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Another Brick in the Wall: Denominational Preferences and Strict Scrutiny under the Establishment Clause: *Larson v. Valente*, 102 S. Ct. 1673 (1982)

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Note

Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under The Establishment Clause

Larson v. Valente, 102 S. Ct. 1673 (1982).

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I. INTRODUCTION

Countless states, counties, and other political subdivisions have enacted laws designed to protect the public from abusive and fraudulent solicitation practices in order to maintain public confidence in charities and to promote the public welfare.[1] Such governmental regulations are within the ambit of the state's police power and are generally held to be valid unless they conflict with constitutionally protected rights.[2]

1. *See, e.g.*, Heritage Village Church and Missionary Fellowship v. North Carolina, 40 N.C. App. 429, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980), where the Supreme Court of North Carolina held that a state law essentially identical to the pertinent provision in Larson v. Valente, 102 S.Ct. 1673 (1982), worked an establishment of religion under Lemon v. Kurtzman, 403 U.S. 602 (1971). *See infra* note 7.
2. Valente v. Larson, 637 F.2d 562, 567 (1981), *aff'd*, 102 S.Ct. 1673 (1982).

Challenges to laws regulating public disclosure of charitable solicitation have traditionally been founded upon the free exercise[3] and free speech[4] clauses of the first amendment.[5] But recently, in *Larson v. Valente*,[6] the plaintiff challenged such a regulatory scheme by asserting that it violated not only the free exercise and free speech clauses, but the establishment clause as well.

In *Larson*, the Court held that the tests enunciated in the seminal establishment clause case, *Lemon v. Kurtzman*,[7] were applicable to laws "affording a uniform benefit to *all* religions."[8] Where an aid or benefit was not evident, but government regulations created denominational preferences by imposing burdensome requirements on some religions while exempting others, the Court held that the proper standard of review was strict scrutiny.[9] Thus, the proper inquiry in these cases is whether the regulation of charitable solicitations is closely fitted to the furtherance of a compel-

3. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the state may regulate the time, place, and manner of solicitation).

In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court considered the constitutionality of a law requiring the payment of a fee as a condition precedent to the issuance of a solicitation license. The Court held:

> [the fee] is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppres its enjoyment. . . . Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. . . . A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.

Id. at 112-13 (citation omitted). Under the Court's analysis in *Murdock*, NEB. REV. STAT. § 28-1440 (1980), which requires the payment of a one dollar fee to the secretary of state as a condition precedent to the issuance of a certificate authorizing solicitation, is a blatant violation of the free exercise clause.

4. *See, e.g.*, Village of Schaumberg v. Citizens for a Better Env't., 444 U.S. 620 (1980).

5. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The first amendment is applicable to the states via the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

6. 102 S.Ct. 1673 (1982).

7. 403 U.S. 602 (1971). The traditional test for the establishment of religion was stated in *Lemon v. Kurtzman*.

> 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 entanglement with religion."

Id. at 612-13 (citations omitted).

8. Larson v. Valente, 102 S. Ct. 1673, 1687 (1982) (emphasis in original).

9. *Id.* at 1684-85.

ling state interest.[10]

The *Larson* decision is important because it reveals the dual nature of the establishment clause: the clause applies when *benefits* are accorded to religions by governmental action and when laws place *burdens* on some religions while exempting others.[11] *Larson* is unique because it represents the first occasion that the Court has applied the strict scrutiny analysis to governmental action under the establishment clause.[12] This Note analyzes the issues raised in *Larson* and discusses the implications of the adoption of the strict scrutiny standard of review in cases of denominational preferences.

II. THE *LARSON* CASE

A. The Lower Courts

In 1978, the Minnesota Legislature modified portions of the state's Charitable Solicitation Act.[13] The Act, which was designed to protect the public against fraudulent solicitation and to maintain faith in charitable causes,[14] exempted[15] all religious organizations from its extensive registration[16] and annual reporting[17]

10. *Id.* at 1685.
11. Since the religion clauses necessarily overlap, the traditional method used to distinguish between those factual scenarios that required analysis under the establishment clause and free exercise clause was that the former proved useful in adjudicating *aid* to religions while the latter was best suited to discern impermissible *burdens* on religions. While the *Larson* decision unfortunately obfuscates this distinction, it also heralds the heretofore undiscovered dual utility of the establishment clause.
12. "[N]otions of compelling justification have been employed only in free exercise cases; government actions have been deemed either violative of the anti-establishment principle or not—the balancing process in that setting has been incorporated into the definitions of the terms themselves." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 846-47 n.1 (1978).
13. MINN. STAT. §§ 309.50-309.61 (1980) [hereinafter cited as the Act].
14. All registration and reporting materials submitted under the Act become public records. MINN. STAT. § 309.54(1) (1980). These records "may assist in preventing fraud by informing the public of ways in which their contributions will be employed." Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (footnote omitted).
15. The exemption may be revoked if the organization employs a professional fund raiser, MINN. STAT. § 309.515-2 (1980), or the organization has had its exempt status revoked by the Department of Commerce "as the department may deem necessary to protect the public interest," MINN. STAT. § 309.515-3 (1980), and if the applicant has filed a false statement or "has engaged in a fraudulent, deceptive or dishonest practice," MINN. STAT. § 309.532-1(b) (1980).
16. Registration under the Act requires the disclosure of information such as the name of the organization; its address; where its books and records are kept; names and addresses of officers, directors, trustees, and the chief executive; tax exempt status; purpose for which solicitations will be used; and methods of solicitation. MINN. STAT. § 309.52-1 (1980).
17. Almost all organizations which are required to register must also file an an-

requirements. The amendments to the Act substantially narrowed the availability of the religious exemption[18] by imposing certain registration and reporting requirements upon only those religious organizations that solicited more than fifty percent of their funds from nonmembers.[19]

The controversy in *Larson* arose when the Minnesota Department of Commerce "notified the appellee Holy Spirit Association for the Unification of World Christianity (Unification Church) that it was required to register under the Act . . . ."[20] Pamela Valente and other followers of the tenets of the Unification Church filed suit seeking temporary and permanent injunctive relief.[21] The appellees alleged that the Act abridged their first amendment rights of free speech and free exercise of religion[22] and their fourteenth

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nual report. The report must include total income from all sources; costs of management, fund raising, and public education; the amount of funds transferred outside of the state with an explanation as to recipient and purpose; and the amount expended in the state broken down as to each major purpose. All of this data must be contained in a financial statement. MINN. STAT. § 309.53 (Supp. 1981).

18. The exemption of any organization may be revoked if it expends an unreasonable amount on administrative expenses. Administrative costs are presumed unreasonable when they exceed thirty percent. MINN. STAT. § 309.555-1(a) (1980). Since the Court in Village of Schaumberg v. Citizens for a Better Env't., 444 U.S. 620 (1980) held that a municipal ordinance, which prohibited solicitation by charities that do not use at least seventy-five percent of their receipts for charitable purposes, was unconstitutional on its face, then the analogous Minnesota statutory provision is arguably unconstitutional. *See also* National Found. v. Fort Worth, 415 F.2d 41 (5th Cir. 1969).

19. The Act exempted the following from its registration and reporting requirements:

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

MINN. STAT. § 309.515-1(b) (1980) (emphasis added); *see also supra* notes 14-18.

20. Larson v. Valente, 102 S. Ct. at 1677.

21. *Id.* at 1677. The defendants/appellants in *Larson*, John Larson, Commissioner of Securities, and Warren Spannus, Attorney General, were charged with enforcement of the Act by virtue of their offices. The Unification Church was later joined as a plaintiff by stipulation. *Id.*

22. The district court denied the church's motion for summary judgment on the

amendment right to equal protection of the laws.[23] Moreover, the appellees contended that the Act violated the establishment clause by discriminating among religions.[24] The district court, relying upon recommendations of a magistrate, held the Act unconstitutional.[25]

"On appeal, the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part."[26] The court affirmed the district court's use of the overbreadth doctrine[27] to provide the church with standing and concluded that "[t]he statutory discrimination between such organizations smacks of 'religious gerrymandering,' an apparently intentional favoritism for the religious organizations obtaining some but less than half of their funds from the public."[28]

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free exercise and free speech claims. Petition for Rehearing at 5 n.2, Larson v. Valente, 102 S. Ct. 1673 (1982).

23. Larson v. Valente, 102 S. Ct. at 1677.
24. In its motion for summary judgment, the Church alleged that the exemption provision of the Act violated the establishment clause by discriminating among religions. *Id.* at 1678. The state, in order to counter the free speech and free exercise claims, maintained that the Church's activities were not religious in nature, and therefore unprotected. The state presented "numerous affidavits of persons claiming to be former members of the Unification Church, who asserted that they had been encouraged to engage in fund raising practices that were both fraudulent and unrelated to any religious purpose." *Id.* at 1678 n.5.
25. The court held that the Act "failed the second of the three Establishment Clause 'tests' set forth by [the] court in Lemon v. Kurtzman." Larson v. Valente, 102 S. Ct. at 1678 (citation omitted). The second test requires that the "principal or primary effect" of the challenged statute "be one that neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 601, 612 (1971). The *Lemon* tests are set forth in note 7, *supra*.
26. Larson v. Valente, 102 S. Ct. at 1679. The Eighth Circuit Court of Appeals decision is Valente v. Larson, 637 F.2d 562 (8th Cir. 1981).
27. Valente v. Larson, 637 F.2d at 565. The overbreadth doctrine holds that "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the first amendment rights of other parties not before the court." *Id.* (quoting Village of Schaumberg v. Citizens for a Better Env't., 444 U.S. 620, 634 (1980) (citations omitted)). The overbreadth doctrine is applicable only to noncommercial speech and should not be relied upon to establish standing for an establishment clause claim since the Supreme Court eschewed the use of the doctrine and undertook a traditional analysis of standing in *Larson*.
28. Valente v. Larson, 637 F.2d 562, 566 (8th Cir. 1981) (footnote omitted). In Gillette v. United States, 401 U.S. 437 (1971) the term "religious gerrymandering" was used "to describe a 'subtle departure from neutrality' between sects." Valente v. Larson, 637 F.2d 562, 566 n.4 (8th Cir. 1981) (citing Gillette v. United States, 401 U.S. 437, 452 (1971)). Strangely, while the Supreme Court directly equates a religious gerrymander with excessive entanglement of government with religion, Larson v. Valente, 102 S. Ct. at 1688, the court of appeals failed to recognize that the political divisiveness caused by gerrymandering constituted excessive entanglement. Although the court of appeals concluded that

The court of appeals analyzed the Act with respect to the commands of the establishment clause and found that the Act passed scrutiny under the first of the *Lemon* criteria because, "viewed as a whole, [it] ha[d] a valid secular purpose."[29] However, when the second of the *Lemon* tests was applied,[30] the court held that the Act constituted an unconstitutional establishment of religion because the statutory classification assisted those religious organizations which were exempted from the registration and reporting requirements and placed an impermissible burden on those which merely happened to solicit the majority of their funds from the public.[31] Having found that the challenged exemption was unconstitutional under the second *Lemon* test, the court opined that it was unnecessary to consider the third test.[32]

In concluding that the fifty percent rule was unconstitutional,[33] the court rejected the state's argument "that a generally valid secular purpose, such an avoidance of unnecessary regulation, defeats an establishment clause challenge to a statute, even though the

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a gerrymander had occurred, it characterized the application of excessive entanglement test as being unnecessary because the Act was unconstitutional under the first and second prongs of the *Lemon* tests. Valente v. Larson, 637 F.2d 562, 569 (8th Cir. 1981). Apparently, the court did not fully comprehend the inquiry of the *Lemon* tests. *See supra* note 7.

The court of appeals also stated:

> [I]t may be *inferred* that the draftsmen of this legislation wished to reduce the burdens otherwise imposed on well-established churches which had achieved strong but not total financial support from their members; the draftsmen have exhibited less concern for easing regulations applicable to churches which are new, or which, as a matter of policy may favor public solicitation over general reliance on financial support from members. Actual discrimination exists if, as we *assume*, there are church organizations in both categories . . . . In the absence of argument to the contrary from state officials here, we . . . [so assume] and conclude that real discrimination exists.

Valente v. Larson, 637 F.2d, 562, 566 (8th Cir. 1981) (emphasis added). Adjudication of constitutional magnitude should show no quarter to assumptions of impermissible legislative discrimination when that very assumption is the gravamen of the inquiry to be made. "Inquiries into congressional motives or purposes are a hazardous matter." United States v. O'Brien, 391 U.S. 367, 383 (1968).

29. Valente v. Larson, 637 F.2d at 567.
30. *See supra* note 7.
31. Valente v. Larson, 637 F.2d at 568.
32. *Id.* at 569.

    Although the court of appeals agreed with the district court that the Act violated the establishment clause, it held that application of the Minnesota rule of severability compelled the result that the fifty percent rule should be stricken from § 309.515-1(b) rather than striking the entire exemption provision as the district court had done. Valente v. Larson, 637 F.2d at 570. *See* MINN. STAT. § 309.61 (1980).

33. Valente v. Larson, 637 F.2d at 567.

burdens may fall more heavily on certain religious groups."[34] The court said:

> The challenged statute in this case expressly separates two classes of religious organizations and makes the separation for no valid secular purpose that has been suggested by the [the state] . . . . Inexplicable disparate treatment will not generally be attributed to accident; it seems much more likely that at some stage of the legislative process special solicitude for particular religious organizations affected the choice of statutory language. The resulting discrimination is constitutionally invidious.[35]

B. The Supreme Court Decision

The first issue addressed by the United States Supreme Court was whether the appellees had standing to sue. The state asserted that since the Unification Church had not proven itself to be a religious organization within the meaning of the Act, it was without standing to challenge an exemption applicable only to religious organizations even if the fifty percent rule of section 309.515-1(b) was declared unconstitutional.[36] The Court said that since the state had attempted to enforce the Act via the fifty percent rule of section 309.515-1(b),[37] it was estopped, at least for the purposes of this suit, from denying that the appellees were a religious organization.[38] The Court concluded that the appellees had established the requisite elements of standing because the threatened application of section 309.515-1(b) constituted "a distinct and palpable in-

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34. *Id.*
35. *Id.* at 568.
36. The church had not proven itself to be a religious organization within the meaning of the Act and would, therefore, not be automatically entitled to an exemption if the fifty percent rule were declared invalid because the modified exemption, by its terms, would be applicable only to a religious organization. *See infra* note 66.
37. Larson v. Valente, 102 S. Ct. at 1681.
38. The basis for the Court's conclusion is the language of the state's letter to the Church. *See* Larson v. Valente, 102 S. Ct. at 1677 n.4. Since the exemption applied only to religious organizations, an attempt to compel the Unification Church's compliance with the Act via the fifty percent rule necessarily assumed that the Unification Church was indeed a religious organization. The Court acknowledged that

> [t]he Church may indeed be compelled, ultimately, to register under the Act on some ground other than the fifty percent rule, and while this fact does affect the nature of the relief that can properly be granted to appellees on the present record, it does not deprive this Court of jurisdiction to hear the present case.

Larson v. Valente, 102 S. Ct. at 1682 (citation omitted). The appellants argued that the only conclusion which could be drawn from the letter was that the Unification Church was not considered to be a religious organization since after the enactment of the 1978 amendments, inquiry into the religious nature of any organization which solicited the majority of its funds from the public was superfluous. Petition for Rehearing at 2-5, Larson v. Valente, 102 S. Ct. 1673 (1982).

jury"[39] to which meaningful relief could be given.[40]

Having concluded that the Unification Church satisfied the standing requirement, the Court turned to the merits of the case. The state's principal contention was that a law may have a disparate impact on religious organizations without offending the establishment clause as long as the differentiating criteria were neutral and secularly based.[41] The Court dismissed this claim in a footnote,[42] stating that section 309.515-1(b) "makes explicit and *deliber-*

39. Larson v. Valente, 102, S. Ct. at 1681. *See* Duke Power Co. v. Carolina Env't. Study Group, 438 U.S. 59, 72 (1978); Warth v. Seldin, 422 U.S. 490, 501 (1975).

40. Larson v. Valente, 102 S. Ct. at 1682. Justice Rehnquist, joined by Chief Justice Burger, Justice O'Connor, and Justice White dissented on the issue of standing. Justice Rehnquist would have held that the appellees had no standing to challenge the exemption of MINN. STAT. § 309.515-1(b) (1980) because they had not proven they were a religious organization within its meaning. Consequently, if the church should fail to meet its burden of proof, *see infra* note 66, the decision of the majority would not redress any harm done to the Unification Church, since the church would fall within the general registration provision of the Act by virtue of its being a charitable, as distinguished from a religious, organization. Justice Rehnquist therefore characterized the majority opinion as possibly being advisory in nature. Larson v. Valente, 102 S. Ct. at 1693-98 (Rehnquist, J. dissenting). The majority did not believe it necessary to relieve every possible harm that may befall the Church and the redressing the harm caused via the threatened application of MINN. STAT. § 309.515-1(b) (1980) was constitutionally sufficient. Larson v. Valente, 102 S. Ct. at 1682.

41. The State relied on Gillette v. United States, 401 U.S. 437 (1971), for the proposition that disparate impact of legislative acts is not per se unconstitutional so long as there is a neutral secular basis for the legislative classification and there is no facial discrimination on the basis of religious affiliation or belief.

Gillette involved a challenge to § 6 (j) of the Military Selective Service Act of 1967, 50 U.S.C. § 456(j) (1976), on the basis that exempting persons from conscription because they held deep objections to war in any form, but not exempting those who objected only to "unjust" wars on religious grounds, constituted a preference for some religions over others in violation of the establishment clause. The Court upheld the statute opining that "[t]he critical weakness of petitioners establishment claim rises from the fact that § 6(j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war." 401 U.S. at 450. In *Larson*, the State of Minnesota desired to substitute "the Act" for "§ 6(j)" and "solicitation"for "war." The Court distinguished *Gillette* because § 6(j) of the Military Selective Service Act of 1967, "focused on individual conscientious belief not on sectarian affiliation." Larson v. Valente, 102 S. Ct. at 1684 n.23 (quoting Gillette v. United States, 401 U.S. at 455). In doing so the Court intimates that the Act in question employs a differential treatment on the basis of sectarian affiliation and not, as the state contended, on the neutral secular grounds of the sources of the religious organization's funding. Thus, the focal point of the Court's analysis lies beyond the face of the statute and concentrates instead upon its effect and application. The Act "focuses precisely and solely upon religious organizations." Larson v. Valente, 102 S. Ct. at 1685 n.23.

42. Larson v. Valente, 102 S. Ct. at 1684 n.23.

ate distinctions"[43] between traditional churches that are primarily funded by the contributions of members and those churches that solicit the preponderance of their funds from nonmembers because they are less well established or because of their religious beliefs.[44]

Having summarily dismissed the state's main argument, the Court reiterated the most fundamental command of the establishment clause: denominational neutrality.[45] Noting that the religion clauses of the first amendment necessarily overlap, the Court stated that the "constitutional prohibition of denominational preferences was inextricably connected with the continuing vitality of the Free Exercise Clause."[46] The Court also said that neutrality among religions was closely intertwined with equal protection.[47] Consistent with these statements, the Court described the analytical scheme to be utilized when a state[48] law created a denominational preference: the Court must "treat the law as suspect . . .

43. *Id.* (emphasis added). It is obvious that the Court views the effect of the Act as intentional.

44. *See id.*

45. "The clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 102 S. Ct. at 1683. In support of this point the court cited Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968) ("The first amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."). The Court has never adopted a policy of absolute strict neutrality regarding the establishment clause, but in the context of denominational preferences the *Larson* case seems to indicate the shift of the Court to stricter neutrality than the past. Indeed since the application of strict scrutiny in *Larson*, the Court has two standards of review for the establishment clause and the newer standard is of a much higher magnitude than the older. For a proposal of strict neutrality as a starting point in analysis of the religion clauses, see Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961), *reprinted in* P. KURLAND, RELIGION AND THE LAW 18 (1962).

46. Larson v. Valente, 102 S. Ct. at 1683. "Free exercise . . . can guaranteed only when legislators—and voters—are required to accord their own religions the very same treatment given to small, new or unpopular denominations." *Id.* "The fullest realization of true religious liberty requires that government . . . effect no favortism among sects . . . and that it work deterrence to no religious belief." *Id.* at 1684 (quoting Abington School Dist. v. Schempp, 374 U.S. 302, 305 (1963)).

47. "[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." Larson v. Valente, 102 S. Ct. at 1863-84 (quoting Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

48. The decision does not compel a narrow reading of the word "state." Indeed actions of any governmental subdivision are subject to constitutional limitations.

[and] apply strict scrutiny in adjudging its constitutionality."[49] The standard of review in such cases required the invalidation of laws creating denominational preferences unless the state was able to prove that the law was closely fitted[50] to the furtherance of a compelling governmental interest.[51]

In *Larson*, the Court assumed *arguendo* that the Act was addressed to a sufficiently compelling governmental interest of protecting the citizens of Minnesota from abusive and fraudulent solicitation practices.[52] Therefore, the Court proceeded to determine whether the Act was closely fitted to its asserted interest.

The state claimed that since Minnesota law provided for the disclosure of a nonprofit corporation's financial records to members,[53] the need for public disclosure of the information increased

49. Larson v. Valente, 102 S. Ct. at 1684. Strict scrutiny is the highest standard of review in constitutional law and is coupled with a compelling state interest analysis.

50. *Id.* at 1685.

51. *Id.* Formerly the concept of compelling justifications was applicable only to free exercise cases. *Larson* is the first case to use the analysis in terms of the establishment clause. *See supra* note 12 and accompanying text.

52. Larson v. Valente, 102 S. Ct. at 1685. The Court held that the state had only a "significant interest." It did not hold that Minnesota's interest was compelling in the context of the establishment clause. *Id. Cf.* Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (in the free exercise context a statute must be narrowly drawn to punish specific conduct).

In Widmar v. Vincent, 102 S. Ct. 269 (1982), the University of Missouri at Kansas City had a compelling interest in maintaining the degree of separation of church and state required by the establishment clause, but to overcome the plaintiff's claim that exclusion of religious groups from meeting in university buildings on the basis of religious content constituted a violation of their rights of free exercise, the university had to demonstrate that its regulations were closely fitted to further the compelling interest. The university was unable to meet the burden of showing that its regulations, which maintained a degree of separation *greater* than that required by the establishment clause, were closely fitted to maintaining the *lesser* degree of separation that the establishment clause required. Hence, plaintiffs, a religious organization, were permitted to use university buildings for their meetings. Thus the standard of review in *Larson* appears essentially identical to the free exercise content-based exclusion standard utilized in *Widmar*.

53. MINN. STAT. § 317.28 (2)-(3) (1980) provides:

> (2) A member, his agent or his attorney, may inspect all books and records for any proper purpose at any reasonable time.
>
> (3) Upon request by a member, the domestic corporation shall furnish the member with a statement showing the financial result of all operations and transactions affecting income and surplus during its last annual accounting period and a balance sheet containing a summary of its assets and liabilities as of the closing date of such accounting period.

Id.

Some Courts have determined that members have a right to inspect financial records or books by virtue of common law. *See* Appellant's Reply

as the percentage of nonmembers' contributions increased. Indeed, "[t]he particular point at which public disclosure should be required . . . is a determination for the legislature. In this case, the Act's 'majority' distinction is a compelling point, since it is at this point that the organization becomes predominantly public-funded."[54]

Working from this assertion, the Court dissected the appellant's argument into three premises and analyzed each premise separately in order to assess its validity. The three premises were

> that members of a religious organization can and will exercise *supervision and control* over the organization's solicitation activities when membership contributions exceed fifty percent; that membership *control*, assuming its existence, is an adequate safeguard against abusive solicitations . . . ; and that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions.[55]

The Court dismissed the first premise as being without merit because there was no substantial support in the record for the theory that members would control the organization's solicitation practices when they contributed the majority of the funds.[56] Similarly, the second premise was found to be meritless since there was no reason to believe that members of exempted organizations have any greater incentive to protect the public than those who were not exempted.[57] Finally, the third premise was found to be without merit because the need for public disclosure arguably rises more in relation to the absolute amount of public contribu-

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Brief at 11, Larson v. Valente, 102 S. Ct. 1673 (1982); *See* H. OLECK, NON-PROFIT CORPORATIONS, AND ASSOCIATIONS 395 (4th ed. 1980).

54. Larson v. Valente, 102 S. Ct. at 1685 (quoting Brief for Appellants at 29).

Consider Village of Schaumberg v. Citizens for a Better Env't., 444 U.S. 620 (1980):

> Efforts to promote *disclosure* of the finances of charitable organizations also *may assist in preventing fraud* by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

Id. at 637-38 (footnote omitted) (emphasis added). The Court cited with approval ILL. REV. STAT. ch. 23, § 5102 (a) (1977) which has disclosure provisions substantially identical to those at issue in *Larson* without the fifty percent rule. Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. at 638 n. 12. Thus, the Court is not concerned in its inquiry with what must be disclosed, but which organizations are required to disclose and which are exempted from the same.

55. Larson v. Valente, 102 S. Ct. at 1685 (emphasis on the word "percentage" in original; other emphasis is added).

56. *Id.* at 1685-86.

57. *Id.* at 1686.

tions than with the percentage of public contributions.[58] Since the acceptance of all three premises was necessary for the state's argument, the Court concluded "that appellants have failed to demonstrate that the fifty percent rule in § 309.515-1(b) is 'closely fitted' to further a 'compelling governmental interest.' "[59]

Although the Court had already found the fifty percent rule to be unconstitutional because it was not closely fitted to the furtherance of a compelling governmental interest,[60] the Court examined the fifty percent rule in light of the *Lemon* tests.[61] The Court applied the *Lemon* tests not because they were "necessary to the disposition of the case . . . [but because] those tests . . . reflect[ed] the same concerns that warranted the application of strict scrutiny . . . ."[62] The Court found that the Act was fraught with the danger of "politicizing religion,"[63] since the history of the Act revealed that the Minnesota Legislature had discussed[64] "the characteris-

58. *Id.* at 1686-87. The Court did not express an opinion on whether an absolute amount exemption would be constitutional. *Id.* at 1687 n.27.

59. *Id.* at 1687. "As our citations of *Allen* and *Walz* indicate, the *Lemon* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions, like § 309.515-1(b)'s fifty percent rule, that discriminate among religions." *Id.* (emphasis in original) (citing Allen v. Board of Educ., 392 U.S. 236 (1968) (loaning textbooks to all students, whether they attended public or private schools, did not work an establishment of religion); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (uniform exemption from property taxation for all property used solely for religious worship did not violate the establishment clause)). For a brief discussion of the *Lemon* tests see *supra* note 7 and accompanying text.

60. Larson v. Valente, 102 S. Ct. at 1687.

61. *Id.*

62. *Id.*

63. *Id.* The Act " 'engender[s] a risk of politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970)). *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12 (1978). For a critical analysis of the political divisiveness test, see Comment, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

64. Larson v. Valente, 102 S. Ct. at 1688. The comments made by the two legislators cited by the Court occurred in one of the ten sessions of discussion of the 1978 amendments to the Act. The only sect actually mentioned during the debate as justification for the amendment was the Roman Catholic affiliated Pallotines. Petition for Rehearing at 6-7, Larson v. Valente, 102 S. Ct. 1673 (1982). Since the issue of legislative motivation was neither argued nor briefed by the parties, the Court involved itself in impermissible fact finding at the appellate level. It is no excuse to rely on the court of appeals' assumption of discriminatory impact, for that court is equally disqualified to act as fact finder. Most startling of all is the Supreme Court's blatant disregard of its own well-founded advice: "Inquiries into [legislative] motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." United States v. O'Brien, 391 U.S. 367, 383-84 (1968). *See gener-*

tics of various sects with a view towards 'religious gerrymandering.' "[65] The Court, therefore, concluded that the Act promoted excessive governmental entanglement with religion.[66]

III. ANALYSIS

A. Discriminatory Intent

In *Larson*, the Court held that when a statute "discriminate[s] *among* religions,"[67] it must be closely fitted to the furtherance of a compelling governmental interest.[68] Perhaps the *Larson* decision can best be conceptualized as requiring the equal protection of religions under the establishment clause. Since the Court employed an equal protection mode of analysis, the question arises whether there is an associated discriminatory intent requirement.[69] Al-

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ally, Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 YALE L.J. 1205 (1970); Note, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U.L. REV. 940, 970-73 (1980).

65. Larson v. Valente, 102 S. Ct. at 1688 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)). In order to establish that a gerrymander had occurred, the Unification Church had to demonstrate that there was an absence of a "neutral, secular basis for the lines the government has drawn." Gillette v. United States, 401 U.S. 437, 452 (1971). The appellees in *Larson* have clearly met this burden.

66. Larson v. Valente, 102 S. Ct. at 1688. The court agreed "with the Court of Appeals that the [unification church] . . . should not automatically enjoy [the] benefits [of a religious organization exemption] . . . . [A]ppellees may be required by the state to prove that the Unification Church is a religious organization within the meaning of the Act." *Id.* at 1689 n.30. However, Justice Stevens in his concurring opinion maintained that the burden was on the state to prove that the Unification Church was not a religious organization. *Id.* at 1689 (Stevens, J., concurring). The dissent took yet another tack and opined that while the burden was on the state to prove that an organization is charitable within the meaning of the registration requirements of MINN. STAT. § 309.52 (1980), the burden then shifted to the organization to prove that it fell within the religious exemption of MINN. STAT. § 309.515-1(b) (1980). Larson v. Valente, 102 S. Ct. at 1695 n.4 (Rehnquist, J., dissenting).

Justice White, joined by Justice Rehnquist dissented from the majority. Justice White felt that the Act did not discriminate on the basis of religious belief and that no intent to discriminate could be found on the face of the Act. He also opined that the line that Minnesota had drawn for its exemption was valid and that exclusion of all religious organizations from the registration and reporting requirements could be construed as a preference for a religious over non-religious organizations and hence amount to an unconstitutional establishment of religion. Larson v. Valente, 102 S. Ct. at 1691-93 (White, J., dissenting). *See infra* note 112 and accompanying text. Justice Rehnquist, joined by Chief Justice Burger, Justice O'Connor and Justice White dissented on the issue of standing. Larson v. Valente, 102 S. Ct. at 1693-98 (Rehnquist, J., dissenting). *See supra*, note 40.

67. Larson v. Valente, 102 S. Ct. at 1687.

68. *Id.*

69. The sine qua non of a discrimination case under the fourteenth amendment

though the Court did not explicitly state that such an intent was necessary to violate the establishment clause, the decision is replete with suggestions that a discriminatory intent was, in fact, present.[70] Furthermore, *Larson* strongly implies that impermissible intent is a requirement for the invalidation of a challenged regulatory action.[71]

The Minnesota Charitable Solicitation Act did not call for differential treatment of religious organizations by name. Instead, the state maintained that the Act was based, at least facially, on secular criteria.[72] The inherent problem with such a statutory scheme is that it opens the door for discrimination by the regulatory bodies which are charged with implementation and enforcement of the Act. The resultant hazard of subtle discriminatory administration strikes fear into the hearts of all civil libertarians because of the increased difficulty of adequately proving both differential impact[73] and discriminatory intent when challenging an administrative determination. Perhaps because of this danger, the *Larson* Court fashioned its rule sufficiently broad so that even though a statute may be facially neutral, it will, nevertheless, be examined with strict scrutiny if its effect is to create a denominational preference.

B. Compelling State Interest

The *Larson* Court did not specifically hold that the state's interest in public disclosure of charitable solititations was a compelling state interest.[74] Considering the lack of difficulty the *Larson* Court had in reaching its decision on this issue, it may be asked whether

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equal protection clause is the presence of an impermissible discriminatory intent. *See*, Washington v. Davis, 426 U.S. 229 (1976). This requirement assures that otherwise valid laws or classifications which merely have a differential impact will not be struck down at the behest of a plaintiff unless, through the use of skewed statistics, legislative history, or discriminatory administration, the aggrieved party is able to prove an intent to discriminate.

70. The Act makes "explicit and deliberate distinctions." Larson v. Valente, 102 S. Ct. at 1684 n.23. The Act "was drafted with the explicit intention of including particular religious denominations and excluding others." *Id.* at 1688. The Act's "express design [was] to burden or favor selected religious denominations . . . ." *Id.*

71. "The Court appears to concede that the Minnesota law at issue does not constitute an establishment of religion merely because it has a disparate impact. An intentional preference must be expressed." *Id.* at 1692 (White, J., dissenting).

72. Appellant's Reply Brief at 3-5, Larson v. Valente, 102 S. Ct. 1673 (1982).

73. *See* Washington v. Davis, 426 U.S. 229 (1976).

74. Larson v. Valente, 102 S. Ct. at 1685. The court said that Minnesota's interest was significant and, for the sake of argument, assumed the interest to be compelling. *Id.*

the state will ever be able to construct a sufficiently compelling reason to discriminate among religions and contravene the establishment clause.

It may not be safe to assume that state interests which are compelling in the context of free speech[75] and free exercise[76] will also suffice for purposes of the establishment clause, for a fundamental distinction between the contexts in which the state interest arises is evident. In the context of free speech and free exercise, regulatory actions generally infringe upon the acts that one may desire to take to either pronounce his views or to support his beliefs. However, in cases like *Larson*, the state is not seeking to enjoin or modify acts which find their impetus in religious belief. Where the state creates an official denominational preference, it does not interfere with the right to act; it interferes with the underlying right to *believe*. The majority opinion in *Cantwell v. Connecticut*[77] cogently stated this distinction.

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individuals may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.[78]

It cannot be gainsaid that state sponsorship of one religion to the exclusion of others or granting favored status to some sects while burdening others creates in the mind of the citizens an incentive to believe in the favored sect while chilling those who happen to believe in the tenets of the sect that has fallen into official disfavor. The continued vitality of the absolute component of the first amendment, the establishment clause, assures that the second concept embraced by the first amendment, free exercise, will also be assured of the same exuberance. "Free exercise . . . can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small,

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75. Cox v. New Hampshire, 312 U.S. 569 (1941) (interest in the orderly flow of traffic).

76. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) ("clear and present danger").

77. 310 U.S. 296 (1940).

78. *Id.* at 303-04.

new, or unpopular denominations."[79] While the state may justifiably infringe upon the right to act on one's beliefs for extremely limited purposes, the Court should never allow discrimination among religions and thereby condone contravention of the more fundamental and absolute right to believe. By allowing such activities, the Court would undoubtedly herald the death knell of the establishment clause as well as the demise of the free exercise clause.

C. A Tight Squeeze Into Close-Fittedness

In *Larson*, the state argued that the need for public *disclosure* of financial information was directly related to the percentage of funds obtained through public contributions.[80] In essence, the state maintained that whoever contributed the majority of the organization's funding should be entitled to discover the purposes for which their contributions would be utilized. Since Minnesota law provided for disclosure of such information to members of a domestic nonprofit corporation,[81] the need for public disclosure was outweighed by the burdensome reporting requirements of the Act unless the organization was primarily funded from public donations.[82]

In order to determine whether the Act was closely fitted to the interest it assertedly served, the Supreme Court dissected the state's argument into three premises. The acceptance of each as valid was necessary to satisfy the close-fittedness standard.[83] In arriving at its construction of the first two premises,[84] the Court misconstrued the main thrust of the state's argument as well as the central theme of the Act. Instead of recognizing that the Act was directed toward disclosure of financial information, the Court mistakenly assumed the main purpose of the Act to be supervision and control of solicitation practices. The Minnesota Act addressed as its main concern *disclosure* of and access to financial information of charities to contributors; not, as the Court asserted, *control* of solicitation practices.[85] If the organization is funded primarily from membership donations, membership disclosure of financial information is sufficient and the need for public disclosure is outweighed by the burden imposed by the registration and reporting

79. Larson v. Valente, 102 S. Ct. at 1683. *See infra* note 121.
80. *Id.* at 1685 (citing Brief for Appellants at 29).
81. *See supra* note 53.
82. Valente v. Larson, 637 F.2d at 567.
83. Larson v. Valente, 102 S. Ct. at 1685.
84. *See supra* text accompanying note 55.
85. The Eighth Circuit Court of Appeals was able to recognize that the appellants' primary concern was access to information by contributors and not control per se. Valente v. Larson, 637 F.2d at 565, 567.

requirements of the Act.[86] Conversely, when a charitable organization becomes primarily publicly funded, public disclosure of its finances is called for in order to inform those who contribute the majority of the funds of the uses to which their contributions are put.[87]

Although it may be argued that disclosure is superfluous because upon making a contribution the contributer has evidenced his acquiescence to the organization's use of the funds, the argument loses force because the Court has found disclosure to be a laudable goal. For example, in *Village of Schaumberg v. Citizens for a Better Environment*,[88] the Court realized the benefits accruing to a populace which was informed about the uses of its charitable contributions when it opined that "efforts to promote [public] disclosure of the finances of charitable organizations may assist in preventing fraud by informing the public of the ways in which their contributions will be employed."[89] The Act in *Larson* sought to achieve the same goals as the Court touted in *Schaumberg*, yet since the Court misconstrued the state's argument, it failed to recognize the Act's fundamental purpose.

When the Court analyzes whether a statute is closely fitted to its purported purpose, it must be particularly careful not to misconstrue the asserted state interest and strike down what may otherwise be a valid statute.[90] Such a standard of care on the Court's behalf was not evident in the *Larson* decision.

Although the Court's construction of the first two premises was clearly erroneous,[91] the Court did not err in its analysis of the third premise, namely that "the need for public disclosure rises in proportion with the *percentage* of non-member contributions."[92]

> The flaw in the appellants' reasoning may be illustrated by the following example. Church A raises 410 million, 20 percent from non-members. Church B raises $50,000, 60 percent from nonmembers. Appellants would argue that although the public contributed $2 million to Church A and only $30,000 to Church B, there is less need for public disclosure with respect to Church A than with respect to Church B. We disagree; the need for public disclosure more plausibly rises in proportion with *absolute*

86. Valente v. Larson, 637 F.2d at 567.
87. Larson v. Valente, 102 S. Ct. at 1685 (citing Brief for Appellants at 29).
88. 444 U.S. 620 (1980).
89. *Id.* at 637-38 (footnote omitted). *See also supra* note 54.
90. Perhaps an overinclusive/underinclusive analysis could determine close-fittedness equally as well as the method the Court utilized. The Court is not a stranger to the use of such a test in adjudication regarding the establishment clause. *See*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979).
91. *See supra* notes 81-90 and accompanying text.
92. Larson v. Valente, 102 S. Ct. at 1685.

amount, rather than with the *percentage*, of non-member contributions.[93]

Regardless of whether the Act's main theme was, the disclosure of financial information as the state maintained or supervision and control of solicitation practices as the Court opined, the example the Court utilized to determine the close-fittedness of the third premise aptly demonstrated that the Act, as a whole, was not closely fitted to its asserted interest. Therefore, while the Court's analysis of close-fittedness is lacking a highly needed degree of precision, which hopefully will be cured in subsequent decisions, the resultant conclusion reached by the Court was undeniably correct.

D. The New Brick In The Wall

In the main, the Court has avoided deciding issues which are not absolutely necessary to the disposition of the controversy at hand. This policy finds its impetus in the principle that the Court should preclude the development of unforeseen complications by deciding issues on the narrowest possible grounds. This reasoning is equally applicable to the pronouncement of a new standard of review where the utilization of a paradigm that has withstood the test of time provides the means to reach the desired end.[94] Such a situation does not accord with "the Court's 'long and . . . considered practice not to decide . . . any constitutional question in advance of the necessity for its decision.' "[95]

While strict scrutiny analysis is perhaps best suited to discern those subtle nuances of discrimination[96] that accompany differential treatment of religions, the Court took great pains to point out that while the Act was unconstitutional under a strict scrutiny analysis,[97] it also violated the third prong of the *Lemon* tests.[98] The Court's methodology of finding the Act violative of the new standard as well as the *Lemon* tests (a standard it held to be inapplicable in cases of discrimination among religions)[99] begs the question of possible motivation on the Court's behalf.

Although it cannot be gainsaid that the principle of intersectarian neutrality has long been a part of the establishment

93. Larson v. Valente, 102 S. Ct. at 1686-87 (emphasis in original) (footnote omitted). *See also supra* note 58.
94. Since the Court found the Act unconstitutional under the tripartite, disjunctive test of *Lemon*, Larson v. Valente 102 S. Ct. at 1688, it could have entirely avoided the pronouncement of the strict scrutiny standard.
95. *Id.* at 1693 (Rehnquist, J., dissenting) (quoting Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1944)).
96. *See supra* notes 69-73 and accompanying text.
97. Larson v. Valente, 102 S. Ct. at 1689.
98. *Id.* at 1688.
99. *Id.* at 1687.

clause's decree, prior to *Larson*, the Court was never confronted with a case framed as discrimination among religions. Despite this fact, the Court attempted to justify its imposition of strict scrutiny on the basis of precedent. "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudicating its constitutionality."[100] The precedents referred to were *Everson v. Board of Education*,[101] *Zorach v. Clausen*,[102] and *Abington School District v. Schempp*.[103] Simply stated, none of these cases employ the strict scrutiny methodology, nor do they involve discrimination among religions.[104]

Since the Court's asserted reason for the application of strict scrutiny was less than compelling, the inquiry must shift and focus on those motivations which may not be so blatantly stated. Although it may be possible that the Court found the church's arguments so convincing that they were entirely subsumed within the opinion,[105] it appears much more plausible that the Court was simply cognizant that interdenominational neutrality demands the

100. *Id.* at 1684.
101. 330 U.S. 1 (1947).
102. 343 U.S. 306 (1952).
103. 374 U.S. 203 (1963).
104. *Zorach* held that the release of students from public schools, upon parental request, for religious observation and instruction did not work an establishment of religion and that, in fact, the release was required in order to accommodate the free exercise of religion. *Everson* approved a state scheme whereby parents were reimbursed for bus fares for children attending both public and parochial educational institutions. *Abington School District* held that Bible reading in public schools was an unconstitutional establishment of religion. Regarding the standard of review employed in these establishment clause cases preceding the utilization of the tests summarized in *Lemon*, no common discernible thread of reasoning can be found to justify the results reached by the Court. Careful studying of the cases cited by the *Larson* Court as precedent reveals that if there is indeed a discernible standard common to all, it is not the methodology used in a modern strict scrutiny analysis. *See supra* note 12; *infra* note 122.
105. For example, the appellees argued that "the *Lemon* tests were designed primarily to evaluate the constitutionality of governmental programs providing benefits to *all* religious organizations." Brief for Appellees at 31, Larson v. Valente, 102 S. Ct. 1673 (1982) (emphasis in original). The Supreme Court agreed with the appellees' position. Larson v. Valente, 102 S. Ct. at 1687. In addition, while the Church argued that the Act should be "invalidated unless justified by, and closely fitted to, a substantial governmental interest," Brief for Appellees at 23, Larson v. Valente, 102 S. Ct. 1673 (1982), the Court held that the Act "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest." Larson v. Valente, 102 S. Ct. at 1685 (citations omitted). Furthermore, the premises constructed from the state's argument by the Church strangely parallel those gleaned by the Court. *Compare* Brief for Appellees at 23-28, Larson v. Valente, 102 S. Ct. 1673 (1982), *with* Larson v. Valente, 102 S. Ct. at 1685-87.

mode of analysis employed in all other equal protection cases: strict scrutiny. Credence is lended to this supposition when the Court stated that "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[106] Employment of the equal protection, strict scrutiny, standard in the establishment clause context assures the continued vitality of not only its core neutrality precept but the free exercise clause as well[107] and leaves all sects free to compete for adherents solely according to the appeal of their dogma and free from the confounding variable of official state favoritism.

E. Future Implications of *Larson*

Perhaps the most important and immediate impact of the *Larson* decision will be on state laws which regulate charitable solicitation. Those statutes, which on their face, call for differential treatment of religious organizations are prime candidates for judicial review under the strict scrutiny test of *Larson*.[108] Judging from Minnesota's failure to demonstrate that the Act was closely fitted to a compelling state interest, it is extremely doubtful that other states will fare much better.[109]

The Court held that the *Lemon* tests "[were] intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate among religions."[110] The Court's cryptic language creates an ambiguity and possible uncertainty as to which standard of review is applicable in a given situation.

At first blush it would seem that the only context in which a law is uniformly beneficial is that of state aid to religions, such as monetary and material aid to sectarian schools, or tuition tax credits and deductions to the parents of children attending such schools.[111] Nevertheless, any form of public aid to sectarian educa-

106. Larson v. Valente, 102 S. Ct. at 1683-84. The identical quotation can be found in the Brief of Appellees at 20, Larson v. Valente, 102 S. Ct. 1673 (1982).
107. *See supra* text accompanying notes 75-79.
108. *See* Note, *State Regulation of Public Solicitation for Religious Purposes*, 16 WAKE FOREST L. REV. 996 (1980). *See also*, Heritage Village Church and Missionary Fellowship v. North Carolina, 40 N.C. App. 429, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 727 (1980) (The court struck down a North Carolina statute essentially identical to the Act at issue in *Larson* because it worked an establishment. The statute exempted religious organizations soliciting primarily, *i.e.*, greater than 50 percent, from members.).
109. *See supra* text accompanying notes 74-79.
110. Larson v. Valente, 102 S. Ct. at 1687 (emphasis in original) (footnote omitted).
111. In Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982), the United States Court of Appeals for the Eighth Circuit held that Minnesota's income tax deduction

tional institutions would not *uniformly* benefit all religions since it would specifically except and thereby discriminate against those religious organizations which do not maintain educational facilities. However, it is doubtful that the Court would find such an analysis convincing since the argument is akin to the argument that exemption of all religions from solicitation registration requirements works an establishment of religions over nonreligious organizations. Assertions analogous to the latter argument have consistently been dismissed,[112] and it is likely that the former would be rejected as well.

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for elementary and secondary school tuition did not violate the establishment clause. MINN. STAT. ANN. § 290.09(22) (West Supp. 1983) provides for a tax deduction of $500 per elementary school student and $700 per secondary school student for actual expenses incurred for tuition, textbooks, and transportation in both public and sectarian educational institutions. 676 F.2d at 1196 n.2. The Court held that the statute did not violate the *Lemon* tests because the primary effect of the statute was not to support and advance religion since the statute had a valid secular purpose in that it provided a tax benefit to all taxpayers.

The court distinguished the Minnesota statute from the New York statute the Supreme Court held to be unconstitutional in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), since the New York statute operated as a tax credit for parents whose children attended private schools rather than a tax deduction for all parents as in *Mueller*. Although the *Mueller* court recognized that the tax deduction may provide an incentive to enroll children in sectarian educational institutions, the benefit thereby accruing to those institutions is too remote to support the plaintiff's contention that the statute violated the primary effect test of *Lemon*. Since the aid in question here is uniformly beneficial to all schools the proper standard of review is the *Lemon* tests.

112. The argument that the exclusion of all religious organizations from regulation (to the chagrin of non-religious organizations) is a preference for religious over non-religious organizations an therefore constitutes an impermissible establishment of religion has been made in the past. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting); TWA, Inc. v. Hardison, 432 U.S. 63, 80-85 (1977); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); Welsh v. United States, 398 U.S. 333, 338-40 (1970) (plurality opinion); *Id.* at 344-61 (Harlan, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 700-27 (1970) (Douglas, J., dissenting); United States v. Seeger, 380 U.S. 163, 165 (1965); *id.* at 188 (Douglas, J., concurring); Sherbert v. Verner, 374 U.S. 398, 442 (1963) (Harlan, J., dissenting); King's Garden, Inc., v. FCC 498 F.2d 51, 56-57 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 22-26, 96 (1961). This type of argument has never been considered by the Court to be meritorious. *See, e.g.*, Thomas v. Review Bd., 101 S. Ct. 1425, 1433 (1981) (work on tank turrets); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (compulsory education); Gillette v. United States, 401 U.S. 437, 448-60 (1971) (conscription); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemption for religious institutions); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) (unemployment compensation for Sabbatarians); the Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918) (conscription).

Since a blanket exemption from regulation is uniformly beneficial to all

When the *Larson* Court held that the *Lemon* tests were applicable to those laws which uniformly aid or benefit all religions, the Court probably meant to use those words in their ordinary meaning and did not intend the attenuated meaning placed on them by an argument that supposes discrimination because a religion chooses not to maintain an educational institution.

Lemon v. Kurtzman[113] is a case which illustrates the ambiguity in the Court's choice of language. In *Lemon*, the Court considered the constitutionality of Rhode Island's Salary Supplement Act[114] which provided for a fifteen percent salary supplement to teachers in non-public schools.[115] At first impression it would appear that such a statute would be properly judged under the *Lemon* tests since the benefit seems to be uniformly accorded to all religions. However, because the only beneficiaries under the Rhode Island Act were 250 teachers in Roman Catholic schools,[116] the Act was discriminatory in both administration and effect and an intent to discriminate could easily be found. The only proper standard of review would therefore be strict scrutiny.

The Rhode Island Act in *Lemon* is clearly within the Court's meaning when it spoke of uniform aid or benefit, yet perhaps since there is evidence of both discriminatory effect and intent, strict scrutiny should be implemented. Because of the inherent dangers that tread closely behind the footsteps of discrimination among religions the use of the higher standard of review, strict scrutiny, is demanded by the best reading of the *Larson* decision.

In cases of state aid to sectarian educational institutions (absent the rare exigent circumstances similar to those in *Lemon* which would militate in favor of strict scrutiny), the tripartite, disjunctive test of *Lemon* retain utility. Conversely, where discrimination among religions is evident, strict scrutiny will be the proper standard of review. Recently, however, the establishment clause and its prohibitions against organized religious activity in the public school have come under attack. Efforts are afoot to legislatively reinstate prayer in the public schools.[117] Although such efforts

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religions the proper standard of review would be the *Lemon* tests and not the strict scrutiny of *Larson*.

113. 403 U.S. 602 (1971).

114. R.I. GEN. LAWS §§ 16-5-1 to 16-5-17 (Supp. 1970).

115. Lemon v. Kurtzman, 403 U.S. at 607.

116. *Id.* at 608.

117. For example, ALA. CODE § 16-1-20.2 (Supp. 1982) entitled "School Prayer" provides:

> From henceforth, any teacher or profesor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray,

have traditionally been analyzed via the *Lemon* tests, strict scrutiny may well be the proper standard.

In *Engle v. Vitale*[118] the Court held that the recitation of a twenty-two word nondenominational Regent's prayer worked an unconstitutional establishment of religion since it involved more than the objective study of religion. It cannot be gainsaid that the establishment of an official denominational preference of Christianity necessarily discriminates against those religions which are not similarly favored, and it chills the right of free exercise and the right to believe as one so chooses. The intent of legislative acts which call for sectarian worship in tax supported educational institutions is an intent to discriminate against non-Christian religions. Such a discriminatory intent may be found on the face of the legislative provision, through the examination of legislative history, or through a refusal by officials to consider the official implementation of prayers of those religious sects which do not share the Protestant majority's belief in Christ.

Therefore, if an intent to discriminate among religions can be demonstrated, the strict scrutiny test of *Larson* is brought to the forefront of the inquiry.[119] It cannot be denied that in the context of religion in the schools the state will never be able to construct a compelling state interest[120] which would justify the violation of the establishment clause's core neutrality precept.[121] With the Court's

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> may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

See infra note 120.

118. 370 U.S. 421 (1962).

119. This reasoning is equally applicable to other cases the Court has considered. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (state law prohibited the teaching of evolution); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (recitation of the Lord's Prayer in the classroom).

120. "[I]t is *no part of the business* of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Engle v. Vitale, 370 U.S. 421, 425 (1962) (emphasis added). *See supra* text accompanying notes 74-80.

121. Local governments would do well to take note of the *Larson* decision. Religiously oriented Christmas observances, including governmental promotion of Christianity by erecting a crèche, necessarily discriminate against those who do not share a belief in Christ.

> *Larson* makes clear that because of the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions it must be evaluated under the test of strict scrutiny.
>
> . . . [D]efendants established no compelling governmental interest in erection of the nativity scene. If one is unable to demonstrate

holding that strict scrutiny under the establishment clause is mandated where discrimination exists among religions, the Court has not overruled any precedent; it has, however, pronounced a uniformly applicable standard to use in the context of religious observations in public schools and statutory provisions which call for differential treatment on the basis of religious beliefs, sectarian affiliation, or solicitation practices.

IV. CONCLUSION

To the average citizen or state legislator the *Larson* decision means that the state control of "Moonies" or other soliciting cults will be difficult to achieve and that legislation proposing prayer in public schools will not obtain the Supreme Court's approval. For the constitutional lawyer, however, the higher standard of review that strict scrutiny provides means that the courts will be able to differentiate the subtle nuances of discrimination that invariably accompany governmental regulatory actions and legislative acts which are not facially discriminatory. Furthermore, and perhaps most importantly, the strict scrutiny standard will assure the continued vitality of not only the absolutist component of the establishment clause, but by so doing, it also assures that the same degree of vitality will be enjoyed by the free exercise clause. The *Lemon* tests will remain the proper standard of review in the context of uniform benefit to all religions.

Since courts are familiar with the application of strict scrutiny in other areas of constitutional law such as equal protection, freedom of speech, and free exercise of religious beliefs, the *Larson* inquiry lends a high degree of familiarity to adjudication of the issues involved in establishment clause cases. Unfortunately, how-

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> *any* legitimate purpose or interest, it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown. We conclude therefore that the first prong of strict scrutiny test is not met, and of course find it unnecessary to address the second prong.

Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982) (emphasis in original). *See supra* text accompanying notes 74-79.

Local school boards should also be aware of the *Larson* decision. Indeed, it appears that even the revered baccalaureate exercises at high school and college graduations throughout the country are of dubious constitutionality. Baccalareate is defined as "an address or sermon delivered at commencement." WEBSTER'S NEW WORLD DICTIONARY 101 (2d college ed. 1976). Many baccalaureates are replete with all the splendor accorded traditional Protestant church services including the singing of hymns, the display of the Latin cross, and a sermon. These tax supported services, which are usually held in public schools, are sectarian in nature and unconstitutional as well since they discriminate against those holding non-Christian beliefs. They establish precisely the sort of official denominational preferences that the Framers of our Constitution forbade.

ever, with its pronouncement that strict scrutiny is the proper standard where the *Lemon* tests also serve to reach the identical and correct result, the Court has entangled itself in reprehensible judicial policy and created obfuscation as to which test is applicable in some limited situations. On the other hand, perhaps the new standard of review will lend a much needed, more discernable standard to cases in which none could previously be found.[122]

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122. One commentator has suggested that the religion clause cases cannot be rationalized, saying that the Court has "tread a narrow path, moving right or left as the Justices' personal predilections and fears moved them." Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 244 (1973).