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Beyond a Sour Lemon: A Look at *Grumet v. Board of Education of the Kiryas Joel Village School District*

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I. INTRODUCTION

The Founding Fathers sought to guard against the publicly-aided institution of one or more religions. They guaranteed religious freedom through the Constitution, mandating that "Congress shall make no law respecting an establishment of religion."[1] With this safeguard, called the Establishment Clause, American citizens would be free from compulsion to join a particular religion or to support a religious entity to which they did not belong through paying taxes. The United States Supreme Court has, in recent years, construed the Establishment Clause to preclude the noncoercive religious accommodation which both the Founding Fathers and prior Courts have favored,[2] contorting the First Amendment's guarantee of religious freedom. By interpreting the Establishment Clause in a narrow fashion, the judiciary has failed to accommodate the religious needs of our country's diverse citizenry. The three-part test codified in the landmark case of *Lemon v. Kurtzman*[3] has given rise to great difficulty in adjudicating Establishment Clause cases, thus warping the First Amendment's guarantee.[4]

Recently, the New York Court of Appeals applied the *Lemon*[5] test in *Grumet v. Board of Education of the Kiryas Joel*

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The author would like to thank Ronald D. Maines, a very skillful practitioner, and Professors Frederick M. Gedicks and David A. Thomas for both their inspiration and insight. The author takes full responsibility for the opinions (and errors) herein.

1 U.S. CONST. amend. I.

2 *See* discussion *infra* part IV.

3 403 U.S. 602 (1971).

4 *See* discussion *infra* part III.

5 *See* discussion *infra* part II.

Village School District[6]. In so doing, it perpetuated the current problems involved in Establishment jurisprudence.[7] In a word, *Lemon* and *Grumet* do not square with the original rationales for enacting the Establishment Clause.

In general, this Note analyzes Establishment jurisprudence and the Supreme Court's shortcomings with respect to noncoercive religious accommodation. It will explore the inadequacies of the *Lemon* test in adjudicating Establishment cases and will suggest an alternative formulation based upon noncoercion. More specifically, this Note examines the constitutionality of the Kiryas Joel Village School District, a secular public school district which is presently entirely composed of children of one religious background. Part II of this Note examines the reasoning in *Grumet*, and Part III shows why the New York high court's reliance on the *Lemon* test is problematic. Part IV affirms the coercion element as a valid test that fulfills both current societal needs and originalist rationales for the Establishment Clause. Finally, Part V explores the need for religious accommodation without coercion, discussing *Grumet* in light of the Establishment Clause's adjudicative history. This Note concludes that the Court should take the opportunity this term, when deciding *Grumet*,[8] to reexamine the *Lemon* test and reformulate its Establishment jurisprudence by espousing an accommodationist/noncoercion paradigm. If not, the Religion Clauses, particularly the Establishment Clause, cannot provide the constitutional guarantees the Founding Fathers intended.

II. THE SUPPOSED EFFECT OF AN ESTABLISHMENT IN *GRUMET*

A. The Facts

The Village of Kiryas Joel is a religious enclave. Located in the town of Monroe, Orange County, New York, its inhabitants are almost entirely members of the Satmarer Hasidim, a sect of the Jewish faith.[9] The principal language of the village is Yiddish.[10] The Satmarer, in addition to separation from an outside community, practice separation between sects and follow a

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6 618 N.E.2d 94 (N.Y. 1993), *cert. granted*, 114 S. Ct. 544 (1993).
7 *See* discussion *infra* part V.
8 618 N.E.2d 94 (N.Y. 1993), *cert. granted*, 114 S. Ct. 544 (1993).
9 *Grumet*, 618 N.E.2d at 96-97.
10 *Id.* at 96.

male and female dress code.[11] Radio, vision, and publications in English are not widely used.[12]

Most children in the Kiryas Joel Village receive their education in private religious schools.[13] Prior to the United States Supreme Court decision in *Aguilar v. Felton*,[14] special education personnel from the Monroe-Woodbury Central School District taught the handicapped Satmarer Hasidic children in an annex to one of the village's religious schools.[15] In 1985, the *Aguilar* Court held that this arrangement was a violation of the Establishment Clause. The *Aguilar* Court held Title I of the Elementary and Secondary Education Act of 1965 violated the Establishment Clause because the Act authorized federally-funded salaries for public employees who taught in parochial schools.[16] The Court stated: "[w]e have long recognized that underlying the Establishment Clause is the 'objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other.'"[17] In response to *Aguilar*, the Monroe-Woodbury Central School District discontinued its teaching arrangement for the handicapped children at the private school annex in Kiryas Joel.[18]

"For some time thereafter, some of the handicapped Satmarer Hasidic children attended special education classes held at the Monroe-Woodbury public schools."[19] But litigation ensued because the Satmarer Hasidim disagreed with the idea of sending their handicapped children to school outside their religious enclave. In *Board of Education v. Wieder*,[20] the New York Court of Appeals noted that, "allegedly because of the 'panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs,' the parents stopped sending them to programs offered at the public schools."[21] The *Wieder* court held that Education Law § 3602-c(2),[22] authorizing special

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11 *Id.*
12 *Id.*
13 *Id.*
14 473 U.S. 402 (1985).
15 *Grumet*, 618 N.E.2d at 96-97.
16 *Aguilar*, 473 U.S. at 413-14.
17 *Id.* at 413 (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).
18 *Grumet*, 618 N.E.2d at 97.
19 *Id.*
20 527 N.E.2d 767, 770 (N.Y. 1988).
21 *Id.*, *noted in Grumet*, 618 N.E.2d at 97.
22 "Education Law § 3602-c(2) provides, in part: 'Boards of education of all

education services to private school handicapped children, allowed boards of education to furnish those services in regular public school classes or to provide otherwise.[23]

As a result, the New York legislature enacted Chapter 748 of the Laws of 1989, creating the Kiryas Joel Village School District, a new union free school district.[24] The district was coterminous with the boundaries of the incorporated Satmarer Hasidic village and was created within Monroe-Woodbury Central School District boundaries.[25] Chapter 748 also instituted a school board whose five to nine members would serve a period not exceeding five years and would be elected by the voters of Kiryas Joel.[26] Chapter 748 sought to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect.[27]

Louis Grumet, Executive Director of the New York State School Boards Association, and Albert Hawk, President of the New York State School Boards Association, brought suit against the New York State Education Department and several state officials. Plaintiffs, both as citizen taxpayers and in their state educational capacities, argued that Chapter 748 violated the First Amendment's Establishment Clause.[28] Both the Board of Education of the Monroe-Woodbury Central School District and the Board of Education of the Kiryas Joel Village School District intervened as defendants.[29]

The New York Court of Appeals upheld the decision of the Supreme Court Appellate Division,[30] holding that Chapter 748 could not withstand constitutional scrutiny as it violated the Supreme Court's three-part test given in *Lemon v. Kurtzman*:

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school districts of the state shall furnish services to pupils who are residents of this state and who attend non-public schools located in such school districts, upon the written request of the parent, guardian or persons legally having custody of any such pupil.' Section 3602-c(1)(a) defines 'services' as 'instruction in the areas of gifted pupils, occupational and vocational education and education for students with handicapping conditions.'" *Grumet*, 618 N.E.2d at 97 n.3.

23 *Wieder*, 527 N.E.2d at 772, *noted in Grumet*, 618 N.E.2d at 97.

24 *Grumet*, 618 N.E.2d at 97.

25 *Id.*

26 *Id.*

27 *Id.* at 97 (citing Governor's Approval Mem., 1989 N.Y. LEGIS. ANN., at 324).

28 *Id.*

29 *Id.*

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

"[f]irst, 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.'"[31]

B. The New York Court of Appeals' Reasoning in Grumet

The New York Court of Appeals specifically addressed *Lemon*'s "effects" prong in its analysis.[32] The court also cited *Grand Rapids School District v. Ball*,[33] affirming that government promotes religion:

> when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.[34]

The court noted that, in considering whether a statute has the primary effect of advancing or inhibiting religion, the consideration is "whether the symbolic union of church and state effected by the challenged governmental action 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."[35] In sum, context will determine whether a particular governmental action will likely be perceived as a religious endorsement.[36] The state's high court reasoned that "[g]overnmental action 'endorses' religion if it favors, prefers, or promotes it."[37]

The New York Court of Appeals stated that "only Hasidic children will attend the public schools in the newly established

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31 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted), *noted in Grumet*, 618 N.E.2d at 98. *See also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

32 *Grumet*, 618 N.E.2d at 99.

33 473 U.S. 373, 389 (1985).

34 *Id.* at 389 (citations omitted).

35 *Id.* at 390. Despite this oft-quoted language, the Court has never adopted Justice O'Connor's endorsement test. *See* discussion *infra* part V.B.

36 *See* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 595-97 (1989).

37 *Grumet*, 618 N.E.2d at 99. *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987); Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985); Lynch v. Donnelly, 465 U.S. 668, 691 (1984).

school district, and only members of the Hasidic sect will likely serve on the school board."[38] As a result, the court concluded that:

> this symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District under Chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices.[39]

The majority[40] countered the dissent's argument[41] that Chapter 748 was analogous to the recent Supreme Court decision in *Zobrest v. Catalina Foothills School District*.[42] In *Zobrest*, a sign language interpreter was to be assigned to a handicapped student attending a religious high school; the Court held this to be a neutral benefit.[43] The *Grumet* court held that a school district coterminous with the boundaries of a religious community could not be confused with the design of "neutral" governmental benefits found in *Zobrest*. By creating the school district in Kiryas Joel, the government is not offering "a neutral service . . . as part of a general program that 'is in no way skewed towards religion.'"[44]

The court rejected the dissent's contention[45] that Chapter 748, like the provision of services construed in *Wolman v. Walter*,[46] gave rise to a "unit on a neutral site" serving "sectarian pupils."[47] The *Grumet* court held that Chapter 748 did not have the primary effect of providing services to handicapped children, because it yields:

> to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate

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38 *Grumet*, 618 N.E.2d at 100.

39 *Id.*

40 *Id.*

41 *Id.* at 116 (Bellacosa, J., dissenting). *See* discussion *infra* part V.C.

42 113 S. Ct. 2462 (1993).

43 *Id.* at 2463.

44 *Id.* at 2467, *noted in Grumet*, 618 N.E.2d at 100-01.

45 *Grumet*, 618 N.E.2d at 116 (Bellacosa, J., dissenting). *See* discussion *infra* part V.B.

46 433 U.S. 229 (1977).

47 *Id.* at 247, *noted in Grumet*, 618 N.E.2d at 101.

> the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion.[48]

The majority concluded that its decision did not "penalize and encumber religious uniqueness" as the dissenting opinion argued.[49] In closing, the court of appeals reiterated: "[s]pecial services are made available to the Satmarer student within the Monroe-Woodbury School District. Our decision does not impose any additional burdens on the students within Kiryas Joel; it simply determines that the Legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation."[50]

III. *LEMON*'S INFIRMITY

The United States Supreme Court recently granted certiorari in *Grumet*.[51] With this case, the Court should reexamine the test set forth in *Lemon v. Kurtzman*.[52] Despite three decades of use, the Court must reconsider the *Lemon* test because of the disparate results it has engendered,[53] the inconsistencies of its application,[54] and its unpopularity among a majority of current Justices.[55]

The Establishment jurisprudential spectrum includes issues such as legislative prayer[56] and tuition subsidies to parents of parochial school children.[57] The spectrum also includes the more arduous church-state issues—graduation prayer,[58] prayer in schools,[59] and display of religious material in public

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48 *Grumet*, 618 N.E.2d at 101.

49 *Id.* at 118 (Bellacosa, J., dissenting). *See* discussion *infra* part V.

50 *Id.* at 101.

51 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 618 N.E.2d 94 (N.Y. 1993), *cert. granted*, 114 S. Ct. 544 (1993).

52 403 U.S. 602 (1971).

53 *See* discussion *infra* part III.A.

54 *See* discussion *infra* part III.B.

55 *See* discussion *infra* part III.C.

56 Marsh v. Chambers, 463 U.S. 783 (1983) (declaring constitutional the historical use of prayer to open legislative sessions).

57 Mueller v. Allen, 463 U.S. 388 (1983) (granting tax deductions to parents of private- or public-school children for tuition).

58 Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding unconstitutional clergy-offered prayers at high school graduation).

59 Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating an Alabama statute authorizing voluntary prayer or meditation in schools). *See also* Abington Sch. Dist.

fora.[60] If violative of the Constitution, creation of the Kiryas Joel Village School District could be seen as one of the more egregious Establishment Clause infractions in light of *Lemon*. But, rather than adequately solving these issues, *Lemon* has created several problems.

A. *Contradictory Outcomes Under* Lemon

Numerous cases decided under the *Lemon* test have reached disparate results, an incongruence which lacks a reasonable explanation. In cases involving public aid, the Court has declared several forms of aid unconstitutional, but has also upheld other forms of aid as constitutional and not violative of the Establishment Clause. The Court has invalidated a reimbursement to nonpublic schools for textbooks, instructional materials, and salaries,[61] but it has validated a reimbursement to non-public schools for costs associated with administering and maintaining state-mandated tests and records.[62] The Court has struck down a statute providing for equipment and instructional materials such as laboratory equipment and maps to (and remedial instruction by public school employees in) non-public schools,[63] while, on the other hand, it has upheld a provision of textbooks of secular subjects to non-public schools.[64] Similarly, the cases involving the crèche, the menorah, and other religious symbols in public fora have also been inconsistent.[65]

B. *The Inconsistency of* Lemon's *Application*

Chief Justice Burger acknowledged the extensive use of *Lemon* but argued that the Court has not strictly adhered to or always used *Lemon* in Establishment analysis:

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v. Schempp, 374 U.S. 203 (1963) (declaring unconstitutional a state law requiring daily Bible reading in public school).

60 Lynch v. Donnelly, 465 U.S. 668 (1984). *See also* Stone v. Graham, 449 U.S. 39 (1980) (invalidating a Kentucky statute that required public schools to display a copy of the Ten Commandments).

61 Lemon v. Kurtzman, 403 U.S. 602, 602-03 (1971).

62 Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

63 Meek v. Pittenger, 421 U.S. 349 (1975).

64 Board of Educ. v. Allen, 392 U.S. 236 (1968).

65 *See* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (disallowing a crèche display on courthouse steps while permitting public display of a menorah next to a Christmas tree); Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing city to include the crèche in the city's annual Christmas display).

> [W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. In two cases, the Court did not even apply the *Lemon* "test." We did not, for example, consider that analysis relevant in *Marsh v. Chambers*. Nor did we find *Lemon* useful in *Larson v. Valente*, where there was substantial evidence of overt discrimination against a particular church.[66]

The Court has also referred to *Lemon*'s three prongs as "no more than helpful signposts."[67]

Nevertheless, Justice White and the majority held in *Lamb's Chapel v. Center Moriches Union Free School District* that *Lemon* controls Establishment adjudication.[68] However, the Court decided another Establishment Clause case only eleven days after its decision in *Lamb's Chapel*, without even mentioning the *Lemon* test.[69] The Court's inconsistent application of the *Lemon* test is indeed perplexing.

C. *Current Justices' Dislike of* Lemon

Five of the currently sitting Justices of the Court have voiced their dissatisfaction with *Lemon*, namely Justices Scalia,[70] Thomas,[71] Kennedy,[72] O'Connor,[73] and Chief Justice Rehnquist.[74] Though he was recently replaced on the

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66 *Lynch*, 465 U.S. at 679 (citations omitted). *See* Marsh v. Chambers, 463 U.S. 783 (1983); Larson v. Valente, 456 U.S. 228 (1982); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Tilton v. Richardson, 403 U.S. 672, 677-78 (1971).

67 Hunt v. McNair, 413 U.S. 734, 741 (1973).

68 113 S. Ct. 2141, 2148 n.7 (1993).

69 Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993). *See also* Lee v. Weisman, 112 S. Ct. 2649 (1992) (refraining to invoke the *Lemon* test when considering clergy-offered prayers at high school graduation).

70 *See, e.g.*, *Lamb's Chapel*, 113 S. Ct. at 2149-50 (Scalia, J., concurring in the judgment); *Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation" of *Lemon*).

71 *See, e.g.*, *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., joined by Thomas, J., concurring in the judgment); *Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting).

72 *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 656 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order.").

73 *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (voicing "doubts about the entanglement test").

74 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dis-

Court, Justice White has similarly expressed his discontent with *Lemon*.[75]

Justice Scalia has announced his disquiet for "the strange Establishment Clause geometry of crooked lines and wavering shapes [*Lemon*'s] intermittent use has produced."[76] He argues that the Court has used *Lemon* to further (or inhibit) certain practices with which it agrees (or disagrees), holding that "[w]hen we wish to strike down a practice it forbids, we invoke it," but that "when we wish to uphold a practice it forbids, we ignore [*Lemon*] entirely."[77]

In sum, the rigidity of *Lemon*'s doctrinal analysis and its inconsistent application have created great difficulty for the Court in its Establishment jurisprudence. In recent years, the Court has failed to enhance religious accommodation despite originalist notions given for the First Amendment's passage.

IV. COERCION, THE "LOST ELEMENT," RECONSIDERED

The *Grumet* court's application of *Lemon* is problematic because *Lemon* marks a departure from originalist rationales for the Establishment Clause.

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senting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results.").

75 *See, e.g.*, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Wallace*, 472 U.S. at 90-91 (White, J., dissenting); Widmar v. Vincent, 454 U.S. 263, 282 (1981) (White, J., dissenting); New York v. Cathedral Academy, 434 U.S. 125, 134-35 (1977) (White, J., dissenting); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. The threefold test of *Lemon I* imposes unnecessary . . . [and] superfluous tests for establishing [a First Amendment violation]."); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

76 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct 2141, 2150 (1993) (Scalia, J., concurring). Justice Scalia here points to the "long list of constitutional scholars who have criticized *Lemon*." *Id.* (noting ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (paraphrasing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); Michael W. McConnell, *Accommodation of Religion*, 1985 S. CT. REV. 1).

77 *Lamb's Chapel*, 113 S. Ct. at 2150 (citations omitted).

A. The Court's Unjustified Departure from the Coercion Element

The Court's current Establishment jurisprudence has evolved most significantly within the past thirty years. In the landmark decision of *Engel v. Vitale*,[78] the Court initiated the formulation of its contemporary paradigm, holding that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[79] *Engel*'s holding was without precedent.

Prior to *Engel*, the Court had consistently considered coercion a fundamental element of Establishment jurisprudence. In *Cantwell v. Connecticut*[80]the Court characterized the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship."[81] Similarly, the coercion element was a central factor in scrutinizing public school release-time programs and Sunday closing laws.[82] Despite these precedents, Michael McConnell notes that *Engel* introduced the legal notion "that the establishment clause does not involve an element of coercion. The proposition has been passed down, with an ever-lengthening string of citations, to be applied in cases in which so-called establishments can be found by courts even though nobody's religious liberty has been infringed in any way."[83] This departure from the coercion element clearly does not square with earlier precedents interpreting the Establishment Clause.

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78 370 U.S. 421 (1962).

79 *Id.* at 430, *noted in* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934 (1986). Others have agreed with McConnell's interpretation of the originalist noncoercion argument. *See, e.g.*, Robert L. Cord, *Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation*, 10 HARV. J.L. & PUB. POL'Y 47 (1987); Rodney K. Smith, *Establishment Clause Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463 (1990). Nonetheless, McConnell is not without his critics. *See, e.g.*, Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991).

80 310 U.S. 296 (1940).

81 *Id.* at 303.

82 Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

83 McConnell, *supra* note 79, at 936.

B. The Coercion Element's Essential Nature in Establishment Jurisprudence

Three decades ago, former Justice Brennan rightly delineated Establishment (and First Amendment) jurisprudence: "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[84] An examination of the Framer's intent reveals that the First Amendment sought to protect against governmental coercion in religious matters.

A primary drafter and supporter, James Madison clarified the wording of the First Amendment in the debates in the First Congress; he apprehended the meaning of the words to be, that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[85] Arguing the proposed amendment was not intended to inhibit religion, Madison stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."[86]

Madison, in his well-known *Memorial and Remonstrance Against Religious Assessments*, holds that "religion 'can be directed only by reason and conviction, not by force or violence,'" and that "'compulsive support' of religion is 'unnecessary and unwarrantable.'"[87] Thus, rather than only an element, "[compulsion] is the essence of an establishment."[88]

McConnell notes that the Founding Fathers formulated the religion clauses with the idea of further safeguarding religious practice from coercion while simultaneously allowing noncoercive religious accommodations:

> Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for

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84 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

85 1 Annals of Congress 730 (J. Gales ed. 1934) (Aug. 15, 1789).

86 *Id.* at 731.

87 McConnell, *supra* note 79, at 937-38 (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶¶ 1, 3 (circa June 29, 1785)).

88 *Id.* at 937.

> religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on. These actions, so difficult to reconcile with modern theories of the establishment clause, are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed.[89]

Thus, history allows the accommodation—not establishment—of religion in the absence of compulsion. Justice Brennan concludes: "nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs."[90]

In 1970, the *Walz* Court acknowledged the originalist rationale in a case decided three decades earlier: "In *Everson* [*v. Board of Education*] the Court declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."[91] Similarly, Justice Scalia has reaffirmed originalist notions: "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."[92] Indeed, the Establishment Clause "was adopted to prohibit such an establishment of religion at the federal level."[93]

In applying the Establishment Clause to the states in *Everson v. Board of Education*,[94] the Court similarly prohibited state establishments of religion. It is this latter practice, respondents contend, that New York has unjustifiably accomplished by enacting Chapter 748.[95] But since provision for the Kiryas Joel Village School District is only a religious accommodation and lacks the element of coercion, respondents' argument appears *non sequitur*.

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89 *Id.* at 939.

90 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 295 (1963) (Brennan, J., concurring).

91 Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970). *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

92 Lee v. Weisman, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting).

93 *Id.*

94 330 U.S. 1 (1947).

95 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 618 N.E.2d 94, 96 (N.Y. 1993), *cert. granted*, 114 S. Ct. 544 (1993).

V. PROVISION FOR THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT IN HARMONY WITH THE ESTABLISHMENT CLAUSE

The New York Court of Appeals invalidated Chapter 748 in light of *Lemon*; however, *Grumet* was not a unanimous decision. In his dissenting opinion, Judge Bellacosa explicates several reasons why *Lemon*'s application is, first, misapplied,[96] and, second, leads to a result at odds with originalist Establishment rationales.[97] In addition, *Grumet* does not reconcile with other accommodationist cases.[98]

A. The Secular Purpose of Chapter 748

Judge Bellacosa reiterated the pains with which the school district has sought to abide by *Lemon*'s secular purpose prong. First, the school superintendent is not Hasidic. With twenty years of experience in special education, the superintendent is only concerned with giving handicapped children a secular education.[99] Second, with a wholly secular curriculum, it is invalid to argue that Chapter 748 has given rise to a religious school district. The school district is a secular one, measured by the curriculum taught and not by the characteristics of the school district's students. Establishment Clause infringements arise "from the nature of the institution, not from the nature of the pupils."[100]

Creation of the Kiryas Joel Village School District follows previous similar creations:

> No one disputes that the [New York] Legislature has the fundamental power to create a union free school district within the boundaries of a previously existing school district to facilitate the provision of public education to a particular group of students. Plaintiffs concede that approximately 20 such school districts have been created by acts of the Legislature.[101]

Plaintiffs challenge "what is otherwise an entirely secular act of public education administration effected by the other two

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96 *See* discussion *infra* part V.A-B.

97 *See* discussion *infra* part V.D.

98 *See* discussion *infra* part V.C.

99 *See Grumet*, 618 N.E.2d at 111-12 (Bellacosa, J., dissenting).

100 Wolman v. Walter, 433 U.S. 229, 248 (1977). *But see* discussion *supra* part II.B.

101 *Grumet*, 618 N.E.2d at 112 (Bellacosa, J., dissenting) (citations omitted).

branches of State government, on their sectarian interpretation of" Kiryas Joel Village's unique cultural characteristics.[102] Despite this, "no claim is made of any alleged restrictive covenants among the village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services."[103] Thus, plaintiffs fail in their contentions that the school district was created without precedent or that the school district is religious.

Plaintiffs assert that "because the municipality and school district share identical borders and frame an enclave currently populated only by Satmarer Hasidim, the very existence of the public school district by authorization of the Legislature and executive constitutes, on its face, an establishment of religion prohibited by the United States Constitution."[104] Judge Bellacosa concludes that "[t]he logical and inexorable extension of this canon would dictate the extinguishment of the Village itself for the identical infirmity."[105]

If, according to plaintiffs' contention, the school district is an establishment of religion, so, too, is the incorporation of the village itself. Neither supposed Establishment "violation" is more egregious than the other. Judge Bellacosa argues that both are benign: just as incorporation of the village cannot be considered an endorsement or establishment of religion, provision for a secular public school district—though coterminous with the village boundaries—cannot be considered an unconstitutional establishment.[106]

The secular purpose prong of *Lemon* is violated "only if the enactment was 'motivated *wholly* by [a religious] purpose.'"[107] But because the stated purpose of Chapter 748 was to allow "only handicapped pupils of the Village of Kiryas Joel to receive a publicly supported, secular special education to which they are entitled," the statute is not an infraction of *Lemon*'s secular purpose prong.[108] Were the school district to consolidate the

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102 *Id.* at 112-13 (Bellacosa, J.,dissenting).

103 *Id.* at 113 (Bellacosa, J., dissenting).

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (emphasis added)).

108 *Id.*

public and private/religious schools in the village or to develop a sectarian curriculum in the public schools, they would undeniably implicate the Establishment Clause.

The predicament of the Kiryas Joel Village School District and its history is a "controversy of virtually epic proportions."[109] Nevertheless, after the tumult subsides, only the students will suffer if the Court determines that Chapter 748 is indeed unconstitutional. The New York Court of Appeals' decision rests solely on *Lemon*'s "effects" prong.[110] But the accusation that Chapter 748 is an endorsement of the Satmarer Hasidim is without justification.

B. The "Effects" Prong's Inadequate Measure of a Religious Establishment

The "effects" prong has been frequently analyzed with respect to an "endorsement" of religion, though the Court's "unsettled jurisprudence in the area of possible government 'endorsement' of religion leaves this subbranch of the *Lemon* test somewhat suspect."[111] Justice O'Connor sought to give shape to the issue of endorsement: an "objective observer" would consider "the text, legislative history, and implementation of the statute" to determine whether an imprimatur of state approval of religion has occurred in the questioned action.[112]

Though members of the school board may mirror the religious and ethnic characteristics of the Kiryas Joel voters, such an occurrence is not an Establishment violation. Similar to the village of Kiryas Joel, other religious groups throughout this country may predominate politically in their respective communities: Catholics in Rhode Island, Protestants in the "Bible Belt" South, Mormons in Utah, or Jews in New York. These groups and others similarly situated find themselves politically influential though no one could legitimately contest their participation in the community and its political process.

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109 *Id.* at 110.

110 *Id.* at 99.

111 *Id.* at 114 (Bellacosa, J., dissenting) (noting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring) ("the phrase 'endorsing religion,' . . . cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence")).

112 Wallace v. Jaffree, 472 U.S. 38, 76 (1985).

Plaintiffs would have difficulty arguing that this represents a government approval of those particular predominant faiths or a disapproval of the minority faiths in those communities.[113] In sum, though the residents of Kiryas Joel (or any other one-faith-predominating community) will elect members of their faith to public office, this does not amount to a governmental endorsement of that particular religious faith.

Judge Bellacosa argued that observers who objected to Chapter 748 "perhaps suffered from a predisposed hostility to religion in the constitutional debate sense. Truly objective observers should be able to conscientiously accept this legislation as secular, neutral and benign within the reasonable doubt spectrum."[114]

Judge Bellacosa maintained that "no message of endorsement for Satmar theology or its particular separatist tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves" but that "the people of the State of New York, as a whole, gain a compelling benefit in the compromise solution achieved here."[115] Indeed, "[t]he incidental, 'attenuated' benefit to the minority Satmar viewpoint supports [New York's] rich pluralistic tradition and does not diminish, but rather enhances, the common good."[116]

Justice Scalia argues that "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate."[117] Such accommodation through respect does not equal an establishment of religion. "[The Court's] precedents plainly contemplate that on occasion some advancement of religion will result from governmental action."[118]

Justice Scalia has shown the problematic nature of the "endorsement" test: "[w]hat a strange notion, that a Constitu-

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113 *Cf.* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (where "endorsement" of one or more religions "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

114 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 618 N.E.2d 94, 115 (N.Y. 1993) (Bellacosa, J., dissenting) (citations omitted), *cert. granted*, 114 S. Ct. 544 (1993).

115 *Id.*

116 *Id.*

117 Lee v. Weisman, 112 S. Ct. 2649, 2682 (1992) (Scalia, J., dissenting). The majority in *Weisman* failed to agree with Justice Scalia's axiom. *Id.* at 2658.

118 Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

tion which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general."[119] Only by effectuating the purposes of both religion clauses can the two be harmonious. Indeed,

> those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good. It suffices to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the famous Northwest Territory Ordinance of 1789, Article III of which provides, "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged."[120]

Just as tolerance of religious speech (in an open forum) "does not confer any imprimatur of state approval on religious sects or practices,"[121] neither can Chapter 748 be construed as an official state sanction of Satmarer Hasidic religious practices.

C. Consistency in Accommodation

Justice Brennan stated that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion."[122] The provision of secular education for handicapped students in the Kiryas Joel Village School District thus does not amount to an Establishment infraction.

The Court has accommodated the particular idiosyncratic religious practices of other faiths. For example, fundamentalist Christians have the right to deny a pregnant, married teacher from teaching at their parochial school; their religion holds that a woman should remain home to nurture her preschool children.[123] The Court has upheld the right of the Mormon

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119 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2151 (Scalia, J., concurring in the judgment).

120 1 Stat. 52 (1789), *quoted in Lamb's Chapel*, 113 S. Ct. at 2151 (Scalia, J., concurring in the judgment) (emphasis added).

121 Widmar v. Vincent, 454 U.S. 263, 274 (1981).

122 Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting). *See also Widmar*, 454 U.S. at 263 (invalidating a university regulation that prohibited religious use of university buildings).

123 Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

Church to deny employment to someone who does not subscribe to particular important Mormon beliefs.[124] The Court has acknowledged the right of Amish parents to keep their children from attending public schools (beyond the eighth grade); the Amish strive to avoid worldly ideals such as competition and the pursuit of material wealth, mores their children may witness in public schools.[125] To remain neutral, the Court should also accommodate Satmarer Hasidic religious practices.

The Court ruled in *Zobrest* that providing a sign language interpreter for a deaf parochial student was not violative of the Establishment Clause since such a service was "neutral" and, at most, provided religion only an "attenuated" benefit.[126] Just as this sectarian-related aid was declared constitutional in *Zobrest*, Chapter 748 also falls within Establishment parameters; it even steers clear of governmental aid in a parochial setting. The measure does not fully accommodate the religious tenets of the Satmarer; quite the contrary, though it may provide for the "separationist" element, it represents a compromise of Satmar beliefs:

> the new public school district offers programs and services at odds with many basic precepts of Satmarer Hasidism. Secularism itself is antithetical to Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. . . . [While] English is the language of instruction within the school[,] Yiddish is the medium of communication within the village. In contrast to the method of instruction at the sectarian schools in the Village, male and female students at the public special education school are grouped together for teaching purposes at the special school; instructional materials are not based upon the sex of the student being taught; female employees are not prohibited from exercising authority over male employees; the physical appearance of the building is secular, including the significant absence of mezuzahs on the doorposts; and the dress of the employees is secular in appearance.[127]

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124 Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). For an exposition of religious group rights in light of *Amos* and *Dayton Christian Schools*, see Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

125 Wisconsin v. Yoder, 406 U.S. 205 (1972).

126 Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2463-67 (1993). *See* discussion *supra* part II.B.

127 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 618

With these compromises, the Satmarer Hasidim have shown their willingness to abide by the law. Governor Cuomo emphasized that "this new school district must take pains to avoid conduct that violates the separation of church and state" but that he believed "they will be true to their commitment."[128]

By ensuring the secular nature of the school for its handicapped children, it is true that the "democratically elected Board of Trustees of the Kiryas Joel Village School District has strained to create a nonsectarian educational environment which is faithful to the secular command of the statute."[129] Judge Bellacosa reaffirms that "this effort is indicative of the secular compromise the Hasidim community was willing to absorb to allow the special education needs of their children to be met within a public, neutral, nondenominational setting."[130]

Yet the "establishment of a union free school district geographically identical to an incorporated municipality . . . should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination."[131] To rule this an Establishment violation would abrogate the Free Exercise Clause; Judge Bellacosa affirms that invalidating the legislation at issue "deprives the citizens of Kiryas Joel of certain educational prerogatives in contravention of their fundamental right to self-governance. Their free exercise of religion is also inextricably implicated and compromised, simply because they have chosen to live and believe in a particular way together in an incorporated village."[132]

Because the "government must be neutral when it comes to competition between sects,"[133] denial of an accommodation here, contrasted with accommodation of the Amish, Mormons, fundamentalist Christians, and other religious groups, amounts to a non-neutral jurisprudence. Such a practice is itself unconstitutional.

N.E.2d 94, 115-17 (N.Y. 1993) (Bellacosa, J., dissenting), *cert. granted*, 114 S. Ct. 544 (1993).

128 Governor's Approval Mem., 1989 N.Y. LEGIS. ANN., at 325, *noted in Grumet*, 618 N.E.2d at 117 (Bellacosa, J., dissenting).

129 *Grumet*, 618 N.E.2d at 117 (Bellacosa, J., dissenting).

130 *Id.*

131 *Id.* at 117-18 (Bellacosa, J., dissenting).

132 *Id.* at 118 (Bellacosa, J., dissenting).

133 Zorach v. Clauson, 343 U.S. 306, 314 (1952).

D. The Lack of Coercion in Chapter 748

While Chapter 748 neither coerces nor influences religious belief, it does facilitate the exercise of the Satmarer Hasidic faith; this accommodation cannot be seen as an establishment of religion. McConnell reiterates the need to reexamine *Lemon*:

> Doctrinally, renewed attention to coercion suggests that the Court's three-part test for an establishment of religion should be modified. A rule that forbids government actions with the purpose or effect of advancing religion fails to distinguish between efforts to coerce and influence religious belief and action, on the one hand, and efforts to facilitate the exercise of one's chosen faith, on the other.[134]

Under an accommodationist paradigm that applies a noncoercion analysis, government in its ideological neutrality will neither advance nor inhibit religion, a result *Lemon* has failed to achieve.[135]

VI. CONCLUSION

The three-prong *Lemon* test must be reconsidered in light of several factors: the contradictory outcomes it engenders,[136] the inconsistency of its application,[137] most of the current Justices' dislike of *Lemon*,[138] and its departure from a noncoercion paradigm.[139]

Coercion was the element against which the Founding Fathers safeguarded America; they viewed the religion clauses as a means of enhancing the free exercise of religious beliefs while protecting against an unconstitutional coercive establishment of religion. The Court's departure from coercion analysis was without justification. In the absence of compulsion, government accommodation of religious beliefs is paramount to a flourishing people. The *Lemon* test is thus inadequate as it does not adequately measure a coercive element.

Chapter 748 of the Laws of 1989 is not violative of the Establishment Clause; the Kiryas Joel Village School District,

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134 McConnell, *supra* note 79, at 940. *But see* Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (holding even "subtle and indirect" coercion unconstitutional).

135 *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

136 *See* discussion *supra* part III.A.

137 *See* discussion *supra* part III.B.

138 *See* discussion *supra* part III.C.

139 *See* discussion *supra* part IV.A-B.

though an accommodation, cannot be considered an establishment of the Satmarer Hasidic religion. To disallow the creation of a school district that provides a secular education to Kiryas Joel's handicapped students would implicate the Free Exercise Clause. *Lemon*'s "effects" prong insufficiently appraises establishments of religion. A failure by the Court to find in favor of the school district would further compound an already inconsistent Establishment jurisprudence. Because Chapter 748 does not involve an element of coercion, provision for the school district is constitutional. Indeed, a reformulation of Establishment jurisprudence that includes the coercion element in its paradigm satisfies both originalist notions and society's current needs.

The Court's previous recognition of the need for neutrality, noncoercion, and accommodation warrants reconsideration. In conclusion, "[w]hen the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[140] The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause."[141]

Judge Bellacosa leaves a reminder for the Court to consider in its adjudication of *Grumet*: "A culturally diverse Nation, which proclaims itself under a banner, *E Pluribus Unum*, . . . [cannot] penalize and encumber religious uniqueness" unless it "strikes the '*E Pluribus*' and leaves only the '*Unum*.'"[142]

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

141 Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (citations omitted).

142 Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 618 N.E.2d 94, 118 (N.Y. 1993) (Bellacosa, J., dissenting), *cert. granted*, 114 S. Ct. 544 (1993).