

# Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations

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What happens when a traditional Hindu or Muslim girl, whose religion requires her to cover her legs in public, is required to attend a gym class where the mandatory dress code is gym shorts?<sup>1</sup> After the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>2</sup> the Free Exercise Clause no longer requires officials to excuse the girl from exposing her legs.<sup>3</sup> In *Smith*, the Court struck a blow to minority religions by holding that the Free Exercise Clause does not mandate religious exemptions from neutral laws of general applicability.<sup>4</sup> Therefore, the only recourse for individuals holding religious be-

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<sup>1</sup> Steven G. Gey presented this hypothetical in his article *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 182 (1990). See *infra* text accompanying note 88.

<sup>2</sup> 494 U.S. 872 (1990). *Smith* involved two members of the Native American Church who were fired by their employer for ingesting peyote, a hallucinogenic drug, for sacramental purposes during a religious ceremony. *Id.* at 874. The State of Oregon refused to provide these individuals unemployment benefits pursuant to a state law that denied unemployment compensation for discharges due to "work-related misconduct." *Id.* The Supreme Court, per Justice Scalia, held that it was permissible for the state to prohibit the use of peyote and that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotations and citations omitted).

<sup>3</sup> It is possible that *Smith's* bright-line rule would not apply to this scenario. In order to distinguish prior precedents, Justice Scalia created an exception to *Smith* for cases involving the "Free Exercise Clause in conjunction with other constitutional protections." *Id.* at 881. Consequently, it is conceivable that the example of the Hindu or Muslim girl in gym class falls within the *Smith* exception because parental rights are also at play.

<sup>4</sup> *Id.* at 879. Congress attempted to override the Court's holding in *Smith* by passing the Religious Freedom Restoration Act (RFRA), which prevents the State from substantially burdening religious exercise, even through neutral rules of general applicability, unless the State has a compelling interest and the law is the least restrictive means of furthering the interest. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). The Supreme Court, however, reasserted itself by striking down RFRA on the grounds that Congress overstepped its authority under § 5 of the Fourteenth Amendment in enacting the legislation. *City of*

liefs that conflict with such laws is to petition the legislature for an exemption, or a sect-specific legislative accommodation.<sup>5</sup> This accommodation, while not mandated by the Free Exercise Clause, may nonetheless be permissible under the Establishment Clause.<sup>6</sup> An important question for the future of religious liberty in the United States is the scope of permissible accommodation.<sup>7</sup> How far can a legislature go in accommodating a religious group without violating the Establishment Clause?

Drawing the zone of permissible accommodation<sup>8</sup> too narrowly risks inhibiting religious exercise, particularly for minority religious groups.<sup>9</sup> At the other extreme, an overly broad conception of permissible accommodation could benefit mainstream religious groups to an extent that undermines the protection the Establishment Clause affords to nonadherents and religious minorities.<sup>10</sup> In this Note, I describe a framework for permissible legislative accommodation that addresses both of these concerns—a framework that will generally allow accommodation for religious minorities while simultaneously responding to fears that accommodation would be used to erode the Establishment Clause.<sup>11</sup> The framework ap-

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Boerne v. Flores, 521 U.S. 507, 536 (1997).

<sup>5</sup> The Supreme Court's holding in *Smith* changed the status of religious accommodations from a constitutional entitlement to a product of legislative sympathy, placing minority religious groups in a much weaker position: they must now rely solely on a legislature elected by the majority to protect their rights. *See infra* note 21 for further discussion.

<sup>6</sup> *See Smith*, 494 U.S. at 890 (suggesting, in dictum, that although exemptions from neutral laws of general applicability are not required, they can be granted through the political process).

<sup>7</sup> *See* Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 458 (1995) (“[I]n the light of the demise of mandated accommodations, the scope of permissible accommodations is probably ‘the defining Religion Clause question for the 1990s.’”) (quoting Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 267 (1994)).

<sup>8</sup> Professor Laurence Tribe uses the phrase “zone of permissible accommodation” to describe the intersection between the Free Exercise Clause and the Establishment Clause, where the Establishment Clause permits accommodation of religious interest and the Free Exercise Clause does not require it. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4, at 1169 (2d ed. 1988).

<sup>9</sup> This Note is consciously silent on the question of which religions qualify as “minority” religions. Whether a religion is a minority or a majority religion is a question that can depend on how many religious groups are affected by a particular law and the relative sizes of these groups. For example, when considering a state law in Salt Lake City, Utah, Mormons would likely qualify as a majority religion, whereas under a federal law, Mormons would likely qualify as a minority religion. Another complicating factor in defining a religious group as a minority or majority religious group is determining what constitutes a religious group: Should Catholics and Protestants be viewed as separate religions, or should they be grouped together under the heading of Christianity? Given these complexities, it is impossible to categorize a religion as a minority religion or a majority religion without making a fact-specific inquiry into the context of a particular community.

<sup>10</sup> TRIBE, *supra* note 8, § 14-7, at 1195 (2d ed. 1988) (“[U]nbounded tolerance of governmental accommodation . . . could eviscerate the establishment clause.”).

<sup>11</sup> The solution proposed in this Note is an attempt to promote religious liberty for minority religious groups in the aftermath of *Smith*, and thus is a second-best solution to reconciling free exercise concerns with the Establishment Clause. In an ideal world, the Free Exercise Clause would mandate exemptions from general laws for religious minorities

plies a version of the endorsement test, which the Court has recently used in school prayer cases,<sup>12</sup> to the legislative accommodations context. The endorsement test looks at the substantive impact of a sect-specific accommodation on individuals who are not accommodated, as opposed to the Court's current test which focuses on whether the accommodation does not facially, formally discriminate between different religious denominations. Applying the endorsement test to sect-specific legislative accommodations will generally result in upholding legislative accommodations for minority religions while denying such accommodations for majority religious groups.

Part I of this Note explores the benefits and drawbacks of permitting sect-specific legislative accommodations and contemplates the status of these accommodations under the endorsement test. Part II outlines and critiques the endorsement test as currently applied by the Court and suggests applying a "reasonable nonadherent" version of the test. Part III both describes and defends the facially unequal treatment of different religions that could result from applying the "reasonable nonadherent" version of the endorsement test to sect-specific legislative accommodations.

#### I. THE DEBATE OVER LEGISLATIVE ACCOMMODATIONS

It is well-settled that one goal of the Religion Clauses is to secure religious liberty for each individual.<sup>13</sup> Included in religious liberty is the freedom to exercise any religious belief or to disavow all religious beliefs.<sup>14</sup> While the Free Exercise Clause directly promotes religious liberty, the ideal of religious liberty cannot be achieved by the Free Exercise Clause alone. The Establishment Clause plays a vital role in securing religious liberty by ensuring that the government does not officially endorse a particular religion, thereby compromising the religious liberty of those who espouse conflicting religious beliefs.<sup>15</sup>

Sect-specific legislative accommodation provides a way to further the goal of religious liberty by allowing groups with religious beliefs that

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and the Establishment Clause would be enforced strictly.

<sup>12</sup> See *infra* text accompanying notes 58–61.

<sup>13</sup> E.g., Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 464–65 (stating that a "traditional goal" of the Establishment Clause is to preserve "intellectual and spiritual autonomy in matters of religious faith"); Berg, *supra* note 7, at 451.

<sup>14</sup> Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) (stating that "[t]he right to free exercise of religion implies the right to free exercise of non-religion").

<sup>15</sup> TRIBE, *supra* note 8, § 14-6, at 1187–88. ("The free exercise clause alone . . . cannot sufficiently safeguard religious liberty; the establishment clause also plays a central role in guaranteeing such freedom, by forbidding official actions that signify official endorsement or exclusion based on an individual's religious beliefs.")

conflict with a generally applicable law to be exempt from the law.<sup>16</sup> As Professor Michael McConnell, a prominent proponent of accommodation, explains:

Far from “enacting into law the political preferences of the political majority,” or bringing about an “alliance between church and state,” accommodations reflect a decision to tolerate dissent from the policies adopted by the political majority. Accommodations are forbearance, not alliance. They do not reflect *agreement* with the minority, but *respect* for the conflict between temporal and spiritual authority in which the minority finds itself.<sup>17</sup>

Several commentators, sympathetic to the plight of religious minorities or atheists, have argued against all legislative accommodations because they fear that minority religious groups will not benefit from legislative accommodations by a majority-elected legislature. These academics argue that accommodations will mainly serve the interests of followers of majority religions, since democratically elected legislatures are more likely to be aware of, believe the sincerity of, and be sympathetic to petitions by majority or mainstream religious groups.<sup>18</sup> Ira Lupu, a leading anti-accommodationist scholar, expresses this view:

Those in the position to accommodate will have grave difficulty maintaining objectivity about where lines are to be drawn. Customary practices are likely to be accommodated; unusual

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<sup>16</sup> A sect-specific accommodation may take the form of an exemption for a particular religious group from a law, such as an exemption for the Native American Church from a law prohibiting peyote use. *Cf. supra* note 2. Alternatively, a legislature may accommodate a particular religious group by passing a new law to address the particular religious group's needs. *See infra* note 23 for a description of the New York legislature's creation of a school district to accommodate the Satmar Hasidim.

<sup>17</sup> Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 717 (1992) (quoting Gey, *supra* note 1, at 76, 186). Professor McConnell would probably allow accommodations for both majority and minority religious groups, since he perceives a “preference for the secular in public affairs.” *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992).

<sup>18</sup> Professor McConnell refutes this argument by pointing to an empirical study that shows that “marginal” religions benefit more than “established” religions from legislative accommodations. Furthermore, McConnell notes that leaders of minority religious groups have enthusiastically supported legislative accommodations and argues that “[w]hen lawyers for Muslims, gypsies, Rastafarians, Scientologists, Orthodox Jews, Amish, Hare Krishnas, Jehovah's Witnesses, and the Native American Church begin to oppose religious exemptions on the ground that they discriminate against nonmainstream religion, it may be time to take this argument more seriously.” McConnell, *supra* note 17, at 733–35. Note, however, that McConnell's statements were made pre-*Smith*, when minority religious groups could petition the courts for a mandatory legislative exemption under the Free Exercise Clause.

ones are less likely to be so treated. Among the unusual practices, it is improbable that the more threatening ones will receive a warm reception from the state's decisionmakers . . . . A regime of accommodation, designed at least in part to produce substantive equality between nonreligious and religious interests, is highly likely to privilege mainstream, well-known religions, or locally dominant ones, and thereby to aggravate conditions of religious inequality.<sup>19</sup>

As Lupu astutely notes, it will be difficult for minority religious groups to get the attention of a legislature elected by the majority.<sup>20</sup> Justice Scalia acknowledged as much in his majority opinion in *Smith*.<sup>21</sup> Denying all legislative accommodations, however, is not the answer. Although minority religious groups may currently have difficulty persuading a legislature to act affirmatively to accommodate their religious exercise, majority-elected legislatures have, at times, chosen to aid religious minorities. *Board of Education of Kiryas Joel Village School District v. Grumet*<sup>22</sup> serves as a perfect example. In *Kiryas Joel*, the New York state legislature responded to the needs of a tiny sect of Hasidic Jews, the Satmar Hasidim, whose religion requires separation from the modern world.<sup>23</sup>

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<sup>19</sup> Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 586 (1991).

<sup>20</sup> An additional concern regarding legislative accommodation for minority religions is that tensions might increase between different religious groups as they each vie for legislative accommodations. However, "systematic exclusion of . . . religious interests from legislative attention is at least as likely to lead to political strife." Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 356 (2001).

<sup>21</sup> *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . ."); see also Sullivan, *supra* note 14, at 216 (criticizing *Smith's* holding on the grounds that it "entrenches patterns of de facto discrimination against minority religions").

<sup>22</sup> 512 U.S. 687 (1994).

<sup>23</sup> Justice Souter's majority opinion describes the Satmar Hasidim as follows:

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 head coverings and special garments for boys and modest dresses for girls.

*Id.* at 691. The Satmar Hasidic children were educated in private religious schools that did not have the special services needed to educate disabled children. *Id.* at 691–92. The disabled children therefore were forced to attend public school, where they suffered such "panic, fear and trauma . . . in leaving their own community and being with people whose ways were so different" that a majority of the parents eventually withdrew their children from public school. *Id.* at 692. The New York legislature subsequently passed a law that created a school district around the Kiryas Joel village, allowing the Satmar Hasidim to open a public school within their village which could provide education to disabled stu-

That such a small, non-mainstream religious group received an accommodation from the New York legislature illustrates that minority religious groups have some chance of convincing a sympathetic legislature to lift the burden of otherwise oppressive laws.<sup>24</sup>

Prohibiting legislative accommodation in a post-*Smith* world would turn a low probability of accommodation for minority religious groups into no possibility of accommodation. Therefore, instead of abolishing all legislative accommodations, I suggest that courts apply the endorsement test to sect-specific legislative accommodations to determine if the accommodation violates the Establishment Clause.<sup>25</sup> The endorsement test focuses on whether a legislative accommodation symbolically endorses a particular religion by sending a message to those not accommodated that their religion is disfavored.<sup>26</sup> Every time a legislature makes an exemption for a particular religious group, the potential exists for the legislature to harm individuals who do not share the religious group's views. Individuals who are not members of the accommodated group might feel like "outsiders, not full members of the political community," a result that the Establishment Clause forbids.<sup>27</sup>

When a legislature accommodates a majority religious group, individuals are more likely to perceive the accommodation as an insidious attempt by the majority to advance a religious agenda,<sup>28</sup> leading to feelings of political exclusion on the part of those not accommodated. Because majority religious groups are often implicitly accommodated through majoritarian laws,<sup>29</sup> accommodations of majority religious groups are more likely to be perceived as expressions of religious favoritism, rather than legitimate attempts to lift a burden on religious exercise. With respect to legislative accommodations of a minority religious group, on the other hand, individuals are likely to perceive the accommo-

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dents. *Id.* at 693.

<sup>24</sup> The Supreme Court held that the New York legislature's accommodation for the Satmar Hasidim violated the Establishment Clause. *See infra* note 33 (discussing the Court's rationale).

<sup>25</sup> For a discussion of the Court's current use of the denominational neutrality test in evaluating sect-specific accommodations, see *infra* text accompanying notes 71–74.

<sup>26</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *See infra* Part II for further discussion of the development of this test in Establishment Clause jurisprudence.

<sup>27</sup> 465 U.S. at 688 (O'Connor, J., concurring). In her *Lynch* concurrence, Justice O'Connor first recognized that one goal of the Establishment Clause is to prevent individuals from feeling excluded from the political community because of their religious beliefs. *Id.*

<sup>28</sup> *See* Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 72 (1996) ("[M]ajorities capturing the legislative process to advance their own expressly religious agendas raises a core Establishment Clause problem whereas majorities benefiting minority religious groups does not.").

<sup>29</sup> *See infra* text accompanying notes 85–93.

dations positively and to impute noble intentions of religious tolerance and pluralism to the accommodating legislature.<sup>30</sup>

Justice Scalia's opinion in *Kiryas Joel* reflects this attitude toward accommodations of minority religious groups.<sup>31</sup> He described the New York legislature's accommodation of the Satmar Hasidim as a "characteristically and admirably American accommodation of the religious practices . . . of a tiny minority sect"<sup>32</sup> and harshly criticized the plurality for finding that an accommodation of a small minority sect could constitute an "establishment" of religion.<sup>33</sup>

The Grand Rebbe [founder of the Satmar] 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 . . . of a tiny minority sect.<sup>34</sup>

This passage powerfully recognizes the absurdity of finding that a legislative accommodation for a small minority group has resulted in an "establishment" of religion. Accommodating a minority religious sect is

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<sup>30</sup> Abner Greene expresses this view in the following passage:

Legislative accommodation of minority religious groups does not pose an Establishment Clause problem because the [legislature's] . . . purpose is not to advance the minority group's religious agenda (if it were, I would agree there is a problem, but this is never the case). Rather, the majority [legislature] is acting out of respect for special burdens faced by the minority religious group, in a similar fashion to how the majority acts when alleviating the burden of any minority group, religious or otherwise.

Greene, *supra* note 28, at 72.

<sup>31</sup> Justice Scalia supports legislative accommodations for both minority and majority religious groups: According to Scalia, the Establishment Clause is not violated unless the government coerces an individual, through "acts backed by threat of penalty," to participate in or support religious exercise. *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting).

<sup>32</sup> *Kiryas Joel*, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting).

<sup>33</sup> The plurality opinion cited two grounds for finding an Establishment Clause violation: first, the statute impermissibly placed civic authority in a religious group's hands; and second, by accommodating a specific sect, the statute violated the neutrality principle of the Establishment Clause. *Id.* See *infra* note 73 for criticism of the Court's application of the neutrality principle in this case.

<sup>34</sup> 512 U.S. at 732 (Scalia, J., dissenting) (citation omitted).

generally something to be applauded and encouraged, rather than denounced, because, as *Kiryas Joel* illustrates, the accommodation often lifts a burden on religious exercise without sending an accompanying signal of support for minority religious views.

It is, of course, possible that a legislative accommodation of a minority religious group could be viewed as government support for the minority religion, thereby resulting in a violation of the Establishment Clause under the endorsement test. If, for example, the accommodation provides a small benefit to the adherents of the accommodated religion while placing large burdens on nonadherents, nonadherents may view the accommodation as expressing government favoritism for the accommodated group.<sup>35</sup> It would, moreover, be possible for an accommodation of a minority religious group to be invalid if another similarly situated minority religious group did not receive an accommodation.<sup>36</sup> For example, if a legislature exempted a particular religious group, like the Amish, from the state's compulsory school laws, and yet refused to exempt another minority religious group with equally compelling religious exercise arguments from the compulsory school laws, the accommodation for the Amish could make others feel as though their religion was disfavored.<sup>37</sup>

Just as it is possible for an accommodation of a minority religious group to be invalid under the endorsement test, it is conceivable that an accommodation of a majority religious group would not constitute an endorsement of the majority faith. In general, however, applying the en-

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<sup>35</sup> See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (Brennan, J., plurality opinion) (“[W]hen government directs a subsidy exclusively to religious organizations that . . . burdens nonbeneficiaries markedly . . . it cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985) (striking down a statute that entitled Sabbath observers to a day off because of the burden it might impose on employers or other employees). Professor McConnell notes that majority accommodations that impose a burden on others are more likely to be invalid under the Establishment Clause than accommodations of minority religions. See McConnell, *supra* note 17, at 703 (“An accommodation that imposes costs on others disproportionate to the alleviation of a burden on religious practice could be a form of favoritism for religion. . . . Presumably, this threat is more serious when . . . politically influential groups are accommodated at the expense of others, than when minority groups are accommodated.”).

<sup>36</sup> Cf. *Kiryas Joel*, 512 U.S. at 727 (Kennedy, J., concurring in the judgment) (stating in dictum that if a state legislature accommodated one religious group but not another group whose religious exercise was similarly burdened, the group that was not accommodated could sue the State on the grounds that the discriminatory treatment violated the Establishment Clause, and, if the reviewing court found a violation, the court could offer a remedy in the form of extending the accommodation to the group seeking relief).

<sup>37</sup> In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the State could not compel Amish children to attend high school under the State's compulsory school attendance statute. But in *Duro v. Dist. Attorney, Second Judicial Dist. of N.C.*, 712 F.2d 96 (4th Cir. 1983), the Fourth Circuit refused to exempt plaintiffs from compulsory attendance laws, distinguishing *Yoder* on the grounds that, “[t]he [parents in this case] . . . , unlike their Amish counterparts, are not members of a community which has existed for three centuries and has a long history of being a successful, self-sufficient, segment of American society.” *Id.* at 98.

dorsement test, with its focus on how the government action is perceived, would likely result in courts upholding legislative accommodations for minority religious groups and striking down legislative accommodations for majority religious groups, since a greater danger exists that accommodations for religious majorities would politically alienate religious minorities or athiests.<sup>38</sup>

## II. THE SUPREME COURT'S RECOGNITION OF SYMBOLIC HARM AND THE EVOLUTION OF THE ENDORSEMENT TEST

Justice O'Connor first referenced prevention of "symbolic harm" as a goal of the Establishment Clause in her *Lynch v. Donnelly* concurrence.<sup>39</sup> In that case, she argued that the Establishment Clause is violated when a government "endorses" religion because "[e]ndorsement 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."<sup>40</sup> This rationale serves as the basis for what is now referred to as the "endorsement test" in Establishment Clause jurisprudence. The endorsement test looks to the symbolic message that is sent when a government acts to benefit religion.<sup>41</sup> But, since a symbol's meaning depends on the eye of the beholder,<sup>42</sup> O'Connor's initial framing of the test begs the question of whose perceptions matter. She answered this question in *Wallace v. Jaffree* by formulating the "objective observer" standard.<sup>43</sup>

Justice O'Connor's theory behind the endorsement test and her professed concern to protect the religious diversity of America are laudable;<sup>44</sup> however, her application of the objective observer standard has

<sup>38</sup> See *infra* Part III for a discussion of the propriety of allowing a legislative accommodation for a minority religion, while striking down a parallel accommodation for a majority religion.

<sup>39</sup> 465 U.S. 688, 688 (1984) (O'Connor, J., concurring).

<sup>40</sup> *Id.*

<sup>41</sup> For applications of the endorsement test, see, for example, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

<sup>42</sup> William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533 (1986) ("A symbol has no natural meaning independent of its 'interpretive community.'") (citations omitted).

<sup>43</sup> 472 U.S. at 76 (1985) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."). For a critique of Justice O'Connor's objective observer standard, see Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 371-75 (1996); Marshall, *supra* note 42, at 533-37.

<sup>44</sup> O'Connor defended her endorsement test against Justice Kennedy's preferred standard of "coercion" by criticizing the coercion test for failing to "take account of the nu-

been, in the words of Professor Kathleen Sullivan, “unsatisfying.”<sup>45</sup> After unveiling her progressive test for the Establishment Clause in *Lynch v. Donnelly*, O’Connor failed to interpret the city’s Christmas display that included a crèche as sending a message of religious endorsement; rather, she viewed it as sending the permissible message of a holiday celebration.<sup>46</sup> Similarly, the Court followed O’Connor’s logic by applying her objective observer standard to uphold opening Judeo-Christian prayer at legislative sessions on the theory that these actions have lost religious significance over time.<sup>47</sup> The fundamental problem with Justice O’Connor’s objective observer test is that her objective observer still measures objectivity against the backdrop of a Christian society. The objective observer is functionally a reasonable Christian<sup>48</sup> and therefore is less likely to see the offensiveness of a government action that supports Christianity.<sup>49</sup> For many non-Christians or atheists, the religious nature of a crèche or prayer does not easily fade into the background, regardless of how long the practice has persisted.<sup>50</sup> Justice Brennan acknowledged as much by

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merous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval.” She believed the coercion test “would not . . . adequately protect the religious liberty or respect the diversity of the members of our pluralistic political community.” *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 627–28 (1989) (O’Connor, J., concurring).

<sup>45</sup> Sullivan, *supra* note 14, at 207.

<sup>46</sup> *Lynch*, 465 U.S. at 691 (O’Connor, J., concurring).

<sup>47</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>48</sup> *But see* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1566–68 (1995) (interpreting O’Connor’s objective observer test as focusing on the perception of a nonadherent).

<sup>49</sup> Sullivan, *supra* note 14, at 207 (“Majority practices are myopically seen by their own practitioners as uncontroversial; asking predominantly Christian courts to judge the exclusionary message of crèches may be a little like asking an all-male jury to judge a woman’s reasonable resistance in a rape case.”).

<sup>50</sup> See Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 1049, 1057 (1986). Professor Loewy writes:

[T]he practice [of judicial prayer] has been continued by common consent only in the sense that schools were segregated by common consent. Nobody asked blacks about segregated schools, and nobody asked nontheists about the invocation . . . . I doubt that many Moslems or Jews would consider it de minimis were the Supreme Court to begin its session with the invocation: “Christ save the United States and this Honorable Court.” Why then should we expect nontheists who are entitled to equal dignity under the establishment clause to react differently?

*Id. See also* Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 YALE J.L. & FEMINISM 137, 159 (1995). Professor Jacobs argues:

The historically pervasive use and acceptance of gender roles has deeply entrenched those roles and rendered them less tractable; they certainly have not become less oppressive by being long and deeply held. The same insight applies to government sponsorship of religious symbols. From the point of view of the non-adherent, the long-term use and pervasiveness of the symbol may well render it more offensive rather than less so and thereby heighten the threat to religious

finding that the crèche signaled government approval of the religious beliefs associated with it.<sup>51</sup> As Professor Sullivan states, to deny that displaying a crèche sends “a message of exclusion to Jews, Muslims or atheists is to see the world through Christian-tinted glasses.”<sup>52</sup>

If the concern under the Establishment Clause is to protect individuals from feeling politically alienated, as Justice O’Connor rightly points out,<sup>53</sup> then the appropriate test should look at government action through the lens of an individual who might be potentially alienated—that is, an individual who does not subscribe to the religious message in question.<sup>54</sup> By not focusing on the viewpoint of a nonadherent, the objective observer standard is at odds with the fundamental purpose of the endorsement test. The objective observer standard “relays the message to religious minorities that their perceptions are wrong; or even worse, that their perceptions do not matter.”<sup>55</sup> If the Court wishes to send a message that the religious beliefs of the minority are to be respected, the Court should replace the objective observer with a reasonable nonadherent for the purposes of the endorsement test.<sup>56</sup>

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freedom. Using the American religious tradition to justify the continuation of public religious practices begs the question in the same way that using a tradition of discrimination to justify its continuation does.

*Id.*

<sup>51</sup> *Lynch v. Donnelly*, 465 U.S. 668, 701 (1984) (Brennan, J., dissenting). Justice Brennan concludes:

The “primary effect” of including a nativity scene in the City’s display is . . . to place the government’s imprimatur of approval on the particular religious beliefs exemplified by the crèche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the City’s decision to include the crèche . . . can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing “a significant symbolic benefit to religion.” The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.

*Id.* (Citation omitted).

<sup>52</sup> Sullivan, *supra* note 14, at 216. See Gey, *supra* note 13, at 481 (“Religious minorities are not likely to agree with Justice O’Connor’s objective observer that the government’s use of the majority’s religious symbols or practices is merely a benign ‘acknowledgment’ of religion.”).

<sup>53</sup> See *supra* text accompanying note 40.

<sup>54</sup> See Greenawalt, *supra* note 43, at 374 (“[S]ince feelings of exclusion among members of minorities are so important, and since the majority (Christians) take cultural dominance so much for granted that they may not perceive endorsement of their position, judges should attend especially to how reasonable members of minorities may react.”).

<sup>55</sup> Gey, *supra* note 13, at 481 (1994).

<sup>56</sup> Professor Tribe describes the reasonable nonadherent as one who is not “hypersensitive,” but, because of her position as an outsider, may be offended by actions that “may seem so natural and proper to adherents as to blur into the background noise of society.” TRIBE, *supra* note 8, § 14-15, at 1293. Cf. Sullivan, *supra* note 14, at 207–08 (“That the endorsement test has been needlessly complicated and unpersuasively applied does not

Justice Stevens has explicitly acknowledged the importance of looking at a religious action by the government from the perspective of a nonadherent.<sup>57</sup> While the other Justices have nominally continued to use the objective observer standard for the endorsement test, in the school prayer context a majority of the Court appears to have functionally analyzed government action from the viewpoint of the reasonable nonadherent. In two recent school prayer cases, *Lee v. Weisman*<sup>58</sup> and *Santa Fe Independent School District v. Doe*,<sup>59</sup> the Court focused on the effect of prayer on students who do not share the religious views espoused in the prayer. The Court specifically responded to the argument that nonsectarian prayer and prayer resulting from a majority election are acceptable because they are a minimal intrusion on the student body as a whole:

[A] majoritarian policy “does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.” Similarly, while . . . majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.<sup>60</sup>

By focusing on the objecting student’s feelings of isolation and offense, the Court clearly considered the message of endorsement through the eyes of a reasonable nonadherent rather than an objective observer. Throughout *Santa Fe* and *Lee*, the Court revealed a sympathy for nonadherents and recognized that the perspective of the nonadherent may differ

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mean that it asked the wrong question to begin with. The Supreme Court should not eliminate such a test from its Establishment Clause doctrine, but rather should more rigorously enforce it . . .”).

<sup>57</sup> Justice Stevens argued that “[i]t is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief [a symbol] expresses.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

<sup>58</sup> 505 U.S. 577 (1992) (holding that student-led, non-sectarian prayer in public schools violates the Establishment Clause).

<sup>59</sup> 530 U.S. 290 (2000) (holding that a student-led, student-initiated prayer at a football game, recited by a student who was chosen through a school election, violates the Establishment Clause). Note that the majority opinion in this case referred to the test as the “coercion” test. Under the coercion test, as originally articulated by Justice Kennedy in *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), in order to find an Establishment Clause violation, the government’s action must “coerce” (a more difficult threshold to reach than “endorse”) an individual to change her religious beliefs. *Id.* at 659–62 (Kennedy, J., concurring in the judgment in part, and dissenting in part.) However, the coercion test announced by the Court in *Santa Fe* is more in line with Justice O’Connor’s endorsement test than Kennedy’s previously articulated coercion test. *Cf. Gey, supra* note 13, at 501 (“Justice Kennedy’s description of the constitutional problem in *Weisman* better fits Justice O’Connor’s theory that the government should not make nonadherents feel like outsiders in society, a theory which Justice Kennedy criticized at great length in *Allegheny*”).

<sup>60</sup> *Santa Fe*, 530 U.S. at 305 (quoting *Lee*).

from the perspective of a follower of the majority religion: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”<sup>61</sup> This statement reflects an understanding on the part of the Court that the religious perceptions of nonadherents should be the relevant reference point when applying the endorsement test.

The Court’s statement regarding the importance of the perceptions of objecting students is nonetheless qualified by the phrase “in a school context.”<sup>62</sup> The school prayer cases are obvious cases for application of the endorsement test because they involve young children who, because of their age and inexperience, are particularly sensitive to messages of endorsement or exclusion.<sup>63</sup> Given the unique role of public schools in teaching students the basic values of inclusionary democracy and participation in civic life,<sup>64</sup> public schools may be viewed as having a particular responsibility to prevent feelings of political alienation based on religious affiliation. The special circumstances of children in public schools help explain why the endorsement test has appeared most prominently in the school prayer cases; however, the Court has not provided adequate justification for limiting the endorsement test to cases involving school prayer.<sup>65</sup>

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<sup>61</sup> *Id.* at 312 (quoting *Lee*).

<sup>62</sup> *Id.*

<sup>63</sup> See *TRIBE*, *supra* note 8, § 14-5, at 1172, 1177 (stating that children are a “young, impressionable, and captive audience” and that “[y]oung students are likely to be vulnerable to coercion and intimidation . . . [and there] is the risk that younger children may see endorsement in the school’s otherwise-permissible accommodation”). The age of those affected has been mentioned as a factor in the Court’s decision in the following cases: *Lee*, 505 U.S. at 593 (“We do not address whether that choice [of silently participating or protesting] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985) (“The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.”); *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring in judgment) (“At the very least, Presidential proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination.”).

<sup>64</sup> *TRIBE*, *supra* note 8, § 14-5, at 1174 (“On-campus, school-time [religious] exercises are particularly offensive to the establishment clause because of public schools’ special place in American life. School is the forum through which basic norms are transmitted to our young, as well as ‘a most vital civic institution for the preservation of a democratic system of government.’”) (citing *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 320 (1963) (Brennan, J., concurring)).

<sup>65</sup> The particular susceptibility of children in schools to the endorsement of religion can be taken into account by treating the reasonable nonadherent in school prayer cases as a reasonable nonadherent child in a school setting, thereby setting a lower threshold for the

Those who perceive government endorsement of religion can feel politically alienated regardless of the place or the form of the government's message.<sup>66</sup> In fact, the endorsement test first emerged in a case involving adult citizens who were confronted with a government-sponsored display.<sup>67</sup> Furthermore, Justice O'Connor subsequently elaborated on the objective observer aspect of the endorsement test in a case involving a general legislative accommodation for religion, the exemption for religious organizations from Title VII's ban on religious discrimination in employment.<sup>68</sup> Most recently, Justices have referred to the endorsement test in Establishment Clause cases involving the application of federal and state school aid programs to religious schools<sup>69</sup> and a religious club's after-school access to school premises.<sup>70</sup>

Despite the Justices' willingness to acknowledge the continuing relevance of the endorsement test, the Court's trend in sect-specific legislative accommodations cases has been to substitute the endorsement test with a formal denominational neutrality test.<sup>71</sup> The Court first mandated denominational neutrality in *Larson v. Valente* when it stated, "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."<sup>72</sup> This statement of denominational neutrality could simply have been construed as another formulation of the endorsement test, since the endorsement test also seeks to prevent the government from sending a message that it officially prefers one religion over another. However, the Court has instead interpreted the denominational neutrality principle to mean that a legislature may not grant an accommodation to a specific religious group or sect. In his plurality opinion striking down the legislative accommodation in *Kiryas Joel*, Justice Souter expressed the view that denomina-

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perception of endorsement.

<sup>66</sup> TRIBE, *supra* note 8, § 14-5, at 1179 ("Audience perceptions and misperceptions are particularly thorny concerning schoolchildren, but they arise—and influence the outcomes of cases—concerning adults as well.")

<sup>67</sup> See *Lynch v. Donnelly*, 465 U.S. 668 (1984). The endorsement test has also been discussed in the following cases involving religious displays: *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>68</sup> *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (O'Connor, J., concurring) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.")

<sup>69</sup> *Mitchell v. Helms*, 530 U.S. 793, 798 (2000).

<sup>70</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118–19 (2001).

<sup>71</sup> "Denominational neutrality," according to Professor Tribe, prevents the state from distinguishing between religions, when the distinction cannot be supported by any free exercise argument. TRIBE, *supra* note 8, § 14-6, at 1190–93. Depending on the context, "neutrality" in Establishment Clause jurisprudence may also mean "strict neutrality," which forbids any classifications in terms of religion, or "political neutrality," which mandates that religious organizations receive the same benefits of the political community as secular organizations. *Id.* at 1188–90.

<sup>72</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982).

tional neutrality requires legislatures to write laws in formally neutral terms: “Petitioners’ proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.”<sup>73</sup> Justice Souter’s opinion essentially interprets the denominational neutrality principle to mean that any sect-specific accommodation is a per se violation of the Establishment Clause.<sup>74</sup> By finding that accommodations for particular religious groups violate the Establishment Clause, the Court has chosen to evaluate favoritism toward a religious group superficially, rather than substantively. Instead of focusing on whether a legislative accommodation has the effect of alienating those who are not accommodated, the Court looked only to whether the accommodation was written in denominationally neutral terms.

Justice O’Connor not only joined the portion of Justice Souter’s opinion striking down the law on formal denominational neutrality grounds,<sup>75</sup> but she also explicitly stated that she believes different tests should be used to determine if the Establishment Clause has been violated depending on the circumstances.<sup>76</sup> Justice O’Connor advocates ap-

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<sup>73</sup> 512 U.S. 687, 706–07 (1994) (citations omitted). But as Justice Kennedy’s dissent and partial concurrence points out, a sect-specific statute should not automatically be considered a violation of the neutrality principle. *Id.* at 725–26 (Kennedy, J., dissenting in part and concurring in part). As long as the legislature will give the same accommodation in the future to a similarly situated religious group, a sect-specific accommodation does not “favor” one religious group over another. *Id.* Professor McConnell concurs in this assessment:

It does not follow . . . that accommodations are suspect merely because they accommodate only a particular religious practice. Most accommodations are of this sort; when the legislature becomes aware that a particular law or government action infringes on the religious exercise of a particular religious minority, it typically carves out a particular exception . . . . The problem of denominational discrimination arises only when an accommodation is extended exclusively to members of certain faiths, when members of other faiths face the same burden of religious exercise . . . . The requirement of denominational neutrality must, however, be applied realistically. Not all religious practices have the same impact on government policy, and too exacting a requirement of equal treatment would likely discourage sensible and beneficial accommodations.

*Supra* note 17, at 705–07.

<sup>74</sup> Souter’s interpretation of the neutrality principle in *Kiryas Joel* as rejecting sect-specific accommodations departs from his earlier explication of the neutrality principle in *Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring), where he acknowledged that a federal sect-specific accommodation of Native American peyote use was not an endorsement of religion. In his *Lee* concurrence, Justice Souter concludes, “[I]n freeing the Native American Church from federal laws forbidding peyote use . . . the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.” *Id.*

<sup>75</sup> *Kiryas Joel*, 512 U.S. at 715–16 (O’Connor, J., concurring).

<sup>76</sup> *Id.* at 720 (O’Connor, J., concurring). Justice O’Connor states:

There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like these, involve government actions targeted

plying the substantive endorsement test in school prayer and public display cases because these cases involve government speech; she advocates applying the formal denominational neutrality test for all other government action.<sup>77</sup> What Justice O'Connor fails to fully appreciate, however, is that whether the religious message is delivered over a loud speaker, presented in the form of a public display, or enacted through legislation, the potential harm to nonadherents is the same—their sense of membership in the political community could be compromised.<sup>78</sup>

### III. JUSTIFYING DIFFERENTIAL TREATMENT OF LEGISLATIVE ACCOMMODATION OF MINORITY AND MAJORITY RELIGIOUS GROUPS: DISPOSING OF NEUTRALITY IN FAVOR OF RELIGIOUS EQUALITY

Justice O'Connor's real hesitation with applying the endorsement test to sect-specific legislative accommodations is that such a test could lead to differential treatment for majority and minority religious groups.<sup>79</sup> If an endorsement test that focuses on the perceptions of a reasonable nonadherent is applied to legislative accommodations, then it is possible that a sect-specific legislative accommodation of a majority religion would be held unconstitutional, whereas an identical sect-specific legislative accommodation for a minority religion would survive constitutional scrutiny. Justice Kennedy, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,<sup>80</sup> identified the differential treatment of minority and majority religious groups as a general problem of the endorsement test:<sup>81</sup>

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at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics [citations omitted] seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion.

*Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Justice O'Connor stated early in her opinion that the Establishment Clause is violated "when the government makes adherence to religion relevant to a person's standing in the political community," and the fact that "the government is acting to accommodate religion should generally not change this analysis." *Id.* at 715. Yet O'Connor then proceeds to apply a formal denominational neutrality test to accommodations, rather than a functional endorsement test. *Cf. Berg, supra* note 7, at 496–98 (criticizing O'Connor's proposal that the Court should apply different tests for different categories of cases on the grounds that this approach would not only produce arbitrariness but would also fail to identify and confront the values at stake in religion cases).

<sup>79</sup> *See supra* text accompanying notes 28–34.

<sup>80</sup> 492 U.S. 573, 677 (1989) (Kennedy, J., concurring in part and dissenting in part).

<sup>81</sup> Interestingly, Justice Kennedy wrote the majority opinion for *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which, as described *supra* note 59, functionally employed the endorsement test.

[With the endorsement test,] the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions.<sup>82</sup>

Although Justice Kennedy's sentiments are aimed at the endorsement test in general, the problem is particularly highlighted in the legislative accommodations context. For example, in a community where the majority religion is Christianity, a legislative accommodation for members of the Christian community would likely be struck down, while the same legislative accommodation for members of a minority religious sect would likely be upheld under the endorsement test. In justifying her application of the formal denominational neutrality principle in *Kiryas Joel*, Justice O'Connor uses the example of state laws outlawing the consumption of alcohol and explains that while a legislature may exempt sacramental wine use from the law, it may not exempt sacramental wine use by Catholics but not by Jews.<sup>83</sup> With application of the "reasonable nonadherent" version of the endorsement test, however, it is conceivable that a court would uphold a law that exempted Jews for sacramental wine consumption but not Catholics.<sup>84</sup> How can such differential treatment possibly be justified?

Not all individuals have an equal ability to exercise their religious beliefs in society. Demanding formal denominational neutrality, or neutral treatment, for religious groups is premised on the assumption that all individuals enjoy equal religious liberty in society, an assumption that is seriously flawed. Through the democratic process, adherents of majority religions enjoy an advantage over adherents of minority religions since majority religious practices are oftentimes already implicitly accommodated. Secular laws tilt the playing field in favor of religious liberty for majority religious groups.<sup>85</sup> To say that a test that primarily results in ap-

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<sup>82</sup> *Allegheny*, 492 U.S. at 677 (Kennedy, J., concurring in part and dissenting in part).

<sup>83</sup> 512 U.S. at 715–16 (1994).

<sup>84</sup> If the endorsement test were applied to Justice O'Connor's sacramental wine example, it is not obvious that a legislature may exempt sacramental wine use for all religious groups without violating the Establishment Clause. In such a case, under the endorsement test, the law would need to be analyzed from the perspective of a reasonable atheist to determine if the law favored religion over nonreligion.

<sup>85</sup> Jacobs, *supra* note 50, 156–57. Jacobs states:

Labeling . . . government actions "neutral" only makes sense from the majority standpoint that views the religious perspective from which the rules were made as "normal" or "natural." . . . The Court's conflation of neutrality and impartiality is . . . deceptive and dangerous. It privileges majority norms while purporting to effectuate religious freedom. . . . [M]inority religious practices are more likely to be unwittingly burdened by government actions, and less likely to be benefited by

proving legislative accommodations for minority religious groups relegates majority religions to the status of “least-favored faiths” is to deny political reality.<sup>86</sup>

The views of a majority religious group are not likely to conflict with most laws since a democratically elected legislature is unlikely to pass a law that curtails the religious exercise of a large constituency.<sup>87</sup> This is not to imply that legislators consciously disguise laws to benefit their own religious beliefs or the beliefs of the religious majority. Rather, laws are often written in such a way as to reflect unconsciously the views of the religious majority. For example, consider the hypothetical offered in the Introduction of the Muslim girl whose religion conflicted with the school dress code. If the girl lived in a community that consisted of a majority of traditional Hindus or Muslims, the dress code for women’s physical education classes would reflect what Hindus or Muslims believe is appropriate.<sup>88</sup> The girl would not need to petition the legislature for an exemption. The challenged statute in *Smith* provides another example. Peyote would never have been listed as a controlled substance had the majority of society considered it to have religious value.<sup>89</sup> When passing laws involving dress codes or a list of illegal substances, legislators may not consciously consider such decisions religiously based. An individ-

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government actions not specifically directed at religion.

*Id.*

<sup>86</sup> See *supra* note 82 and accompanying text.

<sup>87</sup> See McConnell, *supra* note 17, at 734 (“[T]ruly mainstream religions have little need for accommodations at all. Given their influence on the culture, it is unlikely that the laws will conflict in any serious way with their deeply held principles.”).

<sup>88</sup> *Id.* at 721. McConnell writes:

If there were a Hindu or Moslem majority in the community, the uniform would have a different design, and all the students would, in effect, conform to the Hindu or Moslem mores . . . . Because there is neither a Hindu nor Moslem majority, and because the majority’s view of aesthetics and convenience favors the wearing of shorts, those who have different mores (whether religious or secular) pose a problem for the officials with control over the program . . . . [T]he peculiar circumstances of minority religions and the danger of religious majoritarianism make it necessary to buttress the political checks with constitutional protections when the objection is based on adherence to religion (which, given the majoritarian character of the rule, will virtually always be a minority religion).

*Id.*

<sup>89</sup> See Jacobs, *supra* note 50, at 155–56. Jacobs surmises:

The laws that the Court has recently characterized as “neutral” reflect majority religious assumptions . . . . Including peyote in a broad list of illegal controlled substances makes sense only from the point of view of those who do not recognize its religious significance. Similarly, prohibiting military members from wearing head coverings indoors or requiring federal aid applicants to obtain a social security number are rules that developed from a majority religious perspective that did not recognize a possible religious conflict.

ual's religious beliefs nonetheless often influence her legislative priorities:<sup>90</sup>

“[T]he history of the United States reveals an inseparable connection between religion, morality, and law. Many of our laws, even our basic system of constitutional government and individual rights, rest to a significant degree on religious understandings of the world, of human beings, and of social relationships.” Furthermore, individuals and groups often support a wide variety of political, social and economic policies because of their religious ideals . . . . Because “religious beliefs and values may permeate a person’s world view by underlying, reinforcing, and interacting with other ‘secular’ convictions,” many legislators themselves would find it impossible to “fathom their reactions to cross-currents of psychic stimuli” so as to distinguish between which of their social views have a worldly basis and which have deep religious roots.<sup>91</sup>

Statutes preventing sodomy, abortion, murder, pornography, and public nudity, as well as laws promoting civil rights and welfare, are obvious examples of legislative action in which religious views may inform legislators’ votes and even influence the content of a “neutral” law.<sup>92</sup>

Even if a majority religious group’s practices conflict with a general law, the legislature may still be able to accommodate the majority religious group by offering secular rationales to amend the law. For example, Sunday closing laws were upheld in *McGowan v. Maryland*<sup>93</sup> against an Establishment Clause challenge because the Court found that they fulfilled the secular purpose of providing a uniform day of rest. As the Sunday closing laws illustrate, majority religious groups often have the political clout to set the baseline. Religious accommodations for minorities can be thought of as small indentations in that line. When a majority religious group’s religion conflicts with a law, however, the majority does not even need to indent the line; it can often simply move it.

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*Id.*

<sup>90</sup> See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding that religiously motivated legislators are entitled to vote based on their beliefs).

<sup>91</sup> Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 495–96 (1994) (citations omitted).

<sup>92</sup> See *id.* at 495 (citing Timothy Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 68 (1992), for the proposition that welfare laws and the Civil Rights Act of 1964 may have been supported for religious reasons).

<sup>93</sup> 366 U.S. 420 (1961).

## CONCLUSION

Upholding a legislative accommodation of a minority religious group, while striking down an identical accommodation for a majority religious group, is not inherently invidious. Given that laws are enacted through a democratic process that advantages majority religions, treating majority and minority religions unequally might be the only way to achieve equal religious liberty in society.<sup>94</sup> Strict adherence to formal denominational neutrality, while superficially providing equal treatment to religious groups, implicitly disfavors the religious liberty of members of minority religions since these individuals are most likely to experience conflict between religious exercise and majoritarian laws. As Professor Laurence Tribe explains, “where a burden falls with special weight on some religions, religious classifications are called for; religion blindness would produce only an illusory and hostile neutrality.”<sup>95</sup> Allowing legislatures to accommodate religious groups whose free exercise is particularly burdened by general laws promotes substantive equality between groups with respect to the exercise of religious liberty.<sup>96</sup>

The purpose behind denominational neutrality is to ensure that the legislature does not show favoritism for one religious group over another. The endorsement test I propose furthers this purpose by asking whether, from the perspective of the reasonable nonadherent, the law sends a message of favoritism for a particular religious group. The hallmark of this endorsement test is that it focuses on the actual impact of the accommodation on nonadherents, rather than on whether the accommodation is itself written in denominationally neutral terms. The test would therefore prevent marginalization and promote equality between majority and minority groups’ free exercise of religion.

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<sup>94</sup> Jacobs, *supra* note 50, at 151 (recognizing two definitions of equality: formal equality, which means equal treatment, and substantive equality, which “may mean different treatment that achieves an equal result”).

<sup>95</sup> TRIBE, *supra* note 8, § 14-7, at 1193.

<sup>96</sup> Jacobs, *supra* note 50, at 161. Jacobs argues:

[J]udicial hostility towards majority religious beliefs [is not apparent when the Court decides] to base decisions in part on the minority status of those to be burdened by government action where the decision might have been different if the burdened party was the majority religious group. Rather, such an approach is a necessary antidote to the natural advantage that more powerful religions have in the political process and in society in general, and to the conscious and unconscious majority assumptions that create the context of government decisionmaking and judicial review.