charitable regulatory statute "driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater." *Id.* at 1531. One city official stated that Scientology, "has to be treated like a cancer—first you arrest its growth, then remove it from the city . . . ." *Id.* at 1533. Another argued that "total condemnation of all the Scientologist's [sic] property in the city might be a workable solution to this problem facing the City. This might even give them the needed boost to decide to relocate." *Id.* at 1534. Other cases involving *Larson* and alleged denominational preferences that are not discussed in the text include: Droz v. Comm'r, 48 F.3d 1120 (9th Cir. 1995) (upholding limitation of religious exemption from Social Security tax to members of approved religions); Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989) (declining to create religious marijuana use exemption) (discussed *supra* note 256); Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990) (striking down portion of National Labor Relations Act that preferred individuals who belonged to an organized religion) (discussed *supra* note 138); Sklar v. Comm'r, 282 F.3d 610 (9th Cir. 2002) (discussing constitutionality of tax deduction for members of the Church of Scientology) (discussed *supra* note 185); ACLU Neb. Found. v. Plattsmouth, 358 F.3d 1020 (8th Cir. 2004) (striking down Ten Commandments monument) (discussed *supra* note 216). *See also* Trucios-Haynes, *supra* note 17, at 200 (suggesting that certain immigration regulations create a denominational preference). A final example of a law that is viewed by some commentators as creating a denominational preference, even though it is facially neutral, is New York's so-called "Get Law." This law, in effect, requires certain Jews to receive a religious divorce before they can obtain a civil divorce. *See, e.g.*, Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 165 (1995) ("Only people of one particular religion, and indeed, only some followers of the religion—Orthodox or Conservative Jews—are concerned with this procedure."); Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of* Avitzur, 73 GEO. L.J. 193, 205 (1984) ("[A]mong those denominations that have religious requirements concerning divorce, the state is lending support only to particular branches of Judaism."). *See generally* IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY (1993).

applying *Larson* even though a statute explicitly applies only to a single religious denomination, and how courts determine whether a compelling state interest exists, once a denominational preference has been found. Finally, this section addresses whether lower courts achieve the same result by applying *Lemon* instead of *Larson*.

A. Christian Science and Medicare

Perhaps the paradigmatic application of the *Larson* strict scrutiny test took place in *Children's Healthcare is a Legal Duty v. Vladeck*.[275] In *CHILD* I, as the case later became known, a group of child welfare advocates used taxpayer standing to challenge provisions of the federal Medicare act, a complex statutory scheme that, among other things, reimburses health care providers for the expenses incurred in caring for certain disabled or aged persons. The legislation imposes severe constraints on the types of medical care that will be reimbursed, requires caregivers to be trained and licensed, and applies only to inspected and accredited hospitals or other health care facilities.[276] However, when Congress passed the Medicare legislation, it created several exemptions from these requirements for the "First Church of Christ, Scientist, Boston, Massachusetts[,]"[277] a religious denomination that opposes all traditional forms of medical care and believes solely in spiritual healing.[278] In effect, the legislation allowed for tax expenditures to be used to subsidize the spiritual healing practices of a single, named religious denomination.

The court in *CHILD* I found that *Larson* was applicable, stating that the court "[did] not have the luxury, of finding a lack of discrimination between sects, as it is apparent on the face of the

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275 938 F. Supp. 1466 (D. Minn. 1996). *See generally* Danyll Foix, *From Exemptions of Christian Science Sanatoria to Persons Who Engage in Healing by Spiritual Means: Why* Children's Healthcare v. Vladeck *Necessitates Amending the Social Security Act*, 15 LAW & INEQ. 373 (1997).

276 *See CHILD* I, 938 F. Supp. at 1469-70.

277 *See id.* at 1469.

278 *See id.* ("A primary tenet of Christian Science is the belief that disease is caused by sin and mortal frailties; accordingly, physical healing is believed to be dependent on prayer instead of medical technology."); Foix, *supra* note 275, at 375-81 (discussing Christian Science and its members' beliefs, and noting that the First Church of Christ, Scientist operates twenty-three spiritual healing sanatoria across the United States); MEAD, *supra* note 204, at 105 (quoting MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES (1980)) (noting that the founder of Christian Science stated that "the only reality of sin, sickness, or death is the awful fact that unrealities seem real to human, erring belief, until God strips off their disguise. They are not true, because they are not of God.").

Acts."[279] Further, it rejected the argument, put forth by the government and Christian Scientists, that the *Larson* denominational preference test does not apply to attempts to accommodate religion.[280] Applying *Larson*, the court found that although a compelling interest existed in "ensur[ing] that all those who pay taxes to support [Medicare] programs may benefit from them,"[281] the exemptions were not closely fitted to that interest since they accommodated only Christian Scientists and no other religious denominations who may believe in spiritual healing.[282]

Thus, *CHILD* I is a textbook example of *Larson*.[283] The court found a denominational preference existed because of the fact that the statute named only one religious denomination, and held that the existence of an exemption for religious groups was compelling. However, it determined that the sect-specific exemption was too narrow. As we will see, other cases that may at first seem as straight-

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279 *CHILD* I, 938 F. Supp. at 1481 n.27.

280 *See id.* at 1473 ("Nowhere in *Larson* or the subsequent cases are [attempts to accommodate] distinguishing factors; instead, the sole distinguishing factor *Larson* espouses is a differentiation between religious groups on the face of a statute."). This holding is not favored by some commentators who argue that sect-specific exemptions should be held to a lower standard, as discussed *supra* Section VI.D.

281 *CHILD* I, 938 F. Supp. at 1478.

282 The government argued that the legislation singled out Christian Science for the exemptions because it was the only religious group known to Congress at the time that practiced spiritual healing and operated its own health care facilities. *See id.* at 1480. The Court, relying on *Kiryas Joel*, responded that it "may not assume that there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position in order to justify the restriction." *Id. See also* Foix, *supra* note 275, at 416 n.290 (discussing the spiritual healing practices of other religious denominations). In a related issue, the Court held that taxpayer status could give rise to standing under the Establishment Clause, without the need for the plaintiffs to show that they were similarly situated as they would have to do under the Equal Protection Clauses. *See CHILD* I, 938 F. Supp. at 1482-83.

283 The government appealed the decision in *CHILD* I, but then withdrew the appeal after deciding that success was unlikely. *See* Foix, *supra* note 275, at 411. Instead, Congress passed legislation to create sect-neutral exemptions for the use of spiritual healing. *See* Children's Healthcare is a Legal Duty Inc. v. Min de Parle, 212 F.3d 1084, 1089 (8th Cir. 2000). These exemptions were challenged as creating a religious gerrymander for the Christian Scientists. But a divided Court of Appeals found them valid under both *Larson* and *Lemon*, arguing that each of the eligibility requirements to receive federal funds has valid secular justifications and thus do not create a religious gerrymander. *Id.* at 1091. In contrast, the dissent argued, "It is apparent that the definition and qualifying criteria, though not entirely devoid of secular bases, are drawn to benefit a single sect." *Id.* at 1104 (Lay, J., dissenting). The majority was careful, however, to note that a denominational preference need not always consist of benefiting or burdening a sect by name. *See id.* at 1090 ("Such discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation."). The Ninth Circuit recently upheld the exemptions as well, although it did not discuss *Larson*. *See* Kong v. Scully, 341 F.3d 1132 (9th Cir. 2003).

forward as *CHILD* I have often met with more difficulty in the courts.

B. Kosher Fraud Laws

A basic religious obligation held by members of the Orthodox and Conservative branches of Judaism, but not necessarily members of the Reformed branch, is that only kosher food should be consumed.[284] Kosher food is prepared according to strict guidelines that delineate everything from how animals are to be slaughtered to which foods can be eaten or displayed together.[285] Importantly, kosher food is not viewed by most ritual observers as being necessarily more healthy or sanitary than non-kosher food; instead, eating kosher food is seen by observant Jews as a demonstration of personal self-control related in part to conceptions of purity and holiness.[286]

A difficult issue for many courts erupted in the early 1990s and continues today: the constitutionality of kosher fraud legislation. Statutes regulating the preparation and labeling of food sold as "kosher" are designed to prevent a problem in what is now a multi-billion dollar industry:[287] unscrupulous merchants sell food falsely

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284 *See* Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 7-8 (1992). This is by far the best law review article for background on Jewish dietary laws and their origins, although several important kosher fraud cases were decided after this article's publication. Other sources on the cases discussed in this section include Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices With Religious Significance*, 71 S. CAL. L. REV. 781 (1998); Rosenthal, *supra* note 17; Jared Jacobson, Comment, Commack Self-Service Kosher Meats, Inc. v. Rubin: *Are Kosher Food Consumers No Longer Entitled to Protection From Fraud and Misrepresentation in the Marketplace?*, 75 ST. JOHN'S L. REV. 485 (2001); Karen Ruth Lavy Lindsay, Comment, *Can Kosher Fraud Statutes Pass the* Lemon *Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337 (1998); Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 (1993); Shelly R. Meacham, Note, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as* Ran-Dav's County Kosher *Proclaims?*, 23 SW. U. L. REV. 639 (1994); Kristin Morgan, Note, *The Constitutionality of New Jersey Kosher Food Regulations Under the Establishment Clause:* Ran-Dav's County Kosher v. State, 62 U. CIN. L. REV. 247 (1993); Catherine Beth Sullivan, Comment, *Are Kosher Fraud Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201 (1993).

285 Berman, *supra* note 284, at 1.

286 *Id.* at 4-5 ("kosher food is not necessarily any cleaner, nor any healthier, than non-kosher food" and "there is general agreement among Orthodox and Conservative authorities that the rationale for the dietary laws has [to do] . . . with personal self-control.").

287 *See* Jacobson, *supra* note 284, at 492 (describing fifty billion dollar kosher food industry).

labeled as "kosher" in order to reap higher profits.[288] In response to perceived widespread fraud, almost half of all States have passed laws to ensure that food sold as kosher is "actually" kosher by defining what kosher requires, paying inspectors (frequently, but not always, rabbis) to ensure that merchants follow the requirements, and imposing monetary fines or possible jail sentences on manufacturers who fail to meet the requirements.[289] Although these laws obviously present an issue under *Lemon* as to whether they have the purpose or effect of advancing religion, the *Larson* denominational preferences test is frequently implicated as well because most of the statutes define "kosher" by reference to the Orthodox branch's interpretation.[290]

Kosher fraud laws can thus create denominational preferences in three different ways. In the broadest sense, these laws could be seen as preferring Judaism over other religions, especially others religions that also have strict dietary laws, such as Islam.[291] They are also problematic because they usually prefer the Orthodox definition of "kosher" over the Conservative branch's definition of the word.[292] Although the two branches largely agree on the source of

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288 *See* Berman, *supra* note 284, at 2 ("[T]here is money to be made in the kosher food industry by cutting corners. Since the price of many kosher foods includes a premium to cover the added costs of kosher preparation, profits can increase sharply if a non-kosher product is sold as kosher, at the kosher food price.").

289 As of 1997, twenty-two states had kosher fraud legislation. *See* Rosenthal, *supra* note 17, at 962.

290 *Id.* (stating that eighteen of the twenty-two statutes define kosher according to "Orthodox Hebrew religious requirements").

291 Much like some Jews who strictly observe the practice of eating only food that is kosher, many Muslims only eat food that is "halal." *Compare* Rain Levy Minns, Note, *Food Fights: Redefining the Current Boundaries of the Government's Positive Obligation to Provide Halal*, 17 J.L. & POL. 713, 734-35 (2001) ("In order to have truly equal legal protection of Islamic religious practice, all of the states with kosher consumer protection labeling laws should either also have halal laws or not have any religious food labeling laws at all.") *with* Rosenthal, *supra* note 17, at 968 ("[I]t is difficult to say that Muslims and Jews receive disparate protection from kosher fraud laws. Indeed, Muslims should properly be classed as beneficiaries of the laws."). Minns seems to have the stronger position here, noting that although many Muslims in western countries eat kosher food as a compromise since halal is rarely available, full equality between Islam and Judaism would require government protection of both dietary codes. *See* Minns, *supra*, at 719. *But see* Greenawalt, *supra* note 284, at 806 (arguing that laws governing kosher food do not discriminate against Muslims and stating that Muslims "have not pressed for such help").

292 *See* Berman, *supra* note 284, at 65 ("the statutes, on their face, prefer the Orthodox denomination of Judaism, thus discriminating against other denominations."); Rosenthal, *supra* note 17, at 964 ("A statute based on an Orthodox definition of kosher protects Conservative Jews equally only to the extent that they share Orthodox standards."); Lindsay, *supra* note 284, at 365 ("by adopting an Orthodox Jewish stan-

the laws governing kosher food,[293] there are some important differences between how the two branches interpret the requirement. For example:

> Conservative Judaism accepts sturgeon, swordfish, all cheeses, and all wines as kosher. Orthodox authorities do not accept the [kosher status] of sturgeon and swordfish . . . . In addition, Orthodox rabbis accept only cheeses and wines that have fulfilled certain . . . requirements that the Conservative movement no longer deems applicable.[294]

Finally, the laws present a possible denominational preference in their application because there are disagreements *within* the Orthodox branch as to what foods should be considered kosher.[295]

The first major challenge to a kosher fraud law on Establishment Clause grounds was litigated in *Ran-Dav's County Kosher, Inc. v. New Jersey*.[296] In *Ran-Dav's*, State authorities sought an injunction to prevent the owners and operators of a grocery store from holding themselves out as sellers of kosher food.[297] The State argued that the store had violated New Jersey's kosher fraud law[298] by, among other things, mislabeling products, failing to properly remove the veins from calf tongues, and selling hamburger meat without the blood being first removed.[299] The grocery store argued in a facial challenge that "so long as they . . . conformed to the Kosher standards established by their supervising rabbi, the State [was] without authority to establish different religious standards to which plaintiffs must conform."[300]

The Appellate Division of the Superior Court focused prima-

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dard for kosher, many statutes are implicitly stating a preference for Orthodox Judaism over other branches of Judaism.").

293 Berman, *supra* note 283, at 61; Jacobson, *supra* note 284, at 489 n.25 (quoting Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curiae at 9, Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) (No. 94-1918)).

294 Berman, *supra* note 284, at 8-9 (footnotes omitted).

295 *Id.* at 8 n.31 (discussing internal disagreements); Greenawalt, *supra* note 284, at 808 ("Disagreement among Orthodox Jews about kosher requirements is a fact of life. Some groups are stricter than others, and no centralized authority exists to resolve disagreements."). *See also* Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 426 (2d Cir. 2002) (noting that Orthodox Jews of the Sephardic sect adhere to stricter standards of animal slaughtering than other Orthodox Jews).

296 579 A.2d 316 (N.J. Super. Ct. App. Div. 1990), *rev'd*, 608 A.2d 1353 (N.J. 1992).

297 *Id.* at 318.

298 The pertinent regulations defined "kosher" as food "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion." *Id.* at 319 (citation omitted).

299 *Id.* at 321-22.

300 *Id.* at 319.

rily on *Lemon* in upholding the kosher fraud legislation, but responded briefly to an ACLU amicus brief arguing for application of *Larson* on the ground that the laws preferred Orthodox Judaism over other branches. The Court noted that representatives from all of the major branches of Judaism supported kosher legislation and agreed to its basic principles,[301] and that the State had conceded at oral argument that persons selling what they in good faith believed was kosher food would be exempted from the requirements.[302] The Court then concluded that:

> Some Conservative and some divergent Orthodox interpretations do present small variations from the mainstream, but they do not pretend to be adopting different standards; they merely advance their interpretations of the same Orthodox standards . . . . If the State attempted to hold these groups to the majority Orthodox interpretation, we might have some disagreement; but since the State has conceded far more than would be required to support these minor variations, we see no basis for a [*Larson*] attack.[303]

In other words, the Court decided that a denominational preference did not exist because all of the branches of Judaism basically understood "kosher" to mean "according to Orthodox rules" and that any minor variations would be solved by the State's agreement not to prosecute different interpretations made in good faith.[304] The Court did not consider whether the existence of kosher fraud laws themselves constituted a denominational preference for Judaism over other faiths with religious dietary requirements.

In a controversial 4-3 decision, the New Jersey Supreme Court reversed the lower court.[305] The Supreme Court relied on the ef-

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301 *Id.* at 325. Berman argues that this holding was erroneous because "to permit the State to enact that unitary standard in a civil statute is to make the absurd argument that the Establishment Clause should be interpreted to prohibit the establishment of religion, unless everyone agrees that one religious interpretation is correct." Berman, *supra* note 284, at 62.

302 *Ran-Dav's*, 579 A.2d at 323 n.14.

303 *Id.* at 325. A dissenting opinion relied on *Lemon*, but did not clearly invoke *Larson*. *Id.* at 330 (D'Annunzio, J., dissenting).

304 Interestingly, it appears that the good-faith defense allowed by the State would apply only to a good-faith belief that food was kosher according to Orthodox requirements. *See id.* at 323-24. That is, if a seller *admitted* that food was not kosher according to traditional Orthodox requirements as embedded in the legislation, but argued that it *was* kosher according to Conservative Judaism or a personal interpretation, he or she might not be allowed to use the good-faith defense.

305 Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353 (N.J. 1992).

fects and entanglement prongs[306] of the *Lemon* test to invalidate the kosher fraud legislation, stating that "the regulations impose substantive religious standards for the kosher-products industry and authorize civil enforcement of those religious standards with the assistance of clergy, directly and substantially entangling government in religious matters."[307] Interestingly, the State abandoned the "good faith" defense it had offered in the Appellate Division and instead argued that "merchants sincerely believing that their products are kosher could nevertheless be prosecuted under the regulations if the State believes that their products do not conform to the standards of Orthodox Judaism as the State defines and applies them."[308]

Although the Court recognized that this undermined a primary ground for the Appellate Division's holding that *Larson* was inapplicable, it held that "despite [its] doubts"[309] it would not apply the denominational preferences test "primarily because the record suggests uncertainty concerning both the precise meaning and the enforcement standards of the regulations."[310] Since the regulations clearly violated *Lemon*, there was no need to resolve the question of whether they also violated *Larson*.[311]

These statements indicate that a reference to a particular denomination in a statute does not necessarily constitute a denominational preference for that denomination, or perhaps that a minor or trivial preference for a denomination does not merit strict scrutiny. Yet another possibility is that the Court simply found the long-established *Lemon* test a more defensible method for invalidating legislation than the largely dormant *Larson* test. As in the Appellate Division, the New Jersey Supreme Court did not consider whether the kosher fraud laws constituted a general denominational preference for Judaism over other religions, indicat-

306 *Id.* at 1366.
307 *Id.* at 1355.
308 *Id.* at 1359.
309 *Id.*
310 *Id.*
311 *Id.* In a curious statement, a dissenting opinion argued without elaboration that "the regulations need not be subjected to a strict-scrutiny analysis as articulated in [*Larson*] because they do not discriminate among different religions or religious sects." *Id.* at 1370 (Stein, J., dissenting). In response to the Court's ruling, the New Jersey legislature adopted a much more modest law that required sellers of kosher food to inform customers as to what basis they believed it was kosher. *See* Minns, *supra* note 291, at 726 n.66. Notably, there are several dozen organizations and individual rabbis across the United States who certify food and allow a unique mark to be placed on the product's packaging to better help consumers determine if food is kosher. Berman, *supra* note 284, at 11-12; Jacobson, *supra* note 284, at 496.

ing that perhaps the Court believed that only preferences *within* religions are subject to the *Larson* test.

While *Ran-Dav's* was still on appeal, a second major Establishment Clause challenge to a kosher fraud law was brought by a hot dog vendor against Baltimore city ordinances in *Barghout v. Mayor*.[312] Although originally brought in federal district court, the district judge certified the question to the Maryland Court of Appeals to determine whether Baltimore's kosher fraud legislation provided a good-faith defense and whether the law was valid under the Maryland Constitution.[313] The Court of Appeals found that the statute did allow for a good-faith defense[314] and, although noting that the Maryland Constitution does not have an establishment clause,[315] ventured the opinion that "[s]ince kosher is based on Orthodox Jewish standards, a statutory provision that food is properly labeled kosher only if it satisfies Orthodox Jewish standards does not create a denominational preference."[316]

Nevertheless, after receiving answers to the certified questions, the Federal District Court for Maryland invalidated the kosher fraud legislation based on the effects and entanglement prongs of *Lemon*.[317] The Court noted that the laws were "quite literally, an endorsement of orthodox Judaism, for the City has effectively placed its stamp of approval on orthodox Judaism,"[318] however, it did not even cite to *Larson*, much less apply the denominational preference strict scrutiny test.

In contrast, *Larson* and denominational preferences played a

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312 600 A.2d 841 (Md. 1992). The plaintiff was fined for allowing grease from non-kosher hot dogs to drip onto kosher hot dogs, thus rendering them no longer kosher. *See id.* at 843. The Baltimore City ordinance required food sold as kosher to "adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws . . ." *Id.* at 843 (citations omitted).

313 *Id.* at 841-42.

314 *Id.* at 844.

315 *Id.* at 849 ("It is apparent to us that [our Constitution] does not contain an establishment clause, which would prohibit government from setting up a church, giving preferential treatment to any religion or coercing belief or disbelief in any religion.").

316 *Id.* at 847. Aside from the ultimate question of whether or not the statutes create denominational preferences, this statement by the Court seems especially problematic as it is definitively stating what kosher means even when presented with evidence that other branches of Judaism may have different definitions of kosher. This statement is somewhat similar to that of the New Jersey Superior Court Appellate Division in *Ran-Dav's*. Ran Dav's County Kosher, Inc. v. State, 579 A.2d 316, 325 (N.J. 1990)

317 *See* Barghout v. Mayor, 833 F. Supp. 540, 550 (D. Md. 1993), *aff'd*, 66 F.3d 1337 (4th Cir. 1995).

318 *Id.* at 549.

major role when Baltimore appealed to the Fourth Circuit. In an interesting decision, all three judges on the Fourth Circuit panel found Baltimore's kosher fraud legislation unconstitutional.[319] One judge found it invalid under *Lemon*,[320] one found it invalid under *Larson*,[321] and the third found it invalid under both *Lemon* and *Larson*.[322]

Judge Lay, who found the law invalid solely under *Lemon* noted that, as in *Ran-Dav's*, representatives from all the major branches of Judaism rely on the Orthodox standard to define the term "kosher."[323] He argued that the record was inadequate to make a finding of a denominational preference "because neither the district court nor the City addressed this issue, [and] because the district court made no specific factual finding as to whether all sects of Judaism rely on the Orthodox standard . . . ."[324] He concluded that "all of the various sects of the Jewish faith agree that kosher standards are determined by reference to Orthodox Jewish law [and] [t]he mere fact that various sects may have different interpretations does not create an intra-faith dispute as to the basic meaning of what is and is not kosher."[325]

These statements did not satisfy another judge on the panel who argued that the laws "unquestionably expressed an impermissible intra-faith denominational preference for Orthodox Judaism"[326] and that even if the word "kosher" were understood to mean the same thing by all Jewish religious observers, the law would still create a denominational preference by singling out the Orthodox for special protection instead of the Conservative or Reformed branches.[327] He concluded that even if the statutes have a compelling purpose in preventing fraudulent labeling, they were not narrowly tailored to meet that interest.[328]

In the most recent challenge to a kosher fraud law, a butcher shop on Long Island brought suit alleging that New York State's legislation violated the Establishment Clause.[329] A federal district

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319 *See* Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995).
320 *Id.* at 1342 (Lay, J.).
321 *Id.* at 1346 (Luttig, J., concurring).
322 *Id.* at 1349-50 (Wilkins, J., concurring).
323 *Id.* at 1341 n.9 (Lay, J.).
324 *Id.* at 1342 n.9.
325 *Id.* at 1341 n.9.
326 *Id.* at 1348 (Luttig, J., concurring).
327 *Id.*
328 *Id.* at 1349 (Luttig, J., concurring).
329 Commack Self-Service Kosher Meats, Inc. v. Rubin, 106 F. Supp. 2d 445

court in New York found the legislation invalid under the effects and entanglement prongs of *Lemon* without discussing *Larson*.[330] A unanimous panel of the Second Circuit affirmed. Although the Court mentioned, at least six times,[331] that the legislation prefers the Orthodox view of kosher, it did not apply *Larson* because "the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State."[332] Instead, the Court conducted the standard *Lemon* analysis and found, as the district court had, that the legislation was invalid under the effects and entanglement prongs.[333]

Thus three final court decisions have found that substantially similar kosher fraud laws are invalid under the Establishment Clause. The New Jersey Supreme Court referenced *Larson*, but declined to apply it because of purported uncertainty over what the statutory language meant. Two of the three judges on the Fourth Circuit found *Larson* clearly applicable, while all three judges on the Second Circuit simply decided that applying *Larson* was unnecessary since the statute failed the *Lemon* test.

How do we make sense of these very different outcomes? One explanation is that there is a disagreement over how much weight should be afforded to a denominational preference that may be rare in practice, or otherwise trivial or formalistic. One view seems to favor substantive neutrality (ensuring that practically, in the vast majority of cases, there will be no preferences for members of different sects) while the second favors both substantive *and* formal neutrality (ensuring also that statutes do not contain explicit references to particular denominations).[334] Notably, the courts that

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(E.D.N.Y. 2000), *aff'd,* 294 F.3d 415 (2d Cir. 2002). *See generally* Jacobson, *supra* note 284.

330 *Commack*, 106 F. Supp. 2d at 459. The relevant statute defined kosher food as food prepared "in accordance with orthodox Hebrew religious requirements." *Id.* at 452.

331 Commack Self-Service Kosher Meats v. Weiss, 294 F.3d 415, 425-27, 430 (2d Cir. 2002).

332 *Id.* at 425 n.7.

333 *Id.* at 432.

334 *See generally* Laycock, *supra* note 40. *See* Rosenthal, *supra* note 17, at 965 ("Judge Luttig's theory of underinclusion of Conservative Jews approaches the vanishing point of significance. One should be especially reluctant to condemn an effective consumer protection standard on underinclusiveness grounds when there is no evidence that the alleged victim of the standard feels slighted by it in any way."). Berman, on the other hand, suggests that the disagreements are far more significant. *See* Berman, *supra* note 284, at 61-62. A third, but probably problematic view, is that the decision should be made according to what the disadvantaged group thinks of the preference. Under this argument, if Conservative Jews feel the preference is trivial, kosher laws should not be struck down. *See* Greenawalt, *supra* note 284, at 792-93.

found *Larson* applicable considered preferences between branches of Judaism to be the relevant grounds of contrast and were not concerned about disputes *within* Orthodox Judaism or between Judaism and other religions.

Another explanation is that lower courts may be reluctant to find a denominational preference because doing so substantially limits their options. As discussed previously,[335] *Lemon* has become an extraordinarily flexible set of "guideposts" with a long history from which very divergent positions may reasonably be drawn. In contrast, *Larson* substantially narrows a court's discretion if it finds a denominational preference. As one commentator states, "[b]ecause strict scrutiny is almost always fatal to government action, litigation usually centers on the issue of classification as denominational preference rather than the issue of whether an action can survive strict scrutiny."[336] *Lemon*'s malleable standards are likely viewed as a source of flexibility to some judges but as a source of confusion to others. The result is that while some judges may view *Larson* as a strong, straightforward method of uncovering breaches in the "wall" of separation between church and state, others may view it as a blunt instrument unsuited to the delicate task of discerning permissible from impermissible government involvement with religion.

The continued validity of the *Larson* test is clearly questioned by some judges. Since announcing the denominational preferences test, the Supreme Court's language and action has created a doctrinal mystery about when the test should be applied.[337] Many lower courts will likely continue to be hesitant about applying *Larson* until the Supreme Court provides a strong and clear indication of exactly when the test is applicable, and consistently applies it in its own cases.

The final and perhaps most likely reason for the inconsistent application of *Larson* is that judges are simply much more familiar with the *Lemon* Establishment Clause test. Because *Lemon* allows courts to reach the exact same result as *Larson*,[338] judges may understandably deem it unwise to apply the more questionable and untested doctrine.

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335 *See supra* Section V.F.
336 Masoudi, *supra* note 284, at 675.
337 *See supra* note 17.
338 *See supra* Section V.F.

Conclusion

Almost sixty years ago, in the first Supreme Court case applying the Establishment Clause to the states, Justice Jackson noted that "[t]his policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints."[339] Jackson's dictum remains true today in the United States, as battles over school vouchers, faith-based social programs, and government sponsorship of religious symbols demonstrates. The phenomena is no less pervasive in disputes over the proper application of the *Larson* denominational preferences test—many small religious groups who were pleased to see the doctrine used to prevent government endorsement of particular mainstream religions were probably dismayed to see it also used to prevent sect-specific "accommodation" of minority religions.

The principle embodied in the *Larson* test is furthered by several of the Court's other doctrines, including the *Lemon* test, strict scrutiny for non-neutral laws under the Free Exercise Clause, and strict scrutiny for discrimination on the basis of religion under the Equal Protection Clause. Perhaps *Larson*'s greatest virtue is the opportunity for lower court judges to escape the quagmire of the *Lemon* test when deciding Establishment Clause cases that have an element of denominational preference; but, as discussed, they would probably reach the same result under either analysis.

The idea that denominational preferences are necessarily more problematic than laws preferring religion over nonreligion is an idea rooted in history rather than logic. The Supreme Court attempted to give force to this historical presumption by announcing the *Larson* test; whether the Court's attempt succeeded is still difficult to determine. Several lower courts have relied on *Larson* to invalidate legislation, but several others have ignored it entirely. The Court's own precedents leave the impression that *Larson* is only a peripheral part of modern Establishment Clause doctrine.

In many ways this is a surprising result. Considering the fundamental disagreement between liberals and conservatives on the Court regarding the proper relation between religion and government, it would be easy to assume that the one area of agreement they share—that denominational preferences are forbidden—would be strongly expressed and clearly articulated. Whether the Court will ever give this clarity to *Larson* is really anyone's guess,

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[339] Everson v. Bd. of Educ., 330 U.S. 1, 27 (1947) (Jackson, J., dissenting).

but considering that it has been over twenty years since the *Larson* doctrine was announced, the Court clearly does not see it as a high priority.

When all is said and done, is the *Larson* denominational preferences test of any real value? Does it actually protect unpopular denominations against discrimination? Right now the only credible answer to these questions is not a very satisfactory one: probably not, but maybe.