

Up Against the Wall: *Board of Education of Kiryas Joel Village School District v. Grumet*

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I. INTRODUCTION

Essentially, this Comment will address the aftermath of the United States Supreme Court's recent Establishment Clause decision, *Board of Education of Kiryas Joel Village School District v. Grumet*,¹ and attempt to answer two questions: (1) does the Court's fractured opinion provide any stability or predictability for Establishment Clause jurisprudence? and (2) what is the likely impact of this case upon governmental attempts to sensitively accommodate cultural and ethnic diversity when religious adherents are incidentally involved?

In Part II, I will briefly present observations on the American cultural context in which this case is ironically situated. In addition, I will describe the Establishment Clause jurisprudential context of the case.² Part III will present the factual background of the case. In Part IV, I will describe the Supreme Court's unique handling of *Kiryas Joel*—the plurality opinion by Justice Souter, the four concurrences, and the dissent. Part V will present analysis of the result of this case and recommendations to resolve the problems made obvious by the Court's decision. Finally, Part VI will briefly conclude this Comment.

II. PROLEGOMENA

A. *Living in the U.S.A.*

Over the last twenty-five years in the United States, as a result of affirmative efforts on the part of numerous public and private entities,³

¹ 114 S. Ct. 2481 (1994).

² Because of the very limited scope of this Comment, I will not provide the reader a thorough historical analysis of the Establishment Clause, or the religion clauses generally. Many fine articles and books are available. See generally CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631 (1992); Rodney J. Blackman, *Showing the Fly the Way Out of the Bottle: Making Sense of the First Amendment Religion Clauses*, 42 KAN. L. REV. 285 (1994); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988).

³ These entities include, for example, government agencies and organizations, schools,

Americans have grown more cognizant of their diversity.⁴ The myth of the melting pot has dissipated and seems supplanted by recognition and affirmation of our collective differences.⁵ Presently, one regularly hears the call to understand and even celebrate differences. Physical, mental, racial, sexual orientation, gender, cultural, religious and ethnic differences provide a starting point for dialogue rather than an endpoint. Thus, for many, the call to affirmation and celebration of diversity represents a change in the American cultural milieu.⁶

various religious organizations and adherents, civil rights organizations and individual activists, and the mass media.

⁴ See generally LEONARD D. CAIN, *THE EMERGING MINORITIES* (1991) (discussing the recent emergence of non-ethnic minorities (women, the elderly, the disabled, and homosexuals), their experience and effect on culture); THEODORE CAPLOW, *AMERICAN SOCIAL TRENDS* (1991) (discussing numerous socio-cultural trends from 1960-90. Of particular interest are recent trends related to work, government, religion, ethnicity, and social movements).

⁵ Steven M. Tipton has observed that:

In fact, contrary to philosophical liberals and their communitarian critics alike, what holds us together as a polity and a people is not some comprehensive cultural agreement conceived as a value-consensus, or as a value-free arrangement of rules and rights to coordinate our disparate interests and ideals across seamless subcultural communities. Rather, we are held together by the coherence of our moral disagreement and argument within an ongoing cultural conversation that embraces multiple moral traditions, languages, practices, and social settings. . . . The moral argument of public life goes on within each one of us and among all of us, because we all share a common culture woven of contrasting moral traditions that themselves embody continuities of conflict over how we ought to live together. And all of us lead lives that span the different social institutions and practices to which traditions ring more or less true, including a polity that is at once a religious republic and a liberal constitutional state.

Steven M. Tipton, *An American Paradox: The Place of Religion in an Ambiguous Polity*, in *THE POLITICAL DIMENSIONS OF RELIGION* 273, 277 (Said Amir Arjomand ed., 1993) (footnote omitted).

⁶ Of course, this is not to say greater sensitivity and tolerance have automatically accompanied the recognition of diversity. One need only witness the pejorative use of the term "politically correct" to understand that the call to celebration and sensitivity has not gone unchallenged. See Robert Kerr, *Diversity Police Oppressors, Too*, in *Writer's Eyes*, COLUMBUS DISPATCH, Jan. 8, 1995, at 6G. Kerr reviews Richard Bernstein's new book *DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA'S FUTURE* (1994). *Id.* Kerr states that "Bernstein identifies multiculturalism as a growing threat and revival of '60s Marxism." *Id.* According to Kerr, Bernstein argues that advocates of

In the context of this cultural milieu, some citizens expect and even demand that governmental responses to serious societal or community problems show awareness and sensitivity to diversity. Further, many citizens require government to attempt, whenever possible, to accommodate cultural and ethnic diversity. Thus, it is difficult to imagine that a problem of constitutional magnitude would result because the New York Legislature enacted preferential legislation that allowed a group of mentally and physically challenged children from a small ethnic community to attend public school in their own community. In *Kiryas Joel*, the U.S. Supreme Court wrestled with the question of whether the New York State Legislature's enactment of special legislation granting a village authority to accommodate the special education needs of their children without violating the Establishment Clause of the First Amendment.⁷ In a divided and troubling opinion, the Court answered no, declaring such an "accommodation" constituted a violation of the Establishment Clause.⁸

B. *The Establishment Clause*

Generally, one willingly accepts Chief Justice John Marshall's declaration in *Marbury v. Madison*⁹ that it is the exclusive province of the Court is to declare what the law is.¹⁰ Many even agree with Charles Evans Hughes that "[w]e are under a Constitution, but the Constitution is what the judges say it

multiculturalism and recognition of diversity are more interested in imposing politically correct attitudes than free expression of diverse opinions, *i.e.*, multiculturalists are the new oppressors. *Id.* Nevertheless, in spite of recalcitrance on the part of some individuals, recognition and appreciation of our diversity seems secure.

These cultural observations are the author's. They are not based upon scientific research of a sociological or political nature. Rather, the cultural research basically entailed holding a licked finger in the air in order to feel the present American cultural wind. Admittedly, cultural winds change and are mysterious. These observations are not offered as conclusions. The author proposes nothing to the reader beyond the mere suggestion that as a culture, America is changing. Additionally, to a certain extent, the differences once considered a divisive force we now regard positively. To assess the direction of American culture, the author collected data from a variety of sources, including but not limited to radio broadcasts and radio talk shows. In addition, magazine and newspaper articles related to "political correctness" were randomly sampled.

⁷ Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2484 (1994).

⁸ *Id.*

⁹ 5 U.S. 137 (1803).

¹⁰ *Id.* at 177.

is."¹¹ Difficulty arises, however, when our hopes for clarity, understanding, guidance and uniformity in the law's interpretation are dashed by confusing and inconsistent decisions by the Court. The Supreme Court's Establishment Clause cases are a prime example of Court created and perpetuated confusion.

The First Amendment's religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹² Read alone, one would never suspect that some "talismanic catchword, test, or methodology"¹³ is necessary to understand what the Constitution prohibits. Rather, one suspects the words simply mean that government may not act with a religious purpose or under religious influence, and government must refrain from intruding into the sphere of private religious practice. Further, one likely would join Jonathan E. Nuechterlein in the belief that the two aspects of the First Amendment's religion clauses are not in conflict but are correlative—each defining the limits of the other.¹⁴ Nevertheless, the Court recently made clear that a special hermeneutic is required to understand the Establishment Clause.¹⁵

Persons familiar with this area of law recognize that inconsistency and

¹¹ FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* 3 (1976) (quoting Hughes' words as "immortalized" by President Franklin D. Roosevelt in his March 9, 1937 fireside chat).

¹² U.S. CONST. amend. I.

¹³ Benjamin D. Feder, *And A Child Shall Lead Them: Justice O'Connor, The Principle of Religious Liberty and Its Practical Application*, 8 PACE L. REV. 249, 250 (1988).

¹⁴ Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1146 (1990); see also Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 798 (1993) (stating that the Establishment Clause, to protect religious liberty, prohibits states from prescribing religious exercise, and the Free Exercise Clause, in order to protect religious liberty, prohibits government from proscribing religious exercise).

¹⁵ I am not suggesting a naive literalist interpretation of the religion clauses. That approach would solve few if any of our courts' present problems. Furthermore, textual exegesis offers little, and eisegesis, as the courts have performed it, has created doctrinal incoherence. In addition, I do not believe that looking to the constitutional framers' intent will solve the problems. First, how would we determine their intent? Second, whose intent ought we accord the greatest deference? And on it goes. See generally CORD, *supra* note 2 (discussing and comparing Madison's and Jefferson's words and deeds related to church and state relations, which are considerably foreign to the contemporary mythologizing that both the Supreme Court and separationist commentators have indulged in); ANTHEAU, *supra* note 2. Frankly, the interpretations offered by the separationists and the accommodationists offer little. Ultimately, it is clear that a new approach to understanding church and state relations is needed. See *infra* part V.

confusion are nothing new. Establishment Clause jurisprudence has been universally criticized as logically inconsistent, contradictory, and hopelessly confusing.¹⁶ Even the Court “itself has acknowledged its own ‘considerable internal inconsistency,’ candidly admitting that it has ‘sacrifice[d] clarity and predictability for flexibility’”¹⁷

Since *Everson v. Board of Education*,¹⁸ Establishment Clause jurisprudence has been “mired in slogans and multipart tests that could be manipulated to reach almost any result.”¹⁹ The most broadly adopted, applied and criticized of these tests, the three-part *Lemon* test, assembled by the Court in *Lemon v. Kurtzman*,²⁰ has served numerous courts in a myriad of cases determining whether an Establishment Clause violation has occurred. In *Lemon*, the Court united three tests that it gleaned from the Court’s Establishment Clause cases. For legislation or governmental conduct to be constitutional under the Establishment Clause: (1) it must have a secular purpose; (2) it must not have a principle or primary effect of advancing or inhibiting religion; and (3) it must not foster excessive entanglement between government and religion.²¹ Unfortunately, the *Lemon* test’s ambiguity has led to sharp criticism by commentators and members of the Supreme Court itself. According to Michael Stokes Paulson, “[t]he criticism [i]s well deserved. Each of *Lemon*’s three ‘prongs’ . . . ha[s] some major analytical flaw Not all of the . . . decisions [a]re wrong, of course, but they certainly lacked doctrinal coherence.”²²

This lack of doctrinal coherence seems to have motivated the Court to move in its recent cases toward abandoning the *Lemon* test. Michael W. McConnell suggests that “it is increasingly evident that the *Lemon* test is

¹⁶ See William P. Marshall, “We Know It When We See It” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495-97 (1986); see also Feder, *supra* note 13; 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, 813 (1993).

¹⁷ Marshall, *supra* note 16, at 497 (alteration in original) (footnotes omitted) (quoting from *Walz v. Tax Comm’r*, 397 U.S. 664, 669 (1970) and *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980)).

¹⁸ 330 U.S. 1 (1947). The Court, quoting Thomas Jefferson, declared that the Establishment Clause “was intended to erect ‘a wall of separation between Church and State.’” *Id.* at 16 (citation omitted).

¹⁹ Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992).

²⁰ 403 U.S. 602 (1971).

²¹ *Id.* at 612-13.

²² Paulsen, *supra* note 14, at 800-01.

largely irrelevant or indeterminate when applied to most serious establishment issues."²³ Nevertheless, lower courts, particularly state courts, continue to apply the *Lemon* test. *Kiryas Joel*, which originated in the New York state courts, is such an example. Each state court that *Kiryas Joel* passed through on its way to the Supreme Court decided the case based upon application of the *Lemon* test.²⁴ Each court found the legislation in question constitutionally invalid, but for different reasons. When the Supreme Court granted certiorari in *Kiryas Joel*, many hoped for resolution of the Establishment Clause doctrinal chaos. However, as this Comment will illustrate,²⁵ little clarity appears gained by the Court's intervention.²⁶

III. BACKGROUND: THE *KIRYAS JOEL* FACTS

Kiryas Joel originated in the Supreme Court of Albany County, New York when taxpayers and the New York State School Boards Association (NYSBA) brought suit challenging the constitutionality of a state statute passed in 1989 that specially created the Kiryas Joel Village School District (KJVSD).²⁷ The constitutional infringement claim centered on the fact that the school district's boundaries were contiguous with the village's boundaries.²⁸ Grumet²⁹ (one of

²³ McConnell, *supra* note 19, at 685–86.

²⁴ Grumet v. New York State Educ. Dep't, 579 N.Y.S.2d 1004, 1007 (Sup. Ct. 1992), *aff'd sub nom.* Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123, 126–27 (App. Div. 1992), *judgment modified*, 618 N.E.2d 94 (N.Y. 1993), *aff'd*, 114 S. Ct. 2481 (1994).

²⁵ See *infra* parts IV, V.

²⁶ Perhaps, as Phillip E. Johnson seems to suggest, in the religion clause area, the Supreme Court has met its match:

Despite the most determined efforts of the Justices and the scholars, no single logical framework seems capable of explaining the law.

Many areas of constitutional law are unsettled, of course, but in most areas the uncertainty concerns how far the Constitution requires us to go in a particular direction. In the religion clause area, even the general direction is often difficult to ascertain.

Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984).

²⁷ Grumet, 579 N.Y.S.2d at 1005–06. The statute at issue was 1989 N.Y. LAWS ch. 748.

²⁸ *Id.* at 1005.

²⁹ Initially, Louis Grumet and Albert W. Hawk sued both in their individual capacities as taxpayers and as officers of the NYSBA. Grumet v. Board of Educ. of the Kiryas Joel

the taxpayer plaintiffs and a member of the NYSBA) sought the court's declaratory judgment that the statute violated both equal protection and church-state separation.³⁰

The Village of Kiryas Joel is a religious enclave, incorporated since 1977 under New York law.³¹ The villagers are predominantly Satmarer Hasidim,³² a "vigorously religious" Jewish sect which strictly interprets and follows the Torah.³³ In Kiryas Joel, sexes are segregated outside of the home; Yiddish is the primary language; radio and television are not generally used; and villagers wear distinctive Hasidic dress.³⁴ Furthermore, boys and girls from Kiryas Joel receive their education in separate private schools that do not offer special education programs for special needs children.³⁵

The children requiring special education have been the center of controversy for nearly ten years. In 1984 the Monroe-Woodbury Central School District (M-WCSD) provided special education for the villagers' children at an annex to the private girls-school, Bais Rochel.³⁶ Unfortunately, in response to the U.S. Supreme Court's decisions in *Aguilar v. Felton*³⁷ and *Grand Rapids v. Ball*,³⁸ M-WCSD terminated the shared space program.³⁹ As a result, the only opportunity for special education for the children was in the

Village Sch. Dist., 592 N.Y.S.2d 123, 126-27 (App. Div. 1992), *judgment modified*, 618 N.E.2d 94 (N.Y. 1993), *aff'd*, 114 S. Ct. 2481 (1994). However, New York's Appellate Division ruled that the NYSBA and its officers lacked standing to challenge the statute's constitutionality. *Id.*

³⁰ *Grumet*, 579 N.Y.S.2d at 1006.

³¹ *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94, 110-11 (N.Y. 1993) (Bellacosa, J., dissenting), *aff'd*, 114 S. Ct. 2481 (1994).

³² For an interesting and thorough historical and cultural description and analysis of Satmarer Hasidim see ISRAEL RUBIN, *SATMAR: AN ISLAND IN THE CITY* (1972).

³³ *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2485 (1994).

³⁴ *Grumet*, 579 N.Y.S.2d at 1005.

³⁵ *Kiryas Joel*, 114 S. Ct. at 2485.

³⁶ *Id.*

³⁷ 473 U.S. 402 (1985). In *Aguilar*, the Supreme Court declared that aid to parochial schools providing on site remedial education violated the Establishment Clause. *Id.*

³⁸ 473 U.S. 373 (1985). *Ball*, a companion case to *Aguilar*, held remedial programs offered in parochial schools at public expense violated the Establishment Clause. *Id.* See Von G. Keetch, *Grand Rapids School District v. Ball: An Educational Perspective on the Evolution of Lemon*, 1986 B.Y.U. L. REV. 489 (discussing the Court's determination of an Establishment Clause violation upon the finding of a crucial symbolic link representing dependency between the government and the religious denomination whose school shared time). *Id.*

³⁹ *Kiryas Joel*, 114 S. Ct. at 2485.

existing programs offered by the M-WCSD outside of the village.⁴⁰

The parents of the special needs children attempted to integrate their children into M-WCSD schools, but the children experienced such severe emotional distress⁴¹ that nearly all parents withdrew their children from school.⁴² The parents then demanded provision of special education within their village at a neutral site.⁴³ This, however, was subject to litigation that resulted in a New York Court of Appeals decision holding that the provision of special education at a neutral site is discretionary on the part of a school district and not mandatory under federal or state law.⁴⁴ It was at this point that the New York Legislature passed the controversial legislation⁴⁵ that eventually

⁴⁰ *Id.* Under both federal and state law, Kiryas Joel's special needs children are entitled to access to programs and services that meet their special needs. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1990); N.Y. EDUC. LAW, §§ 1701-1726 (McKinney 1988); N.Y. EDUC. LAW, §§ 4401-4410-a (McKinney 1995).

⁴¹ Evidently, the children were traumatized by having to leave the village and travel some distance from home to receive their education in the strange and unfamiliar environment of the M-WCSD schools. The children's physical appearance, dress, and language differences compounded the impact of the unfamiliar environment by noticeably setting them apart from the other students. *See* Brief for Petitioner Board of Education of the Monroe-Woodbury Central School District at 5, *Kiryas Joel*, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527, 93-539).

⁴² *Kiryas Joel*, 114 S. Ct. at 2485.

⁴³ *Id.*

⁴⁴ Board of Educ. v. Wieder, 527 N.E.2d 767 (N.Y. 1988).

⁴⁵ The legislation provided:

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

Grumet v. New York State Educ. Dep't, 579 N.Y.S.2d 1004, 1006 (Sup. Ct. 1992) (citation omitted), *aff'd sub nom.* *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 592 N.Y.S.2d 123 (App. Div. 1992), *judgment modified*, 618 N.E.2d 94 (N.Y. 1993), *aff'd*, 114 S. Ct. 2481 (1994). Further:

Section (2) of the legislation provides for the newly created District to be under the control of a Board of Education composed of between five and nine members elected by the qualified voters of the Village of Kiryas Joel. Finally, the bill provides that the terms of members of the school board shall not exceed five years.

came under U.S. Supreme Court review.⁴⁶

IV. ESTABLISHMENT BY DELEGATION OF STATE AUTHORITY

As stated in the preceding discussion, each of the state courts found the statute creating the KJVSD invalid. The reasoning under and application of the *Lemon* test were somewhat varied. Consequently, one expected that the U.S. Supreme Court granted certiorari to correct some significant aberration in the state courts' application of *Lemon*. Further, one expected that the Supreme Court intended to rectify the imbalances witnessed in the courts' analysis, at least to the extent that some reasonable policy would evolve. Unfortunately, this was not the case. Instead, the Court produced a confusingly fractured opinion that leaves one with the distinct feeling that perhaps the Court should have left the case alone.

A. *We Know Establishment Is Out There*

Kiryas Joel does not fit comfortably into any of the Court's cases related to religion and the schools. Two basic categories of cases exist: (1) challenges to aid to parochial schools or students attending parochial schools and (2) challenges to authorized religious activity in public schools.⁴⁷ Because the

Id.

⁴⁶ According to Grumet, the legislation "which was adopted to 'solve a religious problem' was clearly understood by the Legislature and Governor to provide the Satmar community with an exclusive facility in which their children, whose parents were not willing to send them into the heterogenous Monroe-Woodbury Central Schools, could acquire such services in a homogeneous Satmar environment." Brief for Respondent at 39-40, *Kiryas Joel*, 114 S. Ct. 2481 (No. 93-539) (citation to joint appendix omitted). In sharp contrast, the New York Attorney General asserted the sole purpose was to sensitively meet the bilingual and bicultural needs of the children which were not and could not be met by the M-WCSD. See Reply Brief for Petitioner Attorney General of the State of New York at 3, *Kiryas Joel*, 114 S. Ct. 2481 (No. 93-539). Moreover, the Attorney General likened the *Kiryas Joel* school to schools that catered to Hispanic and Asian students. *Id.* at 2 n.1.

⁴⁷ Aid to parochial schools cases: *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (sign language interpreter for parochial school student); *Witters v. Washington Dep't of Serv. for Blind*, 474 U.S. 481 (1986) (aid to blind student attending sectarian college); *Aguilar v. Felton*, 473 U.S. 402 (1985) (public school instructors teaching on premises of parochial schools); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (similar); *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (reimbursement to parochial schools for record keeping and testing mandated by the state); *Wolman v. Walter*, 433 U.S. 229 (1977) (aid to sectarian schools for textbooks, diagnostic services, remedial

school in *Kiryas Joel* was purely secular and the programming and instruction were purely secular, the Court's education cases were not instructive. Recognizing this, the Court looked elsewhere for guidance. Justice Souter turned to *Larkins v. Grendel's Den, Inc.*,⁴⁸ a case in which the Court invalidated a Massachusetts statute that granted power to the governing bodies of churches, synagogues, and schools to veto the liquor license applications of businesses located within 500 feet of their institutions.⁴⁹ Souter stated that the statute creating the school district was similar to, but more subtle than the one in *Larkin*.⁵⁰ Similar to the State of Massachusetts in *Larkin*, the State of New York delegated its "civic authority to a group chosen according to a religious

education, standardized tests, and field trip transportation); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (grants to private colleges); *Meek v. Pittenger*, 421 U.S. 349 (1975) (textbooks, instructional materials, and various on-site services); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (funds for maintenance and repair, tuition reimbursement, and tax benefits to parents); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (funds for testing); *Hunt v. McNair*, 413 U.S. 734 (1973) (revenue bonds for sectarian-affiliated universities); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal construction grants); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (teachers' salaries, textbooks, and instructional materials); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation).

Religious activity in public schools cases: *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (prayer at graduation ceremony); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute prohibiting teaching of evolution unless accompanied by instruction in theory of "creation science"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (period of silence for "meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute barring instruction in theory of evolution); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (prayer and Bible reading at beginning of each school day); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (religious instruction in public schools by sectarian teachers); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (use of school premises by religious group); *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (states may not compel parents to cause children's school attendance when contrary to religious practice); *Zorach v. Clauson*, 343 U.S. 306 (1952) (students released from public school classes for religious instruction).

⁴⁸ 459 U.S. 116 (1982).

⁴⁹ *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487 (1994).

⁵⁰ *Id.* at 2488.

criterion.”⁵¹ Nevertheless, Souter observed that the statute in *Kiryas Joel* differed because it did not directly delegate authority to the religious leaders, but gave the authority to the voters of Kiryas Joel.⁵² Souter declared that this distinction lacked constitutional significance because it constituted a mere difference in “form, not substance.”⁵³ Souter explained that “Chapter 748 delegate[d] power not by express reference to the religious beliefs . . . but to residents [It] effectively identifie[d] these recipients of governmental authority by reference to [religious] doctrinal adherence, even though it d[id] not do so expressly.”⁵⁴

Souter then stated that the legislature’s conduct represented an unusual deviation from the state’s plan regarding school districting—the statute created a district within a district, contrary to the state’s traditional practice of consolidating smaller school districts into single large districts.⁵⁵ The Village’s school district was, in his estimation, “exceptional to the point of singularity,”⁵⁶ and consequently, was “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.’”⁵⁷

Souter next discussed a second malady identifiable through the *Larkin* lens. The statute raised a fundamental concern whether the benefit received by the villagers was one that the legislature would willingly provide equally to other similarly situated groups.⁵⁸ Souter stated that *Larkin* requires an “‘effective means of guaranteeing’ that governmental power will be and has been neutrally employed.”⁵⁹

In *Larkin*, the Court was concerned whether the governing bodies of the various religious groups would exercise the delegated authority without intentionally advancing their individual religion; whereas, Souter explained, the problem that the KJVSD presented was whether the state legislature would

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2489.

⁵⁵ *Id.* In the dissent, Scalia stated Souter’s claim that the school district’s formation was unique and represented divergence from a state plan was simply untrue. *Id.* at 2509 (Scalia, J., dissenting). Scalia pointed to numerous instances in which separate small school districts were specially formed to remedy special community needs. *Id.*

⁵⁶ *Id.* at 2490.

⁵⁷ *Id.* (quoting *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982)).

⁵⁸ *Id.* at 2491.

⁵⁹ *Id.* (quoting *Larkin*, 459 U.S. at 125).

legislate fairly in the future for other groups seeking their own school district.⁶⁰ Souter declared that the Court could not be certain of governmental neutrality in future action by the legislature because the courts would be deprived of the opportunity to review the legislature's conduct if the legislature failed to enact the same special legislation for a similarly situated group.⁶¹ "A legislature's failure to enact a special law is itself unreviewable."⁶² Consequently, by Souter's logic, the statute was invalid because it violated the Establishment Clause requirement of governmental neutrality—a neutrality not related to the analysis of the statute itself or its particular application, but a formalistic neutrality that requires speculation about the government's future conduct. Thus, the statute was infirm for two reasons: (1) it impermissibly aided a particular religious group; and (2) it permitted the legislature the opportunity to non-neutrally decide similar situations in the future. From this, one can only conclude that Souter believes the Establishment Clause requires absolute neutrality—a neutrality at the present observable level and present symbolic level, as well as, a guarantee of neutrality in the future.

Finally, Souter offered the villagers, the State of New York, and the M-WCSD a bit of advice. He stated that there is "ample room under the Establishment Clause for benevolent neutrality which [would] permit religious exercise to exist without sponsorship and without interference, government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."⁶³ He recommended that the children either receive their special education in the M-WCSD schools, or that M-WCSD provide neutral site education in the Village near one of the private schools.⁶⁴ This recommendation, of course, forgets the controversy's history. The villagers attempted to educate their children in the existing M-WCSD schools, but found this arrangement unsatisfactory and sought a neutral-site

⁶⁰ *Id.* It is in this context that we discern a critical distinction between *Larkin* and *Kiryas Joel*. In *Larkin*, the Court seemed especially sensitive to the fact that the Massachusetts Legislature granted unrestricted veto power to religious entities' ruling bodies without providing any accountability safeguards. The statute in *Kiryas Joel*, on the contrary, established a school district whose governance and operation fell snugly within the whole panoply of New York State education legislation. The villagers were in no way exempted from any of these. Souter's distinction seems makeshift and outright irrational. One needs a real leap of faith to arrive on the same side as Souter.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 2492 (citations omitted).

⁶⁴ *Id.* at 2493.

program.⁶⁵ Unfortunately, their request previously had been denied. Had it not, the case would not have been before the Court.

Frankly, Souter's opinion demonstrates the worst aspects of the Court's eisegetical approach to the Establishment Clause. The Court appears to have started from the conclusion that the statute was unconstitutional, then worked the conclusion into a pseudological framework supposedly supported by the Court's own line of cases. Unfortunately, the fabricated rationale is neither well reasoned, nor does it meaningfully synthesize and apply prior Establishment Clause jurisprudence in a way that would beneficially advance this troubled area of constitutional law.⁶⁶ In addition, the concurrences that follow the plurality opinion add little more than grist for the mill.

B. *The Concurrences*

1. *Blackmun: This Case Still Squeezes into the Lemon Framework*

Justice Blackmun drafted his separate concurrence specifically to assert that the Court's decision did not "signal[] a departure from the principles described in *Lemon v. Kurtzman*."⁶⁷ Evidently, sensing the Court's growing dissatisfaction with the *Lemon* test, Blackmun sought to prop up *Lemon* by promoting its relevance to the case. According to Blackmun, the statute was invalid under the *Lemon* test's second prong (principal or primary effect) and third prong (excessive government entanglement).⁶⁸ However, Blackmun offered no explanation to support this assertion other than vaguely stating that

⁶⁵ See *Board of Educ. v. Wieder*, 527 N.E.2d 767 (N.Y. 1988).

⁶⁶ As I have suggested earlier, numerous commentators have criticized the Court's handling of Establishment Clause cases. Much of the criticism centers upon the Court's inability to shift from a formal application of its precedent (i.e., pouring new facts into the old wineskins of precedent) to the formation of new principles based upon common sense and sensitivity to our culture's change. See generally John J. Coughlin, *Common Sense in Formation for the Common Good—Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 ST. JOHNS L. REV. 261 (1992); Elizabeth J. Samuels, *The Art of Line Drawing: The Establishment Clause and Public Aid to Religiously Affiliated Child Care*, 69 IND. L.J. 39 (1993); Kaarin Long, *Zobrest v. Catalina Foothills School District: A Misapplication of Establishment Clause Precedent*, 39 S.D. L. REV. 404 (1994); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

⁶⁷ *Kiryas Joel*, 114 S. Ct. at 2494 (Blackmun, J., concurring) (citation omitted).

⁶⁸ *Id.* at 2495.

Larkin rested on *Lemon*. Blackmun's concurrence, consequently, provides little clarification.

2. *Stevens, Blackmun, Ginsburg: Less Drastic Means*

Unfortunately, the three Justices patronizingly suggested that "the State could have taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools."⁶⁹ This advice, however, is almost ludicrous. Supposing it was possible and simple to reorient the children's non-Satmar schoolmates,⁷⁰ the village children still would daily face the ravages of an unfamiliar and foreign environment. Further, these village children are special needs children. Their special susceptibility to otherwise tolerable inconveniences calls for special sensitivity on the part of all who share responsibility for their needs, including their special education needs.

The Justices also found fault with the villagers' religious tenets that require separation and the maintenance of cultural/ethnic distinction, and suggested that it is inherently wrong for parents to desire that their children remain faithful to the parents' religious faith.⁷¹ The opinion stated that the fact that the State

⁶⁹ *Id.* (Stevens, J., concurring).

⁷⁰ Anyone familiar with children and their insensitivity to nonconforming peers will recognize the absurdity of this recommendation. Just as adults bear prejudices and unwillingly relinquish them, so too do children. Mere educational intervention will not prevent such discrimination. If this were so, one would expect that racial and other forms of invidious discrimination would soon disappear in America. However, it is all too apparent that in spite of the good and noble efforts of our schools, legislatures, and courts, prejudice and its outward manifestations survive.

⁷¹ *Kiryas Joel*, 114 S. Ct. at 2495. The three Justices exhibit an unusual disregard for the villagers' beliefs. Unfortunately, they have forgotten (maybe they never knew) that the Torah teaches that children must honor and obey their parents, and in so doing they will be blessed. The three Justices impliedly appear to share the belief that the perpetuation of religious and cultural differences is inherently contrary to our society's goals. This notion seems very odd and out of place in the present American cultural milieu. The United States does not profess that the goal of integration is to unify by extinguishing our differences. Our goal is not like that proclaimed by France's Education Minister Francois Bayrou when he banned schoolgirls from wearing traditional Islamic veils: "Our choice is integration: to make a single nation, a country," by removing or hiding differences from public display. Andrew Gumbel, *Covered in Confusion*, THE GUARDIAN (Manchester), Oct. 6, 1994, at

accommodated the villagers' differences signified the State's provision of "official support to cement the attachment of young adherents to a particular faith."⁷² Consequently, in these Justices' opinion, the statute was "[a]ffirmative state action in aid of segregation [It] establish[ed], rather than merely accommodat[ed] religion."⁷³

3. O'Connor: Benevolent Neutrality

Justice O'Connor asserted that "[r]eligious needs can be accommodated through laws that are neutral with regard to religion."⁷⁴ However, "one religious denomination cannot be officially preferred over another,"⁷⁵ neither may government "favor the adherents of any sect or religious organization."⁷⁶ According to O'Connor, the First Amendment requires that religious adherence or nonadherence not affect one's "standing in the political community."⁷⁷ Thus, when a statute, such as Chapter 748, singles out a particular religious group upon which to confer a special benefit, the obvious inequality of treatment invalidates the statute on the basis that it shows favoritism—it is non-neutral.

O'Connor further stated that a legislature may intentionally accommodate a religious group, "so long as it is implemented through generally applicable legislation."⁷⁸ Thus, New York could enact neutral statewide legislation that

T10.

Perhaps, beyond believing that

[i]t is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring), the three Justices also believe that children should keep their differences at home and to themselves. In other words, there is a private sphere and a public sphere and the boundaries should not overlap.

⁷² *Kiryas Joel*, 114 S. Ct. at 2495.

⁷³ *Id.*

⁷⁴ *Id.* at 2496 (O'Connor, J., concurring).

⁷⁵ *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

⁷⁶ *Id.* (quoting *Gillette v. U.S.*, 401 U.S. 437, 450 (1971)).

⁷⁷ *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)).

⁷⁸ *Id.* at 2498.

provided that individual communities, which meet certain criteria (regardless of whether the community was incidentally a religious enclave), could create their own independent school districts.⁷⁹

The final section of O'Connor's opinion is the most significant. In it, she theorized regarding Establishment Clause jurisprudence. By analogizing to Free Speech jurisprudence, O'Connor recognized the need for the Court to establish a new set of tests with narrower applicability. Further, she urged the Court to stop "shoehorning new problems"⁸⁰ into the *Lemon* test. *Lemon's* language has become dysfunctional and "the slide away from *Lemon's* unitary approach is well underway. A return to *Lemon*, even if possible, would likely be futile"⁸¹

Lastly, O'Connor recommended that if the Court in its future cases dropped the unitary approach and embarked on fashioning narrower tests that coincide with "homogeneous area[s], the tests may be more precise and therefore easier to apply[]" allowing more "attention to the specific nuances of each area[]" and "more consensus" within the Court.⁸² This, of course, would be a welcome change from the present state of Establishment Clause jurisprudence.

4. *Kennedy: Religious Gerrymandering*

Justice Kennedy initially distanced himself from the plurality opinion by stating that the Court's outcome, while correct, was not based upon the Court's precedents and forced a "needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group."⁸³ The real problem, according to Kennedy, was that the legislature created the district "by drawing political boundaries on the basis of religion."⁸⁴ Kennedy stated that the statute did not "burden nonadherents or discriminate against other religions as to become an establishment[.]"⁸⁵ rather, "[b]ut for the forbidden manner in which the New York Legislature sought to go about it[s] accommodation it] would have been valid."⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.* at 2499.

⁸¹ *Id.* at 2500.

⁸² *Id.*

⁸³ *Id.* at 2501 (Kennedy, J., concurring).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

In Kennedy's opinion, the legislature's creation of the school district was valid for three reasons: (1) the legislature "sought to alleviate a specific identifiable burden on the Satmars' religious practice";⁸⁷ (2) the statute "did not impose or increase any burden on non-Satmars";⁸⁸ (3) the statute "cannot be said[] to favor the Satmar religion to the exclusion of any other" nor can it be said that it is "officially preferred."⁸⁹ The legislature failed, however, when it created an accommodation that "require[d] the government to draw political [and] electoral boundaries" according to religious criteria.⁹⁰ This use of religion as a line-drawing criterion is clearly forbidden. "In this respect the Establishment Clause mirrors the Equal Protection Clause. Just as government may not segregate on account of . . . race, so too it may not segregate on the basis of religion."⁹¹ Kennedy concluded that the statute constituted a religious gerrymander,⁹² and as such, violated the Establishment Clause.⁹³

5. *The Justices Concur in the Judgment, but Do They Agree on Anything?*

The Court's plurality opinion and the four concurring opinions, although agreeing upon the outcome, defy synthesis. Those who agree with the Court may believe that at least it ended up on the right side of the issue. Those in disagreement, however, will find much that prompts concern.

The Court definitely did not abandon *Lemon*, in spite of its shortcomings.

⁸⁷ *Id.* at 2502.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2504.

⁹¹ *Id.*

⁹² *Id.* Kennedy analogizes *Kiryas Joel* to *Shaw v. Reno*, 113 S. Ct. 2816 (1993) in which the Court invalidated the North Carolina reapportionment plan for being a racial gerrymander. *Kiryas Joel*, 114 S. Ct. at 2504-05. Interestingly, in *Shaw*, the Court indicated that the highly irregular shape of the congressional district was so irrational that it could not be interpreted other than as an effort to segregate voters on the basis of race. *See Shaw*, 113 S. Ct. at 2820-21. In *Kiryas Joel*, however, other rational explanations are obvious—the students' special needs required a special remedy. The purpose of the statute was not to create a religiously controlled voting district; rather, it was created to provide nondiscriminatory secular public education. Consequently, Kennedy's religious gerrymandering theory seems a little stretched.

⁹³ *Kiryas Joel*, 114 S. Ct. at 2504-05. In the final section of Kennedy's concurrence, he stated that the problem of the villagers is attributable to the Court's "unfortunate rulings" in *Aguilar* and *Ball*. *Id.* Kennedy recommended that the Court may need to reconsider the two cases in the future. *Id.* at 2505.

The Court did not revisit its rulings in *Ball* and *Aguilar*, in spite of the obvious repercussions those cases have created, such as the problem in *Kiryas Joel*. The Court did not fashion any new test. On the contrary, the Court offered a slough of rationales for invalidation without a hint of uniformity or consensus.⁹⁴ One suspects that even Justice O'Connor's call for consensus was lost on the other Justices.

C. *The Dissent*

With his characteristic wit and scorn for imprecision, Justice Scalia attacked the Court's decision by showing its oversights, its failure to perceive the paradoxical essence of the case, and its faultily rendered conclusions.⁹⁵ Scalia launched his attack by distinguishing *Kiryas Joel* from the Court's other Establishment Clause cases. He noted that "[t]he school under scrutiny [was] a public school specifically designed to provide a public secular education to handicapped students."⁹⁶ Thus, Scalia shifted the perspective from scrutinizing the statute for symbolic or subliminal invalidity to reviewing the school itself and the students involved. In so doing, Scalia completely refocused the issue and the attendant discourse.

According to Scalia, none of the Court's cases ever found fault with a school comprised of students that incidentally shared the same religion.⁹⁷ Further, the Court had previously "*approved* the education of students of a single religion on a neutral site adjacent to a private religious school."⁹⁸ Therefore, Scalia asked, if that was permissible, what could be wrong with providing secular education in a secular school?⁹⁹ His answer, of course, was that nothing could be wrong.¹⁰⁰ Scalia then suggested that the plurality understood this basic truth, but chose rather to focus upon the school district

⁹⁴ Perhaps, if one overlooks the divergent logic undertaken to arrive at the Court's result, one could infer that Souter, Blackmun, Ginsburg, Stevens, and O'Connor agree in principle that legislatures may not draft legislation that confers a specific benefit to a particular group that is incidentally of one religion. Under this position, only broadly applicable legislation would survive the Court's "review." (This inference is, of course, arguable.)

⁹⁵ *Kiryas Joel*, 114 S. Ct. at 2505-16 (Scalia, J., dissenting).

⁹⁶ *Id.* at 2506.

⁹⁷ *Id.*

⁹⁸ *Id.* (referring to *Wolman v. Walter*, 433 U.S. 229 (1977)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (stating that "[t]here is no danger in educating religious students in a public school.").

and the New York Legislature.¹⁰¹

In so doing, Scalia stated, Justice Souter's opinion boiled down to two arguments supporting the position of the statute's invalidity: (1) "reposing power in the Kiryas Joel Village School District is the same as reposing power in a religious group" and (2) the legislature discriminated on the basis of religion by favoring the Satmar Hasidim.¹⁰² Thus, in accordance with these two arguments, Souter forced his decision into the *Larkin* framework.

Scalia, however, flatly rejected Souter's belief that *Kiryas Joel* resembled *Larkin*. According to Scalia, *Larkin* taught that a state may not delegate its authority directly to a church's governing body.¹⁰³ Contrary to Souter's belief, *Kiryas Joel* involved the transfer of power to citizens who incidentally shared religious beliefs, not the transfer of power to the Grand Rebbe or the Village's other religious leaders. Consequently, Scalia accused Souter of "steamrolling . . . the difference between civil authority held by a church, and civil authority held by members of a church" ¹⁰⁴ According to Scalia, conferral of power upon a group of citizens cannot be conferral of power upon a religious institution, and blurring the distinction is a grave error.¹⁰⁵

Scalia also rejected Souter's belief that the New York Legislature's enactment of the statute was unconstitutional preferential treatment signifying endorsement of the Satmarers' religion.¹⁰⁶ Scalia stated that such a contention is not based upon any rational argument.¹⁰⁷ Scalia preferred to give the legislators the benefit of a presumption that they acted in good faith with the intention of remedying what amounted to a clash of cultural differences.¹⁰⁸ It was Scalia's understanding that the students' differences were not so much an essential part of their religion as merely an accompaniment of their religious beliefs.¹⁰⁹ Thus, Scalia stated "it is a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group."¹¹⁰

Scalia then drew attention to Souter's prejudiced insinuation that the school district boundaries were intentionally drawn on the basis of religion.¹¹¹ Scalia argued that the fashioning of a school district coterminous with a village

¹⁰¹ *Id.* at 2506-07.

¹⁰² *Id.* at 2507.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2508.

¹⁰⁶ *Id.* at 2509.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2510.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2511.

¹¹¹ *Id.*

legitimately incorporated under state law could not, and should not be construed as an intentional “manipulation” of the franchise for religious purposes.¹¹² Rather, entirely “secular reasons . . . produced a political unit whose members happened to share the same religion.”¹¹³

Next, Scalia offered an exhortation on the virtues of accommodation, its precedential foundation, and the legislative tradition.¹¹⁴ Scalia observed that in light of history, the Court’s opinion in *Kiryas Joel* showed a new, unnatural discomfort with accommodation in general.¹¹⁵ Scalia pointed out that in consequence to the Court’s discomfort, the Court warped *Larkin* into supporting the Court’s “no guarantee of neutrality” position.¹¹⁶ Scalia explained, however, that the Court in *Larkin* was not concerned “about the courts’ ability to assure the legislature’s future neutrality”¹¹⁷ Rather, the concern centered upon the “legislature’s ability to assure the neutrality of the churches to which it had transferred legislative power.”¹¹⁸ Thus, the application of *Larkin* was inapposite because the New York Legislature has control over the conduct of school districts and the schools they govern.¹¹⁹

Scalia concluded that the Court’s underlying reason for misapplying *Larkin* was based on its faulty notion that courts would be excluded from reviewing future denials of applications for similar legislative accommodations.¹²⁰ Scalia, however, argued that the Court never required “‘up front’ assurances”¹²¹ from legislatures enacting accommodations because guarantees of equal treatment generally were irrelevant.¹²² This, Scalia intimated, was because traditionally (as in *Kiryas Joel*), accommodations were particular to the specific religious group’s need.¹²³ Furthermore, “[m]aking law . . . through highly particularized rulemaking or legislation, violates . . . no principle of fairness, equal protection, or neutrality, simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of.”¹²⁴

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 2512.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2513.

¹¹⁷ *Id.* at 2512.

¹¹⁸ *Id.* at 2512–13.

¹¹⁹ *Id.* at 2513.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2514.

Scalia ended by asserting that the Court's decision "takes to new extremes, a recent tendency in the opinions of th[e] Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration."¹²⁵ The Court did this, Scalia stated, by casting aside the presumption of validity of a facially neutral law to invalidate it because the Court did not "trust New York to be as accommodating toward other religions (presumably those less powerful than the Satmar Hasidim) in the future."¹²⁶

V. UP AGAINST THE WALL

A. *Old or New Doctrine?*

What is one to make of the six divergent opinions? Souter seems to recommend testing accommodations to determine whether there is any possibility that the effected religious adherents are conferred governmental power. Thus, if governmental power is conferred, the accommodation is per se invalid if those upon whom the power is conferred are incidentally of one religion, even if what is conferred is the kind of power one normally attributes to ordinary citizenship. Ironically, disallowing an accommodation on this basis seems to represent an impermissible religiously motivated disenfranchisement.

Stevens, Blackmun, and Ginsburg seem to recommend a test that requires analysis to determine whether a less drastic accommodation is available. Thus, if any possible remedy can be conceived that does not show awareness or sensitivity to religious factors, that remedy will be preferred. Consequently, the remedy that does factor in religion is invalid. In other words, an accommodation is permissible so long as it does not look too much like an accommodation.

O'Connor, interestingly, recommends discarding *Lemon*, but refuses to proffer any replacement test. Rather, she appears to prefer to allow some new test or tests to evolve independently in the Court's future Establishment Clause cases. Until then, her position seems to be that accommodation is valid only if it results from broad statutory provisions that equally affect all persons. Citizens with special needs who are incidentally religious adherents may not seek special redress through the political process. On the contrary, citizens must seek passage of legislation with statewide applicability. That approach, of course, if taken literally, would nearly rule out all but the most general

¹²⁵ *Id.* at 2516.

¹²⁶ *Id.* at 2515-16.

accommodations of religion.¹²⁷ Further, that approach seems to provoke subterfuge on the part of legislators seeking to sensitively remedy particular needs of particularly needy constituents. Consequently, if the New York Legislature now enacts a statute providing that any village in New York may create its own independent school district, that statute would be valid.¹²⁸

Kennedy's test for determining valid accommodation hinges upon finding that political, electoral, and religious boundaries do not coincide. If those boundaries coincide, even incidentally, the accommodation must fail. Ironically, Kennedy bases his position upon the Equal Protection Clause, suggesting that something is inherently wrong with permitting religious people the same rights as other citizens. Thus, unfortunately like Souter, Kennedy ironically proposes that disenfranchisement on the basis of religion is permissible under circumstances like those in *Kiryas Joel*.

Blackmun, unlike all the other Justices, promoted retention of *Lemon*. His stance seems to suggest that because *Lemon* worked in the past, it still must work for *Kiryas Joel*. However, one could argue that the statute was valid by the *Lemon* test. First, the statute clearly was not *religiously* motivated. The legislature drafted the legislation because it wanted to see that Kiryas Joel's special needs children received their lawful education, in spite of their ethnic, cultural, and religious differences. Second, the statute did not advance the Satmar religion in any way. The statute only accommodated the special needs of children who were incidentally of one religion. Third, New York's generally applicable panoply of education laws had built in safeguards to prevent the school district from running amok. Consequently, no *excessive* entanglement could occur. Only the normally expected entanglement between the state and a school district would be expected.

Scalia, Thomas, and Rehnquist seem resolute in the position that *Lemon* is dead. Scalia recommended that the Court acknowledge this fact and move forward. Unfortunately, his "advice" does not go beyond shooting down the other Justices' positions. While he called for something new, he offered only

¹²⁷ Tax exemption for religious organizations and conscientious objection for religious adherents probably would be consistent with this position. A case like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16 probably would not pass muster. Cases such as *Yoder*, in which the distinction between free exercise and establishment is blurred, emphasize the need for a different approach to accommodation than the rigid analysis that O'Connor's benevolent neutrality entails.

¹²⁸ Such a statute might encourage villages with concentrations of races to create school districts to insulate their villages from mixing races.

that the test should be based upon "our Nation's tradition of religious toleration."¹²⁹

B. *A View from the Top of the Wall*

The Court is in a precarious position. The Court did not resolve anything for the lower courts, neither did the Court provide a clear and applicable rule for courts to follow in the future. Instead, lower courts are left to wonder whether the Court has authorized discretionary decisions when the outcome will depend upon the individual judge's subjective analysis and application of precedent.

The Court could have served better by crafting a new test that would take into account situations that blur the distinction between Establishment and Free Exercise. Such a test could analyze a number of factors that could be independently questioned and collectively balanced against each other.¹³⁰ The

¹²⁹ *Kyrias Joel*, 114 S. Ct. at 2516 (Scalia, J., dissenting).

¹³⁰ Ever since *Everson v. Board of Education*, the Court seems to have been locked into a two-dimensional perspective approach that has necessitated understanding church and state as separate, independently sovereign spheres. As long as one willingly understands church and state as sovereign entities, one can tolerate the non-overlapping, separationist position that the Court's absolute neutrality approach requires. However, the two-dimensional perspective is merely a legal fiction. When confronted with the reality of persons that are religious adherents, one's understanding of the church as an independent sovereign sphere must be discarded. This is because a devout religious adherent's personhood is not separable from her religiosity—the person and the religious belief are existentially united. Similarly, one cannot separate any single aspect of one's personhood from all other aspects—a person's political, religious, racial, ethnic, gender aspects are best understood simultaneously integrated into a single self. Such a person, in the context of the Court's approach is required to split her personality into two selves—a private religiously oriented self and a civic, secularly oriented self. Furthermore, under the Court's approach, legislators may only respond to their constituents' needs in a fragmented, artificial way by giving recognition to their constituents' secular needs while being forced to disregard their essential religious nature.

Some will argue that the Court must maintain this legal fiction to uphold the First Amendment. After all, the Court has adopted and supported the split personality approach in other areas of its jurisprudence and managed to generate coherent legal doctrines. *See, e.g., United States v. Gilmore*, 372 U.S. 39, 44 (1962) (stating "[f]or income tax purposes Congress has seen fit to regard an individual as having two personalities: 'one is [as] a seeker after profit . . . ; the other is [as] a creature satisfying his needs as a human . . . ,'") as support for disallowing a taxpayer's personal expense deduction).

I would argue, however, that while the split personality approach may work wonders elsewhere, in the church and state conflicts, the fiction does not work because the Court is

balancing component of the test I am suggesting would sensitively take into account cultural, ethnic, and religious factors as mutually inclusive factors, rather than as separate and distinguishable elements. Consequently, the presence of a religious factor would not mechanically require the Court to overreact (as I believe it did in *Kiryas Joel*) and work backward from a conclusion of invalidity to a supportive rationale only suggestive of upholding a vague principle of neutrality. Further, if the Court would apply a more concrete test, the Court could avoid basing decisions upon undefinable abstractions that only the Court's idiosyncratic logic permits.

The guiding principle for a multiple perspective multifactor test would be substantive neutrality,¹³¹ not a formalistic absolute neutrality that demands complete separation between church and state. Under a multiple perspective multifactor test, a court reviewing a challenged accommodation or statute purported to be an unconstitutional accommodation would ask a set of basic questions from more than a single perspective to determine if, on balance, the accommodation was substantively neutral. The questions¹³² asked might

forced into a constricted, formalistic analysis that inevitably leads to inequities. *Kiryas Joel* serves as a perfect example.

Under a multiple perspective approach, the Court could comfortably give recognition to the true nature of citizens that are religious adherents. Recognition does not automatically necessitate endorsement. Recognition merely provides a context of toleration that will enable the Court to balance the competing values of citizens within our complex and diverse culture. It is this form of recognition and toleration that seems implicit in the religion clauses. Perhaps this is what Justice Scalia alluded to.

In addition, under a multiple perspective approach, the Court can avoid the pitfalls of defining another mechanical test like *Lemon* that would fail inevitably because of the fictional basis. A multiple perspective approach incorporates a successive filtering method that allows for perceptive recognition of distinctions without wholesale adoption of abstractions subject to conjecture.

¹³¹ For a discussion of the Court's ambiguous meaning of neutrality, and of the distinction between formal and substantive neutrality, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). See also Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7 (1993).

¹³² The set of questions I offer are merely suggestive of the type of questions that could be asked in order to appropriately direct the Court's inquiry. While not specifically restating the *Lemon* three part test, the questions impliedly incorporate the essence of that test. However, the questions are asked in accordance with the balancing component of the test in order to reorient the inquiry to avoid the mechanical application pitfalls of the *Lemon* test. The balancing component I am suggesting is derived from recent expressions of the Court made in the context of both Free Exercise and Establishment Clause cases in which

include:

- (1) Who is benefitted by the accommodation—a person, persons, or a group/organization?
 - (a) Is the benefit purposely conferred because of the religious character of the recipient?
 - (b) Is there only an incidental religious nexus between the accommodation and the persons benefitted?
- (2) How are those in (1) benefitted?
 - (a) Is it a secular benefit conferred upon religious persons/organizations?
 - (i) Does the benefit act as an incentive to religious practice?
 - (ii) Does the benefit exempt religious practitioners from the ordinary burdens of citizenry or some burden peculiar to the beneficiary?
 - (iii) Does the benefit represent the grant of nontypical or unusual governmental authority or power with or without accountability mechanisms?
 - (b) Is it a religious benefit that allows religious practice by removal of obstacles?
 - (c) Is there a substantial governmental interest at stake?
- (3) Who is burdened by the accommodation—other citizens, or groups/organizations?
 - (a) Is the burden purposely placed because of the nonbeneficiary's religious/nonreligious character?
 - (b) Is there only an incidental religious/nonreligious nexus between the burden and the nonbeneficiary?
- (4) How are those in (3) burdened?
 - (a) Are they disadvantaged in some way? Actually—directly or indirectly?
 - (b) Are they coerced in some way? Actually—directly or indirectly?

the Court balanced compelling state interests against the right of religious adherents and nonadherents. *See generally* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993) (balancing compelling state interests of community health and humane treatment of animals against the right to ritually sacrifice animals by religious adherents); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (stating that while school boards may reasonably seek to regulate after-hours school use, denial of use to a church to show a film solely because of the religious subject matter of the film violated free speech, and such use by a church would not violate the Establishment Clause); Texas Monthly v. Bullock, 489 U.S. 1 (1989) (upholding a Texas sales tax exemption for religious publications as promotion of legitimate state interest that does not imbalance free exercise of religion).

- (c) Does the benefit to the beneficiary act as a disincentive to religious practice of the nonbeneficiary? Actually—directly or indirectly?
- (d) Is there a substantial governmental interest at stake?

Answers to these questions would be weighed and sifted. Questions (1) and (2) would be balanced against (3) and (4).¹³³ If the answer to (1)(a) is yes, the inquiry is not concluded as it might be under *Lemon* (as a violation of the first prong). The court would proceed to answer questions (2), (3), and (4). However, if the answer to (1)(b) is yes, then the inquiry could be concluded because objectively the religion clauses would not be implicated. Incidental religious nexus would be viewed as harmless because it is not disruptive to substantive neutrality. The court would not have to venture into subjective conjecture or worry over symbolic establishments or entanglements.

Likewise, if the answer to (3)(b) is yes, no further inquiry is necessary. In addition, under question (4), no inquiry into hypothetical burdens is required. There is either an actual (direct or indirect) burden or there is not.

Under a multiple perspective multifactor test inquiry, no individual factor is dispositive of the outcome, with the exceptions of affirmative answers to questions (1)(b) or (3)(b). In all other situations, the factors could be compared to determine whether the actual effect that an accommodation makes disrupts the substantive neutral balance between church and state. When the balance remains intact, government may affirmatively act to accommodate the peculiar needs of the citizenry even when religion is a factor in the government's decision-making process and when the beneficiaries are religious adherents.

Under this test, the *Kiryas Joel* holding would likely be different. The inquiry would focus primarily upon the beneficiaries, the Village's special

¹³³ To correctly orient oneself within the multiple perspective approach, one must appreciate that "[f]or Constitutional purposes, the belief that there is no God or no afterlife, is as much a religious belief as the belief that there is a God or an afterlife." *Laycock, supra* note 131, at 1002. This is necessary in order to effectuate the balance between the competing values that are inherent in the competing belief systems that conflict in challenges to accommodations. To view the parties otherwise, would falsely represent one side of the equation as religious and the other side as independent of belief, *i.e.*, on neutral turf. Courts could not effectuate a position of religious neutrality because from the outset the conflict would be deemed focused upon the "religious party's" position. Thus, if only one side of the conflict is deemed religious, the perspective is skewed. Whereas, if both parties are deemed religious from the outset, they are immediately on equal footing. Consequently, the Court can focus upon the real issue of the balance between the benefits and the burdens as these are distributed to the parties directly or indirectly.

needs children. The fact that the statute had only an incidental religious nexus as related to the children as beneficiaries, could conclude the inquiry. However, since one could also consider the Village a beneficiary of the government's conferrence of authority, that is, the village itself was granted the authority to form the school district, the inquiry could be conducted in regard to the village. If so, the incidental religious nexus of the Village to the Satmar Hasidim is not determinative and certainly does not automatically cause the statute to be invalid. Under the balancing component of the test, there appears to be no religious benefit conferred upon adherents, and no actual burden, direct or indirect, is apparent in relation to nonbeneficiaries.

Even if the villagers themselves are considered the beneficiaries (and assuming *arguendo* one posits that they are not merely incidentally religious under (1)(b)) the answer to the question under (1)(a), whether the benefit was purposely conferred because of the religious character of the villagers is no. Further, under the balancing component of the test, if the benefit and the burden are juxtaposed, one sees that the statute provided: (1) no actual benefit to religion, (or to religious adherents, either directly or indirectly); (2) has no effect upon religious practice for adherents or nonadherents; (3) places no burdens upon nonbeneficiaries; and (4) does not disadvantage or coerce nonbeneficiaries. Consequently, in spite of the presence of an apparent religious factor, the statute would have been valid.

One might ask whether a multiple perspective multifactor test automatically rules out an angry taxpayer's opportunity to challenge the government's use of revenues when the taxpayer suspects the government's use is in favor of a religion. The answer, of course, is that a taxpayer will still have standing to challenge such alleged governmental action. The burden upon the taxpayer under a multiple perspective multifactor test remains relatively the same, with the exception that mere allegations of symbolic wounds by the taxpayer would no longer support invalidation. The kind of sophistry in which challengers and courts alike have indulged would no longer suffice. A taxpayer's challenge would necessitate a demonstrable showing of injury or substantial burden that outweighs the countervailing substantial state interest in conferring the accommodation.

Would the adoption of this test open the floodgates to improper legislative accommodation, and consequently, to more litigation? The answer depends upon the test and its uniform application. If the Court adopted a test in order to advance the normative themes expressed in the First Amendment with the understanding that a heightened level of scrutiny will be applied, legislation that purposely promotes a religion *qua* religion will fail automatically. Legislation that coincidentally allows the sphere of religion and the sphere of

the state to overlap will not. Inevitably, competing values will not vanish. However, under a multiple perspective multifactor test, those competing values may find a compromising balance, a balance presently unavailable under the Court's approach.

VI. CONCLUSION

Kiryas Joel seems to indicate that the Court is neither settled on how to interpret its own Establishment Clause case law, nor prepared to discard its old unworkable tests and construct new tests to move the Court out of the present doctrinal confusion. The individual Justices' varied rationales which supported their decisions are too divergent to synthesize.

Proponents of the Court's approach will argue that this case is indicative of the Court's recent steps toward fashioning a new neutrality doctrine that draws lines based on Equal Protection jurisprudential doctrines.¹³⁴ The traces of these steps in *Kiryas Joel*, however, are vague if they are present at all.

Those who believe that the religion clauses do not prohibit religious communities and individuals from fully sharing in liberal democracy's benefits may have cause to worry. The Court seems unwilling to accommodate its Establishment Clause analysis to the changing American cultural milieu. Diversity's virtue has not yet washed into the Court. Thus, perhaps Justice Cardozo was wrong when he stated, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."¹³⁵

Finally, *Kiryas Joel* teaches that governments wishing to sensitively accommodate special cultural and ethnic needs of groups or individuals must consider those groups' or individuals' religious adherence. Are religious accommodations still possible? The Court said yes. However, how far the Court will allow accommodation to go is still unknown. Perhaps the Court should heed Alexander M. Bickel's caution: "No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no way of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden."¹³⁶

¹³⁴ See generally PAUL J. WEBER & DENNIS A. GILBERT, PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS (1981).

¹³⁵ BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

¹³⁶ JOHN WEBB PRATT, RELIGION, POLITICS AND DIVERSITY 316 (1967) (quoting from ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 64 (1962)).