CHAPTER II

Introduction to Establishment

Introduction. The First Amendment to the United States Constitution states that Congress shall ''make no law respecting an establishment of religion or prohibiting the free exercise thereof.'' This chapter introduces the Establishment Clause; later chapters examine establishment case law in more detail. The Supreme Court has not developed a coherent Establishment Clause jurisprudence; instead individual justices have developed different tests to determine when an establishment of religion occurs. Part A explores cases in which the Court explains why a ''fusion of governmental and religious functions'' constitutes a core violation of the Establishment Clause.

Part B introduces the controversial three-part *Lemon* test, taken from the 1971 opinion Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), which identifies how a statute may survive Establishment Clause scrutiny:

> 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.

Although Justice Antonin Scalia and other members of the Court have repeatedly called for *Lemon*'s overruling, the Court continues to rely on the three prongs of this test—in brief, secular purpose, primary effect and excessive entanglement—to decide the constitutionality of government actions that involve religion. Over the years, however, some Court opinions have modified the *Lemon* test. In particular, Justice Sandra Day O'Connor combined the prongs of the *Lemon* test to develop an *endorsement* test that holds that the government violates the Establishment Clause whenever it endorses religion. In contrast, Justice Anthony Kennedy argued that the government violates the Establishment Clause whenever it *coerces* religious belief or practice. Part B includes the *Lemon, endorsement* and *coercion* tests. It then considers opinions from lower courts that struggle to apply the *Lemon* formula while remaining faithful to the Court's newer decisions.

As we saw in Chapter I, many of the Supreme Court's free exercise cases have debated the meaning of the word ''religion'' in the First Amendment; in contrast, in the Establishment Clause cases, the Court's focus has been on the quality and quantity of church-state interaction that is allowed or prohibited by the First Amendment. Part C explores the implications of a Constitution that has two religion clauses. It asks what the constitutional baseline of the religion clauses is by focusing on whether the religion clauses require a secular state. You should continue to consider

this theoretical question about the interaction of the two clauses in future chapters whose cases raise both free exercise and establishment concerns.

A. A FUSION OF GOVERNMENTAL AND RELIGIOUS FUNCTIONS

According to the following opinion, the religion clauses serve two purposes: "to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems." As you read the *Larkin* case, ask yourself why there was enough "fusion" of church and state to violate the Establishment Clause. Did the State of Massachusetts interfere with the practice of religion? Did the State of Massachusetts establish the Armenian Catholic Church?

Larkin v. Grendel's Den, Inc.

Supreme Court of the United States, 1982.
459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297.

■ CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a five hundred foot radius of the church or school, violates the Establishment Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.

I

A

Appellee [Grendel's Den] operates a restaurant located in the Harvard Square area of Cambridge, Mass. The Holy Cross Armenian Catholic Parish is located adjacent to the restaurant; the back walls of the two buildings are 10 feet apart. In 1977, appellee applied to the Cambridge License Commission for approval of an alcoholic beverages license for the restaurant.

Section 16C of Chapter 138 of the Massachusetts General Laws provides: "Premises ... located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto."[1]

1. Section 16C defines "church" as "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses." "School" is defined as "an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by [state law] to children of compulsory school age." Mass. G.L. ch. 138, § 16C.

Section 16C originally was enacted in 1954 as an absolute ban on liquor licenses within 500 feet of a church or school, 1954

Holy Cross Church objected to appellee's application, expressing concern over "having so many licenses *so* near." The License Commission voted to deny the application, citing only the objection of Holy Cross Church and noting that the church "is within 10 feet of the proposed location."[2] . . .

II

[The Court rejected appellants' argument that zoning laws like the Massachusetts statute are necessary to protect schools and churches from stores that sell liquor. The Court agreed that courts should usually defer to zoning decisions, but noted that § 16C was not an ordinary zoning law because it gave a veto to private, nongovernmental entities.]

B

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall," see *Reynolds* [ ], was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, [ ] but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies.

[Applying the *Lemon* test, the Court concluded that the statute had a secular purpose, to protect schools and churches from liquor sellers, and that it had a primary and principal effect of advancing religion.]

Turning to the third phase of the inquiry called for by *Lemon v. Kurtzman*, we see that we have not previously had occasion to consider the entanglement implications of a statute vesting significant governmental authority in churches. This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[the] objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." [In *Lemon*, we stated:]

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government*. The Constitution decrees that religion must be a private matter for the individual, the family, and the

Mass.Acts, ch. 569, § 1. A 1968 amendment modified the absolute prohibition, permitting licenses within the 500–foot radius "if the governing body of such church assents in writing," 1968 Mass.Acts, ch. 435. In 1970, the statute was amended to its present form, 1970 Mass.Acts, ch. 192.

2. In 1979, there were 26 liquor licensees in Harvard Square and within a 500–foot radius of Holy Cross Church; 25 of these were in existence at the time Holy Cross Church objected to appellee's application. [ ]

institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Our contemporary views do no more than reflect views approved by the Court more than a century ago:

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730, 20 L.Ed. 666 (1872).

As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions," [ ].[10] The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines," [*Lemon*]. Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

■ JUSTICE REHNQUIST, dissenting.

Dissenting opinions in previous cases have commented that "great" cases, like "hard" cases, make bad law. [ ] Today's opinion suggests that a third class of cases—silly cases—also make bad law. The aim of this effort is to prove that a quite sensible Massachusetts liquor zoning law is apparently some sort of sinister religious attack on secular government reminiscent of St. Bartholemew's Night. Being unpersuaded, I dissent.

In its original form, § 16C imposed a flat ban on the grant of an alcoholic beverages license to any establishment located within 500 feet of a church or a school. [ ] . . . Over time, the legislature found that it could meet its goal of protecting people engaged in religious activities from liquor-related disruption with a less absolute prohibition. Rather than set out elaborate formulae or require an administrative agency to make findings of fact, the legislature settled on the simple expedient of asking churches to object if a proposed liquor outlet would disturb them. Thus, under the present version of § 16C, a liquor outlet within 500 feet of a church or school can be licensed unless the affected institution objects. The flat ban, which the majority concedes is valid, is more protective of churches and more restrictive of liquor sales than the present § 16C.

10. At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control. [ ] In 18th-century England, such a union of civil and ecclesiastical power was reflected in legal arrangements granting church officials substantial control over various occupations, including the liquor trade.

The evolving treatment of the grant of liquor licenses to outlets located within 500 feet of a church or a school seems to me to be the sort of legislative refinement that we should encourage, not forbid in the name of the First Amendment. If a particular church or a particular school located within the 500–foot radius chooses not to object, the State has quite sensibly concluded that there is no reason to prohibit the issuance of the license. Nothing in the Court's opinion persuades me why the more rigid prohibition would be constitutional, but the more flexible not.... The state does not, in my opinion, ''advance'' religion by making provision for those who wish to engage in religious activities, as well as those who wish to engage in educational activities, to be unmolested by activities at a neighboring bar or tavern that have historically been thought incompatible....

Notes and Questions

1. Is the fusion of governmental and religious functions unconstitutional because it harms the church? Because it harms the state? Or for both reasons?

2. Do you think it would be appropriate for a church to provide input into the decision about liquor licenses but not to exercise veto power? Is it constitutional for a state to include a church on a list of entities whose advice must be sought before a license is granted? If the list includes schools, libraries, hospitals, playgrounds and parks, is it constitutional to include a church along with those other groups? Is it constitutional to exclude churches from the list? See Jacob J. Waldman, That's What I Like About Utah: *Larkin v. Grendel's Den* and the Alcoholic Beverage Control Act, 37 Colum. J.L. & Soc. Probs. 239, 273 (2003).

3. An 1897 New York law prohibits bars within 200 feet of a school or religious institution. Recently, after a new owner purchased and renovated a bar, some neighbors discovered the old law on the Internet and decided to challenge the bar's owners under the statute. The bars are within 200 feet of a mosque that is difficult to see. The gold lettering on the mosque's front door does not say mosque, and a representative of the mosque said, ''We don't have a dispute with any of the neighbors. We are here to support them. Our main thing is to be neutral.... We don't want anyone to lose their jobs.'' See David Lombino, N.Y. State Tries To Close TriBeCa Bars For Being Too Close to a Mosque, N.Y. Sun, Mar. 7, 2006, at 1. Is the New York law constitutional under *Grendel's Den*? Why or why not?

4. Do you think that § 16C was a wise accommodation of religion that should have been permitted by the Court, as Justice Rehnquist suggests?

5. Would the Founders of our nation be surprised to discover that Holy Cross Armenian Catholic Church violated the Establishment Clause by its veto of the liquor license?

6. As background to the following case, *Kiryas Joel*, note that in 1985 the Supreme Court decided that a program giving federal funds to New

York City to pay the salaries of public school teachers who taught remedial courses in or near religious schools violated the Establishment Clause. The Court concluded that this arrangement provided excessive entanglement between church and state. See Aguilar v. Felton, 473 U.S. 402 (1985). *Aguilar* was later overruled by Agostini v. Felton, 521 U.S. 203 (1997), after the Court decided that *Aguilar* was too hostile to religion.

Board of Education of Kiryas Joel Village School District v. Grumet

Supreme Court of the United States, 1994.
512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546.

■ JUSTICE SOUTER delivered the opinion of the Court.

The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. The village fell within the Monroe–Woodbury Central School District until a special state statute passed in 1989 carved out a separate district, following village lines, to serve this distinctive population. 1989 N.Y. Laws, ch. 748. The question is whether the Act creating the separate school district violates the Establishment Clause of the First Amendment, binding on the States through the Fourteenth Amendment. Because this unusual Act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment.

I

The Satmar Hasidic sect takes its name from the town near the Hungarian and Romanian border where, in the early years of this century, Grand Rebbe Joel Teitelbaum molded the group into a distinct community. After World War II and the destruction of much of European Jewry, the Grand Rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York. Then, 20 years ago, the Satmars purchased an approved but undeveloped subdivision in the town of Monroe and began assembling the community that has since become the village of Kiryas Joel. When a zoning dispute arose in the course of settlement, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties. [ ] Neighbors who did not wish to secede with the Satmars objected strenuously, and after arduous negotiations the proposed boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today. Rabbi Aaron Teitelbaum, eldest son of the current Grand Rebbe, serves as the village rov (chief rabbi) and rosh yeshivah (chief authority in the parochial schools).

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid

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

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. [ ] Starting in 1984 the Monroe–Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to our decisions in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe–Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different," . . .

By 1989, only one child from Kiryas Joel was attending Monroe–Woodbury's public schools; the village's other handicapped children received privately funded special services or went without. It was then that the New York Legislature passed the statute at issue in this litigation, which provided that the village of Kiryas Joel "is constituted a separate school district, . . . and shall have and enjoy all the powers and duties of a union free school district." . . .

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

II

Larkin presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America, [ ], and a violation of "the core rationale underlying the Establishment Clause." [ ] The Establishment Clause problem presented by Chapter 748 is more subtle, but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State, [ ], and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group. What makes this litigation different from *Larkin* is the delegation here of civic power to the "qualified voters of the village of Kiryas Joel," 1989 N.Y. Laws, ch. 748, as distinct from a religious leader such as the village rov, or an institution of religious government like the formally constituted parish council in *Larkin*. In light of the circumstances of these cases, however, this distinction turns out to lack constitutional significance.

It is, first, not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group's leaders or officers. . . . In the circumstances of these cases, the difference between thus vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance. . . . That individuals who happen to be religious may hold public office does not mean that a State may deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity. If New York were to delegate civic authority to "the Grand Rebbe," *Larkin* would obviously require invalidation (even though under *McDaniel* the Grand Rebbe may run for, and serve on, his local school board), and the same is true if New York delegates political authority by reference to religious belief. Where "fusion" is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.

Of course, Chapter 748 delegates power not by express reference to the religious belief of the Satmar community, but to residents of the "territory of the village of Kiryas Joel." 1989 N.Y. Laws, ch. 748. Thus the second (and arguably more important) distinction between these cases and *Larkin* is the identification here of the group to exercise civil authority in terms not expressly religious. But our analysis does not end with the text of the statute at issue, [ ], and the context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly. We find this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative Act.

It is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it adopted Chapter 748....

Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of the children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause, as we explain in some detail further on. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of governmental and religious functions." *Larkin v. Grendel's Den*, 459 U.S. at 126....

C

... [W]e do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens.... Just as the Court in *Larkin* observed that the State's interest in protecting religious meeting places could be "readily accomplished by other means," 459 U.S. at 124, there are several alternatives here for providing bilingual and bicultural special education to Satmar children. Such services can perfectly well be offered to village children through the Monroe–Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe–Woodbury district. Or if the educationally appropriate offering by Monroe–Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars. [ ] ...

III

Justice Cardozo once cast the dissenter as "the gladiator making a last stand against the lions." B. Cardozo, Law and Literature 34 (1931). Justice SCALIA's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining. We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion. [ ] Unlike the States of Utah and New Mexico (which were laid out according to traditional political methodologies taking account of lines of latitude and longitude and topographical features), [ ], the reference line chosen for the Kiryas Joel Village School District was one purposely drawn to separate Satmars from non-Satmars.

[A concurrence by JUSTICE BLACKMUN is omitted.]

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

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

Instead, the State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith. It is telling, in this regard, that two-thirds of the school's full-time students are Hasidic handicapped children from *outside* the village; the Kiryas Joel school thus serves a population far wider than the village—one defined less by geography than by religion.

Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, a "release time" program for public school students involving no public premises or funds, or a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion. [ ]

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

. . .

III

. . . I think this law, rather than being a general accommodation, singles out a particular religious group for favorable treatment. The Court's analysis of the history of this law and of the surrounding statutory scheme persuades me of this. . . .

Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a

state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group. I do not think the Court's opinion holds the contrary.

I also think there is one other accommodation that would be entirely permissible: the 1984 scheme, which was discontinued because of our decision in *Aguilar*. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government-funded special education. [ ] If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

I thought this to be true in *Aguilar*, [ ], and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. [ ]. It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, toward religion. . . .

■ JUSTICE KENNEDY, concurring in the judgment.

. . .

II

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause," *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992), and in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. . . . There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause. . . .

As the plurality indicates, the Establishment Clause does not invalidate a town or a State "whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists." People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose

between assimilating to mainstream American culture or losing their political rights. There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith. In creating the Kiryas Joel Village School District, New York crossed that line, and so we must hold the district invalid.

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

The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an "establishment" of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed "to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters," [ ]—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.

II

For his thesis that New York has unconstitutionally conferred governmental authority upon the Satmar sect, Justice Souter relies extensively, and virtually exclusively, upon *Larkin.* Justice SOUTER believes that the present litigation "resembles" *Grendel's Den* because that case "teaches that a State may not delegate its civic authority *to a group chosen according to a religious criterion*," [ ] (emphasis added). That misdescribes both what that case taught (which is that a State may not delegate its civil authority *to a church*), and what these cases involve (which is a group chosen according to cultural characteristics). The statute at issue there gave churches veto power over the State's authority to grant a liquor license to establishments in the vicinity of the church. The Court had little difficulty finding the statute unconstitutional....

Justice SOUTER concedes that *Grendel's Den* "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." [ ] The uniqueness of the case stemmed from the grant of governmental power directly to a religious institution, and the Court's opinion focused on that fact, remarking that the transfer of authority was to "churches" (10 times), the "governing body of churches" (twice), "religious institutions" (twice), and "religious

bodies'' (once). Astonishingly, however, Justice Souter dismisses the difference between a transfer of government power to citizens who share a common religion as opposed to ''the officers of its sectarian organization''—the critical factor that made *Grendel's Den* unique and ''rare''—as being ''one of form, not substance.'' [ ]

Justice Souter's steamrolling of the difference between civil authority held by a church and civil authority held by members of a church is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional, and that much more of it than merely the Kiryas Joel school district is unconstitutional today. The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities. [ ] It is preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect. And if they were, surely Justice SOUTER cannot mean that the inclusion of one or two nonbelievers in the community would have been enough to eliminate the constitutional vice. If the conferral of governmental power upon a religious institution *as such* (rather than upon American citizens who belong to the religious institution) is not the test of *Grendel's Den* invalidity, there is no reason why giving power to a body that is overwhelmingly dominated by the members of one sect would not suffice to invoke the Establishment Clause. That might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union, and would undoubtedly make many units of local government unconstitutional today. . . .

III

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

Notes and Questions

1. Which opinion is most persuasive, the one written by Justice Souter, Stevens, O'Connor, Kennedy or Scalia? Why?

2. Why does Justice Souter conclude that the ''allocation of political power on a religious criterion'' is unconstitutional? Was the power in Kiryas Joel really allocated on a religious criterion, or was a cultural characteristic employed instead, as Justice Scalia suggests in his dissent? Is Justice Scalia correct that Justice Souter's theory of the Establishment

Clause allows a special district for American Indians and gypsies but not for the Satmar Hasidim?

3. What are the alternatives to the Kiryas Joel school district that Justice Souter identifies in his opinion? How do you assess their adequacy and their constitutionality?

4. Justice O'Connor has frequently argued for the accommodation of religion in other Establishment Clause cases. Why does she believe that this accommodation of Kiryas Joel is unconstitutional? Do you agree with Justice O'Connor that the government should be allowed to provide remedial education on-site at sectarian schools, the arrangement that was prohibited by *Aguilar*? Or should the Hasidim forfeit any claim to remedial education from the government when they enroll in private schools? We study permissible accommodations of religion under the Establishment Clause in Chapter V. For a discussion of how much the Hasidim should be accommodated, see Abner S. Greene, *Kiryas Joel* and Two Mistakes About Equality, 96 Colum. L. Rev. 1 (1996) and Ira C. Lupu, Uncovering the Village of Kiryas Joel, 96 Colum. L. Rev. 104 (1996).

5. How could the state teach other students to be tolerant of the Satmar customs without violating the Constitution? If the state implemented such a program, would this program in and of itself violate the Establishment Clause? We examine the meaning of tolerance in Chapter IX.

6. What is the difference between a religious gerrymander and the accommodation of religion?

7. Compare the Rehnquist dissent in *Larkin* to Justice Scalia's dissent in *Kiryas Joel*. Did the Court go too far in both cases in finding an Establishment Clause violation? Were the majority opinions hostile to religion?

8. After the Supreme Court decided *Kiryas Joel (Kiryas Joel I)*, the State of New York made several new attempts to accommodate the needs of the Hasidim; the New York Court of Appeals assessed their constitutionality in the following opinion.

Grumet v. Pataki

Court of Appeals of New York, 1999.
93 N.Y.2d 677, 720 N.E.2d 66, 697 N.Y.S.2d 846, cert. denied, Pataki v. Grumet, 528 U.S. 946, 120 S.Ct. 363, 145 L.Ed.2d 284.

■ SMITH, J.

I.

. . .

B. *KIRYAS JOEL II*

Four days after the Supreme Court's decision in *Kiryas Joel I*, the Legislature responded by passing chapter 241 of the Laws of 1994. Under

the new statute, a municipality located wholly within a single central or union free school district but whose boundaries were not coterminous with the boundaries of any preexisting school district could establish its own school district whenever the educational interests of the community required it. [ ] The statute set forth facially neutral criteria that a municipality could satisfy in order to establish a school district and delineated the process by which the new school district could be formed. The statute further defined the term ''municipality'' as ''a city, town or village in existence as of the effective date of this subdivision.''

This Court held chapter 241 of the Laws of 1994 unconstitutional for two reasons. [First, the law was not neutral because only Kiryas Joel reaped its benefits; second the act's primary effect was also to benefit Kiryas Joel, and therefore violated the second prong of the *Lemon* test.]

C. THE STATUTE UNDER REVIEW

Three months after the Court's determination in *Kiryas Joel II* that chapter 241 was unconstitutional, the Legislature enacted a third statute—chapter 390 of the Laws of 1997, or ''The Kiryas Joel School Bill''—which is before us on this appeal. Education Law § 1504 (3) delineates criteria which a municipality, ''situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district,'' may follow in order to establish its own school district. The statute prescribes that (i) the new school district equal at least 2,000 children and that it be no greater than 60% of the enrollment of the existing school district from which the school district will be organized, (ii) the newly formed district have an actual valuation per total wealth pupil unit at least equal to the State-wide average, and (iii) the enrollment of the existing school district from which the new district is formed equal at least 2,000 children, excluding the residents of the municipality....

II.

... Considering both the form and the effect of the statute now before us, we conclude that chapter 390 violates fundamental Establishment Clause neutrality principles. Although chapter 390 sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect (*Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S., *supra*, at 703, 114 S.Ct. 2481). Presently, chapter 390 potentially benefits only the Village of Kiryas Joel and one other of the State's 1,545 municipalities—the Town of Stony Point. In practical effect, therefore, the religious community of Kiryas Joel is not ''merely one in a series of communities'' eligible for equal treatment under chapter 390's special school district laws [*Kiryas Joel*]. That only two municipalities in all of New York State qualify under chapter 390 underscores the fact that groups finding themselves in a situation similar to that confronting the Satmar community will be unable to avail themselves of the statute's benefits. Indeed, because the statute's qualifying criteria are consciously drawn to benefit Kiryas Joel, other communities—both reli-

gious and secular—with similar educational needs will not have equal opportunity to create a publicly funded school district under chapter 390. Thus, the nonneutral effect of the statute is to secure for one religious community a unique and significant benefit—a "public school" where all the students adhere to the tenets of a particular religion—unavailable to other, similarly situated communities. In doing so, chapter 390 violates Establishment Clause principles by preferring one religion over others [ ].

Chapter 390 eliminated some of the fatal flaws of chapter 241—its unconstitutional predecessor—but the effect of the two statutes is virtually identical. Although only *one* municipality—Kiryas Joel—qualified under the prior statute, it does not follow that chapter 390—by allowing one additional municipality to qualify under the statute—is a general, religion-neutral law. Indeed, while it is true that chapter 390 eliminated the two qualification criteria of chapter 241 that were devoid of any legitimate purpose and plainly intended to limit eligibility under the statute to Kiryas Joel, the new statute fails to eradicate the earlier statute's overriding flaw. The eligibility requirements under chapter 390 are still limited in such a way that permits the statute's benefits to flow almost exclusively to the religious sect it was plainly designed to aid. Thus, like its predecessor, chapter 390 is not a neutral law of general application. . . .

V.

We conclude with an observation that we hope has not been lost on parties who have been locked in litigation for more than a decade. The genesis of all this legislation and litigation—the seeming insurmountability of *Aguilar v. Felton*—no longer exists. It is now possible, compatibly with the Federal Constitution, to do what the parties wanted to do before *Aguilar* stopped them. Given this new opportunity, we strongly suggest that the parties make every effort to reach an accord that will benefit the children, and themselves. This is far preferable to the costly and inevitable prospect of further legal strife.

Notes and Questions

1. Were the New York legislators acting unconstitutionally when they wrote chapters 241 and 390?

2. Should the Court of Appeals have deferred to the state legislators? See Grumet v. Pataki, 697 N.Y.S.2d 846, 857, 720 N.E.2d 66 (1999) (Bellacosa, J., dissenting).

3. *Brethren School*. Compare Kiryas Joel with Stark v. Independent School District, 123 F.3d 1068 (8th Cir. 1997), a case about a rural school district in Minnesota, which had two public schools, the Wabasso and Vesta schools, until Vesta closed and the children had to travel to Wabasso. Members of the Brethren, an Irish religious group, then bought the Vesta building and leased it back to the state to form a new Vesta public school. The Brethren oppose the use of technology in the classroom, and were allowed to opt out of technology use while they attended Wabasso. Vesta

classes do not use computers, audios, videos or films. Vesta is open to all students, but only Brethren schoolchildren have attended it. The Eighth Circuit, by a 2–1 vote, upheld the district, with the judges disagreeing whether the case was similar to *Kiryas Joel*. Should the Vesta school district have been upheld? See Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol. 119 (2002).

4. *Churches in Public Schools.* How do you assess the constitutionality of holding church in a public high school? Bushwick High School, a public school in Brooklyn, New York, is used on Sunday mornings for worship services by Christ Tabernacle Church. Some 800 worshippers use the auditorium, and bible study and other classes are held in the classrooms. The churches pay rent and reimburse the school for custodial expenses. According to the *New York Times,* "One evangelical church, Mosaic Manhattan, which holds weekly services in a school in Battery Park City, ... donated about $5,000 to help sponsor a back-to-school party organized by the P.T.A. on a nearby pier.... The P.T.A. agreed to let the church set up a table. The church displayed fliers and gave out balloons with the church logo, which includes an image of a cross." See Benjamin Weiser & Susan Saulny, On Sundays, Hymn Books Replace Textbooks in City Schools, N.Y. Times, Feb. 6, 2005, at 25. For the ruling that made this situation possible, see Bronx Household of Faith v. Board of Educ. of City of New York, 226 F.Supp.2d 401 (S.D.N.Y. 2002), aff'd by Bronx Household of Faith v. Bd. of Educ. of City of New York, 331 F.3d 342 (2d Cir. 2003) (ruling that schools' policy of excluding churches from the rental market violated the First Amendment).

5. *Police in a Religious University.* Chapter 74A of the General Statutes of North Carolina authorized the Attorney General to commission employees of educational institutions as police officers. These campus police then possessed "all the powers of municipal and county police," including the power to make felony and misdemeanor arrests both on campus and on public roads passing through or adjoining the campus. The officers' authority could also be extended by agreement between the school's board of trustees and the governing body of the county or municipality.

Campbell University is a Baptist University affiliated with the Baptist State Convention of North Carolina. The university operates a police force, which includes a captain and eight police officers who were commissioned by the state. Campbell's Board of Trustees and the governing board of the local municipality and county agreed to extend the university's police power throughout the municipality and county.

Campus Police Officer Reed Jones saw student Alan Howard Pendleton weaving back and forth across lanes of traffic and arrested him for driving while impaired. After Pendleton was convicted, he argued that Chapter 74A was unconstitutional because it "authorized a religious institution to exercise the police power of the State."

The North Carolina Supreme Court agreed with Pendleton, concluding, under *Larkin*, that "[a] state may not delegate an important discretionary

governmental power [the police power] to a religious institution or share such power with a religious institution.'' See State v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (1994), cert. denied, 515 U.S. 1121 (1995).

Judge Whichard dissented that there was no fusion of religious and governmental functions because Campbell is ''neither a church nor an 'institution of religious government,' ... but an institute of higher education affiliated with the North Carolina Baptist Convention.'' Id. at 282. Hence the university's board of trustees was not a religious governing body. Moreover, he argued that in *Larkin* the church was using political power for religious ends, whereas in North Carolina the police force swore to uphold the criminal laws of the state. ''The police power conferred was quintessentially secular, neutral and nonideological.'' Id. at 284. Do you agree with the majority or the dissent?

6. *Civil Authority Held by Members of a Church.* Recall what Justice Scalia wrote in dissent in *Kiryas Joel* about Justice Souter's majority opinion:

> Justice Souter's steamrolling of the difference between civil authority held by a church and civil authority held by members of a church is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional.... The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities. That might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union, and would undoubtedly make many units of local government unconstitutional today.

In Oregon v. City of Rajneeshpuram, 598 F.Supp. 1208 (D. Or. 1984), the State of Oregon challenged the constitutionality of the City of Rajneeshpuram, arguing that it violated the Establishment Clause and so was not entitled to public services. Followers of the Bhagwan Shree Rajneesh, an ''enlightened religious master,'' started the Rajneesh Foundation International (RFI) to promote his teachings. RFI and its associated entities own all the real property within the City of Rajneeshpuram except the county road. The group's goal is ''to be a religious community where life is, in every respect, guided by the religious teachings of Bhagwan Shree Rajneesh and whose members live a communal life with a common treasury.'' Everyone who lives in Rajneeshpuram is either a member or guest of the Bhagwan's community, and all visitors are required to get visitors' passes before they can enter the city. The district court rejected the city's argument ''that many cities in the United States were established by adherents of one particular religious faith, such as the German Benedictines of Mount Angel, Oregon,'' and instead concluded ''that the exercise of control over the City of Rajneeshpuram by these religious organizations is different enough from the control exercised by the religious leaders in a city of private landowners of one religion as to allow a constitutional distinction

to be made between the two situations.'' Id. at 1216. Do you agree with the court's decision?

Domino's Pizza Founder Thomas Monaghan wanted to build the town of Ave Maria, based on Catholic principles, in southwest Florida, near Naples. The town's drugstores would not sell birth control, no pornography would be allowed, and cable TV would not have X-rated channels. Florida law does not require pharmacies to sell contraceptives. Florida Governor Jeb Bush, a convert to Catholicism, praised the idea. See Brian Skoloff, The Town Plan Putting Faith in a Way of Life, The Daily Telegraph Mar. 6, 2006, at 22. What would Monaghan and Bush have to do to ensure that the City of Ave Maria did not violate the Establishment Clause?

7. As you read the following description of kosher foods, consider whether laws that regulate kosher foods impermissibly fuse religious rules and government authority.

The Establishment Clause's Effect on Kosher Food Laws: Will the Jewish Meal Soon Become Harder to Swallow in Georgia?

Aharon Junkins Hill, Esq.
38 Georgia Law Review 1067, 1070–73 (2004).

II. A TASTE OF KOSHER FOODS

A. COMPLEXITIES OF KASHRUT

In order to attain a thorough understanding of the constitutional problems caused by the kosher fraud statutes, it is crucial to have at least a rudimentary understanding of *kashrut*, or ''keeping kosher.'' The term, *kashrut*, generally refers to the complex system of rules regulating the daily existence of the Jew. *Kashrut* principles regulate every aspect of the Jewish meal, ''from raising animals to setting the table and everything in between.''

Kashrut principles originated in the Old Testament texts of Genesis, Leviticus, and Deuteronomy, which are found in the Jewish Torah, and have been expanded by the Talmud, a sacred documentation of ongoing rabbinical debate and commentary. Seven principles embody the basic laws of *kashrut*. First, all things that grow, including fruits, vegetables, flowers, nuts, roots, etc., are kosher. Second, only meat from animals that have split hooves and chew their cud is kosher. Thus, while cows, sheep, moose, deer and yak are kosher, pigs, lions, camels and horses are not. Even so, the meat is only kosher if animals are slaughtered and prepared in accordance with *kashrut* principles. Third, fish with fins and scales, such as trout, salmon, and tuna, are permitted; however, impermissible seafood include eel, whale, and clams. Fourth, acceptable fowl include chicken, turkey, ducks, and geese, but again they must be slaughtered and prepared in accordance with principles of *kashrut*. Birds of prey, such as eagles, herons and owls, for example, are not kosher. Fifth, it is not permissible to

consume milk with fowl or meat. This rule comes from rabbis' construal of a verse repeated three times in the Torah stating, ''You shall not boil a kid in its mother's milk.'' Sixth, there is a split of opinion between Conservative and Orthodox Jews on the issue of wine; Conservative Jews believe that all wine is permitted, while Orthodox Jews require that a rabbi must supervise wine production. Lastly, during Passover, no leavening is allowed. In addition to the seven basic rules, there are also strict rules governing the kosher soaking and salting of meat after slaughter (kashering), kosher preparation of food, kosher use of plates and utensils, and the conversion of a non-kosher kitchen into a kosher one (also called kashering).

However, despite the ostensibly solid foundation for unambiguous eating guidelines, both inconsistent rabbinical interpretation of *kashrut* principles, as well as Jewish assimilation into American society, have effectively created diversity in the definition of kosher among Jews. One Jewish scholar has commented:

> ''No two people keep kosher the same way,'' one friend told me. To some, keeping kosher means abstaining from the forbidden animals specifically mentioned in the Bible, like pig and lobster. To others, it means buying only kosher meats. For some, it means keeping separate dishes: one set for milk, one for meat.

Distinct interpretive riffs have formed between Orthodox Judaism and the two other more liberal branches of Judaism, Conservative and Reform.... The differing interpretations of kosher within and among the three branches of Judaism may be explained by their respective placements on the Jewish continuum. Reform Judaism, the most liberal of the three branches, neither requires its adherents to keep kosher at mealtime, nor requires them to maintain kosher homes. Though Conservative Judaism, the more moderate branch, requires adherence to kosher standards, in reality only fifteen percent of Conservative Jews strictly comply with traditional kosher requirements in the home. Orthodox Jews, on the other hand, are known as the most strict of the three branches in terms of keeping kosher. Certainly the differing emphases placed on kosher adherence by Jews within the three branches have influenced how kosher requirements are interpreted, and have also affected the vigilance with which kosher is observed.

Ironically, with such varying interpretation of and adherence to kosher standards, most kosher fraud statutes merely cite to Orthodox Hebrew koshering standards, as the authority to be used for determining violations. Secular law's utilization of Orthodox standards to determine kosher fraud violations has initiated disputes as to whether it is constitutional for Orthodox kosher standards to be employed and enforced by secular law.

Notes and Questions

1. Given the religious nature of the definition of kosher, can kosher food laws be secular?

2. If Reform, Conservative and Orthodox Judaism disagree over the meaning of kosher, can the state pass laws about kosher foods without establishing one version of Judaism as law?

3. Do you think the government should have the constitutional power and responsibility to enforce kosher fraud laws in order to protect citizens from all types of consumer fraud? See Jared Jacobson, *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, 492 (2001) (arguing that the government should protect American citizens from being deceived).

4. As you read the following opinion, consider what kosher laws might survive an Establishment Clause challenge.

Barghout v. Bureau of Kosher Meat and Food Control

United States Court of Appeals, Fourth Circuit, 1995.
66 F.3d 1337.

■ LAY, SENIOR CIRCUIT JUDGE:

The question before us is whether a Baltimore municipal ordinance prohibiting the fraudulent sale of kosher food violates the Establishment Clause of the First Amendment.

BACKGROUND

The Baltimore ordinance at issue, Baltimore, Md., City Code art. 19, §§ 49–52 (1983), makes it a misdemeanor to, "with intent to defraud," offer for sale any food labeled kosher, or indicating compliance "with the orthodox Hebrew religious rules and requirements and/or dietary laws," when the food does not in fact comply with those laws. *Id.* at § 50. The ordinance further states as follows:

> In order to comply with the provisions of this section, persons dealing with either kosher meat, meat preparations, food and/or food products only, or persons dealing with both kosher and non-kosher meat, meat preparations, food and/or food products *must adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws;* otherwise he shall be in violation of this section.

Id. (emphasis added). To aid in its enforcement, the ordinance creates an unpaid Bureau of Kosher Meat and Food Control. *Id.* at § 49(a). Members of the six-person Bureau are appointed by the Mayor and must include three duly ordained Orthodox Rabbis and three laymen selected from a list submitted by "The Council of Orthodox Rabbis of Baltimore" and "The Orthodox Jewish Council of Baltimore." *Id.* Duties of the Bureau include inspecting slaughter houses, butcher shops, and other establishments offering kosher food for sale "with the view and purpose of administering and enforcing the laws and rules relating to the possession, sale, manufacture, preparation and exposure for sale of kosher meats, meat preparations, food and food products in accordance with the orthodox Hebrew religious rules

and requirements and dietary laws. . . .'' *Id.* at § 49(e). In addition, the Bureau is to report violators to the Mayor or other law enforcement authorities. *Id.* at § 49(h). The Bureau is authorized to employ a paid inspector to aid in carrying out its duties. *Id.* at § 49(g).

[George Barghout sold both kosher and non-kosher foods at Yogurt Plus. An inspection by the Bureau's paid inspector, Rabbi Mayer Kurefeld, revealed that Barghout placed kosher hot dogs on a rotisserie next to non-kosher hot dogs, making them non-kosher. Barghout was convicted and fined $400 plus $100 in court costs and appealed his conviction.]

ANALYSIS

At least twenty-one states have adopted laws prohibiting the mislabeling of kosher food. Only one state [New Jersey] has struck down its kosher food law as in violation of the United States Constitution. . . .

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), the Court struck down a Massachusetts zoning statute that permitted a church to veto the issuance of a liquor license to any establishment located within a 500–foot radius of the church. In holding the law violated the Establishment Clause, the Court found the statute had the primary effect of advancing religion because ''[t]he churches' power under the statute [was] standardless'' and ''the mere appearance of a joint exercise of legislative authority by Church and State provides significant benefit to religion in the minds of some by reason of the power conferred.'' [ ] The Court also concluded the statute created excessive entanglement of religious and secular affairs by ''enmesh[ing] churches in the exercise of substantial governmental powers. . . .'' [ ] Using language that clearly illustrates the main defect in the Baltimore ordinance, the Court emphasized that ''[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government.*'' [ ]

The Court's recent decision in *Board of Education v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), reaffirms and extends *Larkin* by making clear that a legislature not only may not expressly delegate governmental functions to the governing body of a church, but also may not otherwise ''identif[y] . . . recipients of governmental authority by reference to doctrinal adherence.'' [ ] In *Grumet*, the New York legislature enacted a special statute constituting the Village of Kiryas Joel, which is populated entirely by members of the Satmar Hasidim sect of Judaism, as an independent school district. The Court held as follows:

> [T]he statute creating the Kiryas Joel Village School District, departs from [the] constitutional command [of the Establishment Clause] by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally. [ ]

Relying on *Larkin*, the Court found that although the statute did not expressly delegate governmental authority based on religious affiliation, because the village boundaries were drawn "so as to exclude all but Satmars, and . . . the New York Legislature was well aware that the village remained exclusively Satmar" when it enacted the legislation, the statute effectively vested governmental authority based on religious criterion. [ ] The Baltimore ordinance at issue here *explicitly* delegates governmental authority to individuals based on their membership in a specific sect of a specific religion, i.e. Orthodox Judaism. The teaching of both *Larkin* and *Grumet* is that the Establishment Clause forbids the "fusion of governmental and religious functions," and that "a state may not delegate its civic authority to a group chosen according to a religious criterion." [ ] There should be little doubt that section 49 of the Baltimore ordinance runs afoul of these principles.[11]

Moreover, the ordinance cannot be saved, as the City urges, by severing portions of section 49, or all of section 49, from the remainder of the ordinance. Sections 49 and 50 are integrally related in that adoption of the Orthodox rules and regulations as the standard for compliance in section 50 makes city officials dependent upon members of that faith to interpret and apply the standard. Simply put, even if membership in the Bureau were not restricted to adherents of Orthodox Judaism, or even if there were no Bureau at all, section 50's adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard. . . .

For the foregoing reasons, the decision of the district court is affirmed.[15]

11. The *Larkin* and *Grumet* courts did not necessarily base those decisions solely on the excessive entanglement prong of the *Lemon* test. In *Larkin*, 459 U.S. at 125–26, 103 S.Ct. at 511–12, the Court relied on both the second and third prongs of the *Lemon* test in finding the statute unconstitutional. The *Grumet* Court did not expressly rely on the *Lemon* test at all. Nevertheless, until the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause. [ ] In our view, the constitutional infirmities of the legislation at issue in both *Larkin* and *Grumet*, as well as in this case, are addressed most directly by the third prong of the *Lemon* test.

15. We note that our decision does not render fraudulent vendors of kosher food immune to prosecution. The City can prevent fraud in the sale of kosher food in a less restrictive and neutral manner by simply requiring that any vendor engaged in the sale of kosher food state the basis on which the food is labeled kosher. Barghout points out in his brief to this Court that there already exist private supervisory agencies that certify food as kosher. For example, a "U" symbol is often used on kosher food to denote the approval of the Union of Orthodox Jewish Congregations of America, and the "K" symbol denotes the approval of the Organized Kashrut Laboratories. Anyone offering for sale food marked with one of these symbols when the product had not in fact been approved by the relevant authority could be convicted of consumer fraud without any intrusion into the internal affairs of the Jewish faith, and without requiring the involvement of adherents of Orthodox Judaism in interpreting a city ordinance. Moreover, if an individual vendor did not wish to be certified by one of these organizations, the vendor could simply post a notice detailing how the food is prepared or under what rabbinic authority. The consumer would then be in a position to decide if the manner of food preparation conforms to his or her own standards, whether that consumer is seeking out kosher food for religious or health-related reasons.

■ JUDGE LUTTIG, concurring in the judgment:

I agree with Judge Lay that the Baltimore City ordinance at issue in this case is unconstitutional. However, I believe the ordinance is invalid because it facially favors one sect of a faith over other sects of that faith, in violation of the most fundamental tenet of the Establishment Clause that the imprimatur of the state shall not directly or indirectly be placed upon one religious faith over another or upon one denomination of a faith over another.

Notes and Questions

1. Does Judge Luttig propose a standard different from *Larkin* and *Kiryas Joel* when he writes that the most fundamental tenet of the Establishment Clause is that the "imprimatur of the state shall not directly or indirectly be placed upon one religious faith over another or upon one denomination of a faith over another"?

2. How do you assess the wisdom and the constitutionality of the alternatives to kosher food laws that the court identifies in footnote 15?

3. *Larkin and Lemon*. Recall that the *Larkin* standard developed as an attempt to flesh out the meaning of the third part of the *Lemon* test, the excessive entanglement prong. If *Lemon* were discredited or overruled, could the Court still maintain the anti-fusion principle as a valid interpretation of the First Amendment?

4. *Sale of City Property to a Church.* The Main Street Plaza goes through an area of Salt Lake City that contains important buildings such as the Tabernacle and Salt Lake Temple, as well as administration buildings of the Church of Jesus Christ of Latter–Day Saints (LDS), the Mormons. Salt Lake City sold the Plaza to the Church, but reserved a pedestrian easement on the property. Despite the easement, the church limited some First Amendment activity on the Plaza until the Tenth Circuit held that the easement arrangement was unconstitutional. The City then sold the easement to the Church. Plaintiffs challenged the sale of the easement, arguing that the sale was "brought about by the undue influence of the LDS Church. In particular, they assert that the pressure brought to bear by the Church and its threat of community divisiveness was the major consideration in the Mayor's decision to capitulate to the Church's demands—even if it meant sacrificing the public interest in maintaining the Easement." In return for the easement, the city received land and cash valued at over $5.375 million. See Utah Gospel Mission v. Salt Lake City, 316 F.Supp.2d 1201 (D. Utah 2004). This is affirmed by 425 F.3d 1249 (10th Cir. 2005).

Would you rule for the Plaintiffs or the City? The district court ruled that the sale of the land to the LDS church was constitutional without citing *Larkin* or *Kiryas Joel*. Does this case involve the "fusion of governmental and religious functions" prohibited by those cases? Should the court have relied on those cases to strike down the City's sale of the easement to

the LDS church? The district court upheld the sale by applying the *Lemon* test, which is examined next.

B. THE *LEMON* TEST, ENDORSEMENT AND COERCION

Many of the Supreme Court's cases about the Establishment Clause involve government financial aid to religious institutions. *Lemon* is one of a modern series of cases about the constitutionality of aid to church-related elementary and secondary schools. The schools cases are examined in more detail in Chapter VI. In this section, the readings focus on the three-part test (in brief, secular purpose, primary effect and excessive entanglement) that the Court has employed to determine if a range of governmental actions violates the Establishment Clause. It then introduces the *endorsement* and *coercion* tests as alternatives to *Lemon*.

Throughout these readings, you should learn to identify the various tests and to apply them to different sets of facts. As you do so, ask why the test has been so controversial and whether the test has the same implications for government conduct that it did in 1971.

Lemon v. Kurtzman

Supreme Court of the United States, 1971.
403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745.

■ MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools.... Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional....

II

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but neverthe-

less be one ''respecting'' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ''sponsorship, financial support, and active involvement of the sovereign in religious activity.'' [ ]

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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.'' [ ]

[The Court concluded that the acts had a secular purpose (to ''enhance the quality of the secular education in all schools'') and did not decide the primary effect prong, because] ''the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.'' . . .

III

. . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church . . . .

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to

prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. [ ] The potential divisiveness of such conflict is a threat to the normal political process. [ ] To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief. . . .

V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intend-

ed to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Notes and Questions

1. Assess Chief Justice Burger's argument about the political divisiveness of government programs aiding religion. Is the possibility of political divisiveness a reason not to give aid to religious institutions?

2. Assess Justice Rehnquist's later criticism that the entanglement prong of *Lemon* is the Court's "Catch–22 paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." See Aguilar v. Felton, supra, at 420–21 (Rehnquist, J., dissenting).

3. *Endorsement and Coercion.* In Estate of Thornton et al. v. Caldor, 472 U.S. 703 (1985), the Court invalidated a Connecticut statute that required employers to grant employees a day off for their Sabbath. Thornton, a Presbyterian, refused to work on Sundays, and rejected Caldor's offer of a transfer to a Massachusetts store that was closed on Sundays, or to a different position with a lower salary. He was then transferred from his management position to a clerical position. In declaring the law unconstitutional, Chief Justice Burger wrote that the statute, which included no exceptions for special circumstances, "arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath" and "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee." Id. at 709. Burger concluded:

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:

> "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." [ ]

> As such, the statute goes beyond having an incidental or remote effect of advancing religion. [ ] The statute has a primary effect that impermissibly advances a particular religious practice [and thus fails the *Lemon* test].

Justice O'Connor concurred in the judgment, but relied on her interpretation of *Lemon*, namely, the endorsement test, to invalidate the Connecticut statute:

> In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.... There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny. Id. at 711.

How do you assess the Connecticut statute from *Caldor*? Was it an accommodation of religion that the Court should have permitted? How would it work in the workplace?

Justice O'Connor had relied on the endorsement test a year earlier, in Lynch v. Donnelly, 465 U.S. 668 (1984), when she concurred in another Burger opinion. Chief Justice Burger wrote that the public display of a crèche in a holiday display that also included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS' " did not violate the Establishment Clause. Justice O'Connor relied on an endorsement test that she thought captured the first two prongs of the *Lemon* test: "The purpose prong of the Lemon test asks whether [the] government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." Id. at 690. *Lynch* also explained the constitutional problem with government endorsement of religion in the following lapidary statement: it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Id. at 688.

In a later crèche case, County of Allegheny v. ACLU, 492 U.S. 573 (1989), Justice O'Connor concurred in a decision that a Christian Nativity scene on the Grand Staircase of the Allegheny County Courthouse violated the Establishment Clause, but an eighteen-foot Chanukah menorah or candelabrum, located outside the City–County Building and next to the

city's forty-five-foot decorated Christmas tree and a ''salute to liberty'' sign, did not. O'Connor again relied upon the endorsement standard, concluding that the crèche conveyed a message of exclusion to non-Christians, while the combined display of menorah and Christmas tree did not send a message of endorsement of Judaism and/or Christianity.

Justice Kennedy argued that both the crèche and the menorah were constitutional, and criticized the endorsement test as a ''recent, and in my view, most unwelcome addition to our tangled Establishment Clause jurisprudence.'' Id. at 668. According to Kennedy, ''the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.'' Kennedy believed that the endorsement test invalidated historical and traditional practices and rituals—such as displaying the nativity scene—that were appropriate accommodations of religion under the Establishment Clause. He proposed in its place a coercion test: ''government may not coerce anyone to support or participate in any religion or its exercise.'' The crèche and the menorah withstood the coercion analysis. In her concurring opinion in *Allegheny*, Justice O'Connor directly addressed Justice Kennedy's arguments when she wrote: ''An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.'' Id. at 627–28.

Is Justice O'Connor's endorsement test clearer and easier to apply than the *Lemon* test? From whose perspective does one employ the endorsement test: the reasonable person, the objective observer, the ideal observer, the public at large, the average citizen, a religious believer, an atheist, Justice O'Connor or an '' 'ultra-reasonable observer' who understands the vagaries of [the Supreme Court's] First Amendment jurisprudence''? See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 781 (1995). Is Justice O'Connor correct that the coercion test insufficiently protects religious liberty?

Three years after *Allegheny*, Justice Kennedy relied on the coercion test to invalidate nonsectarian prayers by a rabbi at a high school graduation. See Lee v. Weisman, 505 U.S. 577 (1992). Kennedy declined the invitation of the petitioners and the United States to reconsider *Lemon*, arguing that doing so was unnecessary to find a constitutional violation in this case. ''It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' '' Id. at 587. In dissent, however, Justice Scalia, a constant critic of *Lemon*, dismissed the coercion test for ending an important American tradition of graduation

prayer: "As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the *Durham* rule did for the insanity defense." Id. at 632. Justice Scalia ridiculed the idea that the high school students were coerced into participation in the prayers.

The following term, Justice Scalia bemoaned the Court's refusal to abandon *Lemon*: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, [ ], conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so." See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

The Supreme Court decided two cases about the Ten Commandments during the 2004 term. In McCreary County v. ACLU, 545 U.S. 844, ___ (2005), Justice Souter's opinion invalidated displays of the commandments in county courthouses because they did not have a secular purpose. Souter observed, "[t]hough we have found government action motivated by an illegitimate purpose only four times since *Lemon*,* and 'the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function.' " In contrast, while upholding the display of a Ten Commandments monument on state capitol grounds, Chief Justice Rehnquist wrote that *Lemon* was "not useful" to the analysis. "Instead, our analysis is driven both by the nature of the monument and by our Nation's history." See Van Orden v. Perry, 545 U.S. 677 (2005).

We study the constitutionality of public displays of religious symbols in Chapter VI.

4. *Blue Laws.* National Public Radio ran the following interview about the history of the blue laws, which prohibited shopping and other activities on the Sabbath. Do blue laws violate the *Lemon*, endorsement and coercion tests?

SUSAN STAMBERG reporting:

"And on the seventh day, he rested," and the rest of us followed that prescription from Genesis for centuries. Sunday was the day on which you

* Justice Souter cited *Stone v. Graham*, 449 U.S. 39, 41 (1980); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985); *Edwards v. Aguillard*, 482 U.S. 578, 586–93 (1987); and *Santa Fe Independent School District v. Doe*, 530 U.S. at 308–309. These cases invalidated a Ten Commandments display, a moment of silence, the teaching of creationism, and prayer at football games.

didn't shop, you didn't get a haircut, you didn't go watch a baseball game. But that's changed. Why? How? Alexis McCrossen is an historian of Sunday.

We've come a long way from those blue-law days, haven't we, when everything was shut down? And maybe you could describe the blue laws.

Professor ALEXIS McCROSSEN (Historian): The blue laws were written on—literally on blue paper . . . in colonial Connecticut and they prohibited work, any form of play, any form of commerce, and they were meant to protect the sanctity of the Sabbath.

STAMBERG: Was church always a component of how time ought to be spent under the blue laws? What about just a simple day, the family together, and you didn't go to church?

Prof. McCROSSEN: The blue laws rarely made mention of family time. And, in fact, Sunday as a day for family was an invention of the 19th century. The blue laws focused very much on creating a space in which people could attend church and attend it in the quiet and in the peace that a day in which everything else was stopped would provide. In actual fact, one of the reasons for the blue laws was to allow husbands and wives to lie together; that is, to procreate. There was so little time during the rest of the week for that, that . . .

STAMBERG: So it set Sunday aside . . . for procreation?

Prof. McCROSSEN: Absolutely.

STAMBERG: Hm! Well, when did the blue laws begin to be more pastel, not quite so blue?

Prof. McCROSSEN: After the Civil War we see a dramatic rise in immigration, particularly Germans, Irish, Italians, who brought with them a wider notion of what was appropriate on Sunday and began to introduce different kinds of recreations and activities on Sunday afternoons: excursions, going to a beer garden, attending a concert . . . a play. And so you have these groups of people in American cities reshaping the landscape. On the other hand, you have a group of native-born Americans who came to feel that the kind of orthodox Protestantism that they were inheritors of was much too constrained, and they began to seek God and religious experience in all parts of the world, not simply in religious spaces, but in nature and art. And they began to feel very constrained by the Sunday of church and prayer and silence.

STAMBERG: So there must have been major battles, though, between going to church and taking time off to do these other things.

Prof. McCROSSEN: Absolutely. There were battles over bicycling on Sunday, over going to the 1893 World's Fair. Telegrams were sent claiming that the nation would be destroyed in a thunderbolt were the fair to be opened. Yes, absolutely, big fights.

STAMBERG: You know, it seemed to me, Professor, that the big change that I—most recent one I can remember happened in the 70s when women entered the marketplace in enormous numbers. We worked all week

and we needed stores and services to be open on Sunday just to manage all of that balancing we were doing—work and family.

Prof. McCROSSEN: That's absolutely right, and you see the beginning of that in the 1960s, when in the state of Texas, for instance, women and men were asked to procure certificates of necessity in which you were able to claim that the items you were going to purchase were necessary. Then you—the storekeeper could sell them to you.

Prof. McCROSSEN: So this led, of course, into the state in the 1970s when the laws keeping stores shut simply could no longer be maintained. . . .

See Morning Edition: Sundays No Longer a Day of Rest (NPR radio broadcast Aug. 17, 2004).

In McGowan v. Maryland, 366 U.S. 420 (1961), the Court upheld the constitutionality of Maryland's Sunday Closing Laws over the challenge of seven employees of a discount store who were fined $5 for selling a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine, in violation of the Maryland Code. The Code "prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals, . . . all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs," as well as most (but not all) alcoholic beverages. The Court ruled that, despite their religious origins, the blue laws served a secular purpose of providing citizens with a day of rest, and so did not violate the Establishment Clause. In Braunfeld v. Brown, 366 U.S. 599 (1961), an Orthodox Jew who closed his store on Saturday to observe the Sabbath, and wanted to open for Sunday business, lost his Free Exercise challenge to the Sunday closing laws.

Should all blue laws be abolished, as the following opinion suggests?

People v. Yafee

Criminal Court, City of New York, Kings County, 2004.
3 Misc.3d 367, 776 N.Y.S.2d 443.

■ CHARLES A. POSNER, J.

Last century, more than two and a half decades ago, the highest court in this state declared two "Sunday Blue Laws" (General Business Law §§ 9, 12) unconstitutional (*People v. Abrahams*, 40 N.Y.2d 277, 386 N.Y.S.2d 661, 353 N.E.2d 574 [1976]). However, not every "Blue Law" or "Sabbath Law" was before the court in *Abrahams* for scrutiny. Some of the vestiges of archaic Blue Laws remain on our law books, waiting to be enforced for no rational basis. It is now time for this court to declare Alcoholic Beverage Control Law § 105–a unconstitutional.

Defendant is charged with selling beer at retail at 3:30 on a Sunday morning, in violation of Alcoholic Beverage Control Law § 105–a [which prohibits beer sales between 3 A.M. and noon on Sundays]. In *Abrahams*, [ ], the court reviewed the history of Sabbath Laws in general, stating that:

> There is little doubt that these laws are clearly religious in origin being derived from the concise directive of the Old Testament that on the seventh day no work shall be done (Exodus, XXXI, 14–15). As a precept of civil government, however, the Sunday Laws are over 16 centuries old having been originated by the Roman Emperor Constantine in 321 AD who ordered all Judges and inhabitants of cities to rest on Sunday. Similar legislation appears in the laws of the Holy Roman Empire and in Saxon laws (28 A & E Encyc. 390). Although the English common law contained no general ban on Sunday activity aside from the prohibition against judicial proceedings, more expansive Sunday Laws were passed at an early date (29 Chas. II, ch. 7) and became the basis for similar legislation in this Country. The first Sabbath laws in America were enacted in Virginia in 1614, some three years before the Pilgrims landed at Plymouth Rock (10 Va. L. Reg. 64; 28 A & E 390). Most of the colonies, including New York, followed suit. The earliest law in force in this State implying an obligation to observe the Sabbath was promulgated by the Dutch Burgomasters of Amsterdam in 1656 (see *People v. Hoym*, 20 How. Pr. 76) and was superseded by the Duke of York's laws when the Dutch relinquished control to the English in 1664.

. . . In view of the acknowledgment by the Court of Appeals that Sabbath Laws are founded in religious beliefs, it is time to declare all such laws unconstitutional. The substitution of a secular concern such as protecting "mom and pop" from being overworked for the earlier concern that the religious nature of the day be observed does not make the statute in question less reprehensible, especially when the government tells the retailer which day is the Sabbath. . . .

As originally formulated, the *Lemon* test required that "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." . . . *Agostini* enhanced the second part of this test—the so-called "effects prong"—by fusing within it the inquiry into excessive entanglement, which had theretofore been the separate third part of the test. [ ]

In the case at hand, there is no secular reason why beer cannot be sold on Sunday morning as opposed to any other morning. While it enhances religions whose Sabbath falls on a Sunday, it inhibits the enjoyment and occupations of those whose Sabbath does not fall on a Sunday. Other than this entanglement with religion, there is no rational basis for mandating Sunday as a day of rest as opposed to any other day. Thus, the constitutionality of Alcoholic Beverage Control Law § 105–a fails on all prongs of the *Lemon/Agostini* test.

Alcoholic Beverage Control Law § 105–a becomes more onerous when alternative and less intrusive government regulation is considered. The statute prevents a person, who does not observe the Sabbath on Sunday, from buying beer on Sunday morning. Similarly, the statute prevents a licensee, who does not observe the Sabbath on Sunday, from earning a livelihood by selling beer on Sunday morning. If the state is concerned about overworking the ''mom and pop'' businesses, there is no reason why a licensee should not be able to designate with the State Liquor Authority the day in which beer would not be sold for extended hours.

Accordingly, enforcement of Alcoholic Beverage Control Law § 105–a violates the Establishment Clause of the United States Constitution.

Notes and Questions

1. Would Americans be more religious if stores and other institutions were closed on Sundays—or at least one day a week?

2. Are there blue laws in your home state?

3. Recall from *Kiryas Joel* that in 1985 the Supreme Court decided that a program giving federal funds to New York City to pay the salaries of public school teachers who taught remedial courses in or near religious schools violated the Establishment Clause because of the excessive entanglement between church and state. See Aguilar v. Felton, supra. The Kiryas Joel School District was formed because New York was no longer permitted to send remedial education teachers into annexes to the Hasidic schools. Justice O'Connor complained about the *Aguilar* decision in her concurrence in *Kiryas Joel*, and later wrote the opinion overruling *Aguilar* in Agostini v. Felton, 521 U.S. 203 (1997). In writing the court's opinion in the *Yafee* case, Judge Posner noted that ''*Agostini* enhanced the second part of this test—the so-called 'effects prong'—by fusing within it the inquiry into excessive entanglement, which had theretofore been the separate third part of the test.'' As Justice O'Connor had explained in *Agostini:*

> We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, [ ] and as a factor separate and apart from ''effect.'' *Lemon*, 403 U.S. at 612–613. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is ''excessive'' are similar to the factors we use to examine ''effect.'' That is, to assess entanglement, we have looked to ''the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'' *Id*. at 615. Similarly, we have assessed a law's ''effect'' by examining the character of the institutions benefited (e.g., whether the religious institutions were ''predominantly religious''), [ ] and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological) [ ]. Indeed, in *Lemon* itself, the entanglement that the Court found ''independently'' to necessitate the program's invalidation also was found to have the effect of inhibit-

> ing religion. [ ] Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect.

521 U.S. at 232–33. After *Agostini*, how many prongs does the *Lemon* test have? Consider whether the *Lemon* test in its original form was more effective in restricting establishment of religion or if *Agostini* achieves the same result. Does *Agostini* allow for Good Friday holidays, the issue in the following case?

Metzl v. Leininger

United States Court of Appeals, Seventh Circuit, 1995.
57 F.3d 618.

■ POSNER, CHIEF JUDGE.

Christians believe that Jesus Christ was crucified on a Friday afternoon in the spring and that he rose from the dead the following Sunday. The crucifixion is commemorated on Good Friday, the resurrection on Easter Sunday. In 1941 Illinois made Good Friday a state holiday; state facilities, including schools (but not colleges or universities), were to be closed on that day. There is no contemporaneous legislative history but in the following year the governor of Illinois explained in a proclamation that Good Friday "is a day charged with special meaning to multitudes throughout the Christian world" and that Illinois had "lately given statutory recognition" to Good Friday by making it a "legal and school holiday throughout the State." He "commended the sacred rites and ceremonies of the occasion to thoughtful consideration of churchgoers and believers throughout our State." In 1989, the Illinois legislature rescinded Good Friday as a state holiday but retained it as a school holiday, and so it remains. All public schools (below the college level) in the state are closed that day but the teachers are paid just as for other holidays. Schoolchildren are excused from attending school on other days if their religion requires their absence, 105 ILCS §§ 5/26–1, 5/26–2b; this alone scotches any argument that the law challenged in this case is necessary to accommodate the religious needs of Christian students in Illinois. And some school districts, apparently without thereby violating any state law, close for major Jewish holidays. But apart from Christmas and Thanksgiving, Good Friday is the only holiday of religious origin or character on which all the public schools of the state are closed, by virtue of the statute here attacked in a suit under 42 U.S.C. § 1983 by a public school teacher who objects, among other things, to the use of public funds derived from taxes that she pays to pay teachers for the Good Friday holiday. Her status as a taxpayer gives her standing to attack a practice, that of making Good Friday a paid school holiday, which her taxes support....

We turn to the merits. When the Bill of Rights, which in the First Amendment forbids Congress to establish a church, was promulgated, there were established churches in several of the states, as there was, of course, in England and as there are to this day there and in most other European

countries. An established church is one that is supported by taxes. What Illinois has done in closing the public schools on Good Friday is remote from the eighteenth century, or for that matter the modern nonlawyer's, conception of creating or operating an established church. But in modern times the courts have interpreted the establishment clause to forbid government—state and local as well as federal—to promote one religion at the expense of others (or even religion in general at the expense of nonbelief). [ ] This principle is qualified, however. As the cases upholding Sunday closing laws (of which more shortly) show, as well as *Lynch v. Donnelly*, [ ], a law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect in promoting religion is too attenuated to worry about. The law may also be defensible as an accommodation of the rights of religious persons to the free exercise of their religion. But that is not a factor here, as we have already noted, since, wholly apart from the challenged law, public school students in Illinois who want to be excused from school on Good Friday for religious reasons are entitled to be excused without penalty save what is implicit in missing a day of school when school is in session.

Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public that government measures to promote them, as by making them holidays or even by having the government itself celebrate them, have only a trivial effect in promoting religion. Even Easter is becoming gradually secularized; in the week before this past Easter Sunday, a radio station in Chicago was advertising an opportunity to have your pet photographed with the Easter Bunny on Easter Sunday for $5. Good Friday, however, is not a secular holiday anywhere in the United States (with the possible exception of Hawaii, as we shall see). This is not merely our impression. It is the unanimous view of the theologians of diverse faiths who submitted affidavits in the district court. Christmas and Thanksgiving have accreted secular rituals, such as shopping, and eating turkey with cranberry sauce, that most Americans, regardless of their religious faith or lack thereof, participate in. Likewise with Easter egg hunts for children, not to mention photo sessions with the Easter Bunny. Good Friday has accreted no secular rituals. That should come as no surprise. Good Friday commemorates the execution of the Christian Messiah. [ ] It is a day of solemn religious observance, and nothing else, for believing Christians, and no one else. Unitarians, Jews, Muslims, Buddhists, atheists—there is nothing in Good Friday for them, as there is in the other holidays we have mentioned despite the Christian origin of those holidays.

Illinois closes its schools on twelve holidays. Nine are purely secular. Two are religious in origin but secularized: Christmas and Thanksgiving. Only one of the holidays is a purely religious holiday, Good Friday, the holiday celebrated only by believing Christians. School districts are free to close their schools on the major holidays of other religions, but *all* public schools throughout the state are forced to close on Good Friday regardless of the preference of local school districts and no matter how small the

number of students or teachers in a particular district who want to use the day for religious observances. The state has accorded special recognition to Christianity beyond anything that has been shown to be necessary to accommodate the religious needs of the Christian majority. The governor's proclamation made clear that the purpose was to encourage Christian religious observances. That is the natural effect as well. The state law closing all public schools on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions. The Christian does not have to absent himself from school on a school day, and so perhaps have to incur the inconvenience of a make-up exam on a later day, as the observant Jew might have to do if his school district decided not to close for any Jewish holidays. Such inconveniences are slight, as we have already noted. But the First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion, unless there is a secular justification for the difference in treatment....

Only one other case has directly addressed the question whether a Good Friday closing law violates the establishment clause; *Cammack v. Waihee*, 932 F.2d 765, 766–67, rehearing en banc denied, 944 F.2d 466 (9th Cir. 1991). [*Cammack* upheld the law] in part on the basis of a factual determination (whether or not correct—for there was a vigorous dissent both to the panel opinion and to the denial of rehearing en banc) that in Hawaii Good Friday has been secularized, becoming the first day of a three day spring weekend devoted to shopping and recreational activities that have about them, as Hamlet would have said, no relish of salvation. [ ] Illinois is not Hawaii. No one goes water skiing on Lake Michigan in mid-April. The defendants in our case admitted that "Good Friday is a religious day without the secular trappings of Christmas, for example." Apparently in Hawaii Good Friday *has* acquired secular trappings. Building on *Cammack*, Illinois might have argued that the contemporary purpose of the Good Friday public school closing law is to provide a long spring weekend, Good Friday being chosen rather than a different Friday in the spring, or a Monday, because many students and teachers would stay away from school anyway on Good Friday even if school were open.... Had Illinois made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case....

With the Illinois statute enjoined, we can expect that many school districts in Illinois will decide to close their schools on Good Friday (according to newspaper accounts, Chicago closed its schools this past Good Friday, as did several other school districts), just as some school districts now close their schools on Jewish holidays. Maybe someone someday will bring a suit charging that a school district which closes its schools on a religious holiday is thereby promoting religion in violation of the establishment clause. Presumably the defense would be that in the particular school district the holding open of the schools on the particular religious holiday would be a waste of educational resources because so few students or

teachers would show up for work. The defense might succeed, if factually supported. That we need not and, given the sensitivity of the issue, do not decide. All we hold today is that the State of Illinois has failed to show that its law closing the public schools *throughout the state* on Good Friday is necessary to prevent a wasteful expenditure of educational resources.

Notes and Questions

1. Judge Posner writes: ''Maybe someone someday will bring a suit charging that a school district which closes its schools on a religious holiday is thereby promoting religion in violation of the establishment clause.'' What would be the outcome if someone brought that case? Would it matter what religion observed the holiday that the school was closing for?

2. Why should students be excused from class if religion requires their absence?

3. A Kentucky County courthouse posted a sign announcing the Good Friday closing of the courts. On the sign was a picture of a four-inch-high crucifix with an image of Jesus Christ on it. The employee who posted the sign explained ''he was merely experimenting with the clip art database on his new computer. He provides for the record posters announcing closings on Thanksgiving, Fourth of July, and Christmas, with pilgrims, turkeys, pumpkins, holly, firecrackers or other symbols appropriate to the particular holiday.'' The County also submitted uncontested evidence that ''Good Friday is the day on which many Kentuckians traditionally begin their spring vacations,'' and ''highway traffic on Good Friday was third in volume only to Independence Day and the Thanksgiving weekend.''

Is the sign constitutional? What about the Good Friday closing of the courthouse? See Granzeier v. Middleton, 955 F.Supp. 741 (E.D. Ky. 1997) (the sign is unconstitutional but the holiday is constitutional because it does not endorse religion); see also Koenick v. Felton, 973 F.Supp. 522, 529 (D. Md. 1997) (the Good Friday holiday is constitutional because it was one of two days ''to extend the secularized Easter weekend''); Bridenbaugh v. O'Bannon, 185 F.3d 796, 799 (7th Cir. 1999) (upholding Indiana statute, *inter alia,* because ''Indiana has officially stated that it continues to recognize Good Friday as a legal holiday in order to provide a spring holiday to state employees during a time period in which there would be over four months without a holiday (between Martin Luther King, Jr.'s birthday, observed January 20, 1997, and Memorial Day, observed May 26, 1997).'').

4. A union of public school employees had a contract that allowed them, upon written request, to receive up to three paid days for religious observance. The supervisor refused employees' request for religious leave and told them to use their personal days to take their religious holidays. The Teachers' Association sued to enforce the contract, and the Board of Education argued that the contract violated the Establishment Clause. Who should win? See Maine–Endwell Teachers' Ass'n v. Board of Educ., 3 A.D.3d 685, 771 N.Y.S.2d 246 (2004) (contract constitutional because it

does not coerce the employees to believe). What result if the Commissioner of Education had designated which holidays qualified for religious leave? See Matter of Port Washington Union Free Sch. Dist. v. Port Washington Teachers Ass'n, 268 A.D.2d 523, 702 N.Y.S.2d 605 (N.Y. App. Div. 2000), appeal dismissed, 95 N.Y. 790, 733 N.E.2d 229 (2000), lv. denied, 95 N.Y.2d 761, 737 N.E.2d 953 (2000).

In *Maine–Endwell*, the majority argued that the contract was constitutional because it did not coerce union members to profess a religious belief and did not identify specific religious holidays for observance. Instead, it was "a reasonable accommodation of the teachers' religious beliefs, which is not violative of the Establishment Clause." 771 N.Y.S.2d at 246. In contrast, the dissent argued that the contract violated the Establishment Clause because it gave leave only to religiously observant employees, thus coercing employees to believe, or, at least, influencing them to believe by "conditioning a substantial economic benefit solely on religious exercise." Id. at 248 (Peters, J., dissenting). Do you agree with the majority or dissent in *Maine–Endwell*?

5. Could Buddhism become an established religion within the United States? In Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000), cert. denied, 531 U.S. 1152 (2001), the court rejected a citizen's allegation that Oak Ridge, Tennessee's "Friendship Bell" endorsed the Buddhist religion in violation of the Establishment Clause. The bell celebrated fifty years of friendship between Oak Ridge and Japan and was similar to bells used in Buddhist temples. "On the exterior of the bell are 108 knobs and two large panels bearing images associated with Japan and Tennessee, including the official flowers, birds, and trees of each. The surface of the bell is inscribed with the following words: 'International Friendship,' 'Peace,' 'Pearl Harbor, December 7, 1941, VJ Day, September 2, 1945,' and 'Hiroshima, August 6, 1945, Nagasaki, August 9, 1945.' "

Buddhist monasteries in Japan, India and China usually contain these bells, which announce times for prayer and meals. The bell shape is used to indicate the location of monasteries on maps. Buddhists ring the bells 108 times on New Year's Eve "to atone for the 108 sins or shortcomings of mankind." "[T]he sound of the bell is a kind of mantra or a chant, which has the kind of sound quality that conveys the unity of the Cosmos, or in this case, the oneness of the Buddha."

The Sixth Circuit concluded that the fiftieth anniversary and the commitment to peace met the secular purpose requirement; that a reasonable observer would believe that Oak Ridge was endorsing peace and friendship with Japan, not Buddhism; and that there was no entanglement because the city did not interact with any religious group in owning or maintaining the bell. A concurrence by Judge Norris concluded that the bell was not a religious symbol.

Is it constitutionally significant that the citizens who designed the bell were not Buddhist and that no Buddhist groups were involved in commissioning or maintaining the bell? Would it make a difference if the majority of the town's population were practicing Buddhists? What if they frequent-

ly visited the bell and performed religious rituals there? Would such Buddhist participation make this case more analogous to *Kiryas Joel*?

6. *Public Officials*. When do the actions of individual government officials violate the Establishment Clause? Must government officials always act for a secular purpose? Does the first prong of the *Lemon* test mean that government officials must never be influenced by their religion?

a. *The Mayor*. Recall that in the *Utah Gospel Mission* case from Salt Lake City, supra, p. 59, where the City sold the pedestrian easement to the LDS, the district court did not use the *Larkin* standard. Instead, following the Tenth Circuit, the court noted that, although Justice O'Connor's endorsement test provides the "controlling analytical framework" for the Establishment Clause, there is enough uncertainty about *Lemon* to require application of "both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*." *Utah Gospel Mission*, 316 F.Supp.2d at 1236. The district court concluded that the City had numerous secular purposes for its action, that no reasonable observer would think that the government was endorsing religion in the plaza, and that the entanglement of church and state in fact decreased with the sale. Among the City's secular purposes were resolving the legal dispute, avoiding litigation and receiving a large amount of money: "nearly $5.4 million in value for giving up an Easement appraised at $500,000." Id. at 1238.

The plaintiffs raised an additional argument about secular purpose, namely that "the Mayor's deeper, subjective motivation for promoting the sale and catering to the desires of the LDS Church was not to obtain these financial benefits but rather to avoid Church-generated 'community divisiveness,'" and so his motives were not secular and failed *Lemon*. Id. at 1239. The court rejected that argument:

> At most, Plaintiffs' allegations suggest that there was a dual purpose in the extinguishment of the Easement—an alleged desire to pacify the Church while at the same time gaining millions of dollars for the City and its residents. Such dual motivations, however, are not unconstitutional....
>
> In addition, the purpose prong does not require or permit a psychological inquiry into the secular purity of Mayor Anderson's personal motivations, much less those of each member of a legislative body like the City Council. Nothing in *Lemon* or its progeny suggests that this court ought to wade into that morass under these facts; indeed, the law is to the contrary. Given the undisputed secular benefits that flowed to the City, Plaintiffs' allegations about the subjective intent of the Mayor or City Council are irrelevant.

Do you think Mayor Anderson's personal motivations should have been relevant to the court's Establishment Clause analysis? Why or why not? If Mayor Anderson concluded the deal for religious reasons, would his actions violate the first prong of *Lemon*? Does it matter to your analysis whether the mayor is a Mormon or not?

b. *The Military*. Officers at the Air Force Academy in Colorado Springs, Colorado, were accused of proselytizing about their Christian faith and failing to accommodate the religious needs of non-Christian cadets. ''Among the incidents highlighted in the report were fliers that advertised a screening of 'The Passion of the Christ' at every seat in the dining hall, more than 250 people at the academy signing an annual Christmas message in the base newspaper that said that 'Jesus Christ is the only real hope for the world' and an atheist student who was forbidden to organize a club for 'Freethinkers.' . . . The commandant of cadets . . . sent an academywide e-mail message to announce the National Day of Prayer, instructed cadets that they were 'accountable to their God' and invented a call-and-response chant with the cadets that went, 'Jesus . . . Rocks.' The longtime head football coach, Fisher DeBerry, had . . . [linked] his team to his Christian beliefs, praying with them in the locker room to the 'Master Coach,' and posting a banner saying 'Team Jesus.' '' See Laurie Goodstein, Air Force Academy Staff Found Promoting Religion, N.Y. Times, June 23, 2005, at A12; Alan Cooperman, Air Force Withdraws Paper for Chaplains; Document Permitted Proselytizing, Wash. Post, Oct. 10, 2005, at A3.

Did the conduct of the Air Force personnel violate the Establishment Clause? Why or why not? Did the conduct violate the free exercise rights of non-Christian cadets, such as the student wishing to organize a club for Freethinkers?

The Constitution suggests at least two answers to these questions about the mayor and the military. On one hand, some scholars argue that government officials, like other citizens, are entitled to the free exercise of religion. Hence mayors or judges should be allowed to rely on their religious commitments whenever they make an important decision, just as other citizens do. Moreover, it would discriminate against religion to ask government officials to separate their religious faith from their public decisions. In response, other scholars insist that government officials must act in a neutral, secular manner that respects the diverse religious commitments of the citizens. When government officials pursue their own beliefs, they establish one religion at the expense of others, the precise state of affairs that the Establishment Clause prohibits. We examine the religious motivations of politicians and other public officials in Chapters VI and VII.

The side one chooses in that debate depends on the connection between the Free Exercise and Establishment Clauses, or, in other words, the baseline of the Religion Clauses. In the following section, two prominent constitutional law professors, Michael McConnell of the University of Utah

(now a judge on the Tenth Circuit Court of Appeals) and Kathleen Sullivan (professor and former dean of Stanford Law School) identify two different baselines for interpreting the Religion Clauses. Professor McConnell argues that the baseline is pluralism and that a secular state is unduly hostile to religion; Professor Sullivan responds that secular government is required by the First Amendment. Which argument is more persuasive?

C. THE BASELINE OF THE RELIGION CLAUSES

Religious Freedom at a Crossroads

Michael W. McConnell.
59 University of Chicago Law Review 115, 168–69, 175, 188, 189, 190–92 (1992).

. . .

III. A RELIGION CLAUSE JURISPRUDENCE FOR A PLURALISTIC NATION

A jurisprudence of the Religion Clauses must begin with a proper understanding of the ideals of the Clauses and the evils against which they are directed. We can then formulate legal doctrine. The great mistake of the Warren and Burger Courts was to embrace the ideal of the secular state, with its corresponding tendencies toward indifference or hostility to religion. The mistake of the emerging jurisprudence of the Rehnquist Court is to defer to majoritarian decisionmaking. A better understanding of the ideal of the Religion Clauses, both normatively and historically, is that they guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state (unless necessary to important purposes of civil government), whether that hindrance is for or against religion.

The great evil against which the Religion Clauses are directed is government-induced homogeneity—the tendency of government action to discourage or suppress the expression of differences in matters of religion. As Madison explained to the First Congress, "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." As such authorities of the day as Thomas Jefferson and Adam Smith argued, government-enforced uniformity in religion produced both "indolence" within the church and oppression outside the church. Diversity allows each religion to "flourish according to the zeal of its adherents and the appeal of its dogma," without creating the danger that any particular religion will dominate the others. At some times in our history, and even in some isolated regions of the country today, the great threat to religious pluralism has been a triumphalist majority religion. The more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs. This

translates into an unwillingness to enforce the Free Exercise Clause when it matters, and a hypertrophic view of the Establishment Clause.

When scrutinizing a law or governmental practice under the Religion Clauses, the courts should ask the following question: is the purpose or probable effect to increase religious uniformity, either by inhibiting religious practice (a Free Exercise Clause violation) or by forcing or inducing a contrary religious practice (an Establishment Clause violation), without sufficient justification? The baseline for these judgments is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government. The underlying principle is that governmental action should have the minimum possible effect on religion, consistent with achievement of the government's legitimate purposes. . . .

B. A Pluralist Approach to the Establishment Clause

A pluralist approach to the Establishment Clause requires more explication, since the Supreme Court has never had a satisfactory Establishment Clause doctrine. The Court's first Establishment Clause case in this century was in 1947 [*Everson*, 330 U.S. 1] and thereafter the Court fell quickly into the secularist interpretations that I have already criticized, most notably the three-pronged *Lemon* test. Unlike the *Lemon* test, a pluralistic approach would not ask whether the purpose or effect of the challenged action is to "advance religion," but whether it is to foster religious uniformity or otherwise distort the process of reaching and practicing religious convictions. A governmental policy that gives free rein to individual decisions (secular *and* religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices. The concern of the Establishment Clause is with governmental actions that constrain individual decisionmaking with respect to religion, by favoring one religion over others, or by favoring religion over nonreligion. . . .

There are three baselines from which the neutrality of government speech might theoretically be evaluated. The first is complete secularization of the public sphere. If the "neutral" position were one in which religion is completely relegated to the private sphere of family and the institutions of private choice, any reference to religion in the public sphere would be a departure from neutrality. This is the position advocated by Professor Sullivan, who says that the solution to the government speech problem is "simple" if we would only "[b]anish public sponsorship of religious symbols from the public square." . . .

The problem with the secularization baseline is that it is not neutral in any realistic sense. A small government could be entirely secular, and would have little impact on culture. But when the government owns the street and parks, which are the principal sites for public communication and community celebrations, the schools, which are a principal means for transmitting ideas and values to future generations, and many of the principal institutions of culture, exclusion of religious ideas, symbols, and voices marginalizes religion in much the same way that the neglect of the

contributions of African American and other minority citizens, or of the viewpoints and contributions of women, once marginalized those segments of the society. Silence about a subject can convey a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, cultures, and ideological commitments, to exclude all those whose basis is ''religious'' would profoundly distort public culture. . . .

Some argue for a totally secular public sphere not on the spurious ground that this would be ''neutral,'' but on the ground that the First Amendment committed the United States to a certain public philosophy: a liberal, democratic, secular ''civil religion,'' which is entitled to a preferred status—even a monopoly status—in our public culture. As an historical assertion about the meaning of the First Amendment, however, this position is plainly false. Virtually the entire spectrum of opinion at the time of the adoption of the First Amendment expected the citizens to draw upon religion as a principal source of moral guidance for both their private and their public lives. The Establishment Clause prevented the federal government from interfering with the process of opinion formation by privileging a particular institution or set of religious opinions, but it left the citizens free to seek guidance about contentious questions from whatever sources they might find persuasive, religious as well as secular. As a normative proposition, the secularization position must depend on an argument that secular ideologies are superior to religious. But some secular ideologies are divisive, exclusionary, and evil; just as some religious ideologies are tolerant, open-minded, and beneficent (and vice-versa). The republican solution is to leave the choice of public philosophy to the people. There is a great irony in the claim that liberal, democratic, nonsectarian positions have a superior constitutional status to religious positions. Such a position is illiberal (since it denies the people's right to determine what will bring about the good life), undemocratic (since it conflicts with the democratic choices of the people), and sectarian (since it is based on a narrow point of view on religious issues).

Religion and Liberal Democracy

Kathleen M. Sullivan.
59 University of Chicago Law Review 195, 198–99, 201 (1992).

. . . Professor Michael McConnell, my opponent in this debate, laments what he depicts as a relentless pattern of ''secularization'' in which ''serious religion—religion understood as more than ceremony, as the guiding principle of life''—has been ''shoved to the margins of public life.'' This secularization, he suggests, is a result of the increasing displacement of religious functions by an expanding welfare state, coupled with two kinds of error by the Supreme Court: (1) it has granted too few religious exemptions from public laws under the Free Exercise Clause; and (2) it has too often excluded religion from public programs in the name of preventing establishment. Professor McConnell would read both Religion Clauses as requiring government to respect a single ''baseline'': ''the hypothetical

world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government.'' On this view, the Court should mandate more exemptions and find fewer establishments in order to maintain religious pluralism.

I disagree with both the diagnosis and the cure. To begin, I find any picture of rampant secularization difficult to square with numerous indicators of religion's lively role in contemporary American social and political life. . . . More fundamental than our disagreement about the facts, however, is our disagreement about the proper reading of the Religion Clauses . . . .

I. RELIGIOUS BASELINES

The Free Exercise Clause and the Establishment Clause each harbor an unstated corollary. The right to free exercise of religion implies the right to free exercise of non-religion. Just as Caesar may not command one to transgress God's will, he may not command one to obey it. To do either is to run afoul of free exercise. As the Court put it in *Wallace v. Jaffree*, ''the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.'' The ''conscience of the infidel [or] the atheist'' is as protected as any Christian's.

Just as the affirmative right to practice a specific religion implies the negative right to practice none, so the negative bar against establishment of religion implies the affirmative ''establishment'' of a civil order for the resolution of public moral disputes. Agreement on such a secular mechanism was the price of ending the war of all sects against all. Establishment of a civil public order was the social contract produced by religious truce. Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms. Religious grounds for resolving public moral disputes would rekindle inter-denominational strife that the Establishment Clause extinguished.

This reading of the Religion Clauses entails a baseline very different from McConnell's. To McConnell, the proper baseline from which to measure free exercise or establishment violations is undistorted prepolitical religious choice. Government preserves religious liberty best, in his view, if it leaves intact the religious choices that would have been made in the absence of government: ''The great evil against which the Religion Clauses are directed is government-induced homogeneity'' in matters of religion, and their great virtue, the preservation of the religious diversity or pluralism that emerges from unfettered private choice. In other words, the war of all sects against all is to continue by other means after the truce.

McConnell's view wrongly ignores the affirmative implications of the Establishment Clause. The bar against an establishment of religion entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes. The baseline for measuring Religion Clause violations thus is not ''undistorted'' prepolitical religious choice. The social contract to end the war of all sects against all necessarily, by its very

existence, "distorts" the outcomes that would have obtained had that war continued. Public affairs may no longer be conducted as the strongest faith would dictate. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be. Neither Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life.

The correct baseline, then, is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order. On this view, the exclusion of religion from public programs is not, as McConnell would have it, an invidious "preference for the secular in public affairs." Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all. From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like "discrimination." But from the perspective of the settlement worked by the Establishment Clause, it looks like proper treatment. . . .

If the baseline from which to measure establishment or free exercise violations is the exercise of religious liberty insofar as compatible with the establishment of the secular public order, the secularization of the public order is not "discrimination" against religion. . . .

Notes and Questions

1. If Professor McConnell is correct, were *Larkin*, *Kiryas Joel* and *Lemon* correctly decided? Are those decisions correct under Professor Sullivan's theory of the First Amendment?

2. In light of Professors McConnell's and Sullivan's arguments, how do you assess Justice Stevens' concurrence in *Kiryas Joel*, supra p. 45?

3. Can religious freedom be protected without an Establishment Clause? As Professor Carolyn Evans explains:

> World-wide there are a huge variety of religions, sects, cults, philosophies, and other forms of belief. There are also a significant variety of relationships between these religions or beliefs and the State. At one extreme, there are States in which there is no meaningful division between religion and the State. The State dedicates itself to religious ends and State officials and religious officials have overlapping roles. Other religions may be restricted in their rights to practise or prohibited from exercising their freedom of religion at all. At the other extreme, a state may dedicate itself to secular ends and persecute all religions and beliefs that do not conform to a State ideology.

Carolyn Evans, Freedom of Religion Under the European Convention on Human Rights 19 (2001). According to Evans, the members of the Council of Europe have avoided either extreme, and have adopted numerous varieties of church-state relationships. For example, Turkey and France have secular constitutions; Greece recognizes the Eastern Orthodox Church as the "prevailing religion"; the Evangelical Lutheran Church is established

in Iceland; in the United Kingdom the monarch must be the head of the Church of England; the Catholic Church has some privileges in Spain that other religions lack; the Irish Constitution shows the influence of Catholicism in certain provisions. Nonetheless, these states allow for freedom of religion and prohibit discrimination on the basis of religion.

What arguments can you give in favor of freedom of religion that do not depend upon the Establishment Clause? See id. at 22–33 (identifying (1) instrumental arguments, (2) historical justifications, (3) religious arguments, and (4) arguments based on autonomy and pluralism.).

In Chapter III, we examine the relationship of individual free exercise to both church and state through study of the issue of conscientious objection.