COMMENT

FORBIDDEN FAVORITISM IN THE GOVERNMENT ACCOMMODATION OF RELIGION: *Grumet* AND THE CASE FOR OVERTURNING *Aguilar.*

*Basilios E. Tsingos**

Since *Everson v. Board of Education*,[1] the Supreme Court has grappled to define the proper relationship between the Free Exercise and Establishment Clauses of the First Amendment.[2] The Court's struggle has been a tortured attempt to draw a line that not only separates government from religion, but also accommodates religion by preventing the state from unduly burdening religious beliefs or practices.[3] Its efforts have proven less than successful. In *Lemon v. Kurtzman*,[4] the Court announced a three-pronged test[5] that has been criticized for being amorphous[6] and overly separationist.[7] In addition, *Lemon* no longer seems to command majority support on the Court.[8] With *Lemon* in a state of disrepair and the Court's unsettled jurisprudence in this area seemingly up for grabs, the fears of separationists and hopes of accommodationists understandably rise when the Court reviews

* Lecturer on Social Studies, Harvard University; J.D. candidate, 1996, Harvard Law School.

1. 330 U.S. 1 (1947). Justice Black, in his majority opinion, stated that "[n]either a state nor the Federal Government . . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15.

2. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

3. *See* ARLIN ADAMS & CHARLES EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 32-42 (1990); Norman Redlich, *The Separation of Church and State: The Burger Court's Tortuous Journey, in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986, at 56, 66 (Herman Schwartz ed., 1987).

4. 403 U.S. 602 (1971).

5. *Id.* at 612-13. Under *Lemon*, a government action is unconstitutional if it: (1) has no secular legislative purpose; or (2) has the primary effect of aiding or inhibiting religion; or (3) fosters an excessive government entanglement with religion. *Id.*

6. *See* LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 129 (1986).

7. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 110-15 (1993); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986). For an overview of *Lemon* and its critics, see Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 236, 242-46 (1994).

8. Lyle Denniston, *Church v. State: Room for Improvement in* Kiryas Joel, AM. LAW., July-Aug. 1994, at 97; *see, e.g.*, Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993); Lee v. Weisman, 112 S. Ct. 2649 (1992).

an Establishment or Free Exercise case.[9] Last Term, in *Board of Education v. Grumet*,[10] the Court held that a State may not create and finance a school district to accommodate the school children of one particular religion. In so holding, the Court avoided the *Lemon* test. Moreover, *Grumet*'s multiple opinions indicated that a sufficient number of votes might exist to overturn *Aguilar v. Felton*[11] which held that public schools could not send teachers to parochial schools to provide special services.

The Court's decision, on the facts, was fundamentally correct. Further, the majority's reasoning reveals a jurisprudence that remains faithful to the separation of church and state, but does not insist on an impermeable barrier between the two, so long as government maintains a neutral stance towards religions and accommodates them only on an equal, nonpreferential basis. Together with the broader revelations concerning *Aguilar*, *Grumet* seems to indicate (perhaps counterintuitively) that the Court will be more willing to accommodate religious beliefs and practices—at least when it comes to the schooling of special needs students.

The village of Kiryas Joel, located about fifty miles northwest of New York City in the town of Monroe, is a community of 8,500 that consists almost entirely of Orthodox Jews belonging to the Satmar Hasidic sect.[12] In the 1970s, the Satmars purchased undeveloped land in the town of Monroe and, after disputing certain zoning codes with the town board, petitioned to form a new village.[13] The petition was approved in 1977, and the village—its proposed boundaries carefully drawn to include just the 320 or so acres owned and settled by the Satmars—was incorporated and named Kiryas Joel.[14]

The village has prospered as an Orthodox Jewish enclave, similar to the well-known Christian isolationist communities such as

9. *See, e.g.*, Marcia Coyle, *Drawing a New Line on Religion? Justices Consider Whether a Jewish Sect's School District Passes Muster*, NAT'L L.J., Apr. 4, 1994, at A1; Denniston, *supra* note 8, at 97; Robert F. Drinan, *The Delicate Separation: Religion, the State, and Special Needs*, LEGAL TIMES, Mar. 21, 1994, at 38.

10. 114 S. Ct. 2481 (1994).

11. 473 U.S. 402 (1985). A companion case was School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

12. *See Grumet*, 114 S. Ct. at 2485.

13. *Id.* The Satmars invoked N.Y. VILLAGE LAW § 2 (McKinney 1973 & Supp. 1994) which makes it relatively easy for any group of citizens to incorporate as a "village" and exercise broad powers of self-government.

14. *See Grumet*, 114 S. Ct. at 2485. Kiryas Joel, which means "the village of Joel," borrows its name from the sect's highly revered leader, Grand Rebbe Joel Teitelbaum. Linda Greenhouse, *High Court Bars School District Created to Benefit Hasidic Jews*, N.Y. TIMES, June 28, 1994, at D21.

the Old Order Amish.[15] The Satmars embrace their history and resist mainstream American culture, viewing their village as a bastion against "undesirable acculturation."[16] The villagers speak Yiddish as their main language and follow a strict interpretation of the Torah and its rules of behavior.[17] Men and women are segregated methodically in public spaces, and virtually all the village children attend private religious schools that are segregated on the basis of sex.[18]

Kiryas Joel's religious schools, however, do not provide special services for handicapped students, who are entitled under federal and state law to government-funded special assistance at both public and private schools.[19] Until 1985, teachers from nearby public schools provided such services to children in the village, but they stopped because of the Supreme Court's rulings in *Aguilar*[20] and *School District v. Ball*.[21] The public school district in which Kiryas Joel was located offered to teach the affected Satmar children at local public schools, but after a brief trial period, most of the childrens' parents withdrew them.[22]

The search for alternatives led parents and village leaders to lobby for the creation of a special public facility, but public school officials rejected the proposal as too costly. Litigation ensued and culminated in 1988 when the New York Court of Appeals held that the Satmars' right to exercise their religion freely did not require the provision of a separate school.[23]

---

15. *See generally* WILLIAM M. KEPHART & WILLIAM W. ZELLNER, EXTRAORDINARY GROUPS (4th ed. 1991).

16. Bd. of Educ. v. Wieder, 527 N.E.2d 767, 769 (N.Y. 1988).

17. *See Grumet*, 114 S. Ct. at 2485.

18. *See* JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD 206-15 (1992); Gary Rosenberger, *In Quiet New York Village, Unusual Jewish Sect Embraces Past*, L.A. TIMES, Sept. 30, 1990, at A35; *see also* ISRAEL RUBIN, SATMAR: AN ISLAND IN THE CITY 143-56 (1972).

19. *See Grumet*, 114 S. Ct. at 2485; Individuals with Disabilities Education Act of 1970, Pub. L. 91-230, 84 Stat. 121 (codified as amended in scattered sections of 20 U.S.C.); N.Y. EDUC. LAW § 89 (McKinney 1981 & Supp. 1994).

20. 473 U.S. 402 (1985). In a five to four decision, the *Aguilar* Court prohibited public school teachers from providing remedial education services to children on the premises of private religious schools. *See id.* at 404-07, 414.

21. 473 U.S. 373 (1985).

22. *See Grumet*, 114 S. Ct. at 2485. As one parent put it, the children suffered "panic, fear and trauma . . . in leaving their own community and being with people whose ways were so different." *Id.* (quoting Bd. of Educ. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).

23. *See Wieder*, 527 N.E.2d at 775. The court based its decision on the fact that the sect members argued that the practice of educating the children in the local schools created emotional difficulties, but did not argue that such practices violated their religious beliefs. *See id.*

In 1989, in an effort to break the stalemate and to accommodate the handicapped children, the New York state legislature passed a statute, Chapter 748, that provided Kiryas Joel with its own school district.[24] The law created a village school board and vested it with the power to open its own public schools, thus effectively ensuring classes comprised exclusively of Hasidic students. The statute also facilitated Kiryas Joel's access to funds through government programs for disabled and bilingual students.[25] Governor Cuomo admitted that the new school district was comprised of "members of the same religious sect," but deemed the law constitutional because it was "a good faith effort" to solve the problem of the handicapped Satmar children.[26]

In 1990, the New York State School Boards Association and two of its officers, Louis Grumet and Albert Hawk, filed suit in New York state court, asserting that Chapter 748 represented an unconstitutional establishment of religion that violated both the federal and state constitutions.[27] The trial court granted summary judgment in favor of the plaintiffs.[28] Both the intermediate

24. *See* 1989 N.Y. Laws ch. 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.

25. *See* Joseph Berger, *Ruling Leaves Anxiety Among Parents But Perhaps Little Change for Students*, N.Y. TIMES, June 28, 1994, at D21.

26. GOVERNOR'S MEM., 1989 MCKINNEY'S SESSION LAWS OF N.Y., at 2430; *see Grumet*, 114 S. Ct. at 2486; Drinan, *supra* note 9, at 38; Greenhouse, *supra* note 14, at D21; Craig L. Olivo, Note, Grumet v. Board of Education of the Kiryas Joel Village School Dist.—*When Neutrality Masks Hostility—The Exclusion of Religious Communities From an Entitlement to Public Schools*, 68 NOTRE DAME L. REV. 775, 782-83 (1993).

27. *See Grumet*, 114 S. Ct. at 2486.

28. Grumet v. New York State Educ. Dept., 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992). The court ruled that the statute was unconstitutional because it failed all three prongs of the *Lemon* test. *See id.* at 1007.

state appellate court[29] and the New York Court of Appeals upheld the trial court's ruling.[30]

In a six to three decision, the Supreme Court affirmed.[31] Writing for the majority, Justice Souter stated that New York state authorities, in enacting Chapter 748, had violated "a principle at the heart of the Establishment Clause," namely, "that government should not prefer one religion to another, or religion to irreligion."[32] In explaining his decision, Justice Souter avoided the *Lemon* test and focused instead on what he termed the "instructive comparison"[33] offered by *Larkin v. Grendel's Den.*[34]

In *Grendel's Den,* the Court struck down a Massachusetts law that granted churches, synagogues, and other religious institutions the power to veto liquor licenses awarded to businesses within a 500-foot radius of the institution's premises.[35] The constitutional defects found in the Massachusetts statute, Justice Souter reasoned, also plagued New York's Chapter 748.[36] One such defect was "the absence of an 'effective means of guaranteeing' " that government power will be or has been used in a religiously neutral way.[37] In *Grendel's Den,* the threat to neutrality sprang from the religious groups that explicitly were granted civic powers because there existed no means to ensure that the groups would not exercise their power in a religiously discriminatory fashion. In the case of Chapter 748, Justice Souter explained, the legislature itself threatened religious neutrality because the Satmar community of Kiryas Joel received its school district with "no assurance that the next similarly situated group seeking a school district of its own will receive one."[38]

29. Grumet v. Bd. of Educ., 592 N.Y.S.2d 123 (N.Y. App. Div. 3d Dept. 1992) The court held that the statute failed at least the first two prongs of the *Lemon* test. *See id.* at 127, 129-30.

30. Grumet v. Bd. of Educ., 618 N.E.2d 94 (N.Y. 1993). The court found Chapter 748 defective under at least the second prong of the *Lemon* test, which prohibits government action that has the primary effect of aiding religion. *See id.* at 100.

31. *Grumet,* 114 S. Ct. at 2494. Justice Souter announced the Court's judgment in an opinion joined in full by Justices Blackmun, Stevens, and Ginsburg and in part by Justice O'Connor, with Justice Kennedy concurring separately. Justice Scalia dissented in an opinion joined by Chief Justice Rehnquist and Justice Thomas.

32. *Id.* at 2491.

33. *Id.* at 2487.

34. 459 U.S. 116 (1982).

35. *See* MASS. GEN. LAWS ANN. ch. 138, § 16C (West 1974).

36. *See Grumet,* 114 S. Ct. at 2491.

37. *Id.* (quoting *Grendel's Den,* 459 U.S. at 125).

38. *Id.*

In the Court's view, the Kiryas Joel school district was thus constitutionally defective because of the manner in which it was created. The district did not owe its existence to a general regulatory scheme that allowed any similarly situated group of residents, religious or otherwise, to receive the government benefit of its own school district, but was a creature of "a special and unusual Act of the legislature."[39] In passing Chapter 748, the New York legislature sought to accommodate the Satmar Jews, but such case-specific religious accommodation did not guard sufficiently against the danger of "legislative favoritism along religious lines"—a violation of the maxim that "civil power must be exercised in a manner neutral to religion."[40] In *Walz v. Tax Commission of New York City*[41] and other cases,[42] Justice Souter explained, the Court already had demonstrated that it would examine "the general availability of any benefit provided religious groups or individuals" when reviewing Establishment Clause cases.[43] The Court finally intimated that the facts surrounding Chapter 748's passage did not alleviate concerns about the lack of evenhanded treatment on the part of state authorities.[44] The majority pointed specifically to New York's history and cited earlier efforts that had failed to establish more localized school districts as a way to accommodate the separate schooling of Catholic students.[45]

Writing for a plurality of four, Justice Souter analyzed another constitutional defect in Chapter 748 that he felt resembled *Grendel's Den*: the impermissible delegation of civic power by the State to religious groups.[46] The two cases differed, Justice Souter stated, in that Chapter 748, unlike the Massachusetts statute reviewed in *Grendel's Den*, did not involve a direct delegation of gov-

39. *Id.*

40. *Id.*

41. 397 U.S. 664 (1970). The *Walz* Court sustained property tax exemptions for religious properties where the State had not singled out one particular denomination or religious property as such, but had exempted a broad class of nonprofit, quasi-public organizations. *Id.* at 672-73.

42. *See, e.g.*, Texas Monthly v. Bullock, 489 U.S. 1 (1989) (striking down a sales tax exemption for religious publications only); Bowen v. Kendrick, 487 U.S. 589 (1988) (allowing local religious bodies to have an input in matters regarding teen sexuality where the statute does not discriminate between secular and religious groups and broadly enlists the aid of civic organizations).

43. *Grumet*, 114 S. Ct. at 2491.

44. *Id.*

45. *See id.* (citing R. CHURCH & M. SEDLAK, EDUCATION IN THE UNITED STATES 162, 167-69 (1976)).

46. *See id.* at 2488 (Souter, J., plurality opinion).

ernment power to religious leaders.[47] Chapter 748 granted civic power to Kiryas Joel's voters, not to any specific religious organization. This difference, Justice Souter reasoned, was constitutionally insignificant.[48] When it enacted Chapter 748, the legislature created a local school district in which a particular religious group plainly was meant to enjoy political control, amounting to an impermissible state "manipulation of the franchise" to benefit a specific religious sect.[49] Any difference between giving civic power to religious denominations through their leaders, as in *Grendel's Den*, and granting them such power through their members in the manner envisioned by Chapter 748 was, Justice Souter insisted, "one of form, not substance."[50]

In defending this conclusion, Justice Souter acknowledged that government could not deny people the opportunity to vote or hold office "simply because of their religious affiliations or commitments."[51] Denials of this nature would trigger the constitutional protections afforded by the Free Exercise Clause, and implicate decisions such as *McDaniel v. Paty*.[52] But such Free Exercise protection, the plurality explained, does not mean conversely that government may delegate civic power to "an individual, institution, or community on the ground of religious identity."[53] Such a reading of the Constitution, Justice Souter suggested, would take insufficient stock of the Establishment Clause.[54]

Justice Blackmun joined in the Court's opinion, but filed a short concurrence emphasizing that the majority's disposition of the case was fully consistent with *Lemon*.[55] *Grendel's Den*, he reasoned, on which the Court relied heavily, was itself decided by an application of *Lemon*.[56] As a result, the Court had done little beyond finding Chapter 748 to be an impermissible "entanglement" of religion and government that had the "primary effect"

47. *See id.*

48. *See Grumet*, 114 S. Ct. at 2488 (Souter, J., plurality opinion).

49. *Id.*

50. *Id.*

51. *Id.* at 2489.

52. 435 U.S. 618 (1978). The *McDaniel* Court held that a person cannot be denied the right to hold political office because of his religious involvements. *Id.* at 626-27, 629.

53. *Grumet*, 114 S. Ct. at 2489 (Souter, J., plurality opinion).

54. *See id.*

55. *Id.* at 2494-95 (Blackmun, J., concurring).

56. *Id.*

of aiding a particular religious group, thereby violating the second and third prongs of the *Lemon* test.[57]

Justice Stevens also joined the majority, but filed a separate concurrence that was joined by Justices Blackmun and Ginsburg.[58] Expressing the view that Chapter 748 went beyond the permissible accommodation of religion, Justice Stevens stated that the legislature had created "a school district . . . specifically intended to shield children from contact with others who have 'different ways.' "[59] The "telling" result was the existence of a putatively public school district whose student population was "defined less by geography than by religion," as a full two-thirds of its students were Hasidics from *outside* the village.[60] In creating such a system of education, Justice Stevens concluded, "the State [had] provided official support . . . to a particular faith."[61]

Justice O'Connor concurred in part and in the judgment.[62] In her separate concurrence, Justice O'Connor stressed the idea that the Establishment Clause mandates nonpreferential, equal treatment.[63] The government, she explained, "may not treat people differently based on the God or gods they worship or don't worship."[64] Chapter 748 failed under this standard, she argued, because "it single[d] out a particular religious group for favorable treatment."[65]

Writing at length and approvingly of the Court's growing independence of the *Lemon* test,[66] Justice O'Connor also stated that the problems with accommodating the Satmar Jews arose because of the Court's five to four ruling in *Aguilar v. Felton*.[67] She strongly urged the Court to reconsider *Aguilar*:

> All handicapped children are entitled by law to government-funded special education. If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well . . . . The Establishment Clause does not de-

57. *Id.* at 2495.
58. *Grumet*, 114 S. Ct. at 2495 (Stevens, J., concurring).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 2495-500 (O'Connor, J., concurring in part and concurring in the judgment).
63. *Grumet*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment).
64. *Id.*
65. *Id.* at 2497-98.
66. *See id.* at 2498-500.
67. 473 U.S. 402 (1985).

> mand hostility to religion, religious ideas, religious people, or religious schools.[68]

In his separate concurrence, Justice Kennedy argued that the New York legislature had contravened the Establishment Clause by engaging in "explicit religious gerrymandering . . . to carve out territory for people of a particular religious faith."[69] The Establishment Clause places "fundamental limitations" on the free exercise of religion, he stated, one of them being "that government may not use religion as a criterion to draw political or electoral lines."[70] Echoing Justice O'Connor, he concluded that the Court should reexamine both *Aguilar* and *School District v. Ball*.[71] "A neutral aid scheme, available to religious and nonreligious alike," he explained, "is the preferable way to address problems such as the Satmar handicapped children have suffered."[72]

Justice Scalia dissented in an opinion joined by Chief Justice Rehnquist and Justice Thomas.[73] Justice Scalia called into question the Court's conclusion that the New York state legislature had acted improperly in its attempt to resolve the problem posed by the special needs of Kiryas Joel's handicapped children. "The Court today," he wrote, "finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim."[74] The sect's founder, Grand Rebbe Joel Teitelbaum, he exclaimed, "would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State."[75]

Justice Scalia first refused to accept the proposition "that any group of citizens . . . can be invested with political power, but not if they all belong to the same religion."[76] Such a position, he exclaimed, "might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union and would undoubtedly make many units of local govern-

68. *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment) (internal citations omitted).
69. *Id.* at 2504-05 (Kennedy, J., concurring in the judgment).
70. *Id.* at 2504, 2505.
71. 473 U.S. 373 (1985).
72. *Grumet*, 114 S. Ct. at 2505 (Kennedy, J., concurring in the judgment).
73. *Id.* at 2505 (Scalia, J., dissenting).
74. *Id.* at 2505-06.
75. *Id.* at 2506.
76. *Id.* at 2508.

ment unconstitutional today."[77] Justice Scalia considered the Court's refusal to see a constitutional difference between the direct grant of civic power to religious leaders in *Grendel's Den* and Chapter 748's grant of power to the lay members of a religious group *qua* voters to be "breathtaking" and inconsistent with the protections offered by the Free Exercise Clause.[78]

Justice Scalia next rejected the Court's "facile conclusion" that the New York legislature had enacted Chapter 748 because of religious favoritism.[79] "[I]n the Land of the Free," he offered, "democratically adopted laws are not so easily impeached by unelected judges."[80] Chapter 748 was a facially neutral law, Justice Scalia explained, that required the Court to show either the absence of a neutral, secular basis for the law, or, in the presence of such secular purpose, "direct evidence that religious preference was the objective" behind the law.[81] In Justice Scalia's mind, the Court's opinion did not carry its burden of proof on either count: there was a secular purpose behind Chapter 748 (providing special services to handicapped children) and no "direct evidence" existed "to say that the Act was motivated by a desire to favor or disfavor a particular religious group."[82]

Justice Scalia further contended that Chapter 748 did not impermissibly accommodate *religion*.[83] The educational problem involving the Hasidic children did not spring from religion, Justice Scalia reasoned, but rather from "dress, language, and cultural alienation."[84] It was in addressing these "[e]ntirely secular" problems that the legislature "produced a political unit whose members happened to share the same religion."[85]

Even if Kiryas Joel's special treatment was in fact based upon religion, Justice Scalia argued, "it would be a permissible accommodation."[86] In requiring a demonstration from the New York legislature that its future actions will be religiously neutral, Justice Scalia maintained that the Court was adopting a "special rule

77. *Grumet*, 114 S. Ct. at 2507-08 (Scalia, J., dissenting).
78. *Id.* at 2507-08.
79. *Id.* at 2508.
80. *Id.* at 2508.
81. *Id.* at 2508-09.
82. *Grumet*, 114 S. Ct. at 2508-10, 2511 (Scalia, J., dissenting).
83. *Id.* at 2510.
84. *Id.* at 2510.
85. *Id.* at 2511.
86. *Id.* at 2511.

to govern only the Satmar Hasidim."[87] Indeed, Justice Scalia took sharp exception to the Court's "imposition of novel 'up front' procedural requirements on state legislatures."[88] "[T]he mere risk that the State will not offer accommodation to a similar group in the future," he argued, was not enough to make Chapter 748 unconstitutional.[89] In the first instance, Justice Scalia refused to agree with the Court that *Walz* and other decisions, "suggest[ ] that approaching accommodations in a case-specific manner automatically violates the Establishment Clause."[90] What was more, he found there existed no reason to doubt the fairness of Chapter 748 as a matter of jurisprudential philosophy:

> Making law (and making exceptions) one case at a time, whether through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality, simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of.[91]

If Justice Scalia found anything heartening, it was Justice O'Connor's separate call for the overruling of *Aguilar* and Justice Kennedy's suggestion that the Court revisit both *Aguilar* and *Ball*: "I heartily agree that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity."[92]

Despite Justice Scalia's incisive dissent, *Grumet*'s holding was fundamentally correct. Chapter 748 failed to pass constitutional muster because it granted a special favor to one religious sect: the right to operate its own public school district free from "outside" interference. For the Establishment Clause to have meaning, it must mean at least that government cannot act to advantage specially one religious sect with respect to some government benefit.

Justice Souter's majority opinion properly stressed the special and unusual nature of Chapter 748 as a legislative act. The case-specific approach followed by New York not only failed to guard against the danger of "legislative favoritism along religious

87. *Grumet*, 114 S. Ct. at 2514 (Scalia, J., dissenting).
88. *Id.* at 2514.
89. *Id.* at 2512.
90. *Id.* at 2513-14 & n.5.
91. *Id.* at 2514.
92. *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

lines,"[93] but also ensured that all religious accommodations would be subject directly to the vagaries of politics, *precisely* by making government accommodation of religion a question to be answered on a case-by-case basis by the legislature. The Court correctly viewed New York's approach to religious accommodation as an impermissibly weak system of protecting people's rights to equal religious liberty. Indeed, the manner of religious accommodation that provided the underpinning rationale for Chapter 748 runs dangerously afoul of the both the letter and spirit of the Bill of Rights. As Justice Jackson explained in *West Virginia Board of Education v. Barnette*[94] (in words that Justice O'Connor quoted extensively in her concurrence in *Employment Division v. Smith*[95]):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[96]

Chapter 748 and the system of accommodation it embodied were highly suspect on constitutional grounds precisely because they left religious accommodation exposed to the political "vicissitudes" of the legislative process. In this regard, Justice Souter's majority opinion was correct in pointing to *Walz* and subsequent cases to underscore the importance for Establishment Clause cases of "the general availability of any benefit provided [to] religious groups or individuals" by the government.[97] In *Grumet*, the concern with equal religious liberty and government even-handedness led the Court to demand a general regulatory scheme with "up front" procedural requirements that allowed any similarly situated group, religious or otherwise, to receive the same government benefit (a public school district) that the citizens of Kiryas Joel received, if only indirectly, by virtue of their being members of the Satmar sect of Hasidic Judaism.

---

93. *Grumet*, 114 S. Ct. at 2491.

94. 319 U.S. 624 (1943).

95. 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in the judgment).

96. *Barnette*, 319 U.S. at 638, *quoted in Smith*, 494 U.S. at 903 (1990) (O'Connor, J., concurring in the judgment).

97. *Grumet*, 114 S. Ct. at 2491.

Justice Scalia's rejoinder to this part of the Court's opinion is not particularly persuasive. First, Justice Scalia argues that the Court need not be paralyzed by the risk that the state legislature will not likewise accommodate similar groups in the future. Should the legislature refuse to act, "the necessary guarantee can and will be provided, after the fact, *by the courts.*"[98] It is not clear how this could be done without federal courts delving into *both* the legislature's motives in denying an accommodation to the subsequent group and its motives in granting "the first accommodation."[99] Precisely because this is the type of inquiry that Justice Scalia generally opposes, one might expect him to invoke Ockham's Razor or the proper judicial role to support the majority's neutral, "up front" procedural requirements, which, after all, exemplify the very objective test Justice Scalia often advocates.[100] Instead, Justice Scalia offers a jurisprudential pæan to the merits of case-by-case legislative review for purposes of religious accommodation—a most curious exercise given his well-known pro-rule position in the "rules-standards" debate.[101]

This is not to suggest any convenient inconsistency on Justice Scalia's part. On the contrary, his Religion Clause jurisprudence is remarkably consistent with his views on religious accommodation and the political process. In *Smith,* Justice Scalia conceded that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[102] Justice Scalia nonetheless viewed this as an "unavoidable consequence of democratic government."[103] This facile conclusion rightly earned a sharp rebuke from Justice O'Connor, who flatly noted in her *Smith* concurrence that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[104]

98. *Id.* at 2513 (Scalia, J., dissenting) (original emphasis).

99. *Id.* at 2513.

100. *See* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 128 (Supp. 1994).

101. *See, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992).

102. *Smith,* 494 U.S. at 890.

103. *Id.*

104. *Id.* at 902 (O'Connor, J., concurring in the judgment).

Justice Scalia's opinion in *Smith* is thus consistent with his dissent in *Grumet*, but his underlying rationale in both cases concerning the sufficiency of political protections in matters of religious accommodation conflicts squarely with the Constitution. Justice Souter's majority opinion seems more faithful to the Constitution because it adheres more closely to the First Amendment's insistence on equal religious liberty for all, including popularly despised minorities. If the Religion Clauses do not protect latter-day Anne Hutchinsons and Mary Dyers from the tyranny of majoritarian orthodoxy or legislative favoritism in religious matters, their very *raison d'etre* would have to be questioned. Indeed, Justice Scalia's apparent willingness in *Smith* and *Grumet* to defer to legislative majorities in picking and choosing religious favorites serves, in the end, as the strongest argument against embarking down the "political path" he would have the Court follow in its Religion Clause jurisprudence.

Along similar lines, Justice Souter's plurality opinion is also right to point to *Grendel's Den* and to find no constitutional difference between a government grant of civic power to a religious sect's leaders, on the one hand, and to its membership, on the other. The dissenters, led by Justice Scalia, again fail to persuade on this point. They charge that the Court's position jeopardizes the constitutionality of many American counties and Utah's and New Mexico's admission to the Union. It is difficult to see how they arrive at this conclusion from the plurality's insistence (joined here by Justice Kennedy) that government cannot grant civic power along religious lines and remain faithful to the Establishment Clause. It would seem that Justice Scalia fails to see the important difference between the State narrowly tailoring a political suit to fit a religious body, and a religious body being placed and expanding within an off-the-rack political suit tailored by the state according to neutral geographic and topographical lines.[105] There is a world of difference, which carries with it constitutional implications, between creating a political constituency along religious lines and the existence or subsequent flowering of a religious constituency within political lines that are not drawn so as to ensure the exclusion of non-adherents. As Justice Souter

105. In fairness to Justice Scalia and the dissenters, this crucial distinction is one that some widely respected commentators also have failed to grasp in their evaluation of Justice Souter's opinion. *See, e.g.*, LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 254 (2d ed. 1994); *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 259-60 (1994).

rightly contends, Justice Scalia's broad claims for Free Exercise rights on this point takes insufficient stock of the Establishment Clause and tends to reduce it to a nullity.

The dissent's strongest reply is its argument that Chapter 748 did not belie forbidden religious favoritism on the part of the New York legislature. Justice Scalia concluded that "[e]ntirely secular reasons . . . produced a political unit whose members happened to share the same religion," and it would be "a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group," and Justice Scalia demanded that Justice Souter point him to some "direct evidence that religious preference was the objective behind the law."[106]

The fundamental problem with Justice Scalia's dissent at this juncture is that it works only by insisting on an evidentiary burden of proof—production of a "smoking gun"—that requires federal judges to maintain a stance of political naiveté and innocence opposite government action somewhat akin to the suspension of disbelief required of an audience viewing a Shakespearean comedy. But the law is not comedy. At some point, judges cannot, nor should they, ignore what they know as human beings.[107] Justice Souter and the majority were well within their proper judicial roles in looking to the record before them and rejecting the flimsy contention that Chapter 748 produced a school district whose voters merely "happened to share the same religion." In no way does it seem a "remarkable stretch" for federal judges to draw eminently reasonable and supported inferences from a case to reach a conclusion shared by virtually every political observer of the facts surrounding Chapter 748's enactment. As Ira C. Lupu pointedly asks:

> Is it imaginable that New York State would create a new public school district at the behest of an insular group of Branch Davidians or members of the Unification Church, whose children—like the Hasidim—may suffer panic, fear, and trauma at encountering those outside their own community?[108]

The legislature's motive was not the promotion of the Satmars' version of Hasidic Judaism *à la* the pre-disestablishment days of

106. *Grumet*, 114 S. Ct. at 2508-09, 2511 (Scalia, J., dissenting).

107. *See, e.g.*, Beal v. Doe, 431 U.S. 439, 464 (1977) (Blackmun, J., dissenting) ("There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore, or fears to recognize . . ."); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

108. Lupu, *supra* note 7, at 270.

state-sponsored religions. It seems disingenuous to suggest that Chapter 748's goal was *not* in some real way the bestowal of a special legislative favor upon one religious sect in response to its real or perceived political strength within New York (Governor Cuomo surely did not sign the law to lose votes). This remains true *even if* this legislative action was taken only reluctantly and in the interests of defusing a long standoff regarding the proper manner to handle the education of handicapped children.

To reach the dissent's contrary result requires judges to adopt a stance that borders on willful blindness towards government conduct and privileges form over substance. In writing for the Court, Justice Souter wisely took a different tack. Justice Souter and the Court refused to be bamboozled by implausible intimations that the religious identity of the Kiryas Joel school district was the mere coincidence and byproduct of a purely secular calculus. In doing so, the Court upheld the real and substantive protections afforded to equal religious liberty under the First Amendment—including its prohibition of preferential treatment for any religious sect, however large or small, popular or unpopular, mainstream or isolated.

Alternatively, even if cultural differences, and not theological ones, were found to be at the heart of the Kiryas Joel dispute, as Justice Scalia forcefully contended, it is not clear how he could then close his dissent by invoking "our Nation's tradition of religious toleration."[109] It would seem that the entire project of defending the school district would not rise to the level of the First Amendment, thereby precluding any expansive claim concerning the Satmars' rights under the Religion Clauses. In the end, Justice Scalia's own impassioned appeal to religious tolerance strongly suggests the speciousness of his own "secular cultural differences" reading of the case.

Justice Stevens's concurring opinion, however, provides an even stronger reason to doubt the accuracy or veracity of the dissent's characterization of this case. In enacting Chapter 748, the state legislature had indeed created "a school district . . . specifically intended to shield children from contact with others who have 'different ways.' "[110] But this is precisely the quintessential function of a private school. The "telling" result was, as Justice Stevens pointed out, that a full two-thirds of the students in the

109. *Grumet*, 114 S. Ct. at 2516 (Scalia, J., dissenting).
110. *Id.* at 2495 (Stevens, J., concurring).

Kiryas Joel public school were Hasidic children from outside the village. Whatever its nominal status, the school brought into being by Chapter 748 was thus best characterized as an ersatz private school for Hasidic Jewish children (funded by public money), because its student population was, in the end, "defined less by geography than by religion."[111] Indeed, Hasidic families from as far away as Israel came to Kiryas Joel to enroll their children in this "public" school.[112] It is difficult to imagine what would qualify as an impermissible union between a religious sect and the public schools if a public school created by a special legislative act that catered only to the children of one religious group, without any particular concern for residence, does not cross the threshold.

Despite sharp differences between the Court's six-member majority and its three dissenters concerning the case at hand, the call by five justices (the three dissenters plus Justices Kennedy and O'Connor) to revisit and reconsider *Aguilar* should be welcomed as a move towards a more sensible and principled view concerning acceptable government accommodation of religion. The Court's 1985 decision in *Aguilar* sparked the Kiryas Joel schooling controversy in the first place, by stopping public school teachers from providing on-site special education services to handicapped children enrolled at religious schools while allowing such services to continue at private nonreligious schools. If the human story surrounding *Grumet* teaches us anything, it is this: to single out children at private religious schools for disparate treatment in the provision of secular, special assistance programs imposes an extra burden on them along nothing else but religious lines. The placement of such a burden does not square fully with the Court's own jurisprudence, which advocates impartial government neutrality as among specific religious sects, and between religion and irreligion more generally.

Importantly, overruling *Aguilar* would comport with both the majority and dissenting views in *Zobrest v. Catalina Foothills School District*,[113] which upheld a state-paid hearing interpreter for a deaf child in a Catholic high school. Overturning the case would be consistent with Chief Justice Rehnquist's majority opinion. Allowing on-site services to parochial students when students at

111. *Id.*
112. Berger, *supra* note 25, at D21.
113. 113 S. Ct. 2462 (1993).

other private schools already are receiving them would not violate the Court's long-standing policy of upholding government-funded programs that provide benefits to a class of persons defined broadly and without any religious criteria whatsoever.

On the other hand, the constitutional issues involved in *Aguilar* seem sufficiently dissimilar from *Zobrest* so as not to implicate the reservations that Justice Blackmun expressed in a dissenting opinion joined by Justice Souter.[114] The two Justices rebuked the *Zobrest* majority, arguing that the decision departed from almost a half century of the Court's Establishment Clause case law that forbade government from taking any part in the inculcation of religion. The *Zobrest* majority violated this principle, they argued, as the state's provision of the hearing interpreter provided the parochial school with the very medium for communicating its religious message to James Zobrest, making his religious education a joint venture between public employees and private religious teachers.[115]

The provision of special on-site education services for handicapped students at private religious schools does not frame the same issue that lies at the heart of the *Zobrest* dissent: the use of public resources in the inculcation of religion. To be sure, *Aguilar* could not be repudiated without calling attention to some element of risk that a parochial school's religious mission might receive a "symbolic" or fiscal benefit because of on-site instruction of handicapped children by public employees. There can be no doubt that a "cleaner" separation of church and state could be maintained by continuing to prohibit on-site special services at private religious schools.

Viewing *Aguilar* in this manner, however, obscures a broader issue that more directly implicates the Religion Clauses. As compared with a small risk of indirect government benefit to religion on one side of the balance, the government's neutrality as between religion and irreligion *is* necessarily compromised by prohibiting special on-site services at religious schools, while allowing them to continue at nonreligious private schools. As Justice O'Connor's dissent in *Aguilar* suggests, the Court's current willingness to differentiate between religious schools and nonreligious private schools does more violence to the Establishment Clause's principle of government neutrality towards religion and

114. *Id.* at 2471-74 (Blackmun, J., dissenting).
115. *Id.*

irreligion than treating all private school children the same.[116] *Aguilar* imposes extra time, money, and emotional "transaction costs" on religious school children and local governments on the basis of a small risk that is unlikely to occur, unlikely to lend any real support to religion, and likely to be avoided by monitoring.

One logically defensible response, which marries strict "separationism" with "neutrality," might be for the Court to forbid on-site special services to handicapped children enrolled at *both* private religious schools *and* private nonreligious schools. This approach, however, would impose a high human cost, likely on disabled children, for the sake of upholding principles and a result that are neither in the Constitution nor in the Court's own precedents. The Establishment Clause may warn against government aid to religion, but it does not mandate or require an impregnable wall between church and state that forbids any state action in the pursuit of a neutrally- and broadly-defined secular goal due to the possibility of a small ancillary benefit to religion.[117]

In this regard, it is important to remember that *Everson v. Board of Education*[118] and its "separationist" progeny were devoted to permissible government accommodation as much as to the separation of church and state. *Everson* itself upheld a local program of state assistance (bus transportation) for children attending parochial schools. No doubt, the pre-*Aguilar* Court had rejected open-ended financial aid to religious schools in *Committe for Public Education and Religious Liberty v. Nyquist*[119] and *Lemon*, and struck down state efforts that sought to have public school teachers provide a broad range of services in religious schools in *Meek v. Pittenger*.[120] But, in *Everson v. Board of Education*, *Wolman v. Walter*,[121] and *Board of Education v. Allen*,[122] the Court had allowed narrowly-tailored but broadly available state assistance programs

116. *See* Aguilar v. Felton, 473 U.S. 402, 424-30 (1985) (O'Connor, dissenting).

117. *See* Olivo, *supra* note 26, at 775, 788 n.70; *see, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745-46 (1976) ("a hermetic separation of the two [church and state] is an impossibility [that the Establishment Clause] has never required"); Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) ("the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier"); Zorach v. Clauson, 343 U.S. 306, 312 (1952) ("The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State").

118. 330 U.S. 1 (1947).

119. 413 U.S. 756 (1973).

120. 421 U.S. 349 (1975).

121. 433 U.S. 229 (1977).

122. 392 U.S. 326 (1968).

for children attending private religious and nonreligious schools (such as bus transportation, medical care, and diagnostic services), and even had authorized limited assistance to the schools themselves (such as the provision of textbook funds), "even though religious schools were the indirect financial beneficiaries."[123]

The *Aguilar* Court was right to suggest that allowing public teachers to provide general remedial services to children at religious schools might have the "symbolic" or fiscal effect of aiding religion. But the human story surrounding *Grumet* strongly indicates that this small, albeit ever-present, risk is dwarfed by, and cannot justify, the extra time, money, and emotional costs imposed on religious school children and local government when it comes to the education of the handicapped. In short, the burdens on "free exercise" in this narrow set of circumstances seem substantially greater than the risk of excessive entanglement or symbolic union. Overruling *Aguilar* to the extent of allowing public teachers to provide on-site services for handicapped children with special needs, in accordance with the Individuals with Disabilities Education Act,[124] would minimize and circumscribe the threat that the public teachers involved would be seen as endorsing or aiding religion rather than supporting the nation's legislated commitment to the education of handicapped children, regardless of the school they attend, the creeds they profess, or the God or gods they may or may not worship.

Overturning *Aguilar* in this manner would face few if any of the obstacles usually presented by stare decisis. In short, it seems highly doubtful that *Aguilar* has been relied upon by private citizens to such a degree that it would cause great hardship to overrule it now. On the contrary, the equitable termination of the aforementioned hardships, together with the principled restoration of government neutrality opposite religion and irreligion in the education of handicapped children, is one of the factors that most strongly favors reversing *Aguilar* on the narrow grounds outlined here.

Whatever the broader doctrinal implications of *Grumet*, the Court's opinion will not be the last word spoken in this case. Both the New York legislature and Governor Cuomo reacted

123. Redlich, *supra* note 3, at 66.

124. Individuals with Disabilities Education Act of 1970, Pub. L. 91-230, 84 Stat. 121 (codified as amended in scattered sections of 20 U.S.C.).

promptly after the Court struck down Chapter 748,[125] and passed a new law, Chapter 241,[126] meant to save the Kiryas Joel public school district. The initiative sought to redress the Court's objection to the village school district as an entity that owed its existence to a special legislative act, and so allowed any village or municipality that met certain specified criteria to petition and establish its own school district.[127] The plaintiffs who had initiated the successful suit challenging Chapter 748 filed a new suit, charging that Chapter 241 was simply a cynical attempt to circumvent the Court's ruling. While state officials maintained that the new provision would allow anywhere between ten and sixty localities to create their own school districts, the plaintiffs maintained that only Kiryas Joel fulfilled all the criteria listed in the new law.[128]

The same judge that originally struck down Chapter 748 recently upheld Chapter 241.[129] It is conceivable that this new decision could wind itself back to the Supreme Court. The above recent developments seem to indicate that Chapter 241 stands a better chance of surviving judicial scrutiny under the Establishment Clause than did its precursor. Both Justice Souter's majority opinion and Justice O'Connor's concurrence suggested ways that the legislature could accomplish its desire to accommodate the Satmar Jewish residents of Kiryas Joel while at the same time remaining faithful to the requirements of the First Amendment. Foremost among these was the enactment of a generally applicable statute with religiously neutral "up front" procedural requirements for incorporating a new school district.

Whether the new law currently applies only to Kiryas Joel is a factual question, but its ultimate relevance is far greater than the state trial judge suggested in denying a temporary restraining or-

125. James Dao, *Albany in Accord on School District for Hasidic Group*, N.Y. TIMES, July 2, 1994, at 1, 22.

126. 1994 N.Y. Laws ch. 241.

127. Under the new law, "only municipalities with enrollments of at least 2,000 pupils in kindergarten through 12th grade would be eligible. The municipalities would have to be wholly contained within one school district, the new district's enrollment could not be more than 60 percent of the old district's enrollment, the old district would have to keep an enrollment of at least 2,000 students, the new district's wealth would have to be at or above the state average and the old district's wealth could not change by more than 10 percent." Kevin Sack, *School Groups Challenge New Law on Hasidic District*, N.Y. TIMES, July 19, 1994, at B2.

128. *Id.*

129. Grumet v. Cuomo, 626 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995); *see* Joseph Berger, *Court Affirms Public School for Hasidim*, N.Y. TIMES, Mar. 9, 1995, at B1; Gary Spencer, *School District Measure Affirmed*, N.Y. L.J., Mar. 9, 1995, at 1.

der.[130] If we keep in mind the Court's recent decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[131] there is no reason to think that a facially-neutral law that is preferential in religious terms is any more constitutionally grounded than a facially neutral law that burdens religion. In *Lukumi*, the Court rightly suggested that a secular law can contain so many exceptions that it becomes plain that it is aimed at one particular religion and nothing else. If a law that is dressed in neutral and secular language can be said to be tailored enough to constrict and disadvantage a religious group, then Chapter 241, *if* it indeed applies only to the village of Kiryas Joel, should be struck down by the Court. A law supporting a religion should be as presumptively unconstitutional as one attacking it.

Still, it appears at least that Chapter 241 has been tailored to address the Court's problems with Chapter 748. By arguably providing a broader accommodation of religious needs within a religiously-neutral and nonpreferential framework, Chapter 241 perhaps best points out the true merits of the Court's ruling in *Grumet*. In announcing "up front" procedural requirements to ensure government evenhandedness, Justice Souter's opinion ultimately provided both more protection than Justice Scalia's dissent against religious favoritism inconsistent with the Establishment Clause *and* more guidance to government concerning the full range of steps it could take to accommodate religion without violating the Constitution. Seen in this light, Justice Souter's opinion for the Court was optimally maximizing the size both of the zone in which individuals and groups can and should expect to be free from legislatively favored religious preferences, and the zone in which government can and should exercise its discretion and power of accommodation to ensure that religious beliefs and practices are not unduly burdened.

130. *See* Grumet v. Cuomo, 617 N.Y.S.2d 620, 628 (N.Y. Sup. Ct. 1994) ("[T]he fact that only the Village of Kiryas Joel currently qualifies under the statute, even if true, is not dispositive of the constitutional question. It is possible that other municipalities might qualify in the future."); *see also* Gary Spencer, *Judge Declines to Bar School District Law*, N.Y. L.J., Aug. 11, 1994, at 1, 2.

131. 113 S. Ct. 2217 (1993). For a discussion and critique of the *Lukumi* decision, see R. Ted Cruz, Recent Development, *Animal Sacrifice and Equal Protection Free Exercise:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 17 HARV. J.L. & PUB. POL'Y 262 (1994).