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Sorting through the Establishment Clause Tests, Looking Past the Lemon

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Notes

Sorting Through The Establishment Clause Tests, Looking Past the Lemon

Board of Education of Kiryas Joel Village School District v. Grumet[1]

I. INTRODUCTION

After the decision in *Lemon v. Kurtzman*,[2] one three-pronged test controlled all Establishment Clause issues.[3] The *Lemon* test has guided the court's analysis of a broad range of issues, including governmental speech on religious topics, governmental impositions of burdens and grants of benefits, and governmental delegations of civil power to religious bodies.[4]

The *Lemon* test was not originally intended to provide strict rules, but rather, "helpful signposts."[5] However, the Court began using the *Lemon* test exclusively to evaluate Establishment Clause issues soon after the decision was rendered.

The results of some of these decisions indicate the test should not always control the outcome. Of particular relevance in the background of the Kiryas Joel dispute was *Aguilar v. Felton*.[6] The *Aguilar* Court declared that public funds could not constitutionally be used to pay public school teachers when they furnished special educational services at parochial schools.[7] The *Aguilar* decision sparked the plaintiffs in *Kiryas Joel* to question the constitutionality of Kiryas Joel's own similar program. In *Kiryas Joel*, five Justices thought the *Aguilar* decision may have been incorrect. If it had not been for the

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1. 114 S. Ct. 2481 (1994).

2. 403 U.S. 602, 612-13 (1971). The Court's decision in *Lemon* set forth the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion." *Id.* (citations omitted).

3. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. *See also*, Everson v. Board of Educ., 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states through the Fourteenth Amendment).

4. *Kiryas Joel*, 114 S. Ct. at 2500 (O'Connor, J., concurring).

5. Hunt v. McNair, 413 U.S. 734, 740-41 (1973).

6. 473 U.S 402 (1985).

7. *Id.* at 413-14.

Aguilar decision, the New York legislature would not have created a separate school district for the village of Kiryas Joel, and this litigation would not have been prompted. The result in *Aguilar* and its impact on *Kiryas Joel* exemplify the harsh result obtained through rigid application of existing standards.[8]

The Justices have not been altogether satisfied with *Lemon*'s unitary approach to Establishment Clause issues. One demonstration of this is the Court's retreat, in dicta, from the *Aguilar* decision.[9] Before *Kiryas Joel* was heard by this Court, several Justices had introduced alternatives to *Lemon*. The Court has, on several occasions invoked these tests rather than using *Lemon*, but it has not yet announced how these tests fit into Establishment Clause jurisprudence. However, Justice O'Connor suggested the other tests are necessary because no single test can effectively dispose of the multitude of possible Establishment Clause issues.

Commentators regarded *Kiryas Joel* as a possible vehicle for elucidating the Establishment Clause tests.[10] However, because the Justices did not agree which standard was appropriate, their separate analyses provided many examples of the various standards, rather than a reformulation or clarification of the appropriate standard for the issue presented in *Kiryas Joel*.

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8. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring).

9. *Id.*

10. By accepting the invitation to review *Grumet*, "[t]he Supreme Court agreed . . . to re-examine the strict limits that the court established 22 years ago on governmental support for religious groups." Aaron Epstein, *Justices to Review Religion Standard, A Public School District was Created for Disabled Children of Hasidic Jews. The Separation of Church and State is at Issue*, PHILADELPHIA INQUIRER, Nov. 30, 1993, at A01. Professor Michael McConnell stated "[t]he case would be 'an excellent vehicle' for a reassessment of the *Lemon* test." James H. Andrews, *Court, Lawmakers Wrestle with Church-State Issues*, CHRISTIAN SCIENCE MONITOR, Dec. 9, 1993, at p.2.

Some commentators did not believe revision would signal positive change. "We are very worried that the court could rewrite years of doctrine and open the door to massive government aid to religious education." Tony Mauro, *Jewish School Tests Church-State Separation, Court's Newest Member Could Cast the Crucial Vote*, USA TODAY, Nov. 30, 1993 at O8A (quoting Joseph Conn of Americans United for the Separation of Church and State).

Others simply did not foresee a revision of the *Lemon* test in *Kiryas Joel*. Jesse Choper, a professor at University of California—Berkeley, "said it was 'very unlikely' the court will make a drastic change in Establishment Clause law this term[,]" quoted by David G. Savage, *Justices to Hear a Church-State Case on Schools*, LOS ANGELES TIMES, Nov. 30, 1993, at p. 1 pt. A, col. 4.

II. FACTS AND HOLDING

The Kiryas Joel Village is located in Monroe, Orange County, New York, and is populated exclusively by Satmars, practitioners of a form of orthodoxed Judaism called Hasidism.[11] The Satmars avoid assimilation into the dominant American culture.[12] They do not watch television, listen to the radio, or read English-language publications.[13] Yiddish is the primary language spoken in the community.[14] The Satmars abide by a strict dress code; Women shave their heads and cover their scalp with a wig and a hat and men wear long black coats, side curls, and head coverings.[15]

The sect originates from a town near the Hungarian-Romanian border.[16] Those who survived the Holocaust followed their leader, Grand Rebbe Joel Teitelbaum to the Williamsburg section of Brooklyn, New York.[17] Later, overpopulation in Brooklyn spurred the group's decision to move to an undeveloped subdivision in the Monroe School District.[18] After their new neighbors complained that the Satmar custom of multi-generation housing violated the city's single-family zoning, the Satmars successfully petitioned to form their own village.[19] The Village of Kiryas Joel, named after their leader, currently has a population of approximately 8,500 and consists of 320 acres.[20]

Although the Village of Kiryas Joel is located in the Monroe-Woodbury School District, the children are educated at parochial schools in the village. Boys learn to interpret the Torah at the United Talmudic Academy, while girls are trained at Bias Rochel to assume their future role as wife and mother.[21]

The problem leading to this dispute arose because the Satmars claimed they did not have the financial resources to provide special educational to their disabled children.[22] Under both state and federal law, all children have the

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11. *Kiryas Joel*, 114 S. Ct. at 2485.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id. See generally* ISRAEL RUBIN, SATMAR: AN ISLAND IN THE CITY (1972) and LIS HARRIS, HOLY DAYS: THE WORLD OF A HASIDIC FAMILY (1985).
17. *Kiryas Joel*, 114 S. Ct. at 2485.
18. *Id.* at 2485.
19. *See, In Re Formation of a New Village to be Known as "Kiryas Joel"*, MONROE TOWN SUPERVISOR, Dec. 10, 1976; *See generally* N.Y. VILLAGE LAW § 200, et seq. (McKinney 1973 and Supp. 1995).
20. *Kiryas Joel*, 114 S. Ct. at 2485.
21. *Id.*
22. Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527

right to receive public education.[23] The Monroe-Woodbury School District attempted to provide the necessary service to the disabled Satmar children. In 1984, the school district agreed to furnish "health and welfare services" at a "neutral site," an annex to one of the Village's parochial schools.[24] One year later, in response to the Supreme Court decision in *Aguilar*, declaring unconstitutional the use of public funding to pay public school teachers instructing children at parochial schools, the Monroe-Woodbury School District discontinued its services.[25]

Left with no alternative but to forego special education, some parents chose to send their children to the Monroe-Woodbury public schools.[26] They soon withdrew the children, however, because they suffered "panic, fear and trauma [as a result of] leaving their own community and being with people whose ways were so different [than theirs]."[27]

Parents next sought administrative review of the Monroe-Woodbury School District's decision to discontinue providing educational services at the parochial school site.[28] The School Board responded by seeking a declaration that it lacked statutory authority to provide services to the disabled students at an annex to a parochial school.[29] The court rejected the School Board's argument, holding that state education laws did not restrict the Board to offering its services "only in the regular classes and programs of its public schools."[30] However, the decision did not result in a victory for the Satmars, because the court also concluded the Satmars were not *entitled* to receive special education at a neutral site within the village.[31] The court's holding left to the Monroe-Woodbury School District the decision whether to offer educational services outside the regular public school site.[32] The school district opted to continue not doing so.

The Satmars next presented their dilemma to the legislature, which, seeking to resolve the prolonged dispute, enacted Chapter 748. Chapter 748 of the Laws of 1989 created a school district, coterminous with the boundaries

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N.E.2d 767, 770 (N.Y. 1988).

23. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 ed. and Supp. IV); N.Y. CONST., Art. 11, §1 (McKinney 1987).

24. *Wieder*, 527 N.E.2d at 770 (citing N.Y. EDUC. LAW § 912 (McKinney 1988)).

25. *Kiryas Joel*, 114 S. Ct. at 2485 (citing Aguilar v. Fenton, 473 U.S. 402 (1985)).

26. *Id.*

27. *Id.* (citing *Wieder*, 527 N.E.2d 767, 770 (N.Y. 1988)).

28. *Wieder*, 527 N.E.2d at 770.

29. *Id.*

30. *Id.* at 775 (citing N.Y. EDUC. LAW § 3602-c (McKinney 1995)).

31. *Id.* at 770 (citing N.Y. EDUC. LAW § 3602-c (McKinney 1995)).

32. *Id.* at 775.

of the Kiryas Joel Village, located wholly within the Monroe-Woodbury School District.[33]

By its terms, Chapter 748 provided for a full school district, but the school board operated only a special education program for disabled children.[34] The other Satmar children continued to be educated at Kiryas Joel's parochial schools. However, all the children relied on the new school district for "transportation, remedial education, and health and welfare services."[35]

The executive director and the president of the New York State School Boards Association, Louis Grumet and Albert Hawk,[36] brought suit claiming Chapter 748[37] delegated governmental powers to a religious organization in violation of the Establishment Clause. The Boards of Education of the

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33. Chapter 748 of the Laws of 1989, entitled "An Act to establish a separate school district in and for the Village of Kiryas Joel, Orange County," provided in relevant part:

> The territory of the Village of Kiryas Joel in the Town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel Village school district and shall have and enjoy all of the powers and duties of union free school district under the provisions of the education law.

1989 N.Y. Laws ch. 748.

34. Kiryas Joel's public special education program was operated by a superintendent with 20 years of experience with the New York public schools and by non-Hasidic teachers who lived outside the village. The program was governed by New York laws applicable to all public schools, so it observed national holidays but remained in session during Hasidic religious holidays. Furthermore, unlike the village's religious schools, the public schools were purely secular in design; no religious symbols adorned their walls. Students of both sexes were educated together, although the tenets of Hasidim prohibit co-education. *Kiryas Joel*, 114 S. Ct. at 2506 (Scalia, J., dissenting). However, the school district's board of education was composed entirely of Satmars "elected by the qualified voters of the village of Kiryas Joel." N.Y. EDUC. LAW § 3202 (McKinney 1981 & Supp. 1994). Because the village is exclusively populated by the Satmars, the school district's governing power was delegated entirely to the Satmars.

35. *Kiryas Joel*, 114 S. Ct. at 2486.

36. Louis Grumet and Albert Hawk originally brought suit as individuals and in their capacities as executive director and president of the New York State School Board Association, respectively. The New York Supreme Court, Appellate Division ruled that they could not sue as board members because the Association itself was not a tax-paying citizen within the meaning of New York law and it therefore did not have the substantive right to raise constitutional challenges to a state statute. Grumet v. Board of Education, 592 N.Y.S.2d 123, 125 (N.Y. App. Div. 1992). Grumet and Hawk continued the suit as plaintiffs in their capacity as individual citizens.

37. *See supra* note 32.

Kiryas Joel School District and the Monroe-Woodbury School District intervened as defendants.

The trial court held that Chapter 748 violated all three prongs of the *Lemon* test and granted summary judgment to the plaintiffs.[38] A divided appellate division upheld that decision.[39] The Court of Appeals of New York affirmed,[40] relying primarily on the second prong of the *Lemon* test. The court reasoned that the school district was not created to fill a void where *no* opportunity to receive special education existed, but rather to replace an educational system that the children's parents believed was inadequate.[41] Therefore, Chapter 748 constituted a governmental endorsement of the sect's religious tenets.

The U.S. Supreme Court granted certiorari and affirmed. The Court held that an act is unconstitutional if neither its terms nor the conditions surrounding its enactment provides assurance that it has been and will continue to be implemented on a neutral basis with respect to similarly situated organizations.[42]

III. LEGAL BACKGROUND

The Establishment Clause and the Free Exercise Clause comprise the First Amendment Religion Clauses. Although they are intended to complement one another, tension frequently arises in their application. In its strictest form, the Establishment Clause mandates a "wall of separation" between church and state[43]; no church or religious group may receive any form of governmental

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38. Grumet v. New York State Educ. Dept., 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992).

39. Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123 (N.Y. App. Div. 1992).

40. Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist., 618 N.E.2d 94, 98 (N.Y. 1993), *aff'd*, 114 S. Ct. 2481 (1994).

41. *Id.* at 99.

> Because special services are already available to the handicapped children of Kiryas Joel, the primary effect of chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenants create a tension between the needs of its handicapped children and the need to adhere to certain religious practices . . . the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus 'a core purpose of the Establishment Clause' is violated.

Id. (citing *School Dist. of Grand Rapids*, 473 U.S. at 389).

42. *Kiryas Joel*, 114 S. Ct. at 2491.

43. 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281-82 (A. Lipscomb ed.

aid. However, the Free Exercise Clause requires government to "accommodate" the needs of a particular group or individual to protect the right to practice their religion.[44] One example of the tensions between the two clauses occurs when government must confer benefits on religious people or organizations in the same way that the benefit is conferred on society generally.[45] Conferring the benefit might be seen as impermissible governmental support of religion, but withholding it might be an equally unconstitutional act of governmental hostility towards religion. Because of the tension between separationism and accommodation, the Establishment Clause's strict "wall" metaphor has been rejected. Instead government aid has to be provided to individuals or groups similarly situated to those for whom the aid was intended, irrespective of religion (or irreligion).[46]

In search of a uniform standard with which to analyze Establishment Clause issues, the Supreme Court adopted the *Lemon* test.[47] The first two prongs of *Lemon* were taken from *Abington School District v. Schempp*.[48] Reasoning that the purpose of the questioned government action must be secular and the primary effect of the action must not advance or inhibit religion, the Court in *Schempp* found that the common practice of teacher-led prayer in public schools was unconstitutional.[49] The third and final prong of *Lemon* was articulated first in *Walz v. Tax Commission*,[50] a case which upheld exempting real property dedicated to religious use from municipal taxation. The Court reasoned, *inter alia*, that the exemption did not result in impermissible assistance to religious groups, but instead "restrict[ed] the fiscal relationship between church and state and . . . complement[ed] and reinforce[d] the desired separation insulating each from the other."[51]

To pass constitutional scrutiny under *Lemon*, a legislative act must satisfy all three prongs. Thus, if a court decides the purpose of the government

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1903) (referring to a letter Thomas Jefferson wrote to a Committee of the Danbury Baptist Association dated January 1, 1820).

44. Sherbert v. Verner, 372 U.S. 398, 409 (1963).

45. *See, e.g.*, Lamb's Chapel v. Center Meriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993) (holding that a public school must allow a religious group to have access to their auditorium to show religious films, if the district would allow non-religious groups access to the auditorium for non-religious purposes); *Zobrest*, 113 S. Ct. at 2469 (holding that the state did not violate the Establishment Clause by paying for a hearing interpreter to aid a hearing-impaired student in a parochial school, since that benefit was offered to students at public schools as well).

46. *Lamb's Chapel*, 113 S. Ct at 2148; *Zobrest*, 113 S. Ct. at 2469.

47. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

48. 374 U.S. 203 (1963).

49. *Id.* at 222-26.

50. 397 U.S. 664, 676 (1970).

51. *Id.*

action is not secular, if its primary effect advances or inhibits religion, or if it results in excessive entanglement of government and religion, the act will be declared unconstitutional. Although cases handed down soon after *Lemon* was decided stated the test was meant only as a guideline,[52] *Lemon* has more often been applied as a rule.

The Court has become increasingly dissatisfied with *Lemon*. Several Supreme Court Justices have suggested revising or replacing *Lemon*,[53] and the Court has even used some alternatives. For example, the Court mentioned *Lemon* in *Larson v. Valente*, but decided the case based on a "strict scrutiny" test introduced by Justice Brennan.[54] *Larson's* result was that an exemption from a charitable solicitation regulation was unconstitutional when applied only to religious organizations receiving at least half their funding from members or affiliated organizations.[55]

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52. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 677-78 (1971) (decided the same day as *Lemon*); *Hunt*, 413 U.S. at 734; Meek v. Pittenger, 421 U.S. 349, 359 (1975) (citing *Tilton*, 403 U.S. at 677-78).

53. Justices White, Rehnquist, O'Connor, Scalia and Thomas have all suggested that *Lemon* need to be revised or replaced. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (White, J., dissenting) ("I would support a basic reconsideration of our precedents."); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) ("I am no more reconciled now to *Lemon* than I was when it was decided"); *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) (*Lemon* "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . . ."); *Aguilar*, 473 U.S. at 422 (O'Connor, J., dissenting) ("I question the utility of entanglement as a separate Establishment Clause standard in most cases"); *Lamb's Chapel*, 113 S. Ct. at 2149 (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence"). Edwards v. Aguillard, 482 U.S. 578, 640 (1987) (Scalia, J., joined by Rehnquist, C.J., dissenting) ("Abandoning *Lemon's* purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences—would be a good place to start"); *Lee*, 112 S. Ct. at 2678 (1992) (Scalia, J., joined by Thomas, J., dissenting) (describing *Lemon* as "not deriv[ing] from, but positively conflict[ing] with, our long-accepted constitutional traditions."); *County of Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in part and dissenting in part) ("I . . . do not wish to be seen as advocating, let alone adopting, [*Lemon*] as our primary guide in this difficult area . . . [s]ubstantial revision of our Establishment Clause doctrine may be in order . . . .").

54. 456 U.S. 228, 246 (1982).

55. *Id.* at 246 and 249-50 ("When we are presented with a state law granting a denominational preference, our precedents demand we treat the law as suspect and that we apply strict scrutiny in adjudicating its constitutionality").

Decided two years later, *Lynch v. Donnelly*[56] is noteworthy for two reasons. First, it demonstrated that judges applying the *Lemon* test could reach inconsistent results, even when considering identical facts. The majority and dissenting opinions both applied *Lemon*, but the majority held that a city's sponsorship of a publicly displayed nativity scene was constitutional while the dissent concluded it was not. The second reason *Lynch* is important is that in her concurrence, Justice O'Connor introduced the "no-endorsement" test,[57] stating that the inquiry is not whether secular objectives for the legislation existed, but rather "whether the government intend[ed] to convey a message of endorsement or disapproval of religion" or whether that message had such effect.[58]

Concurring again in *Wallace v. Jaffree*, Justice O'Connor stated that the no-endorsement test should be considered from the perspective of an "objective observer."[59] The dispositive question is whether an objective observer would "perceive" the questioned governmental action to "send[] a message to non-adherents that they are outsiders, not full members of the political community . . . ."[60]

The no-endorsement test has been accepted by a majority of the Court in some cases. In 1989, a five-Justice majority used a version of the no-endorsement test in *County of Allegheny v. ACLU* to determine the constitutionality of public sponsorship of religious symbols (a Christmas tree, a Chanukah menorah, and a Nativity scene).[61] However, not all Justices believe this test is viable. Justice Kennedy, for one, opposed the no-endorsement test pointing out that very few government attempts to accommodate religion could survive a strict application of the test.[62] He commented that a "reasonable" atheist could feel like an "outsider" to the political community as a result of the references to God in the Pledge of Allegiance, in legislative prayers, and the motto printed on U.S. currency.[63]

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56. 465 U.S. 668 (1984).

57. *Id.* at 670-72 (O'Connor, J., concurring).

58. *Id.*

59. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

60. *Id.* at 69 (quoting Lynch v. Donnelly, 476 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

61. County of Allegheny v. ACLU, 492 U.S. 573, 578 (1989).

62. *Lynch*, 465 U.S. at 671 (Kennedy, J., dissenting).

63. *Id.* at 671-72. It has also been suggested that while the endorsement test is appropriate when government attempts to benefit a religious group or religion, generally (i.e., cases concerning official prayers and publicly sponsored religious displays), it is inappropriate to judge the government's attempts to alleviate burdens. Christopher L. Eisgruber, *Political Unity and The Powers of Government*, 41 UCLA L. REV. 1297, 1309-1310 (1994). Supporting this contention is that Justice O'Connor

Justice Kennedy suggested, instead, replacing *Lemon* with a "coercion" test. He applied this test in his concurrence in *County of Allegheny*[64] as well as his majority opinion in *Lee v. Weisman*.[65] In *Lee*, he noted that "prayer exercises in public schools carry a particular risk of indirect coercion."[66] Justice Kennedy defined coercion broadly to include social and psychological pressure.[67] However, the coercion test also has critics.[68]

Justice Rehnquist authored his test, "nonpreferential treatment," in his dissent in *Wallace v. Jaffree*.[69] According to Justice Rehnquist, the Establishment Clause "[forbids] establishment of a national religion, and [forbids] preference among religious sects or denominations," but does not forbid "programs that benefit religion, generally, without preferring one religion to another, or religion to non-religion."[70]

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did not even mention the no-endorsement test in either *Aguilar* or in *School Dist. of Grand Rapids*, both Establishment Clause challenges to school funding, even though she had introduced the test only one year earlier. *Id.* For scholarly criticism of the no-endorsement test, *see* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987); Mark V. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711-712 (1986); Craig L. Olivo, Note, *Grumet v. Board of Education of the Kiryas Joel Village School District: When Neutrality Masks Hostility—The Exclusion of Religious Communities From an Entitlement to Public Schools*, 68 NOTRE DAME L. REV. 775, 814 (1993).

64. 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part).

65. Lee v. Weisman, 112 S. Ct. 2649, 2657 (1992).

66. *Id.* at 2658 (citing *Engle*, 370 U.S. at 421 and *Abington Sch. Dist.*, 374 U.S. at 307).

67. *Lee*, 112 S. Ct. at 2658.

68. The coercion test has been criticized by Justices Blackmun, Stevens, O'Connor and Souter. *See, e.g., County of Allegheny*, 492 U.S. at 628 (1989) (O'Connor, J., concurring) (Justice O'Connor suggested that the coercion test "would make the Free Exercise Clause a redundancy"); *Lee*, 112 S. Ct. at 2664 ("The court has repeatedly recognized that a violation of the Establishment Clause is not predicated on coercion"). For scholarly criticism, *see* Ronald C. Kahn, *God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983 (1993).

69. 472 U.S. at 92-114 (Rehnquist, J., dissenting).

70. *Id.* at 105. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT at xii, 155 (1986) (suggesting that Justice Rehnquist "flunked history when he wrote" his dissent in *Wallace*); Douglas Laycock, *"Non-preferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 885-94 (1986).

Even Supreme Court Justices who have not introduced alternative tests have opposed strict adherence to the *Lemon* test.[71] The author of the *Lemon* test, retired Chief Justice Burger, noted "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[72]

That so many Justices have expressed dissatisfaction with *Lemon* indicates that the test is not well-suited to analyze all Establishment Clause issues. However, the Court has not yet agreed upon one sufficiently satisfying standard with which to overrule *Lemon.*

IV. INSTANT DECISION

In a 6 to 3 decision, the Court ruled that Chapter 748 was unconstitutional. Justice Souter wrote for the Court. The first section of his opinion, joined by Justices Stevens, Blackmun, and Ginsburg, constituted a plurality. The second section was accepted by a majority of the Court, consisting of all the members of the plurality plus Justice O'Connor. Justice O'Connor wrote a separate opinion, concurring with the judgment, but not with the plurality. Justice Blackmun wrote a concurring opinion, as did Justice Stevens, whose opinion was joined by Justice Blackmun and Justice Ginsburg. Justice Kennedy concurred only in the judgment. Justice Scalia dissented, accompanied by Chief Justice Rehnquist and Justice Thomas.

A. Majority Opinion

Writing for the majority, Justice Souter declared Chapter 748 unconstitutional because it did not provide an "effective means of guaranteeing" that governmental power has been and will continue to be neutrally employed.[73] The case-specific manner in which Chapter 748 was

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71. Justices Scalia, Thomas and White have opposed strict adherence to the *Lemon* text. *See, e.g, Lamb's Chapel*, 113 S. Ct. at 2149-50 (Scalia, J., joined by Thomas, J., concurring); *Lee*, 112 S. Ct. at 2678 (Scalia, J., joined by Thomas, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); *School Dist. of Grand Rapids*, 473 U.S. at 400 (White, J., dissenting); *Wallace*, 472 U.S. at 90-91 (White, J., dissenting); *Widmar*, 454 U.S. at 282 (White, J., dissenting); New York v. Cathedral Academy, 434 U.S. 125, 134 (1977) (White, J., dissenting); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

72. *Lynch*, 465 U.S. at 679.

73. *Kiryas Joel*, 114 S. Ct. at 2491 (citing Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982)). The *Grendel's Den* court invalidated a Massachusetts law that gave religious groups veto power over applications for liquor licenses in their vicinity for

enacted left the Court "without any direct way to review such state action," because "a legislature's failure to enact a special law is itself unreviewable."[74] If the village of Kiryas Joel had received its authority through general legislation, "simply as one of many communities eligible for equal treatment under the law," or alternatively, as a result of a series of special acts written to benefit various communities, the likelihood of its constitutionality would have been greater.[75] For instance, an act written broadly to apply to any group that meets certain criteria would describe the standards a group would have to meet to receive the benefit of the act. On the other hand, a "series of special acts" would provide examples of the kinds of organizations that were eligible.[76]

In addition to being "special" because it was enacted for the sole benefit of a single group, Chapter 748 was also unique in that it was against New York's trend of consolidating school districts to form schools "large enough to provide a comprehensive education at affordable cost."[77] The Kiryas Joel Village School District has only 13 local, full-time students, and less than 200 total students, including part-time and out-of-area students.[78] To demonstrate the uniqueness of Chapter 748, Souter contrasted earlier attempts at similar arrangements: "[e]arly on in the development of public education in New York, the State rejected highly localized school districts for New York City when they were promoted as a way to allow separate schooling for Roman Catholic children."[79]

Lastly, Justice Souter found that the barriers to providing educational services to the Satmar's disabled children arose not from religious tenets but from preference. Although "Satmars prefer to live together 'to facilitate individual religious observance and maintain social, cultural and religious values'. . . it is not 'against their religion' to interact with others."[80] Chapter 748, then, was unacceptable because it merely catered to the Satmars'

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two reasons: (1) absence of an effective means of guaranteeing that governmental power has been and will continue to be neutrally employed; (2) impermissible entanglement of government and religion. *Grendel's Den*, 459 U.S. at 125-26. Justice Souter's majority in *Kiryas Joel* used the first *Grendel's Den* criterion to strike Chapter 748. *Kiryas Joel*, 114 S. Ct. at 2491. The plurality, discussed *infra* notes 86-96 and accompanying text, used both criteria. *Id.* at 2488-89.

74. *Kiryas Joel*, 114 S. Ct. 2491.

75. *Id.*

76. *Id.*

77. *Id.* at 2489.

78. *Id.* at 2490.

79. *Id.* at 2491 (citing R. CHURCH & M. SEDLAK, EDUCATION IN THE UNITED STATES 162, 167-69 (1976)).

80. *Id.* at 2492 n.9 (citing Brief for Petitioner No. 93-517, p.4, n.1).

"religiously grounded preferences" rather than accommodating that which their religion mandates.[81] According to Justice Souter, an act that bends to the preferences of a particular religious group clearly violates the principle that neutrality among religions must be honored.[82] The enactment of Chapter 748 could not even be justified by principles of accommodation, as Justice Scalia's dissent would have liked, because the Court has "never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation."[83] Thus, Justice Souter's majority found Chapter 748 an unconstitutional establishment of religion.

He suggested alternative ways, however, to provide special education to the disabled Satmar children. Because separation is not mandated by their religion, the children could receive bilingual and bicultural education within the Monroe-Woodbury district.[84] Alternatively, the Monroe-Woodbury School District could provide special education services at a neutral site in the village.[85] Furthermore, Justice Souter suggested that the Satmars take advantage of the administrative review process they instigated but had not exhausted before Chapter 748 was enacted.[86] Lastly, the legislature "could certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings."[87]

B. Plurality Opinion

Although a majority of the Court agreed that Chapter 748 violated the rule in *Grendel's Den* because it provided no effective means to guarantee that legislative power would be neutrally employed,[88] the plurality went a step further. They applied the second principle of *Grendel's Den*, that governmental power should not be delegated to people or organizations based on a religious criteria,[89] and concluded that Chapter 748 could not be validated because it did not delegate power "on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[90]

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81. *Id.* at 2492.

82. Larson v. Valente, 456 U.S. 228, 244-46 (1982).

83. *Kiryas Joel*, 114 S. Ct. at 2493. "[T]he Constitution allows the state to accommodate religious needs by alleviating special burdens." *Id.* at 2492.

84. *Id.* at 2493.

85. *Id.*

86. *Id.*

87. *Id.* at 2493.

88. *Id.* at 2491.

89. *Id.* at 2488.

90. *Id.* at 2489. *See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27

The plurality conceded that Chapter 748 did not delegate governmental power to individuals explicitly in their religious capacity or to the village explicitly as a religious organization. The plurality found this was enough to distinguish *Kiryas Joel* from *Grendel's Den* facially but not substantively. Delegating power to the "qualified voters of the village of Kiryas Joel"[91] and to the "territory of the village of Kiryas Joel"[92] was unconstitutional, just as the statute empowering churches in *Grendel's Den.* In both cases, governmental power was delegated to a group based on its religious affiliation.

The plurality supported its conclusion that governmental power was delegated based on religious criteria with two findings: (1) the school district was created "under the terms of an unusual and special legislative act,"[93] and (2) the district's boundary purposefully followed village lines so as to include only Satmars.[94] In addition, the Satmars and the legislature had agreed that 20 disabled Hasidic children living outside Kiryas Joel would come to the village daily to receive special education,[95] and that if a non-Hasidic child were to move into the village, the district would pay his or her tuition at a neighboring school.[96] Based on these findings, the plurality would also invalidate Chapter 748 because the Act created a "political subdivision" which defined the "qualifications for its franchise by a religious test."[97]

C. Concurring Opinions

1. Justice Blackmun

In a short concurrence, Justice Blackmun wrote only to reaffirm his commitment to the *Lemon* test. Although the Court's opinion did not rely on the three-pronged test, Justice Blackmun asserted that the *Kiryas Joel* decision did not depart from *Lemon*'s principles. Instead, he believed the decision was based on *Lemon* through *Grendel's Den.*

(1982) (quoting *Abington Sch. Dist.*, 374 U.S. at 222) (An act which results in "fusion of governmental and religious functions" by delegating important, discretionary governmental powers to religious bodies impermissibly entangles government and religion.)

91. 1989 N.Y. Laws ch. 748.

92. *Id.*

93. *Kiryas Joel*, 114 S. Ct. at 2489. The plurality found that "the district's creation ran uniquely counter to state practice . . . [and that] customary and neutral principles would not have dictated the same result." *Id.* at 2490.

94. *Id.* at 2489.

95. *Id.*

96. *Id.*

97. *Id.* at 2490 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982).

Justice Blackmun claimed that the two tests set forth in *Grendel's Den*, and used by the Court in *Kiryas Joel*, were essentially the second and third prong of *Lemon*. Disallowing "a fusion of government and religious functions," he said was the same as *Lemon*'s "entanglement" prong.[98] The need for an "effective means of guaranteeing" that governmental power is neutrally employed" was, according to Justice Blackmun, the same as *Lemon*'s "effect" prong.[99] Justice Blackmun was the only Justice on the *Kiryas Joel* Court to defend the *Lemon* test, and he has since retired from the Court.

2. Justice Stevens

Justice Stevens wrote simply to add to the reasons for invalidating Chapter 748. He stated that the establishment of a new school district within the village would "tend to support the religious sect's interest in segregating itself,"[100] a result he believed was contrary to the public's interest in "promoting diversity and understanding in the public schools."[101] Instead of "responding with a solution that affirmatively supports a religious sect's interest in . . . preventing its children from associating with their neighbors," Justice Stevens suggested the legislature should have "taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs."[102] Responding to the problem in that manner, he concluded, would raise no constitutional concerns.[103]

3. Justice O'Connor

Justice O'Connor did not join the majority opinion because she considered the test set forth in *Larson*,[104] not *Grendel's Den*, most relevant.[105] The *Larson* Court stated that the principles of the *Lemon* test were irrelevant to the issue being considered because *Lemon* should be used to measure laws affording uniform benefit to all religions, not provisions that discriminate among religions.[106] In *Larson*, rather than applying *Lemon*, Justice Brennan's majority used a "strict scrutiny" test: "When we are presented with a state law granting denominational preference, our precedents

98. *Kiryas Joel*, 114 S. Ct. at 2495 (Blackmun, J., concurring).
99. *Id.*
100. *Id.* at 2495 (Stevens, J., concurring).
101. *Id.*
102. *Id.*
103. *Id.*
104. 456 U.S. 228 (1982).
105. *Kiryas Joel*, 114 S. Ct. at 2495-2500 (O'Connor, J., concurring).
106. Larson v. Valente, 456 U.S. 228, 252 (1982).

demand that we treat the law as suspect and that we apply strict scrutiny in judging its constitutionality."[107] Although she used different precedent, Justice O'Connor's result paralleled Justice Souter's. Using *Larson's* strict scrutiny test, Justice O'Connor would have invalidated Chapter 748 because the language of the Act proved it was written solely for the benefit of the Village of Kiryas Joel.[108] Justice O'Connor also observed that "this benefit was given to this group based on its religion," thus presenting an even more obvious appearance of impermissible establishment.[109]

Justice O'Connor did not believe invalidating the act would prevent the disabled Satmar children from receiving the education to which they are entitled.[110] She explained that New York could allow all villages to establish their own school districts, or set forth neutral criteria and allow any village that could meet those criteria to form a new school district.[111] However, she also suggested returning to the old arrangement, under which the Monroe-Woodbury School District provided educational services to disabled Satmar students at a neutral site in the village, which was discontinued in response to the *Aguilar* decision.[112] Justice O'Connor, who dissented in *Aguilar*, restated her belief that the case was incorrectly decided and asserted that the decision should be reconsidered.[113]

Remarking on the Court's refusal to use *Lemon* in this case and in other recent cases,[114] she noted "the slide away from *Lemon*'s unitary approach is well under way [and] a return . . . would likely be futile."[115] Justice O'Connor advised that no single test could control all Establishment Clause issues because "[t]he same constitutional principle may operate very differently in different contexts."[116] Instead, *Lemon* should be replaced with a less unitary approach, in order to provide more precise analyses of specific issues within Establishment Clause jurisprudence.

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107. *Id.* at 246.

108. *Kiryas Joel*, 114 S. Ct. at 2497 (O'Connor, J., concurring).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 2500 (O'Connor, J., concurring) (citing *Lee*, 112 S. Ct. 2649 (1992); Zobrest v. Catalina Foothill Sch. Dist., 113 S. Ct. 2462 (1993); *Larson*, 456 U.S. 228 (1982)).

115. *Id.*

116. *Id.* at 2499.

4. Justice Kennedy

Justice Kennedy, concurring only in the judgment, believed Chapter 748 was unconstitutional because the district was created "by drawing political boundaries on the basis of religion,"[117] and not because, as the majority held, the act had no internal safeguards to ensure its consistent application in the future. Political-line drawing based on religious criteria is impermissible, and, according to Justice Kennedy, "there is more than a fine line . . . between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."[118] Justice Kennedy found this principle was violated because the New York legislature enacted Chapter 748 with purpose and precision to create school district boundaries contiguous with the village lines.[119]

However, Justice Kennedy disagreed with the majority that the Act was unconstitutional because no internal mechanisms existed that would ensure the legislature has and will continue to implement it consistently.[120] Remarking that the Court has no reason to believe the New York Legislature would not grant the same accommodation in a similar future case, Justice Kennedy stated "[t]his reasoning reverses the usual presumption that a statute is constitutional and, in essence, adjudges the New York Legislature guilty until it proves itself innocent."[121] Justice Kennedy said there was no basis for a presumption of guilt, since there was no evidence that the legislature has so far denied a similarly situated village the same opportunity.[122]

Justice Kennedy also disagreed with Justice Souter that Chapter 748 crossed the boundaries of accommodation into impermissible establishment.[123] Principles of accommodation allow the Court to lift restrictive burdens, and Justice Kennedy found that in this case lifting those burdens clearly outweighed any reciprocal burdens placed on non-Satmars.[124] Chapter 748 alleviated a burden by affording the disabled Satmar children the opportunity to receive special education without enduring the "understandable anxiety and distress" that resulted from attending the public school.[125] The

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117. *Kiryas Joel*, 114 S. Ct. at 2501 (Kennedy, J., concurring).
118. *Id.* at 2505 (Kennedy, J., concurring).
119. *Id.* at 2504 (Kennedy, J., concurring)
120. *Id.* at 2502 (Kennedy, J., concurring).
121. *Id.* at 2503 (Kennedy, J., concurring).
122. *Id.*
123. *Id.* at 2501-02 (Kennedy, J., concurring).
124. *Id.* at 2502 (Kennedy, J., concurring).
125. *Id.*

fact the burden was not created by religious tenants prohibiting children from receiving a public education, but rather by the Satmars' desire not to assimilate, did not render it unremediable.[126] Had political line-drawing not been based on religious criteria, Justice Kennedy believed Chapter 748 would have been constitutional because Supreme Court precedent allows the Court to accommodate religion by alleviating burdens.

Lastly, like Justice O'Connor, Justice Kennedy noted the decision in *Aguilar* "may have been erroneous . . . [o]ne misjudgment is no excuse, however, for . . . bending rules to free the Satmars from a predicament into which we put them."[127]

D. Dissenting Opinion

Justice Scalia's biting dissent contended that Chapter 748 was constitutional because governmental power was delegated based on cultural, not religious, criteria to further educational, not religious, aims.[128] Even if those cultural differences were so inextricably linked to religion that the legislature could have been motivated by religion to enact Chapter 748, Justice Scalia insisted the Act was constitutional as an accommodation.

Justice Scalia disagreed with Justice Souter's majority's decision because he believed safeguards did exist that would ensure impartial decision-making. For instance, a similarly situated group could sue the legislature if it suspected unfair treatment.[129] Justice Scalia reasoned that no legislative decision should be declared unconstitutional simply because "it does not announce in advance how all future cases . . . will be disposed of."[130]

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126. *Id.* Justice Kennedy found it essential that "New York did not impose or increase any burden on non-Satmars . . . that might disqualify the District as a genuine accommodation." *Id.* No burden placed on non-Satmars, such as an increase in taxes, outweighed the burden lifted by the Act. *Id.* Justice Kennedy pointed to examples of similar cases in which religious burdens were lifted. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 442 (1971) (upholding a military draft exemption based on a religious objection necessarily increased the chances of those with no religious objection being drafted, yet the exemption was constitutional); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336-37 (1987) (upholding an exception to employee discrimination laws allowing religious organizations to favor their own members in hiring).

127. *Kiryas Joel*, 114 S. Ct. at 2505 (Kennedy, J. concurring).

128. Id. at 2511 (Scalia, J., dissenting).

129. *Id.* at 2512 (Scalia, J., dissenting).

130. *Id.* at 2514 (Scalia, J., dissenting). The majority thought the dissent's solution was unworkable. "[U]nder the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until

Although agreeing with Justice Souter's plurality that government cannot delegate power to religious organizations as such, Justice Scalia argued that the plurality had misapplied the principle.[131] While Justice Souter stated *Grendel's Den* was an "instructive comparison", Justice Scalia found it an inappropriate precedent for deciding *Kiryas Joel* because the party receiving the benefit of the legislative act in *Grendel's Den* was a church, while in *Kiryas Joel* those that benefitted were the voting citizens of the village.[132] Justice Scalia stated the distinction was not merely facial and disagreed with the plurality that the enactment of Chapter 748 was religiously motivated.[133] Instead, Justice Scalia reasoned that Chapter 748 was enacted by the legislature to cure a unique problem—cultural differences prevented the Satmar children from receiving adequate special education in the public school system, a right guaranteed to them by law.[134]

Even if cultural differences, dress, language and avoidance of assimilation, were an integral part of the Satmar's religious belief, as distinct from a mere accompaniment of that belief, there was no proof that the legislature sought to benefit the Satmars because of their religion.[135] Justice Scalia contended that it made no difference whether the legislature knew, at the time it drew the boundaries of the school district, that the village was populated exclusively by Satmars. It was irrelevant, he reasoned because that exclusion was not the result of the Satmars' desire to separate themselves, but rather the result of the non-Satmars' desire not to live in a high-density zoning area.[136] Justice Scalia believed this was simply further support of his conclusion that cultural, not religious, differences were the source of the conflict.

Taking the analysis yet one step further, Justice Scalia believed that even if the Court were able to show the legislature was motivated by a desire to benefit the Satmars religiously, Chapter 748 was *still* constitutional, as an accommodation. A legislature acting "to accommodate religion, particularly

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faced by a request from a non-Christian family for equal treatment under the patently unequal law." *Id.* at 2494; *cf. Everson*, 330 U.S. at 17 (holding that a statute authorizing school districts to provide for the transportation of public, private and parochial school students to and from school was constitutional).

131. *Kiryas Joel*, 114 S. Ct. at 207 (Scalia, J., dissenting).

132. *Id.*

133. *Id.*

134. *See supra* note 33-34.

135. *Kiryas Joel*, 114 S. Ct. at 2510 (Scalia, J., dissenting). *See also* Church of Lukumi Babulu Aye, Inc. v. Hialeah, 113 S. Ct. 2217, 2231 (1993) (holding that by providing more frequent garbage collection to the city, the government intended not to further the religious practice of animal sacrifice, but rather to maintain sanitation).

136. *Kiryas Joel*, 114 S. Ct. at 2510 (Scalia, J., dissenting).

a minority sect . . . follows the best of our [nation's] traditions."[137] Justice Scalia found *Zorach v. Clauson*[138] analogous. In that case, the Court held that a program allowing children to be released from public schools for an hour each week to receive religious training "accommodates the public service to their spiritual needs" and that finding the program unconstitutional would "show a callous indifference to religious groups."[139] Justice Scalia pointed out that principles of accommodation are deeply rooted and examples can even be found in the Constitution.[140]

With regard to *Aguilar*, Justice Scalia agreed with Justices O'Connor and Kennedy that the decision should be reconsidered. "[T]hese cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity; but meanwhile, today's opinion causes us to lose still further ground . . . ."[141]

He also commented on the Court's refusal to use the *Lemon* test, as follows: "it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and . . . the opinions of lower courts, to mislead [them] about the relevance of the *Lemon* test."[142] He advocated abandoning the *Lemon* test, but would not "let case law 'evolve' into a series of situation-specific rules," as he understood Justice O'Connor as having suggested.[143] Justice O'Connor's recommendation, he thought, would leave the Court with no guidelines and would instead "announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle."[144]

E. Back to Court

The Court's decision in *Kiryas Joel* never resulted in the village's public school closing. Less than two weeks after the decision was rendered, the New York Legislature passed, and the Governor signed, an act allowing any

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137. *Id.*

138. 343 U.S. 306 (1952).

139. *Id.* at 314.

140. *Kiryas Joel*, 114 S. Ct. at 2514 (Scalia, J., dissenting) (For instance, Article VI was amended to say officers of the three branches of government would bind themselves to support the Constitution "by oath *or affirmation*" because certain religious tenants disallow members to take oaths) (emphasis added). *See also Hobbie*, 480 U.S. at 144-145; *Amos*, 483 U.S. at 338; *Walz*, 397 U.S. at 669.

141. *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

142. *Id.*

143. *Id.*

144. *Id.*

municipality that meets certain criteria to establish its own school district.[145] This act, of broader application than Chapter 748, was intended to comply with Justice O'Connor's suggestion that an act generally applicable to any group meeting specific qualifications would be more likely to pass constitutional muster.[146]

The new act was once again challenged by *Kiryas Joel's* original plaintiffs. They alleged the new law was only facially broad and that its specific criteria of size, wealth and location could only be met by the Village of Kiryas Joel. The legislature, on the other hand, estimated that at least twenty villages qualified for the new law.[147]

On March 8, 1995, the same New York trial judge that declared Chapter 748 unconstitutional in 1992 upheld the new law.[148] Although he acknowledged it was enacted with the Satmar's "conundrum" in mind, he concluded that the law was religiously neutral because it was written in such a way that it would also be applicable to those similarly situated.[149] Thus, the new law accommodated the Satmars "without singling them out for favorable treatment."[150]

In reaching this result, the trial judge used *Lemon*'s three-pronged test, even though the test was disregarded by the Supreme Court in *Kiryas Joel.* Because the Court had not agreed on a replacement or reformulation of the Establishment Clause test, the trial judge applied of *Lemon* necessary. He expressed his adherence to the test: "Absent an announced abandonment of *Lemon* by the Supreme Court, it remains the law and shall be applied."[151]

Justice Scalia foreshadowed the trial court's use of *Lemon*, stating in *Kiryas Joel* that it was "inefficient" for the Court not to explicitly overrule the *Lemon* test, considering that litigants and lower courts, who prepare their Establishment Clause arguments and decisions using Supreme Court precedent, are bound by *Lemon.*[152]

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145. 1994 N.Y. Laws ch. 241. *See also Cuomo signs a Bill to Keep Hasidic school open*, N.Y. TIMES, July 9, 1994, at B 1, p. 24, col. 4.

146. 1994 N.Y. Laws ch. 241.

147. *Id.*

148. Grumet v. Cuomo, 625 N.Y.S.2d. 1000 (N.Y. Sup. Ct. 1995). *See also Court Affirms Public School for Hasidim*, N.Y. TIMES, March 9, 1995, at § B; p. 1; col. 5.

149. *Grumet*, 625 N.Y.S.2d at 1005.

150. *Id.*

151. *Id.* at 1004.

152. *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

V. COMMENT

Six Supreme Court Justices analyzed *Kiryas Joel* in four separate opinions to conclude Chapter 748 was unconstitutional, and even then three Justices dissented. The need to redefine or reformulate Establishment Clause standards is obvious. *Lemon*, the traditional Establishment Clause test, was reduced to "see also" citations in Justice Souter's majority and plurality opinions, and the only Justice that affirmed his commitment to the test has retired.[153] Despite the need for reformulation of Establishment Clause principles, no new tests were introduced in *Kiryas Joel*, nor did one of the existing alternatives emerge as the most appropriate for analyzing the issue specific to that case—concerning statutes alleged to single out certain religious groups for special treatment.

Concurring in *Kiryas Joel*, Justice O'Connor suggested the reason the Justices cannot reach an agreement on a particular standard is that Establishment Clause issues do not fit a single mold.[154] In fact, Establishment Clause jurisprudence covers various dissimilar issues.[155] The Court's past attempts to use a unitary standard have stretched *Lemon* beyond its original bounds, and, when that does not work, it has invoked exceptions to the rule on a case-by-case basis.[156] "Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts . . . try to patch up the broad test, making it more and more amorphous and distorted."[157]

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153. *Id.* at 2494-95 (Blackmun, J., concurring).

154. *Id.* at 2498-2500 (O'Connor, J., concurring).

155. *Id.* Justice O'Connor identified the following categories of Establishment Clause litigation: (1) those involving "governmental actions targeted at particular individuals or groups, imposing special duties or giving special benefits;" (2) those "involving governmental speech on religious topics;" (3) those that "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;" (4) those "in which the government must make decisions about matters of religious doctrine and religious law;" and (5) "government delegations of power to religious bodies." Justice O'Connor intended this list be illustrative, not conclusive. *Id.*

156. *Id.* at 2499 (O'Connor, J., concurring). For example, she believed the decisions in *Amos*, 483 U.S. at 336-37, *Grendel's Den*, 459 U.S. at 125-26, *Aguilar*, 473 U.S. at 413 and *Lee*, 112 S.Ct. at 2658 resulted from "shoehorning new problems into a test that does not reflect the special concerns raised by those problems . . . ." *Id.*

157. *Kiryas Joel*, 114 S. Ct. at 2499 (O'Connor, J., concurring). In the 1995 term, the Court considered Establishment Clause issues in two cases: Capitol Square Review and Advising Bd. v. Pinette, 115 S. Ct. 2440 (1995) and Rosenburger v. The Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995). Neither majority opinion cited to *Lemon*. In *Pinette*, the petitioner argued that Ohio had to

In the same way, the dispute giving rise to *Kiryas Joel* and the various opinions in *Kiryas Joel* made obvious the lack of a mutually satisfactory Establishment Clause test and the need for such clarification. The decision in *Aguilar*, which prompted this dispute by compelling the Monroe-Woodbury School District to abandon its original arrangement, was likely erroneous according to five Justices on the *Kiryas Joel* Court.[158] In *Aguilar*, the Court relied on *Lemon*, and it arrived at a decision "hostile" to religion.[159] "It is the court's insistence on disfavoring religion in *Aguilar* that led new York to favor it [by enacting Chapter 748]," stated Justice O'Connor.[160]

Instead of using a unitary standard, such as *Lemon*, the Court should implement clear, concise tests geared not at the Establishment Clause, generally, but at the Establishment Clause's more specific issues. A standard specifically crafted for the issue considered in *Kiryas Joel* already exists. Instructing courts to disfavor legislative attempts to single out certain religious groups for special treatment, the strict scrutiny approach is tailored to the *Kiryas Joel* dilemma. Approaching Establishment Clause issues on a more individualized basis than *Lemon* provides would serve at least three important

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refuse the Ku Klux Klan's request for a permit to erect a Latin cross in the plaza next to the state capitol in order to avoid official endorsement of Christianity. *Pinette*, 115 S. Ct. at 2446. Seven justices rejected this claim. Justice Scalia, author of the dissent in *Kiryas Joel*, wrote the plurality opinion in *Pinette*. He refused to use the petitioners "transferred endorsement" test and relied primarily on *Lamb's Chapel* and *Widmar*. *Id.* at 2449. Justice Scalia concluded that where expression is purely private and occurs in a public forum open to all on equal terms, government bodies allowing such expression do not endorse it. *Id.* at 2450.

In *Rosenburger*, the court voted 5 to 4 that a university would not violate neutrality or endorsement principles by providing funds for a Christian magazine on an equal basis with other student publications. *Rosenburger*, 115 S. Ct. at 2524. Although the majority does not mention *Lemon*, it uses two-thirds of the *Lemon* test in *Rosenburger*, excluding analysis only of the "entanglement" prong. *Id.* Justice Kennedy's majority opinion stated the "purpose" prong was satisfied: "There is no suggestion that the university created [the program] . . . with the purpose of aiding a religious cause." *Id.* at 2521. As to the "effect" prong, Justice Kennedy reasoned that the Establishment Clause was not violated since the university subsidizes the cost for printing for a range of student publications and "[a]ny benefit to religion is incidental . . . ." *Id.* at 2524.

158. Justices O'Connor and Kennedy, each writing separately, and Justice Scalia, with whom Justice Thomas and Chief Justice Rehnquist joined, expressed that *Aguilar* should be reconsidered. Justice Kennedy and Justice Scalia also indicated they believe the result in *Aguilar's* companion case, *School Dist of Grand Rapids* was also erroneous. *Kiryas Joel*, 114 S. Ct. at 2505 (Kennedy, J., concurring) and 2515 (Scalia, J., dissenting) and 2498 (O'Connor, J., concurring).

159. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring).

160. *Id.*

functions: it would reduce confusion regarding the standards' applicability, provide guidelines for litigants and lower courts, and minimize the chances that Supreme Court Justices will second-guess past decisions.

IV. CONCLUSION

By virtually ignoring *Lemon* in its analysis of *Kiryas Joel*, the Supreme Court simply followed a trend it had set in motion in earlier cases. This specific holding may serve to further weaken *Lemon*'s grasp on Establishment Clause issues, especially when the analysis involves governmental delegations of power on religious grounds. At the same time, the Court, because it could not agree on a replacement for *Lemon*, did not leave lower courts free to follow the Supreme Court's direction. Lower courts are not authorized to supplant *Lemon* with more appropriate, case-specific Establishment Clause tests until *Lemon* is overruled explicitly.[161] Thus, *Lemon* will remain the standard until the proper Establishment Clause test(s) are made clear by a majority of the Court. Soon, the Court needs to reaffirm its commitment to *Lemon*,[162] overrule the test, implement another unitary test, or replace the single-test method with several more narrowly drawn standards to fit specific issues.

The most obvious approach is to dispel the notion that all Establishment Clause issues can be bound by one three-pronged checklist. Rather, each diverse area of Establishment Clause jurisprudence requires its own particularized guidelines. In cases involving alleged delegation of civil authority based on religious criteria, strict scrutiny has been presented as an appropriate standard.[163] Although the Court did not offer guidance for the lower courts regarding the appropriate Establishment Clause test or tests, six members of the court ultimately reached the result required by a strict scrutiny analysis. They weighed the principles of separationism with those of accommodation and found that legislation delegating power based, on religious criteria should be upheld only when the legislature wrote the act with religious neutrality, to accommodate, not to establish, religion.

STEPHANIE E. RUSSELL

161. *See, e.g.*, Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995).

162. This is unlikely. "As the Court's opinion today shows, the slide away from [*Lemon*] . . . is well under way. *Kiryas Joel*, 114 S. Ct. 2500 (O'Connor, J., concurring).

163. Larson v. Valente, 456 U.S. 228, 246 (1982).