CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice" United Larson v. Valente, 456 U.S. 228 (1982)

The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution, religious establishments of differing denominations were common throughout the Colonies. [Footnote 17] But the Revolutionary generation emphatically disclaimed that European legacy, and "applied the logic of secular liberty to the condition of religion and the churches." [Footnote 18] If Parliament had lacked the authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong. [Footnote 19] The

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force of this reasoning led to the abolition of most denominational establishments at the state level by the 1780's, [Footnote 20] and led ultimately to the inclusion of the Establishment Clause in the First Amendment in 1791. [Footnote 21]

This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted:

"Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects. [Footnote 22]"

Madison's vision -- freedom for all religion being guaranteed by free competition between religions -- naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators -- and voters -- are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations. As Justice Jackson noted in another context,

"there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority

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must be imposed generally."

Railway Express Agency, Inc. v. New York, 336 U. S. 106, 336 U. S. 112 (1949) (concurring opinion).

Since Everson v. Board of Education, 330 U. S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." Id. at 330 U. S. 15. This principle of denominational neutrality has been restated on many occasions. In Zorach v. Clauson, 343 U. S. 306 (1952), we said that "[t]he government must be neutral when it comes to competition between sects." Id. at 343 U. S. 314. In Epperson v. Arkansas, 393 U. S. 97 (196), we stated unambiguously:

"The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute."

Id. at 393 U. S. 104, 393 U. S. 106, citing Abington School District v. Schempp, 374 U. S. 203, 374 U. S. 225 (1963). And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that

"[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."

Abington School District, supra, at 374 U. S. 305. In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.

In Lemon v. Kurtzman, 403 U. S. 602 (1971), we announced three "tests" that a statute must pass in order to avoid the prohibition of the Establishment Clause.

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"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U. S. 236, 392 U. S. 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' Walz [v. Tax Comm'n, 397 U. S. 664, 397 U. S. 674 (1970)]."

Id. at 403 U. S. 612-613.

As our citations of Board of Education v. Allen, 392 U. S. 236 (1968), and Walz v. Tax Comm'n, 397 U. S. 664 (1970), indicated, the Lemon v. Kurtzman "tests" are intended to apply to laws affording a uniform benefit to all religions, [Footnote 28] and not to provisions, like § 309.515, subd. 1(b)'s fifty percent rule, that discriminate among religions. Although application of the

Lemon tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny to § 309.515, subd. 1(b)'s fifty percent rule. The Court of Appeals found that rule to be invalid under the first two Lemon tests. We view the third of those tests as most directly implicated in the present case. Justice Harlan well described the problems of entanglement in his separate opinion in Walz, where he observed that governmental involvement in programs concerning religion

"may be so direct or in such degree as to engender a risk of politicizing religion. . . . [R]eligious groups inevitably represent certain points of view, and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded

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against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation."

397 U.S. at 397 U. S. 695.

The Minnesota statute challenged here is illustrative of this danger. By their "very nature," the distinctions drawn by § 309.515, subd. 1(b), and its fifty percent rule "engender a risk of politicizing religion" -- a risk, indeed, that has already been substantially realized.

It is plain that the principal effect of the fifty percent rule in § 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that, as the Court of Appeals noted,

"[t]he benefit conferred [by exemption] constitutes a substantial advantage; the burden of compliance with the Act is certainly not de minimis."

637 F.2d at 568. [Footnote 29] We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, nor was it designed to do so: the fifty percent

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rule of § 309.515, subd. 1(b), effects the selective legislative imposition of burdens and advantages upon particular denominations. The "risk of politicizing religion" that inheres in such legislation is obvious, and indeed is confirmed by the provision's legislative history. For the history of § 309.515, subd. 1(b)'s fifty percent rule demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others. For example, the second sentence of an early draft of § 309.515, subd. 1(b), read:

"A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention that elects and controls the governing board of the religious society or organization is exempt from the requirements of . . . Sections 309.52 and 309.53."

Minn.H. 1246, 1977-1978 Sess., § 4 (read Apr. 6, 1978). The legislative history discloses that the legislators perceived that the italicized language would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act. Transcript of Legislative Discussions of § 309.515, subd. 1(b), as set forth in Declaration of Charles C. Hunter (on file in this Court) 8-9. On the other hand, there were certain religious organizations that the legislators did not want to exempt from the Act. One State Senator explained that the fifty percent rule was

"an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . our state."

Id. at 13. Another Senator said,

"what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations."

Id. at 14. Still another Senator, who apparently

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had mixed feelings about the proposed provision, stated, "I'm not sure why we're so hot to regulate the Moonies anyway." Id. at 16.

In short, the fifty percent rule's capacity -- indeed, its express design -- to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards "religious gerrymandering," Gillette v. United States, 401 U. S. 437, 401 U. S. 452 (1971). As **THE CHIEF JUSTICE stated in Lemon, 403 U.S. at 403 U. S. 620:**

"This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction . . . of churches."

[Footnote 17]

See S. Cobb, The Rise of Religious Liberty in America: A History 67-453 (1970); L. Pfeffer, Church, State, and Freedom 71-90 (rev. ed.1967).

[Footnote 18]

B. Bailyn, The Ideological Origins of the American Revolution 265 (1967).

[Footnote 19]

For example, according to John Adams, colonial Massachusetts possessed "the most mild and equitable establishment of religion that was known in the world, if indeed [it] could be called an establishment." Quoted id. at 248. But Baptists in Massachusetts chafed under any form of establishment, and Revolutionary pamphleteer John Allen expressed their views to the members of the General Court of Massachusetts in his declamation, The American Alarm, or the Bostonian Plea, for the Rights and Liberties of the People:

"You tell your [colonial] governor that the Parliament of England have no right to tax the Americans . . . because they are not the representatives of America; and will you dare to tax the Baptists for a religion they deny? Are you gentlemen their representatives before GOD, to answer for their souls and consciences any more than the representatives of England are the representatives of America? . . . [I]f it be just in the General Court to take away my sacred and spiritual rights and liberties of conscience and my property with it, then it is surely right and just in the British Parliament to take away by power and force my civil rights and property without my consent; this reasoning, gentlemen, I think is plain."

Quoted id. at 267-268.

[Footnote 20]

See Pfeffer, supra, at 104-119.

[Footnote 21]

Id. at 125-127.

[Footnote 22]

The Federalist No. 51, p. 326 (H. Lodge ed.1908).

[Footnote 28]

Allen involved a state law requiring local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in parochial schools. 392 U.S. at 392 U. S. 238. Walz examined a state law granting property tax exemptions to religious organizations for religious properties used solely for religious worship. 397 U.S. at 397 U. S. 666. And in Lemon itself, the challenged state laws provided aid to church-related elementary and secondary schools. 403 U.S. at 403 U. S. 606.

[Footnote 29]

The registration statement required by § 309.52 calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization. The organization must disclose the "[g]eneral purposes for which contributions . . . will be used," the "[b]oard, group or individual having final discretion as to the distribution and use of contributions received," and "[s]uch other information as the department may . . . require" -- and these are only three of sixteen enumerated items of information required by the registration statement. The annual report required by § 309.53 is even more burdensome and intrusive. It must disclose "[t]otal receipts and total income from all sources," the cost of "management," "fund raising," and "public education," and a list of "[f]unds or properties transferred out of state, with explanation as to recipient and purpose," to name only a few. Further, a religious organization that must register under the Act may have its registration withdrawn at any time if the Department or the Attorney General concludes that the religious organization is spending "an unreasonable amount" for management, general, and fund-raising costs. § 309.555.