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# Benevolent Neutrality Toward Religion: Still an Elusive Ideal after Board of Education of Kiryas Joel v. Grumet

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## **“Benevolent Neutrality” Toward Religion: Still an Elusive Ideal After *Board of Education of Kiryas Joel v. Grumet***

In its interpretation of the two religion clauses of the First Amendment, the United States Supreme Court has sought to balance the dictates of each.<sup>1</sup> Nearly fifty years ago, invoking the image of a “ ‘wall of separation between church and State,’ ”<sup>2</sup> the Court found that the Establishment Clause requires governmental neutrality toward religion: “Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>3</sup> Shortly afterwards, however, the Court acknowledged the deficiency of the “wall” metaphor by stressing the governmental duty to accommodate religion, holding that under the Free Exercise Clause the state “follows the best of our traditions” when it “respects the religious nature of our people and accommodates the public service to their spiritual needs.”<sup>4</sup> Because it has recognized an essential “play in the joints” between the mandates of the two religion clauses, the Court has accepted the constitutional propriety of a certain degree of interaction between government and religion.<sup>5</sup> Consequently, the Court has renovated its church-state imagery, replacing the “wall” with a “barrier” that is “blurred, indistinct, and variable” depending on the nature and degree of governmental involvement with religion in each case.<sup>6</sup>

To characterize the delicate and elusive balance between the First Amendment principles of neutrality and accommodation, the Court introduced the ideal of “benevolent neutrality.”<sup>7</sup> In *Board of Education of Kiryas Joel v. Grumet*,<sup>8</sup> the Court examined the constitutionality of a state statute that established a separate public school district to provide secular special education services for

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1. According to the religion clauses, referred to respectively as the Establishment Clause and the Free Exercise Clause, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

2. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)); see also *infra* notes 105-10 and accompanying text.

3. *Everson*, 330 U.S. at 15; see also *infra* notes 105-10 and accompanying text.

4. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

5. *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

6. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also *infra* notes 111-21 and accompanying text.

7. *Walz*, 397 U.S. at 669.

8. 114 S. Ct. 2481 (1994).

handicapped children of a village populated exclusively by members of a single religious sect.<sup>9</sup> The *Kiryas Joel* Court cited "benevolent neutrality" as a mechanism by which "the Constitution allows the state to accommodate religious needs by alleviating special burdens."<sup>10</sup> However, the majority decided that the statute at issue in *Kiryas Joel* violated the neutrality principle of the Establishment Clause<sup>11</sup> and exceeded the degree of governmental accommodation of religion allowed by the Free Exercise Clause.<sup>12</sup>

This Note reviews the Court's development of the First Amendment neutrality and accommodation principles, examining the various analytical schemes used by the Court to determine the constitutionality of government involvement with religion.<sup>13</sup> The Note gives particular attention to the "*Lemon* test,"<sup>14</sup> the focal point of sharp controversy among the Justices in recent years because of conflicting assessments of its continued utility.<sup>15</sup> The Note then examines the application of the neutrality and accommodation principles in the *Kiryas Joel* decision.<sup>16</sup> The Note finds that while the *Kiryas Joel* Court appeared to eschew a formal reliance upon the *Lemon* analysis, the Court nonetheless employed the basic *Lemon* principles, refined and reframed in new terminology.<sup>17</sup> Furthermore, the Note proposes that the sharply divided Court and the divergent rationales offered by the Justices concurring in the judgment stem more from the anomalous nature of the effort at accommodation under review in *Kiryas Joel* than from the ongoing controversy over the utility of the *Lemon* test.<sup>18</sup> Moreover, the Note suggests that while the majority refused to find the elusive "benevolent neutrality" ideal in the *Kiryas Joel* statute, it could have, as the dissent effectively argued.<sup>19</sup> In fact, the majority likely would have so held if the statute had been generally applicable, requiring the state to establish a separate public

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9. *Id.* at 2486.

10. *Id.* at 2492.

11. *Id.* at 2484.

12. *Id.* at 2493.

13. See *infra* notes 104-82 and accompanying text.

14. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The three prongs of the *Lemon* test require that a statute have a secular legislative purpose, have a primary effect that neither hinders nor promotes religion, and not require excessive governmental entanglement with religion. *Id.* at 612-13.

15. See *infra* notes 137-77 and accompanying text.

16. See *infra* notes 198-201 and accompanying text.

17. See *infra* notes 202-15 and accompanying text.

18. See *infra* notes 216-43 and accompanying text.

19. See *infra* notes 244-55 and accompanying text.

school district for any similarly situated group.<sup>20</sup> Finally, recognizing that five Justices expressed in *Kiryas Joel* their readiness to reconsider the Court's decisions in *School District of Grand Rapids v. Ball*<sup>21</sup> and *Aguilar v. Felton*,<sup>22</sup> the Note predicts that if the Court again encounters statutes similar to the ones overturned in those cases, it will uphold them as examples of benevolent neutrality.<sup>23</sup>

Twenty years ago the Satmar Hasidim—sectarians who practice a strict form of Judaism—purchased property in Monroe, New York, and began relocating there from Brooklyn, where they had resided since immigrating to the United States from eastern Europe after World War II.<sup>24</sup> To resolve a zoning dispute,<sup>25</sup> the Satmars petitioned to form the Village of Kiryas Joel within the town, invoking a right provided by New York's Village Law.<sup>26</sup> Because non-Satmars in the area objected to secession, the lines of the village were drawn to include only Satmar-owned property.<sup>27</sup> Incorporated in 1977, the village now has a population of around 8,500.<sup>28</sup>

Satmar children are educated in private, sex-segregated religious schools that do not offer the special education services to which handicapped children are entitled under state and federal law.<sup>29</sup> From 1984 until 1985, the Monroe-Woodbury Central School District provided such services at an annex to one of the Satmar schools; however, in response to the United States Supreme Court's decisions in *Aguilar v. Felton*<sup>30</sup> and *School District of Grand Rapids v. Ball*,<sup>31</sup> the district discontinued this program.<sup>32</sup> The Kiryas Joel children

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20. See *infra* notes 263-78 and accompanying text.

21. 473 U.S. 373 (1985); see also *infra* notes 160-66 and accompanying text.

22. 473 U.S. 402 (1985); see also *infra* notes 167-77 and accompanying text.

23. See *infra* notes 256-62, 279 and accompanying text.

24. *Kiryas Joel*, 114 S. Ct. at 2485. For more information on the Satmar Hasidim, see Nancy E. Roman, *Hasidic Village in School Test Case Traces Roots to Ukraine, Holocaust*, WASH. TIMES, March 27, 1994, at A10.

25. Local zoning regulations prohibited Satmar practices such as subdividing single-family homes into multiple apartments to enable extended families to live together, and housing schools and synagogues in the basements of buildings owned by the sect. *Kiryas Joel*, 114 S. Ct. at 2496 (citations omitted) (O'Connor, J., concurring in part and concurring in the judgment).

26. *Id.* at 2485 (citing N.Y. VILLAGE LAW §§ 2-200 to 2-258 (McKinney 1973 & Supp. 1994)).

27. *Id.*

28. *Id.*

29. *Id.* (citing Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-85 (1988 & Supp. IV 1992); N.Y. EDUC. LAW §§ 4401-09 (McKinney 1981 & Supp. 1994)).

30. 473 U.S. 402 (1985); see also *infra* notes 167-77 and accompanying text.

31. 473 U.S. 373 (1985); see also *infra* notes 160-66 and accompanying text.

32. *Kiryas Joel*, 114 S. Ct. at 2485.

then could receive special education services only by attending the neighboring public schools, an option rejected by most Satmar parents.<sup>33</sup> Citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different," the parents sued to contest the closing of the village program and the resulting public school placements.<sup>34</sup> The state court found, however, that because the parents had complained only of emotional trauma rather than treatment inconsistent with the sect's doctrine or practices, the parents had failed to show a violation of their children's constitutional right to free exercise of religion.<sup>35</sup> Therefore, the public school district was not required to provide the Satmar children a separate school.<sup>36</sup>

The Satmars then turned their attention to legislative solutions, and in 1989 the New York legislature enacted a statute, Chapter 748, declaring the Village of Kiryas Joel "a separate school district" with "all the powers and duties of a union free school district."<sup>37</sup> All nonhandicapped Satmar children remained in their private schools while the village's public district provided a special education program for handicapped children, along with transportation, remedial education, and health and welfare services for nonhandicapped children.<sup>38</sup> Neighboring public school districts sent handicapped Hasidic children to the Kiryas Joel public school; in fact, two-thirds of the forty-odd full-time students came from other districts.<sup>39</sup>

Before the new district began operating, respondents challenged the constitutionality of Chapter 748 in state court.<sup>40</sup> The trial court found that the statute failed all three prongs of the *Lemon* test and

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33. *Id.*

34. *Id.* (quoting *Board of Educ. v. Wieder*, 527 N.E.2d 767, 770 (N.Y. 1988)).

35. *Id.* at 2485-86 (citing *Wieder*, 527 N.E.2d at 775).

36. *Id.*

37. 1989 N.Y. Laws, ch. 748.

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

39. *Id.* The Kiryas Joel public school also provided part-time services for many students who regularly attended religious schools. *Id.*

40. *Id.* The state court action was brought by the New York State School Boards Association and by some of its officials, including Louis Grumet, suing as both officers of the Association and as individuals. However, because the New York Appellate Division found that the Association and its officers had no standing to challenge Chapter 748, the respondents appeared before the United States Supreme Court as "citizen-taxpayers." *Id.* at 2486 n.2. When the action against the original defendants, the New York State Education Department and several state officials, was discontinued by the parties' stipulation, the Kiryas Joel Village School District was allowed to intervene as a party defendant. *Id.* at 2486-87.

thus was unconstitutional.<sup>41</sup> The appellate division affirmed, finding that the statute violated the second prong of the *Lemon* test: It had the "primary effect" of advancing religion.<sup>42</sup> The New York Court of Appeals affirmed on this basis, holding that the statute created a "symbolic union of church and state" because both the public school population and the district's school board would be made up only of Satmars.<sup>43</sup> The United States Supreme Court also affirmed,<sup>44</sup> finding that "[b]ecause this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, . . . it violates the prohibition against establishment."<sup>45</sup>

In a plurality opinion, Justice Souter, joined by Justices Blackmun, Stevens, and Ginsburg, invoked the First Amendment requirement that the state remain neutral toward religion, "favoring neither one religion over others nor religious adherents collectively over nonadherents."<sup>46</sup> Justice Souter found that Chapter 748 violated this neutrality principle by "delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally."<sup>47</sup> As an "instructive comparison," Justice Souter recalled *Larkin v. Grendel's Den, Inc.*,<sup>48</sup> in which the statute at issue granted to religious groups a veto power over liquor license applications.<sup>49</sup> The Court struck down the statute because it "brought about a 'fusion of governmental and religious functions' ' by delegating 'important, discretionary governmental powers' to

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41. *Id.* at 2487 (citing *Grumet v. New York State Educ. Dep't*, 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992)). A statute rarely fails the secular purpose prong of the *Lemon* test, but in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court struck down a state law providing for a moment of silent prayer or meditation in public schools because it lacked a secular purpose. *Id.* at 56-59; see also *infra* notes 137-50 and accompanying text.

42. *Kiryas Joel*, 114 S. Ct. at 2487 (citing *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 592 N.Y.S.2d 123, (N.Y. 1992)).

43. *Id.* (citing *Grumet v. Board of Educ. of Kiryas Joel Sch. Dist.*, 618 N.E.2d 94 (1993)).

44. *Id.* at 2484.

45. *Id.*

46. *Id.* at 2487 (plurality opinion).

47. *Id.* at 2484.

48. 459 U.S. 116 (1982).

49. *Kiryas Joel*, 114 S. Ct. at 2487-88 (plurality opinion).

religious bodies, thus impermissibly entangling government and religion.”<sup>50</sup>

In support of his conclusion that Chapter 748 gave a religious sect exclusive control over a political subdivision,<sup>51</sup> Justice Souter noted the following facts: (1) The New York legislature knew that the village was established to be exclusively Satmar and that it remained so when the legislature passed Chapter 748; (2) establishing a new village school district contradicted New York’s statewide trend toward large, consolidated systems; (3) the legislature employed a special act to create the district rather than utilizing general laws designed to accomplish school district reorganization; and (4) the legislature failed to exercise available options that would not have implicated the Establishment Clause.<sup>52</sup> Justice Souter concluded that these factors identified Chapter 748 as “substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden ‘fusion of governmental and religious functions.’”<sup>53</sup>

Writing for a majority formed by the addition of Justice O’Connor, Justice Souter continued to stress the neutrality principle.<sup>54</sup> Justice Souter noted that Chapter 748 was flawed by its failure to ensure the neutral exercise of governmental power.<sup>55</sup> Because Chapter 748 was not a “general law” providing equal treatment for many eligible communities, as was the law under which the village was formed, Justice Souter complained that “we have no assurance that the next similarly situated group seeking a school district of its own will receive one.”<sup>56</sup> Justice Souter concluded that because neither the statute itself nor its historical context contradicted the finding that the benefits of Chapter 748 flowed only to a single sect, Chapter 748 violated the Establishment Clause.<sup>57</sup>

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50. *Id.* (plurality opinion) (quoting *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126-27 (1982) (quoting *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963))).

51. *Id.* at 2488 (plurality opinion).

52. *Id.* at 2490 (plurality opinion).

53. *Id.* (plurality opinion) (quoting *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982)).

54. *Id.* at 2491.

55. *Id.* Justice Souter noted that the statute examined in *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982), was struck down because of the same defect. *Kiryas Joel*, 114 S. Ct. at 2491.

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

57. *Id.* at 2492 (citing *Larson v. Valente*, 456 U.S. 228, 244-46 (1982)). Similarly, Justice O’Connor found Chapter 748 unconstitutional because it isolated a single group for special treatment, and because the nature of the legislative process and the

Finally, Justice Souter took up the counter-theme of accommodation, acknowledging it to be essential to the “ ‘benevolent neutrality’ ”<sup>58</sup> through which “the Constitution allows the state to accommodate religious needs by alleviating special burdens.”<sup>59</sup> However, he insisted that Chapter 748 exceeded the limits of permissible accommodation because “we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation.”<sup>60</sup> Justice Souter argued, though, that the State could provide for the special needs of the Satmars by alternative means such as programs based at schools in the neighboring Monroe-Woodbury Central School District, or even programs offered by the neighboring district but housed in a neutral site near one of the village’s religious schools.<sup>61</sup> Such schemes would be constitutional so long as they are “administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars.”<sup>62</sup>

Justice Kennedy wrote separately to emphasize that “[t]he real vice of the school district . . . is that New York created it by drawing political boundaries on the basis of religion.”<sup>63</sup> Arguing that some accommodation of the Satmars was proper, Justice Kennedy noted that the sect faced a legitimate burden, that the state’s action to relieve it did not increase the burden on non-Satmars, and that the creation of the district did not favor the Satmars over other religious groups.<sup>64</sup> However, Justice Kennedy agreed that the particular method the state employed to accomplish this permissible accommodation must be found unconstitutional because it “require[d] the government to draw political or electoral boundaries,” and “the Establishment Clause forbids the government to use religion as a line-drawing criterion.”<sup>65</sup> Justice Kennedy asserted that because the

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unavailability of judicial review made assurances of equal treatment in future decisions impossible; however, Justice O’Connor qualified her position by acknowledging that “this is a close question, because the Satmars may be the only group who currently need this particular accommodation.” *Id.* at 2497-98 (O’Connor, J., concurring in part and concurring in the judgment).

58. *Id.* at 2492 (quoting *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970))).

59. *Id.*

60. *Id.* at 2493.

61. *Id.* (citing *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977)).

62. *Id.*

63. *Id.* at 2501 (Kennedy, J., concurring in the judgment).

64. *Id.* at 2502 (Kennedy, J., concurring in the judgment).

65. *Id.* (Kennedy, J., concurring in the judgment).



State knew that the boundaries of Kiryas Joel defined it as a religious enclave, the State's use of these lines in establishing the school district represented "explicit religious gerrymandering" in violation of the Establishment Clause.<sup>66</sup>

In sharp contrast, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas in a forceful dissent, praised the actions of the New York legislature as an "admirably American accommodation" of religion.<sup>67</sup> Moreover, Justice Scalia affirmed the legislature's chosen means—the establishment of a school district for Kiryas Joel—as "a classic drawing of lines on the basis of communality of *secular governmental desires*, not communality of religion."<sup>68</sup> Justice Scalia focused first on the educational mechanism by which the New York legislature sought to accommodate the needs of the handicapped Satmar children, a public facility through which the state provided secular special education.<sup>69</sup> Justice Scalia relied on two recent cases, one in which the Court affirmed a public education program that served students of the same religion and was housed at a neutral site adjacent to a religious school,<sup>70</sup> and another in which the Court allowed public provision of special education services to a Catholic student on site at a parochial school.<sup>71</sup> Justice Scalia argued that because the provision of public educational services to handicapped sectarian students in a separate public facility is no more offensive to the First Amendment than the provision of such programs on a neutral site adjacent to a religious school, or even on the very premises of such a school, these precedents require that the Court affirm the accommodation at issue in *Kiryas Joel*.<sup>72</sup>

Justice Scalia then turned his attention to the public school district entrusted to the Satmar villagers by the New York legislature through Chapter 748, responding to Justice Souter's two-pronged argument against its constitutionality.<sup>73</sup> Justice Scalia attacked Justice Souter's first argument—that Chapter 748 offended the Establishment Clause by delegating governmental authority to the

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66. *Id.* at 2504 (Kennedy, J., concurring in the judgment).

67. *Id.* at 2506 (Scalia, J., dissenting).

68. *Id.* at 2511 (Scalia, J., dissenting).

69. *Id.* at 2506 (Scalia, J., dissenting).

70. *Id.* (Scalia, J., dissenting) (citing *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977)).

71. *Id.* (Scalia, J., dissenting) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993)).

72. *Id.* (Scalia, J., dissenting).

73. *Id.* at 2507-14 (Scalia, J., dissenting).

Satmars—as a misreading of *Larkin v. Grendel's Den, Inc.*<sup>74</sup> Justice Scalia contended that in that case the Court rejected the delegation of government authority to a religious institution, not to citizens who happened to share a common religion.<sup>75</sup> Justice Scalia cited instances of religious groups establishing political communities to support his conclusion that impermissible governmental favors to religious institutions are different from permissible governmental benefits conferred upon political entities that are religiously homogeneous.<sup>76</sup>

Justice Scalia also rejected Justice Souter's second argument—that the state's creation of the district was unconstitutional because it was intended to favor the Satmars over other groups.<sup>77</sup> He concluded that there was no direct evidence that the legislature intended to disadvantage or benefit the Satmars “because of their religion.”<sup>78</sup> To Justice Souter's intimation that the State drew the district's boundaries intentionally on the basis of religion,<sup>79</sup> Justice Scalia responded that the school district was created for the secular purpose of meeting the educational needs of the handicapped children of Kiryas Joel, and that the selection of the existing village boundaries for the school district was reasonable and consistent with this secular purpose.<sup>80</sup> Acknowledging that the drawing of the village boundaries resulted in exclusion of non-Satmars, Justice Scalia pointed out that all non-Satmars who were excluded from the village when it was formed chose to be excluded because they did not favor the Satmars' rezoning plan to permit high-density housing where formerly only single-family homes had been allowed.<sup>81</sup> Justice Scalia concluded by chiding Justice Souter for doubting the integrity of the New York legislature and for unreasonably demanding “up front” assurances of neutrality.<sup>82</sup>

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74. 459 U.S. 116 (1982).

75. *Kiryas Joel*, 114 S. Ct. at 2507 (Scalia, J., dissenting).

76. *Id.* at 2507-08 (Scalia, J., dissenting).

77. *Id.* at 2489-90 (plurality opinion).

78. *Id.* at 2508-10 (Scalia, J., dissenting).

79. *Id.* at 2490 (plurality opinion).

80. *Id.* at 2511 (Scalia, J., dissenting).

81. *Id.* (Scalia J., dissenting).

82. *Id.* at 2512-13 (Scalia, J., dissenting). Justice Souter portrayed Justice Scalia's dissent as “the work of a gladiator” who “thrusts at lions of his own imagining.” *Id.* at 2493 (citing BENJAMIN CARDOZO, *LAW AND LITERATURE* 34 (1931)). Responding to Justice Scalia's argument that Chapter 748, with no regard to religion, simply granted political power to a group that happened to be religiously homogeneous, Justice Souter reiterated his perception that the school district's lines were drawn with the intention of separating Satmars from non-Satmars. *Id.* at 2493-94. Answering Justice Scalia's charge that the majority harbored groundless and unfair suspicions about the motives of the New

As three Justices noted in *Kiryas Joel*, the *Lemon* test<sup>83</sup> was conspicuously absent from the majority and dissent's analysis of the constitutionality of Chapter 748. Justice O'Connor applauded the Court's avoidance of the rigid *Lemon* test. She reported that omitting the *Lemon* analysis was consistent with the Court's recent tendency to develop and apply more precise case-specific tests, citing *Lee v. Weisman*,<sup>84</sup> *Zobrest v. Catalina Foothills School District*,<sup>85</sup> and the case most similar, in her opinion, to *Kiryas Joel*, *Larson v. Valente*,<sup>86</sup> as illustrative of the movement away from the *Lemon* test.<sup>87</sup>

In contrast, Justice Blackmun wrote separately to argue specifically that the lack of explicit reliance on the *Lemon* test in the opinion of the *Kiryas Joel* majority did not signify the Court's departure from the analytical principles embodied in the *Lemon* test.<sup>88</sup> Noting that the majority and plurality opinions relied on several prior holdings that themselves rested on the *Lemon* criteria—most significantly *Larkin v. Grendel's Den, Inc.*<sup>89</sup>—Justice Blackmun reasoned that *Kiryas Joel* was actually decided on the basis of the second and third prongs of the *Lemon* test; only the terminology changed.<sup>90</sup> For example, a “‘fusion of governmental and religious functions’” implicates the entanglement prong of the *Lemon* test, and the “lack of any ‘effective means of guaranteeing’ that governmental power will be neutrally employed” implicates the “‘principle or primary effect’” prong of the *Lemon* test.<sup>91</sup>

Justice Scalia noted that while the *Kiryas Joel* Court snubbed the *Lemon* test, it figured prominently in the decisions of the courts

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York legislature, Justice Souter insisted that “we simply refuse to ignore that the method it chose is one that aids a particular religious community . . . .” *Id.* Finally, to justify the requirement of “up front” assurances of neutrality in application of Chapter 748 against Justice Scalia's attack, Justice Souter criticized Justice Scalia's approach as shortsighted:

[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 faced by a request from a non-Christian family for equal treatment under the patently unequal law.

*Id.* at 2494 (citing *id.* at 2513-14 (Scalia, J., dissenting)).

83. See *supra* note 14 and accompanying text.

84. 112 S. Ct. 2649 (1992).

85. 113 S. Ct. 2462 (1993).

86. 456 U.S. 228 (1982).

87. *Kiryas Joel*, 114 S. Ct. at 2498-500 (O'Connor, J., concurring in part and concurring in the judgment).

88. *Id.* at 2494 (Blackmun, J., concurring).

89. 459 U.S. 116 (1982); see also *infra* notes 129-36 and accompanying text.

90. *Kiryas Joel*, 114 S. Ct. at 2494-95 (Blackmun, J., concurring).

91. *Id.* at 2495 (Blackmun, J., concurring) (quoting *Larkin*, 459 U.S. at 125-27).

below and in the briefing of the parties.<sup>92</sup> Accusing the Court of perpetuating confusion concerning the *Lemon* test, Justice Scalia criticized the Court for failing once again in *Kiryas Joel* to decide the future relevance of the *Lemon* test for the benefit of those who are obligated to follow the Court's precedent.<sup>93</sup> Justice Scalia disapproved of Justice O'Connor's suggestion that the Court replace *Lemon* with what he characterized as nothing more than "a series of situation-specific rules;"<sup>94</sup> however, Justice Scalia proposed no alternative of his own to the *Lemon* test and appeared to express unwillingness to abandon the test without a worthy alternative.<sup>95</sup>

Several Justices proposed remedies for the problem posed by the special circumstances in the Village of Kiryas Joel. For instance, Justice Stevens, joined by Justices Blackmun and Ginsburg, suggested that instead of taking an action that "affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors," the state should have taken measures to alleviate the children's "panic, fear and trauma" by "promoting diversity and understanding in the public schools."<sup>96</sup> Justice O'Connor suggested that Chapter 748 could be cured of Establishment Clause conflicts if the state redrafted it as an act of generally applicable legislation.<sup>97</sup> She added that a second solution would become available if the Court would, as it should, "reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what . . . is the proper track—government impartiality, not animosity, towards religion."<sup>98</sup> Justice Kennedy agreed, reasoning that Chapter 748 would not have been deemed necessary but for the Court's decisions in *Aguilar v. Felton*<sup>99</sup> and *School District of Grand Rapids v. Ball*,<sup>100</sup> which "may have been erroneous" and may deserve reconsideration.<sup>101</sup> Finally, Justice Scalia would have solved

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92. *Id.* at 2515 (Scalia, J., dissenting).

93. *Id.* (Scalia, J., dissenting).

94. *Id.* (Scalia, J., dissenting).

95. *Id.* (Scalia, J., dissenting).

96. *Id.* at 2495 (Stevens, J., concurring).

97. *Id.* at 2498 (O'Connor, J., concurring in part and concurring in the judgment).

98. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

99. 473 U.S. 402 (1985); see *infra* notes 167-77 and accompanying text.

100. 473 U.S. 373 (1985); see *infra* notes 160-66 and accompanying text.

101. *Kiryas Joel*, 114 S. Ct. at 2505 (Kennedy, J., concurring in the judgment). Justice Kennedy noted that in *Aguilar* and *Ball* the Court struck down programs providing public education services on the premises of parochial schools, and in response to these decisions the Monroe-Woodbury Central School District discontinued similar programs at annexes to the parochial schools of Kiryas Joel. *Id.* (Kennedy, J., concurring in the judgment).

the problem in *Kiryas Joel* simply by upholding Chapter 748 as a permissible religious accommodation.<sup>102</sup> Moreover, he agreed that *Aguilar* and *Ball* "should be overruled at the earliest opportunity" because these decisions are "so hostile to our national tradition of accommodation."<sup>103</sup>

Throughout the half-century prior to *Kiryas Joel*, the Court struggled to balance the two constitutional dictates embodied in the religion clauses of the First Amendment.<sup>104</sup> Beginning with *Everson v. Board of Education*,<sup>105</sup> the Court distilled these requirements of the religion clauses into the twin principles of neutrality and accommodation.<sup>106</sup> At issue in *Everson* was the constitutionality of a state statute that authorized reimbursement of public bus fares to the

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The difficulties encountered by Satmar children subsequently sent to Monroe-Woodbury schools precipitated efforts by the New York legislature to establish a school district for the village. *Id.* (Kennedy, J., concurring in the judgment). Admittedly troubled by these events, Justice Kennedy intimated that, contrary to the *Aguilar* and *Ball* holdings, "sound elaboration of constitutional doctrine" should embrace a scheme whereby neutral aid is provided to both religious and nonreligious citizens so that problems such as those faced by the handicapped children of *Kiryas Joel* could be addressed without the requirement of special religious accommodations. *Id.* (Kennedy, J., concurring in the judgment).

102. *Id.* at 2506 (Scalia, J., dissenting).

103. *Id.* at 2515 (Scalia, J., dissenting).

104. Commentators have proposed an array of solutions to the apparent conflict between the two religion clauses, according to which the state must prevent the establishment of religion while also allowing free religious expression. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) (proposing as a reconciling principle that "the Establishment Clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1992) (harmonizing the religion clauses by asserting that their complementary purpose "is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism"); Jonathan E. Neuchterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation under the Establishment Clause*, 99 YALE L.J. 1127, 1146 (1990) (positing that "the free exercise principle defines the limits of the anti-establishment principle").

105. 330 U.S. 1 (1947).

106. For an historical review of the Court's balancing of neutrality ("separation") and accommodation from *Everson* forward, see Kenneth F. Mott, *The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond*, 14 J.L. & EDUC. 111, 112-45 (1985). For differing views regarding which principle should predominate in the Court's analysis, compare LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-8, at 1201 (2d ed. 1988) (arguing that accommodation should prevail when the principles of the religion clauses conflict, because "[s]uch dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment") with Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 352-53 (1986) (contending that "scrupulous neutrality" is the proper course for the Court in Establishment Clause cases).

parents of Catholic school students who used public transportation to travel to and from school.<sup>107</sup> The Court held that while the Establishment Clause prohibits the state from contributing tax dollars to support a religious institution, the Free Exercise Clause forbids the state to exclude anyone, "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."<sup>108</sup> Because the use of tax dollars for the benefit of parochial students was, in this case, part of a public welfare program that granted the same provision to students in both public and sectarian schools, the Court found no constitutional violation.<sup>109</sup> Pointing toward the emerging principles of neutrality and accommodation, the Court concluded: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."<sup>110</sup>

In *Lemon v. Kurtzman*,<sup>111</sup> the Court consolidated the various tests for neutrality it had developed in previous cases<sup>112</sup> and

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107. *Everson*, 330 U.S. at 3.

108. *Id.* at 16.

109. *Id.* at 17.

110. *Id.* at 18.

111. 403 U.S. 602 (1971).

112. In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Court set forth the following test: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 222. Prior to *Abington*, the Court used "purpose" and "effect" to examine state actions for neutrality toward religion. *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961). In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the Court examined the purpose and effect of the governmental action at issue. *Id.* at 669-72. However, the Court supplemented the effect test with an assessment of the resultant "degree" of government involvement with religion to ensure that "the end result—the effect—is not excessive government entanglement with religion." *Id.* at 674. Anticipating, ironically, what would later become a familiar critique of the *Lemon* test—that the diverse array of First Amendment cases involving religion are not amenable to analysis by any broad unifying principles—the *Walz* Court reasoned that "[t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." *Id.* at 668. Writing separately in *Walz*, Justice Harlan noted that testing for neutrality of purpose and effect also calls for "an equal protection mode of analysis" by which the Court may identify and strike down "religious gerrymanders" if it finds that the entire class covered by the legislation is not significantly broader than the religious groups or institutions to which the legislation applies. *Id.* at 696 (Harlan, J., concurring). The Court subsequently adopted Justice Harlan's breadth of coverage test in *Gillette v. United States*, 401 U.S. 437 (1971), finding no religious gerrymandering because the conscientious objector statute under review was "tailored broadly enough that it reflects valid secular purposes." *Id.* at 454.

fashioned the three prongs of what became known as the *Lemon* 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.'" <sup>113</sup> Utilizing the new test, the *Lemon* Court examined statutes providing state funding for nonpublic schools to facilitate secular education through reimbursement of expenses for salaries, books, and materials, or through salary supplements granted directly to teachers of secular subjects in nonpublic schools. <sup>114</sup> In the Court's analysis, these statutes passed the secular purpose test because "they [were] intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws." <sup>115</sup>

The *Lemon* Court measured the level of entanglement by three considerations: "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." <sup>116</sup> In light of these considerations, the Court found that the state aid at issue in *Lemon* required impermissible, excessive entanglement in at least four ways. <sup>117</sup> First, the special religious character of the schools presented the potential for excessive entanglement. <sup>118</sup> Second, direct funding of teachers' salaries entailed exceptional governmental involvement, not only in the financial affairs of recipient schools, but also in the daily educational

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113. *Lemon*, 403 U.S. at 612-13 (citation omitted) (quoting *Walz*, 397 U.S. 664 at 674). In the voluminous negative commentary on the *Lemon* test, no aspect of it has escaped sharp criticism. See, e.g., Choper, *supra* note 104, at 680 (claiming the entanglement prong has created "conceptual chaos" and improperly discourages legitimate government involvement with religion); Patricia M. Lines, *The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?*, 17 J.L. & EDUC. 1, 16 (1988) (condemning the *Lemon* test for failing to yield predictable outcomes and facilitate distributive justice); Michael S. Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 *passim* (1993) (offering a thorough critique of each prong of the *Lemon* test); William B. Peterson, "A Picture Held Us Captive": *Conceptual Confusion and the Lemon Test*, 137 U. PA. L. REV. 1827, 1830-49 (1989) (arguing for elimination of the purpose test because of difficulties in ascertaining purpose).

114. *Lemon*, 403 U.S. at 606-07.

115. *Id.* at 613-14. The Court briefly discussed application to the statutes of the principal or primary effect prong, noting that compliance was a close question; however, the Court declined to decide that question because it found that the statutes failed the entanglement test. *Id.*

116. *Id.* at 615.

117. *Id.* at 616.

118. *Id.*

operations of each school.<sup>119</sup> Third, the elaborate, ongoing state monitoring required by the nature of the aid resulted in excessive entanglement.<sup>120</sup> Finally, the Court noted that hotly contested statutes such as the ones in *Lemon* inherently lead to excessive entanglement because the perennial need for yearly appropriations and the probability of ever-increasing demands consistent with growing costs and populations will combine to aggravate political divisiveness and generate extraordinary religiously motivated political activity.<sup>121</sup>

In *Larson v. Valente*,<sup>122</sup> the Court limited the applicability of the *Lemon* test and employed a strict scrutiny analysis. At issue in *Larson* was a state statute subjecting to special registration and reporting procedures only those religious organizations that received over half their funding from nonmembers.<sup>123</sup> The *Larson* Court found the *Lemon* test inapplicable to such a measure because it is "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."<sup>124</sup> The *Larson* Court reasoned that when it examines the constitutionality of a governmental action favoring one religious denomination over another, it deems the measure suspect and strikes it down unless it is narrowly tailored to further a compelling government interest.<sup>125</sup> Applying this strict scrutiny to the statute at issue in *Larson*, the Court acknowledged that the state had a significant interest in protecting the public from abusive charitable solicitations, but ruled that the statute was not narrowly tailored to further that interest.<sup>126</sup> The Court rejected as unsubstantiated the state's argument that religious groups which receive more than fifty percent of their contributions from nonmembers are less fiscally responsible than other religious groups,<sup>127</sup> and concluded that the statute was so blatantly designed to favor certain denominations while burdening

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119. *Id.* at 616-19. The Court distinguished the direct funding of teachers' salaries in this case from the provision of transportation services, *see* *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947), or secular textbooks, *see* *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968).

120. *Lemon*, 403 U.S. at 619.

121. *Id.* at 622-23.

122. 456 U.S. 228 (1982).

123. *Id.* at 230.

124. *Id.* at 252.

125. *Id.* at 247.

126. *Id.* at 251.

127. *Id.* at 248-49.



others that the state was vulnerable to the charge of " 'religious gerrymandering.' " <sup>128</sup>

*Larkin v. Grendel's Den, Inc.*, <sup>129</sup> by contrast, exemplified the Court's frequent thorough application of the *Lemon* test. The *Larkin* Court examined a state law empowering the decision-making bodies of churches and schools to veto the licensing of liquor sales within 500 feet of their facilities, <sup>130</sup> and found it unconstitutional for "vesting discretionary governmental powers in religious bodies" in violation of the First Amendment mandate of governmental neutrality toward religion. <sup>131</sup> Applying the *Lemon* test, the *Larkin* Court first reasoned that, while the statute had in view valid secular purposes, those could have been realized by other means, such as a total ban on alcohol sales within reasonable distances of churches, schools and similarly sensitive institutions. <sup>132</sup> Next, the *Larkin* Court determined that the statute violated the primary effect test in two respects: First, it failed to ensure that churches would make only religiously neutral use of the political power entrusted to them; <sup>133</sup> and second, it presented the "appearance of a joint exercise of legislative authority by Church and State," thus providing "a significant symbolic benefit to religion." <sup>134</sup> Finally, the *Larkin* Court found that the statute violated the entanglement prong of the *Lemon* test because the statute, by delegating political power to churches, effected a " 'fusion of governmental and religious functions' " <sup>135</sup> that created the potential for " '[p]olitical fragmentation and divisiveness on religious lines.' " <sup>136</sup>

*Wallace v. Jaffree* <sup>137</sup> heralded a transformation in the Court's analysis of legislation implicating the religion clauses. Although the majority explicitly employed the *Lemon* test, <sup>138</sup> the analysis focused

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128. *Id.* at 255 (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)). The *Larson* Court also concluded that the statute at issue would have failed the "primary effect" and "entanglement" prongs of the *Lemon* test, had the Court applied them. *Id.* at 252-55.

129. 459 U.S. 116 (1982). The Court decided *Larkin* and *Larson* in the same year.

130. *Id.* at 117.

131. *Id.* at 123.

132. *Id.* at 123-24.

133. *Id.* at 125.

134. *Id.* at 125-26.

135. *Id.* at 126 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963), and citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970); *Everson v. Board of Educ.*, 330 U.S. 1, 8-13 (1947)).

136. *Id.* at 127 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971)).

137. 472 U.S. 38 (1985).

138. *Id.* at 55-56.

almost exclusively on *Lemon*'s secular purpose and primary effect prongs, combining and reframing them as a new "endorsement" test.<sup>139</sup> The *Wallace* Court struck down as unconstitutional a state law providing for a moment of silence for " 'meditation or voluntary prayer' " in public schools<sup>140</sup> because the statute had no secular purpose.<sup>141</sup> The Court found the statute's purpose to be wholly religious because the statute added the phrase "or voluntary prayer" to an earlier version that mentioned only "meditation" as the purpose of the moment of silence.<sup>142</sup> Moreover, the declared legislative intent behind this revision was "to return prayer to the public schools."<sup>143</sup> Therefore, the Court reasoned that through this statutory effort "to characterize prayer as a favored practice," the State had endorsed religion.<sup>144</sup>

Justice O'Connor wrote separately in *Wallace*, in part to elaborate her understanding of how the endorsement test gives "analytical content" to the *Lemon* test.<sup>145</sup> Although Justice O'Connor was not prepared to abandon the *Lemon* test completely,<sup>146</sup> she urged that it be "reexamined and refined," characterizing her "endorsement test" as one such refinement.<sup>147</sup>

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139. *Id.* at 56-61. Thus the majority opinion echoed the "endorsement" language used by Justice O'Connor a year prior to *Wallace v. Jaffree* to explicate the *Lemon* test: " 'The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.' " *Id.* at 56 n.42 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). For commentary explicating and affirming the endorsement test, see Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 175-90 (1987); Christopher S. Nesbit, Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590, 598-612 (1990).

140. *Wallace*, 472 U.S. at 41-42.

141. *Id.* at 57.

142. *Id.* at 58-59.

143. *Id.* at 59.

144. *Id.* at 60.

145. *Id.* at 69 (O'Connor, J., concurring in the judgment).

146. *Id.* at 68-70 (O'Connor, J., concurring in the judgment). Justice Rehnquist argued vigorously in dissent for abolishing the *Lemon* test along with the Court's entire Establishment Clause analysis from *Everson v. Board of Educ.*, 330 U.S. 1 (1947), forward. *Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting). Justice Powell offered a brief explication of the *Lemon* test "to respond to criticism" of it, noting that it has been neither overruled nor modified, and warning that "continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis." *Id.* at 63-64 (Powell, J., concurring).

147. 472 U.S. at 68-69 (O'Connor, J., concurring in the judgment) (citing *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring)). Justice O'Connor also

For Justice O'Connor, the endorsement test gives "analytic content" to the *Lemon* test's consideration of secular purpose and primary effect by "requir[ing] courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."<sup>148</sup> To this end, the endorsement test entails two inquiries: first, a review of the legislative purpose behind the statute to determine whether government intends through it to "convey a message of endorsement or disapproval of religion";<sup>149</sup> and second, a consideration of the effect of the measure to determine whether an objective observer would perceive it as an act of either endorsement or disapproval of religion.<sup>150</sup>

In *Allegheny County v. Greater Pittsburgh ACLU*,<sup>151</sup> the Court once again employed the *Lemon* test—now refined by incorporation of endorsement analysis into the purpose and effect prongs—to strike down a government-sponsored Christmas crèche for impermissibly endorsing religion.<sup>152</sup> However, the Court did uphold a display including a Christmas tree, a menorah, and a sign celebrating liberty, because of its religiously pluralistic and purely secular aspects.<sup>153</sup> Although acknowledging that it formerly used the terms "favoritism" and "promotion" as it now used "endorsement"—to express its concern over whether the purpose or effect of a governmental action

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criticized the role of the neutrality concept in *Lemon* analysis, arguing that the Court's inconsistent and imprecise appeals for "government 'neutrality' toward religion" have "exacerbated the conflict" between the two religion clauses. *Id.* at 82-83 (O'Connor, J., concurring in the judgment). As a more realistic alternative approach, Justice O'Connor proposed an "accommodation" analysis, contending that "[t]he solution to the conflict between the Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion." *Id.* at 83 (O'Connor, J., concurring in the judgment).

148. *Id.* at 69 (O'Connor, J., concurring in the judgment).

149. *Id.* at 74 (O'Connor, J., concurring in the judgment).

150. *Id.* at 76 (O'Connor, J., concurring in the judgment). Justice O'Connor's view that the "objective observer" perspective is the appropriate one from which to assess endorsement is disputed in James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 688-94 (1990), according to whom "the genuine objection of any reasonable observer [should] constitute a prima facie case of establishment clause violation." *Id.* at 694. More severe is the critique of Steven D. Smith in *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267-68 (1987), who rejects the endorsement test as flawed by its reliance on interpretation of symbolism and its assessment of perceptions which render it unpredictable and inconsistent in application. *Id.* at 331.

151. 492 U.S. 573 (1989).

152. *Id.* at 578-79.

153. *Id.*

endorses religion<sup>154</sup>—the Court articulated the “essential principle” common to these concepts: “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”<sup>155</sup>

Writing on behalf of the *Allegheny County* dissenters, Justice Kennedy reaffirmed the classic *Lemon* test, with some reservation,<sup>156</sup> and rejected the majority’s incorporation of the endorsement test into the *Lemon* framework.<sup>157</sup> Justice Kennedy decried the endorsement test, finding it flawed because it would invalidate many traditional practices in which government historically has affirmed the role of religion, such as presidential Thanksgiving Day proclamations, the Court’s own opening prayer, legislative chaplains, and the national motto “In God we trust.”<sup>158</sup> He also found it impracticable because it “embraces a jurisprudence of minutiae,” as evidenced by the *Allegheny County* majority’s application of it to evaluate the various features of the holiday displays at issue.<sup>159</sup>

154. *Id.* at 590-92 (citing *Engel v. Vitale*, 320 U.S. 421, 436 (1962)).

155. *Id.* at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).

156. *Id.* at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist and Justices Scalia and White joined Justice Kennedy’s dissent.

157. *Id.* at 668-74 (Kennedy, J., concurring in the judgment in part and dissenting in part).

158. *Id.* at 670-73 (Kennedy, J., concurring in the judgment in part and dissenting in part).

159. *Id.* at 674-79 (Kennedy, J., concurring in the judgment in part and dissenting in part). As a replacement for the *Lemon* test, in lieu of the endorsement test, Justice Kennedy proposed a “coercion” test, according to which “[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.” *Id.* at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part). For arguments favoring the coercion test over the endorsement test as a successor to the *Lemon* test, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (preferring the coercion test because the *Lemon* test “fails to distinguish between efforts to coerce and influence religious belief and action, on the one hand, and efforts to facilitate the exercise of one’s chosen faith, on the other”); Patrick F. Brown, Note, *Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis*, 35 CATH. U. L. REV. 573, 575 (1986) (contending that the coercion test most accurately reflects the historical impetus of the Establishment Clause, namely “fear of government coercion,” and is most likely to be applied with uniformity); Kristin J. Graham, Comment, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation*, 42 BUFFALO L. REV. 147, 148-50 (1994) (noting that the coercion test predates the *Lemon* test and predicting its readoption, which would result in the Court

In both *School District of Grand Rapids v. Ball*<sup>160</sup> and *Aguilar v. Felton*,<sup>161</sup> decided on the same day, a common five-member majority employed the *Lemon* test to strike down legislation providing public funding of remedial and enrichment classes for nonpublic school students on the premises of nonpublic schools; however, dissatisfaction with the *Lemon* test resurfaced among the dissenters.<sup>162</sup> Noting that the Court had utilized the *Lemon* test "in every case involving the sensitive relationship between government and religion in the education of our children," the *Ball* majority pointedly reaffirmed the validity of the test in such cases.<sup>163</sup> The *Ball* Court found that the programs it examined failed the effect prong of the *Lemon* test by impermissibly advancing religion in three ways: The teachers potentially could propagate religious beliefs because of the absence of a monitoring process;<sup>164</sup> the programs themselves created a "symbolic link between government and religion" by utilizing nonpublic school classrooms;<sup>165</sup> and because the public funding relieved sectarian schools of much of the cost of

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affirming more efforts to accommodate, sustaining more funding for religion-sponsored social programs, and allowing more incidental support of religion in governmental actions). Some commentators have proposed harmonizing or combining the endorsement and coercion tests. See Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1805 (1993) (seeking to harmonize coercion and endorsement by asserting that there is no state endorsement of religion "[w]here governmental use of religious language or symbols merely recognizes the support of religious traditions for consensual secular values"); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1270 (1994) (reasoning that government must respect dual prohibitions of coercion and "orthodoxy"—meaning endorsement—so that the inquiry becomes first whether religious speech by government is coercive, and second whether it conveys a message of orthodoxy; if not, its scope must be determined by "the political process and mutual forbearance").

160. 473 U.S. 373 (1985).

161. 473 U.S. 402 (1985).

162. This dissatisfaction occurred primarily in the more comprehensive *Aguilar* dissents. See *infra* notes 171-77 and accompanying text.

163. *Ball*, 473 U.S. at 383.

164. *Id.* at 385-89.

165. *Id.* at 389-92. The *Ball* Court's only use of endorsement language appeared in its explanation that the creation of a "symbolic link between government and religion" offends the effect prong of *Lemon* when it "is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 390. The *Ball* Court suggested that had the programs under review been conducted off the nonpublic school premises, they would have been upheld. *Id.* at 390-91 (citing *Zorach v. Clauson*, 343 U.S. 306 (1952)). In his dissent Justice Rehnquist wondered how the programs at issue in *Ball* could signify "a greater 'symbolic link' " than the municipal crèche permitted by *Lynch v. Donnelly*, 465 U.S. 668 (1984), or the legislative chaplain upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Ball*, 473 U.S. at 401 (Rehnquist, J., dissenting).

offering secular courses, such funding directly promoted religion by subsidizing these schools' religious mission.<sup>166</sup>

The entanglement prong of the *Lemon* test was not addressed in *Ball*, but it proved decisive in *Aguilar*.<sup>167</sup> In *Aguilar* the Court found that the state's system for monitoring the content of publicly funded classes in nonpublic schools to ensure religious neutrality met the key concern of the effect prong because the state supervision helped to prevent the program from serving to advance religion.<sup>168</sup> Nonetheless, this system failed the third prong of the *Lemon* test because such monitoring "inevitably results in an excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine."<sup>169</sup> The Court reasoned that the state's efforts to ensure religious neutrality by a strategy of comprehensive surveillance necessitated a constant and complex relationship between state officials and religious schools in violation of the principle of governmental neutrality toward religion.<sup>170</sup>

Noting this problematic relationship between the effect and entanglement prongs of the *Lemon* test in *Aguilar*, Justice Powell admitted that the Court's application of the test "require[d] governments extending aid to parochial schools to tread an extremely narrow line."<sup>171</sup> In his dissent, Chief Justice Burger declared that "the Court's obsession with the criteria identified in *Lemon v. Kurtzman* . . . has led to results that are 'contrary to the long-range interests of the country.'"<sup>172</sup> In Chief Justice Burger's view, the programs at issue simply helped educate disadvantaged children and posed no threat of establishing religion; he concluded that by striking them down, the Court, instead of showing neutrality, demonstrated "hostility toward religion and the children who attend church-sponsored schools."<sup>173</sup> Justice Rehnquist likewise attacked the *Aguilar* majority's application of the effect and entanglement prongs of the *Lemon* test, condemning it as a "'Catch-22' paradox" because the Court found excessive entanglement in the supervision that the

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166. *Ball*, 473 U.S. at 385, 392-97.

167. *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985).

168. *Id.* at 409.

169. *Id.*

170. *Id.* at 414 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970)).

171. *Id.* at 418 (Powell, J., concurring).

172. *Id.* at 419 (Burger, C.J., dissenting) (quoting *School Dist. v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting)).

173. *Id.* at 420 (Burger, C.J., dissenting).

state intended to guard against entanglement.<sup>174</sup> Justice O'Connor, the last *Aguilar* dissenter, found the majority's application of the *Lemon* test flawed by virtue of the fact that the test "condemns benign cooperation between church and state."<sup>175</sup> She specifically questioned the continued usefulness of the entanglement prong.<sup>176</sup> Justice O'Connor asserted what she considered to be a more coherent test: A statute which meets the purpose and effect tests of *Lemon* should not be struck down solely because its administration entails some continuing church-state cooperation to protect against impermissible advancement of religion.<sup>177</sup>

Finally, in *Zobrest v. Catalina Foothills School District*,<sup>178</sup> a Court divided five-to-four upheld a public school district's provision of a sign-language interpreter to accompany a deaf student to his sectarian school.<sup>179</sup> The Court invoked a "breadth of coverage" test by which it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit."<sup>180</sup> The Court found that although the programs it had previously disallowed involved direct aid in the form of teachers, teaching materials, and equipment which the sectarian

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174. *Id.* at 420-21 (Rehnquist, J., dissenting); see also Lines, *supra* note 113, at 16 (criticizing the contradictory outcomes that "*Ball* failed for lack of monitoring; *Aguilar* failed for too much monitoring"). But cf. Braveman, *supra* note 106, at 379 (arguing that in both *Aguilar* and *Ball* the Court properly "reaffirmed the need for scrupulous neutrality by government in religious matters").

175. *Aguilar*, 473 U.S. at 421 (O'Connor, J., dissenting).

176. *Id.* at 422 (O'Connor, J., dissenting). Justice O'Connor charged that "[t]o a great extent, the anomalous results in our Establishment Clause cases are 'attributable to [the] entanglement prong.'" *Id.* at 430 (O'Connor, J., dissenting) (quoting Choper, *supra* note 104, at 681). Illustrative of this point for Justice O'Connor is the inconsistency of the Court's decision to uphold public funding for bus transportation to a nonpublic school, *id.* (O'Connor, J., dissenting) (citing *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947)), but to strike down public funding of bus transportation for nonpublic school field trips because of alleged excessive entanglement resulting from state supervision of the nonpublic school teachers directing the field trips, *id.* (O'Connor, J., dissenting) (citing *Wolman v. Walter*, 433 U.S. 229, 254 (1977)).

177. *Id.* (O'Connor, J., dissenting).

178. 113 S. Ct. 2462 (1993).

179. *Id.* at 2464-65. Chief Justice Rehnquist wrote for the majority, which included Justices White, Scalia, Kennedy, and Thomas. *Id.* at 2463.

180. *Id.* at 2466 (citing *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983)).

schools otherwise would have been required to fund themselves,<sup>181</sup> the *Zobrest* program provided aid directly to a handicapped student, and otherwise would not have been funded by his school.<sup>182</sup>

One commentator has posited that *Zobrest* signalled "a new trend in regard to public aid to religious schools under which the Court will look to the facts of prior cases rather than applying the *Lemon* test anew," and predicted that the Court's continued use of this approach will lead to more "accommodationist results" and add "more uncertainty to the law."<sup>183</sup> The *Kiryas Joel* Court did, in fact, continue the trend of eschewing *Lemon*, at least in its traditional application, in favor of case-by-case analysis; arguably the *Kiryas Joel* holding also added uncertainty to the law. For instance, five members of the *Kiryas Joel* Court indicated support for overturning two of the Court's recent decisions.<sup>184</sup> However, *Kiryas Joel* did not yield an accommodationist result, though it hinted at the prospect of accommodations to come if the five Justices who expressed their willingness to overturn *Aguilar* and *Ball* act accordingly.

Consistent with earlier cases, the *Kiryas Joel* Court applied to the statute at issue the twin principles of neutrality and accommodation. Following its recent trend, the Court did so not by formally employing the *Lemon* test, but by comparing the *Kiryas Joel* statute with a law struck down by the Court in *Larkin v. Grendel's Den, Inc.*<sup>185</sup> as violative of those principles.<sup>186</sup> Still, the *Lemon* principles, refined and renamed, continued to function prominently in the Court's

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181. *Id.* at 2468-69 (citing *Meek v. Pittenger*, 421 U.S. 349 (1975); *School Dist. v. Ball* 473 U.S. 373 (1985)); see also *supra* notes 160-66 and accompanying text.

182. *Zobrest*, 113 S. Ct. at 2468-69. Unconvinced by the majority's effort to distinguish a teacher from an interpreter, Justice Blackmun in his dissent argued that the Court's holding "has authorized a public employee to participate directly in religious indoctrination" because the *Zobrest* interpreter must necessarily convey the subject matter of the deaf student's religion classes. *Id.* at 2469, 2471-72 (Blackmun, J., dissenting). The majority's holding, Blackmun concluded, contradicted the Court's consistent proscription of public provisions to sectarian schools "that afford even 'the opportunity for the transmission of sectarian views.'" *Id.* at 2473 (Blackmun, J., dissenting) (quoting *Wolman v. Walter*, 433 U.S. 229, 244 (1977)). Justice Blackmun found the provision of an interpreter for religion classes to be analogous to the provision of equipment such as tape recorders that the Court has deemed impermissible. *Id.* at 2474 (Blackmun, J., dissenting).

183. T. Jonathan Adams, Note, *Interpreting State Aid to Religious Schools Under the Establishment Clause: Zobrest v. Catalina Foothills School District*, 72 N.C. L. REV. 1039, 1058-59 (1994).

184. See *infra* notes 256-62 and accompanying text.

185. 459 U.S. 116 (1982); see also *supra* notes 129-36 and accompanying text.

186. *Kiryas Joel*, 114 S. Ct. at 2487.



analysis. Indeed, *Larkin*, heavily cited by a plurality<sup>187</sup> and relied upon by a majority,<sup>188</sup> was itself decided under the *Lemon* test.<sup>189</sup> Because of the anomalous nature of the *Kiryas Joel* statute, however, the *Larkin* analogy was rejected absolutely by the dissenters,<sup>190</sup> and was avoided even by two members of the majority,<sup>191</sup> resulting in a judgment defended by sharply differing rationales. While the Court held that Chapter 748 exceeded the degree of accommodation allowed by the benevolent neutrality ideal,<sup>192</sup> the dissent argued persuasively to the contrary.<sup>193</sup> Interestingly, the members of the majority, in their diverse opinions, seemed dismayed that their decision left unmet the educational needs of the handicapped children of the Village of Kiryas Joel. In fact, these Justices proposed some intriguing solutions, ranging from Justice O'Connor's prescription of modifications to the *Kiryas Joel* statute,<sup>194</sup> to a recommendation endorsed by five Justices that the Court reverse its holdings in *School District of Grand Rapids v. Ball*<sup>195</sup> and *Aguilar v. Felton*,<sup>196</sup> the decisions that prompted the enactment of Chapter 748.<sup>197</sup>

The Court's application of the principles of neutrality and accommodation in *Kiryas Joel* is reflected in the two prongs of its holding: First, Chapter 748 is an impermissible accommodation because of its "allocation of political power on a religious criterion"; and second, the statute violates neutrality because it "neither presupposes nor requires governmental impartiality toward religion."<sup>198</sup> Writing for a plurality, Justice Souter found that Chapter 748 violated the neutrality principle specifically by "delegating the State's discretionary authority over public schools to

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187. *Id.* at 2487-90 (plurality opinion); see also *infra* notes 202-08 and accompanying text.

188. *Id.* at 2491-93; see also *infra* notes 202-12 and accompanying text.

189. See *supra* notes 129-36 and accompanying text.

190. *Kiryas Joel*, 114 S. Ct. at 2507-14 (Scalia, J., dissenting); see also *infra* notes 221-30 and accompanying text.

191. For Justice O'Connor, the case most relevant to *Kiryas Joel* was *Larson v. Valente*, 456 U.S. 228 (1982). *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment); see also *supra* notes 231-33 and accompanying text. Justice Kennedy reached the judgment on an alternative rationale. *Id.* at 2500-01; see also *supra* notes 234-39 and accompanying text.

192. See *infra* notes 240-43 and accompanying text.

193. See *infra* notes 244-47 and accompanying text.

194. See *infra* notes 263-69 and accompanying text.

195. 473 U.S. 373 (1985); see also *supra* notes 160-66 and accompanying text.

196. 473 U.S. 402 (1985); see also *supra* notes 167-77 and accompanying text.

197. See *infra* notes 256-62 and accompanying text.

198. *Kiryas Joel*, 114 S. Ct. at 2484.

a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.”<sup>199</sup> Writing for a majority, Justice Souter found that Chapter 748 also offended the accommodation principle, specifically because “we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation.”<sup>200</sup> Therefore, the Court held that Chapter 748 did not qualify as an exercise of benevolent neutrality whereby “the Constitution allows the state to accommodate religious needs by alleviating special burdens.”<sup>201</sup>

In articulating a rationale throughout the plurality and majority opinions, Justice Souter did not rely on traditional *Lemon* analysis; instead, he undertook a case-specific comparative evaluation, considering the statute overturned by the Court in *Larkin* as an “instructive comparison” for determining the constitutionality of Chapter 748.<sup>202</sup> Justice Souter admitted that the analogy between the *Larkin* law and Chapter 748 was not perfect because Chapter 748 delegated civic power to the voting citizens of Kiryas Joel rather than to the leaders of a religious group or organization as did the *Larkin* statute.<sup>203</sup> Yet he dismissed this distinction as constitutionally insignificant because the legal and historical “context” in which Chapter 748 was enacted demonstrated that it “effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly.”<sup>204</sup> Furthermore, Justice Souter stressed that, like the *Larkin* law, Chapter 748 was flawed by the “absence of an ‘effective means of guaranteeing’ that governmental power will be and has been neutrally employed.”<sup>205</sup>

Justice Blackmun correctly noted in his concurrence that, despite the Court’s avoidance of a *Lemon* analysis format and *Lemon* test terminology, the *Kiryas Joel* decision utilized *Lemon* principles, refined and renamed to fit the circumstances of the case.<sup>206</sup> Illustrative of this fact is the effect of Justice Souter’s reliance upon

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199. *Id.* at 2487 (plurality opinion).

200. *Id.* at 2493.

201. *Id.* at 2492.

202. *Id.* at 2487 (plurality opinion); see also *supra* notes 48-50 and accompanying text.

203. *Id.* (plurality opinion).

204. *Id.* at 2489 (plurality opinion).

205. *Id.* at 2491 (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982)).

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

*Larkin*, itself a textbook example of *Lemon* analysis. Applying the *Lemon* test, the *Larkin* Court first reasoned that while the statute had in view valid secular purposes, these could have been realized by other means, such as a state-imposed total ban on alcohol sales within reasonable distances of churches, schools, and similarly sensitive institutions.<sup>207</sup> Likewise, the *Kiryas Joel* Court proposed several religiously neutral means by which the state could have realized a legitimate secular purpose of Chapter 748.<sup>208</sup> Second, the *Larkin* Court determined that the statute violated the primary effect test because it "does not by its terms require that churches' power be used in a religiously neutral way."<sup>209</sup> Similarly, in *Kiryas Joel* the Court complained that Chapter 748 gave no assurance that "governmental power will be and has been neutrally employed" by religion.<sup>210</sup> Third, the *Larkin* Court found that the statute violated the entanglement prong of the *Lemon* test because by "vesting significant governmental authority in churches" it effected a "fusion of governmental and religious functions" prohibited by the Establishment Clause.<sup>211</sup> Borrowing this *Larkin* language, the *Kiryas Joel* Court found that Chapter 748 also resulted in "a purposeful and forbidden 'fusion of governmental and religious functions.'"<sup>212</sup>

Justice O'Connor and Justice Scalia presented differing assessments of the conspicuous absence of formal *Lemon* analysis in *Kiryas Joel*. Justice O'Connor justified the *Kiryas Joel* Court's approach, contending that the use of alternative terminology for the *Lemon* principles has allowed the Court to develop more precise, case-specific tests.<sup>213</sup> Justice Scalia lamented the fact that the Court, while snubbing *Lemon*, refrained once again from explicitly and finally laying it to rest.<sup>214</sup> Noting that in *Kiryas Joel* the lower courts in their holdings and both parties in their briefs presumed the precedential authority of the *Lemon* test, Justice Scalia argued that

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207. *Larkin*, 459 U.S. at 123-24.

208. *Kiryas Joel*, 114 S. Ct. at 2493; see also *supra* notes 61-62 and accompanying text.

209. *Larkin*, 459 U.S. at 125.

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

211. *Larkin*, 459 U.S. at 126 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963), and citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970); *Everson v. Board of Educ.*, 330 U.S. 1, 8-13 (1947)).

212. *Kiryas Joel*, 114 S. Ct. at 2490 (plurality opinion) (quoting *Larkin*, 459 U.S. at 126).

213. *Id.* at 2499-500 (O'Connor, J., concurring in part and concurring in the judgment).

214. *Id.* at 2515 (Scalia, J., dissenting).

until the Court formally rejects *Lemon*, it will continue “to mislead lower courts and parties about the relevance of the *Lemon* test.”<sup>215</sup>

Though the *Kiryas Joel* majority acknowledged that Chapter 748 was an “unusual act,”<sup>216</sup> Justice Souter insisted that “it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen by a religious criterion.”<sup>217</sup> Thus, Justice Souter found that Chapter 748 was fatally flawed because “the State’s manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision.”<sup>218</sup> Justice Souter mustered arguments from the legal and historical context in which Chapter 748 was enacted to support his charge of “manipulation,” and to explain the significant fact that the statute does not expressly name its beneficiaries as a religious group.<sup>219</sup> By this reasoning, Justice Souter rejected the alternative view of this unusual act—that it is distinguishable from the *Larkin* law because it represented “a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.”<sup>220</sup>

The position that Chapter 748 is distinguishable from the *Larkin* law may be appropriate on the facts of *Kiryas Joel*. As Justice Scalia noted in his dissent, unlike the *Larkin* case, in which the government allowed certain religious organizations to wield discretionary political powers, the statute at issue in *Kiryas Joel* did not intend to single out the Satmars as a religious group to receive any analogous benefits.<sup>221</sup> First, unlike the *Larkin* law, Chapter 748 sought to provide the benefits of a welfare program for the general public to citizens who happened to share a common religious identity.<sup>222</sup> In this respect, Chapter 748 is analogous to the statute authorizing reimbursement of public bus fares to the parents of private school students, all of whom happened to be Catholic, which the Court upheld in *Everson v. Board*

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215. *Id.* (Scalia, J., dissenting). Justice Scalia’s complaint, however, rings hollow when coupled with his critique of Justice O’Connor’s alternative “situation-specific rules” as an effort “to replace *Lemon* with nothing.” See *supra* notes 94-95 and accompanying text.

216. *Kiryas Joel*, 114 S. Ct. at 2484.

217. *Id.* at 2488 (plurality opinion).

218. *Id.* (plurality opinion).

219. *Id.* at 2489-90 (plurality opinion); see also *supra* notes 51-53 and accompanying text.

220. *Kiryas Joel*, 114 S. Ct. at 2489 (plurality opinion).

221. *Id.* at 2510 (Scalia, J., dissenting).

222. *Id.* at 2506 (Scalia, J., dissenting).

of Education.<sup>223</sup> The *Everson* Court held that in the case of public welfare programs for students, such as the provision of public transportation—or, arguably, as in *Kiryas Joel*, special education for handicapped students—the Free Exercise Clause prohibits the state from excluding anyone “because of their faith, or lack of it.”<sup>224</sup> Therefore, Chapter 748 should not have been struck down simply because it provided public welfare benefits to citizens of a common religious identity. Second, unlike the statute in *Larkin*, Chapter 748 was respectful of neutrality. Contrary to the majority’s interpretation of the governmental action in *Kiryas Joel*, the state arguably did not draw the school district’s political boundaries intentionally on the basis of religion; rather, it adopted the village’s preexisting political boundaries.<sup>225</sup> As Justice Scalia noted, these preexisting village boundaries were drawn for the political purpose of excluding those who did not share the Satmars’ preference for zoning that permitted high density housing, not for the religious purpose of excluding those who did not share the Satmars’ religious identity.<sup>226</sup>

That Chapter 748 adopted preexisting political boundaries, “drawn on the basis of communality of *secular governmental desires*”<sup>227</sup> rather than religion, weakens Justice Souter’s first contextual argument that, as with the *Larkin* provision, the state in *Kiryas Joel* must have intended Chapter 748 to single out the Satmars for special favor because it passed the measure with full knowledge that the village was exclusively Satmar.<sup>228</sup> Justice Souter’s other contextual arguments are less than compelling. Although establishing a village school district may have marked a departure from the statewide trend, and the use of a special legislative act may have been an unusual way to set up such a district,<sup>229</sup> these facts do not require a finding that the state intended Chapter 748 as anything other than a religiously neutral accommodation of the unusual needs of the Village of Kiryas Joel. If the state deemed its enactment of Chapter 748 a workable mechanism for delivering public welfare services to citizens in need of them, the legislature’s failure to choose among

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223. 330 U.S. 1, 3-18 (1947).

224. *Id.* at 16.

225. *Kiryas Joel*, 114 S. Ct. at 2511 (Scalia, J., dissenting).

226. *Id.* (Scalia, J., dissenting).

227. *Id.* (Scalia, J., dissenting).

228. *Id.* at 2489-90 (plurality opinion).

229. *Id.* (plurality opinion).

other options deemed available by Justice Souter was not an indication of religious favoritism on the state's part.<sup>230</sup>

Like Justice Souter, Justice O'Connor found Chapter 748 to be unconstitutional partly because it isolated a single religious sect for special treatment; however, she recognized the unusual attendant circumstances: "I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation."<sup>231</sup> Instead of *Larkin*, though, Justice O'Connor looked to *Larson v. Valente*,<sup>232</sup> in which the Court used strict scrutiny equal protection analysis to evaluate governmental action for religious favoritism.<sup>233</sup> Justice O'Connor's choice of *Larson* as an analog is subject to the same critique as Justice Souter's use of *Larkin*: Unlike the statute at issue in *Larkin*, which clearly favored religion over nonreligion, or the one in *Larson*, which clearly favored some denominations over others, Chapter 748 was facially neutral. The majority, therefore, had to rely on speculative contextual arguments to support the contention that the *Kiryas Joel* statute intentionally favored the Satmars so that it could be characterized as religious gerrymandering.

Justice Kennedy added to the *Kiryas Joel* majority's diversity of rationales by declining to join in the Court's *Larkin*-based opinion, choosing instead to decide the case by invoking the Establishment Clause's prohibition of "explicit religious gerrymandering" and analogizing from Equal Protection Clause analysis which bars government segregation by race or religion.<sup>234</sup> Justice Kennedy acknowledged that the Village of Kiryas Joel was legitimately founded "pursuant to a religion-neutral self-incorporation scheme," but the logic of his reasoning was strained by his conclusion that by conforming the school district to the preexisting village boundaries the state "had a direct hand in accomplishing the religious segregation which characterizes the district."<sup>235</sup> More reasonable is the conclusion that the government was not guilty of segregating on a religious basis when it simply recognized and made practical use of the political boundaries that were formed when the Satmars legitimately incorporated the Village of Kiryas Joel with the resultant self-segregation

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230. *Id.* (plurality opinion).

231. *Id.* at 2497-98 (O'Connor, J., concurring in part and concurring in the judgment).

232. 456 U.S. 228 (1982); see also *supra* notes 122-28 and accompanying text.

233. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment).

234. *Id.* at 2504 (Kennedy, J., concurring in the judgment).

235. *Id.* (Kennedy, J., concurring in the judgment).

of their religious sect. Surely Chapter 748 did not present the danger of "stigma and stirred animosities" characteristic of the governmental segregation against which the Equal Protection Clause was intended to protect.<sup>236</sup> Nor is it clear that Chapter 748 constituted religious gerrymandering. As Justice Scalia noted,<sup>237</sup> the Court previously had held that to prove religious gerrymandering a claimant "must be able to show the absence of a neutral secular basis for the lines government has drawn."<sup>238</sup> The preexisting village boundaries arguably constituted such a neutral secular basis for the lines drawn by Chapter 748 to establish the school district for the Village of Kiryas Joel, because the village boundaries were established pursuant to a neutral, generally applicable state law, not through a special act of religious accommodation.<sup>239</sup>

The *Kiryas Joel* Court's determination that Chapter 748 exceeded the degree of accommodation allowed by the benevolent neutrality ideal was based on two contentions: first, that an "unconstitutional delegation of political power to a religious group" cannot be deemed a permissible accommodation of religion;<sup>240</sup> and second, that the measure lacked the requisite means of insuring neutrality in its application.<sup>241</sup> The first contention begs the question whether Chapter 748 in fact delegated political power to a religious group.<sup>242</sup> The second contention was grounded in the questionable presumption that by creating the village school district through a case-specific act of the legislature benefitting a single religious group, the state preempted the process of judicial review that operates under a

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236. *Id.* (Kennedy, J., concurring in the judgment).

237. *Id.* at 2508 (Scalia, J., dissenting).

238. *Kiryas Joel*, 114 S. Ct. at 2508 (Scalia, J., dissenting) (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

239. See *supra* notes 225-26 and accompanying text. Sharing Justice Scalia's view of Kiryas Joel by depicting it as "a validly incorporated municipality comprised of individual landowners most of whom happen to be adherents of the same religion," one commentator argued that government aid to the village passed all three prongs of the *Lemon* test. Craig L. Olivo, Note, *Grumet v. Board of Education of the Kiryas Joel Village School Dist.—When Neutrality Masks Hostility—The Exclusion of Religious Communities From an Entitlement to Public Schools*, 68 NOTRE DAME L. REV. 775, 800 n.136 (1993). Olivo contrasted the Village of Kiryas Joel with the City of Rajneeshpuram in Oregon, whose incorporation was struck down as having the primary effect of advancing religion because its boundaries were coterminous with those of a religious commune in which all property was owned and controlled by a for-profit corporation founded expressly to advance the faith of the sect. *Id.* (citing *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208, 1216-17 (D. Or. 1984)).

240. *Kiryas Joel*, 114 S. Ct. at 2493.

241. *Id.* at 2491.

242. See *supra* notes 221-26 and accompanying text.

generally applicable law. From this presumption, the Court concluded that the state could not ensure neutrality because, in the event that the state should subsequently deny to a similarly situated group the benefits conferred upon the Satmars by Chapter 748, a court challenge based on equal protection would be unavailable.<sup>243</sup>

Justice Kennedy and Justice Scalia forcefully contended that the Court's insistence upon guarantees of neutrality lacked backing in legal precedent and ignored the unusual nature of the facts of *Kiryas Joel*. Justice Kennedy asserted that the *Kiryas Joel* Court's position

that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden . . . seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group.<sup>244</sup>

Furthermore, Justice Kennedy argued that the rationale for the Court's conclusion that the creation of the district favors the Satmars was flawed because it failed to presume the constitutionality of the statute and it prejudged the New York legislature.<sup>245</sup> Moreover, Justice Kennedy charged that it was incorrect for the majority to assume that no court challenge would be available in the event the state denied accommodation to another group facing a similar burden.<sup>246</sup> On the same grounds, Justice Scalia sharply protested the Court's unreasonable demand for "up front" assurances of neutrality, declaring with indignation and, seemingly, with some justification:

It is presumptuous for this Court to impose—*out of nowhere*—an unheard-of prohibition against proceeding in this manner [case by case, as do the courts] upon the Legislature of New York State. I never heard of such a principle, nor has anyone else, nor will it ever be heard of

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243. *Kiryas Joel*, 114 S. Ct. at 2491; see also *id.* at 2497-98 (O'Connor, J., concurring in part and concurring in the judgment).

244. *Id.* at 2500-01 (Kennedy, J., concurring in the judgment).

245. *Id.* at 2503 (Kennedy, J., concurring in the judgment).

246. *Id.* (Kennedy, J., concurring in the judgment). Justice Kennedy argued that if the state failed to accommodate a similarly situated religious community, that community could sue on the ground that such discriminatory treatment offended the Establishment Clause, requiring the court to decide only "whether the community does indeed bear the same burden on its religious practice as did the Satmars in *Kiryas Joel*." *Id.* (Kennedy, J., concurring in the judgment) (citing *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463-65 (D.C. Cir. 1989)).



again. Unlike what the New York legislature has done, this is a special rule to govern only the Satmar Hasidim.<sup>247</sup>

The fact that the Justices proposed an array of alternative constitutionally permissible strategies for meeting the educational needs of the handicapped Satmar children created the impression that the Court was almost apologetic for striking down Chapter 748. Justice Souter and the majority encouraged the state to solicit "an educationally appropriate offering by Monroe-Woodbury," the neighboring district—such as "a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools"—to be "administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars."<sup>248</sup> However, this suggestion sounds like a modified version of the pre-Chapter 748 program, housed in an annex to a Satmar school, that was terminated by Monroe-Woodbury in response to the *School District of Grand Rapids v. Ball*<sup>249</sup> and *Aguilar v. Felton*<sup>250</sup> decisions.<sup>251</sup> Furthermore, as Justice Souter intimated, the Monroe-Woodbury district was not likely to undertake the expense of a free-standing program such as this without state pressure or incentives.<sup>252</sup>

Justices Stevens, Blackmun, and Ginsburg recommended that the state implement programs "promoting diversity and understanding in the public schools" to help the neighboring district assimilate the Satmar children.<sup>253</sup> This idea appears somewhat insensitive to the Satmars' religious and cultural commitments to self-segregation, especially when considered in connection with these Justices' allegation that through Chapter 748 the state improperly advanced religion by segregating the Satmar children so as to increase the likelihood that they would remain adherents of their parents' religion.<sup>254</sup> As long ago as *Everson v. Board of Education*,<sup>255</sup> the

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247. *Id.* at 2514 (Scalia, J., dissenting).

248. *Id.* at 2493 (citing *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977)).

249. 473 U.S. 373 (1985); see also *supra* notes 160-66 and accompanying text.

250. 473 U.S. 402 (1985); see also *supra* notes 167-77 and accompanying text.

251. See *supra* notes 29-36 and accompanying text.

252. *Kiryas Joel*, 114 S. Ct. at 2493. Justice Souter advised that "if the New York legislature should remain dissatisfied with the responsiveness of the local school district, it could certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings." *Id.*

253. *Id.* at 2495 (Stevens, J., concurring).

254. *Id.* (Stevens, J., concurring).

255. 330 U.S. 1, 3 (1947) (regarding funding for public transportation); see also *supra* notes 105-10 and accompanying text.

Court upheld state benefits for parochial school students even though one effect of that aid was to make it easier for parents to keep their children in religious schools, thereby enhancing the prospect that those children would remain faithful to their parents' religion.

Five members of the *Kiryas Joel* Court—Justice O'Connor,<sup>256</sup> Justice Kennedy,<sup>257</sup> and the three dissenters, Justice Scalia, Chief Justice Rehnquist, and Justice Thomas<sup>258</sup>—called for reconsideration of *School District of Grand Rapids v. Ball*<sup>259</sup> and *Aguilar v. Felton*,<sup>260</sup> the decisions that set the stage for the enactment of Chapter 748 by striking down state provision of public educational services on the premises of religious schools. Justice O'Connor expressed the sentiments of these Justices when she asserted that one acceptable accommodation of the Satmars would be a return to the pre-*Aguilar* scheme.<sup>261</sup> She reasoned that "[i]t is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here" and concluded that "[i]f the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well."<sup>262</sup> Such reformist intentions regarding *Aguilar* and *Ball* notwithstanding, the prospect that the Court will revisit these holdings at an undetermined future date does little to resolve the immediate problem of providing needed public educational services to the Village of Kiryas Joel.

Much more promising is the other solution proposed by Justice O'Connor: the enactment of a new statute that meets the Court's requirements for benevolent neutrality.<sup>263</sup> Justice O'Connor counseled that the state could properly accommodate the Satmars by enacting "generally applicable legislation" that would either permit all villages to operate school districts, or establish neutral criteria, to be applied by a state agency whose decisions are subject to judicial review, and permit only those villages that meet these criteria to operate school districts.<sup>264</sup> Insisting that "[o]ur invalidation of

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256. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment). Of these companion cases, Justice O'Connor specifically named only *Aguilar*. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

257. *Id.* at 2505 (Kennedy, J., concurring in the judgment).

258. *Id.* at 2514-15 (Scalia, J., dissenting).

259. 473 U.S. 373 (1985); see also *supra* notes 160-66 and accompanying text.

260. 473 U.S. 402 (1985); see also *supra* notes 167-77 and accompanying text.

261. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment).

262. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

263. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

264. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

[Chapter 748] in no way means that the Satmars' needs cannot be accommodated," Justice O'Connor concluded that a school district established according to the model legislation she outlined would be upheld under the *Kiryas Joel* decision "even though it coincides with a village which was consciously created by its voters as an enclave for their religious group."<sup>265</sup> Taking Justice O'Connor at her word, just days after the Court delivered its opinion in *Kiryas Joel*, the New York legislature enacted a statute purporting to conform to Justice O'Connor's proposed model.<sup>266</sup> Validated by this new law, the Village of Kiryas Joel school district remains in operation.<sup>267</sup> However, shortly after the measure was passed, opponents of Chapter 748 renewed litigation, challenging the constitutionality of the revised statute.<sup>268</sup> Thus, Justice O'Connor's "solution" will not finally solve the problem of providing public special education to the handicapped children of the Village of Kiryas Joel until and unless the judiciary endorses the state's new statute in "*Kiryas Joel II*."<sup>269</sup>

Only Justice Scalia's proposal could have effected an immediate solution for the village and the Satmar children: The Court simply should have upheld Chapter 748 as "an admirably American accommodation" of religion.<sup>270</sup> The Justices' various arguments for and against the constitutionality of Chapter 748 seem to stem in great part from differing assessments of the New York legislature's intention in passing the statute. At the core of the differing assessments is the anomaly of a specially created school district with boundaries that conform to those of a village whose residents are exclusively members of a single religious sect. The majority seemed to view these circumstances with a skepticism that extended to its assessment of the state's purpose. To the majority, protective of the

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265. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

266. Gary Spencer, *Judge Declines to Bar School District Law; New Kiryas Joel Statute Called Constitutional*, N.Y. L.J., Aug. 11, 1994, at 1. The measure permits any municipality to form a school district if it meets requisite population, enrollment, and wealth criteria. N.Y. Educ. Law § 1504.3.a (McKinney 1995); *see also* Spencer, *supra*, at 1.

267. *Id.*

268. *Id.*

269. The Kiryas Joel school district survived the first skirmish in the renewed litigation, on August 9, 1994, when Albany County Supreme Court Justice Joseph Harris refused to enjoin continued operation of the district, upholding the constitutionality of the newly enacted statute and portraying it as "essentially a peace treaty with the Establishment Clause." *Grumet v. Cuomo*, No. 4210-94, 1994 N.Y. Misc. LEXIS 448, at \*29 (N.Y. Sup. Ct. Aug. 9, 1994).

270. *Kiryas Joel*, 114 S. Ct. at 2506 (Scalia, J., dissenting).

principle of neutrality, it all smacked of religious favoritism.<sup>271</sup> However, because the majority had no direct evidence of such favoritism, it had to support its assessment with conjecture from context.<sup>272</sup>

On the other hand, the dissent, more eager to act on the accommodation principle, accepted at face value the creation of the exclusively Satmar village and the resultant Satmar-only school district. The dissent reasoned that the state laws establishing the school district and founding the village were facially neutral, and these laws made no express reference to the beneficiaries as members of a discrete religious sect.<sup>273</sup> This analysis effectively exposed the speculative nature of the majority's allegation of religious favoritism in Chapter 748 and made a strong case for its constitutionality as a permissible accommodation.

Nevertheless, the *Kiryas Joel* Court found that Chapter 748 fell short of the Court's conception of the elusive ideal of benevolent neutrality.<sup>274</sup> Perhaps the model statute prescribed by Justice O'Connor in *Kiryas Joel* embodies that ideal. However, did Chapter 748 fall so short of the benevolent neutrality ideal as to be violative of religious neutrality? Or did the ideal elude the New York legislature when it enacted Chapter 748 because the Court requires too much? Considering the acknowledged anomaly of the *Kiryas Joel* facts—facts that presented a case of first impression to the legislature—the state's course of action in drafting Chapter 748 to provide for the only religious group apparently in need of such an accommodation could hardly be considered unreasonable.

Under these circumstances, Justice Souter's expressed concern over the absence of any track record by which the state could demonstrate its good-faith intent to provide similar benefits to other groups seems unrealistic.<sup>275</sup> Justice Scalia seized upon this unfairness and responded sarcastically that had the state, prior to *Kiryas Joel*, actually established such school districts for other religious groups, "each of *them* would have been attacked (and invalidated) for the same reason as this one: because it had no antecedents. The Court certainly has in mind some way around this chicken-and-egg problem. Perhaps the legislature could name the first four districts in

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271. *Id.* at 2491-92.

272. *Id.* at 2491.

273. *Id.* at 2510-11 (Scalia, J., dissenting).

274. *Id.* at 2492.

275. *Id.* at 2491.

pectore."<sup>276</sup> Now, with direction from a Court guided by hindsight unavailable to the state legislature that adopted Chapter 748, the state has cured this statute of constitutional problems, assuming that the measure holds up under the scrutiny of the ongoing litigation.<sup>277</sup> After all, Justice O'Connor's prescription was only dictum.<sup>278</sup>

It is indeed noteworthy that five members of the *Kiryas Joel* Court decided that, in its quest for the elusive ideal of benevolent neutrality, the Court in *Aguilar* and *Ball* required too much. It also is arguable that the *Kiryas Joel* Court required too much of Chapter 748. If the successor to Chapter 748, modeled after Justice O'Connor's proposal, is successfully defended, perhaps the ideal will gain some clarity and be rendered somewhat less elusive. However, unless and until that happens, *Kiryas Joel* may best be remembered as a case in which the Court missed a good chance to affirm "an admirably American accommodation" of religion.<sup>279</sup>

WELTON O. SEAL, JR.

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276. *Id.* at 2513 n.4 (Scalia, J., dissenting).

277. See N.Y. Educ. Law § 1504.3.a (McKinney 1995); see also *supra* notes 266-69 and accompanying text.

278. *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment); see also *supra* notes 263-65 and accompanying text.

279. *Id.* at 2506 (Scalia, J., dissenting).