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KIRYAS JOEL AND TWO MISTAKES ABOUT EQUALITY

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INTRODUCTION

In 1948, Rebbe Joel Teitelbaum founded the congregation Yetev Lev D'Satmar in Williamsburg, Brooklyn.[1] Over the next twenty-five years, the Satmar Hasidic sect grew, and members started thinking about leaving the urban, heterogeneous setting for a place where they could live in relative isolation.[2] In 1974, Satmar families began leaving Brooklyn for upstate New York.[3] They purchased property in the Town of Monroe, and later, after a zoning dispute with the Town, incorporated as the Village of Kiryas Joel.[4] As of 1990, approximately 10,000 Satmar Jews lived in or around the Village.[5] The Satmars dress in conformance with a semiformal code;[6] they speak Yiddish;[7] they resolve most of their disputes in Satmar courts;[8] their marriages are prearranged.[9] Further, the Satmars educate almost all of their children in private, religious schools, with boys and girls educated separately.[10]

Public funds for educating handicapped children may not be used in those private, religious schools,[11] so to qualify for such funds, the Satmars of Kiryas Joel experimented with sending their handicapped children to the heterogeneous county schools. But "the Satmar children had a hard time dealing with immersion in the non-Satmar world."[12] "Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing 'the panic, fear and trauma [the children] suffered in

1. See Israel Rubin, Satmar: An Island in the City 40 (1972).

2. See id. at 224.

3. See Jerome R. Mintz, Hasidic People: A Place in the New World 206–07 (1992).

4. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994). The Satmars wanted to subdivide their homes into "several apartments, apparently in part because of their traditionally close-knit extended family groups." Id. at 2496 (O'Connor, J., concurring). Additionally, the Satmars used "basements of some of their buildings as schools and synagogues, which according to the town was also a zoning violation." Id. Following the procedures of New York village incorporation law, the Satmars incorporated their community as the Village of Kiryas Joel, after drawing the boundaries narrowly to "include just the 320 acres owned and inhabited entirely by Satmars." Id. at 2485.

5. See Mintz, supra note 3, at 214.

6. See id. at 30–31; Rubin, supra note 1, at 93–94, 186.

7. See Gershon Kranzler, Williamsburg Memories 202 (1988).

8. See Rubin, supra note 1, at 170–71.

9. See id. at 114–15.

10. See id. at 137–38.

11. See Aguilar v. Felton, 473 U.S. 402, 411 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 396–97 (1985).

12. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2496 (1994) (O'Connor, J., concurring).

leaving their own community and being with people whose ways were so different.' "[13] The Satmars then lobbied the New York legislature for a special school district. The Satmars did not argue that religious doctrine required separation; rather, they contended that separate schooling would alleviate the emotional trauma of their handicapped children.[14] In 1989, the New York legislature responded by constituting the Village of Kiryas Joel as a "separate school district," granting "all the powers and duties of a union free school district."[15] Governor Cuomo indicated that the action was "a good faith effort to solve th[e] unique problem" faced by the Satmars.[16] But in *Board of Education of Kiryas Joel Village School District v. Grumet* [*Kiryas Joel*],[17] the United States Supreme Court held the law unconstitutional.

Kiryas Joel, and the questions the case raises, are the focus of this Article. Although at first glance *Kiryas Joel* might seem to involve somewhat unusual circumstances, in fact the issues raised cut to the core of the conflict between the values expressed cogently in the motto "e pluribus unum."[18] The values of the "unum" are those of integration and of treating similar cases similarly. They are centripetal values, emphasizing what we share. The values of the "e pluribus," on the contrary, are those of separation and of treating different cases differently. They are centrifugal values, emphasizing how we differ. In *Kiryas Joel* the Court abandoned the latter for the former.[19] In this Article, I seek to defend an

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13. Id. at 2485.

14. See id. at 2486; Board of Educ. v. Wieder, 527 N.E.2d 767, 775 (N.Y. 1988).

15. *Kiryas Joel*, 114 S. Ct. at 2486; see 1989 N.Y. Laws ch. 748, at 1527 (McKinney). The Satmars used this legislation to establish one school only; it provides a special education program for their handicapped children and for other Hasidic handicapped children who are "tuitioned in" from neighboring school districts. *Kiryas Joel*, 114 S. Ct. at 2486.

16. *Kiryas Joel*, 114 S. Ct. at 2486.

17. 114 S. Ct. 2481. After the Court's decision, New York enacted a law permitting municipalities to secede from larger school districts if they satisfy certain criteria. See 1994 N.Y. Laws ch. 241, at 827 (McKinney). The law allows municipalities that are "wholly within a single central or union free school district, but whose boundaries are not coterminous with the boundaries of such school district, to organize a new union free school district consisting of the entire territory of such municipality whenever the educational interests of the community require it" if four additional requirements are met. Grumet v. Cuomo, 625 N.Y.S.2d 1000, 1003 (Sup. Ct. 1995). These requirements concern the number of children in the municipality and the wealth of the municipality. See id. In early 1995, this law was upheld by the same judge who had first invalidated the 1989 law benefiting the Village of Kiryas Joel alone. See id. at 1008.

18. "One out of many." Black's Law Dictionary 536 (6th ed. 1990).

19. Cf. Grumet v. Board of Educ., 618 N.E.2d 94, 118 (N.Y. 1993) (Bellacosa, J., dissenting) ("A culturally diverse Nation, which proclaims itself under a banner, E Pluribus Unum, should not tolerate such a self-contradiction, for to penalize and encumber religious uniqueness in this way, in effect, strikes the 'E Pluribus' and leaves only the 'Unum.' "), aff'd, 114 S. Ct. 2481 (1994). I reject the reading of the motto that interprets "out of many, one" to mean that the "many" have become totally assimilated into the "one." See Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1462 (1987) ("Article V prospectively abolished that sovereign right [of secession] for each state People

appropriate balance between the two competing sets of values, using *Kiryas Joel* as the focal point of the discussion. The position I stake out rests in the middle of a spectrum between two groups of scholars. On the one hand, John Rawls, Christopher Eisgruber, and others have emphasized the importance of the American common ground and the dangers of granting norm-creating power to sectarian groups.[20] On the other hand, Robert Cover, Will Kymlicka, and others have stressed the virtues of decentralized nomic communities, sometimes called "nomoi," which are constituted by people who share a comprehensive world view that extends to creating law for the community.[21] Such communities check the centralized government's lawmaking and create separate normative cultures; one might use the term "permeable sovereignty"[22] to describe the recognition and acceptance of these cultures within the public legal regime. This Article argues that the American constitutional order is best understood as adopting a version of "permeable sovereignty" that allows homogeneous nomic communities to exercise public as well as private power, provided that the communities exercise public power in a constitutional fashion. To limit public power to heterogeneous, mainstream communities would relegate more idiosyncratic, homogeneous communities to an inferior status. But if we allow such communities to take the reins of public power, it is proper to insist that they comply with the rules governing the public arena.

The exercise of public power by idiosyncratic, homogeneous, and often separatist, exclusionary groups, is the problem at the center of *Kiryas Joel*. This problem might best be seen as one of "partial exit." The partial exit problem arises when a group of like-minded people leaves one geographical location for a new place, establishes a set of private institutions, and also seeks the accoutrements of governmental power for its

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who joined the Union, thereby melting themselves into the larger common sovereignty of the People of America. E Pluribus Unum.").

20. See John Rawls, Political Liberalism (1993); Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 Colum. L. Rev. 87, 98–101 (1996) [hereinafter Eisgruber, Assimilation]; Christopher L. Eisgruber, Madison's Wager: Religious Liberty in the Constitutional Order, 89 Nw. U. L. Rev. 347, 402–08 (1995) [hereinafter, Eisgruber, Madison's Wager]; Christopher L. Eisgruber, Political Unity and the Powers of Government, 41 UCLA L. Rev. 1297, 1326–28 (1994) [hereinafter Eisgruber, Political Unity].

21. See Will Kymlicka, Liberalism, Community, and Culture 5 (1989); Robert M. Cover, The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 68 (1983).

22. See Abner S. Greene, Uncommon Ground—A Review of Political Liberalism by John Rawls and Life's Dominion by Ronald Dworkin, 62 Geo. Wash. L. Rev. 646, 649 (1994) [hereinafter Greene, Uncommon Ground]; see also Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 149 (1994) [hereinafter Greene, Checks and Balances] (maintaining that multiple repositories of power were central to the framers' design regarding separation of powers); Abner S. Greene, The Political Balance of the Religion Clauses, 102 Yale L.J. 1611, 1613 (1993) [hereinafter Greene, Political Balance] (arguing for mandatory exemptions under the Free Exercise Clause).

new community. The problem is sharpened if we assume that the world view the group shares is a religious one. Are there limits to the governmental power that people who share a common religion may receive? Under current constitutional doctrine, some limits are clear: The group may not use its governmental power to teach religious doctrine in public schools;[23] it may not enact ordinances that are justifiable solely on religious grounds;[24] and it may not discriminate against other religions in the granting of governmental benefits or in the imposition of governmental burdens.[25]

What makes *Kiryas Joel* a difficult and interesting case is that the Satmars were accused of doing none of these things.[26] At issue was not how the Satmars were using their governmental power (no record was made on this point), but rather the very establishment of a special school district, carved out of a larger heterogeneous school district, to accommodate the Satmars' desire to educate their handicapped children away from the pressures of a setting integrated in religious and cultural terms. The Court condemned the legislation, on its face, on what can best be termed two grounds of equality. First, the Court concluded that a political line had been drawn on the basis of a religious criterion, implicating the inequality of segregation. Second, the Court expressed the concern that other similarly situated groups would not receive the same benefit as the Satmars; thus, it condemned the legislation as exhibiting favoritism.[27]

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23. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987).

24. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

25. See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2234 (1993).

26. On the record of the case as litigated before the Supreme Court, the school district and the school are being run in a secular fashion. Allegations of the intrusion of religious doctrine into the running of the school were not shown on the record. Thus, as Justice Scalia pointed out in dissent (and this is undisputed), "these cases involve no public funding . . . to private religious schools," and "classes at the public school are co-ed and the curriculum secular." Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2506 (1994) (Scalia, J., dissenting). The case does not, then, directly implicate either of the Court's primary lines of doctrine involving the Establishment Clause and schooling: (1) funding of private, religious schools, and (2) religious activities in public schools.

27. Justice Souter wrote an opinion for a majority and for a plurality. His opinion for a majority—including Justices Blackmun, Stevens, O'Connor, and Ginsburg—concluded that New York violated the Establishment Clause by favoring one sect over others. See id. at 2491–92. I discuss this holding, and Justice O'Connor's concurrence on this point, see id. at 2495–500, in Part II. Justice Souter's opinion for a plurality—including Justices Blackmun, Stevens, and Ginsburg—concluded that New York violated the Establishment Clause by "delegat[ing] its civic authority to a group chosen according to a religious criterion." Id. at 2488. I discuss this conclusion in Part I.B.1. In addition to Justice O'Connor's separate opinion, Justices Blackmun, Stevens, and Kennedy also wrote separate concurrences. Justice Blackmun stated his allegiance to the *Lemon* test. See id. at 2494–95. Justice Stevens explained, in a brief opinion joined by Justices Blackmun and Ginsburg, that New York had "affirmatively support[ed] a religious sect's interest in segregating itself and preventing its children from associating with their neighbors." See id. at 2495. Justice Kennedy, who concurred in the judgment only, opined that New York had engaged in "religious gerrymandering" and thereby had violated the Establishment

There is reason to believe, however, that the Court, by failing to pay proper attention to the partial exit problem, made two mistakes about equality, both of which stem from a similar brand of constitutional myopia—emphasizing the virtues of the *unum* while seeing only the destructive aspects of the *e pluribus*. The Court's first mistake about equality was to condemn the New York law for promoting segregation over integration; the Justices referred to the Establishment Clause, but seemed animated by broader Equal Protection Clause values. There are two aspects to the Court's concern with segregating citizens by religion. The first relies on the apprehension that citizens who share a common religion will exercise public power in an unconstitutional fashion. The second relies not on how such delegated public power will be used, but rather on the state's drawing a district line around a village known to be populated by a religiously homogeneous group of citizens. I respond to these concerns in Part I. First, in Part I.A, I set forth the "complete exit" model. Many people can accept a model of complete exit: A community should have a significant berth of religious freedom if it exits completely and seeks a purely private domain of action. A true political liberalism, I argne, incorporates the complete exit model—or what I call "permeable sovereignty"—by providing not only for a public arena for the advancement of a common ground, but also for an exit option for citizens to live according to private law. I show that permeable sovereignty—the recognition that within one nation there exists a multiplicity of law-givers, both at the public and private level—is both normatively defensible and consonant with our constitutional structure.

I then turn to the partial exit problem: Even for those who accept the complete exit model, it is harder to accept a community's wanting the rewards of both the private realm (living separately as a religious community) and the public realm (receiving certain accoutrements of public power at the same time). If the Satmars truly want to be alone, one might argue (and *Kiryas Joel* seems to imply), then let them forgo governmental power that comes more appropriately to groups that accept the integrationist model. The first half of Part I.B responds to the concern that citizens who share a common religion will exercise public power in a religious way.

The second half of Part I.B responds to the argument that states may not draw political lines around groups of citizens known to share a common religion, i.e., that states may not enact religious gerrymanders. I show that governmental recognition of a separated, homogeneous community—defined by religion or race—is not the same as governmental insistence on such separation and homogeneity. I begin by discussing

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Clause. See id. at 2504. I discuss this argument in Part I.B.2. Although the Justices based their conclusions on the Establishment Clause, the two key concerns—about favoritism and about gerrymandering—are essentially arguments about equality in the setting of religion.

Brown v. Board of Education[28] and its progeny. This line of cases establishes the de jure/de facto distinction, which allows racially (and by extension religiously) homogeneous groups to exercise governmental power, so long as (a) the group lives separately by its own choice, not by governmental mandate, and (b) the governmental power is exercised in constitutional fashion. I also provide a normative defense for drawing such a sharp line between public and private action. I then explain why the Kiryas Joel Village School District should be seen not as an instance of religious gerrymandering, but rather as an example of the secular respect that a majority might sometimes show toward a minority that has paid the various costs of exit to seek a home of its own. I also discuss whether we should distinguish between minority and majority exit, and between religious and racial exit, and whether physical exit should be required before granting political power to distinct groups.

Although a law favoring one religious sect over others should be invalidated, there is no evidence that New York's law exhibited such favoritism. This is the Court's second mistake about equality, which I discuss in Part II. Just as the Court's focus on the model of integration led it to undervalue the separationist element of our constitutional structure, so did the Court's continued insistence on formal equality (refusing to permit distinctions based on race or religion) lead it further astray from a more constitutionally accurate substantive equality, which would allow a majority to draw racial or religious distinctions to benefit a minority. As with the concern regarding religious gerrymandering, here too the Justices referred to the Establishment Clause, but seemed animated by broader Equal Protection Clause values. Part II.A responds to the argument that relies not on the absolute unconstitutionality of a governmental benefit for the Satmars, but rather on the conditional concern that New York might not grant a similar benefit to other groups. I argue that this line of reasoning is erroneous and unprecedented in both Establishment Clause and Equal Protection Clause jurisprudence.

Second, in Part II.B, I suggest that the Court's opinions on this point are best understood as relying on a more generalized concern with special governmental benefits for racial or religious groups. I show how the Court has moved from invalidating racial affirmative action programs under the Equal Protection Clause, to relying on similar logic to invalidate, under the Free Speech Clause, a type of racial affirmative action program, to relying (though not explicitly) on similar logic to invalidate the Kiryas Joel Village School District under the Establishment Clause. I argue that there is little reason for strict judicial scrutiny of majorities lifting burdens on minorities, in both the race and religion settings.

Finally, even if the Equal Protection Clause should not bar majorities from lifting burdens on minorities, it has been argued that the Establishment Clause requires the invalidation of laws lifting burdens on identifi-

28. 347 U.S. 483 (1954).

able religious minorities. Indeed, although at one point *Kiryas Joel* seems to approve, in theory, legislative accommodations for specific minority religions, much of the rest of the opinion indicates discomfort with such accommodations. To support New York's law, I say more on this issue in Part II.C, by proposing a deferential test for religious accommodation.

It might or might not be a good thing for the health of the Republic that certain groups want to live on their own and simultaneously exercise governmental power. But so long as such groups exercise governmental power in a constitutional fashion, our opposition to balkanization should take a form other than judicial injunctions against separation. Part III sketches the contention that there are other, constitutional measures for combating voluntary religious or racial separation. The "government speech" model permits government great power to encourage people to live together in heterogeneous communities.

I. THE FIRST MISTAKE ABOUT EQUALITY: THE PARTIAL EXIT PROBLEM

A. *The Complete Exit Model*

1. *The Virtues of Permeable Sovereignty.* — A salient feature of liberal democracy is its commitment to an agnosticism of value: Although we want effective legislation and enforcement, we're always somewhat unsure whether we've gotten things right, so we leave open significant avenues for change and dissent. Normative communities, or nomoi,[29] can play an important role in establishing power bases from which government may be checked. But the focus on clearing paths for political change—that is, the checking value of political rights[30]—should not obscure other affirmative, nonchecking reasons to allow normative communities to flourish. Multiple repositories of power are valuable both in a negative and positive way; normative communities such as religious communities, private associations, and families not only provide power bases for challenging value choices in the public arena, but also allow separate visions of the good to coexist, in the private arena, alongside those established by government.[31] Sovereignty in a liberal democracy is best seen as permeable;[32] as part of its commitment to an agnosticism of value, government in a liberal democracy should allow separate nomoi to thrive, by relaxing the grip of the law through either enforcement discretion or exemptions.[33]

By contrasting the work of John Rawls with that of Robert Cover, we can see the importance both of seeking a common public ground in

29. See Cover, supra note 21; supra text accompanying note 21.

30. See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521.

31. See infra Part III.

32. See Greene, Uncommon Ground, supra note 22, at 649.

33. See Greene, Political Balance, supra note 22, at 1633–40; Greene, Uncommon Ground, supra note 22, at 649.

which differences regarding the good can be overcome, and of recognizing a private space in which those differences may be manifested. In his recent book, *Political Liberalism*,[34] Rawls largely supports the agnostic theory of liberal democracy. At least for core issues of justice, a liberal democracy should not rely on any particular theory of the good, or, as Rawls puts it, on any particular comprehensive doctrine.[35] Rather, adherents to various comprehensive doctrines should locate the ground on which their doctrines overlap, and accept that common ground as their shared political conception of justice, even though the bases for such acceptance will vary among the many comprehensive doctrines.[36] But although Rawls maintains that a properly functioning liberal democracy should not permit an appeal to a sectarian view of the good to justify law,[37] he does not fully acknowledge the harm done to adherents of at least certain comprehensive doctrines by enforcing such "gag rules." A government based on an overlapping consensus of otherwise divergent views, and in gag rules that support a common ground of public reason, is consistent with the ideas of the good of some comprehensive doctrines. But other comprehensive doctrines are not consistent with living in a regime that forbids sectarian arguments for the good in the lawmaking process. Rawls acknowledges this differential impact of his theory, but asserts that the harm is merely incidental.[38] In other words, Rawls objects to a comprehensive liberalism that insists on the truth of statements such as "the moral order arises in some way from human nature itself . . . ."[39] Political liberalism, says Rawls, must remain agnostic on ultimate theories of the good. But if certain sectarian views are harmed by the insistence on an overlapping consensus achieved through rules of public reason while other sectarian views are helped, and if this is the result, not of an intentional exclusion of certain views as wrong, but rather the unintended by-product of the overlapping consensus and public reason requirements, then Rawls claims that adherents to the harmed comprehensive doctrines have no legitimate complaint.

As I have suggested elsewhere, to remain agnostic between competing theories of the good, political liberalism should not stop when an overlapping consensus of comprehensive doctrines is located, but must attend as well to the differential harm done to those whose comprehensive views cannot accept the rules of overlapping consensus and public reason.[40] The solution is to accept sovereignty as permeable rather than complete, to insist that government allow insular normative communities to live according to their own law, so long as people in those communities

34. Rawls, supra note 20.

35. See id. at xviii–xxix.

36. See id. at 10, 39, 127–28, 134.

37. See id. at 136–37, 143–44, 217, 225, 243.

38. See id. at 138, 152, 194–200.

39. Id. at xxvii.

40. See Greene, Uncommon Ground, supra note 22, at 671–73.

do not impose (significant) externalities on outsiders. Rawls's political liberalism, although properly focused on locating common ground among competing theories of the good, does not adequately address the concerns of normative communities that are harmed by the common ground approach.

Just as Rawls cedes too much to the centripetal force, dismissing the incidental but significant harm to certain norm-creating communities, so does Robert Cover's influential article, "Nomos and Narrative,"[41] surrender too much to the centrifugal force, eloquently advancing the cause of plural normative communities, or nomoi, but neglecting the legitimate claims of the common government. Cover argues that formal institutions of law are "but a small part of the normative universe that ought to claim our attention."[42] Central government should "stop circumscribing the *nomos*; we ought to invite new worlds."[43] Focusing on one small, separatist religious group, Cover maintains that "the Mennonite community creates law as fully as does the judge . . . . The Mennonites are not simply advocates, for they are prepared to live and do live by their proclaimed understanding of the Constitution."[44] Nomic groups such as the Mennonites seek "a refuge not simply *from* persecution, but *for* associational self-realization in nomian terms."[45] The Constitution, says Cover, should be read to include a broad principle of associational liberty, which "implies a degree of norm-generating autonomy on the part of the association."[46] In particular, notes Cover, "The religion clauses of the Constitution . . . [are] unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationship with the individuals subject to its norms are entitled to constitutional recognition and protection."[47]

Cover forcefully makes the case for a broad principle of associational freedom based not on the negative, or checking, value of dissident communities, but rather on the affirmative virtues of living according to law made locally, by a group that constructs itself as an insular, norm-making community. Cover goes further than this, though, when he suggests not only that the Supreme Court should construe the Constitution to require government to respect such separate nomoi, but also that the Supreme Court does not have any greater authority to interpret the Constitution than do these separate communities. He makes

> a very strong claim for the Mennonite understanding of the first amendment[,] . . . asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a

41. Cover, supra note 21.
42. Id. at 4.
43. Id. at 68.
44. Id. at 28–29.
45. Id. at 31.
46. Id. at 32.
47. Id. at 32 n.94.

> status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge.[48]

If Cover means that the Mennonite understanding of the Constitution is worthy of respect, and that the Constitution should be read to accord great associational, norm-creating freedom to communities such as the Mennonites, then I do not disagree. I also agree that the Constitution and the Court's interpretation of the Constitution are not identical, that other governmental actors and citizens have a role to play in interpreting the Constitution, regarding both unresolved questions and questions the Court has addressed but others think should be reexamined.[49] This view seems correct, for although it acknowledges a plurality of constitutional interpreters, it also grants the Court the final say in interpretive disputes, at least until it can be persuaded to change its mind. But in the passage quoted above, Cover implies, additionally, that the Court has no privileged status as constitutional interpreter. It is one thing to accord great norm-creating freedom to religious communities and to respect their role in interpreting the Constitution. It is another thing—and too dangerous to our civic order—to strip the Supreme Court of its role as final arbiter of constitutional disputes.

Later in the article, Cover seems to support the first, or narrower reading, when he criticizes the Court for claiming that "[e]veryone else offers suggestions or opinions about what the single normative world should look like, but only the state creates it. The position that only the state creates law thus confuses the status of interpretation with the status of political domination."[50] I agree with Cover that the Court should construe the Constitution as permitting a plurality of lawmakers, i.e., that the Constitution should be read to endorse permeable sovereignty. In this way, we could urge the Court to adopt a constitutional principle of associational freedom for norm-creating communities, but accept the Court's role as final arbiter of the scope of this principle. In discussing civil disobedience and the collateral bar rule, however, Cover again supports a more radically decentralized view of interpretive authority. Civil disobedients are engaged in radical reinterpretation, and a judge must "choose between affirming his interpretation of the official law through violence against the protestors and permitting the polynomia of legal meaning to extend to the domain of social practice and control."[51] When a federal judge refuses to apply her best understanding of federal law, however, and instead permits those who prefer a different reading (or a different law) to act according to their own views, we have moved

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48. Id. at 28.

49. See Robert A. Burt, The Constitution in Conflict (1992); Sanford Levinson, Constitutional Faith (1988); Cass R. Sunstein, The Partial Constitution 145–53 (1993).

50. Cover, supra note 21, at 43.

51. Id. at 47–48.

from endorsing the value of insular, norm-creating communities, to a much more radical form of chaos. It is true that civil disobedients do not properly fall within Cover's first category of interpretive community (insular autonomy), but rather within Cover's second category, of those seeking "redemptive constitutionalism," using associations as a sword rather than as a shield.[52] But the category shift is significant, for allowing insular communities to make law for themselves when external costs are nonexistent or low is different from requiring that governmental courts accept minority views of law as binding outside those insular communities.

Cover backs his view of civil disobedience when he criticizes the collateral bar rule of *Walker v. City of Birmingham*,[53] which held that the constitutionality of a federal district court injunction must be challenged through appeal, rather than through disobedience. Cover takes issue with this rule, a basic one for maintaining order,[54] as

> subordinat[ing] the creation of legal meaning to the interest in public order. . . . When the judge, aligned with the state, looks out upon the committed acts of those whose law is other than the state's, *Walker* tells him that the court's authority is greater than its warrant in interpretation of the Constitution or the law.[55]

Cover admits that he "accord[s] no privileged character to the work of the judges."[56] Cover's elegant misdescription of the rule of *Walker* is instructive: *Walker* teaches not that a district court's injunctive authority is greater than its warrant in interpretation of the Constitution or the law, but rather that the question whether the injunction is warranted should be decided through proper appellate processes, not through random acts of disobedience masquerading as interpretive heterogeneity.

In sum, Rawls seeks common ground, a center that will hold through divergent theories of the good reaching an overlapping consensus on core principles of justice through the gag rules of public reason. But he downplays the injury done to those adhering to comprehensive doctrines that are inconsistent with such rules. Cover seeks to affirm the autonomous law-creating of certain communities (which might well include the communities that adhere to comprehensive doctrines that cannot abide by Rawls's overlapping consensus). But he extends a principle of respect for self-governance to a broader principle of disrespect for centralized government; apparently this ethic would apply even to matters that must be settled at a nonlocal level because the conduct at issue necessarily ex-

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52. See id. at 33–34.

53. 388 U.S. 307 (1967).

54. Whether *Walker* was correctly decided on the rather unusual facts of that case is a different matter that I do not address. The basic rule of *Walker*—obey an injunction and challenge it on appeal—seems sound.

55. Cover, supra note 21, at 55.

56. Id. at 57 n.158.

ports significant costs beyond an insular community. A proper blend of Rawls and Cover would seek accommodation of divergent views of the good through centrally accepted and administered principles of justice, while allowing sufficient room for separate, insular communities to live by their own laws. The concept of permeable sovereignty, I believe, captures both the centripetal force of seeking common ground among divergent theories of the good, and the centrifugal force of permitting pockets of difference to remain outside this overlapping consensus.[57]

In an article touching on some of these concerns, Nomi Stolzenberg and David Myers argue that civic republicans and cultural pluralists often appear faced with a choice between a legal pluralism that allows a multitude of law-creating communities to coexist within a nation and an assimilative model that recognizes the perspectives and traditions of such nomic communities but does not grant them anything approaching sovereignty.[58] Stolzenberg and Myers suggest a third option: "[W]ith a bit

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57. Wholly apart from this normative argument for the virtues of permeable sovereignty, scholars have made the descriptive point that despite government's claim to a monopoly on lawmaking, law is in fact made in multiple ways within a society. Sally F. Moore writes, "Though the formal-legal institutions may enjoy a near monopoly on the legitimate use of force, they cannot he said to have a monopoly of any kind on the other various forms of effective coercion or effective inducement." Sally F. Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 Law & Soc'y Rev. 719, 721 (1973). Moore defines a "semi-autonomous social field" by "a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them." Id. at 722. In theory, a social field could be completely autonomous or not autonomous at all, but complete autonomy is impossible for a group within an established polity, and no autonomy is rare, because even when dominated, most groups establish some norms in their "underlife." Id. at 742–43. The reality is semi-autonomy; lawmaking groups exist within lawmaking governments. "A court or legislature can make custom law. A semi-autonomous social field can make law its custom." Id. at 744.

Similarly, Marc Galanter explains that justice is not distributed "exclusively by the state." Marc Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. Legal Pluralism & Unofficial L. 1, 1 (1981). Even as centralized legal systems have developed, indigenous orderings have persisted and interacted with the centralized systems. The relation between "official and indigenous law is variable and problematic"; neither is primary. Id. at 25. John Griffiths defines "legal pluralism" as "the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields.' " John Griffiths, What is Legal Pluralism?, 24 J. Legal Pluralism & Unofficial L. 1, 38 (1986); see also Sally E. Merry, Legal Pluralism, 22 Law & Soc'y Rev. 869 (1988). As Griffiths puts it, "[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion." Griffiths, supra, at 4. Although legal pluralism is sometimes recognized in a weak way—as the recognition by the state of separate lawmaking communities, often of customary law—Griffiths focuses instead on a strong conception of legal pluralism, the empirical fact that various groups within society enforce legal norms. For purposes of empirical theory, "[t]he state is . . . an association like all the others." Id. at 27. In sum, "For legal pluralists, relationships between legal subgroups and the state are inherently problematic *precisely because* they involve multiple sovereignties with potentially or actually incongruous systems of governance." Nomi M. Stolzenberg & David N. Myers, Community, Constitution, and Culture: The Case of the Jewish *Kehilah*, 25 U. Mich. J.L. Ref. 633, 659 (1992).

58. See Stolzenberg & Myers, supra note 57, at 666.

of a legerdemain, [civic republicans and cultural pluralists] might embrace alternative legal cultures, but only ones that are so marginal that they do not pose a realistic threat to the sovereignty and essential homogeneity of the civic state."[59] My arguments for permeable sovereignty, in this Article and elsewhere,[60] would fall somewhere within this third category, though I would be less likely than many to brand an alternative legal culture a "realistic threat" to the state, and though I (obviously) want to resist the characterization of such a middle ground as attainable only through "a bit of legerdemain." Rather, we should accept as appropriate a middle ground between the chaos of multiple nomic communities without a central government and the imperialism of a central government that fails to recognize the legitimate lawmaking claims of nomic communities.

2. *Permeable Sovereignty in Our Constitution.* — In both its structural provisions and its rights-granting clauses, the American Constitution embodies a fairly strong version of permeable sovereignty. Though the Constitution does not go as far as Cover claimed—to accord equal lawmaking sovereignty to each citizen's or community's norm-creating power even when opposed to that of the central government—the Constitution nonetheless places power to make decisions that govern one's life in many places. The Constitution, in other words, establishes multiple repositories of power,[61] and it does so in at least three different ways. Some aspects of the Constitution's multiple repositories of power divide government itself into separate arenas for norm-creation—the separation of powers at the federal level, including judicial review, and federalism. Other aspects preserve citizen sovereignty over governmental agents by ensuring that channels of political change remain unblocked; here, the political rights of voting, speech, press, and petition are central. The aspect of the Constitution's multiple repositories of power with which I am most concerned in this Article are the community-enhancing rights of religion, association, and parenting.[62] Although one argument for these rights focuses on the special ability of communities to challenge governmental orthodoxy—it is easier to fight the government if you can band together with like-minded folk than if you have to go it alone—associational rights possessed by persons in communities are valuable for the additional reason that they foster separate governance, enabling peo-

59. Id.

60. See Greene, Uncommon Ground, supra note 22, at 666–71; see also Greene, Political Balance, supra note 22 (arguing that the Free Exercise Clause provides a prima facie right to religious exemptions).

61. See Greene, Checks and Balances, supra note 22.

62. One should probably speak of parental "power" rather than "right" over children. On this view, parents rather than the government make most decisions for children because we think the parents are better positioned to act in the children's best interest. On "power" versus "right," see generally John H. Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756 (1981); Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917).

ple to live by norms created through private communities of association.[63]

I will merely sketch how our Constitution incorporates community-enhancing rights. First, the Free Exercise Clause protects the liberty of religious belief and practice. Government may not deliberately seek to impinge on such liberty.[64] Whether the Constitution compels exemptions for religion from generally applicable laws not directed at religion has been the subject of a wavering set of Court opinions and a large volume of academic commentary.[65] Finally, the Free Exercise Clause protects the "self-government of religious organizations"[66] from interference by public courts of law. In sum, the Free Exercise Clause protects one kind of normative community from some kinds of governmental intrusions.

Although the freedom of association is less well developed, the Constitution protects both intimate and expressive association. As the Court stated, regarding intimate association:

> [W]e have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability

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63. Jim Fleming has demonstrated that the Constitution recognizes yet another level of sovereignty, specifically, the sovereignty of individual citizens governing their lives in deliberative ways. See James E. Fleming, Constructing the Substantive Constitution, 72 Tex. L. Rev. 211, 252–60 (1993); James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1 (1995).

64. See Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2232 (1993).

65. See Employment Div. v. Smith, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245 (1994) (Free Exercise Clause does not mandate exemptions; Equal Protection Clause might, in some instances, but is not limited to religion); Greene, Political Balance, supra note 22 (criticizing *Smith*, supporting compelled exemptions); William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case W. Res. L. Rev. 357 (1989–1990) (exemptions not required); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109 (1990) (criticizing *Smith*, supporting compelled exemptions); see also Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (Supp. V 1993)) (legislatively requiring religious exceptions in many instances).

66. Laurence H. Tribe, American Constitutional Law 1231 (2d ed. 1988); see also Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

> independently to define one's identity that is central to any concept of liberty.[67]

In three key cases, the Court held that state and local antidiscrimination laws could be applied constitutionally to otherwise private clubs.[68] The Court did, though, suggest that associations that are relatively small and selective might receive greater protection against such laws.[69]

Finally, the Court has held that the Constitution protects parental decisionmaking against state interference, in certain instances. So, the Court has invalidated legislation restricting instruction in a foreign language,[70] prohibiting parents from educating children in a private school,[71] and restricting the types of families that may live together.[72] In a case that overlaps the religion and parenting categories, *Wisconsin v. Yoder*,[73] the Court held that Amish parents could not be prosecuted for keeping their children out of formal schooling after eighth grade. Central to the Court's holding was its recognition of the value of the separatist Amish nomic community:

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.[74]

Furthermore, the Court has read the Constitution to protect the right of unwed fathers to seek to establish a relationship with their children.[75]

In all three of these settings—religion, association, and parenting—the Constitution offers a substantial degree of protection for communities of interest to form and seek to establish rules and norms other than those provided by the centralized government. In each setting, as with the structure of government and with political rights, the Constitution protects multiple repositories of power. Permeable sovereignty is thus not only warranted by a proper view of liberal democratic theory, but it also fits our constitutional tradition.

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67. Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984) (citations omitted).

68. See New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); *Roberts*, 468 U.S. 609.

69. See *Board of Directors*, 481 U.S. at 547–48 n.6; *Roberts*, 468 U.S. at 620–21.

70. See Meyer v. Nebraska, 262 U.S. 390 (1923).

71. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

72. See Moore v. City of East Cleveland, 431 U.S. 494 (1977). But see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

73. 406 U.S. 205 (1972).

74. Id. at 223–24.

75. See Lehr v. Robertson, 463 U.S. 248, 261–62 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

B. *The Partial Exit Problem*

The virtues of permeable sovereignty clearly exist in cases of complete exit. Religious communities that want to be left alone to live by their own law, other nonreligious associations that have similar needs, and parents who desire substantial discretion in the rearing of their children, are all communities of association that present strong cases for the value of separate nomoi, of separate nongovernmental, lawmaking arenas. One reason that we should endorse this value and should strive to protect it is that even at the governmental level, we have a strong commitment to dividing power, both horizontally (the separation of powers, including judicial review) and vertically (federalism). Multiple repositories of power may exist both within government and in the separation from government that some citizens desire.

The partial exit problem arises when a community of citizens that otherwise desires to live by its own norms seeks, as well, to operate as a government.[76] Many of the apparent virtues of permeable sovereignty in the setting of private communities of association—the ability to live by parochial practices that exclude others—seem antithetical to cardinal principles of inclusion and public-regarding reasons by which government must operate. When a homogeneous community that operates primarily through private institutions (such as synagogues and yeshivas) seeks accoutrements of governmental power (such as public schools and zoning power), a natural response is to be wary of the use to which the community wishes to put the governmental power. The primary reasons to cede sovereignty to private homogeneous communities are, one might argue, reasons to refuse to give those communities governmental power. The objection to the Kiryas Joel Village School District is in part an objection to separatist communities exercising public power. The objection is based on a fear that the communities will not play by the rules, that instead they will find either overt or covert means of using public power toward unconstitutional ends.

A separate argument against actions such as the creation of the Kiryas Joel Village School District stems not from a prediction regarding the abuse of public power by homogeneous religious groups, but rather from the very establishment of such a district by the state. Although

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76. A separate type of partial exit problem arises when parents want to send their children to public schools yet retain the right to remove their children from certain classes because of religious concerns about the material taught therein. See Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988). The Sixth Circuit rejected Mozert's claim for a constitutionally compelled opt-out from a reading class, distinguishing *Yoder*, 406 U.S. at 205, on the ground that the Amish in *Yoder* were seeking complete exit for their children after the eighth grade, whereas Mozert was seeking both the benefits of public schooling and an accommodation to his religious needs within the public school setting. See *Mozert*, 827 F.2d at 1067; see also Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581, 634–46 (1993). In this Article, I address only the *Kiryas Joel* type of partial exit problem.

states may permit like-minded people to exercise self-government in all of its forms (while ensuring that those communities play by the constitutional rules), courts should ensure that homogeneous communities are created by private action and not by governmental line drawing. When government draws a political district around a group of citizens known to share a common religion, this argument continues, courts should intervene to prevent such segregation.

Both of these arguments are present in the opinions in *Kiryas Joel.* In response to the first argument, I maintain in Part I.B.1 that we should not equate the granting of public power to private citizens with the granting of public power to religious institutions; that the risk that a religiously homogeneous group of citizens will abuse public power is an insufficient basis on which to invalidate such a grant of power; and that partial exit remains a meaningful category in spite of the constitutional restrictions placed on a homogeneous group's exercise of public power. Additionally, I offer some reasons why we should not be overly concerned about public education falling into the hands of citizens whose world views lie outside the mainstream. In response to the second argument, I contend in Part I.B.2 that courts should defer to legislative recoguition of an act of physical exit by a small group of citizens that shares a world view, even if such recognition involves drawing a political district around the village that those citizens inhabit.

1. *The Abuse of Public Power Objection.*

a. *The* Larkin *Analogy.* — A plurality of four Justices in *Kiryas Joel* thought that the special school district violated the Establishment Clause because New York had granted public power to a group of citizens known to share a common religion.[77] For the plurality, the school district reflected New York's use of "a religious criterion for identifying the recipients of civil authority."[78] The plurality saw a "fusion of governmental and religious functions,"[79] and thus a violation of the Establishment Clause as it had been interpreted in a prior case, *Larkin v. Grendel's Den, Inc.*[80]

Larkin invalidated a law vesting in religious institutions veto power over liquor licenses.[81] This was an easy decision for the Court; never before had it addressed a law granting governmental power directly to religious institutions, probably because such a law is so obviously a constitutional violation. The obviousness of the violation, however, does not depend on proof that public power has been used to advance a sectarian religious doctrine. The *Larkin* Court invalidated the law on its face, without asking for such proof. Instead, *Larkin* focused on the risk that a religious institution would use governmental power in a religious way:

77. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2488–90 (1994) (opinion of Souter, J., joined by Blackmun, Stevens, and Ginsburg, JJ.).

78. Id. at 2490.

79. Id. at 2488 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

80. 459 U.S. 116 (1982).

81. See id. at 116–27.

> [The law] substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines."[82]

It seems fair to read *Larkin* as concluding that the delegation of governmental power to a religious institution is invalid because we assume that religious institutions will use such power to advance sectarian religious ends.

The *Kiryas Joel* plurality reasoned that delegating governmental power to citizens known by the legislature to share a common religion raises the same concern as delegating governmental power to a religious institution.[83] But this cannot be correct. Plenty of locales are populated in a religiously homogeneous way, and plenty of them exercise the power of local governance granted by the State. One cannot equate the recipients of governmental power in a case such as *Kiryas Joel* with the recipients of governmental power in *Larkin* simply by stating the equivalence of (a) a synagogue and (b) a group of Satmar Jews. To prove such an equivalence, one would have to show that although governmental power was vested in a group of Satmar Jews, we have reason to believe that the group is functioning as a religious institution, or that the group is likely to function as a religious institution. As to the first possibility, if there were actual evidence that the Kiryas Joel Village School Board was functioning as a religious institution, then an as-applied challenge could succeed. But the Justices did not rely on such evidence, because plaintiffs' attorneys presented none. Perhaps, though, the plurality was influenced by the amicus brief of the National Coalition for Public Education and Religious Liberty ("PEARL"), which relied on extra-record evidence to argue that the Village of Kiryas Joel "functions as a religious establishment."[84] The PEARL brief also acknowledged, however, that plaintiffs moved for sum-

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82. Id. at 127 (quoting Lemon v. Kurtzman, 403 U.S. 602, 623 (1971)).

83. Although the power was granted to the Village of Kiryas Joel, and not to any religious body, the Court opined that "this distinction turns out to lack constitutional significance." *Kiryas Joel*, 114 S. Ct. at 2488. Recognizing that McDaniel v. Paty, 435 U.S. 618 (1978), invalidated a ban on ministers holding public office, and thus understanding that political power may not be denied to citizens merely because they are religious, the Court in *Kiryas Joel* said that invalidating the special school district would not run afoul of this command, because New York had "delegate[d] political authority by reference to religious belief." 114 S. Ct. at 2489. Although the law establishing the special school district did not expressly mention the Satmars or their religious belief, the Court found that the law "effectively identifies these recipients of governmental authority by reference to doctrinal adherence." Id.

84. Brief Amicus Curiae in Support of Respondents by the National Coalition for Public Education and Religious Liberty and the National Education Association, et al. at 4, *Kiryas Joel*, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527, and 93-539).

mary judgment based on a facial challenge to the New York law.[85] Although the plurality did not say it was relying on PEARL's brief (how could the plurality admit to relying on evidence not properly made part of the record by plaintiffs' lawyers?), perhaps this evidence colored the plurality's *Larkin* analogy. It is hard to know. But it certainly would be improper for the plurality to rely on evidence not introduced into the record.[86] I agree with the view that school board actions expressly meant to advance a sectarian religious agenda should be invalidated under the Establishment Clause. And if plaintiffs could prove in court that the Village (and the School Board) function as a religious establishment, then *Larkin* probably would be the appropriately analogous case. But one of the things that makes *Kiryas Joel* such an interesting case is that none of this was proved in the trial court. And from the face of the Supreme Court's opinion, extra-record evidence played no role in the decision.

The second possible way of moving from *Larkin* to the facts of *Kiryas Joel* would have been to conclude that the Kiryas Joel Village School Board is likely to function as a religious institution. That is, although the delegation of governmental power should be invalidated per se only when the delegation is to a religious institution (*Larkin*), and although record evidence is needed for an as-applied challenge to the use of governmental power when it has not been delegated to a religious institution, there might be a third category that falls somewhere in between these two. In such a third category, the Court might sometimes invalidate the delegation of governmental power to citizens who share the same religion when there is a high risk that the power will be used for religious doctrinal purposes. The *Kiryas Joel* Court did not rely on this type of risk analysis, but it might have. It is worth exploring how it might have done so, and why it did not.

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85. See id. at 3 n.1.

86. See Thomas C. Berg, Slouching Towards Secularism: A Comment on *Kiryas Joel School District v. Grumet*, 44 Emory L.J. 433, 488 n.249 (1995). But see Ira C. Lupu, Uncovering the Village of Kiryas Joel, 96 Colum. L. Rev. 104, 111–12 & n.37 (1996) [hereinafter Lupu, Uncovering Kiryas Joel] (relying on evidence not in the record).

In his response to this Article, Chip Lupu contends, "To defend persuasively an academic theory of how the law should treat distinctive religious communities, however, more is required than the happenstance of litigation strategy." Id. at 112. My Article, though, uses the *Kiryas Joel* litigation as paradigmatic of a certain type of problem—the grant of public power to a group of citizens defined by a common religion, where no showing has been made that those citizens have abused that public power. It is precisely that paradigm that leads to the difficult questions of religious gerrymandering and sect-specific benefits that are at the core of the case. Separate questions arise when we examine other facts about the administration of public power in a case such as *Kiryas Joel*; those questions deserve attention, but I have chosen not to write about them here. Finally, whether and how risk analysis should apply in this case is a matter of substance about which Lupu and I disagree. In short, it is quite unfair of Lupu to suggest that my theory is not "academic" because I have chosen to focus on *Kiryas Joel* as litigated rather than as observed outside the litigation record.

b. *Risk Analysis.* — In a series of cases beginning with *Lemon v. Kurtzman*,[87] the Court has invalidated public funding of secular programs in religious schools, not because of the content of the programs (secular) nor because of proof that the funds were channeled to a religious use, but rather because of (a) the risk that the funds would be channeled to a religious use, and (in some cases) (b) the "entanglement" of public monitors and religious institutions that would occur were the government to oversee the use of its funds. *Kiryas Joel* could have relied on the *Lemon* line of risk analysis in the following way: Although there is no record proof that public power is being used to advance a religious agenda, because the recipients of the public power share a common religion—a religion, one might add, that permeates most aspects of the lives of its adherents—there is a significant risk that they will use that power to advance a religious agenda. More precisely, there is reason to fear that the Kiryas Joel Village School Board will run its public school (for the handicapped) in a religious rather than secular fashion. Thus, following *Lemon* and its progeny, the Court might have invalidated the New York law by pointing to the risk of abuse of public power.

The Court, however, did not rely on risk analysis. There are two reasons that explain this omission. First, although the Court has, since *Lemon*, applied risk analysis to invalidate laws authorizing public funds for religious primary and secondary schools, in other settings it has rejected risk analysis, upholding on their face laws that channel public funds to religious institutions so long as the funds are for a secular purpose. Thus, in *Tilton v. Richardson*[88] and *Roemer v. Board of Public Works*,[89] the Court upheld public funds flowing to religiously affiliated institutions of higher education, distinguishing *Lemon* primarily on the ground that "there is less likelihood [in higher education] than in primary and secondary schools that religion will permeate the area of secular education."[90] Because of the perceived reduced risk of the funds being used for religious purposes, less public oversight would be needed, and thus less entanglement between public monitors and religious institutions would ensue.

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87. 403 U.S. 602 (1971); see also Aguilar v. Felton, 473 U.S. 402 (1985) (striking down public funds for public employees to teach remedial education in parochial schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (same); Wolman v. Walter, 433 U.S. 229, 252–55 (1977) (invalidating public funding for parochial school field trips); Meek v. Pittenger, 421 U.S. 349, 367 (1975) (striking down funds to parochial schools for "professional staff, . . . supportive materials, equipment, and personnel," for the provision of " 'auxiliary services,' " namely, "remedial and accelerated instruction, guidance counseling and testing, [and] speech and hearing services"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762 (1973) (invalidating public grants to parochial schools for "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils" (citation omitted)).

88. 403 U.S. 672 (1971).

89. 426 U.S. 736 (1976).

90. *Tilton*, 403 U.S. at 687.

One might be tempted to write off *Tilton* and *Roemer* as "higher education" cases, effectively a special subcategory. But in *Bowen v. Kendrick*[91] the Court extended its reluctance to apply risk analysis in a different setting. The case involved a federal statute that authorized grants for various community organizations—including religious organizations—to counsel adolescents to refrain from premarital sexual activity. Although some funds flowed directly to religious organizations, the Court distinguished the public and secondary school cases in the following manner:

> [N]othing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated . . . grantees are not capable of carrying out their functions under the [Act] in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion.[92]

Thus, even though some funds would be used by religious organizations to counsel adolescents about issues on which those organizations had firm religious views, the Court refused to invalidate the law on its face, instead remanding the plaintiffs to as-applied challenges.

Thus, *Tilton* and *Roemer* do not appear to be exceptions to the *Lemon* rule. Rather, the Court's rejection of risk analysis in *Bowen* implies that *Lemon* and its progeny should be viewed as the exception to a rule requiring as-applied challenges to facially secular programs channeling public funds to religious institutions and organizations. *Bowen* is the most recent case of those discussing risk analysis, and it sets up funding to pervasively sectarian institutions (invalidated under risk analysis) as the exception to the rule (as-applied challenges). If further evidence were needed that risk analysis is the exception rather than the rule, it may be found in the concurring opinions of Justices O'Connor and Kennedy in *Kiryas Joel*, and in Justice Scalia's dissent.[93] Counting Chief Justice Rehnquist and Justice Thomas, who joined the Scalia dissent, five Justices are now on record for the position that *Aguilar v. Felton*[94] and *School District of Grand Rapids v. Ball*[95] should be reconsidered. Overruling those cases—thus permitting public funds to go directly to religious schools for remedial

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91. 487 U.S. 589 (1988).

92. Id. at 612 (citations omitted).

93. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring in part and concurring in the judgment); id. at 2505 (Kennedy, J., concurring in the judgment); id. at 2514–15 (Scalia, J., dissenting, joined by Rehnquist, C. J., and Thomas, J.).

94. 473 U.S. 402 (1985).

95. 473 U.S. 373 (1985).

education taught by public personnel—would not necessarily result in overruling the entire *Lemon* line of cases involving public funds in the parochial school setting,[96] but it surely would open the door for such arguments, and it would serve as further proof that the *Bowen* skepticism of risk analysis is now the rule, not the exception.

This movement away from risk analysis is, I believe, the best explanation for the Court's failure to invoke it in *Kiryas Joel.* Although the Court could have followed the *Lemon* line of cases by holding that the New York law raised a significant risk that public funds would be used for religious ends, such risk analysis would have been inconsistent with *Bowen* and with a majority's willingness to signal a departure from *Aguilar* and *Grand Rapids.*

The second likely explanation for the *Kiryas Joel* Court's failure to apply risk analysis is that most of the cases invoking risk analysis—*Lemon, Nyquist, Meek, Aguilar,* and *Grand Rapids*—involved statutes channeling public funds directly to religious institutions.[97] The power granted to the Village of Kiryas Joel, as I have shown above, went not directly to a religious institution but rather indirectly to the citizens of the Village. The Court's failure to apply risk analysis in *Kiryas Joel* can be seen as following this distinction. Indeed, in three cases related in structure, the Court upheld public funds that eventually aided religious institutions, on the ground that the benefit to the institutions was indirect only. *Mueller v. Allen*[98] upheld a state tax deduction for all parents for tuition, textbooks, and transportation. Most of the incidence of the deduction was for tuition, and virtually all those claiming that deduction sent their children to private, religious schools. *Witters v. Washington Department of Services for the*

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96. *Lemon* involved funding of religious school teachers, rather than of public personnel teaching in religious schools, so it could be distinguished. Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971). Part of *Meek* involved funding of public personnel in private schools, so that part of *Meek* would probably be overruled along with *Aguilar* and *Grand Rapids.* See Meek v. Pittenger, 421 U.S. 349, 367–73 (1975). The portion of *Nyquist* cited supra note 87, 413 U.S. at 762, involved funding of religious facilities in the parochial school setting, and thus could be distinguished from *Aguilar, Grand Rapids,* and *Meek.*

Another point is worth noting. In addition to invalidating direct public funding of religious schools pursuant to risk analysis (and thus spawning a line of risk analysis cases), *Lemon* also set forth the three-part test for Establishment Clause analysis that the Court has since invoked in many Establishment Clause cases. 403 U.S. at 612–13. That a statute must have a secular purpose, a primary secular effect, and not entangle church and state, have been requirements applied to a wide range of Establishment Clause problems. Id. In recent years, this three-part *Lemon* test has come under sharp attack from various members of the Court. Whether the three-part *Lemon* test survives or is modified is a different question from whether the holding of *Lemon,* and the risk analysis contained therein, will survive.

97. See supra note 96. The funded field trips in *Wolman* were different, because the funding did not go directly to the parochial school. See Wolman v. Walters, 433 U.S. 229, 264 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part).

98. 463 U.S. 388 (1983).

Blind[99] upheld state funds for vocational rehabiliation assistance for the blind, as used by an individual citizen to attend a private, Christian college. Finally, *Zobrest v. Catalina Foothills School District*[100] upheld a governmental grant for a sign-language interpreter, used by Zobrest in his Catholic high school. In all three cases, the Court pointed to the fact that a private citizen decided how to use the funds; the flow of money to the religious institution was thus seen as indirect.

Mueller, Witters, and *Zobrest* show that the Court treats indirect benefits to religious institutions differently from direct benefits. The *Lemon* line of cases, in contrast, focuses in part on the direct flow of public money into the coffers of religious institutions. The Court's avoidance of risk analysis in *Kiryas Joel,* therefore, might be seen as consistent with this direct/indirect line, for the grant of power in *Kiryas Joel* was not directly to a religious institution.[101]

In sum, although the Court might have followed *Lemon* and its progeny, invalidating the Kiryas Joel Village School District on the ground that it posed a substantial risk of religious use of public power, it is understandable that the Court did not rely on risk analysis. It has been moving away from risk analysis in Establishment Clause cases, and it has generally not applied risk analysis to indirect benefits to religious institutions. Furthermore, the Court's refusal to rely on risk analysis in *Kiryas Joel* seems correct. We should not assume that citizens will abuse public power. Although it might be appropriate to invalidate grants of public power or funds on their face when those grants are made directly to religious institutions, it seems appropriate to limit facial invalidations to such direct grants, and otherwise to rely on as-applied challenges. The one hitch in this argument is the homogeneity of the Kiryas Joel Village School District and the likelihood that no parent will complain if his or her child is taught Satmar religious doctrine in the public school.[102] Perhaps, one might argue, we should treat the Kiryas Joel Village School District as if it were a pervasively sectarian institution; perhaps, that is, the sharp public/private line that I have drawn is too sharp in the rare case in which the recipients of public power share the same religion. There is no easy way to resolve this debate. On balance, it seems best to assume that citizens

99. 474 U.S. 481 (1986).

100. 113 S. Ct. 2462 (1993).

101. Entanglement analysis would also differ in the setting of a public school run by citizens who share the same religion. Public monitoring of private, religious schools—the concern of entanglement analysis—differs from public monitoring of religious persons who are running public schools. Only in the former case is there a danger of church and state intermingling.

102. One could argue that if there are no non-Satmar students in the public school, then there is no Establishment Clause harm from governmentally organized prayer or the teaching of Satmar religious doctrine. This argument, however, neglects taxpayer harm; just as the Establishment Clause protects taxpayers from funding religious activities in parochial schools, so does it protect taxpayers from funding religious activities in public schools.

will understand the difference between acting in their public capacity and acting in their private capacity, rather than to assume that citizens will violate the Constitution by abusing public power. A facial invalidation based on risk analysis in the *Kiryas Joel* setting denigrates the ability of citizens to obey the Constitution. We do not similarly denigrate the ability of religious institutions to obey the Constitution when we invalidate grants of public power or public funds that flow directly to those institutions (*Larkin* and *Lemon* et al.), because it is understood that when citizens are acting in their private, religious capacity, they will act in accordance with religious doctrine.[103]

c. *Is "Partial Exit" a Meaningful Category?* — Even if we accept the facial grant of public power to citizens who share a common religion, one might be puzzled as to why those communities would want such a benefit. After all, the Kiryas Joel Village School District may not be run constitutionally as a religious school. Government-organized prayer and the teaching of religious doctrine in public school are unconstitutional. If the parents of the handicapped children in the Village of Kiryas Joel were given a choice between overruling *Kiryas Joel* and overruling *Aguilar* and *Grand Rapids* (thus permitting public funds for special education to be used in private, religious schools), would they not choose the latter? Moreover, should not a supporter of partial exit likewise be a supporter of public funding of parochial schools, precisely because such funding increases the chance that communities such as Kiryas Joel will flourish?

There are two responses to this line of argument. First, although this Article supports partial exit to the extent that it should be considered constitutional for state legislatures to draw public school district borders around communities that are religiously homogeneous, I reach that conclusion in part because of the restrictions on the use of public funds for religious purposes in public schools. Allowing public funds to flow directly into the coffers of private religious institutions raises a different set of concerns. Although ordinarily taxpayers may not constitutionally object that their money is being used to fund causes with which they disagree (the "right not to speak"[104] does not extend this far), for over twenty

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103. But see Lupu, Uncovering Kiryas Joel, supra note 86, at 110–112 (arguing that the special school district should be invalidated on risk analysis, even though the grant of power is not to a private, religious institution).

104. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2347 (1995) (holding that organizers of a private parade could not be required to include gay and lesbian group, because "one who chooses to speak may also decide 'what not to say' "); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (union dues of public employees could not be contributed to political candidates and used to express views unrelated to collective bargaining); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that a state may not require an individual to display a license plate with an ideological message because the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that in compelling students to recite the pledge of allegiance, local authorities violated the First and Fourteenth Amendments); see also Abner S. Greene, The Pledge of Allegiance Problem, 64 Fordham L. Rev. 451 (1995).

years the Court has held that forcing taxpayers to fund religious institutions constitutes Establishment Clause harm. To be sure, the *Lemon* line of cases may not stand for long, but there is a powerful argument that the Establishment Clause provides a trump over funding the educational mission of religious institutions (even if the funded programs are purportedly secular), both because of the risk that the funds will be used for religious purposes and because of the entanglement problem that results when public monitors seek to assure that such funds are not used for religious purposes. Accordingly, one can consistently support permitting citizens who share the same religion to run a public school while simultaneously forbidding those same citizens from using public funds to run parochial schools.

In his response to this Article, Chris Eisgruber deems unconstitutional the special school district for the Village of Kiryas Joel, and he argues that the Court should overrule *Aguilar*, thus permitting the Satmar parents of Kiryas Joel (along with many others) to educate their children with public funds in private, religious schools.[105] Eisgruber criticizes me for adopting the converse position, namely, that the special school district is constitutional but that public funding for private, religious schools is not. My position relies on a fairly strict adherence to the public/private distinction: New York may grant public power to a group of citizens who share a religion so long as those citizens exercise that power in constitutional fashion. New York may not fund private, religious schools, which we assume exist to advance sectarian religious missions.

Second, religious parents such as the Satmars are not cut off completely from advancing their values in the public schools. To be sure, governmentally organized school prayer and the teaching of Satmar religious doctrine are not allowed, but what about the following cases: Teaching in Yiddish? Serving Kosher food in the school cafeteria? Slanting the teaching of secular materials in the direction (say, politically conservative) that the school board favors? These would all seem to be constitutionally valid choices for any public school to make. More broadly put, within the confines of both the Constitution and state-mandated curricular minima, local school districts will, of necessity, accommodate the particular needs of their students. I would hope that we would all agree that the Constitution is no bar to teaching classes in Spanish if the students speak Spanish; serving only fish on Fridays if the students are Catholic; serving Kosher food if the students are Jewish; and so forth.[106] I am not arguing that a school district must do these things, nor am I arguing that it is always good to do these things. But recognizing that different communities will structure secular public education in different ways should be neither the predicate to finding a constitutional violation nor cause for concern about the decay of an American common ground.

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105. See Eisgruber, Assimilation, supra note 20, at 92–96.

106. See infra Part II.C for an extended discussion of the problem of religious accommodation.

Some might find troubling the slanting of local public education to the political position favored by the local school board (and, let's assume, the majority of the community). A parade of horribles is easy to imagine—the prospect of an extreme right wing group running a public school and teaching hatred of minorities might be the most troublesome example. But should the possibility of such horrific situations lead to a categorical bar on states ceding public power to homogeneous communities? Remember, in my view, states may also decide not to cede such power, and the prospect of students being taught awful things would be a strong reason to insist on heterogeneous, integrated education. Also, states may insist on a rigorous minimum curriculum, and may monitor schools for compliance. If a particular school or school district is spending too much time teaching hate and not enough time teaching math, then there would be a good reason for the state officials to intervene to ensure that the minimum curriculum is being taught. But this still leaves room for such curriculum to be slanted in various ways depending on the views of local school boards, principals, and teachers. The virtues of permeable sovereignty, as I have defined it, argue for permitting various visions of the good to flourish while simultaneously seeking a common, public, political consensus. A state should be allowed to decide that it is possible to achieve this delicate balance by delegating public power to homogeneous communities, while at the same time insisting on compliance with constitutional norms and curricular minima (which might include teaching certain common values that the state mandates). Reading the Constitution as mandating education in a heterogeneous setting to avoid the most horrible abuses of power seems like overkill.

2. *The Religious Gerrymandering Objection.* — Even if we assume the facial validity of a grant of public power to citizens who share a common religion, the state's involvement in drawing a political district to benefit such a group might be thought to violate a principle against religious gerrymandering. Justice Kennedy put the matter clearly in his concurrence in the judgment in *Kiryas Joel*:[107] Even though the legislature may accommodate the particular problems of specific religious groups, this "particularity takes on a different cast . . . when the accommodation requires the government to draw political or electoral boundaries."[108] He continued:

> [G]overnment may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing

107. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2504–05 (1994) (Kennedy, J., concurring in the judgment). In a brief concurrence, Justice Stevens, joined by Justices Blackmun and Ginsburg, also condemned the New York law as fostering segregation. See id. at 2495.

108. Id. at 2504 (Kennedy, J., concurring in the judgment).

> criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial. . . . There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause.[109]

He added:

> People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. . . . There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith.[110]

In Justice Kennedy's view, the New York legislature violated a cardinal principle of the Equal Protection Clause, which has an analogue in the Establishment Clause: Government may not segregate its citizens by race or religion; it may not draw political lines to include one race or religion while excluding another race or religion. I agree with Justice Kennedy that the government may not do these things. But I disagree that the New York legislature did these things in establishing the Kiryas Joel Village School District. If there is a spectrum from a purely private act of exit (private schools only, no governmental power exercised) to a purely public act of forced separation (majority takes members of the minority against their will and ostracizes them), then the difficult question posed by the facts of *Kiryas Joel* is how we should respond to a case that falls at neither end.

a. Brown *and Its Progeny.* — To begin answering this question, it is valuable to examine a series of cases following *Brown v. Board of Education.*[111] These cases stand for a particular iteration of the public/private distinction: Governmentally forced segregation is forbidden, but political districts are allowed to follow voluntary residential choices. More precisely, these cases differentiate between de jure segregation—segregation caused by government—and de facto segregation—segregation caused by the residential choices of private citizens. Although every case involving school districting implicates the government in drawing district lines (so there is never an absence of state action), the cases following *Brown* invalidate districting (and cognate practices) undertaken by the government for the purpose of segregating, while upholding governmental deci-

109. Id.
110. Id. at 2505.
111. 347 U.S. 483 (1954).

sions that follow residential choices by private citizens, even if it is clear that the government knows that by following these residential choices it is tracking private segregative decisions. In this section, I will show, descriptively, that this distinction is unmistakable in the *Brown* line of cases. In the next section, I will defend the distinction normatively.

In the four cases consolidated in *Brown*, the defendant governments segregated African-American from white students in public schools. The Court described the harm not as resulting from attending schools that happened to be all white or all African-American, but from attending schools that were segregated by law: "To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[112]

Two cases decided in the early 1960s also reveal the Court's focus on de jure segregation. In *Goss v. Board of Education*,[113] as part of a desegregation plan to remedy official segregation, defendants provided that white students assigned to previously African-American schools could transfer, African-American students assigned to previously white schools could transfer, and any student could transfer who would "otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."[114] Finding that the plan would lead to "continued segregation," the Court struck it down, adding:

> [I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another.[115]

In other words, once the choice of which school to attend within a school district is truly that of the citizen, the constitutional violation ceases.

The second case, *Griffin v. County School Board*,[116] invalidated a complex effort on the part of various Virginia governmental units to keep white and African-American children in separate schools. The case history involved the closing of Prince Edward County public schools, state and county vouchers for sending children to private schools, and tax concessions for people making contributions to private schools. As might be expected, there were plenty of all-white in-county private schools, but no such schools for African-American children (until late in the day, when a temporary one was set up). Although the state was not constitutionally

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112. Id. at 494.
113. 373 U.S. 683 (1963).
114. Id. at 686 (quoting the Knoxville, Tennessee transfer plan).
115. Id. at 687.
116. 377 U.S. 218 (1964).

required to have public schools in every county, the history showed clearly that the state and county had acted to ensure that white and African-American children were educated separately.

Beginning in the late 1960s, the Court increasingly was faced with determining when school districts previously segregated by the government had become desegregated. In the first important case, *Green v. County School Board*,[117] the Court examined the desegregation plan of a county with no residential segregation, but with (formerly) one school for whites and one school for African Americans. The County had adopted a so-called "freedom of choice" plan, allowing any student to choose between the two schools. But the evidence showed that the plan had not worked; no whites chose the previously African-American school and few African Americans chose the previously white school. The County argued that its plan "may be faulted only by reading the Fourteenth Amendment as universally requiring 'compulsory integration,' a reading it insist[ed] the wording of the Amendment will not support."[118] The Court refused to accept this dichotomy, explaining that this

> argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.[119]

Here again, the Court clarified that *Brown* (and *Brown II*[120]) required the dismantling of state segregation through the transition to a unitary school system—i.e., a school system not officially dual, with one set of schools for whites and another for African Americans. The concern was with de jure segregation; as the Court emphasized, "It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation."[121]

In *Monroe v. Board of Commissioners*,[122] the Court followed *Goss* in invalidating a free-transfer provision that operated "as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones."[123] Thus, although free-transfer provisions might have a role in desegregation plans, "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."[124]

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117. 391 U.S. 430 (1968).
118. Id. at 437.
119. Id.
120. Brown v. Board of Educ., 349 U.S. 294 (1955).
121. Id. at 439.
122. 391 U.S. 450 (1968).
123. Id. at 459.
124. Id.

The Court's most sweeping validation of the power of federal district courts to remedy de jure segregation came in *Swann v. Charlotte-Mecklenburg Board of Education*.[125] Based on a predicate of de jure segregation, the district court had ordered an ambitious remedial plan that involved substantial altering of school attendance zones (within the school system) as well as busing of students beyond neighborhood schools. In affirming, the Supreme Court explained, "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation,"[126] but added that "judicial powers may be exercised only on the basis of a constitutional violation."[127] Thus, to dismantle an officially dual school system, the district court was authorized to depart from compactness and contiguity in drawing school attendance zones. However, "[a]bsent a constitutional violation there would be no basis for judicially ordering assigument of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."[128] The Court added, "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be 'unitary' . . . ."[129] Finally, after observing that the demographic makeup of students in school systems might shift, the Court explained that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system,"[130] there is no further role for the district court.

In a pair of cases from the early 1970s—*Keyes v. School District No. 1*[131] and *Milliken v. Bradley* [*Milliken I*][132]—the Court elaborated on the proper scope of federal court remedial power when one area is found to be de jure segregated and another area is found merely to be de facto segregated. The question to be resolved was when the two areas would be considered one for purposes of remedy. The Court drew a line based on preexisting school districts. Thus, in *Keyes*, the Court explained that if the two areas are part of the same school system, then a finding of de jure segregation in "a meaningful portion of a school system"[133] creates a prima facie case of systemwide de jure segregation, which defendants have the burden of disproving. "[W]here, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent

125. 402 U.S. 1 (1971).
126. Id. at 15.
127. Id. at 16.
128. Id. at 28.
129. Id. at 31.
130. Id. at 32.
131. 413 U.S. 189 (1973).
132. 418 U.S. 717 (1974).
133. *Keyes*, 413 U.S. at 208.

with respect to other segregated schools in the system."[134] But in *Milliken I*, the Court refused to authorize a remedy running across school district lines when one system was de jure segregated and the other de facto segregated. The Detroit schools had been found to be de jure segregated, but not the surrounding suburban schools, which were mostly white. The Court rejected the district court's remedial order encompassing both sets of schools, stating:

> The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. . . . [T]here is no evidence in the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining, or perpetuating segregation of races.[135]

Although *Milliken I* has come under heavy attack for, in effect, permitting "white flight" from the inner city to thwart any real inner-city school inte-

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134. Id. at 207. *Keyes* was preceded the year before by two cases holding that a new school district may not be carved out of a larger one if the larger one had been found to have engaged in de jure segregation and if the carving out would "impede the process of dismantling a dual system." Wright v. Council of Emporia, 407 U.S. 451, 470 (1972); see also United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

135. *Milliken I*, 418 U.S. at 746–48. The Court did add the following:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Id. at 744–45. What Chief Justice Burger meant by "segregative effect in another district" is unclear. Apparently, if plaintiffs can prove that de jure segregation in district A caused de facto segregation in district B, then an interdistrict remedy would be appropriate. But given the facts of *Milliken I*, such a scenario must be distinguished from a situation in which the increased integration of inner-city schools causes whites to move to the suburbs. If that counted as a "segregative effect in another district," then *Milliken I* would have come out the other way, under the quoted passage above. The Court's most recent desegregation decision, *Missouri v. Jenkins*, states, "What we meant in Milliken I by an interdistrict violation was a violation that caused segregation between adjoining districts." 115 S. Ct. 2038, 2052 (1995).

gration,[136] *Milliken I* can be seen as the clearest example of one aspect of the *Brown* line of cases: Government may not officially segregate whites and African Americans, but if private citizens move to relatively homogeneous neighborhoods, government is not required to draw school attendance zones across neighborhoods.[137] In sum, as the Court said in *Keyes*, "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[138]

After *Milliken I*, the Court has continued to draw a clear line between de jure and de facto segregation, releasing school systems from federal district court control when segregation can no longer clearly be traced to governmental discrimination. Thus, in *Pasadena City Board of Education v. Spangler*,[139] defendant petitioned the district court for modification of a desegregation order, which had required that no school have a majority minority student enrollment. Finding that the school district had never been in full compliance with the initial order, the lower courts denied the petition. But the Supreme Court reversed, holding that a "quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools," and that "these shifts were not attributed to any segregative actions on the part of the petitioners."[140] Accordingly, the Court rejected the district court's view that "it had authority to impose this requirement even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible."[141]

Finally, in two recent cases the Court has again stated clearly what was true in all of the post-*Brown* cases: The Constitution requires the absence of de jure segregation, it does not require integration. So, in *Board of Education v. Dowell*,[142] the Court held:

> In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the Board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the Board.[143]

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136. See, e.g., *Milliken I*, 418 U.S. at 802 (Marshall, J., dissenting); Richard T. Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1875 (1994); Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 645–46 (1983).

137. See James S. Liebman, Desegregating Politics: "All-Out" School Desegregation Explained, 90 Colum. L. Rev. 1463, 1655–63 (1990).

138. 413 U.S. at 208.

139. 427 U.S. 424 (1976).

140. Id. at 436.

141. Id. at 434.

142. 498 U.S. 237 (1991).

143. Id. at 247.

In *Freeman v. Pitts*,[144] the Court released a school district from federal court supervision over the aspects of a school system that had achieved unitary status even as the District Court retained supervision over other aspects of the system. The Court explained:

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. . . . Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.[145]

In sum, the *Brown* line of cases holds (and has never held otherwise[146]) that school assignments that follow residential patterns are permissible, even if the residential patterns divide the citizenry by race (or, by analogy, religion). If a school system has been found to have engaged

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144. 503 U.S. 467 (1992).

145. Id. at 494–95; see also Missouri v. Jenkins, 115 S. Ct. 2038, 2055–56 (1995) ("Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, . . . so too will numerous external factors beyond the control of the [school district] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus.") (citations omitted).

146. David Strauss disagrees:

> Several post-*Brown* school desegregation decisions suggest (without unequivocally embracing) the far-reaching principle that governments are required to bring about actual integration. The Court repeatedly ruled that school districts that had been segregated by law did not bring themselves into compliance with the Constitution merely by enacting race-neutral measures (for example, a so-called freedom of choice plan). The question, the Court implied, was whether those measures actually brought about racially integrated schools.

David A. Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935, 949 (1989). In my view, none of the post-*Brown* majority opinions even suggested that governments "are required to bring about actual integration." What even the most far-reaching remedial cases said was that *if de jure segregation had been shown*, then a school system would have to achieve unitary status (no separate schools for whites and blacks), and integration of schools might be a measure of the system's success in achieving that status. But the Court never held that the Constitution required integration absent a predicate finding of de jure segregation. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."); Green v. County Sch. Bd., 391 U.S. 430, 437 (1968) (quoted supra text accompanying notes 117–121).

in de jure segregation, then following residential patterns in that system might be insufficient to undo a dual school system. But absent this predicate finding,[147] if a homogeneous group of citizens exits a heterogeneous setting, the Constitution does not require that their children continue to be educated in an integrated setting. As I will explain in Part III, a state might have good reason to insist on integrated public education, and it may ensure this through creative drawing of school attendance zones and even through busing. But if a state determines that it will allow school assignments to track communities formed from groups exiting other communities, then the Constitution does not stand in the way.[148]

Just as in *Milliken I* the whites who left Detroit for the suburbs were able to attend schools in their community (virtually all white) without violating the Constitution, so should the Satmars who left Williamsburg for upstate New York be able to attend schools in their community (all Satmar) without violating the Constitution. Below, I will discuss the one important additional fact in the *Kiryas Joel* setting, namely, that the Satmar exit from heterogeneity was not complete until the New York legislature drew the Kiryas Joel Village School District line to carve out an all-Satmar jurisdiction from the heterogeneous county school district. But the relevant lessons for *Kiryas Joel* from the *Brown* line of cases are that the Constitution does not require integrated public schools, that it permits public schools that are racially or religiously homogeneous, and that this is so even if the schools came about because of a racially or religiously homogeneous group exiting a heterogeneous setting precisely for the purpose of living in a homogeneous setting.

b. *Defending the De Jure/De Facto Distinction.* — The *Brown* line of cases provides strong support for adhering to a traditional de jure/de facto distinction in examining the racial or religious makeup of political districts. The Constitution precludes the government from engaging in racial or religious segregation for its own sake, but poses no barrier to private choices that result in racial or religious separation. Although it is true that state action is involved in all public school student assignments, the *Brown* line of cases reveals that when the government's school assignments appear to track residential segregation, the segregation is considered privately caused for constitutional purposes. But does it make sense

147. Even with a finding of de jure segregation in a school system, the Court has suggested that although rare, there may nevertheless be cases "in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units." Keyes v. School Dist. No. 1, 413 U.S. 189, 203 (1973).

148. The *Brown* line of cases also holds that if a school system has been found to have engaged in de jure segregation, then a federal court may police subsequent insistence on neighborhood schools with a wary eye. If a school system did not at some earlier point in time send children to neighborhood schools, precisely because it wanted to ensure racial segregation, it may not at a later time claim that neighborhood schools (now virtually all-white or all-African-American) are merely responsive to geographical communities. See *Keyes*, 413 U.S. at 212.

to adhere to a de jure/de facto line in the context of racial or religious separation?

The principal line of attack on this distinction is that private agglomerations of power cause at least as much social harm as governmental agglomerations of power. For example, although the Equal Protection Clause prevents government from segregating public schools or public housing, private schools that discriminate on the basis of race or religion, and private residential associations that do the same, cause significant social harm. Private power, especially when it is monopolistic or oligopolistic with regard to the relevant market, results in harm similar to that caused by public power. If we were persuaded of the existence of this synonymy between public and private power (which is a difficult and context-dependent empirical question), we could respond legally in two different ways. We could expand the scope of constitutional coverage, considering actors to be public who were previously considered private. Or, we could permit government broad latitude in regulating private discrimination.

There are three reasons, fairly interlinked, for not expanding greatly the category of those actors considered "public" for purposes of constitutional coverage. The first reason is descriptive; the other two are normative.

(1) The Constitution covers (for the most part) only governmental action because the Framers wanted to restrict the power of the people's agents but not the power of the people themselves.[149] Collapsing this distinction would be in tension with the Constitution's history and structure.

(2) As discussed in Part I.A, there are many virtues to a system in which power is reposited in multiple places, in which sovereignty is seen as permeable rather than solid and monolithic. Just as the virtues of multiple repositories of power can be seen in divided government, in political rights, and in rights of community, so are those virtues visible through a broader separation of public from private. By having two types of arena for collective action, the citizenry can endorse, and test, different values in different places. In this way, the public arena can be the arena for inclusion, for the "e pluribus" to become the "unum." Conversely, the private arena can be the arena for selectivity, for the "unum" to become the "e pluribus."

(3) Just as differentiating between public and private allows the citizenry to experiment with different types of social norms, so does this differentiation encourage different forms of social action to overcome barriers and to achieve change in the separate settings. A public form of

149. See the Thirteenth Amendment for the key exception: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall exist within the United States*, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1 (emphasis added).

progressive action—constitutional amendment, legislation, debate in the public square—requires persuading others that measures are in their interest as part of a common good. A private form of progressive action—overcoming through nongovernmental, social means the private barriers to the enlargement of community—may require an appeal to a moral or religious sensibility. This difference can be seen in another way as well. If we were to apply constitutional antidiscrimination norms against private associations, one could go directly to court to permeate such an association. If we adhere to a brighter line between public and private, then to permeate a private association one must resort to a nonjudicial forum, either by seeking the enactment of antidiscrimination laws that will apply to private action (discussed immediately below) or by seeking change within the homogeneous community. The extra effort needed to combat private ostracism helps to define the difference between public and private forms of association, helps to ensure that what is attacked is worth attacking, and energizes those doing the combating in a way that lawsuits do not.

Assuming we do not expand the category of the "public" for purposes of constitutional coverage, the other way to collapse the public/private distinction is to regulate the private. The appropriate scope of such regulation is a major, difficult question, which I can address only briefly in this Article. Public regulation of private action is, of course, generally constitutional. One question is whether forbidding private associations from discriminating against the "other" is constitutional, or whether a constitutional right of association, and in the context of religion, the Free Exercise Clause, should be understood to trump such legislation. As discussed above, the Supreme Court has construed the general freedom of association narrowly, permitting regulation of private associations in each case coming before it. Only in dicta has the Court stated that freedom of association might trump an antidiscrimination law if the association is small and selective, and if no business is transacted at the association's physical location.[150] Here, let me add a few words about freedom of religious association.

In many ways, the religion clauses are the Constitution's quintessential marker of the public/private line. Religion as a subject is unique in being singled out for two clauses all its own: The Establishment Clause appears to restrict the public intersection with religion, while the Free Exercise Clause appears to enhance the private practice of religion. As I have argued elsewhere, one result of this arrangement is that legislation may not be based dominantly on expressly religious arguments;[151] but precisely because of this disabling rule in the public sphere, private religious practice should be granted exemptions from law (at least in certain

150. See Roberts v. United States Jaycees, 468 U.S. 609, 617–21 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 n.6 (1987).

151. See Abner S. Greene, Is Religion Special? A Rejoinder to Scott Idleman, 1994 U. Ill. L. Rev. 535 [hereinafter Greene, Rejonder]; Greene, Political Balance, supra note 22.

instances) when adherence would conflict with religious obligations. One category of cases raising the exemptions question is the application of antidiscrimination laws to religious institutions.[152] Here, there are two subcategories: First, should the Free Exercise Clause be construed to provide religious institutions a right to discriminate on the basis of religion? Second, should the Free Exercise Clause be construed to provide religious institutions a right to discriminate on other grounds (say, race or sex or sexual orientation)? On both issues, my (somewhat tentative) views are on the side of the religious institution.

The first subcategory is the easier of the two. A Jewish synagogue, for example, has a Free Exercise Clause right to hire only Jewish people for positions as rabbis, cantors, and teachers. This seems fairly straightforward.[153] Whether this right extends to hiring for nondoctrinal positions—say, building custodian or security guard—is a harder question. In *Corporation of the Presiding Bishop of the Church of Jesus Christ Latter-Day Saints v. Amos*,[154] the Supreme Court upheld against an Establishment Clause challenge Title VII's exemption from antidiscrimination law for religious institutional hiring. The case involved the Mormon church, which had refused to hire a non-Mormon for the position of building engineer for a gymnasium. Although that job might appear secular, the Court stressed the difficulty of determining which positions are secular and which religious, and opted for a strong rule of deference to the perceived needs of religious institutions in this regard. *Amos* seems correctly decided, and I would go further to argue that the Free Exercise Clause compels an exemption from antidiscrimination law for a religious institution that claims in good faith that a position must be filled by a coreligionist. Policing such claims risks severe entanglement between government officials and church officials, which treads on both Establishment Clause and Free Exercise Clause values (the government would get to say what a particular religion requires and a religious institution's view of what its religion requires would be overridden).

Whether a religious institution has a Free Exercise Clause right to discriminate on the basis of a nonreligious attribute is a harder question, but only because the source of the religious need is somewhat more attenuated. Thus, while it is apparent that a religious institution needs to hire a coreligionist for a doctrinal position, and fairly clear that we should defer to a religious institution's determination that a nondoctrinal position must nonetheless be filled by a coreligionist, the source of a religious institution's need to discriminate on the basis of sex (for example) is not as immediately apparent. But if the representatives of the religious insti-

152. The application of antidiscrimination laws to private persons who object to obedience on religious grounds is a related matter that I do not address here.

153. Cf., e.g., Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (finding the subjection of church employment decision to Title VII scrutiny barred by First Amendment), cert. denied, 478 U.S. 1020 (1986).

154. 483 U.S. 327 (1987).

tution believe in good faith that (for example) their religion mandates that only men may drive school buses to the institution's private, religious schools for boys,[155] then requiring the institution to hire female bus drivers might injure the institution just as requiring that it hire a person of a different religion would injure it, although the injuries might be of differing magnitude.

Furthermore, although the American public commitment to eradicating discrimination on the basis of race, sex, and (in some places) sexual orientation is important, so is the American commitment to letting religions flourish. Precisely because we properly exclude expressly religious arguments from providing the predominant justification for legislation that will coerce people of many religions, religious groups have a bona fide claim to be let alone in their practices, at least regarding discrimination on the basis of attributes the religion deems religiously relevant. Some religious practices may, of course, be regulated by the state—either those that export clear harms to others (say, a religious practice of stealing from a neighboring community), or those that impose certain harms to the religious community only, but that we cannot countenance (say, human sacrifice). The hard question is determining what counts as the exportation of a clear harm (why not failure to hire on the ground of sex? doesn't that foreclose employment opportunities?) and what counts as harms internal to the religious community that we cannot countenance (why not the harm done to women, or gays and lesbians, even if they are coreligionists?). These questions require longer answers than I can give in this Article. In short, my claim is that the constituting of a religious community through rules of inclusion and exclusion is an integral part of (at least some) religious doctrines and to permit religion to flourish we must sometimes accept the bitter with the sweet. This does not mean we should not try to persuade religions to change their practices (and their doctrines), but such proselytization should take the form of persuasion and not coercion. I discuss this further in Part III.

c. *Majority Recognition of Minority Exit.*

(i) Kiryas Joel *as a Case of Exit.* — Thus, the distinction between governmentally imposed segregation and privately chosen segregation is an important one. But even though the citizens of an identifiable geographic area might be all one religion or all one race because of private choices, government still acts when it draws political lines (or allows groups of citizens to draw political lines). In other words, even though (on the record of the case) neither the State of New York nor the Village of Kiryas Joel prevented non-Satmars from moving to the Village, drawing a school district line around a village known to comprise citizens who share a common religion excludes (at least for the time being) non-Satmars from whatever public schools the Village establishes (one, at the moment). To be sure, this is not the same sort of exclusion as refusing to

155. See Bollenbach v. Board of Educ., 659 F. Supp. 1450 (S.D.N.Y. 1987).

admit a certain group into a town or school. But when a political division is subdivided, exclusion by separation has indeed occurred.

This argument is at the core of Justice Kennedy's opinion. The establishment of the Kiryas Joel Village School District did not follow from a general state law applying neutral principles for the creation of school districts; rather, said Justice Kennedy, the state legislature "had complete discretion"[156] not to establish the school district. So even though Justice Kennedy assumed that New York would establish similar school districts for similarly situated homogeneous religious groups,[157] he deemed such establishments (in general) invalid because "government may not use religion as a criterion to draw political or electoral lines."[158]

Two related questions arise: Is it more significant that the Satmars exited Brooklyn, exited the Town of Monroe, and then sought to exit the Monroe-Woodbury Central School District, or is it more significant that the state acted to split off the Village of Kiryas Joel from that larger school district? Additionally, what is the significance of the fact that the special school district for the Village of Kiryas Joel is, as of today, fairly special—i.e., New York has been expanding, rather than contracting, the size of school districts?

That New York carved the small district out of the larger one, and that the state has not had a practice of granting school districts to small communities (but would in the future for similarly situated communities), are points about timing and nothing else. In other words, if the law establishing the Kiryas Joel Village School District had been the second, or fifth, or fiftieth, in a series of special laws establishing small school districts for homogeneous communities that had exited other settings, it would be easier to see that the legislature had responded to exit rather than created it. And if the Satmars had lobbied the state legislature for a special school district immediately upon incorporating as a village, rather than first trying to send their handicapped children to the heterogeneous county schools, then again it would be easier to see that the legislature had responded to exit rather than created it. That the Satmars first tried the county school alternative, and that Kiryas Joel is the first rather than second, fifth, or fiftieth special school district, are distractions from the proper categorization of this case as one of recognizing minority exit.

To help see this, consider the following spectrum of cases:

156. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2504 (1994) (Kennedy, J., concurring in the judgment).

157. That is, he expressly disagreed with the majority's opinion invalidating the school district because of the concern that the State might not act evenhandedly in the future. See id. at 2501–03.

158. Id. at 2504.

(a) The majority carves out a bizarrely shaped school district to harm a minority. This is (essentially) *Gomillion v. Lightfoot*,[159] and it is unconstitutional. This is an easy case.

(b) The majority carves out a bizarrely shaped school district to help a minority. (By "help a minority" in these examples I mean something like the *Kiryas Joel* situation—a minority group petitions the majority for a school district that will serve all or mostly minority members, which the minority group feels it needs to educate its children in a less hostile, more productive atmosphere.) This is (approximately) the case I will address below of whether a school just for Satmars drawn from throughout New York City would be constitutional.[160] Even if under current Supreme Court doctrine such a district easily would be invalidated, the question should be considered an interesting and difficult one.

(c) The majority carves out a school district matching an established geographical community, to help a minority, but not where the minority has exited another setting to reach its current location. Rather, the community has become a minority one because members of the majority group have moved away. In general I see nothing unconstitutional about such a district; the purpose is noninvidious, the benefit is real (as perceived by both majority and minority), and the district lacks the problems the district in case (b) would have. Case (c), though, is somewhat more difficult than the next case, (d), where the cause of the minority group's isolation is the group's own act of exit from a heterogeneous community. As I explain below,[161] exit should be given a privileged place in our recognition of minority interests.

(d) This case matches the facts of *Kiryas Joel*. It is true that the Satmars had to go through (at least) three steps to get where they were as of the passage of the New York law: They had to leave Williamsburg; they had to incorporate as a village to get out from under the zoning restrictions of the Town of Monroe; and they had to get a school district coincident with the Village's boundaries to escape the mistreatment of their handicapped children by other children in the county school. But, again, why should the three-step matter? Why is this any different from a (hypothetical) one-step, in which the Satmars, all at once, moved from Williamsburg to upstate New York, incorporated as a village, and got a school district coincident with the village's boundaries? We should see *Kiryas Joel* as a case about a group that wants both to live by itself and operate private institutions and to exercise appropriate public power. So long as the Satmars are willing to live by the constitutional rules, there should be no constitutional barrier to the state's ceding them the public as well as private attributes of sovereignty.

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159. 364 U.S. 339 (1960) (invalidating the boundaries of the City of Tuskegee, which had been redrawn from a square to a bizarre, 28-sided figure, removing from the city all but a few African-American voters, but not removing any white voters or residents).

160. See infra text accompanying notes 194–198.

161. See infra text accompanying notes 196–198.

Those who criticize governmental recognition of homogeneous communities created through exit are often inconsistent in their criticism, indicating at other times that the Constitution allows state recognition of such communities. So, for example, Justice Kennedy's position in *Kiryas Joel* is in tension with his majority opinion in *Freeman v. Pitts*,[162] one of the recent post-*Brown* line of public school desegregation cases discussed above.[163] In *Freeman*, Justice Kennedy acknowledged that whites might choose to live apart from African Americans, and that if segregated schools result from such "private choices,"[164] then the federal courts lack authority to intervene. If the Constitution does not forbid a state from drawing school districts around all-white communities in these circumstances, then it is hard to understand why it forbids a state from drawing a school district around an all-Satmar community, especially given that the all-Satmar community (a) exited a heterogeneous setting to establish a homogeneous community, and (b) desired that the school district be drawn around it.[165]

Similarly, Justice O'Connor and Justice Kennedy both appear willing to permit public funds to be used in private, religious schools.[166] But doesn't that exacerbate division by religion? Doesn't that involve state action in fostering religious separation? Further, as I argned above,[167] permitting such funding is arguably worse than permitting the Kiryas Joel

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162. 503 U.S. 467 (1992).

163. See supra text accompanying notes 144–145.

164. *Freeman*, 503 U.S. at 495.

165. Likewise, after Paul Gewirtz criticizes *Milliken I* for foreclosing effective interdistrict relief, he examines the possibility of preventing white flight by "impos[ing] an intradistrict integration remedy that bars white families in the public school system from sending their children to private schools or changing neighborhoods; threats of contempt or other sanctions would provide incentives for compliance." Gewirtz, supra note 136, at 650. Although Gewirtz seems fairly sympathetic with this suggestion, he nonetheless rejects it, because "[a]s currently interpreted, the Constitution itself protects the right to attend private schools and the right to travel." Id, at 651. He adds, "Courts do have the power to enjoin private parties from interfering with desegregation in some instances and may even have the power to influence access to private schools or the suburbs indirectly, but they probably lack the power to block flight directly." Id. But if a court lacks the constitutional authority to bar white families from sending their children to private schools or from changing neighborhoods within a school district, why may the court effectively nullify suburban migration by ordering interdistrict remedies? Again, I agree that the legislature may district in such a way as to ensure integrated public schools, and I agree that the legislature may not district in such a way as to ensure segregated public schools—unless such districting can legitimately be said to respond to a noninvidious category, which (centrally for my argument) includes geography. In that case, the state may, if it chooses, district in ways that recognize geographical communities created by exit.

166. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Gt. 2481, 2498 (1994) (O'Connor, J., concurring in part and concurring in the judgment); id. at 2505 (Kennedy, J., concurring in the judgment); see also Eisgruber, Assimilation, supra note 20, at 92–96 (arguing that including religious schools among beneficiaries of nonpreferential aid to private education is constitutional exercise of legislature's discretion).

167. See supra text accompanying notes 104–105.

Village School District, because there is more reason to believe that religion will infuse education in a private, religious school than in a public school that is pervasively governed by constitutional norms. Another inconsistency in the approach to the partial exit problem appears in Justice Souter's *Kiryas Joel* opinion. He wrote:

> [I]f the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars.[168]

But if only Satmar children attend school at a neutral site, or if only children of a different religion attend school at the next neutral site established, hasn't the state still segregated citizens by religion? Granted, the public power would not, in these neutral site examples, be exercised by parents who share a common religion, but that does not diminish the segregative impact of such neutral site schools.

(ii) *The Concept of "Exit," Unpacked.* — What are the limits of my focus on exit? *Kiryas Joel* presents perhaps the most appealing constitutional case for a special school district (or other grant of local political power) for a distinct group: The group is a minority, it is religious (and thereby nomic), and it has exited a heterogeneous setting precisely to establish a separate nomos. Difficult questions arise in thinking about the limits of special school districts for distinct groups: Should a specially targeted school district be upheld for a majority group? For a nonreligious group? For a group that has not exited? Although the arguments for a special school district are strongest in the minority religious exit setting, I will conclude, somewhat tentatively, that it should be constitutionally permissible (though not required) to establish school districts in any community formed through deliberate exit from another setting, even if the community is otherwise a majority (say, Christians or whites)[169] and even if the community does not cohere as a nomos, but rather is linked more loosely by a common attribute such as race. On the other hand, it is probably unconstitutional to establish school districts for

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168. *Kiryas Joel*, 114 S. Ct. at 2493; see also Grumet v. Board of Educ., 618 N.E.2d 94, 106 (N.Y. 1993) (Kaye, C.J., concurring), *aff'd*, *Kiryas Joel*, 114 S. Ct. 2481 ("[A] law providing special education services to Satmar children at neutral sites can be considered closely fitted to a compelling government interest. Creating a new public school district cannot.").

169. Although I conclude later that a court should not uphold "a purported accommodation of a minority religion [that] is actually governmental action advancing the majority religion," see infra text accompanying note 320, granting a school district to a majority religious group that had exited to its own geographical setting would constitute "governmental action advancing the majority religion" only if the grant were made for doctrinal religious purposes. See my discussion of legislative accommodation of religion in Part II.C.

distinct religious or racial minority groups that are scattered throughout a heterogeneous setting, though again the question is a close one.

To consider this set of questions, imagine four scenarios involving the grant of a special school district by the state: minority exit, majority exit, majority nonexit, and minority nonexit. Within each scenario, I will also discuss the relevance of the nomic or nonnomic character of the group in question. The first scenario involves *minority exit.* At the outset, I am going to assume, arguendo, that accommodation of minority interests is, in many instances, constitutionally permissible. I will defend that claim in Part II when I discuss the issue of favoritism in *Kiryas Joel.* The question now is whether the award of local political power is a constitutionally legitimate means of accommodating a minority interest. In the *Kiryas Joel* setting, the answer should have been yes. If we add together the lesson of the *Brown* line of cases—integration is not constitutionally required; school district lines may be drawn to coincide with geographical communities—and the argument made above suggesting that the Kiryas Joel Village School District is best seen as responsive to a minority community's desire for exit (rather than as forced segregation by the majority), then there is no good reason to block New York's grant of political power to the Village of Kiryas Joel. Furthermore, following my earlier discussion about the value of nomic communities, the case is made even stronger once we see that the community of Kiryas Joel defines itself normatively, through a comprehensive world view. While it may be true that members of the Satmar community will have to curtail their use of religious doctrine in running the school district, and thus will not be able to operate as a religious nomos while exercising public, governmental power, the nomic character of the community is still relevant in assessing the strength of New York's interest in granting a special school district. If we accept the importance of separate nomic communities in the United States (both as fitting our constitutional tradition and as justified on independent, normative terms), then we should see that the survival of at least some nomic communities will depend not only on their ability to flourish through private institutions, but also on their ability to exercise public, governmental power on certain occasions, even if those occasions require the softening of the very nomic qualities that define the communities to begin with.

A harder question is whether it is constitutional for a state to grant a special school district to a racial minority community established through exit. Here, we hold constant the "minority" and "exit" factors, but change the character of the community from "nomic" to "nonnomic." Consider this case: A county is 80% white and 20% African-American. All children attend the county public schools. The African-American families are tired of their children being mistreated by the white children, so the African-American families move to a previously undeveloped area in the county and incorporate as a village under state incorporation law. They then petition the state government for a new school district,

drawn to cover the new village. If the state would grant a school district to other similarly situated groups, then is there a constitutional barrier to granting that school district here? Assume that this new community of African Americans does not function as a nomos—that is, assume that the members of the community share race and some other attributes, but assume that the shared attributes do not rise to the level of a comprehensive world view.[170] The case for granting the school district would not, under these facts, be as strong as the case for the grant in the *Kiryas Joel* setting, because the government has a stronger interest in aiding a distinct nomic community than in aiding a distinct community defined less thickly, by an attribute such as race. But the case for upholding the constitutionality of the school district is still strong. The benefited group is a minority, and the minority group clearly expressed its interest in functioning as a community by paying the price of exit.[171] Moreover, if we were concerned purely with fitting precedent, and not with justification as an independent matter, then the African-American school district in this hypothetical would follow *a fortiori* from *Milliken I*. The lesson of that case, as hard as it may be to accept in a nation committed to an "American" ideal, is that citizens may, of their own volition, move away from other citizens—based on whatever reason they have for moving—and still govern themselves as a public entity. They may not, of course, use this public power to exclude on the basis of religion or race the citizens away from whom they moved (or any other citizens), but if the public power, at least temporarily (and perhaps for a long time), runs in effect to a group homogeneous as to religion or race, then it is wrong to say that the government has "segregated" or has "forced separation."[172]

In a pair of voting rights cases, the Supreme Court has recently spoken on the issue of electoral districts drawn to benefit racial minorities. Although the cases are relevant to evaluating *Kiryas Joel*, they are distinguishable from the *Kiryas Joel* facts. The first case was *Shaw v. Reno*.[173] North Carolina drew a new congressional district, District 12, which ran approximately 160 miles long, "for much of its length, no wider than the I-85 corridor."[174] This line ensured a majority African-American electorate. The Court held:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[175]

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170. Cf. Miller v. Johnson, 115 S. Ct. 2475, 2486–88, 2490 (1995) (Court unwilling to assume that shared race overlaps with shared political interests).

171. See infra text accompanying notes 196–198.

172. See *Kiryas Joel*, 114 S. Ct. at 2504–05.

173. 113 S. Ct. 2816 (1993).

174. Id. at 2820–21.

175. Id. at 2828.

The Court recognized that race could not be ignored in districting,[176] and seemed most concerned with the obviousness of the racial gerrymander. Thus the Court insisted that its analysis would have been different had North Carolina paid attention to "traditional districting principles."[177] The Court continued:

> [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.[178]

Similarly, the Court distinguished its earlier decision in *United Jewish Organizations v. Carey*[179]—upholding New York's race-conscious redistricting to ensure African-American electoral success—on the ground that the districts in *Carey* followed traditional compactness and population equality criteria.[180] The Court left open on remand the possibility that the state could prevail by showing a compelling need for the oddly shaped district, including the possibility that the Voting Rights Act requires such a district. The Court also left open another major question: If the Voting Rights Act requires such a district, is the Voting Rights Act itself unconstitutional?[181]

Shaw is a somewhat difficult case to understand. Broadly read, it holds that a legislature may not draw an electoral district to benefit a class defined by race, even if that class is a minority that has been discriminated against for years. On this reading, North Carolina's District 12 is an easy case for invalidation because the district is so obviously drawn to benefit a racial class, and less bizarrely drawn districts could be invalidated as well if plaintiffs could show the appropriate race-specific purpose. But *Shaw* might stand for the more narrow proposition that so long as a district line can plausibly be explained in a non-race-specific way, it should be upheld, even if race played a (perhaps siguificant) role in the line-drawing, for the Court repeatedly insisted that evidence of compactness and contiguity could help dispel the inference that a district was based on race. Further, recall that the precise language of the Court's holding is that, without sufficient justification (what counts as such is left open), the Equal Protection Clause bars a district that "rationally cannot be understood as anything other than an effort to separate voters into

176. See id. at 2826.

177. Id. at 2824.

178. Id. at 2826.

179. 430 U.S. 144 (1977).

180. See *Shaw*, 113 S. Ct. at 2829.

181. On remand, a divided three-judge district court panel ruled for the state, holding that the districting plan "is narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act," and that the plan "does not violate the plaintiffs' Equal Protection rights in the manner alleged." Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D.N.C. 1994), prob. juris. noted, 115 S. Ct. 2639 (1995).

different districts on the basis of race."[182] This indicates that only the most unusual looking districts would be invalidated; if a district could plausibly fall within a category other than "race-specific" it would be upheld, and the leading candidate for such a legitimizing category is a district based on traditional compactness and contiguity criteria.

In *Miller v. Johnson*,[183] the Court clarified its holding in *Shaw*, explaining that plaintiffs need not show that a district is "bizarre on its face"[184] to make out an Equal Protection Clause claim:

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. . . . [P]arties may rely on evidence other than bizarreness to establish race-based districting.[185]

A district is invalid, under *Miller*, if race was the "predominant factor" in the districting process, but the district may survive if the legislature relied primarily on such legitimate factors as "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests."[186] As Justice O'Connor stated in her important concurrence (she provided the fifth vote for the majority opinion), the "threshold standard" for invalidating a district is a "demanding one": "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices."[187]

Even after *Shaw* and *Miller*, my argument in support of the constitutionality of the Kiryas Joel Village School District can stand. *Shaw* and *Miller* hold that government may not pluck out citizens who live apart and group them together by racial (or, if we analogize, religious) criteria alone. The cases do not, though, forbid government from recognizing the residential choices of a homogeneous group of citizens. Both cases recognize compactness and contiguity as legitimate districting factors. Accordingly, even if it is clear that a district was drawn to benefit a racial or religious group, so long as the district is rationally explicable on other grounds, and not predominantly based on race or religion, it may stand.[188] Thus, the Kiryas Joel Village School District is constitutional even after *Shaw* and *Miller*, because it does not pluck out Satmars from

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182. *Shaw*, 113 S. Ct. at 2828.

183. 115 S. Ct. 2475 (1995).

184. Id. at 2486.

185. Id.

186. Id. at 2488.

187. Id. at 2497 (O'Connor, J., concurring).

188. See T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*, 92 Mich. L. Rev. 588, 643–44 (1993) (concluding that *Shaw* condemns race-conscious districting only if the district drawn is bizarrely shaped); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre

various communities and give them a school district, but rather follows the compactness and contiguity of the Village of Kiryas Joel.[189] Moreover, even if we accept *Miller*'s conclusion that shared race does not equal shared interests, that case permits districting based on "actual shared interests," i.e., it allows districting "directed toward some common thread of relevant interests."[190] Thus, even if it is illegitimate to use race as the predominant factor, using religion as a predominant factor is distinguishable, because a common religion—especially with a group such as the Satmars—is good evidence of deeply shared interests.

Let us return now to *Milliken I* itself. Should the Court have been more cautious about ceding authority to the white majority after its exit? This is the second scenario: *majority exit*. Consider the following case, similar to the above hypothetical[191] but with altered demographics: A county is 80% African-American and 20% white, and the whites happen to be right wing extremists. All children attend the county public schools. The right wing extremist families are tired of their children being educated according to the values of the African-American majority, so the right wing extremist families move to a previously undeveloped area in the county and incorporate as a village under state incorporation law. They then petition the state government for a new school district, drawn to cover the new village. Assuming that the state would grant a school district to other similarly situated groups, is there a constitutional barrier to granting that school district here? *Milliken I* indicates that the answer is no, but was that case correctly decided?

The arguments against the constitutionality of ceding public power in a case such as this are considerable. The hypothetical right wing extremist white community might not be nomic, that is, the members of the community might not share a world view (although they clearly share certain values). Furthermore, granting public power to otherwise nonprivileged minorities who exit majority settings is not the same thing as granting public power to people who are otherwise privileged. The social meaning of creating a new school district for the Village of Kiryas Joel, or in the hypothetical of the 20% African Americans, is different from the social meaning of creating a new school district for the white suburbanites in *Milliken I* or, more dramatically, the white right wing extremists in the hypothetical here. Part II will explore the Court's unwillingness to affirm that the social meaning of accommodating minority interests is significantly different from the social meaning of acceding to special requests from the majority. If we accept this difference in social meaning, then perhaps exit alone is an insufficient reason to grant public power to majority groups. The case becomes somewhat stronger for the grant of

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Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 494–99 (1993) (same).

189. See Berg, supra note 86, at 492–93.

190. 115 S. Ct. at 2488, 2490.

191. See supra text accompanying notes 168–170.

power if the group coheres as a nomos, for example, if we stipulated that the right wing white extremists shared the same (majority) religion. And if we eliminate the race issue, leaving a multi-racial community formed through exit whose members share the same (majority) religion, then the case for the special school district is even stronger. On balance, I believe that public power should be allowed, constitutionally, to follow exit—even in the hardest case of the right wing white extremists—but I recognize that the question is a close one.[192]

Although it is virtually impossible to construct a case for upholding a special school for the third scenario, *majority nonexit* (imagine an officially all-Christian public school in New York City, or an officially all-white one), one hard case remains: What about (say) an all-Satmar school in New York City, even if the Satmars are scattered throughout the city? This is the fourth scenario: *minority nonexit*. My earlier discussion of *Shaw* and *Miller* assumed that those cases were correctly decided, but distinguished *Kiryas Joel* on its facts. If one agrees that the Kiryas Joel Village School District should have been upheld, what about the creation of an all-minority school in an otherwise heterogeneous setting?[193] What if, for example, New York City created a public school for Satmar children, who are (by hypothesis) scattered throughout the city?[194] Under *Shaw* and *Miller*, it would seem that such a school should be invalidated. The argument for upholding the school (which would require distinguishing or overruling *Shaw* and *Miller*), is that, as with the school district for the Village of Kiryas Joel, this school would be established for a minority defined by its nomic status. The difference from the Kiryas Joel setting is that the Satmars in the New York City hypothetical have not exited a heterogeneous community. Thus, this hypothetical is the best test of the importance of the exit condition for granting public power to a distinct group. If nomic communities are important in ways that I have suggested, then perhaps majorities may, in their discretion, help such com-

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192. For a further discussion of "exit," see infra text accompanying notes 194–96. One problem will be ensuring that majorities actually exit before receiving public power. There is an important line between a group of whites getting up and moving to an uninhabited area and then establishing a new public school, and that same group of whites sitting still and redrawing their borders so as to exclude African Americans. See Gomillion v. Lightfoot, 364 U.S. 339 (1960).

193. Cf. United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (upholding Virginia's separate male and female military colleges under a "heightened intermediate scrutiny test"), cert. granted, 64 U.S.L.W. 13 (U.S. Oct. 10, 1995) (No. 94-1941).

194. Apparently two-thirds of the students in the Kiryas Joel public school are from Hasidic families that do not live in the Village. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2486, 2490 (1994); id. at 2495 (Stevens, J., concurring). This raises the possibility that the Kiryas Joel school should be viewed as a magnet school for Hasidic children. The Court did not discuss the case in this fashion, and the predicate for the discussion in this Article is that the school district was created for the Village of Kiryas Joel, not for Hasidic (or, more narrowly, Satmar) families more broadly. If it were proved in court that the school was created or run as a magnet school, then the defense of the school could not rely on geographic community in the way I have.

munities through magnet schools in otherwise heterogeneous physical settings.

Exit, however, might be thought necessary for the constitutionality of special school districts drawn to benefit a distinct group.[195] At least five reasons support this claim. The first reason is historical: There is a strong American tradition of religious groups seeking out their own physical place to live. Allowing public, governmental power to follow exit is consonant with this tradition. In contrast, establishing a magnet school for Satmars throughout New York City does not fit within an established practice. The absence of proportional representation systems of voting is also evidence of an American tradition unsympathetic with claims for minority power not backed by some form of physical contiguity or compactness.[196] The second reason is constitutive: The experience of life in a physically compact and contignous community is different from the experience of life in a sprawling urban setting, where members of the distinct group live intermingled with members of other groups. This phenomenological difference might be thought to justify a grant of political power to the distinct group in the exit case only, on the ground that there are special values of community that obtain only when members of the nomos live in a geographically circumscribed area.[197]

The third reason is evidential: Exit is a good proxy for the nomic character of a community. The argument for granting political power to nomic minorities is stronger than the argument for granting political power to minorities that do not cohere in such a fashion. This argument "fights the hypothetical" by refusing to accept the characterization of the group requesting a special magnet school as nomic in character. Rather, this argument suggests that exit is evidential of the nomic character of a group of citizens, and that nonexit is evidential of the nonnomic charac-

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195. The reasons stated below in the text to accord special deference to minority nomic communities that have exited might be thought to apply as well to minority nomic communities that live in a geographically compact area as a result of the flight of others rather than the minority community's own act of exit. The reasons apply more strongly in the case of exit, however, primarily because exit provides stronger evidence of the nomic character of the community.

196. See Daniel D. Polsby & Robert D. Popper, Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act, 92 Mich. L. Rev. 652, 663–64 (1993) ("Single-member districts and proportional representation aim at mutually inconsistent objectives . . . .").

197. As Michael Walzer has stated:

> [T]he associative principle of neighborhood . . . is . . . the preferred principle. For politics is always territorially based; and the neighborhood . . . is historically the first, and still the most immediate and obvious, base for democratic politics. People are most likely to be knowledgeable and concerned, active and effective, when they are close to home, among friends and familiar enemies. The democratic school, then, should be an enclosure within a neighborhood: a special environment within a known world, where children are brought together as students exactly as they will one day come together as citizens.

Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 225 (1983).

ter of a group of citizens. The fourth reason is administrative: A minority community's ability to act as a nomos will be greatly enhanced if it lives in isolation from others; if the community lives in a heterogeneous environment, the influence of the majority public legal culture will be harder to resist.

The fifth and final reason is symbolic: Although the Kiryas Joel Village School District and a school for Satmars scattered throughout New York City would both affirm the distinctness of the Satmars and signal the majority's willingness to aid such distinctness, the message in the second case is, I believe, significantly different from the message in the first case. Precisely because physical exit is lacking in the second case, the message cannot be, "If you're willing to establish your own geographic communities, we're willing to make the constitutional deal with you—you get public power so long as you exercise it in constitutional ways." Rather, the message in the second case would be, "Even in this heterogeneous setting, we have failed to create successful integrated schools. Some of our children are, we now realize, better off educated in segregated settings."[198] (Again, we're assuming the support of the minority group in question.) By insisting on exit, and by insisting that schools in heterogeneous settings be integrated, the government can ensure two ways of living; it can ensure the survival of both the "e pluribus" and the "unum."

(iii) *Response to Eisgruber and Lupu.* — In his prior writings on *Kiryas Joel,* Chris Eisgruber disagrees with my characterization of the case as majority recognition of minority exit. He argues, to the contrary, that the New York law constitutes separation—segregation—pure and simple,[199] and is accordingly invalid under a structural constitutional principle prohibiting "government from exercising any form of power likely to create caste-based factions."[200] He first acknowledges that if the New York law "were merely a nondiscriminatory accommodation of burdens imposed by sincere religious faith, it might pose no constitutional problems from the standpoint of political unity."[201] But he continues,

> It hardly seems accurate, though, to describe the Kiryas Joel school district as an instance of religious accommodation. The public school in Kiryas Joel violates important tenets of the Satmarer religion. Virtually the only interest accommodated by

198. For a related point, see Eisgruber, Political Unity, supra note 20, at 1317–18 (would invalidate high schools restricted to African Americans under a principle of political unity that forbids the government from segregating the citizenry).

199. See id. at 1325–26. Eisgruber's article addresses the New York law after it was invalidated by the New York Court of Appeals but before the United States Supreme Court issued its affirmance. There is nothing either in the various Supreme Court opinions in *Kiryas Joel* or in Eisgruber's analysis to indicate that he would have reached a different conclusion upon addressing those opinions. Indeed, in a later article, and in his response to this Article, Eisgruber reiterates his argument against the New York law. See Eisgruber, Madison's Wager, supra note 20, at 402–08; Eisgruber, Assimilation, supra note 20.

200. Eisgruber, Political Unity, supra note 20, at 1302.

201. Id. at 1325.

> the new district is an interest in separating students who are unlike one another.[202]

He emphasizes a bit later that the New York law "accommodates separatism and nothing else."[203] He concludes, "The Kiryas Joel school district is accordingly unconstitutional not because it endorses the Satmarer Hasidic religion, but because it is inconsistent with the antisegregation principle that helps to explain the force of our intuitions about *Brown*."[204]

Political unity is certainly an important structural feature of the Constitution, and I agree with Eisgruber that a majority may not segregate a minority for segregation's sake. But just as Eisgruber is correct in pointing to the various aspects of the Constitution that promote political unity, so must one remember the other parts of the Constitution that promote multiple repositories of power and divergent ways of life. I argued in Part I.A that the Constitution may be read structurally to protect these "e pluribus" values, through the separation of powers at the federal level (including judicial review), federalism (including the Court's insistence that Congress may not coopt state lawmaking apparatus[205]), the political rights of voting, speech, press, and petition, and the freedoms to form normative communities—religious, associative, and familial. In applying the principle of political unity to *Kiryas Joel*, Eisgruber (1) proceeds too quickly to the conclusion that the New York law "accommodates separatism and nothing else," and (2) fails to acknowledge the importance of minority group exit leading up to the school district. On the first point, although the law doesn't lift a direct burden on the free exercise of religion, it nonetheless lifts a burden on a minority community's ability to educate its handicapped students. As I will argue in Part II.C, there is no good reason to limit legislatures to lifting burdens on *required* religious practices (why shouldn't the majority be permitted to lift burdens on a minority's nonrequired religious practices as well?), and there is no good reason to limit legislatures to lifting burdens on *religious* practices (why shouldn't the majority be permitted to lift burdens on any minority lifestyle?). The law does not accomplish separatism pure and simple; rather, it allows a small, unusual group of citizens to obtain a better education for their handicapped children.

On the second point, Eisgruber appears to reject any distinction between majority-imposed and minority-desired separation, and while he does not address the issue of exit, he implicitly rejects the factual predi-

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202. Id.

203. Id. at 1326.

204. Id.

205. See, e.g., New York v. United States, 112 S. Ct. 2408, 2418 (1992) (stating that "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States"); see also United States v. Lopez, 115 S. Ct. 1624 (1995) (invalidating federal school gun-control statute as outside power to regulate interstate commerce).

cate of exit in this case. Regarding the possibility of approving minority-desired separation, Eisgruber argues—at least in the nonexit setting—that minority-desired separation should be invalidated (he gives the example of a public high school for African Americans, presumably desired by all involved).[206] On the issue of exit, Eisgruber argues that the power to divide citizens along racial or religious lines "must remain reserved to the people, not delegated to their government."[207] So I assume that he would not invalidate a public school in a religiously homogeneous community that has developed without being carved out of a heterogeneous district, even if the religiously homogeneous community came into being through the members exiting from a heterogeneous setting. In that case, just as in *Kiryas Joel*, both "the people" and "the government" play a role in the separation, so I assume the question does not turn on the presence or absence of state action (since it is present in all of these cases). Rather, since Eisgruber would invalidate the Kiryas Joel Village School District, I assume that he places in the foreground the fact that the state split off the District from the larger county district, and that he relegates to the background the antecedent history of how and why the Satmars migrated to upstate New York. But as I argued earlier, it seems arbitrary on the one hand to permit religiously homogeneous public schools that developed without being carved out of a heterogeneous district, even though the residents of the religiously homogeneous village arrived there precisely for the purpose of separation, and on the other hand to invalidate the Kiryas Joel Village School District because it was not established immediately upon the arrival of the Satmars in upstate New York.

The difference between my position and Eisgruber's is highlighted in his response to this Article. He suggests that "[t]he American constitutional order might . . . embody a commitment to a specific version of the good—a version that values, among other things, self-critical reflection about the good."[208] Adopting a "reflective, rather than agnostic, [attitude] about the good," he continues, the American constitutional order values subcultures such as the Amish and the Satmars, but "because reflective constitutionalism embraces a particular conception of the good, it regrets the extent to which dissident sub-communities deviate from that conception."[209] In my view, the American constitutional order is agnostic about the good in a more profound way than Eisgruber believes, one result of which is that "dissident sub-communities" are not a source of regret, but rather, are a sign of social well-being.

Eisgruber's focus on the self-critical or reflective aspect of the American constitutional order is similar to Rawls's conception of public reason, which I have discussed earlier.[210] Both Eisgruber and Rawls place

206. See Eisgruber, Political Unity, supra note 20, at 1317–18.
207. Id. at 1327.
208. Eisgruber, Assimilation, supra note 20, at 89.
209. Id. at 91.
210. See supra text accompany notes 34–40.

reason and reflection at the core of liberal democracy. Rawls, as I have suggested earlier, is improperly blind to the claims of citizens whose comprehensive doctrines cannot support the requirements of public reason. Eisgruber, too, although valuing dissident sub-communities, regrets that they exist, or at least regrets that they depart from the good of self-reflection.[211] In my view, the core of liberal democracy is fractured in an irreparable way. I agree with Eisgruber and Rawls that in the public arena, rules of public reason and critical self-reflection must obtain. But such rules will disproportionately affect dissident subcultures that endorse views of the good that brook no compromise with public reason and critical self-reflection. The flourishing of those subcultures is just as central to the project of liberal democracy—and, I suggest, to the instantiation of liberal democracy that is the American constitutional order—as is the establishment of a public arena of reason and critical self-reflection.

Thus, although assimilation is a value of our constitutional order, it must compete, without hope of resolution, with its opposite, separatism. The core commitment of our constitutional order, then, is to multiple repositories of power through and through. In the public arena, government may, if it chooses, push for assimilation in various guises. But it may also choose to let subunits break off and establish less assimilative communities (and in some instances it must permit such exit). The competition between the various repositories of power, some operating through public reason and critical self-reflection, and some not, is central to the American constitutional order. *Kiryas Joel* raises a particularly difficult twist on this problem, because the dissident subculture desires to operate not only its synagogues and religious schools, but also a public school. As I have argued earlier,[212] the fact that the Village of Kiryas Joel must play by the constitutional rules that govern the public arena does not mean that the values of multiple repositories of power are absent here. For although the school may not use certain means to advance a sectarian agenda (teacher-led prayer or Satmar religious doctrine, for example), it may still accommodate many idiosyncratic values held by the Satmar parents.

Both Eisgruber and Chip Lupu (in his response to this Article) want to discourage competition among subcultures, and both criticize the establishment of the Kiryas Joel Village School District, in part, because they view it as an example of such competition. Thus, Eisgruber writes that New York "will be worse off if its citizens come to regard politics as a

211. Our constitutional order, as I understand it, goes beyond merely tolerating dissident subcultures; rather, it deems their existence a good thing. Eisgruber recognizes the value of dissident subcultures, but most often for what I have called the negative, or "checking value of political rigbts." See Eisgruber, Assimilation, supra note 20, at 91, 99 n.57. Although he does, finally, acknowledge the affirmative value of such subcultures—they engage in "sincere efforts to pursue a vision of the good," id. at 91—that acknowledgment quickly gives way to the conclusion that it is a source of regret that such subcultures deviate from self-critical reflection.

212. See supra text accompanying note 106.

competition among opposing groups,"[213] and Lupu warns of the "dangers of encouraging sectarian competition for the state's favors."[214] Both views, I think, reflect a needless pessimism about pluralism. Separate nomic communities living separately, and seeking differing goods, can lead to the flourishing of many nations within one nation, and of an acceptance of difference and its (sometimes) nonplasticity. Not only is it unrealistic to expect dissident subcultures to disappear, their members melding into "American man" and "American woman," but it is also wrong to see only the dangers of separatism and thereby fail to envision the benefits of flourishing subcultures within a larger American public culture that can, if it chooses, agitate for reason, self-reflection, and assimilation.

Furthermore, both Eisgruber and Lupu cast the Satmar desire for separation as an evil, ignoring the affirmative case for the school district. Eisgruber maintains that the New York law "accommodates nothing but the desire for segregation,"[215] while Lupu concludes that "[p]ermitting the majority to legitimate the exit with a segregative decision . . . may constitute a bootstrap ratification of the majority's exclusionary practices."[216] Why not put the matter differently? The Satmars are unusual, and others sometimes react to them in unfortunate ways. The New York law allows the Satmar children (real children, alive today, with real educational needs) to avoid real psychic harm, and it permits the Satmars to advance idiosyncratic values (and thereby enhance the flourishing of their subculture) so long as they stop short of violating the Constitution (say, by having teacher-led prayer in school or by teaching Satmar religious doctrine). There is, of course, a cost here: Both Satmar and non-Satmar children will lose exposure to difference. But the constitutional question is whether the government should be prohibited from striking the balance in favor of a productive, here-and-now education for the Satmar children, which, incidentally, aids the Satmar nomic venture. If the legislature concludes that a small subculture would flourish better on its own than under the heels of others, there is no overarching norm of assimilation in our constitutional order that requires judicial invalidation.

Finally, in his response to this Article, Chip Lupu maintains that "[t]he concept of permeable sovereignty is of no assistance in resolving the sort of problems presented by *Kiryas Joel* . . . . As an overarching matter, permeable sovereignty has been the condition of every human being and every human association from the beginning of time."[217] This response, which assumes that permeable sovereignty is merely an uncontroversial description of people's lives, misses the thrust of my argument. Not everyone agrees that the American constitutional order embodies a

213. Eisgruber, Assimilation, supra note 20, at 100.
214. Lupu, Uncovering Kiryas Joel, supra note 86, at 119.
215. Eisgruber, Assimilation, supra note 20, at 94.
216. Lupu, Uncovering Kiryas Joel, supra note 86, at 117.
217. Id. at 109–10.

substantial commitment to recognizing multiple lawmaking bodies, both within government and between the public and private arenas. I argue for a particularly vigorous version of permeable sovereignty, in which sometimes the government is required to defer to the law-creation of nomic communities, and in which at other times the government may so defer, although it need not. Secondly, I focus on a particular turn on the permeable sovereignty question, namely, whether the State may grant public power to a religiously homogeneous community. That is what I call the "partial exit problem," and as is clear from the opinions in the *Kiryas Joel* litigation and from my Article and the responses by Professors Lupu and Eisgruber, the problem admits of no simple resolution. Whether our constitutional order embodies a deep or shallow commitment to multiple repositories of power, and whether our constitutional order permits partial exit (and if so, when, how, and under what conditions), are contested, difficult questions upon which I take quite specific views in this Article. Lupu might be right that the unadorned concepts of "permeable sovereignty" and "partial exit" cannot resolve the problem raised by *Kiryas Joel*. However, much of this Article is devoted to taking these concepts and qualifying them, explaining conditions and variations on them, and otherwise modifying them.

In his book *Liberalism, Community, and Culture*, Will Kymlicka provides a helpful hypothetical to show how costly it is for minorities to preserve their separate existence.[218] Imagine two ships, he writes, one large and one small, that shipwreck on an island and divide resources in a blind, equitable manner, before discovering that "the two ships are of different nationalities."[219] If the divided resources are "distributed evenly across the island," the minority group "will now be forced to try to execute [its] chosen life-style[ ] in an alien culture . . . ."[220] To ensure "that they can also live and work in their own culture," the members of the minority group may decide "to buy resources in one area of the island, which would involve outbidding the present majority owners for resources which *qua* resources are less useful to their chosen way of life. They must incur this additional cost in order to secure the existence of their cultural community."[221] Thus, when the majority seeks to accommodate a small, minority, nomic community (Kymlicka addresses the case of Canadian aborigines) such "special measures . . . serve to correct an advantage that non-aboriginal people have before anyone makes their choices."[222] In sum, both the majority and minority may care equally about the preservation of their cultures, but the majority "get for free what aboriginal people have to pay for: secure cultural membership."[223]

218. See Kymlicka, supra note 21, at 188.
219. Id.
220. Id.
221. Id. at 188–89.
222. Id. at 189.
223. Id. at 190.

One way to ensure the preservation of minority culture, Kymlicka suggests, is to "redraw[ ] the boundaries of political units, and redistribute[ ] powers between levels of government, so as to ensure that a minority culture controls a political unit which has sufficient powers to protect the community . . . ."[224] Kymlicka's argument helps demonstrate that even if majorities should not be required to aid minority groups in maintaining their status as nomic communities, at least majorities should be permitted to do so. The difficulties minority communities face are real, and sometimes living in a place of their own while exercising both private and public power is the only realistic way to preserve their cultures.[225]

II. The Second Mistake About Equality: The Affirmative Action/Accommodation Problem

The preceding discussion assumed the evenhanded treatment of similarly situated minority groups, and furthermore assumed that special benefits for minority groups are constitutionally legitimate. This Part examines those assumptions. Legislative action that affects a distinct group in a special way, especially when that group is identifiable by religion or race, raises immediate constitutional questions.[226] When the legislative

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224. Id. at 203.

225. Kymlicka adds that although some liberals have trouble justifying special protections for minority groups as such, in fact liberalism should back such protections. He offers at least four reasons that an otherwise heterogeneous society should protect the desire of homogeneous groups to live separately and develop their separate cultures. First, Kymlicka maintains that the Canadian Indians "value their separation from the mainstream life and culture of North America. . . . It is forced *integration* that is perceived as a badge of inferiority by Indians, damaging their motivation." Id. at 145. Second, Kymlicka argues that separate cultural structures are valuable "not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value." Id. at 165. Third, Kymlicka explains that while the majority needs to spend nothing to maintain "secure cultural membership," minority communities "must incur . . . additional cost in order to secure the existence of their cultural community." Id. at 189–90. One way to correct for this inequality is by "redrawing the boundaries of political units, and redistributing powers between levels of government, so as to ensure that a minority culture controls a political unit which has sufficient powers to protect the community . . . ." Id. at 203. Fourth, Kymlicka acknowledges that "minority rights may indeed prevent instability in some circumstances," although he states that this is a "very limited argument for" such rights. Id. at 215. All of these arguments help the case for New York's establishment of the Kiryas Joel Village School District.

226. More generally, even beyond the race or religion setting, the Constitution prohibits the legislature from singling out individuals or groups for the purpose of harming them. Thus, the prohibitions on bills of attainder, U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1, prevents legislatures from punishing identifiable citizens. See United States v. Lovett, 328 U.S. 303 (1946). There is also an interesting line of Equal Protection Clause cases, supported by opinions by Justice Stevens, asserting that government may not act for the purpose of harming a person or group. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (zoning ordinance requiring special permit for home for the mentally retarded violates Equal Protection Clause); id. at 452–53 (Stevens, J., concurring); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (tax discriminating against out-of-

purpose is to harm a religious or racial minority, well-established doctrine operates to invalidate such legislation. Thus, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[227] the Court invalidated ordinances that were designed to harm a religious minority, the Santeria, by banning their ritual animal sacrifice. Laws designed to harm racial minorities have suffered a similar fate.[228]

But laws that benefit a religious or racial minority pose a different type of constitutional question. Whether racial "affirmative action" measures are constitutional has, of course, spawned an entire category of Equal Protection Clause litigation since the late 1970s. The Court has been notably inconsistent in this area, sometimes upholding governmental action designed to benefit African Americans, sometimes striking it down. In recent years, the Court has evidenced increasing discomfort with racial affirmative action measures, culminating in last Term's *Adarand Constructors, Inc. v. Pena*.[229] Despite strong arguments that such measures represent a legislative commitment to the forgotten part of the Equal Protection Clause—treating different cases differently—the Court has insisted on imposing the more familiar Equal Protection Clause jurisprudence—treating similar cases similarly. In other words, instead of accepting legislative conclusions that a special benefit for a racial minority is required to equalize the position of the races (treating different cases differently to assure equality), the Court has adopted a more formal view of racial equality, revealing a skepticism about legislative judgments mandating special benefits for African Americans.

My central claim in this Part is that the Court's growing opposition to racial affirmative action has now spilled over into Establishment Clause jurisprudence, leading to *Kiryas Joel*. Part II.A shows that legislation is generally not unconstitutional merely because it is underinclusive; thus, the Court was plainly wrong to condemn the law because New York might not treat similarly situated groups similarly in the future. Furthermore, and of greater constitutional interest, just under the surface of the Court's discussion of underinclusion one can discern a more fundamental concern with laws that benefit particular religions or particular races. Indeed, the New York law, a legislative accommodation of a minority religious group, bears a close affinity to affirmative action measures that benefit racial minorities. Part II.B explores this affinity, and through this linkage offers a way of evaluating such measures. The Court properly stepped up judicial review in race cases not out of a categorical concern with racial classifications, but rather to protect discrete and insular mi-

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state insurance companies violates the Equal Protection Clause); see also Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984).

227. 113 S. Ct. 2217 (1993).

228. See Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down law allowing only white men to serve as jurors).

229. 115 S. Ct. 2097 (1995).

norities[230] from invidious oppression by powerful majorities. Strict judicial review is not needed, however, if majorities are acting to aid minorities; in such instances, there are no political process concerns to which judicial review need respond.

This logic should have led the Court, over the past two decades, to uphold both racial affirmative action measures and legislative accommodations of minority religions, but unfortunately the trend has been in the opposite direction. This trend is due in part, I argue, to a subtle but devastating mistake in strategy on the part of those backing racial affirmative action; rather than focus more broadly on the argument that courts have no business closely examining measures that benefit minorities, proponents of affirmative action have sought real-world justifications for such measures (e.g., remedying past discrimination, increasing diversity), and thus have opened the door to a close judicial scrutiny of these justifications. *Kiryas Joel* is properly seen as yet another decision applying a model of formal equality—striking down laws that favor a race or a religion—rather than a model of substantive equality, which defers to majorities acting to lift burdens on minorities. Part II.C extends the argument for substantive equality—for judicial deference to legislation benefiting minorities—to legislative accommodation of religion. There, I explain how the *Lemon*[231] test should be dealt with in this setting, set forth the Court's religious accommodation jurisprudence, and propose a test for evaluating laws that lift burdens on minority religions. The test is quite deferential to such laws; as with racial affirmative action, religious accommodation is a matter on which courts should intervene cautiously, in limited circumstances.

A. *The Kiryas Joel Village School District: The Problem of Underinclusion*

The *Kiryas Joel* Court was concerned that New York had never before set up a special school district to accommodate a religious community and might not do so in the future if asked by another religious community, and that the courts would have no way to police such a future refusal. In other words, "the legislature itself may fail to exercise governmental authority in a religiously neutral way."[232] Justice O'Connor concurred in this portion of the Court's opinion, and wrote separately to explain that the risk of favoritism toward the Satmars was the core problem.[233] There was no proof, however, that New York had denied similar school districts to other groups (religious or otherwise) and there was no evidence that New York would deny similar school districts to other

230. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

231. Lemon v. Kurtzman, 403 U.S. 602 (1971).

232. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2491 (1994).

233. See id. at 2497–98 (O'Connor, J., concurring in part and concurring in the judgment).

groups. Rather, the Court relied simply on a vague, speculative discomfort with the possibility of future denials.

The following rejoinders come to mind. First: Why not wait until those future denials occur before exercising the judicial power to invalidate legislation? Second: Hasn't the Court turned to a type of risk analysis that it is more generally in the process of rejecting in Establishment Clause litigation? And isn't there a line of Equal Protection Clause jurisprudence approving underinclusive legislation?

The Court answered the first question in unprecedented fashion. "[W]e have no assurance that the next similarly situated group seeking a school district of its own will receive one," complained the Court, adding that "a legislature's failure to enact a special law is itself unreviewable."[234] There was no citation provided. Justice O'Connor's separate opinion buttressed the Court's opinion on precisely this point. If the legislature refused to grant a similar school district in the future, she explained, "[s]uch a legislative refusal to act would not normally be reviewable by a court. Under these circumstances, it seems dangerous to validate what appears to me a clear religious preference."[235] But the Court and Justice O'Connor had no response to Justice Kennedy's rejoinder. It is not true, wrote Kennedy, that a future legislative refusal to grant a school district in a similar case would be unreviewable:

> The burdened community could sue the State of New York, contending that New York's discriminatory treatment of the two religious communities violated the Establishment Clause. To resolve this claim, the court would have only to determine whether the community does indeed bear the same burden on its religious practice as did the Satmars in Kiryas Joel. . . . While a finding of discrimination would then raise a difficult question of relief, . . . the discrimination itself would not be beyond judicial remedy.[236]

The Court offered no response to Kennedy's argument, because (I think it fair to say) there is no response. Although it might be difficult to show, in a future case, that the legislature should have granted a school district just as it did to the Satmars, this evidentiary problem is merely difficult—the Court writes as if it is insurmountable. If the Court had thought a bit more broadly, however, it would have discovered an analogue in Title VII[237] suits brought by unsuccessful job applicants. Assume an employer has hired only whites for managerial positions. Along comes an African-American applicant; the employer turns her down and hires yet another white. At that point, the rejected applicant may prevail in a

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234. Id. at 2491.

235. Id. at 2498 (O'Connor, J., concurring in part and concurring in the judgment).

236. Id. at 2503 (Kennedy, J., concurring in the judgment) (citations omitted).

237. See 42 U.S.C. § 2000(e)(2) (1988 & Supp. V 1993) (banning workplace discrimination on the basis of race, color, religion, sex, or national origin).

Title VII suit if she can show that the rejection was based on her race.[238] In other words, she will claim that she is similarly situated to the white person hired, and that her rejection was based on an impermissible criterion, her race. If she can prove that race was the key factor in her rejection, she will prevail in a Title VII suit.

There are some differences between this fact pattern and that in *Kiryas Joel*, but the important point is that Title VII law has a well-established mechanism for adjudicating rejections of benefits (considering a job a benefit). The employer's past practice of hiring only whites for managerial positions will become relevant in the future, when it rejects a qualified African-American applicant. At the time of the rejection, the fact-finder will look at facts over a broad time frame, including prior hiring by the business. I see no reason that a fact-finder could not similarly examine New York's practice of granting and not granting special school districts, to determine whether a future denial violates the equality concerns of the Establishment Clause. It is true that a legislature, unlike an administrative agency, does not issue an official "denial" of a request for a special benefit. But a future plaintiff should be allowed to prove that such a denial occurred either by: (a) showing that a special school district was voted down; or (b) showing that a special school district was never reported out of committee; or (c) showing that a special school district was never put on a committee's agenda, or . . . and so on.

One perhaps unintended consequence of the Court's analysis on this point is that legislative accommodations that benefit specific religious sects now appear to be in jeopardy, for they are always subject to the argument that future groups might not receive similar treatment. As I will discuss in Part II.C, legislatures often have acted to ease burdens on specific minority religions, and the Court has, at least in dicta, approved such accommodations. If we take the Court and Justice O'Connor seriously, however, then sect-specific accommodations must be invalidated because of the risk that the legislature will not grant accommodations to other needy sects in the future.

The Court's concern that New York might treat a different religious group differently, furthermore, resuscitates the risk analysis that *Bowen v. Kendrick* seemed to inter, and that five Justices in *Kiryas Joel*—including Justice O'Connor—seem about to reject in the context of public funding in religious schools.[239] I have discussed the decline of risk analysis in Part I.B.1.b; here let me add that the Court's reluctance to let the New York legislature tackle problems as they arise is in deep tension with the well-established Equal Protection Clause principle of underinclusion. "In defense of underinclusiveness it has been argued that piecemeal legislation is a pragmatic means of effecting needed reforms, where a demand for

238. I'm assuming a disparate treatment claim rather than a disparate impact claim.

239. See *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment); id. at 2505 (Kennedy, J., concurring in the judgment); id. at 2514–15 (Scalia, J., dissenting) (joined by Rehnquist, C.J. and Thomas, J.).

completeness may lead to total paralysis . . . ."[240] Although much underinclusive legislation effects a burden, sometimes underinclusion provides a benefit, and "such classifications are normally upheld."[241] Particularly relevant is a sequence of two cases on special benefits—*Morey v. Doud*[242] and *City of New Orleans v. Dukes*.[243] In *Morey*, the Court invalidated under the Equal Protection Clause an Illinois law that exempted American Express by name from a general regulation of companies selling money orders. In *Dukes*, the Court reversed course, overruling *Morey* and upholding a New Orleans ordinance that banned all pushcart food vendors from the French Quarter while exempting two vendors who had been hawking food for over twenty years. The Court deferred to the legislative majority's determination that a benefit for a small number of persons was appropriate; specifically, the Court deemed reasonable the legislative findings that the two vendors were more likely to have built up "substantial reliance interests," and that they had "themselves become part of the distinctive character and charm that distinguishes the [French Quarter]."[244]

Upholding underinclusive benefits makes sense if doing so involves deferring to a majority's determination that a minority needs a particular benefit and that any collateral harm to others is outweighed. When comparisons between minorities become necessary, then the Court would have to examine more closely the reasons for denying a benefit to one group that was granted to another. If there are good reasons for granting benefit X to group Y only, then the term "underinclusion" becomes a misnomer, because then the category of beneficiaries is properly inclusive, not underinclusive.[245] However, if we expand the time frame to ask, "Might another person Z come along who is similarly situated to person Y?," we can then appropriately say that granting benefit X to person Y only is underinclusive—not because there are other persons now who merit such a benefit, but because there might be other persons in the future who will merit such a benefit.[246] So the term "underinclusion" might still make some sense, but the jurisprudence should be no different. To condemn legislation as unconstitutional because of the risk of improper (discriminatory) underinclusion later on runs directly counter to the rationale behind *Dukes*. Courts should wait for the later case,

240. Tribe, supra note 66, at 1447.

241. Id. at 1448 n.11.

242. 354 U.S. 457 (1957).

243. 427 U.S. 297 (1976) (per curiam).

244. Id. at 305.

245. See Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 UCLA L. Rev. 447, 475–76 (1989).

246. Thus, I do not mean to argue that the benefit for the Village of Kiryas Joel should be upheld under a "one step at a time" argument. Such an argument is used to justify granting a benefit to certain persons only even if other similarly situated persons are currently in need of the benefit. My point about underinclusion is diachronic rather than synchronic, whereas the "one step at a time" cases focus on synchronic underinclusion. See id. at 474–75.

where the governmental body has in fact denied the benefit to a similarly situated party, before exercising the power of judicial review to invalidate the governmental action.

Thus, the Court's concern with the potential denial of a special school district to a similarly situated religious group is unfounded both in logic (the later group would be able to challenge the future denial) and in precedent (the Court generally has upheld "underinclusive" benefits). One rejoinder to my argument is that when a special benefit runs to a racial or religious group, perhaps the Court should police underinclusion more stringently. To understand the Court's condemning without much argument an instance of legislative underinclusion, it will be helpful to connect *Kiryas Joel* with the Court's jurisprudence regarding special benefits to African Americans.

B. *The Underpinning: The Racial Affirmative Action Model*

As I have shown in the discussion of underinclusive laws, and as is clear from any theory of equality, the principle of equal treatment can be violated (a) by treating similar cases differently or (b) by treating different cases similarly. The *Kiryas Joel* majority opinion and the separate opinion of Justice O'Connor are far more concerned, however, with type (a) violations than with type (b) violations. That is, although these Justices acknowledged that the Satmars of Kiryas Joel faced a special problem in educating their handicapped children, this acknowledgment quickly gave way to the concern that "equal" or "neutral" treatment requires a flattening out of difference. The acknowledgment that differences among religious groups might require legislation tailored to distinctive group burdens faded in the face of the demands of formal equality. Refusing to defer to legislative recognition of differential burdens on minority groups is consistent with the trend in the Court's racial affirmative action cases. Examining those cases will help illuminate the opinions in *Kiryas Joel.*

From the late nineteenth Century, when the Court first began invalidating laws that treated African Americans worse than whites,[247] to 1978, when it decided *Bakke,*[248] the Court developed a body of doctrine that became increasingly sensitive to governmental use of race as a criterion of distinction. Perhaps the case that best reveals how ingrained the rule against racial classifications has become is *Palmore v. Sidoti,*[249] in which the Court rejected a child custody decision that had been based on the harm the child would face from growing up in a mixed-race family. Although acknowledging that it might be more difficult to grow up in such a family than in a same-race family, the Court nonetheless ruled out of bounds such reliance on race. The decision was unanimous.

247. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1879).
248. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
249. 466 U.S. 429 (1984).

It is not surprising, then, that when faced with laws seeking to help African Americans, the Court would be reluctant to depart from its hard-earned jurisprudence of strict scrutiny for racial classifications. This reluctance is well-expressed in Justice Powell's central opinion in *Bakke*, where he provided the fifth vote for the Court's judgment to reject a special medical school admissions program that set aside 16 of 100 seats for racial minorities. Powell wrote, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[250] The question, of course, was the scope of "the guarantee of equal protection," and the argument Powell rejected was that such a guarantee might mean one thing when a white majority disadvantages an African-American minority, and another thing when a white majority advantages an African-American minority. Although the Court's affirmative action jurisprudence since *Bakke* has wavered between upholding and invalidating affirmative action programs, the trend is now decidedly in the direction of invalidation. In *Wygant v. Jackson Board of Education*,[251] the Court struck down a school board's provision for protecting African-American teachers from layoffs. Although in the late 1980s the Court twice upheld court-imposed affirmative action plans, in *Sheet Metal Workers v. EEOC*[252] and in *United States v. Paradise*,[253] those cases may be seen as approving judicial race-consciousness to remedy proven statutory or constitutional discrimination. Then, in 1989, in *City of Richmond v. J.A. Croson Co.*,[254] the Court invalidated a municipal program setting aside city funds for minority contractors, holding that legislatures (at least at the state and municipal level) must make findings of past discrimination—just as the courts had done in *Sheet Metal Workers* and *Paradise*. *Croson* stands in sharp contrast to an earlier decision, *Fullilove v. Klutznick*,[255] in which the Court had upheld a federal minority business set-aside program. The difference, said *Croson*, is that Congress has broader power than states or local governments, under Section 5 of the Fourteenth Amendment, to use race-based measures to combat prior racism.[256] Following this logic, the Court upheld a federal program favoring minority firms for FCC broadcast licenses in *Metro Broadcasting*,

250. *Bakke*, 438 U.S. at 289–90.

251. 476 U.S. 267 (1986).

252. 478 U.S. 421 (1986).

253. 480 U.S. 149 (1987).

254. 488 U.S. 469 (1989).

255. 448 U.S. 448 (1980).

256. See 488 U.S. at 486–93; see also Mary C. Daly, Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans, 33 B.C. L. Rev. 903 (1992) (Congress may and should use its Section 5 power to authorize states to adopt minority business set-aside programs and other race-conscious preferences.).

Inc. v. FCC.[257] But last Term, in *Adarand Constructors, Inc. v. Pena*,[258] the Court rejected the argument that Section 5 of the Fourteenth Amendment gives Congress any special powers regarding affirmative action. *Adarand* overruled *Metro Broadcasting* to the extent that it applied less than strict scrutiny to federal affirmative action programs. After *Adarand*, "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[259] Although the Court acknowledged that the "government is not disqualified from acting in response to . . . racial discrimination against minority groups,"[260] we must wait for future cases to see whether any affirmative action programs will stand.[261]

On the Court's view as set forth in *Adarand* and *Croson*, people of different races should always be treated the same, and the fact that the races have not been treated equally, and that the government may at times seek to acknowledge that fact through providing benefits for the hitherto maltreated racial minorities, becomes irrelevant. Saying that government may take race into account only with findings that particular African Americans have been injured by de jure racial discrimination says nothing more than that government may remedy proven harm.[262] But legislative affirmative action programs seek to go beyond remedying proven harm, and it is precisely at the point that the legislature must take a kind of legislative notice of the harm done to African Americans that the Court insists on something more. Justice Stevens was correct in his *Croson* concurrence that legislatures generally do not make particularized findings of governmental harm against specific individuals;[263] surely that is (generally) a judicial function. But if that is so, then why insist on such findings before legislatures can provide affirmative action benefits?

Thus, despite a wealth of writing explaining that laws benefiting African Americans are justified although laws benefiting whites are not,[264] the Court increasingly has stuck to a "color-blind" jurisprudence, insisting on treating all race-based laws the same. At least in the area of race, the Court is well on its way toward a complete rejection of the forgotten principle of Equal Protection Clause law, treating different cases differently.

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257. 497 U.S. 547 (1990).

258. 115 S. Ct. 2097 (1995).

259. Id. at 2113.

260. Id. at 2117.

261. The *Adarand* Court did cite favorably United States v. Paradise, 480 U.S. 149 (1987), which involved a race-based remedy to proven racial discrimination. See *Adarand*, 115 S. Ct. at 2117.

262. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526–27 (1989) (Scalia, J., concurring in the judgment).

263. See id. at 513–14 (Stevens, J., concurring in part and concurring in the judgment).

264. See, e.g., John Hart Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Michel Rosenfeld, Decoding *Richmond*: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729 (1989).

Further evidence of the Court's refusal to heed arguments suggesting that African Americans are in greater need of governmental protection than are whites can be found in *R.A.V. v. City of St. Paul*.[265] The city had adopted an ordinance prohibiting the display of a burning cross, swastika, or other symbol that one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[266] The city prosecuted a white teenager for burning a cross on the lawn of an African-American family. Five Justices, in an opinion authored by Justice Scalia, invalidated the ordinance on the ground that it covered certain hate speech only, such as speech made on the basis of race, color, creed, religion, or gender, and not other hate speech, such as that made on the basis of "political affiliation, union membership, or homosexuality."[267] The Court said it was applying a basic canon of free speech law, the rule against content discrimination.[268] But Justice White responded, in a concurrence in the judgment joined by three other Justices,[269] that the majority had invented a new doctrine of fatal underinclusion, condemning the law for addressing too small a set of problems.[270] For Justice White, this new doctrine ignored a simple truth:

> [The] selective [inclusion of certain categories of hate speech only] reflects the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable.[271]

As Justice Stevens added in a separate concurrence in the judgment, "Conduct that creates special risks or causes special harms may be prohibited by special rules."[272]

For the Justices concurring in the judgment, underinclusion may be constitutional when sensible—when a subcategory of harm needs special treatment, it is valid for a legislature to protect against just that subcategory of harm. This is consistent with *Dukes*, where the Court validated a special benefit, again because there was a good reason for the benefit. But the majority in *R.A.V.* rejected this line of argument, which focuses on treating different cases differently, and, refusing to see relevant differ-

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265. 112 S. Ct. 2538 (1992).

266. Id. at 2541.

267. Id. at 2547.

268. See id. at 2545.

269. See id. at 2550 (White, J., concurring in the judgment). Justice White would have invalidated the ordinance on overbreadth grounds. Even though the ordinance, as narrowed by a state court interpretation, constitutionally punished fighting words, it went further, punishing expression that causes "anger, alarm or resentment." Id. at 2559 (White, J., concurring in the judgment). For Justice White, this made the ordinance overly broad; the "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." Id.

270. See id. at 2553 (White, J., concurring in the judgment).

271. Id. at 2556 (White, J., concurring in the judgment).

272. Id. at 2561 (Stevens, J., concurring in the judgment).

ences between different types of hate speech, insisted that all hate speech be treated alike.[273] *R.A.V.* is a close relation to *Adarand* and *Croson* and the Court's trend in racial affirmative action cases;[274] in both settings, the Court refuses to defer to legislative judgment that, in some instances, African Americans deserve special protection.

So it should not be surprising that when faced with a special benefit given to a particular religious group, the Court did not defer to the legislature's judgment that the group needed the special benefit for a good reason, but rather insisted that special treatment violated the principle of treating similar cases similarly. *Kiryas Joel* may be placed neatly next to both the *Croson/Adarand* trend in racial affirmative action cases and *R.A.V.* All of these opinions evidence a reluctance to defer to legislative justifications for special treatment of minority groups. This reluctance may be traced to the long struggle for a firm rule of strict scrutiny as applied to governmental action harming minorities. Rather than establishing two categories—judicial review of governmental action harming minorities and judicial review of governmental action benefiting minorities—the Court has instead applied one strict rule to both categories.[275]

This regime of formal equality stems from a subtle error in the argument *for* affirmative action. By specifying the precise justification for treating the races differently in any given law, the proponents of racial affirmative action have left the door open for a debate about the validity of such justifications. Once a specific justification for a racial classification is offered—remedy past discrimination, increase diversity, you name it—opponents of racial affirmative action can argue, "The law you propose isn't a good fit with that justification," or, "That justification looks like a paternalistic subterfuge for a caste system." The constitutionality of racial affirmative action is supported better through a more structural, less justification-specific argument, which goes directly to the proper role of judicial review. Strict scrutiny, on this argument, is appropriate if the law burdens a fundamental right (*Carolene Products* footnote 4 paragraph 1), if the law blocks channels of political change (*Carolene Products* footnote 4 paragraph 2), or if the law operates to the detriment of discrete

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273. See id. at 2549–50.

274. See Akhil R. Amar, The Case of the Missing Amendments: *R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124 (1992).

275. *Kiryas Joel* can be seen as stemming, as well, from the Court's focus on "neutrality" in certain Establishment Clause cases, which I discuss in greater detail in Part II., "Legislative Accommodation of Religion," immediately below. Doug Laycock has criticized cogently the formal neutrality theory of the religion clauses that would prevent, among other things, the legislature from granting religious accommodations. Laycock would adopt a theory of substantive neutrality: "[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance . . . . [R]eligion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible." Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001–02 (1990) (citation omitted).

and insular minorities (*Carolene Products* footnote 4 paragraph 3).[276] When whites act to the detriment of African Americans, there is good reason for stepped-up judicial review. But when a majority acts to lift a burden on a minority, *regardless of the justification*, there is no good reason for stepped-up judicial review. In such a case, there is no structural reason not to defer to the majority's determination that a burden on a minority group needs to be lifted. Similarly, there is no structural reason not to defer to the majority's determination regarding the significance of any collateral harm to third parties from lifting a burden on a minority group. In short, when a majority acts to lift a burden on a minority rather than to harm a minority, there is generally no good reason for strict judicial review.[277] (Issues involving equal treatment among and between various minorities will, of course, remain.) This reasoning applies as well to legislative accommodations of religion when the majority is lifting a burden on the minority, as I will discuss further in the next section.

The comparison between racial affirmative action and religious accommodation holds even if one observes that the goal of racial affirmative action is to eradicate differences between the races while the goal of religious accommodation is often to allow differences between religions to remain. That is, an African American might be given a preference for a medical school slot or a teaching job or a government contract to level the playing field between whites and African Americans. To the contrary, when a religious sect is given an accommodation that lifts a burden on its religious practice or on the ability of its members to live in a distinctive way, the accommodation supports the distinctiveness of the sect. This difference between racial affirmative action and religious accommodation should not, however, obscure the constitutional argument for deference to majorities lifting burdens on minorities. Although the immediate goal of racial affirmative action might differ from the immediate goal of religious accommodation, in the end both types of burden-lifting are meant to assure a kind of first class citizenship for the minority group. Sometimes the eradication of difference is the means to that end; other times the preservation of difference is the means to that end. But in both types of cases, if the minority deems a certain law beneficial to its achieving equality of citizenship, and the majority agrees and enacts legislation to that end, then the reasons stated above for deferential judicial review should hold.

One objection to my argument for deference to majorities lifting burdens on minorities is that majorities are just shifting coalitions of minorities, that minorities can often gain substantial leverage, and thus that a law lifting a burden on a distinct minority group should be seen less as majority largesse and more as an exercise of power by the aided minority group. As Mancur Olson and others have observed, legislation that bene-

276. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

277. See Ely, supra note 264, at 727, 735; Rosenfeld, supra note 264, at 1740–41.

fits a small group without concentrated burdens on others often is enacted not for public-regarding reasons, but rather because of intense lobbying by the small group and the absence of a coordinated opposition.[278] This argument, however true, should not be considered a predicate for stepped-up judicial review. The argument does not show that a majority (or a coalition of minorities) has acted to harm a minority. Furthermore, a previously burdened group remains the beneficiary; presumably, to convince others to pass the law that lifts the burden, the minority group must persuade at least some important legislators that the burden is worthy of notice and that collateral harms to others from lifting the burden are insubstantial. That minority-aiding legislation might be the product of savvy lobbying and coalition-building rather than a more pristine sense that a good deed is being done should not matter for constitutional analysis,[279] even if it is interesting to note for political science purposes.

The Court's increasing tendency to reject special treatment for minority groups—under either the "equality" or "neutrality" rubric, under either the Equal Protection Clause or the Establishment Clause—is deeply problematic. Even if one rejects the constitutionality of affirmative action in the race setting, however, the religion setting might be treated differently.[280] In many of the racial affirmative action cases, identifiable white citizens who were denied governmental benefits brought suit to invalidate the minority preferences. In other words, the plaintiffs in the racial affirmative action cases generally have been people with straightforward claims of injury, such as, "my medical school spot was given to an African American with lower test scores," or "my government contract was given to an African-American firm that had submitted a higher bid."[281] Who were the plaintiffs in *Kiryas Joel*? Members of other minority religions that had been denied the benefit the Satmars received?

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278. See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1971). Another possible objection to my argument is that "there is . . . disagreement concerning the proper definition of the group disadvantaged by state-sanctioned racial preferences." Rosenfeld, supra note 264, at 1743; see also Lupu, Uncovering Kiryas Joel, supra note 86, at 117–18 (concerning the difficulty in distinguishing between a minority-favoring and majority-favoring accommodation). For example, "various white ethnic groups, each of which constitutes a political minority," Rosenfeld, supra note 264, at 1743 n.62, might be disadvantaged by an affirmative action program benefiting African Americans. The *Carolene Products* point here, though, is not whether the persons disadvantaged by a law might plausibly be viewed as members of a minority group, but rather whether we have reason to believe that the disadvantaged persons are a discrete and insular minority, traditionally disadvantaged and excluded from the political process. If not, then there is little reason for judicial intervention.

279. But see Lupu, Uncovering Kiryas Joel, supra note 86, at 118–19.

280. See Jesse H. Choper, Religion and Race Under the Constitution: Similarities and Differences, 79 Cornell L. Rev. 491, 504 (1994).

281. Michel Rosenfeld persuasively argues for the constitutionality of these laws burdening whites, because the harm involved does not violate "individual rights to equal dignity and respect and to formal means-regarding equality of opportunity," Rosenfeld, supra note 264, at 1789, whereas laws that deliberately benefit whites and harm African Americans do implicate these rights.

Members of any religion who were forced to sit through religious exercises in a Satmar-run public school? Neither of the above. The plaintiffs were New York State school officials granted standing as citizen-taxpayers under the special rules for Establishment Clause lawsuits.[282] I don't object to expanding Establishment Clause standing to taxpayers whose money is (arguably) going to support an establishment of religion. But at the merits stage of the argument, surely it is appropriate to ask whether the special benefit given the religious minority (here, the Satmars) is harming other citizens in the way that special benefits given African Americans in many racial affirmative action cases are harming other citizens. The answer is no. There is no direct harm to members of other religions in a case such as *Kiryas Joel* as there was in many of the racial affirmative action cases.[283] Moreover, unlike most racial affirmative action cases, where the African-American beneficiary might (but need not) be the victim of past discrimination, the benefited group in cases involving the accommodation of religious minorities (here, the handicapped Satmar children) includes identifiable individuals with particularized burdens.[284]

C. *Legislative Accommodation of Religion*

Legislative accommodation of religion may, thus, be seen as a close relative of legislative racial affirmative action, and if one accepts my argument about judicial deference to majorities lifting burdens on minorities, then both types of legislation should be seen as constitutionally valid. Thus far my analysis has not distinguished between the Establishment Clause and the Equal Protection Clause; that is, the discussion has been about two equality concerns (segregation and favoritism) that both clauses address. The Establishment Clause, however, might be thought to limit burden-lifting in the religious arena. After all, the (in)famous *Lemon* test prohibits laws whose primary purpose or effect is the advancement of religion, and a law seeking to benefit a particular religious sect might be thought, at first glance, to violate both the purpose and effects tests. Such a view of religious accommodation of minority religions is deeply problematic, however. After explaining why in Part II.C.1, I summarize the Court's jurisprudence on the issue of legislative accommodation of religion in Part II.C.2 and then set forth a test for evaluating legislation in this area, in Part II.C.3.[285]

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282. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2486 n.2 (1994); see also Flast v. Cohen, 392 U.S. 83 (1968) (granting taxpayer standing to challenge a spending program under the Establishment Clause). But see Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (rejecting standing; distinguishing *Flast*).

283. Matters would be different if public funds were used to teach religion in public schools, or if public funds were channeled to parochial schools.

284. See also infra Part II.C.3.

285. Michael McConnell is the best-known advocate of legislative accommodation of religion, and Chip Lupu is the best-known critic. See Michael W. McConnell,

1. *Getting Past* Lemon. — The Court has four times invalidated a law because its primary purpose was religious. Importantly, each case involved a religious majority capturing the legislative process to advance its religious agenda; no case involved a religious majority lifting a burden on a religious minority. Thus, in *Epperson v. Arkansas*,[286] the Court struck down an Arkansas statute forbidding the teaching of evolution in public schools, on the ground that fundamentalist Christians had advanced the law to promote a Christian view of creation. Similarly, in *Edwards v. Aguillard*,[287] the Court invalidated a Louisiana law forbidding the teaching of evolution in public schools unless creationism was also taught, because the supporters of the law clearly had advanced it to promote a sectarian religious view. In two other cases, religious purpose was again critical to the Court's invalidation of a state law. *Stone v. Graham*[288] involved a Kentucky law requiring the posting of the Ten Commandments

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Accommodation of Religion, 1985 Sup. Ct. Rev. 1 [hereinafter McConnell, Accommodation]; Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685 (1992) [hereinafter McConnell, Update]; Lupu, Uncovering Kiryas Joel, supra note 86; Ira C. Lupu, The Trouble with Accommodation, 60 Geo. Wash. L. Rev. 743 (1992); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555 (1991) [hereinafter Lupu, Reconstructing]; see also Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 2 (1961) (opposing legislative accommodation); Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 Sup. Ct. Rev. 373 (same). In a previous article, I supported McConnell's view that legislative accommodation of religion does not (in most cases) violate the Establishment Clause. See Greene, Political Balance, supra note 22, at 1625–27.

On the issue of accommodation, the *Kiryas Joel* opinion is unclear; the Court did not reach any firm conclusions on the matter because it struck down the law on other grounds. The Court acknowledged that legislatures may "accommodate religious needs by alleviating special burdens," *Kiryas Joel*, 114 S. Ct. at 2492, and the Court did not deny that the New York legislature might deem it a special burden for the Satmar children to be abused in school. Thus, the Court stated, "The fact that Chapter 748 facilitates the practice of religion is not what renders it an unconstitutional establishment." Id. In the next breath, though, the Court averred that "what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance." Id. at 2492–93 (footuote omitted). What might the Court have meant by "adjustment to the Satmars' religiously grounded preferences"? The most obvious meaning of that phrase is "benefit to a religious group that enables it more easily to practice its religion." But that is what an accommodation is, and the Court had just said that facilitation of the practice of religion is not unconsitutional. The Court then stated, "[W]e have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation." Id. at 2493. Putting aside the obvious circularity of "otherwise unconstitutional," see id. at 2512 (Scalia, J., dissenting), what the Court seems to be saying is that although a state may help a religious group in the practice of its religion by lifting burdens on that group, it may not do so through the means of granting political power to a group defined by a common religion. This brings us back to the religious gerrymandering point, discussed above in Part I. *Kiryas Joel*, thus, sheds no particular light on the accommodation issue per se.

286. 393 U.S. 97 (1968).

287. 482 U.S. 578 (1987).

288. 449 U.S. 39 (1980) (per curiam).

in public school classrooms; *Wallace v. Jaffree*[289] involved an Alabama law authorizing a moment of silence for meditation or voluntary prayer at the beginning of the public school day. The Court held both laws invalid because it found the purpose of the legislation was to advance a religious agenda.

Thus, the Court has set forth a clear principle regarding laws passed with a primarily religious purpose: They may not stand, because the Establishment Clause forbids majorities from using their political power to pass legislation expressly intended to advance religious agendas. I have argued elsewhere that these cases were correctly decided, because the religious minorities in the jurisdictions at issue in those cases were effectively excluded from meaningful political participation in the legislative process that produced the laws in question.[290] Others have been critical of the Court's religious purpose line of cases.[291] Those cases are still good law, though, and what is important here is that they were about majority abuse of the legislative process to advance a religious agenda. There is no evidence that the New York state legislature gave the Village of Kiryas Joel its own school district to advance the religion of the majority, Christianity. Saying that a religious criterion was used in two types of cases—a majority expressly advancing its religious agenda in lawmaking versus a majority helping a minority group that is of one religion—leads to the unfortunate conclusion that the legislative action in both types of case poses the same sort of concern.[292] It is precisely this melding of two uses of the term "religious purpose" that has led to the most justifiable criticism of the *Lemon* test. For if the *Lemon* test requires invalidation of laws enacted with a religious purpose, and if "religious" here includes specially tailored benefits to alleviate burdens felt by religious minorities, then indeed the test deserves criticism. But majorities capturing the legislative process to advance their own expressly religious agendas raises a core Establishment Clause problem whereas majorities benefiting minority religious groups does not. Legislative accommodation of minority religious groups does not pose an Establishment Clause problem because the majority's purpose is not to advance the minority group's religious agenda (if it were, I would agree there is a problem, but this is never the case). Rather, the majority is acting out of respect for special burdens faced by the minority religious group, in similar fashion to how the majority acts when alleviating the burden of any minority group, religious or otherwise. It is best to say that in alleviating a minority religion's burden,

289. 472 U.S. 38 (1985).

290. See Greene, Political Balance, supra note 22; Greene, Rejoinder, supra note 151.

291. See, e.g., Edwards v. Aguillard, 482 U.S. at 636–40 (Scalia, J., dissenting) (asserting the impossibility of ascertaining the "purpose" of legislation); *Wallace*, 472 U.S. at 108–09 (Rehnquist, J., dissenting) (arguing that the purpose and effects tests are based on historical error).

292. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

the majority benefits a group that happens to be religious, for religion is seen properly as a background rather than foreground criterion, the foreground criterion being "small group of citizens that we can benefit without causing significant harm to others."[293] In this way, we can see that legislative accommodation of minority religions shares important attributes with legislative affirmative action for minority races.

Now it is true that the New York legislature—not itself Satmar—understood that the beneficiaries of the new school district were all of the same religion. But that is a point about the legislature's knowledge, not about its purpose. In criminal law, much time is spent debating the connection between purpose and knowledge. Perhaps, as some argue (and as the common law held[294]), when one acts with purpose X fully knowing that Y will happen, one can be charged with purposely causing Y to happen. But there are good reasons to distinguish more carefully between purpose and knowledge. The Model Penal Code approach, deeming the mental state of one who causes such a result "knowing" rather than "pur-

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293. Justice Scalia would obviate this discussion by deeming the *Kiryas Joel* accommodation a cultural rather than religious one. As the New York Court of Appeals had observed in a prior case, "the Satmars' constitutional right to exercise their religion freely did not require a separate school, since the parents had alleged emotional trauma, not inconsistency with religious practice or doctrine, as the reason for seeking separate treatment." Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2486 (1994) (referring to Board of Educ. v. Wieder, 527 N.E.2d 767, 775 (N.Y. 1988)). Justice Scalia picked up on this concession, arguing that "the physically and mentally disabled [Satmar] children who attend public school suffer the . . . handicap of cultural distinctiveness." Id. at 2509 (Scalia, J., dissenting). Under Scalia's view, the Court improperly concluded that "it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision" when it should have followed the "normal assumption . . . that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children." Id. at 2510. If we accept Scalia's categorization, then the case was litigated improperly under the Establishment Clause; on Scalia's view, the case is about alleviating the burden on a culturally distinct minority community that just happens also to be a religious minority community.

I agree with Scalia's argument that it is appropriate to view the accommodation as one of a group that happens to be religious, just as I agree that the New York law does not violate the Establishment Clause. But the case is still one within the domain of the Establishment Clause. Although the religious identity of the Satmar children is appropriately seen as the background criterion to the foreground criterion "small group of citizens facing a burden," the background religious identity cannot be made to disappear entirely. The so-called cultural distinctiveness of the Satmar handicapped children—their appearance, trouble with the English language, etc.—is a direct offshoot of their religious distinctiveness. The non-Satmar children who allegedly made life difficult for the Satmar children probably knew this; surely the New York legislature knew that it was accommodating a group whose cultural distinctiveness overlapped completely with its religious distinctiveness. Further, even if we accept the Satmars' argument that their religion does not require separate schooling, everything else that we know about the Satmar religion indicates that it encourages separation. Thus, although I disagree with each reason the Court relied upon to invalidate the New York law, I share the Court's view that it is appropriate to understand the law as an accommodation of religion.

294. See Joshua Dressler, Cases and Materials on Criminal Law 109 (1994).

poseful," seems preferable.[295] But regardless of this dispute, if one wants to say that the New York legislature knew it was granting school board power to a homogeneous religious group and therefore that the New York legislature had the purpose of granting such power to a homogeneous religious group, one should be careful to acknowledge that the use of the word "purpose" in this setting is different from using the term to denote an actor's conscious object. There is no evidence that the New York legislature granted the Village of Kiryas Joel school board power to advance a religious mission. Rather, the evidence suggests that the New York legislature was lobbied hard by a group that happened to be religious, and that it bowed to that political pressure, all the while knowing that the recipients of the school board power shared a common religion and were pushing for the new school district because of discomfort felt by their children in a heterogeneous religious and cultural setting.

If we understand "religious purpose" in this setting to mean "a majority using the legislative process to advance a religious agenda," then majority accommodation of a minority religious burden does not manifest a religious purpose. What, though, of primary religious effect? Lifting a burden on a religious minority will enable it to practice its religion more easily, even if, as in the *Kiryas Joel* setting, the accommodation does not lift a direct burden on the practice of religion but rather enables a religious community to flourish in a more general sense, by permitting it to educate some of its children in a more congenial environment. Here, again, the fact that the law benefits a minority religion should make all the difference. It is appropriate to be concerned, under the Establishment Clause, about majority religious groups using the legislative process to advance their religious needs. When a majority pushes for governmentally organized prayer in public schools or for the placement of its favored religious symbols in the halls of government, it is wrong to call such actions "accommodation" and correct to be concerned about an "Establishment" of religion. But when the effect of the majority's actions is to make life easier for a minority, there is no concern about an "Establishment" of religion. It also seems wrong to say that accommodation of minority religions constitutes a symbolic endorsement of those religions; rather, accommodation in this context suggests that the majority is coming to the aid of a burdened minority, not that the majority agrees with the minority on any matter of religious truth.

Thus, the Establishment Clause attack on legislative accommodations has shifted improperly the foreground category from "a benefited minority group that happens to be religious" to "the advancement of reli-

295. Compare Model Penal Code § 2.02(2)(b)(ii) (1962) ("A person acts knowingly with respect to a material element of an offense when[,] if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.") with § 2.02(2)(a)(i) ("A person acts purposely with respect to a material element of an offense when[,] if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result.").

gion." By backgrounding the category "religion" and recognizing that accommodations of minority religious practices are part of a larger category of benefits to small groups, only some of which are religiously homogeneous, we can deflect the initial criticism that accommodation of minority religions reflects either religious purpose or effect.[296]

2. *The Accommodation Cases.* — The Court has addressed legislative accommodation of religion in three categories: (i) legislation that benefits religion as a subset of a larger category; (ii) legislation that benefits religion only, but broadly; and (iii) legislation that benefits particular religions only. As one might imagine, the Court has been increasingly more reluctant to uphold accommodations in each successive category.

(i) The Court has upheld legislation that benefits religion as a subset of a larger category. In *Walz v. Tax Commission*,[297] the Court upheld New York City's tax exemption for property used exclusively for religious, educational, or charitable purposes. Here, religious property was subsumed within a larger category, for which the city could reasonably have wanted to grant tax exemptions. Some commentators would limit accommodations to this category.[298] Furthermore, Justice Harlan, concurring in *Walz*, insisted that benefits to religion be subsumed within a larger category:

> The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.[299]

On this formal neutrality view, the law in *Kiryas Joel* would be invalid. But the Court has not adopted the formal neutrality position, as the next two categories show.

(ii) The Court has upheld legislation that benefits religion only, but broadly. In *Corporation of the Presiding Bishop v. Amos*,[300] the Court validated Section 702 of Title VII of the Civil Rights Act of 1964, which exempts religious organizations from the rule against discrimination on the

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296. See McConnell, Update, supra note 285, at 720; see also id. at 715 ("[W]hen a particular law or government policy threatens to inflict serious injury to the legitimate interests of a particular segment of the population . . . the government should consider making a special provision. That the injury happens to involve religious conscience . . . makes the desirability of accommodations even more evident."); id. at 717 (accommodations "do not reflect *agreement* with the minority, but *respect* for the conflict between temporal and spiritual authority in which the minority finds itself").

297. 397 U.S. 664 (1970).

298. See Kurland, supra note 285; Lupu, Reconstructing, supra note 285; Tushnet, supra note 285.

299. 397 U.S. at 696. Justice Harlan uses the term "religious gerrymanders" not to refer to districts drawn around groups known to share a common religion, but rather more broadly to refer to any legislative accommodation benefiting religious institutions only.

300. 483 U.S. 327 (1987).

basis of religion.[301] *Amos* held that Section 702 constitutionally granted an exemption for hiring not only for religious positions, but also for secular nonprofit activities (in *Amos*, a building engineer in a Mormon-run gymnasium). Previously, the Court in *Zorach v. Clauson* had upheld New York City's program permitting "its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises."[302] Both *Amos* and *Zorach* upheld laws that facially benefited religion only, but that were not limited to particular sects. So although the results of both *Amos* and *Zorach* are helpful to New York's support for its law in *Kiryas Joel*, they are not dispositive, because the New York law benefited one sect only.

In a case reflecting the limits of the Court's patience with religion-only accommodations, the Court in *Texas Monthly, Inc. v. Bullock*[303] invalidated a state exemption from sales tax for religious periodicals only. Although there was a majority for striking down the law on Establishment Clause grounds, the lead opinion was for a plurality of three Justices only. That opinion cited a confluence of three factors resulting in the law's invalidation. First, the law benefited religion only and not a larger category. Second, the law could not be seen as alleviating a governmentally imposed burden on the free exercise of religion. Third, the law imposed substantial burdens on nonbeneficiaries.[304] The Court stated that governmental action passing the test of any one of these three categories would be upheld, even if it flunked the other two categories. Thus, the Court explained that the *Walz* ordinance satisfied category one, by benefiting a category larger than religion-only;[305] the *Amos* law—although satisfying neither category one nor three (since it benefited religion only and imposed a substantial burden on rejected job applicants)—satisfied category two, by alleviating a burden on the free exercise of religious organizations;[306] and the *Zorach* program—although satisfying neither cate-

301. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 702, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-1 (1988)).

302. 343 U.S. 306, 308 (1952).

303. 489 U.S. 1 (1989).

304. These three conditions are clear from both the text of the opinion and from an important footnote. See id. at 15 (Establishment Clause prohibits government from "direct[ing] a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); id. at 18 n.8 (approving cases upholding benefits "conferred exclusively upon religious groups or upon individuals on account of their religious beliefs," even though not mandated by the Free Exercise Clause, because the cases either "involve[d] legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, or that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause").

305. See id. at 11.

306. See id. at 18 n.8.

gory one nor two—satisfied category three, by not imposing substantial costs on nonbeneficiaries.[307] The New York law in *Kiryas Joel* would also satisfy the test set forth by the *Texas Monthly* plurality.[308]

(iii) Finally, although the Court has invalidated the two religion-specific accommodations to come before it (three, if you include *Kiryas Joel*, although the Court said it was not invalidating the law as an impermissible accommodation), the Court has also, in dicta, approved religion-specific accommodations. In *Larson v. Valente*,[309] the Court struck down a Minnesota law exempting from the registration and reporting requirements of its Charitable Solicitation Act "only those religious organizations that received more than half of their total contributions from members or affiliated organizations."[310] There was no good reason for this dividing line, and the Court determined that the law officially preferred some religious organizations over others; moreover, the legislative history showed that legislators were aware that writing the exemption in different ways would have different impacts on different religions.[311] *Larson* seems clearly correct; the justifications for the fifty-percent rule were quite thin. The analogue to *Larson* in the *Kiryas Joel* setting would be if New York offered patently weak arguments for refusing to establish a special school district for communities similarly situated to the Village of Kiryas Joel.

In *Estate of Thornton v. Caldor, Inc.*,[312] the Court invalidated a Connecticut law granting an absolute right not to work on one's Sabbath. The Court's main concern was the burden the law placed on both employers and non-Sabbatarians. Justice O'Connor, concurring, stressed what she believed to be the discriminatory aspect of the law—it protected some religious practices and not others.[313] *Thornton* is a difficult case, because the law alleviated burdens on the exercise of religion (albeit privately rather than governmentally imposed), and arguably reached quite broadly, covering many religions practiced in America. Furthermore, it is difficult to determine what religious practices are similarly situated to Sabbatarianism, and thus that should have been accommodated as well. One argument that the Justices did not raise is that the Connecticut law comes close to advancing the majority's religion, since Christians would

307. See id.

308. See id. Applying the *Texas Monthly* test to *Kiryas Joel*: The New York law fails the first prong, since its benefits do not sweep broadly enough, and it fails the second prong, since the law does not lift a governmentally imposed burden on the free exercise of religion. The Satmars did not allege that sending their children to a heterogeneous school conflicted with religious law. The third prong, however, is satisfied, because the New York law imposes zero or insubstantial costs on nonheneficiaries. So under *Texas Monthly*, the law should be sustained as a legislative accommodation of religion. On the *Texas Monthly* test, *Kiryas Joel* looks somewhat like *Zorach*—in both cases the State helped students who shared a common religion receive education separately from other students.

309. 456 U.S. 228 (1982).

310. Id. at 231–32.

311. See id. at 252.

312. 472 U.S. 703 (1985).

313. See id. at 711 (O'Connor, J., concurring).

be the primary beneficiaries of the law (Connecticut had just repealed its Sunday-closing laws). On the other hand, Christians would be the primary burdened parties as well (assuming that most Connecticut employers and non-Sabbatarian employees who would have to accommodate Sabbatarians are Christian).[314] To the extent *Thornton* focused on the law's failure to sweep broadly enough, it would carry some weight on the side of invalidating the *Kiryas Joel* accommodation under the Establishment Clause.

Despite *Larson* and *Thornton*, the Court has, in dicta, approved legislative accommodations for specific religious sects.[315] Moreover, there are many instances of laws, both federal and state, enacted to benefit specific religious minorities. Sometimes this legislation has resulted from the Court's refusal to require an exemption, under the Free Exercise Clause, from a generally applicable law. Thus, after the Court refused to mandate an exemption for Jewish yarmulke wearers from the military's ban on nonmilitary headgear, Congress provided for such an exemption by law.[316] After the Court refused to block a federal road from being built through a forest area held sacred by a particular Native American tribe, Congress again required such accommodation by law.[317] And after the Court refused to hold that the Native American Church must receive an exemption from Oregon's drug laws to ingest peyote, an hallucinogenic drug, during religious rituals, Oregon's legislature provided such an exemption.[318] In addition, courts have upheld federal and state laws prohibiting peyote possession by all but members of the Native American Church.[319]

3. *A Proposed Test for Legislative Accommodation of Religion.* — Taking account of these three categories of decision, along with the values promoted by the Establishment Clause, I propose the following method of examining legislative accommodations of religion. First, I would ask whether a purported accommodation of a minority religion is actually governmental action advancing the majority religion.[320] Government-mandated prayer in public schools and government-sponsored religious

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314. See Mark Tushnet, The Emerging Principle of Accommodation of Religion (Dubitante), 76 Geo. L.J. 1691, 1700, 1713 (1988).

315. See Employment Div. v. Smith, 494 U.S. 872, 890 (1990); United States v. Lee, 455 U.S. 252, 260 & n.11 (1982); Braunfeld v. Brown, 366 U.S. 599, 608 (1961).

316. See 10 U.S.C. § 774 (1994). Although the law was drafted in response to a case brought by a Jewish member of the armed forces, the exemption for religious garb covers all religions.

317. See House Comm. on Appropriations, Dept. of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988).

318. See Or. Rev. Stat. § 475.992(5) (1993). The exemption covers religious use of peyote, and thus has fairly narrow scope.

319. See Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990).

320. See David E. Steinberg, Religious Exemptions as Affirmative Action, 40 Emory L.J. 77, 117–21 (1991) (supporting a test that would permit exemptions for minority but not majority religions).

symbols on public property should not be sustained as accommodations of religion. (I don't think they should be sustained at all, but that's not the point here.) *Thornton* might have been decided correctly on this ground. One difficulty here is drawing a line between the majority's advancing its own religious doctrinal concerns (invalid) and the majority's alleviating a burden faced by a subset of itself. For example, perhaps *Thornton* was not correctly decided on the ground that the majority was advancing its own religious interests; perhaps, instead, the Connecticut legislature was alleviating a burden felt by a small subset of the majority only, those for whom a Sabbatarian right not to work was essential to their religious practice.

Second, I would ask whether a purported accommodation discriminates among religions. To answer this question, we need to identify the appropriate category of benefit. For example, if the legislature grants an exemption for religious headgear in the military, it must extend the exemption to (at least) all nonobtrusive religious headgear.[321] Whether it must extend the exemption as well to obtrusive headgear or to other clothing regulations are more difficult questions. *Larson* seems correctly decided as a case about an unjustified discrimination among sects. Whether *Thornton* can be defended on this ground is a difficult issue.

In most cases, negative answers to these two questions—that is, the purported accommodation of a minority religion is not actually a subterfuge for the majority's advancing its own religious agenda, and the purported accommodation of a minority religion does not discriminate among religions—should be sufficient to sustain the constitutionality of the accommodation. On this test, the accommodation for the Satmars in *Kiryas Joel* would be valid. The law clearly benefits a minority, and, if one agrees with my discussion earlier in Part II, the law does not discriminate against any other religion.[322] On the spectrum of upholding versus strik-

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321. See Goldman v. Weinberger, 475 U.S. 503 (1986).

322. One of Chip Lupu's principal lines of attack on legislative accommodations is the risk of discrimination among sects. See Lupu, Reconstructing, supra note 285, at 581, 586; Lupu, Uncovering Kiryas Joel, supra note 86, at 117; see also United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment) (Both legislatures and courts should be "out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."); Tushnet, supra note 285, at 394 (expressing concern with the disparate impact of religious accomodations); cf. *Goldman*, 475 U.S. at 512–13 (Stevens, J., concurring) (rejecting claim for mandatory exemption for yarmulke-wearer in the military and expressing concern that it will be difficult to grant exemptions in an evenhanded manner). But just as the *Kiryas Joel* Court's fear that the New York legislature might not authorize a school district for a similarly situated group in the future should be considered insufficient to invalidate the Kiryas Joel Village School District today, so are Lupu's concerns about preferred minorities best left for case-by-case analysis. Why deprive deserving minority groups of much-needed relief on the ground that other groups might fail to persuade the legislature to give them relief, too? Why not, instead, encourage majorities to aid minorities, and insist that the aid be evenhanded, over time? To

ing down accommodations, this test places me far toward the "upholding" end. Should I not also be concerned with (a) the nature of the burden that the legislation relieves, and (b) the nature of collateral harms inflicted on nonbeneficiaries? How would these two concerns apply in *Kiryas Joel*?

On the first matter, one might argue that we should uphold legislative accommodations that exempt religious practice from generally applicable law, but not otherwise. For example, consider the congressional response to *Goldman*—permitting the wearing of religious headgear in the military—and the Oregon legislature's response to *Smith*—permitting the use of controlled substances during religious rituals. These accommodations are valid, one might argue, because otherwise some citizens would be faced with an immediate dilemma of violating their religious faith or violating the law. The Satmars faced a different sort of problem. The law did not prohibit the Satmars from educating their handicapped children in a setting away from the taunts of other children. Instead, if the Satmars wanted to educate their handicapped children in a private setting, after *Aguilar* and *Grand Rapids* they would have to forgo government funds. The loss of government funds is different from the risk of criminal sanctions, one might contend. (The same analysis would apply if the burden is considered the taunting of other students; that is certainly not a burden imposed by law, but rather by other citizens.) Legislative accommodations should be permitted only when lifting a direct burden imposed by law, the argument goes.

This argument confuses exemptions mandated by courts under the Free Exercise Clause with exemptions enacted through legislative discretion, but not mandated by Free Exercise Clause analysis.[323] There might be good reasons to limit mandated exemptions to the lifting of burdens on religious practice that stem from generally applicable law. (This is a

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invalidate accommodations because evenhandedness might be hard to ensure would leave all minority communities subject to majoritarian practices that harm them either directly or indirectly, which should be of greater concern to those who are concerned about evenhandedness. See McConnell, Accommodation, supra note 285, at 9; cf. *Goldman*, 475 U.S. at 521 (Brennan, J., dissenting) (would grant claim for mandatory exemption for yarmulke-wearer in the military; rejects Justice Stevens's concern that exemptions might not be applied evenhandedly, by arguing that the existing, purportedly neutral standard, results in a disparate impact on minority religions); Frank I. Michelman, Foreword—Traces of Self-Government, 100 Harv. L. Rev. 4, 5–17 (1986) (discussing *Goldman*).

323. See Greene, Political Balance, supra note 22, at 1626; McConnell, Accommodation, supra note 285, at 31; McConnell, Update, supra note 285, at 709–12. But see Jonathan E. Nuechterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L.J. 1127, 1128–29, 1143 (1990). I refer of course to exemptions mandated under the Free Exercise Clause in the world before Employment Div. v. Smith, 494 U.S. 872 (1990). Now, the Religious Freedom Restoration Act mandates exemptions in a purportedly similar way to how the courts enforced the Free Exercise Clause prior to *Smith*. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (Supp. V 1993)).

controversial position; there are substantial arguments for extending the sweep of the Free Exercise Clause beyond this point.) Even if one accepts this position, however, one should still permit legislatures to accommodate other types of burdens on minority religions, which might include more indirect governmentally imposed burdens (say, the denial of funds for the education of handicapped children) or burdens imposed by private persons (say, the taunting of other children). So long as the legislature is acting out of respect for the special burdens faced by a small community (something the legislature might well do for nonreligious minority groups, as well),[324] the accommodation should be upheld, even though it does not lift a direct legal burden on religious practice. Thus, the *Texas Monthly* focus on lifting burdens imposed directly by law seems too narrow.[325]

This argument does not, however, entail permitting the public funding of religious schools. The Kiryas Joel Village School District should be seen as an accommodation that fits between permitting the public funding of religious schools and lifting a direct legal burden on religious practice. The District saves the Satmars money they would otherwise have to spend on educating their handicapped children; in other words, it permits the flow of public money for education of the handicapped to benefit the Satmar handicapped children just as it benefits other children throughout the state. The law, thus, does not lift a direct legal burden on religious practice, but neither does it raise the complex set of issues en-

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324. There is, then, this implicit third requirement for upholding a legislative accommodation: The legislation must be an accommodation of harm, and not simply a reward for being a member of the benefited religion. I would resolve close cases in favor of the constitutionality of the accommodation. Thus, with a few alterations, I agree with Michael McConnell that "[a]n accommodation must facilitate the exercise of beliefs and practices independently adopted rather than inducing or coercing beliefs or practices acceptable to the government." McConnell, Accommodation, supra note 285, at 35. My alterations would be, first, as discussed in the text, that accommodations need not be seen as lifting religious burdens; rather, religious accommodations should be seen as a subset of the larger set of accommodations for a small group of citizens out of respect for a burden it faces. Second, although it might be implicit in McConnell's argument, he does not state that he would resolve close cases in favor of constitutionality. I would do so because, assuming that the accommodation met my two requirements—it doesn't advance the majority's religion and it doesn't discriminate among religions—if there's a reasonable argument for seeing the law as lifting a burden rather than simply issuing a reward, courts should defer to legislative judgment. There's no need for intermediate or strict scrutiny in such a case.

325. *Amos*, too, adopts too narrow a view of the burdens a majority may permissibly lift. In distinguishing *Thornton*, *Amos* suggests that the Title VII exemption for religious institutions lifted a governmentally imposed burden (the Title VII rule against religious discrimination) whereas the Connecticut Sabbatarian law in *Thornton* intervened in the private marketplace and did not lift a governmentally imposed burden. See Corporation of the Presiding Bishop of the Church of Jesus Christ Latter-Day Saints v. Amos, 483 U.S. 327, 337 n.15 (1987). The thrust of my argument is that a majority should be permitted constitutionally to determine what sorts of burdens on minorities require alleviation.

gendered by the public funding of religious schools.[326] In sum, there is good reason to support some legislative accommodations of religion that go beyond what might be mandated under the Free Exercise Clause.

On the issue of collateral harm to nonbeneficiaries, I would generally leave to legislative judgment the balancing of benefits to a minority class against burdens to all others. My main difficulty with *Thornton* is the Court's elevating the economic harm to nonbeneficiaries—employers and non-Sabbatarian employees—to a level of constitutional import. If the Connecticut law properly could be said to help a minority group (perhaps Sabbatarians are a minority group, even though "people with religions that have a Sabbath" clearly is not a minority group), and if the Connecticut law properly could be said to be nondiscriminatory (Justice O'Connor thought this was a problem, but there is a good case that protecting Sabbath observance is a legitimate category of its own), then the incidental economic harms to those who have to accommodate Sabbatarians should be considered insufficient to invalidate the law on Establishment Clause grounds. We generally allow the legislature to balance benefits against burdens, and stepped-up judicial review is not warranted if the legislature enacts a law to benefit a minority while imposing burdens on others. I would not completely ignore harm to nonbeneficiaries, however. As I argued earlier, in Part II.B, one way of distinguishing many of the racial affirmative action cases from *Kiryas Joel* and many religious accommodation cases is the presence in the former of identifiable citizens harmed by the affirmative action programs, say in the setting of graduate school admissions or of contracting set-asides. If a religious accommodation resulted in this type of harm, then I would agree it must be examined much more closely, perhaps requiring an elevated showing of harm to the minority were the benefit not granted. In any event, the New York law in *Kiryas Joel* harms no one in such a direct fashion.

In short, there is good reason to support the constitutionality of sect-specific exemptions. If one can escape the grip of *Croson/Adarand* and *R.A.V.*, and the insistence on formal neutrality that sometimes appears in Establishment Clause cases, one can accept sect-specific accommodations as reflecting, not biased favoritism, but rather an act of respect by a majority group toward a minority group. If one can distingnish cases in which the majority advances its own religious interests under the guise of accommodation (properly raising the concern that the law has a primary religious purpose or effect) from cases in which the majority seeks to benefit a group that happens to be religious (where it seems wrong to say the legislature has violated any Establishment Clause values), then one can overcome the Establishment Clause objection to sect-specific accommodations.

326. See supra text accompanying notes 102–103.

III. Creating the Unum: The Government Speech Model

I have argued in this Article that the Constitution does not forbid a legislature from exercising its discretion to enable a homogeneous group of citizens that lives in an identifiable community from exercising public power as a town or village, specifically the power of public education. I have argued elsewhere that the Constitution at times requires government to cede power to homogeneous communities, by exempting them from otherwise valid laws.[327] The virtues of the "e pluribus"—of the many homogeneous communities from which We the People derive—support this view. But the virtues of the "unum"—of political unity, of heterogeneous communities—are real, as well, and I want to suggest in this final Part that although legislatures should be permitted to support homogeneous communities, and should sometimes be required to cede power to them, there is much that government may do to encourage such communities to become more inclusive. Government has virtually unfettered authority to promote its view of the good, through public schools[328] as well as other forms of government speech.

I can only sketch the argument for what I call the "government speech model" here; the issue is substantial and requires detailed treatment. But even this sketch is important, I believe, to round out my views about an appropriate balance between the values of the e pluribus and the values of the unum. One version of liberalism maintains that government must be neutral as to sectarian views of the good, and that such neutrality mandates not only that government refrain from *coercing* people into a favored view of the good, but also that it refrain from *persuading* people toward a favored view. The government, it is argued, has enormous powers at its disposal, and were government to enter the debate over the good, it would likely overwhelm the opposition. Furthermore, it is suggested, the government has no place intentionally seeking to foster a particular conception of the good.

This argument seems misguided. I will make three claims against it, the first normative and the others descriptive. The normative claim is that it is a good thing for an elected majority to come clean, as it were, with its view of the good, and to try to persuade dissenters to its viewpoint. Government is just one of many players in the struggle to determine value, and citizens understand this. By allowing governmental agents to pursue visions of the good through persuasion, we allow the establishment of a transparent public debate in which sides can be taken.[329] Simultaneously, by not coercing people's beliefs regarding value in the pri-

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327. See Greene, Political Balance, supra note 22, at 1613.

328. Remember that my argument is not that a state must establish small, homogeneous school districts in response to minority exit, but only that it may do so. A state may also choose to insist on integrated public education, and it may draw school districts, or implement busing, as a means to that end.

329. I would, though, invalidate laws based predominantly on expressly religious arguments, because of their inaccessibility to nonbelievers. The Establishment Clause, I

vate arena, we leave various channels open both for changing the government and for pockets of sovereignty that can coexist with government. In short, the appropriate "e pluribus unum" balance is struck by permitting permeable sovereignty to exist and by allowing the debate over value to take place openly in both public and private space.

The first descriptive claim is that it is impossible for government not to advance views regarding the good. The President cannot avoid doing so; neither can Congress, neither can the courts, and neither can school boards, principals, and teachers. Better, then, to encourage such debates to be laid bare for public discussion.

The second descriptive claim is that our Free Speech Clause doctrine already supports a governmental role in advancing a theory of the good. Two types of case can be seen to back this claim. First, the Court has upheld funding programs limited to advancing a particular theory of the good, even when such programs exclude competing viewpoints. *Rust v. Sullivan*[330] is the best case for this point. There, the Court upheld a federal law forbidding health care providers receiving federal funds from discussing abortion as part of their family planning counseling. Because government's funds are limited, said the Court, the government may define the nature of the program it wishes to fund, even if that program limits the messages that may be advanced:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. . . .
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> . . . [W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.[331]

The Court also gave the example of the National Endowment for Democracy, which urges "other countries to adopt democratic principles, . . . [without] encourag[ing] competing lines of political philosophy such as communism and fascism."[332] Although *Rust* itself raises some difficult questions beyond the free speech context (specifically, the effect of the program's restriction on a woman's right to choose whether to terminate her pregnancy), the basic point regarding the government's power to spend money to advance particular visions of the good seems sound.

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believe, requires such a rule. See Greene, Political Balance, supra note 22, at 1611–13; Greene, Rejoinder, supra note 151.

330. 500 U.S. 173 (1991).

331. Id. at 193–94.

332. Id. at 194.

Second, in *Meese v. Keene*[333] the Court upheld legislation classifying certain films as "political propaganda," even though such a label might affect citizens' decisions whether to see the films. As the Court stated:

> Congress simply required the disseminators of [relevant] material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. . . . By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.[334]

The government, in other words, is permitted to express an official view on various subjects.[335]

Whether government is advancing its own message or regulating private speech is sometimes a difficult question. Furthermore, government speech is sometimes sufficiently powerful to drown out or limit the effect of private speech; in such instances, free speech problems arise. One systemic way of ensuring against the hegemony of government's view of the good is to encourage permeable sovereignty, to endorse, that is, venues of norm-creation that compete with the government. Earlier in this Article, I advanced the cause of permeable sovereignty. This last Part is meant to suggest that government, too, can be a player in the debate over theories of the good. Thus, if government wants to advocate integration, and wants to establish curricular minima for schools to advance values of inclusion and antidiscrimination, then the Constitution should not be read as an obstacle to such government speech.[336] Government can help ho-

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333. 481 U.S. 465 (1987).

334. Id. at 480–81.

335. Again, the Establishment Clause imposes an important limitation on this claim; I agree with the Court's doctrine invalidating publicly sponsored religious symbols that endorse a preferred religion. See County of Allegheny v. ACLU, 492 U.S. 573 (1989); see also Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2454 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid."); id. at 2457 (Souter, J., concurring in part and concurring in the judgment); id. at 2464 (Stevens, J., dissenting); id. at 2474 (Ginsburg, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("[A] more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion.").

336. One important issue that requires more detailed treatment than I can give here is whether the government's power of education is too strong, drowning out other voices and establishing a favored, secularist view. Michael McConnell, for example, has argued for a voucher program that would allow parents freedom of choice for their childrens' education. See Michael W. McConnell, Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?, 1991 U. Chi. Legal F. 123 [hereinafter McConnell, Multiculturalism]; see also Stephen Arons, The Separation of School and State: *Pierce* Reconsidered, 46 Harv. Educ. Rev. 76 (1976) (arguing for a strong parental control theory); Stephen G. Gilles, On Educating Children:

mogeneous nomic communities thrive while simultaneously encouraging citizens—sometimes the same citizens who comprise those homogeneous nomic communities—to find common ground. Government can, that is, seek to create the unum and at the same time aid the flourishing of the e pluribus.

CONCLUSION

The Court's two mistakes about equality in *Kiryas Joel* stem from an exaggerated concern for the unum, for a Constitution that emphasizes integration of persons and sameness of treatment. There is another part of our motto, the e pluribus part, which represents values of allowing people to separate themselves from others and of treating different cases differently. The difficulty of locating an appropriate balance between values of integration and sameness of treatment, on the one hand, and values of separation and differential treatment, on the other, is especially acute when a distinct group such as the Satmars seeks public as well as private power, when, that is, the group wants to exit partially rather than completely from the mainstream culture. An appropriately agnostic political liberalism should permit grants of public power to minority nomic communities, for the virtues of permeable sovereignty—of the existence of multiple repositories of norm-creating power within one nation—do not stop at the doors of private institutions. Minority nomic communities often will want to function as governments, too, and we should allow them to be the recipients of public power, so long as they play by the rules of the Constitution in exercising that power. Furthermore, intrusive judicial review is inappropriate when majorities are lifting burdens on minority groups, especially when the benefited groups cohere in a way that gives rise to separate arenas for norm-creation. Finally, although states should be permitted to cede public power to minority nomic communities, states may encourage such groups to join with others in creating an American common ground.

A Parentalist Manifesto, 63 U. Chi. L. Rev. (forthcoming 1996) (same). McConnell argues that compulsory education, the *Lemon* line of cases invalidating public funding for various parochial school programs, and the bracketing of all things religious in the public school setting have led to an intolerable situation for many religious parents and their children. See McConnell, Multiculturalism, supra; see also Michael W. McConnell, Neutrality Under the Religion Clauses, 81 Nw. U. L. Rev. 146, 161–67 (1986) (arguing that neutrality cannot be achieved in areas where the government dominates to the point that private initiative is crowded out). One line of response to arguments such as McConnell's is that the public schools have control over students for a limited number of hours only, as compared with the time parents have to educate their children. Children are not solely the responsibility of parents, one might argue, and the state properly has the power to exert some educational control over children. See Amy Gutmann, Democratic Education 28–33, 69, 116 (1987).