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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

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Our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test .... 1

I. INTRODUCTION

Government attempts to accommodate, acknowledge, and support religion are an accepted and valued part of our political and cultural heritage. Sensitive to this heritage, the Supreme Court has attempted to enforce the proscription of the Establishment Clause by requiring government neutrality between religion and “irreligion.” Yet the Supreme Court has long struggled with the vexatious problem of developing workable standards to apply to Establishment Clause challenges. Consequently, the Court has continuously re-examined the relationship between church and state over the past two decades.

While currently applicable standards initially provided some guidance and assistance, the Court has gradually begun to distance itself from such a neutrality-driven approach. Competing for acceptance appears to be at least one approach which returns to the more limited scope of the original understanding of the Establish-

2 U.S. CONST. amend. I. The religion clauses of the First Amendment provide that “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.” Id.
3 The currently applicable standards were articulated by the Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). See infra Part IV-B.
4 The Court declined to apply the Lemon test in at least two cases, see Marsh v. Chambers, 463 U.S. 783 (1983), Larson v. Valente, 456 U.S. 228 (1982), and most recently, in Lee, gave it only nominal recognition at best. Difficulties with the Lemon test stem largely from the fact that it is no more grounded in the historical underpinnings of the First Amendment, than is the “wall” theory upon which it is based. See Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); see also infra Part IV-A.
ment Clause: that "nothing in the Establishment Clause requires
government to be strictly neutral between religion and irreligion,
nor does that Clause prohibit Congress or the States from pursu-
ing legitimate secular ends through nondiscriminatory sectarian
means."5

Recently, in Grumet v. Board of Education of the Kiryas Joel Village
School District,6 the Third Department of the New York Appellate
Division illustrated the inadequacy and need for abandonment of
the current approach. In Grumet, state legislation creating a public
school for a municipality comprised almost entirely of members of
an ultraorthodox Hasidic sect was challenged as a violation of the
Establishment Clause of the First Amendment and its New York
State counterpart, article XI, section 3 of the New York Constitution.7

Following a judgment of a New York supreme court,8 which, inter alia,
granted plaintiff's motion for summary judgment and
declared the legislation facially unconstitutional, the appellate divi-
sion affirmed the lower court's order.9 If left unreversed by the
New York Court of Appeals to which it is currently under consid-
eration, Grumet may very well serve to perpetuate what the lower
courts failed to recognize: that we are still a religious people, that

5 Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting); see also Lee, 112 S. Ct. at 2683
(Scalia, Rehnquist, White, Thomas, JJ., dissenting).
7 N.Y. CONST. art. XI, § 3. This section provides:

Neither the state nor any subdivision thereof shall use its credit or any public
money, or authorize or permit either to be used, directly or indirectly, in aid or
maintenance, other than for examination or inspection, of any school or institu-
tion of learning wholly or in part under the control or direction of any reli-
gious denomination, or in which any denominational tenet or doctrine is taught,
but the legislature may provide for the transportation of children to and from
any school or institution of learning.

Id.

Because the Unites States Constitution is clearly more restrictive than article XI, §
3, of the New York Constitution, the state constitutional provision will not be addressed
in this Note. Moreover, it seems clear that because the District would not be under the
direct control of any "religious denomination," nor would any "religious denominational
tenet or doctrine" be taught therein, that Chapter 748 raises no state constitutional is-

Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123
9 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123
we are capable of separating government from religion, and that all levels of government must never be blind to the religious nature of their citizens. For even current standards, when applied with proper sensitivity to our traditions and case law, irrefutably support the conclusion that accommodating the provision of public benefits to the unique cultural and religious needs of a community is permissible, if not required.

Grumet does not present an opportunity for especially new or novel legal analysis. However, in light of the current state of flux of Establishment Clause jurisprudence, Grumet’s unique and complex factual scenario may very well prove to be both an exceptional challenge and opportunity for clarification for the New York Court of Appeals, and quite possibly the United States Supreme Court. Therefore, regardless of which side’s argument the New York Court of Appeals ultimately accepts, Grumet will likely indicate the future direction that Establishment Clause jurisprudence will take within New York and the nation as a whole.

This Note, therefore, will focus on the constitutional issues raised by the application of current Establishment Clause standards to state legislation, where the state legislation creates a public school district for a municipality populated almost entirely by members of the same religion and attempts to permissibly accommodate their unique culture and lifestyle. Part II of this Note will set the factual and procedural stage for the discussion. Part III reviews the facts and holding of the Grumet decision. Part IV briefly reviews the foundational underpinnings of both Establishment Clause analysis and the Lemon test. It then suggests that the appellate division misapplied the three-pronged Lemon test, illustrating how the murky neutrality-based approach produces both ahistorical and inconsistent results. Part V briefly examines possible alternative approaches to Establishment Clause analysis in light of the recent shift away from Lemon in the Supreme Court’s Establishment Clause jurisprudence. Part VI concludes that while the legislation withstands a facial challenge under the Lemon test, such neutrality tests should be abandoned. It then urges the New York Court of Appeals to reverse the decision of the appellate division and reaffirm the time honored principles of religious tolerance and accommodation, by recognizing the central role that religion plays in our society.

10 See infra Part IV-B.
II. FACTUAL BACKGROUND

A. Historical Overview

The Village of Kiryas Joel ("the Village"), located in Monroe, New York, is one of four communities within New York11 whose inhabitants are members of the Satmar,12 an ultraorthodox Hasidic13 sect. The Village is of relatively recent origin. In 1974 the Satmar first began their exodus from the Williamsburg section of Brooklyn, New York to the town of Monroe in Orange County, where they desired to establish a community in which they could raise their families and preserve their religious and cultural lifestyle.14 As a result of what has been termed a "bitter contest" and arduous opposition by the Satmar to Monroe's zoning and build-
ing codes, the Satmar petitioned the Town in 1976 to establish their existing community as an incorporated village to be known as Kiryas Joel.\textsuperscript{15} That petition was granted, and in February, 1977, the Village’s residents approved the resultant incorporation proposition.

The Village has grown to become a religious enclave for approximately 8000 Satmar.\textsuperscript{16} By separating themselves from the contiguous community (which was accomplished by founding and incorporating the Village), the Satmar promote and further their own religious beliefs, ideologies, and culture, while simultaneously avoiding undesired “acculturation.”\textsuperscript{17} No one has seriously challenged that the social and cultural components of the Satmar Hasidim are markedly different from the outside community.

As the New York Court of Appeals detailed in Board of Education of the Monroe-Woodbury Central School District v. Wieder,\textsuperscript{18}

[a]part from separation from the outside community, separation of the sexes is observed within the Village. Yiddish is the principal language of Kiryas Joel; television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive—the boys, for example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmarer children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel. Boys are enrolled in the United Talmudic Academy (UTA) and the girls in Bais Rochel, a UTA affiliate. With an apparent over-all goal that children should continue to live by the religious standards of their parents, “Satmarer want [the UTA] to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women.”\textsuperscript{19}

\textsuperscript{15} In \textit{In re Formation of a New Village to be Known as “Kiryas Joel”} (Monroe Town Supervisor, N.Y., Dec. 10, 1976) (decision on the sufficiency of a petition to incorporate as a village).

\textsuperscript{16} See Rosenberger, \textit{supra} note 14.

\textsuperscript{17} See \textit{supra} notes 13-14 and accompanying text.

\textsuperscript{18} 527 N.E.2d 767 (N.Y. 1988).

\textsuperscript{19} \textit{Wieder}, 527 N.E.2d at 769 (quoting RUBIN, \textit{supra} note 12, at 140). The court further noted that the Satmar made no reference to their religious beliefs or practices in their submissions, rather only to their lifestyle and environment. \textit{Id.} at 769 n.2. Therefore, the majority concluded that it would be improper to entertain any potential free exercise arguments because they had not been raised in the court below. The propriety
B. Prior Related Litigation

The Satmar's adherence to their ultraorthodox religious beliefs and cultural practices has in recent years been at the center of multiple lawsuits, one of which eventually led directly to the passage of Chapter 748 of the Laws of 1989 ("Chapter 748") and the instant appeal. In that case, Board of Education of the Monroe-Woodbury Central School District v. Wieder, the Monroe-Woodbury Central School District ("Monroe-Woodbury") brought suit seeking a judgment declaring that it could not legally provide special education and related services to the handicapped students residing in the Village at any location other than within Monroe-Woodbury's own public school buildings. The defendants in that suit, who were the parents of the students involved, asserted that the special education needs of their handicapped children should be provided by Monroe-Woodbury on the premises of the school which their children would have attended for regular instruction, their religiously affiliated private school. The

of such an argument is beyond the scope of this discussion and will not be addressed.

20 See, e.g., Bollenbach v. Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist., 659 F. Supp. 1450 (S.D.N.Y. 1987) (holding that Monroe-Woodbury's provision of male only bus drivers for the transportation of male Satmar students, in accordance with the Satmar's religious tenet of separation of the sexes, had the primary effect of advancing their religious beliefs); Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767 (N.Y. 1988) (holding that Monroe-Woodbury was not required to provide special education services to handicapped Satmar children only within its public schools and could constitutionally provide such services at a neutral site apart from the sectarian schools within Kiryas Joel, but could not be compelled to do so). For another case involving Satmar litigation relating to the provision of special education services, but unrelated to the Kiryas Joel Satmar litigation, see Parent's Ass'n v. Wilson, 803 F.2d 1235 (2d Cir. 1986) (striking down the construction of a partition within the public school building to separate Hasidic children from the general student population).

21 See infra Part III-A.


24 This suit was precipitated by Monroe-Woodbury's termination of special education services at a "neutral site," consisting of an annex to the Bais Rochel school, in response to the United States Supreme Court's decisions in Aguilar v. Felton, 473 U.S. 402 (1985), and Grand Rapids v. Ball, 473 U.S. 371 (1985). In these cases, the Court held that public school teachers could not constitutionally provide educational services to school children on the premises of private, sectarian schools. Aguilar, 473 U.S. at 414; Grand Rapids, 473 U.S. at 391. Monroe-Woodbury concluded that the Supreme Court's decisions mandated that the special education services be provided to the Kiryas Joel handicapped children only at its public schools. Wieder, 527 N.E.2d at 770. After several months of attendance at the public school programs, the defendant parents refused to permit their children to continue. Id.

25 This school was the United Talmudic Academy ("UTA") for boys and Bais
parents maintained that the delivery of special education services at the site of the student’s normal educational instruction was essential because of “the panic, fear and trauma [the students] suffered in leaving their own communities and being with people whose ways were so different from theirs.”

The New York Court of Appeals held in *Wieder* that New York Education Law section 3602-c(9) did not require Monroe-Woodbury to provide special education services to the defendants’ children only within Monroe-Woodbury’s regular classes and programs. However, the court went on to hold that while Monroe-Woodbury was not statutorily restricted to limiting its rendition of special education services to its own school buildings, it did not follow that the defendants’ children therefore were entitled to receive instruction within their own religious schools or even at a neutral site within the Village. The court explicitly stated that “the defendant’s [sic] statutory entitlement to special services does not carry with it a constitutional right to dictate where they must be offered.” Unfortunately, the dispute was not resolved because Monroe-Woodbury continued to offer the services only at its public schools. It was in the wake of the *Wieder* decision, and as a result of the Satmar’s political efforts to which they directed their energy, that Chapter 748 was enacted into law. Chapter 748 created the Kiryas Joel Village School District (“the District”) which could now provide the handicapped children in Kiryas Joel with the necessary auxiliary services at a neutral site within the Village and yet apart from the UTA or its affiliates. It was viewed by many as a practical solution to what had become a protracted problem.

Rochel, a UTA affiliate, for girls. *Wieder*, 527 N.E.2d at 770.

26 *Id.*

27 *Id.* at 773-74. Monroe-Woodbury was “neither compelled to make services available to private school handicapped children only in regular public school classes and programs, nor without authority to provide otherwise.” *Id.* at 774.

28 *Id.* at 775.

29 *Id.* at 774-75.

30 As a result, most of the parents of handicapped children in Kiryas Joel refused to enroll their children in the Monroe-Woodbury public school system, where the special education services continued to be offered. Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123, 128 (App. Div. 3d Dept. 1992).
III. THE APPELLATE DIVISION'S GRUMET DECISION

A. Factual Background

Through Chapter 748, the New York State Legislature created the Kiryas Joel Village School District and granted its trustees the powers and duties of union free school districts. Governor Mario Cuomo noted in his approval memorandum that the leg-

31 1989 N.Y. LAWS 748. Chapter 748 reads as follows:
An Act to establish a separate school district in and for the village of Kiryas Joel, Orange County,
The People of the State of New York, represented in Senate and Assembly, do enact as follows:
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 the powers and duties of a union free school district under the provisions of the education law.
Section 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.
Section 3. This act shall take effect on the first day of July next succeeding the date when it shall have become law.

32 The creation of a new school district by special act of the legislature is one of several ways in which such a district may be created. Historically, the New York State Legislature has utilized this power specifically for the purpose of creating a public school to service handicapped and other children with special needs.

Currently, union free school districts are established pursuant to the provisions of sections 1522 and 1523 of the New York Education Law (through a petition for request to establish a district, public notice of meeting, public meetings, etc.). See N.Y. EDUC. LAW §§ 1522, 1523 (McKinney 1981). The New York Legislature has previously established 16 so-called "special act union free school districts" to provide educational services to handicapped pupils and persons in need of supervision. These districts have not typically had their own local real property tax base, taxation powers, or their own local school population. Rather, most of the pupils at such schools usually are placed there by other local school districts, social services, or Family Court. A. REp. No. 8747, 1989 Sess. 2 (1989) (budget recommendation on Chapter 748). However, nothing precludes them from doing so, and in fact, the legislature has created at least one such district in Wayne County.

33 The Governor stated in this memorandum that the bill "is regarded by opponents and proponents alike as a practical solution to what has been, so far, an intractable problem." In approving the bill he went on to conclude:

I believe that this bill is a good faith effort to solve this unique problem. And as noted above, I am advised that it is facially constitutional. Of course the new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. The village officials acknowledge this responsibility. I believe they will be true to their commitment.
islation constituted an effort to resolve the longstanding conflict between Monroe-Woodbury and the Village with respect to the provision of special education services to handicapped students residing within the Village. The bill finds its genesis in the years of litigation surrounding Monroe-Woodbury's attempts to accommodate the undisputed needs of the Village's handicapped children.34

The District, whose boundaries are coterminous with those of the Village, constitutes a unique and wholly secular presence within the Village. As is made clear in the affidavits submitted during discovery, the District school building35 is physically separate and apart from the religious schools within the community.36 It is wholly secular in appearance and lacks even the customary sectarian symbols on the building, walls, and classrooms.37 State certified teachers, who are assisted by non-instructional personnel selected in accordance with applicable civil service rules and regulations,38 staff the school which follows a secular academic calendar.39 While strict separation of the male and female students is practiced within the surrounding community and religious schools, boys and girls are instructed jointly at the District school.40 Moreover, the curriculum is secular and is not influenced or directed by the sex of the student as occurs in the religious schools within the Village.41 In addition, female teachers instruct male students,42 which also would not occur in the religious schools. Finally, English is the primary language of instruction, although the

GOVERNOR'S MEM., 1989 MCKINNEY'S SESSION LAWS OF N.Y., at 2430.


35 At present, the District has only one school building. See generally Sarah Lyall, Hasidic Public School District Is Unconstitutional, Judge Rules, N.Y. TIMES, Jan. 23, 1992, at B6.


37 Id.

38 Id.

39 Id.

40 Id.

41 Id.

42 This is especially notable because the Village had previously litigated the related, but certainly less significant, issue of the provision of female bus drivers for its male sectarian school children. See Bollenbach v. Board of Educ. of Monroe-Woodbury Cent. Sch. Dist., 659 F. Supp. 1450 (S.D.N.Y. 1987).
school also offers bilingual and bicultural secular education programs. This too is in marked contrast to the surrounding community, where Yiddish is the primary language of communication and instruction.

The District currently educates approximately 140 handicapped students of both sexes. Moreover, like all other public school districts, it provides secular textbooks, health and welfare services, dual enrollment services, and transportation to and from school to resident students attending various nonpublic schools.

B. Analysis of the Appellate Division Decision

In January, 1990, Louis Grumet, Albert Hawk, and the New York State School Boards Association ("NYSSBA") brought suit in a New York supreme court, alleging that Chapter 748 constituted an unconstitutional establishment of religion in violation of both the Establishment Clause of the First Amendment and its New York counterpart, article XI, section 3. In a cursory opinion with little discussion of the actual merits, Judge Kahn granted plaintiff's motion for summary judgement and declared that Chapter 748 represented an unconstitutional establishment of religion. He concluded that it violated all three prongs of the oft utilized Lemon test, which requires that legislation have: a secular
legislative purpose, that its principal or primary effect be one which neither advances nor inhibits religion, and that it not foster an excessive government entanglement with religion. Defendants appealed this decision. The Third Department of the New York Appellate Division was no more receptive to the Village's arguments. The Village urged the court to reconsider its decision in light of the recent Supreme Court decision in *Lee v. Weisman* and the seeming trend away from the application of the *Lemon* test in the Supreme Court's Establishment Clause jurisprudence. The court declined this invitation, however. Instead it too applied the *Lemon* test, yielding similar, if not identical, results. Those results will be addressed in turn.

1. Secular Purpose

Applying the first prong of the *Lemon* test, the appellate division found that Chapter 748 lacked a secular purpose for two reasons. First, the court noted that the handicapped children of the Village were already entitled to receive special education services pursuant to both state and federal law. Second, the court noted that these services were already available to the Village children from the Monroe-Woodbury Central School District, within

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53 *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also infra* Part IV-B.
55 *112 S. Ct. 2649* (1992) (striking down the recitation of invocations and benedictions at public high school graduations). This decision has been described as "forming the foundation for some future multicultural and humanist Constitution, draw[ing] little upon the thinking of those who drafted our present Constitution." *The Borked Court*, NAT'L REV., July 20, 1992, at 12. The Court avoided the important question of permissible government accommodation and involvement with religion. It also refused to reconsider the vitality and usefulness of the *Lemon* test, but then distanced itself from the test by giving it only nominal application.

If anything, *Lee* represents a slight shift towards the more historically accurate conception of the Establishment Clause, focusing on whether there has been government coercion of religious belief, practice, or support. Yet the dissenters were obviously unpersuaded by the majority's conclusion, because for them the historically accurate construction of the Establishment Clause requires "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee*, *112 S. Ct. at 2683* (Scalia, Rehnquist, White, Thomas, JJ., dissenting). Thus, while the neutrality-based approach of the *Lemon* test is losing its vitality, the original understanding view has as of yet been unable to garner majority support.

56 *See infra* Part IV-B.
which the Village was located at the time. The court concluded that one of the contributing factors to the New York Legislature's action, therefore, was not just the provision of educational services, but also the accommodation of the unique lifestyle of the Village residents. The court thus found no secular "need" for the statute, thereby rendering it in violation of the first prong of the Lemon test.

2. Primary Effect

The appellate division next examined the second prong of Lemon, whether Chapter 748 had the primary effect of advancing religion. Allegedly examining the entire context surrounding the District's creation, the court held that "the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to children of the community, it creates the type of symbolic impact that is impermissible under the second prong of the Lemon test." The fact that the school was located at a wholly neutral site within the Village and

58 Grumet, 592 N.Y.S.2d at 127.
59 Id.
60 See infra Part IV-B.
61 Grumet, 592 N.Y.S.2d at 127. The court seemingly suggests that because the composition of the Board of Education will likely consist of Satmar Hasidim, it will be under de facto religious control. This is not the case, however. The District is not a sectarian school. It does not teach or promote any religious tenets or doctrines and is also not under the control or direction of any religious denomination.

Moreover, the Supreme Court has explicitly held that the Constitution does not prohibit individuals of faith from holding public office. It is only when governmental power is given directly to a religious institution that a constitutional problem arises. See Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982) (striking down Massachusetts statute vesting governing bodies of churches with governmental veto power relative to issuance of liquor licenses); cf. McDaniel v. Patty, 435 U.S. 618, 627 (1978) (striking down provision of Tennessee Constitution disqualifying ministers from serving in capacity of constitutional delegate).

The issue in Grendel's Den was not that religious leaders were exercising governmental power. Rather, it was that they were exercising that power in a capacity in which they were not required to be constitutionally neutral, because they were acting as members of a church rather than as public officials. In contrast, Reverend McDaniel was acting as a public official and was accountable to his constituents and the Constitution rather than just his church. The decision in McDaniel, therefore, puts a limit on the scope of Grendel's Den.

This all suggests that any dual role that the residents of Kiryas Joel may play would not constitute a violation of the Establishment Clause, for they would fall within the scope of McDaniel rather than within Grendel's Den. Board members would not be acting as religious leaders, but rather as public school officials, and as such would be accountable first and foremost to the laws of the state of New York.
would offer only secular services provided by state certified teachers was deemed irrelevant given that such services would be provided to a community comprised almost entirely of the adherents of one religion. The court concluded that because the recipient's deeply held religious beliefs permeated their lifestyle, the state could not constitutionally provide them with these services within the confines of the Village itself without their rendition being "perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval, of their individual religious beliefs." The court declined to examine the third prong of the Lemon test given its conclusions from the first two prongs.

IV. THE APPELLATE DIVISION'S FLAWED ANALYSIS OF THE ESTABLISHMENT CLAUSE AND THE LEMON TEST

A. Background

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Although this provision was primarily intended as a check on the authority of the federal government, it has been made applicable to the states through the Fourteenth Amendment.

The drafters of the Establishment Clause feared a union of church and state at the federal level because they believed that government-sponsored religion resulted in "hatred, disrespect and even contempt of those who [hold] contrary beliefs." James Madison described the primary role of the Establishment and

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62 Grumet, 592 N.Y.S.2d at 128.
63 Id.
64 See infra Part IV-B.
65 Grumet, 592 N.Y.S.2d at 129-30.
66 U.S. CONST. amend. I.
67 Writing for a unanimous Court in Cantwell v. Connecticut, 310 U.S. 296 (1940), Justice Roberts explained that "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Id. at 303; see also Murdock v. Pennsylvania, 319 U.S. 105 (1943).
69 James Madison wrote his eloquent Memorial and Remonstrance against government sponsorship of religion. See MADISON'S MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in the Appendix to Mr. Justice Rutledge's dissenting opinion in Everson v. Board of Educ., 330 U.S. 1, 64 (1947).
Free Exercise Clauses to be to prevent, as far as possible, the intrusion of either the church or the state into the other’s domain. As described by Thomas Jefferson, the clause was intended to erect a “wall of separation between Church and State.” Justification for this requirement of separation rests upon the premise that “both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”

In applying these principles to church-state interaction, the Supreme Court has recognized that absolute, total separation is not possible and that such interaction is more probably inevitable. Yet, as the Court has consistently commented regarding the relationship between man and religion, “the State is firmly committed to a position of neutrality.” To maintain this neutral role, the state need not be hostile towards religion, but rather is encouraged to assume a posture of neutral accommodation. In

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70 Reynolds v. United States, 98 U.S. 145, 164 (1878); see also Abington Sch. Dist. v. Schempp, 374 U.S. 203, 219-20 (1963) (noting that the separation between Church and State must be complete and unequivocal); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (“First Amendment reflects philosophy that Church and State should be separated”); McCollum v. Board of Educ. of Sch. Dist. No. 71, 33 U.S. 203, 212 (1948) (noting that the wall between Church and State must be kept high).

However, while the Court has recognized that some separation between Church and State is required, it has also concluded that the “wall,” rather than being impenetrable, is instead a permeable barrier. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106-07 (1985) (Rehnquist, J., dissenting) (criticizing “wall of separation” metaphor as both lacking historical foundation and useless in guiding the Court’s interpretation of the Establishment Clause); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976) (“[A] hermetic separation of the two is an impossibility [the Establishment Clause] has never required.”); Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (“[T]he line of separation, far from being a “wall,” is a blurred, indistinct, and variable barrier.”); Engel v. Vitale, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting) (The Court is not “responsibly aided by the uncritical invocation of metaphors like the ‘wall of separation,’ a phrase nowhere to be found in the Constitution.”); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (“[T]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State.”); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 213-15 (1982) (arguing that rigid separation was not contemplated by the framers of the Constitution and therefore such separation is an erroneous judicial interpretation of the Establishment Clause).

Thus, the Everson “wall” illustrates the wisdom of Benjamin Cardozo’s observation that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” Berkey v. Third Ave. R. Co., 155 N.E. 58, 61 (N.Y. 1926).

71 McCollum, 333 U.S. at 212.


73 Wallace, 472 U.S. at 55; see also Roemer, 426 U.S. at 747 (“[C]ourt has enforced scrupulous neutrality by the state.”).

74 See, e.g., Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (“Government in our
assuming this posture, however, the state must be careful not to accommodate to the point where it lends direct support to a particular religion.\(^7\) This, in essence, is the inherent tension in Establishment Clause jurisprudence and is the linchpin of the conflict over Chapter 748 and the Village District.

**B. The Lemon Test**

Currently, any analysis of the constitutionality of Chapter 748 must have its origin in the principles articulated by the Supreme Court in *Lemon v. Kurtzman*.\(^6\) While the so-called three-pronged or tri-partite test may well be less relevant in light of recent Supreme Court decisions such as *Lee v. Weisman*,\(^7\) until such time as the Court clearly articulates different governing principles, any analysis of an Establishment Clause challenge must at least begin with the *Lemon* test.

In *Lemon*, the Supreme Court struck down as unconstitutional a Pennsylvania statute that, among other things, provided state financial aid directly to church-related schools, including salary reimbursement for the secular component of teacher's salaries, textbooks, and instructional materials. The Court explained the nature of the Establishment Clause and set out the test as follows:

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75 In distinguishing government accommodation of religion from government establishment of religion, one commentator has stated:

Accommodations of religion are government policies that take religion specifically into account not for the purpose of promoting the government's own favored form of religion, but of allowing individuals and groups to exercise their religion—whatever it may be—without hindrance . . . . Accommodation must be distinguished from the establishment of religion, which is government action designed to promote, channel, or direct religious exercise in socially-preferred ways. The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates ("accommodates") the decision of the individual or group; it does not induce or direct, by means of either incentive or compulsion. The hallmark of establishment is that the government uses its authority and resources to support one religion over another, or religion over nonreligion. Much of the argument over accommodation is based on a failure to perceive the fundamental difference between these two postures toward religion.


76 403 U.S. 602 (1972).

77 *Lee v. Weisman*, 112 S. Ct. 2649 (1992); see supra note 55 and accompanying text.
The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

However, in *Tilton v. Richardson,* a companion case decided on the same day that the Court articulated the *Lemon* test, the Court qualified its application somewhat by noting "that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent." Moreover, just four years later in *Meek v. Pittenger,* the Court further clarified the *Lemon* test stating that it constituted a convenient distillation of principles rather than establishing precise limits and thus served "only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." Yet the *Grumet* court engaged in a rigid and

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78 *Lemon*, 403 U.S. at 612-13 (citations omitted).
79 403 U.S. 672 (1971) (upholding act authorizing construction grants to religiously affiliated colleges).
80 *Tilton*, 403 U.S. at 677.
81 421 U.S. 349 (1975) (striking down government program providing auxiliary services on parochial school property).
82 *Id.* at 355; see also *Hunt v. McNair*, 413 U.S. 734, 741 (1973) ("[The three ele-
often inaccurate application of these mere “signposts” and “guidelines” in striking down Chapter 748, thereby departing from the tradition of accommodation of religion. The problems with such a strict analysis will be addressed in turn.

C. Separating the Facial Constitutionality of the Statute from Potential “As Applied” Violations

In *Bowen v. Kendrick*, the Supreme Court specifically upheld the authority of a court to distinguish, for First Amendment purposes, between the facial constitutionality of a statute and the particular manner in which such statutes have been applied or administered in practice. The Supreme Court noted:

There is, then, precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications. Although the Court’s opinions have not even adverted to (to say nothing of explicitly delineated) the consequences of this distinction between “on its face” and “as applied” in this context, we think they do justify . . . separating the two issues . . . .

The issue before the Court in *Bowen* was whether the financing of grants to nonpublic groups, including religious and charitable groups, violated the First Amendment by having the direct effect of advancing religion. The Court found the statute to be constitutional on its face but remanded the action to determine whether there had been any “as applied” violation.

In *Grumet*, Judge Kahn, and subsequently the appellate division, failed to distinguish between these two separate and distinct forms of constitutional challenge. By focusing on the religious identity of the inhabitants of the Village rather than on the nature of the legislation establishing the school, the court has blurred the distinction between “facial” constitutionality and “as applied” viola-

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84 *Bowen*, 487 U.S. at 600-02. The Supreme Court has decided several cases involving challenges to a statute “on its face.” See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (finding the Louisiana Creationism Act “facially invalid”). Other cases have been decided without the benefit of a record as to how the challenged statute has been applied. See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).
85 *Bowen*, 487 U.S. at 602.
86 *Id.* at 604-05.
87 *Id.* at 622.
tions. The court below has held, in effect, that because the underlying community consists almost exclusively of Satmar Hasidim, any provision of municipal services to that area will necessarily be tainted by religious influences. In other words, an "as-applied" violation might result when Chapter 748 is implemented. The Grumet court therefore concluded that Chapter 748 must necessarily run afoul of the Establishment Clause because the possibility of "as-applied" violations exists. However, there does not appear to be any logical justification for developing such an inference. A statute should not be invalidated on a facial challenge unless it can be demonstrated that it can never be administered in a constitutional manner.88

In fact, were the court to find, that there had actually been some form of "as-applied" violation (of which there is no evidence in the record),89 the proper remedy would not be to strike down the legislation as a whole, but rather would be to enjoin the unconstitutional action running afoul of the Establishment Clause.90 The appropriate action by the court, if any, should be as Judge Levine suggests in dissent: to reverse, declare the statute facially valid, and remand for trial the disputed factual issues to determine whether Chapter 748 is valid as applied.91 This would "give the Satmarer Hasidim their day in court to establish that the statute can be and has been implemented in a way that sufficiently separates the Village District's children from their religious precepts and practices to avoid conflict with the Establishment Clause."92

D. Chapter 748 Has a Secular Legislative Purpose

As Judge Levine noted in his dissent in Grumet, Chapter 748 was enacted "to break the impasse between the members of the Satmar Hasidic sect . . . and the Monroe-Woodbury Central School District . . . over the public provision of special education services for the handicapped children of the Village."93 Yet the majority

88 Id. at 612.
89 See supra notes 35-48 and accompanying text. These examples serve to illustrate the significant disparity between the uniquely sectarian nature of the community itself and the wholly secular nature of the District created by Chapter 748.
90 Bowen, 487 U.S. at 621-22.
92 Id.
93 Id.
concluded that because these services were already available through Monroe-Woodbury, Chapter 748 therefore lacked any secular "need," thereby violating the purpose prong of *Lemon*. However, the majority completely misunderstood the manner in which the Supreme Court has traditionally applied the purpose prong.

Often with very little discussion, the Court has seemingly accepted virtually any plausible secular purpose for legislation or actions challenged under the Establishment Clause, demonstrating the virtual meaninglessness of this requirement. In fact, only when the Court determined that there was no question that a statute or activity was motivated *wholly* by religious considerations did it invalidate legislation for lack of a secular purpose. The Court realized that "focus exclusively on the religious component of any activity would inevitably lead to its invalidation."

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94 See *supra* notes 57-59 and accompanying text.


Of course, as Justice O'Connor notes in her concurrence to *Wallace*, "this secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'" *Wallace*, 472 U.S. at 64. However, this is of no concern in *Grumet*, for the purpose of Chapter 748 is clearly sincere as indicated by the record. See also *Edwards*, 482 U.S. at 586-87; *Stone*, 449 U.S. at 41; *Schempp*, 374 U.S. at 223-24.

the test to require that the state have "exclusively secular" objectives whenever it adopted legislation, there would be little, if any, legislation or conduct approved by the Court in the past that would have satisfied such an immense burden.98

Moreover, the Establishment Clause does not proscribe state legislation merely because it coincides with the personal desires of the individuals most directly affected or harmonizes with the tenets of some or all religions.99 In fact, such a proscription would require "that the government show a callous indifference to religious groups,"100 which the Court has never before demanded in its Establishment Clause jurisprudence. Rather, this first prong of Lemon attempts to prevent the legislative abandonment of neutrality aimed at directly promoting religious activity.101 Therefore, the proper inquiry is whether the state legislature's actual purpose was either to endorse or disapprove of religion.102

When evaluating this critical issue, the Court has repeatedly affirmed its "reluctance to attribute unconstitutional motives to the

98 Id. at 682 n.6; see also Amos, 483 U.S. at 335 (concluding that Lemon does not require that a law's purpose must be completely unrelated to religion); Wallace, 472 U.S. at 56 ("[A] statute that is motivated in part by a religious purpose may satisfy the first criterion [of the Lemon test].").

99 McGowan v. Maryland, 366 U.S. 420, 442 (1961) (sustaining Sunday closing laws even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services); see also Bowen, 487 U.S. at 602-04 (upholding AFLA grants to religious institutions even though such funding aids their religious mission); Harris v. McRae, 448 U.S. 297, 319-20 (1980).


The most extensive discussion of the Establishment Clause's latitude can be found in Everson v. Board of Educ., 330 U.S. 1 (1947):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15-16.

States." Therefore, the Court "presume[s] that legislatures act in a constitutional manner." Moreover, the Court "presume[s] that legislatures act in a constitutional manner." Therefore, so long as the record suggests that those legislators who supported Chapter 748 acted with a sincere secular purpose in mind, the Act must survive the first prong of Lemon. This should be true regardless of whether there were other means at their disposal to accomplish the same or similar objectives.

The New York Legislature suggests as its intended purpose the provision of "special education services to handicapped children who were not receiving those services." While one of the factors contributing to the passage of Chapter 748 likely was the accommodation of the Village resident's concerns, as is evident from the discussion above, it would be a disingenuous stretch of reality to suggest that the New York Legislature's exclusive purpose was to endorse the religious beliefs of the Satmar Hasidim. It is apparent that when placed in context, there is insufficient evidence to establish that Chapter 748 was a purposeful or surrep-

108 In fact, in his dissenting opinion in Edwards v. Aguillard, 482 U.S. 578 (1987), Justice Scalia advocated the abandonment of the purpose prong of the Lemon test: "[W]hile it is possible to discern the objective 'purpose' of a statute . . . , or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." Id. at 656. Therefore, inquiry into the legislative history of an act is unnecessary unless it is ambiguous on its face. As Chapter 748 is not ambiguous, the court's analysis of its secular purpose should be confined to the act's four corners.
titious effort to express some kind of subtle-govermental advocacy of the Hasidic faith. As the Supreme Court appropriately noted in Everson, "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." Chapter 748, therefore, clearly survives analysis under the first prong of Lemon.

E. Chapter 748 Has a Primary Effect Which Neither Advances Nor Inhibits Religion

The Establishment Clause requires that legislation have more than merely a secular purpose. "[T]he propriety of a legislature’s purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion." Accepting arguendo that Chapter 748 had a secular purpose, the Grumet majority apparently struck down Chapter 748 for just this reason.

However, the appellate division again misunderstood the underpinnings of the Court’s Establishment Clause jurisprudence. For purposes of the second prong of Lemon, the crucial issue to be determined is not whether some benefit accrues to religion as a consequence of the legislation, but whether its principal or primary effect advances religion.

In determining whether a statute has the “primary effect” of advancing religion, the Court has seemingly utilized a two-part analysis, often in a haphazard and indeterminate manner. The first element of this analysis considers whether the state has advanced religion by directly engaging in government-financed or government-sponsored involvement in religious activity. Only if both elements have been satis-

112 Impermissible advancement occurs when the government "fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations." Grand Rapids v. Ball, 473 U.S. 373, 389 (1985). "If this identification conveys a message of government endorsement or disapproval of religion," then the Establishment Clause has been violated. Id. Therefore, a symbolic link may be created if the challenged legislation or conduct is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." Id. at 390; see also Lynch v. Donnelly, 465 U.S. 668,
fied has the Court apparently been willing to uphold a challenged statute.

1. Chapter 748 does not provide direct government support of religion

The Court has identified two areas in which government funds have been used to finance secular educational activities in a sectarian context, each meeting differing results. In the first area, "the government has used primarily secular means to accomplish a primarily secular end, and no 'primary effect' has thus been found." Legislation which the Court has upheld under this rationale includes reimbursement to parents of transportation costs to parochial schools, release time programs, aid for construction of secular classroom buildings at sectarian universities, grants to non-public colleges, tax deductions to parents for tuition, textbooks, and transportation, loans of textbooks and instructional materials to parochial school students, and federal grants to non-public institutions providing counseling services. Merely because the challenged legislation provided


In Grand Rapids, the Court, among other things, invalidated a program that allowed public school teachers to provide instructional services to parochial schoolchildren in the parochial schools. The Court found the program unconstitutional because allowing such instruction "in the parochial schools" conveyed a message of support for religion to both the children and the community. Grand Rapids, 473 U.S. at 390-92.

Thus, the Court maintained the facade of neutrality. They found it permissible to impose the neutrality standard upon the Grand Rapids School District because it resulted in the mere denial of a public subsidy within one narrowly confined area—the private school. The Court, in essence, permitted these religious individuals access to remedial reading services, just not within the confines of a religiously affiliated school. Such sleight of hand proves inadequate in Grumet, however. Rather than denying the Village a public subsidy within one narrowly confined area, the appellate division has demanded that the Satmar change their lives comprehensively if they desire public instruction within the Village. Such alleged neutrality, therefore, becomes instead, latent hostility. See also infra Part V-A.

113 Grand Rapids, 473 U.S. at 398.
114 Id.
117 Tilton v. Richardson, 403 U.S. 672 (1971); see also Hunt v. McNair, 413 U.S. 734 (1973).
some "remote," "incidental," or "indirect" benefit to religion, was not considered enough to render it constitutionally infirm. The proposition that the Establishment Clause prohibits all legislative action which in some manner facilitates religion has consistently been rejected by the Court. As Justice White once noted:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under Lemon, it must be fair to say that government itself has advanced religion through its own activities and influence. As the Court observed in Walz, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Thus, the Court has never indicated that legislation which gives special consideration to religious groups is per se invalid. Such a proposition would run contrary to the fundamental principle that there is considerable room for accommodation of religion under the Establishment Clause. Yet a rigid analysis such as that undertaken by the appellate division leads to just such an unacceptable result.

In the second area identified by the Court, "the government, although acting for a secular purpose, has done so by directly supporting a religious institution." Accordingly, the Court has struck down legislation which provided for religious instruction on the premises of public schools during the school day, salary supplements for teachers of secular subjects in parochial schools, direct aid to parochial schools for maintenance and repairs, instructional equipment loans to parochial schools,

125 See, e.g., Wallace v. Jaffree, 472 U.S. 38, 89-90 (1985); Walz, 397 U.S. at 669-70;
126 Grand Rapids, 473 U.S. at 394.
130 Meek v. Pittenger, 421 U.S. 349 (1975); see also Wolman v. Walter, 433 U.S. 229
instruction of secular subjects by public school teachers on the premises of sectarian schools,\textsuperscript{131} and leasing of parochial school classrooms to public school personnel for secular instruction.\textsuperscript{132} The crucial determination in discerning between mere accommodation (category 1) from support of religion (category 2), therefore, is whether the challenged legislation provides such direct support to religion or merely an incidental benefit similar to those often upheld by the Court in the past.

Critical to reaching any conclusion to this question, has been the Court's consideration of whether the beneficiary under the challenged legislation could be characterized as being "pervasively sectarian" in nature.\textsuperscript{133} In every case in which the Court has struck down legislation involving educational programs, the challenged aid was given directly to a sectarian beneficiary.\textsuperscript{134} These beneficiaries consisted primarily of sectarian schools, in which religion so permeated the provision of a secular education that their religious and secular educational functions were in fact inseparable.\textsuperscript{135}

This obviously has not occurred in Grumet, however. Rather, Chapter 748 provides purely secular aid to a purely secular beneficiary: a public school within the validly incorporated Village of Kiryas Joel. Thus, no sectarian beneficiary or school is involved at all. Only if one were to consider the personal religious choices of the individual taxpayers comprising the Village populous, could the exceptionally tenuous argument be made that Chapter 748 provides direct aid or support to a "religious institution." To make such an argument, however, the Village must be considered a de facto church, an argument which none of the litigants has made. While religious considerations certainly prompted the initial con-

\begin{itemize}
\item\textsuperscript{131} Aguilar v. Felton, 473 U.S. 402 (1985).
\item\textsuperscript{132} Grand Rapids v. Ball, 473 U.S. 373 (1985).
\item\textsuperscript{133} In Grand Rapids, for example, the Court began its "effects" inquiry with "a consideration of the nature of the institutions" receiving government aid. \textit{Id.} at 384.
\item\textsuperscript{135} Tilton v. Richardson, 403 U.S. 672, 680 (1971). In discussing what constitutes a "pervasively sectarian" beneficiary, the Court stated in Hunt v. McNair, 413 U.S. 734 (1973), that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." \textit{Id.} at 743.
\end{itemize}
gregation of Satmar within the Village, the fact remains that it is just that, a validly incorporated municipality comprised of individual landowners most of whom happen to be adherents of the same religion.\textsuperscript{136} Moreover, the \textit{Grumet} majority specifically stated that it was not the location of the public school in a community comprised of a religious populous that they found offensive to the Establishment Clause.\textsuperscript{137}

Therefore, for purposes of this first element, Chapter 748 fits squarely within the contours of a permissible accommodation of religion. The New York Legislature has used primarily secular means, creating a public school for a validly incorporated munici-

\begin{itemize}
\item \textsuperscript{136} The United States District Court in Oregon found this fact to be of special significance. In Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208 (D. Oregon 1984), the district court struck down the incorporation of the city as having the primary effect of advancing religion in violation of the Establishment Clause. \textit{Id.} at 1216-17.

The city's boundaries were contiguous with those of a religious commune, all of whose real property was owned and controlled by a for-profit corporation, the Rajneesh Investment Corporation ("RIC"). \textit{Id.} at 1210-11. The commune and corporation were founded to advance the religious teachings of the Bhagwan Shree Rajneesh and to establish a religious community where every aspect of life would be controlled by such teachings. \textit{Id.} However, because residency and all real property in and around the city were controlled by the RIC, the district court concluded that the conferral of municipal status upon such a religious community had the primary effect of advancing religion in violation of the Establishment Clause. \textit{Id.} at 1216-17.

The linchpin of the court's conclusion was that both real property and residency were controlled by the RIC, a religious organization. As the court stated:

[C]ontrol over the City of Rajneeshpuram by these religious organizations is different enough from the control exercised by the religious leaders in a city of private landowners of one religion as to allow a constitutional distinction to be made between the two situations.

Similarly, there is a difference between the effect on and benefit to religion of the provision of ordinary municipal services to a city of private landowners of one religion and to the City of Rajneeshpuram, where the land is communally owned and controlled by religious organizations. The provision of these services by a municipal government in a city whose residents are private landowners of one religious faith has the direct and primary effect of aiding the individual landowners and residents living in the city. The effect on the religion of those private landowners is remote, indirect, and incidental.

\textit{Id.} at 1216.

The Village of Kiryas Joel can clearly be distinguished from the plight of the City of Rajneeshpuram and its constitutional infirmities. Whereas all real property within the Rajneeshpuram was owned and controlled by the RIC, all real property within the Village is privately owned with no restraints upon alienation or residency. Thus, the Village is not under the control of a religious organization as occurred in \textit{Rajneeshpuram}. Any benefits or services (including the creation of a public school) provided to the Village, therefore, aid not the Hasidic religion, but the individual landowners and residents living within the Village. Any effect on the Hasidic religion is indirect and incidental.

pality; to achieve a primarily secular end, the provision of secular instructional services to the Village's handicapped children. The fact that Chapter 748 allows the children to remain in a familiar environment can be characterized only as an "indirect" or "incidental" benefit to religion at best. This conclusion becomes especially strong when it is noted how uniquely secular a presence the school appears when contrasted with the unique culture and lifestyle of the majority of the populous. As expressed by the Court in Wolman v. Walter, providing educational services, even to exclusively parochial schoolchildren, will not have the impermissible effect of advancing religion if it is done in "truly religiously neutral locations." The District provides these services in a religiously neutral location that is physically and educationally separate from the functions of both the UTA and the Village. Thus, Chapter 748 no more provides direct government support of religion than do any of those programs previously upheld by the Court.

2. Chapter 748 does not create an impermissible symbolic link between government and religion.

The majority in Grumet did not conclude that Chapter 748 provided direct support of religion. Rather, it was the second element, an alleged "symbolic link" between government and the Hasidic faith upon which they based their holding and struck down Chapter 748. As the court stated,

We emphasize that it is not the location of the public school in the religious community and the provision of public educational services to sectarian students that we find offensive to the Establishment Clause. The impermissible effect is the symbolic impact of creating a new school district coterminous with a religious community to provide educational services that were already available in an effort to resolve a dispute between the religious community and the school district within which the community was formerly located, a dispute based upon the language, lifestyle and environment of the community's chil-

138 See supra notes 35-48 and accompanying text.
139 433 U.S. 229 (1977) (allowing therapeutic, guidance, and remedial services, which were offered in mobile units to parochial school children).
140 Wolman, 433 U.S. at 247-48.
141 See supra notes 35-48 and accompanying text.
dren created by the religious tenets, practices and beliefs of the community.  

The two, however, seem inextricably intertwined. How can Chapter 748 create a symbolic link between government and the Hasidic religion if the court does not consider the religious nature of the Village populous?

The majority seemingly evaluated two distinct questions, answering one in the affirmative and the other in the negative. The first question considered was whether the mere existence of a public school within the confines of a community comprised almost entirely of the adherents of one religion was necessarily infirm as creating a symbolic link between government and religion. While the trial court focused primarily on this issue in striking down Chapter 748, the appellate division apparently answered this question in the negative. The majority failed to discuss this issue other than to note that it allegedly was not the source of its holding.

The appellate division next examined whether the legislative action of creating a public school, in an attempt to accommodate the desires of the residents of the Village, resulted in a similar impermissible symbolic effect. The majority answered this question in the affirmative. However, an affirmative response to either interrogatory finds no support in Establishment Clause jurisprudence. Each interrogatory will be addressed in turn.

(a) The mere existence of a school within a religiously homogeneous community does not create an impermissible symbolic link.—In striking down Chapter 748, Judge Kahn determined that because the District’s boundaries are coterminous with those of the Village, an impermissible symbolic link between government and religion must always occur due to the religious nature of the populous. However, even if one considers the personal religious choices of the Village populous to warrant different constitutional treatment

143 Id. (citations omitted).
145 Grumet, 592 N.Y.S.2d at 129-30.
146 Id. at 128.
147 Grumet, 579 N.Y.S.2d at 1007.
from that given to any other municipality, neither sound logic nor Supreme Court precedent support such a conclusion.

Even when considering the provision of instructional staff and materials to classes composed exclusively of parochial schoolchildren in parochial school buildings, the Court has consistently stated that standing alone, the fact that remedial services are provided only to sectarian school students does not create a symbolic link that impermissibly advances religion, so long as the services are provided at a neutral site. Only because the services offered were provided within the parochial school buildings themselves have programs been struck down as having the impermissible symbolic effect of advancing religion.

For example, in *Meek v. Pittenger*, the Court struck down that portion of a Pennsylvania statute at issue which authorized the provision of certain auxiliary services on nonpublic school premises. Similarly, in *Grand Rapids v. Ball*, the Court invalidated a program that allowed public school teachers to teach certain courses in nonpublic schools. However, the Court has also recognized that so long as these types of services are offered at religiously neutral locations, the danger perceived in *Meek* and *Grand Rapids* does not arise.

It was for this reason that the Court upheld, in *Wolman v. Walter*, a state statute that provided therapeutic, guidance, and remedial services to sectarian pupils in public schools, public centers, and mobile units located "off the premises of the nonpublic

148 See *supra* note 136.

149 Wolman v. Walter, 433 U.S. 229, 247 (1977) (danger that a public employee might be unduly influenced by sectarian atmosphere "arose from the nature of the institution, not from the nature of the pupils").

150 Wolman v. Walter, 433 U.S. 229 (1977) (upholding provision of auxiliary services to parochial school students off the premises of the parochial schools).

151 Grand Rapids v. Ball, 473 U.S. 373 (1985) (invalidating program allowing public school teachers to provide instruction within parochial school buildings); Aguilar v. Felton, 473 U.S. 402 (1985) (invalidating program allowing public school teachers to provide instruction on the premises of parochial schools); Meek v. Pittenger, 421 U.S. 349 (1975) (concluding that provision of auxiliary services on parochial school property violated Establishment Clause); McCollum v. Board of Educ., 333 U.S. 203 (1948) (concluding that provision of religious instruction within the public school classrooms caused violation of Establishment Clause); see also *supra* note 112.


153 Id. at 371.


schools." The Court found nothing impermissible in the provision of such services to parochial school students separate and apart from public school students so long as they were provided at sites that were "neither physically nor educationally identified with the functions of the nonpublic school." Provision within such mobile units was sufficient to satisfy the "neutral location" requirement, and therefore, was not considered part of the "pervasively sectarian atmosphere of the church-related school."

Most recently, in *Cavazos v. Pulido*, the Eighth Circuit reaffirmed the principles announced in *Wolman*, and upheld the constitutionality of a program providing Chapter 1 services to parochial school students in mobile units parked on the property of, but physically separated from, the parochial school buildings. The court failed to see any risk of creating a symbolic link between church and state or conveying a message of state support for religion "when the services are provided by nonparochial school teachers in mobile and portable units that are separate and distinct from the parochial school classrooms and buildings." Moreover, the court noted that the mobile units were owned, operated, and controlled exclusively by the public school authorities, that they did not exhibit or contain any religious symbols, that they were secular in appearance, and that exclusively secular subjects were taught by only public school teachers. These facts were considered sufficient to demonstrate that the "services [were] provided in a location that [was] physically and educationally separate from the functions of the parochial school, and [therefore] religiously neutral."

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157 *Id.* at 246-47.
158 *Id.* at 247. Here again the facade of neutrality was maintained. The Court required only a minor alteration in the site of provision of these services rather than requiring the individuals involved to comprehensively change their lives and compromise their religious beliefs as was required by the appellate division in *Grumet*.
159 934 F.2d 912 (8th Cir. 1991).
160 *Id.* at 920; see also *Walker v. San Francisco United Sch. Dist.*, 761 F. Supp. 1463 (N.D. Cal. 1991). While the district court differed with *Cavazos* in its conclusion as to whether the mobile units could be located on the property of parochial schools, it did sustain the constitutionality of providing separate instruction to parochial school children in religiously neutral locations off parochial school property. It concluded that such a practice conferred only an incidental benefit to religion and therefore did not have a primary effect of advancing religion. *Id.; cf. Cavazos*, 934 F.2d at 923 ("[W]e do not believe that dictum by Justice O'Connor compels a holding that Chapter 1 services must be provided in units that are parked off the property of the religious institution.").
161 *Cavazos*, 934 F.2d at 919-20.
162 *Id.* at 920.
Applying these principles to *Grumet*, it quickly becomes apparent that there is little to distinguish the mobile units described in *Wolman* and *Cavazos* from the Village District created by Chapter 748. The provision of services through the newly created District, like the provision of services through the use of mobile units, was a creative and practical attempt to provide much needed remedial services to students of but one religious denomination in a manner consistent with the Supreme Court’s holding in *Aguilar.*

The Village District, like the mobile units, constitutes a religiously neutral location within the Village. The District is physically separate from the religious schools within the community, is wholly secular in appearance, follows a secular academic calendar, and offers instruction only by public school teachers in exclusively secular subjects. The District buildings, therefore, are indistinguishable from a “typical” public school. These factors make it likely that the students as well as the general public will distinguish the crucial difference between government support of religion and mere government accommodation of religion. Thus, it is difficult, if not impossible, to discern any real difference between the District and the mobile units previously upheld by the Supreme Court.

Moreover, the *Wieder* court specifically suggested that Monroe-Woodbury was free to provide remedial services at a “neutral site” within the Village if it chose to do so, in a manner analogous to, if not exactly the same as, that involved in *Cavazos.* Monroe-Woodbury would thereby be providing public school teachers to teach secular subjects at a neutral site to a group of students, most of whom, if not all, adhere to the same religious precepts. An objective observer would find it difficult, if not impossible, to distinguish between a neutral site located within the Village administered by the Board of Education of Monroe-Woodbury and the Village District currently administered by the publicly-elected

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163 See supra note 24 and accompanying text.
164 See supra notes 35-48 and accompanying text.
165 See generally Tilton v. Richardson, 403 U.S. 672, 680 (1971) (noting the absence of these factors as proof of the secular nature of the facilities).
Board of Education of the District. Accordingly, the mere existence of the Village District within the confines of a religiously homogeneous municipality cannot have the impermissible effect of creating a symbolic link between government and the Hasidic religion.

(b) The legislative action of creating a public school does not create an impermissible symbolic link between government and religion.—While the Grumet trial court initially focused on the symbolic effect arising from the presence of the District within a religiously homogeneous community, the appellate division attacked the legislative action of creating the District in an attempt to accommodate the needs and desires of the Satmar. The majority felt that this attempt at accommodation, regardless of the constitutionality of the District’s presence or of the constitutional manner in which it was operated, created an impermissible symbolic union between church and state.

However, if one were to adopt the appellate division’s reasoning, “it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible ‘symbolic link’ could be created, no matter whether the aid was to be used solely for secular purposes.” Such an approach would jeopardize aid to religiously affiliated hospitals, aid to religiously affiliated colleges, and aid to religiously affiliated institutions providing counseling services, all of which have previously been upheld by the Court. If the Village were viewed as a religious entity, such


170 Id.


172 See Bradfield v. Roberts, 175 U.S. 291 (1899) (mere fact that hospital was conducted under auspices of Catholic Church was insufficient to alter purely secular character of the corporation for purposes of federal aid for construction of new building).


174 See Bowen, 487 U.S. at 613-14.
an approach would also seem to proscribe the provision of services such as police and fire protection, sewage disposal, and highway maintenance. Yet, as the Court noted in Committee for Pub. Educ. & Religious Liberty v. Nyquist, "Such services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture towards religious institutions."

Moreover, to conclude that Chapter 748 creates an impermissible symbolic union between government and religion would require that the District be viewed as more of an endorsement and create a closer identification with religion, than do Sunday closing laws, creche displays on city property, legislative prayers, and release time programs for religious instruction. It would stretch reality to conclude that the provision of wholly secular services, even to a community whose populous adheres to essentially one religion, creates more of a symbolic union between government and religion than do these benefits previously sustained by the Court.

175 See supra note 136 for a discussion of the different constitutional treatment afforded religious communities of private landowners as distinguished from the treatment afforded religious communities in which all real property is owned and controlled by a religious organization.


177 Nyquist, 413 U.S. at 781-82 (citation omitted) (quoting Everson v. Board of Educ., 330 U.S. 1, 17-18 (finding bus fare program analogous to other neutrally available services)); see also Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) (noting that the Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aid to religious institutions); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 659 (1980) (noting that the Establishment Clause does not proscribe extension of general benefits to religious groups).

178 See McGowan v. Maryland, 366 U.S. 420 (1961). The Court noted in Nyquist, that these laws "were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services." Nyquist, 413 U.S. at 775-76.


182 As the Court noted in Wolman v. Walter, 433 U.S. 229 (1977),

At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of a significant religious denominational control over our demo-
Thus, the Court has long recognized that government may accommodate the religious choices of individuals without necessarily running afoul of the Establishment Clause. By cooperating with the expressed desires of the Village residents, the state affirmatively advances not religion, but rather the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Chapter 748 merely accommodates the purely private, voluntary religious choices of the Village residents and at the same time provides much needed secular remedial services. As Chief Justice Burger noted in dissent in Wallace v. Jaffree, "If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require."

F. Chapter 748 Does Not Foster Excessive Government Entanglement with Religion

Determining that Chapter 748 does not establish, sponsor, or support religion does not end the requisite analysis. The end result—the effect—also must not excessively entangle government with religion. While the appellate division intentionally did not address this third prong of Lemon because it had concluded Chapter 748 already failed the first two prongs, Judge Kahn of the New York Supreme Court did address the issue. He concluded that the New York State Education Department would be required to take special steps to monitor the new District to ensure that no public funds were expended to further the religious tenets of the
NOTE—MASKED HOSTILITY TOWARDS RELIGION

Satmar Hasidic faith, thereby unavoidably entangling government in religious matters.\(^{188}\) Therefore, it deserves at least cursory analysis here.

As Justice Brennan observed in *Aguilar v. Felton*,\(^ {189} \)

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the government purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the government intrusion into sacred matters.\(^ {190} \)

The objective of this third prong, therefore, is to prevent as far as possible the intrusion of either the church or the state into the respective sphere of the other, without prescribing hostility.\(^ {191} \) This necessarily requires close scrutiny of the degree of entanglement involved in any relationship between government and religion. Determining whether government entanglement is excessive and thus impermissible has been accomplished by examining three factors: the character of the beneficiary aided, the nature of the aid provided, and the potential for political divisiveness.\(^ {192} \)

Most of the cases in which the Court has invalidated programs under the "entanglement" prong of the *Lemon* test have involved aid to sectarian schools. Any finding by the Court of excessive entanglement has rested largely upon the undisputed fact that the beneficiaries were "pervasively sectarian" schools who had "as a substantial purpose the inculcation of religious values."\(^ {193} \)


\(^{190}\) Id. at 409-10.


It should be noted that the Court has never held that political divisiveness alone can serve to invalidate an otherwise constitutional practice. In fact, Justice O'Connor has suggested that political division along religious lines should not even be a separate test:
In *Lemon*, for example, the Court made extensive findings about the very real potential for excessive entanglement due to the substantially religious character of the church-related schools receiving aid.\textsuperscript{194} The Court further noted the character of the aid provided; that the program subsidized teachers, either directly or indirectly, as the teachers were employed by a religious organization, subject to the direction and discipline of religious authorities, and taught within facilities dedicated to the inculcation of particular religious tenets.\textsuperscript{195} The Court concluded that greater governmental surveillance would be required to guarantee that the aid would not result in subsidizing religious instruction. Such prophylactic contacts involved excessive and impermissible government entanglement with religion.\textsuperscript{196}

In *Meek v. Pittenger*,\textsuperscript{197} the Court made similar findings. In striking down a Pennsylvania program which provided professional staff and materials to sectarian schools, the Court concluded that "[t]he prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."\textsuperscript{198} While supervision may very well have ensured that the teachers did not advance the religious mission of the school, the Court observed that it would nonetheless result in unconstitutional administrative entanglement.\textsuperscript{199}

However, not all such programs which provide aid to religious or religiously affiliated beneficiaries have been struck down for entanglement concerns by the Court. In *Aguilar v. Felton,*\textsuperscript{200} the Court expressly distinguished three such programs on the basis that the beneficiaries were not "pervasively sectarian" in charac-

\textsuperscript{195} *Id*. at 618.
\textsuperscript{196} *Id*. at 619.
\textsuperscript{197} 421 U.S. 349 (1975).
\textsuperscript{198} *Meek*, 421 U.S. at 370.
\textsuperscript{199} *Id*.
\textsuperscript{200} 473 U.S. 402 (1985).
The Court allowed the government aid in these cases due to the limited extent to which religion permeated the character of the beneficiary. Finding that religious indoctrination was not a substantial purpose for these schools, as well as noting the non-ideological character of the aid provided, the Court concluded that impermissible government entanglement with religion would not occur. The necessity for any supervision or inspection was found to require no more intensive an administration than would occur had the beneficiary been wholly secular in nature.

Applying these principles to the facts in Grumet, there is no evidence of any degree of involvement between government and religion at all, let alone excessive interaction. Rather than being "pervasively sectarian," the new District is instead a wholly secular school like any other that can be found across the state.

No religious influences appear, whether it be the character of the facilities themselves, the nature of the subjects taught therein, or the individuals providing the instruction. All are completely devoid of any and all religious overtones. The only monitoring that must be undertaken requires no more entanglement with religion than does state inspection of any public school.

Given that the District is operated by a non-Hasidic Superintendent of Schools and a publicly elected Board of Education, and that the teachers are all state certified and non-Hasidic as well, the concerns expressed by the Court in Lemon relating to surveillance of the teachers do not arise. In Lemon, the teachers involved were directly employed by a religious organization, subject to the direction and discipline of religious authorities, and taught within a system whose primary purpose was dedicated to specific religious indoctrination. Conversely, the teachers involved in Grumet are not subject to any such religious controls. In fact, the exact oppo-

201 Aguilar, 473 U.S. at 411-12; see Roemer v. Board of Pub. Works, 426 U.S 736 (1976) (finding the possibility of occasional audits to ensure the secular use of noncategorical grants to lack the impermissible effect of entangling government with religion); Hunt v. McNair, 413 U.S. 734 (1973) (provision for inspection by state authorities to ensure secular use of state issued revenue bonds did not foster excessive government entanglement); Tilton v. Richardson, 403 U.S. 672 (1971) (inspections to ensure secular use of one-time construction grants to sectarian colleges does not foster excessive government entanglement).

202 See Roemer, 426 U.S. at 750-54; Hunt, 413 U.S. at 746-49; Tilton, 403 U.S. at 685-88.

203 Tilton, 403 U.S. at 687.

204 See supra notes 35-48 and accompanying text.

205 See supra text accompanying notes 195-97.
site is true. The teachers are all employed by the State of New York, are subject only to the direction and discipline of the Superintendent of Schools, and provide only secular remedial and auxiliary services in an environment dedicated only towards providing the free public education which the children who attend deserve. Furthermore, when the Court concluded in *Wolman v. Walter* that the provision of remedial services to parochial school students at neutral sites did not impermissibly advance religion, it also noted that,

> [n]either w[ould] there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state.

If the surveillance of a mobile unit parked outside a parochial school to provide secular instruction to exclusively parochial school students does not rise to the level of excessive government entanglement with religion, then surely a public school within a validly incorporated municipality requires no more extensive contact. Cumulatively, therefore, for purposes of determining the facial validity of Chapter 748, all of these considerations indicate that any church-state interaction would be far from excessive.

Thus, when analyzed giving proper sensitivity to our traditions and case law, Chapter 748 must be sustained as constitutional on its face. It has a valid secular purpose in that it provides much needed remedial services to the Village's handicapped children who would otherwise be forced to refuse these entitlements in the manner previously provided by Monroe-Woodbury. The statute also does not have a primary effect which either advances or inhibits religion. It neither provides direct support to religion nor does it create an impermissible symbolic link between government and religion. Rather, the District facilities represent a wholly secular presence within the Village and provide only secular services, thereby rendering the District virtually indistinguishable from any other public school in New York. Finally, the supervision of public employees, on public property, providing secular services cannot rationally be argued to represent an unconstitutional entanglement

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206 See *supra* notes 35-48 and accompanying text.
208 *Wolman*, 433 U.S. at 248.
of government with religion. Therefore, Chapter 748 should be viewed as exactly what it is, a good faith attempt to provide a practical solution to an otherwise intractable problem through the permissible accommodation of religion. Requiring anything more from such "neutrality" between government and religion leads not to a truly neutral result, but to unnecessary hostility towards religion.

V. TWO RECENT ALTERNATIVE APPROACHES TO LEMON—A TEST FOR THE FUTURE OR MORE OF THE SAME?

Over the past decade, the area of Establishment Clause jurisprudence has been clouded by a veil of change and uncertainty. Tests used by the Court have been revised, re-examined, and even ignored. Moreover, given the recent decision of Lee v. Weisman\(^{209}\) and the much anticipated decision in Zobrest v. Catalina Foothills School District,\(^{210}\) it is apparent that this period of uncertainty is far from complete. In seemingly incremental steps, the Court has been cautiously shedding the constraints imposed by the much maligned and periodically ignored Lemon test and moving towards a more flexible, and hopefully more determinate standard of analysis. As this process of change continues, every Establishment Clause challenge provides an opportunity for growth and clarification.

Two different approaches appear to be contending for the opportunity of replacing Lemon. The first of these was presented by Justice O'Connor in two separate concurring opinions in Wallace v. Jaffree\(^{211}\) and Lynch v. Donnelly.\(^{212}\) The tests enunciated therein focus upon whether the challenged conduct or legislation signifies government "endorsement or disapproval of religion." Realistically, however, this approach represents nothing

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\(^{209}\) 112 S. Ct. 2649 (1992); see also supra note 55.

\(^{210}\) 963 F.2d 1190 (9th Cir.), cert. granted, 113 S. Ct. 52 (1992). At issue in Zobrest is whether public school authorities would violate the Establishment Clause by providing the services of a sign-language interpreter for a deaf child attending a parochial school. The district court, as well as a divided panel of the Ninth Circuit, granted the school district's motion for summary judgment. Thus, Zobrest provides the Court with yet another opportunity to either clarify its Establishment Clause jurisprudence or abandon the Lemon test entirely.


more than a modification in the focus of the primary-effect symbolic-union prong of the Lemon test.

The second of these approaches was presented by Justice Kennedy in two opinions as well, in County of Allegheny v. ACLU213 and Lee v. Weisman.214 For Justice Kennedy, the critical element of analysis is whether government has used its power to “coerce” or “proselytize” religious faith. However, while it represents movement in the direction of the original understanding of the Establishment Clause, it falls short of complete adoption of that approach.

A. O'Connor's Endorsement Test

Justice O'Connor's approach attempts to re-examine and refine the Lemon test in an effort to make it more useful and capable of consistent application. It fundamentally relies upon the notion that Establishment Clause challenges should be analyzed with respect to whether an “objective observer” would “perceive” government action or legislation to “send[d] a message to nonadherents that they are outsiders, not full members of the political community.”215 Thus, under this approach, Lemon's modified inquiry requires the courts to determine “whether government's purpose was to endorse religion and whether the statute actually conveys a message of endorsement.”216

Few government attempts at accommodation of religion which have been upheld by the Court and which have become part of our tradition, however, could withstand challenge under an honest application of this standard. As Justice Kennedy notes in his separate opinion in Allegheny, even references to God in such things as the Pledge of Allegiance, in legislative prayers which begin each session of Congress, and in the motto which adorns our currency, all would surely result in making the “reasonable” atheist feel less than a full member of the community.217 Yet such government acknowledgement and accommodation of religion does not represent an unconstitutional establishment of religion.218 Thus, this

214 112 S. Ct. 2649 (1992) (striking down the recitation of invocations or benedictions at public school graduation ceremonies).
215 Wallace, 472 U.S. at 69, 76.
216 Id. at 69; see also note 112.
217 Allegheny, 492 U.S. at 671-73.
218 There are numerous other examples of government acknowledgement and accom-
standard suffers from many of the same infirmities as the Lemon test. It too results not in government neutrality towards religion, but rather in inconsistent line drawing which at times merely conceals what is in fact hostility towards religion.\footnote{As applied to the facts of Grumet, no message of endorsement of the Satmar Hasidim's religion could rationally be perceived by a truly objective observer. Rather, what such an observer would in fact notice, is that the District facilities are wholly secular in appearance, provide only secular instruction in a wholly secular environment, and comply fully with all state laws and regulations. \textit{See supra} notes 35-48. An objective observer would also note the uniquely secular presence which the District represents within the culture and lifestyle of the Village: where every building is decorated with religious symbols, contact between men and women is severely restricted, Yiddish is the primary language spoken, and education focuses upon study of the Torah. Thus, an objective observer would not fairly regard Chapter 748 as endorsing Hasidic religious principles. Rather, they would understand that Chapter 748 merely represents a secular attempt at accommodating the unique cultural and religious needs of the Village residents. For as Justice O'Connor noted in her concurrence in Wallace, "[t]he endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy." \textit{Wallace}, 472 U.S. at 70.}

\textbf{B. Kennedy's Coercion Test}

Justice Kennedy's approach gives only nominal recognition to Lemon, and instead focuses on essentially two limiting principles gleaned from the Court's prior case law, that
government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so.\footnote{Allegheny, 492 U.S. at 659 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).}

However, rather than relying squarely upon the concept of coercion as understood by the Framers,\footnote{As Justice Scalia notes in his dissent in \textit{Lee}, "[t]he coercion that was the hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." \textit{Lee} v. Weisman, 112 S. Ct. 2649, 2683 (1992).} Justice Kennedy expanded the concept in \textit{Lee} to include so called "psychological coercion," a
form of coercion which is backed by neither the force of law nor the threat of penalty.

While Justice Kennedy practically ignores *Lemon*, illustrating its essentially terminal existence, the psychological-coercion test also falls short of representing a wholly workable standard for the future. As Justice Scalia noted in dissent in *Lee*, this standard “suffers the double disability of having no roots whatsoever in our people’s historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.” Thus, it too requires the courts to engage in haphazard line drawing, which would likely result in many of the same shortcomings as the *Lemon* test which it is designed to replace. However, it does represent movement in the right direction, namely towards a workable approach which incorporates the standard of coercion which motivated the Framers to adopt the Establishment Clause in the first place. It remains to be seen which approach will ultimately be accepted by a majority of the Court. Cases such as *Zobrest* and *Grumet* will likely provide insight to the answer.

VI. CONCLUSION

If current or future standards require the invalidation of legislation such as Chapter 748, which meets an entirely secular need, then the crisis in Establishment Clause jurisprudence is much worse than it appears. *Grumet* convincingly illustrates why the murky neutrality tests should be abandoned. Not only do they produce inconsistent results, but their purported neutrality towards religion in the public square, in reality, leads only to the exclusion of religiously affiliated people from full participation in public programs. Thus, their concept of “neutrality,” rather than being truly neutral, instead merely results in masked hostility toward religion.

The position of religion in society is an important one, a position buttressed by the diversity of faiths we profess to admire. To disallow sorely needed remedial assistance to a group of handi-

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222 Id. at 2685.
223 As applied to the facts in *Grumet*, there is little if any problem surrounding Chapter 748. The District no more coerces support or participation in religion or its exercise than does any other public school district within the country. Merely because the influence of any particular religion may be significant over a majority of the pupils attending a non-sectarian and public school, created for specifically defined secular purposes and with clearly articulated secular powers, is surely not enough to represent a government attempt at coercion of religious participation or exercise.
capped children merely because they choose to live a life of deep religious conviction is to abandon our celebration of such diversity. Only by accommodating the provision of public benefits to their unique cultural and religious needs do we thereby demonstrate respect for the religious nature of our people and follow the best of our traditions. We must never lose sight of the fact that the religion clauses were not written as a protection from religion, but rather as a protection for religion. The New York Court of Appeals should take this opportunity to reaffirm these fundamental principles upon which the Establishment Clause is based and reverse the decision of the appellate division.

Craig L. Olivo