Casenotes

Board of Education of Kiryas Joel Village School District v. Grumet: A Missed Opportunity for the Supreme Court to Clarify Establishment Clause Analysis

The village of Kiryas Joel in Orange County, New York is populated entirely by practitioners of Satmar Hasidim, a strict form of Judaism.[1] The Satmar Hasidics, incorporated the village in 1977, and the boundaries included only the 320 acres owned and inhabited by Satmar Hasidics.[2] Two private, gender-segregated religious schools provided the education for most of the village's children.[3] However, these schools were not able to offer special services to handicapped children[4] who are entitled under state and federal law to special education services even

1. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2484 (1994). The Satmar Hasidic believe they are "required by divine command to live as their Jewish ancestors did centuries ago." Petitioner's Reply Brief at 2, 114 S. Ct. 2481. Their practices include: interpreting the Torah strictly, segregating the sexes outside the home, speaking Yiddish as their primary language, foregoing television and radio, and dressing in a distinctly religious manner. 114 S. Ct. at 2485.

2. *Id.* at 2485.

3. *Id.*

4. *Id.* These handicapped children included the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders.

when enrolled in private schools.[5] Thus, in 1984 the Monroe-Woodbury Central School District began providing special services for the handicapped children of Kiryas Joel at an annex to one of the private, religious schools.[6] Monroe-Woodbury ended this arrangement one year later, however, in response to two United States Supreme Court decisions.[7] The handicapped children were thus forced to attend public schools outside the village to receive special education services. Parents of most of these children withdrew them from the public schools because of the "panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."[8] By 1989, only one child from Kiryas Joel was attending public schools; the other handicapped children either received privately funded services or went without.[9] In the wake of this problem, the New York Legislature passed a statute creating a separate school district for the village of Kiryas Joel.[10] The Kiryas Joel Village School District operated only a special education program for handicapped children. The other children stayed in their respective parochial schools, relying on the new school district for transportation, remedial education, and health and welfare services.[11] In response to the enactment of Chapter 748, Louis Grumet and others brought an action against the State Education Department and various state officials challenging the statute as an unconstitutional establishment of religion.[12] The State Supreme Court for Albany County allowed the Kiryas Joel Village School District and Monroe-Woodbury to intervene as party defendants and accepted the

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5. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1988 & Supp. IV); N.Y. EDUC. LAW art. 89 (McKinney 1981 & Supp. 1994).

6. *Id.*

7. *See* Aguilar v. Felton, 473 U.S. 402 (1985), *and* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (companion cases holding that federal funds used to pay salaries of public school teachers who provided remedial services to parochial schools violated the Establishment Clause).

8. Board of Educ. of Kiryas Joel Village Sch. Dist., 114 S. Ct. at 2485 (citing Board of Educ. of Monroe-Woodbury Central Sch. Dist. v. Wieder, 72 N.Y.2d 174, 180-81, 527 N.E.2d 767, 770 (1988)).

9. 114 S. Ct. at 2486.

10. 1989 N.Y. LAWS ch. 748. The statute provides in part: "The territory of the village of Kiryas Joel . . . shall be and hereby is constituted a separate 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." *Id.* at § 1.

11. 114 S. Ct. at 2486. In fact, the school district served several of the neighboring districts' handicapped Hasidic children as well. In all, the new district served just over forty full-time students, and two or three times that many parochial school students on a part-time basis. *Id.*

12. *Id.*

parties' stipulation discontinuing the action against the original state defendants.[13] On summary judgment, the trial court ruled for the plaintiffs, finding that the statute failed all three prongs of the *Lemon* Test,[14] and was thus unconstitutional.[15] A divided New York Appellate Division affirmed on the ground that the statute was unconstitutional because it had the primary effect of advancing religion.[16] The state court of appeals affirmed.[17] The Supreme Court of the United States granted certiorari,[18] and affirmed the lower court, holding that because the statute was "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion", it violated the prohibition on establishment.[19]

The First Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[20] In *Reynolds v. United States*,[21] the Supreme Court interpreted the Establishment Clause as creating "a wall of separation between Church and State."[22] Likewise, in *Everson v. Board of Education of Ewing Township*[23] the Supreme Court reaffirmed the idea that the Establishment Clause built a "wall of separation." However, this rigid "wall of separation" standard proved to be an unworkable test in light of the inevitable relationship between government and religion.[24] Thus, in *Lemon v. Kurtzman*[25] the Supreme Court finally recognized that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[26] In *Lemon*, the

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13. *Id.* at 2487.
14. Lemon v. Kurtzman, 403 U.S. 602 (1971).
15. 114 S. Ct. at 2487.
16. 187 A.D.2d 16, 592 N.Y.S.2d 123 (1992).
17. 81 N.Y.2d 518, 618 N.E.2d 94 (1993).
18. Board of the Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 544 (1993).
19. *Id.* at 2484.
20. U.S. CONST. amend. I, amend. XIV.
21. 98 U.S. 145 (1878).
22. *Id.* at 164. Justice Waite plucked these words from a letter by Thomas Jefferson.
23. 330 U.S. 1 (1947). The Court also stressed the principle that the Establishment Clause forbids not only state practices that "aid one religion . . . or prefer one religion over another," but also those that "aid all religions." *Id.* at 15.
24. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding that a New York statute exempting from real property tax realty owned by religious associations and used exclusively for religious purposes did not violate the Establishment Clause).
25. 403 U.S. 602 (1971).
26. *Id.* at 614.

Court instituted a three-pronged test that vowed to add clarity and stability to Establishment Clause issues. Under the *Lemon* test, a governmental action must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive government entanglement with religion.[27] Rather than providing clarity and stability to Establishment Clause analysis, the *Lemon* test has added only confusion and uncertainty in its use.[28] For example, in *Larson v. Valente*[29] the Supreme Court held that a Minnesota statute requiring registration and disclosure only of those religious organizations that solicited more than fifty percent of their funds from nonmembers violated the Establishment Clause.[30] The Court did not rely on the *Lemon* test to invalidate the statute, but rather applied strict scrutiny and the principle that government cannot prefer one religious organization over another.[31] Alternatively, the Supreme Court in *Larkin v. Grendel's Den, Inc.*[32] relied exclusively on the *Lemon* test to hold that a Massachusetts statute, which vested in the governing bodies of churches the power to effectively veto applications for liquor licenses within a 500-foot radius of churches, violated the Establishment Clause.[33] Thus, the Court implicates the *Lemon* test only in some situations. In others, the Court will effectively ignore *Lemon*, and harken back to the principles of separation of church and state, and strict government neutrality towards religion.[34] A comparison of two recent cases, *Aguilar v. Felton*[35] and *Lee v. Weisman*,[36] provides a model illustration of this trend. In *Aguilar*, the Court's harsh adherence to the *Lemon* test struck down a New York City program that used federal funds to pay salaries of public school teachers who provided much needed remedial services to parochial schools.[37] By contrast, the

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27. *Id.* at 612-13.

28. *See* Stuart W. Bowen, Jr., *Is Lemon A Lemon? Crosscurrents In Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129 (1990).

29. 456 U.S. 228 (1982).

30. *Id.* at 255.

31. *Id.* at 246-47. The Court did add that the statute probably violated the third prong of the Lemon test, the prohibition on excessive entanglement. *Id.* at 252.

32. 459 U.S. 116 (1982).

33. *Id.* The Court found that the statute not only had the primary and principal effect of advancing religion, but also fostered an excessive government entanglement with religion. *Id.* at 126.

34. *See* Everson, *supra* note 23.

35. 473 U.S. 402 (1985).

36. 112 S. Ct. 2649 (1992).

37. 473 U.S. at 414. The Court found that despite New York City's extensive supervision to ensure religious neutrality, the program nevertheless violated the second and third prongs of the Lemon test. *Id.* Also, this decision and its companion case, School

Court in *Lee* not only declined to reconsider *Lemon*,[38] but also did not even cite *Lemon* as authority in holding prayers at public school graduation ceremonies unconstitutional.[39] Rather, the Court resolved the Establishment Clause issue on the ground that government is forbidden to sponsor or direct a religious exercise in a public school.[40] Therefore, when *Board of Education of Kiryas Joel Village School District*[41] confronted the Court, constitutional scholars eagerly hoped the Justices would either re-establish the *Lemon* test or formulate a new paradigm for Establishment Clause analysis.[42]

The Supreme Court, in a six-to-three decision, held the New York statute, Chapter 748, which created a school district for the Village of Kiryas Joel, unconstitutional.[43] In reaching its decision, however, the Court, refused to clarify its analysis for future Establishment Clause issues. The filing of four concurring opinions, each stressing a different approach to interpret the Establishment Clause,[44] highlighted the unclear status of this analysis. In Justice Souter's plurality opinion, the Court focused on the character of the group vested with governmental authority.[45] Pointing to the drawing of village lines to exclude all but Satmar Hasidics, the Court explained that the village is "defined by its character as a religious community, in a legal and historical context."[46] Even though Chapter 748 did not delegate governmental power expressly to the religious beliefs of the Satmar Hasidic community, the Court found that because of the group's character "Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence."[47] Thus, the Court concluded that Chapter 748 was "substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious

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Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), are the two cases that dismantled Monroe-Woodbury's accommodation of the handicapped children of Kiryas Joel prior to the passage of Chapter 748. *See supra* note 7.

38. 112 S. Ct. at 2655.

39. *Id.*

40. *Id.*

41. 114 S. Ct. 2481 (1994).

42. Marcia Coyle, *Drawing a New Line on Religion? Justices Consider Whether A Jewish Sect's School District Passes Muster*, NAT'L L.J., Apr. 25, 1994, at 1.

43. 114 S. Ct. at 2487.

44. *Id.* at 2481. Justice Blackmun filed a concurring opinion. Justice Stevens filed a concurring opinion joined by Justices Blackmun and Ginsburg. Justice O'Connor filed an opinion concurring in part and concurring in the judgment. Justice Kennedy filed an opinion concurring in the judgment only. *Id.*

45. *Id.* at 2489.

46. *Id.* at 2487.

47. *Id.* at 2489.

test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"[48] In this part of its analysis, the Court has essentially invoked the entanglement prong of the *Lemon* test. Justice Blackmun's concurring opinion echoed this idea by strongly emphasizing that the decision did not represent a departure from *Lemon*.[49] Justice O'Connor's concurring opinion stated, however, that "the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon*."[50] Moreover, Justice Kennedy's concurring opinion did not even mention *Lemon*; instead, it found the statute unconstitutional because the government intentionally drew political boundaries based on a particular religious faith.[51] Also, Justice Kennedy stated that the decisions in *Grand Rapids*[52] and *Aguilar*,[53] both resolved on strict applications of the *Lemon* test, "may have been erroneous."[54] The uncertainty surrounding the viability of *Lemon* thus remains, as even the Justices themselves cannot agree on its application. Another chief concern of the Court was that the legislature failed "to exercise governmental authority in a religiously neutral way."[55] The Court stressed the general principle that civil authority must be employed in a manner neutral to religion.[56] By selecting the Kiryas Joel community, and hence the Satmar Hasidic religion, for special treatment, the legislature practiced religious favoritism with no guarantee that other similarly situated groups would be treated equally.[57] The Court concluded that the legislature failed to uphold the constitutional mandate that "neutrality as among religions must be honored."[58] Thus, the Court also relied on pre-*Lemon* principles of neutrality and separation to find the statute unconstitutional.[59] Justice Stevens'

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48. *Id.* at 2490 (quoting Larkin v. Grendel's Den, 459 U.S. at 126).

49. 114 S. Ct. at 2494 (Blackmun, J., concurring). Justice Blackmun asserted that the decision based its conclusion on the second and third prongs of the Lemon test; the principal or primary effect prong and the entanglement prong. *Id.*

50. 114 S. Ct. at 2498 (O'Connor, J., concurring). Justice O'Connor stressed that Establishment Clause analysis would be better served if it was "freed from the Lemon test's rigid influence." *Id.* at 2500. She advocated an analysis that would be sensitive to the particular context of each case resulting in "more opportunity to pay attention to the specific nuances of each area." *Id.*

51. 114 U.S. at 2505 (Kennedy, J., concurring).

52. *See supra* note 36 and accompanying text.

53. *Id.*

54. 114 U.S. at 2505 (Kennedy, J., concurring).

55. *Id.* at 2491.

56. *Id.*

57. *Id.*

58. *Id.* at 2493.

59. *See* Everson, *supra* note 23.

concurring opinion, joined by Justices Blackmun and Justice Ginsburg, expanded these principles by stressing the unconstitutionality of the statute's affirmative support for a religious sect's segregation.[60] In holding the statute impermissibly delegated governmental authority to a group defined by its character as a religious community, the Court not only relied on principles of *Lemon*,[61] but also stressed the preeminent mandate of governmental neutrality towards religion.[62]

In choosing to use both *Lemon* and strict neutrality principles, the Court rejected any notion that it might formulate a new analysis for Establishment Clause issues.[63] Thus, the decision will be remembered for what it did not do, rather than for what it did. The Court passed on an opportunity to clarify the determinative principles for deciding Establishment Clause cases. Instead, the Court placed Establishment Clause analysis into a lottery, where not even the Justices themselves know which principles to apply. Moreover, the decision sends a warning signal to state legislatures seeking to accommodate religion. The Court stated that "the Constitution allows the state to accommodate religious needs by alleviating special burdens,"[64] but the minefield of principles a statute now must avoid to be upheld suggests that religious accommodation will only be tolerated in the rarest of circumstances. As Justice Kennedy's criticism of *Aguilar* intimated, however, there may be a window of opportunity for religious accommodation that was formerly closed.[65] The Court now appears to have five Justices willing to overturn *Aguilar* and allow the type of accommodation that was present in the New York City program which paid public school teachers to provide remedial services at parochial schools.[66] Therein lies the paradox of *Board of Education of Kiryas Joel Village School District*.[67] The Supreme Court, as it now stands, seems amenable to validating a previously unconstitutional religious accommodation that resulted in the creation of the Kiryas Joel Village School District. This paradox lends

60. 114 S. Ct. at 2495 (Stevens, J., concurring).

61. *Id.* at 2488.

62. *Id.* at 2491.

63. *See* Daniel Wise, *Religious School District Held Unlawful: Splintered High Court Affirms 1993 Ruling By State Court Of Appeals*, N.Y.L.J., June 28, 1994, at 1.

64. 114 S. Ct. at 2492.

65. *See supra* note 53 and accompanying text.

66. *See Aguilar*, 473 U.S. at 402. The dissenters in Aguilar still present on the Court are Chief Justice Rehnquist and Justice O'Connor. By their dissents in Board of Educ. of Kiryas Joel Village Sch. Dist., Justices Scalia and Thomas would also appear willing to join Justice Kennedy in overturning a decision such as Aguilar. 114 S. Ct. at 2505 (Scalia, J. dissenting).

67. 114 S. Ct. 2481 (1994).

further support to a need for clarification of Establishment Clause analysis. As religious issues continue to be at the forefront of American controversies, the Court will again face religion cases and a stable approach is required. Ironically, the Court could revisit these very same parties in the coming years. Just nine days after the Court struck down the statute creating the Kiryas Joel School District, the New York Legislature passed Chapter 241[68] which allows any municipality meeting certain population, enrollment, and property wealth criteria to form a school district. Not surprisingly, Kiryas Joel is the only municipality in the state that meets the criteria.[69] Louis Grumet has, once again, joined in an action to have the new statute ruled unconstitutional.[70] Therefore, the Court may well have to redetermine whether the Kiryas Joel School District violates its myriad of Establishment Clause principles. Hopefully, the Justices will not pass on the next opportunity to add clarity and stability to Establishment Clause analysis.

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68. 1994 N.Y. LAW ch. 241 (McKinney 1994).

69. Gary Spencer, *Judge Declines to Bar School District Law: New Kiryas Joel Statute Called Constitutional*, N.Y.J.L., AUG. 11, 1994, at 1.

70. *Id.*