Constitutional Law - First Amendment - Establishment of Religion

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CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT OF RELIGION—The United States Supreme Court held that a state law creating a public school district for a village, whose boundaries had been drawn to include only members of a religious sect, violates the First Amendment by delegating political authority to a group defined by its religious character.


The Village of Kiryas Joel (the “Village”) in New York State is home to over 8,500 members of an ultraorthodox Jewish sect known as the Satmar Hasidim. The Village traced its roots to the mid-seventies, when the Satmar Hasidim began relocating to a subdivision they had purchased in the town of Monroe. After clashing with the town over zoning laws, the Satmar Hasidim used New York’s Village Law to petition the Town Board of Monroe to create a new village within the town.

The sect’s religious schools, however, were unable to provide

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1. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994). The Satmar Hasidim lead their lives in strict adherence to the Torah and avoid assimilation into the greater American society around them. Kiryas Joel, 114 S. Ct. at 2485. They are distinguished by their use of Yiddish as their primary language and by distinctive dress. Id. They educate their children in private religious schools, segregating the sexes. Id. The sect originated in the early part of the twentieth century and consisted of followers of the Grand Rebbe Joel Teitelbaum in the town of Satmar, along the Hungarian-Romanian border. Id. In the aftermath of World War II, the Grand Rebbe and his surviving followers moved to Brooklyn, New York. Id.

2. Kiryas Joel, 114 S. Ct. at 2485. Monroe is located in Orange County, New York. Id. at 2484.

3. Id. at 2496 (O'Connor, J., concurring). In areas zoned for single-family use, the Satmar Hasidim subdivided homes into several apartments and used basements in synagogues and schools to house religious followers. Id. This traditional practice accommodated members of the extended family. Id.

4. N.Y. VILLAGE LAW, §§ 2-200 to 2-258 (McKinney 1973 & Supp. 1994). These sections of the Village Law outline the necessary procedures and requirements for inhabitants to incorporate as a village. Id. These sections describe requirements regarding population and area as well as petition and election procedures. Id.

5. Kiryas Joel, 114 S. Ct. at 2485. In a negotiated settlement, the parties drew the boundaries of the Village to include only the 320 acres owned and occupied entirely by the Grand Rebbe’s followers. Id.

6. Most boys were educated at the United Talmudic Academy, while most
services for the special needs of handicapped children. State and federal laws mandate the provision for the special education needs of handicapped children even when enrolled in private schools. To this end, the Monroe-Woodbury Central School District ("Monroe-Woodbury") began to provide services for the sect's handicapped students at an annex to one of the Satmar Hasidim's religious schools in 1984. In 1985, Monroe-Woodbury discontinued its services. Children from the Village who needed special education had to travel to the public schools in Monroe. The parents viewed this as highly unsatisfactory because the Hasidic children were distinguished from the other children in the public school by language and culture.

By 1989, only one handicapped child from the Village was enrolled in a public school in the Monroe-Woodbury school system, while the other handicapped children received no services at all or received privately funded services. The territory of the Village remained part of Monroe-Woodbury until 1989, when the New York State Legislature (the "Legislature") passed a special state statute, referred to as Chapter 748, creating a

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7. Id. The sect's handicapped children suffered from a range of physical, mental or emotional disorders, including deafness and mental retardation. Id.
11. Id.
12. See Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). In both Aguilar and Ball, the Supreme Court held that the use of federal funds to pay public school teachers who provided remedial services at private schools was a violation of the Establishment Clause. See Aguilar, 473 U.S. at 412; Ball, 473 U.S. at 397. The similarities between these cases and the practice used in Monroe-Woodbury prompted the district to withdraw its teachers from the annex in the Village. Kiryas Joel, 114 S. Ct. at 2485.
14. Id. In Board of Education of Monroe-Woodbury Central School District v. Wieder, Hasidic parents of handicapped children argued that the public schools were inappropriate "because of the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs." Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988).
15. Kiryas Joel, 114 S. Ct. at 2486.
16. 1989 N.Y. Laws 748. The statute, entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county," provided that:

Section 1. 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 a union free school district under provisions of the Education Law.
union free school district with boundaries coterminous with those of the Village. Though empowered with the full authority of a school district, the Kiryas Joel Village School District (the "District") only provided special education services for handicapped children.

Shortly before the District initiated its programs, the New York State School Boards Association and two of its officers, Louis Grumet and Albert W. Hawk, in their capacities as officials and as taxpayers (the "Appellees"), filed suit against the New York State Education Department and various state officials. The suit challenged the constitutionality of Chapter 748 under the Establishment Clause of the United States Constitution and the New York Constitution.

The parties filed cross motions for summary judgment, and

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years. § 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

1989 N.Y. Laws 748.

17. N.Y. EDUC. LAW § 1709 (McKinney 1988 & Supp. 1994). The law describes the organization of the district and the board of education and prescribes the scope of powers of such a district. Id.

18. Kiryas Joel, 114 S. Ct. at 2486.

19. Id. By arrangement with Monroe-Woodbury, the District was to send any non-handicapped children from the Village to a public school in Monroe or some other nearby district. Id.


21. Id. The First Amendment provides in part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

22. Grumet, 579 N.Y.S.2d at 1006. The New York Constitution prohibits the state's subdivisions from using public money to aid or maintain religious schools. N.Y. CONST. art. XI, § 3.

By stipulation and order, the action was discontinued as to the state defendants after the state supreme court for Albany County granted the motions to intervene as defendants made by the Kiryas Joel Village School District and Monroe-Woodbury (the "Appellants"). Grumet, 579 N.Y.S.2d at 1006. On behalf of the state defendants, the Attorney General of New York continued as a party to defend the constitutionality of Chapter 748. Id. (citing N.Y. EXEC. LAW § 71 (McKinney 1993)).

This statute provides that the attorney general may be permitted to appear at any proceeding that challenges the constitutionality of a state statute. N.Y. EXEC. LAW § 71.
the trial court ruled for the Appellees, finding that Chapter 748 was an unconstitutional establishment of religion and violated all three parts of the test outlined by the United States Supreme Court in *Lemon v. Kurtzman.*\(^{23}\) The Appellate Division of New York State Supreme Court affirmed the trial court's decision on the ground that Chapter 748 violated the second part of the *Lemon* test in that it had the primary effect of advancing religion.\(^{24}\) The Court of Appeals of New York affirmed on the federal constitutional question and did not reach the state constitutional question.\(^{25}\) The Appellants subsequently appealed the decision of the Court of Appeals and the United States Supreme Court granted certiorari.\(^{26}\) The issue addressed by the Supreme Court was whether Chapter 748 violated the Establishment Clause by allocating civil authority on the basis of a religious criterion.\(^{27}\)

The Supreme Court, with Justice Souter writing for the plurality initially and for the majority in the later parts,\(^{28}\) began by noting that the Establishment Clause required government to exercise neutrality in its relationship with religious organizations.\(^{29}\) The plurality held that Chapter 748 violated this command by vesting political authority over public schools in a

\(^{23}\) *Grumet,* 579 N.Y.S.2d at 1007 (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971)). In *Lemon,* the United States Supreme Court developed a three-part test to be applied in the evaluation of governmental actions under the Establishment Clause. *Lemon,* 403 U.S. at 612-13. The *Lemon* test requires that: "[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " Id. (citations omitted).


\(^{27}\) *Kiryas Joel,* 114 S. Ct. at 2484.

\(^{28}\) Joining Justice Souter in the plurality were Justices Blackmun, Stevens, and Ginsburg. *Id.* at 2495. Justice O'Connor concurred in part, joining Justice Souter's opinion to create a majority as to Parts I-B, II-C, and III. *Id.* at 2497 (O'Connor, J., concurring). Justice Kennedy also concurred in the judgment. *Id.* at 2500 (Kennedy, J., concurring).

\(^{29}\) *Kiryas Joel,* 114 S. Ct. at 2487 (citing Committee for Public Educ. v. Nyquist, 413 U.S. 756, 792-93 (1973) and *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)).
group defined by its religious composition. In support of this, the plurality relied on *Larkin v. Grendel's Den, Inc.*, in which the Court held that a statute vesting discretionary state authority in a religious body was an impermissible entanglement of government and religion.

Next the plurality asserted that while Chapter 748 was a more subtle violation of the Establishment Clause than the statute in *Larkin*, it was nevertheless an impermissible entanglement. The Court found that vesting power in a secular organization dominated by members of the sect instead of in the religious organization was a difference only of form, not substance. Citing two factors, the plurality held that the Satmar Hasidim received special treatment in the creation of the District. First, creating a small school district did not fit the trend in New York state toward fewer and larger school districts. Second, the District was created by a special act of the Legislature instead of by the general laws of the State. The plurality concluded that the District, as a reflection of the homogeneous nature of the Village's population, had been created and vested with civil authority on the basis of a religious test in violation of the Establishment Clause.

After the plurality found a violation of the Establishment Clause, a majority of the Court expressed concern that the

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32. *Kiryas Joel*, 114 S. Ct. at 2488 (citing *Larkin*, 459 U.S. at 126). The *Larkin* Court found that the statute at issue was an impermissible entanglement because the "statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause." *Larkin*, 459 U.S. at 126.
34. Id. The Court noted that while Chapter 748 did not expressly delegate authority according to religious criteria, the Legislature was aware that the Village's boundaries were drawn to exclude all but Satmar Hasidim. Id. at 2489 (citing Appellant's Brief, at 20, *Kiryas Joel*, 114 S. Ct. 2481 (No. 93-517), and Appellee's Brief, at 11, *Kiryas Joel*, 114 S. Ct. 2481 (No. 93-517)).
36. Id. at 2489.
37. Id. at 2490. The Appellants argued that the Legislature had created at least twenty small school districts by special acts, but the Court distinguished the instant case because the District had its own tax base and student population. Id. These other school districts were created to be run by private organizations which would accept placements of children from school districts and public agencies. Id. None had geographical boundaries or separate tax bases. Id.
38. Id.
39. In this part of the opinion, Justice O'Connor joined Justice Souter to create a majority. Id. at 2495.
Legislature would not be able to ensure that other groups would receive the same special treatment given to the Satmar Hasidim. The case-specific nature of the act of the Legislature appeared to lack neutrality, while leaving the impression that the government was expressing a preference for one religion over all others. The majority stated that it was a well-grounded principle that any benefit provided to religious organizations had to be available on an equal basis to all religious groups. The majority concluded that because the benefit flowed to a specific religious group with no assurance of governmental neutrality, the State of New York had violated the Establishment Clause.

In the next section of the opinion, the Court acknowledged that the principle of accommodating the needs of religious groups was constitutionally sound. The Court reaffirmed that the command of neutrality did not require government to ignore the burdens its actions could place on religion and religious practices. Noting that there were limits to the principle of accommodation, the Court maintained that Chapter 748 was unconstitutional not for facilitating religious practice, but because it delegated political authority to a religious group.

The final section of the majority opinion was followed by

40. Kiryas Joel, 114 S. Ct. at 2491.
41. Id. (citing Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); and School Dist. of Abington v. Schempp, 374 U.S. 203, 216-17 (1963)).
42. Kiryas Joel, 114 S. Ct. at 2491 (citing Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)). In Walz, the Court allowed property tax exemptions to remain for properties owned by religious groups because no one group was singled out. Walz, 397 U.S. at 696-97. The exemption was available to a broad range of non-profit organizations. Id.
43. Kiryas Joel, 114 S. Ct. at 2492.
44. Id. The Court noted that the state could intervene to remove special burdens because "government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." Id. (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987)).
45. Kiryas Joel, 114 S. Ct. at 2492 (citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987)). In Corporation of Presiding Bishop, the Court held that religious employers were exempt from Title VII of the Civil Rights Act of 1964 and could favor their own adherents in hiring, even for secular positions. Corporation of Presiding Bishop, 483 U.S. at 335-36.
46. Kiryas Joel, 114 S. Ct. at 2492-93. Justice Souter suggested that the Hasidic children could have received bilingual and bicultural instruction through Monroe-Woodbury, either at a public school or at a neutral site near one of the Village schools, without violating the Establishment Clause. Id. at 2493.
47. Id. In the final section, the Court criticized the views expressed in the dissenting opinion. See Kiryas Joel, 114 S. Ct. at 2505 (Scalia, J., dissenting). Joining Justice Scalia in the dissent were Chief Justice Rehnquist and Justice Thomas. Id. The Court criticized the dissenters for what was characterized as their antiquated view of the Establishment Clause. Id. at 2494. Intimating that the dissent's view...
the concurring opinions of Justices Blackmun, Stevens, O'Connor and Kennedy. Concurring in part and concurring in the judgment, Justice O'Connor agreed with the plurality that Chapter 748 went beyond accommodation because it conferred favorable treatment on a particular religious group. Justice O'Connor indicated that the Court should abandon its search for a general theory to be applied in all religion cases, typified by the Lemon test, and resolve such disputes on a case-by-case basis. Justice O'Connor contended that a unitary approach was ill-suited to addressing unique concerns raised by new problems.

While concurring with the Court that Chapter 748 discriminated among religious groups and violated the Establishment Clause, Justice Kennedy disagreed with the Court's contention that the Legislature would not be able to ensure a neutral treatment of all religious groups seeking special legislative acts. Justice Kennedy argued that a legislature should be free to respond to unique burdens placed on particular religious groups. Justice Kennedy was persuaded that, while the Legislature had rightly sought to remove special burdens on the Satmar Hasidim, it had gone beyond accommodation by drawing political boundaries on the basis of religious faith.

was not that of the Framers of the Constitution or the Court throughout its history, the majority opinion argued that Justice Scalia wished to narrow the Establishment Clause to a few simple rules. Id. The Court argued that the dissenters did not recognize the command of neutrality whenever government had contact with religion or religious groups. Id.

48. Kiryas Joel, 114 S. Ct. at 2494 (Blackmun, J., concurring). Justice Blackmun stated that he wrote separately in order to express his support of the principles enunciated in Lemon. Id.

49. Id. at 2495 (Stevens, J., concurring). Justice Stevens, joined by Justices Blackmun and Ginsburg, suggested that Chapter 748 went beyond the principle of accommodation because it segregated children on the basis of religion, which was in opposition to the public interest of diversity and understanding. Id. This concurrence stated that instead of isolating the Satmar children, the State should strive to instill the principle of tolerance in the children attending public schools. Id. Justice Stevens was persuaded that whenever government lent its support to the indoctrination of young adherents, it had moved beyond accommodation and into the establishment of religion in violation of the Establishment Clause. Id.

50. Id. at 2495 (O'Connor, J., concurring).

51. Id. at 2500 (Kennedy, J., concurring).

52. Id. at 2499-500 (O'Connor, J., concurring).


54. Id. at 2499. In fact, Justice O'Connor called for the reconsideration of Aguilar, which prohibited public school teachers from providing remedial services in parochial schools. Id. at 2498 (citing Aguilar, 473 U.S. at 421-31 (O'Connor, J., dissenting)).

55. Kiryas Joel, 114 S. Ct. at 2500-01.

56. Id. at 2501.

57. Id. at 2505 (Kennedy, J., concurring). Justice Kennedy agreed with Justice
In a dissenting opinion, Justice Scalia asserted that he lamented the use of the Establishment Clause to prohibit the accommodation of a small religious sect. The dissent contended that the Court's first argument, which centered on the unconstitutionality of vesting governmental authority in a religious group, was based on a misreading of Larkin v. Grendel's Den, Inc. The dissent opined that the Court had failed to distinguish between civil authority held directly by a church and civil authority held by individuals who incidentally were members of a church.

The dissent also contended that the Court's second argument, that the Satmar Hasidim received special treatment by the creation of the District, was flawed. First, the dissent argued that the creation of the Kiryas Joel Village School District by a special act of the Legislature was not extraordinary. Second, the dissent contended that the Court's argument that the creation of the District ran counter to the trend toward larger school districts was not true. The dissent contended that the Court's argument that the District included only Satmar Hasidim and therefore favored one religion, was illogical.

The dissent then argued that even if Chapter 748 gave special treatment to the Satmar Hasidim on the basis of their religion, this would still be a permissible accommodation. Justice Scalia cited a line of cases to support his contention that accom-

O'Connor that Ball and Aguilar may have been wrongly decided and should be reconsidered. Id.

58. Id. (Scalia, J., dissenting). The dissent viewed the plurality's arguments as twofold: first, providing the District with governmental authority was the same as giving such power to a religious group, and second, the Legislature was favoring the religion of the Satmar Hasidim over all others. Id. at 2507.

59. Id.

60. Id. The dissent contended that such a failure ignored much of the history of the United States, in which co-religionists set out to create homogeneous communities. Id. By the majority's standard, the dissent argued, the creation of the State of Utah was unconstitutional, given that state's predominately Mormon population. Id. The dissent also cited McDaniel v. Paty, in which the Court struck down a statute prohibiting a member of the clergy from holding public office. Id. at 2508 (citing McDaniel v. Paty, 435 U.S. 618 (1978)). In McDaniel, the Court held that it was a violation of the Free Exercise Clause to bar a citizen from participating in the political process on the basis of religious affiliation. McDaniel, 435 U.S. at 628-29.

61. Kiryas Joel, 114 S. Ct. at 2508-09 (Scalia, J., dissenting).

62. Id. at 2509. The dissent cited several examples of the Legislature creating other school districts by special act. Id.

63. Id.

64. Id. at 2510. Justice Scalia contended that special treatment was not proof of religious favoritism. Id.

65. Id. at 2511. Justice Scalia regarded the District as a secular governmental entity, whose population base just happened to be a homogeneous group of religious adherents. Id. at 2506.
modation of religion had been a long-standing American tradition. Justice Scalia disagreed with the Court's contention that there was no guarantee that the Legislature would offer accommodation to other religious groups. The dissent argued that it was the nature of accommodation to address the problems of a single religious group, making a neutral system of assurances impossible.

The dissent concluded that the opinion cited Lemon only twice, even though the decisions below relied on its test. Justice Scalia, taking issue with Justice O'Connor's promotion of situation-specific rules, ended by advocating that Lemon be abandoned because its application has left it without meaning. The dissent asserted that the Court's Establishment Clause cases had had the effect of abrogating the country's religious tradition.

The First Amendment prevents the federal government from passing laws establishing religion or prohibiting the free exercise of religion. In 1947, the Supreme Court first considered whether a state statute implicated the Establishment Clause of the First Amendment in Everson v. Board of Education. The Court briefly reviewed the historical background leading to the adoption of the Religion Clauses of the First Amendment. The Court noted that the centuries prior to the founding of the United States were marked by turmoil generated by established religious sects in Europe attempting to hold on to absolute political power. The Court noted that while religious minorities sought refuge from persecution in the American colonies, mem-


68. Id.

69. Id. at 2515. The parties used significant portions of their briefs to expound on Lemon. Id. See note 163 for a discussion of the parties' arguments.

70. *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting). Justice Scalia asserted that the Court had applied the Lemon test in a variety of cases to achieve whatever result it wanted. Id. (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring in the judgment) and Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting)).

71. *Kiryas Joel*, 114 S. Ct. at 2515-16 (Scalia, J., dissenting).

72. U.S. CONST. amend. I. In *Cantwell v. Connecticut*, the Supreme Court held that the Religion Clauses of the First Amendment were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

73. 330 U.S. 1 (1947).


75. Id. at 8-9.
bers of the religious majorities were also transplanted, bringing with them many of worst religious traditions of the old world.\footnote{Id. at 9-10. The Court stated that the English Crown granted charters authorizing individuals and land companies to establish churches requiring financial support from the general population. Id. at 9.} The Court asserted that these practices shocked some leading colonial figures into opposing the established churches.\footnote{Id. at 11. In Virginia, James Madison and Thomas Jefferson led the movement against the established church, opposing a tax levy on all citizens for support. Id. at 11-12. Their efforts culminated in the enactment of the "Virginia Bill for Religious Liberty." Id. at 12.} The Court reasoned that the First Amendment was adopted to achieve the same objectives of prohibiting the establishment of religion, while leaving citizens free to follow their individual consciences.\footnote{Id. at 13.}

In \textit{Everson}, the Court addressed the issue of whether a New Jersey statute providing for public transportation to and from both public and parochial schools was a violation of the Establishment Clause.\footnote{\textit{Everson}, 330 U.S. at 3-4. The board of education reimbursed parents for the cost of sending their children to school on buses operated by the public transportation system. Id. at 3. Some of the money went to parents who sent their children to Catholic parochial schools. Id.} While noting that the First Amendment required a state to be neutral in its relationships with religious organizations, the Court observed that this did not mean that a state had to be hostile to religion.\footnote{Id. at 18. The Court noted that under the state's compulsory education laws, parents were free to send their children to religious schools as long as such schools met certain secular education requirements. Id.} The Court determined that the actions of a state had to remain within the rather broad boundaries of the First Amendment, which prohibited a state from supporting a particular church as well as burdening the free exercise of religion.\footnote{Id. at 17-18.} The Court held that religious groups were entitled to benefits from public welfare legislation, which included safe transportation to school and police protection.\footnote{370 U.S. 421 (1962).}

In \textit{Engel v. Vitale},\footnote{Engel, 370 U.S. at 422-24. The prayer was composed by the state board of regents, which had been granted extensive legislative and executive powers concerning the administration of public schools by the state legislature \textit{Id.} at 422-23. On the recommendation of the board, a school district instructed its principal to read the following prayer at the beginning of each school day: "Almighty God, we ac-
that the Establishment Clause was included in the First Amendment as a precaution against the intermingling of governmental authority and religious doctrine. Therefore, the Court reasoned, government was without power to prescribe the content of a prayer or otherwise sponsor a religious activity. The Court observed that even a voluntary, non-denominational prayer was invalid because the purpose of the Establishment Clause was to prevent both coercive and non-coercive encroachments on religious freedom. The Court added that its decision was not to be interpreted as in any way hostile to religion and concluded that the First Amendment was designed to end governmental control of religion.

A year later, the Court decided a similar issue when it considered whether a state law requiring schools to begin each day with a Bible reading was a violation of the Establishment Clause. In School District v. Schempp, the Court stated that the Establishment Clause and the cases interpreting the Clause required governmental neutrality and prohibited official support for any religious group. The Court asserted that a statute should be tested on the basis of its purpose and effect. The Court reasoned that a legislative body had overstepped its
power if the enactment of such a statute advanced or inhibited religion.\textsuperscript{93} The Court held that the religious nature of the readings as well as the law making the readings mandatory were a violation of the Establishment Clause because the law had no secular purpose.\textsuperscript{94}

In \textit{Walz v. Tax Commission},\textsuperscript{95} the issue before the Court was whether state tax exemptions for real property owned by religious organizations violated the prohibition of establishing religion.\textsuperscript{96} The Court asserted that the inclusion of the Establishment and Free Exercise Clauses in the Constitution required a degree of interaction between government and religion and that it was the role of the judiciary to delineate between unavoidable entanglement and open hostility.\textsuperscript{97} The Court was satisfied that the language of the statute did not favor the properties of a particular faith or even churches generally, but included a range of properties owned by groups exerting positive influences in local communities.\textsuperscript{98}

After determining that it was not the aim of the legislature to sponsor religion, the Court next examined the effect of the statute.\textsuperscript{99} The Court pointed out that the issue of taxation of churches necessarily involved entanglement regardless of how the Court chose to resolve the issue.\textsuperscript{100} Thus, the Court held

\textsuperscript{93} \textit{Schempp}, 374 U.S. at 222.
\textsuperscript{94} Id. at 223. The \textit{Schempp} decision was applied in \textit{Board of Education v. Allen}. See \textit{Board of Educ. v. Allen}, 392 U.S. 236 (1968). In \textit{Allen}, the Court considered the issue of whether a statute requiring public school districts to purchase and lend books to students attending religious schools violated the Establishment Clause. \textit{Allen}, 392 U.S. at 238. The Court examined the legislative purpose of the statute and found that it was for the secular purpose of furthering educational opportunities. \textit{Id.} at 243. Next, the Court found that the effect of the statute did not advance religion in contradiction to its purpose. \textit{Id.} at 243-44. The Court observed that the books, none of which were religious in nature, were lent to support secular education in parochial schools and did not amount to an endorsement of the religious instruction given at these schools. \textit{Id.} at 247-48. In reliance on \textit{Everson}, the Court in \textit{Allen} held that the statute did not violate the Establishment Clause. \textit{Id.} at 238. \textit{Allen} formed the basis of the first two parts of the \textit{Lemon} test. See notes 103-12 and accompanying text for a further discussion of \textit{Lemon}.
\textsuperscript{95} 397 U.S. 664 (1970).
\textsuperscript{96} \textit{Walz}, 397 U.S. at 667. An owner of real estate brought suit, claiming that the exemption indirectly forced the owner to contribute to religious entities. \textit{Id.}
\textsuperscript{97} \textit{Id.} at 670.
\textsuperscript{98} \textit{Id.} at 672-73. The statute granted tax exemptions to real property owned by a range non-profit organizations including churches, hospitals, libraries, scientific and literary societies, cemeteries, and patriotic groups. N.Y. REAL PROP. TAX LAW § 420-a (McKinney 1984 & Supp. 1994).
\textsuperscript{99} \textit{Walz}, 397 U.S. at 674.
\textsuperscript{100} \textit{Id.} at 674. The Court pointed out that the elimination of the exemption would have resulted in increased entanglement by way of tax valuations, tax liens, foreclosures and all resulting legal proceedings. \textit{Id.}
that even though such exemptions bestowed an indirect economic benefit on religious organizations, this was not a violation of the Establishment Clause because the state was merely abstaining from forcing the church to support the state.\(^{101}\) Recognizing the long history of tax exemptions for religious properties, the Court affirmed the validity of the statute.\(^{102}\)

In its next case, the Court developed a test that would define all subsequent Establishment Clause cases.\(^{103}\) In *Lemon v. Kurtzman*,\(^ {104}\) the Court addressed the issue of whether two state statutes providing state aid to religious schools were an excessive entanglement between government and religion.\(^ {105}\) The Court applied a three-part test distilled from prior Supreme Court cases.\(^ {106}\) First, the Court declared that a legislature had to have a secular purpose when enacting a statute.\(^ {107}\) Next, the Court asserted that the statute's could neither advance nor inhibit religion.\(^ {108}\) Finally, the Court insisted that the administration of a statute could not excessively entangle government with religion.\(^ {109}\) The Court noted that both state legislatures attempted to restrict public aid to the support of secular educational functions.\(^ {110}\) However, the Court asserted that the administration of the statutes required a degree of involvement that went beyond the limits specified in *Walz*.\(^ {111}\) The Court held that, by enlarging the involvement of the state in religious affairs, the statutes were an excessive entanglement violative of the Establishment Clause.\(^ {112}\)

\(^{101}\) *Id.* at 675.

\(^{102}\) *Id.* at 680.

\(^{103}\) *See* *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

\(^{104}\) 403 U.S. 602 (1971).

\(^{105}\) *Lemon*, 403 U.S. at 606. The Rhode Island statute authorized salary supplements to teachers of secular subjects who taught in private religious schools. *Id.* at 607. The Pennsylvania statute reimbursed religious schools for expenditures on books and salaries that went to secular subjects. *Id.* at 609.

\(^{106}\) *Id.* at 612-13 (citations omitted). The Court based the first two prongs on *Allen*. *Id.* at 612 (citing Board of Educ. *v.* Allen, 392 U.S. 236, 243 (1968)). The third prong was based on *Walz*. *Lemon*, 403 U.S. at 613 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

\(^{107}\) *Lemon*, 403 U.S. at 612.

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 613.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 613-14. The Court asserted that it was impossible to monitor a teacher's handling of a subject to ensure that instruction was purely secular. *Id.* at 617. The Court also noted that the Pennsylvania statute provided financial aid directly to the religious schools, unlike earlier cases like *Everson* and *Allen*, in which the financial aid flowed to parents and students. *Id.* at 621.

\(^{112}\) *Lemon*, 403 U.S. at 614. The Court asserted that the innovative nature of both state programs presented a different problem than the universal practice of tax
In *Larkin v. Grendel's Den, Inc.*, the Supreme Court considered the issue of whether a Massachusetts statute granting schools and churches the power to prevent the issuance of liquor licenses to be used at premises located within five hundred feet of a church or school was a violation of the Establishment Clause. The Court contended that even the appearance of an exercise of legislative power by a church violated the Establishment Clause. The Court applied the *Lemon* test and found that the statute had excessively entangled government with religion. The Court held that the statute effectively granted governmental authority to a religious group, had the primary effect of advancing religion and excessively entangled government and religion.

In *Mueller v. Allen*, the Court considered whether a statute allowing state income tax deductions for private school tuition, books and transportation violated the Establishment Clause. The Court applied the three-part test enunciated in *Lemon* and found that the statute did not violate the test. First, the Court found that the secular purpose of the statute was to ensure the education of the state's children by defraying educational costs. Second, the Court determined that the statute did not have the primary effect of advancing religion because the deduction was available to all parents, including exemptions for church property that was allowed in *Walz*. The Court noted that both programs were aimed at alleviating the deepening financial crises at the parochial schools in Pennsylvania and Rhode Island and that the programs, if not invalidated, would become progressively larger, further impinging on First Amendment prohibitions.
those sending their children to public schools and those sending their children to private schools, both sectarian and non-sectarian. Third, the Court reasoned that no entanglement was involved because the private decisions of parents, and not some state action, conferred the benefit on a particular religion. The Court concluded that the statute did not violate the Establishment Clause.

In *Lynch v. Donnelly*, the issue before the Court was whether the inclusion of a nativity scene in a Christmas display erected by a city in a privately-owned park was a violation of the Establishment Clause. The Court defended the creche as a depiction of the historical origins of what had become a secular holiday. The Court maintained that the religious impact of the creche was offset by its setting among secular symbols of the holiday. Applying the *Lemon* test, the Court was satisfied that the creche was erected for a secular purpose whose primary effect did not advance religion or entangle government and religion and thus, did not violate the Establishment Clause.

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122. *Id.* at 397. Children who attended a public school outside of their district were allowed to deduct tuition costs charged by public schools to non-residents. *Id.* at 391 n.2.

123. *Id.* at 397.

124. *Mueller*, 463 U.S. at 403. The Court noted that the role of state officials was limited to disallowing deductions for religious books and materials. *Id.* Also, the Court distinguished this case from *Committee for Public Education v. Nyquist*, which forbade direct subsidies to parochial schools. *Id.* at 398 (citing Committee for Public Educ. v. Nyquist, 413 U.S. 746, 780-83 (1973)).


128. *Id.* at 680.

129. *Id.* at 686. According to the Court, the display included: "[Many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here."

*Id.* at 671.

130. *Id.* at 681-85. The dissenting opinion in *Lynch* also applied the *Lemon* test and reached a different conclusion about the constitutionality of the creche. *Id.* at 694 (Brennan, J., dissenting). The dissent claimed that the presence of the creche violated all three parts of the *Lemon* test. *Id.* at 696-704.

In her concurring opinion in *Lynch*, Justice O'Connor suggested that the Court clarify its Establishment Clause doctrine. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). From the Court's previous cases, the Justice distilled two principal ways that government could violate the Establishment Clause. *Id.* First, government could become excessively entangled with religion by interfering in religious institutions or by granting access to governmental authority; and second, governmental endorsement of religion sent a message to adherents that they were favored in the political process, while non-adherents are made to feel like outsiders. *Id.* at 687-88.
In *Wallace v. Jaffree*, the Court again addressed the issue of whether a state statute allowing for a period of meditation and prayer in public schools violated the Establishment Clause. Applying the *Lemon* test, the Court found that the legislature had no secular purpose in mind when it enacted the statute and that the sole purpose was to endorse prayer activities. The Court reasoned that without a secular purpose in enacting legislation, the government was unable to maintain its neutrality toward religion. The Court struck down the statute as a violation of the Establishment Clause because the state government’s action could have been interpreted as an endorsement of religion.

Justice O’Connor focused on whether the creche was intended to communicate, and whether in fact it did communicate, an endorsement of Christianity. *Id.* at 690-91. The Justice agreed with the Court that the City’s purpose was to celebrate a public holiday and that the effect of the display could not be interpreted as a message of approval of religion. *Id.* at 691-92.

The statute at issue prescribed no particular prayer, but allowed a teacher to announce a period of silence to be used for meditation and voluntary prayer. *Id.* at 40 n.2. A unanimous Supreme Court had earlier invalidated a companion statute that allowed a teacher to lead willing students in prayer and prescribed the prayer to be recited. *See Wallace v. Jaffree*, 466 U.S. 924 (1984). At the trial stage of this litigation, a third statute allowing for a moment of silence to be used for meditation was held to be valid, and the issue was not raised on appeal. *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982).

The Court found that the legislative purpose of promoting and endorsing voluntary prayer in public schools was quite different from protecting a student’s right to engage in voluntary prayer during a moment of silence. *Id.* at 59. The Court found it significant that the legislature enacted a statute specifically mentioning prayer when it had already enacted a meditation statute during which students were able to engage in prayer. *Id.* at 60.

In his dissenting opinion in *Jaffree*, Justice Rehnquist maintained that the Court’s rulings on the Establishment Clause were inconsistent with the intent of the Framers of the Bill of Rights. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting). Justice Rehnquist argued that the Court’s Establishment Clause doctrine was faulty because of its reliance on a quotation from Thomas Jefferson regarding “a wall of separation between church and State.” *Id.* at 91 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). Justice Rehnquist emphasized the fact that Jefferson was not present during the debate and ratification of the Bill of Rights and that these words were written 14 years after the adoption of the Bill of Rights. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting). Justice Rehnquist argued that a proper historical grounding was found in James Madison’s views, which the Justice characterized as prohibiting only a national religion. *Id.* at 98. Justice Rehnquist contended that Madison did not require governmental neutrality toward religion. *Id.* Justice Rehnquist ended his overview of the debates on the Bill of Rights with the contention that there was no historical basis for the Court’s requirement of governmental neutrality toward religion. *Id.* at 106.

Next, Justice Rehnquist maintained that the idea of a “wall of separation,” elevated to a constitutional principle in *Everson*, had led the Court into a jurisprudential morass of divided and imprecise opinions. *Jaffree*, 472 U.S. at 107 n.6.
In *County of Allegheny v. American Civil Liberties Union*, the Court considered the issue of whether two holiday displays on public property violated the Establishment Clause. At a county courthouse, a religious group had erected a creche. At the entrance to a building housing city and county offices, the city had erected a holiday display that included a Christmas tree, a message from the mayor saluting liberty and a Chanukah menorah. The Court determined that the creche communicated a sectarian message because of the absence of secular symbols and the use of a religious slogan praising the birth of Jesus. The Court held that the display violated the Establishment Clause because the government was sending an unmistakable message of endorsement of the Christian content of the display.

The second holiday display included a Christmas tree, a me-
norah and a sign saluting liberty. The Court asserted that the menorah was both a religious and secular symbol whose religious impact was diminished by its placement alongside a secular symbol of the Christian holiday. The central question for the Court was whether this display represented an endorsement of both religions. The Court concluded that the display did not have the effect of advancing religion, like the creche approved in *Lynch*, because the display only acknowledged the secular status of the coinciding holidays without conveying a message that the government supported either faith.

In *Lee v. Weisman*, the Court considered the issue of whether a member of the clergy could deliver a non-sectarian prayer at public high school graduation ceremonies. The Court observed that the prayer reading coerced those students objecting to the religious practice to participate in a state-sponsored religious activity. The Court found that the practice was sanctioned by the state, which controlled the content of the prayer. Because the prayer was delivered in a public setting with the support of the state, the Court reasoned that a student who objected would be forced to participate in the religious exercise. The Court held that the prayer exercises violated the Establishment Clause because the state compelled attendance and participation in a religious activity that an objecting student could not avoid.

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143. Id.
144. Id. at 616.
145. Id. at 620-21. The Court concluded that residents of the city could not infer from the presence of the display that the city government was endorsing either Christianity or Judaism. Id. The Court asserted that the constitutionality of the display must be judged from the perspective of the “reasonable observer.” Id. (citing *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment)).

In *County of Allegheny*, Justice O'Connor concurred in the judgment that the creche display was violative of the Establishment Clause and again advocated the endorsement test. *County of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring). For Justice O'Connor, the creche sent a message to non-Christians that they were not represented in the political community and that government endorsed Christianity. Id. at 626. Justice O'Connor maintained that the Establishment Clause made a person's religious beliefs irrelevant to one's standing in the political community. Id. at 627.

148. Id. at 2655.
149. Id. at 2656-57.
150. Id. at 2658-59.
151. Id. at 2661. In his concurring opinion in *Lee*, Justice Souter expounded on two issues: whether a government practice that did not favor a particular religion was constitutional, and whether state coercion was a necessary element implicating
In Zobrest v. Catalina Foothills School District, the issue the Court faced was whether federal funding used to provide for an interpreter for a deaf student attending a Catholic school was a violation of the Establishment Clause. The Court found two factors to be significant. First, the aid and benefit flowed directly to the handicapped child, and not to the religious school, and second, the task of the interpreter was different from that of a teacher because the interpreter did nothing more than interpret the material presented in class. Because the federal law providing the funds created no incentive for a parent’s choice of a sectarian school, the Court held that the law was not a violation of the Establishment Clause even though a religious school received a slight financial benefit.

In reviewing the history of the Supreme Court’s Establishment Clause jurisprudence, it becomes evident that the Court has faced troubling issues and created fine distinctions in its
cases. The current Court includes a divergent majority,\textsuperscript{158} clinging to the general legal principles summarized in \textit{Lemon}, emasculated by its progeny\textsuperscript{159} and ignored in other cases,\textsuperscript{160} and a committed minority declaring America's religious tradition.\textsuperscript{161} \textit{Kiryas Joel} is symbolic of this tension. While the \textit{Lemon} test itself has effectively been bypassed, a majority of the Court adheres to its underlying principles, with Justice Souter assuming a leading intellectual role on the issue. While the case was correctly decided, the opinion in \textit{Kiryas Joel} contains little guidance for predicting the future course of the Court's Establishment Clause jurisprudence.

In the \textit{Kiryas Joel} decision, the Court revealed disagreements on the proper course to pursue in Establishment Clause cases. In the majority are three differing positions,\textsuperscript{162} each representing a vision of how to address the shortcomings of the \textit{Lemon} test while remaining true to its underlying principles.\textsuperscript{163} The

\textsuperscript{158} Those concurring in the judgment in \textit{Kiryas Joel} included Justices Souter, Blackmun, Stevens, Ginsburg, O'Connor, and Kennedy. \textit{Kiryas Joel}, 114 S. Ct. at 2484. After the retirement of Justice Blackmun, Justice Breyer was appointed to the Court beginning with the 1994-1995 term. Justice Breyer's position on the Establishment Clause is left to speculation.

\textsuperscript{159} See, e.g., Bowen v. Kendrick, 487 U.S. 589 (1988); Mueller v. Allen, 463 U.S. 388 (1983). At issue in \textit{Kendrick} was a federal law providing funds to private organizations, some of which were religious in nature, for counseling services aimed at addressing the social and economic problems associated with teenage sexuality and pregnancy. \textit{Kendrick}, 487 U.S. at 597. Applying the \textit{Lemon} test, the Court in \textit{Kendrick} held that the law did not violate the Establishment Clause. \textit{Id.} at 617. See notes 118-25 and accompanying text for a discussion of \textit{Mueller}.

\textsuperscript{160} See, e.g., Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Marsh v. Chambers, 463 U.S. 783 (1983) (allowing the Nebraska State Legislature to employ a chaplain and begin its sessions with a prayer); Larson v. Valente, 456 U.S. 228 (1982) (invalidating a state statute requiring a denomination collecting more than 50% of its funds from non-members to register with the state's charitable organizations bureau).

\textsuperscript{161} Dissenting in \textit{Kiryas Joel} were Chief Justice Rehnquist and Justices Scalia and Thomas. \textit{Kiryas Joel}, 114 S. Ct. at 2505 (Scalia, J., dissenting).

\textsuperscript{162} These positions can be found in the opinions of Justices Souter, O'Connor, and Kennedy.

\textsuperscript{163} In \textit{Kiryas Joel}, the Appellants structured their briefs around the proposition that Chapter 748 did not violate the \textit{Lemon} test. See Appellants' Brief, \textit{Kiryas Joel} v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527 and 93-539). Taking note that Chapter 748 had failed the test in three state proceedings, the Appellants asked that \textit{Lemon} be overruled in the event that the Supreme Court agreed with the New York Court of Appeals that Chapter 748 did not pass constitutional muster. Appellant's Brief, at 45, \textit{Kiryas Joel} v. Grumet, 114 S. Ct. 2481 (No. 93-517).

The Appellees also based their brief on a \textit{Lemon} analysis. See Appellees' Brief, \textit{Kiryas Joel} v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527 and 93-539). Significantly, the \textit{Kiryas Joel} opinion cited \textit{Lemon} only in passing, though part of the opinion relied on \textit{Larkin v. Grendel's Den}, which had applied the \textit{Lemon} test. \textit{Kiryas Joel}, 114 S. Ct. at 2487-90. However, the principles underlying \textit{Lemon} can be detected in the competing positions of the Court's majority.
dissenters in *Kiryas Joel* express a different opinion concerning the fate of *Lemon*.

Justice Souter, author of the Court's opinion in *Kiryas Joel*, had signaled his special interest in religion cases in his concurring opinions in *Lee v. Weisman* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*. In *Lee*, Justice Souter discussed two points he considered fundamental in Establishment Clause cases: first, that all government aid to religious groups, whether characterized as preferential or non-preferential, was impermissible; and second, that coercion was not required to sustain an Establishment Clause claim. In Justice Souter's view, even the non-preferential endorsement of the idea of religion was impermissible under the First Amendment. In rejecting the coercion test with his second argument, Justice Souter showed that the Court had invalidated statutes and practices even in the absence of coercion.

Justice O'Connor advocates the adoption of an endorsement test to solve Establishment Clause issues. The test involves an analysis of whether a reasonable person would interpret a state

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165. 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring) (holding that a law burdening religious practices that was neither neutral nor generally applicable was unconstitutional unless justified by a compelling state interest).
166. *Lee*, 112 S. Ct. at 2670-72 (Souter, J., concurring).
167. *Id.* at 2670.
168. *Id.* at 2671-73. Justice Souter set out his thinking on the accommodation of religious practices under the Free Exercise Clause in his concurrence in *Lukumi Babalu*. *Lukumi*, 113 S. Ct. at 2240 (Souter, J., concurring). Justice Souter argued that government had to accommodate religious exercise by granting exemptions whenever a statute burdened religious practices in the absence of a compelling interest. *Id.* at 2241. Such a position recognizes the interplay between the religion clauses and allows government to respond to the religious needs of citizens. In *Lukumi*, Justice Souter called for the re-examination of the Court's holding in *Employment Division v. Smith*, which declared that a neutral law of general applicability that burdened a religious practice did not violate the Free Exercise Clause. See *Employment Division v. Smith*, 494 U.S. 872, 878-80 (1990). At issue in *Smith* was a denial of unemployment benefits to two members of the Native American Church who were dismissed from their jobs for sacramental peyote use in violation of a state criminal statute. *Smith*, 494 U.S. at 874. In *Lukumi*, Justice Souter argued that *Smith* adopted a narrow conception of governmental neutrality toward religious free exercise in contradistinction to the Court's previous jurisprudence. *Lukumi*, 113 S. Ct. at 2240 (Souter, J., concurring). Prior to *Smith*, the Court had held that facial neutrality was not enough to validate a statute burdening free exercise and that the state had to demonstrate a compelling interest. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents from a state law requiring children to attend school until the age of sixteen). In *Lukumi*, Justice Souter asserted that the Free Exercise Clause required a law to be substantively, as well as formally, neutral and that when a facially neutral statute had the effect of burdening a religious practice, the government was required to accommodate that practice by exempting it from the statute. *Lukumi*, 113 S. Ct. at 2241 (Souter, J., concurring).
action as conveying a message of endorsement or whether non-adherents would feel alienated from the political process. Justice O'Connor also joined Justice Souter in suggesting that the Establishment Clause could be violated in subtle, non-coercive ways.

A third approach to Establishment Clause cases is advocated by Justice Kennedy, who signaled his support for a return to a coercion test. Justice Kennedy concentrated on psychological coercion as a required element in an Establishment Clause case. While not abandoning completely the principles of Lemon, Justice Kennedy has clearly stated that he has a different view than Justice Souter on the role of coercion in Establishment Clause cases, while sharply criticizing Justice O'Connor's establishment test. In his concurrence in Kiryas Joel, Justice Kennedy maintained that Chapter 748 was violative of the Establishment Clause because it drew political boundaries on the basis of a group's religious character. Justice Kennedy appears more open to legislative accommodation than Justice Souter, while recognizing the limits of such a remedy.

Finally, the Kiryas Joel dissenters adhere to a position advocating greater government support and accommodation of religion and religious groups under the Establishment Clause, arguing that such a position was consistent with the Framers' intent. The dissenters contend that it was the intent of the Framers that government merely prevent the establishment of a national church, while expressing no preference among religious groups. In Kiryas Joel, the dissenters reiterated their adherence to a narrow interpretation of the Establishment Clause,
one limiting its application to prohibiting the establishment of a national religion and the preference of one sect over all others.

The Kiryas Joel dissenters advocate a complete repudiation of the Court's Establishment Clause jurisprudence starting with Everson. The dissenters' approach is flawed in two respects. First, reliance on the record of the Framers' debates has not revealed a clear picture of the Framers' intentions, allowing opposing Justices to quote freely in support of incompatible positions.176 Second, adherence to the Framers' conception of religion ignores the present reality of increased religious diversity.177 Today, the population of the United States is far more diverse than the Framers could have imagined. The problems of Establishment Clause cases arising today require an interpretation that reflects this heterogeneity.178

In sum, the positions represented in the Court's majority share an adherence to the principles of the separation of church and state, if not to the mechanical and vague Lemon test. Justice Souter's position offers the soundest approach to Establishment Clause cases because it recognizes that government has no place meddling in religious affairs, except by granting judicial accommodations under the Free Exercise Clause. The real issue presented in Kiryas Joel, that of providing federally funded remedial services to children attending religious schools, would

176. This argument was first proposed by Justice Brennan in his concurring opinion in Schempp. See Schempp, 374 U.S. at 237 (Brennan, J., concurring). Justice Brennan asserted that "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . [O]n our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition." Id.


178. A proper approach to the relationship between religion and government in a secular, representative democracy is best exemplified by a quotation from the majority opinion in Schempp, written by Justice Clark:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Schempp, 374 U.S. at 226. For example, in each of the school prayer cases, the government had composed a banal, non-denominational prayer. This is certainly an example of an "'unhallowed perversion' by a civil magistrate." Everson, 370 U.S. at 432 (quoting James Madison, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland & William M.E. Rachal eds., 1969).
have been more properly framed as one of free exercise, which means that the Court must reconsider its decisions in Aguilar and Ball. As noted by Justice Souter in the majority opinion, a solution could be fashioned that allowed teachers employed by the public school district to provide these services at a neutral site in the Village. The legislative approach to providing these services, represented by Chapter 748, was a clear violation of the Establishment Clause because the character of the school district was defined by the Village boundaries, drawn to ensure a closed religious community.

The Court needs to clarify the concepts of accommodation and neutrality and attempt to resolve the tension between the Free Exercise Clause and the Establishment Clause. Un fortunately, the decision in Kiryas Joel adds little to the Court's Establishment Clause jurisprudence, other than revealing a wide divergence of opinion on the direction of the Court on issues more subtle than that presented here. However, the Court appears poised to strengthen its commitment, if not to the Lemon test itself, then to its underlying principles, though predicting the future course of the Court in this divisive area is problematic. The Court needs to harmonize the Religion Clauses to ensure that religious organizations can flourish free of governmental interference and endorsement, while guaranteeing that governmental actions do not hinder the free exercise and expression of religious faith.

The United States was, and continues to be, a nation dominated by followers of the Christian faith. The myths and values of

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179. See note 12 for a further discussion of the impact of Aguilar and Ball on the present case.
180. Kiryas Joel, 114 S. Ct. at 2493.
181. If there are any doubts about granting political authority to a religious group, consider the following account of school board elections in Kiryas Joel: As for the public school board, the first and only election was held in January 1990. A month earlier the Grand Rabbi said: "It's like this. With the power of the Torah, I am here the Authority in the Rabbinical leadership. . . . As you know I want to nominate seven people and I want these people to be the people." When Joseph Waldman, a dissenting Satmar, tried to run without the rabbi's permission, he was banished from the congregation; his six children were expelled from the yeshiva; his tires were slashed; his windows were broken; and several hundred people, including the rabbi, marched outside his house chanting, "Death to Joseph Waldman!"
Jeffrey Rosen, Court Watch, THE NEW REPUBLIC, April 11, 1994 at 11.
182. See Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685 (1992). Professor McConnell argues that accommodation of religion can occur under both clauses. Id. at 687. The Constitution compels accommodation under "free exercise" and permits discretionary accommodation under "establishment." Id. at 686-87.
the Christian tradition suffuse American history and culture. However, the United States Constitution requires that the nation conduct its political affairs outside of the area of Christian faith. Otherwise, the political ideas that illuminate the Constitution, and the document itself, cannot survive a confrontation with religious intolerance and factionalism.

Charles B. Schweitzer