

# Note

## Circumscribing Constitutional Identities in *Kiryas Joel*

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### I. INTRODUCTION: CONSTITUTIONAL ETHNOGRAPHIES

This Note examines the opinions and legal commentary on the *Kiryas Joel*<sup>1</sup> case decided by the United States Supreme Court in 1994. The case turned on the constitutionality, under the Establishment Clause of the First Amendment, of New York State legislation establishing a separate school district providing special education exclusively for Hasidic Jewish children. The Court deemed that legislation an unconstitutional establishment of religion.<sup>2</sup> However, in line with certain dicta of the Court, the legislation was redrafted in a fashion which, until August 1996, appeared to permit the separate school district to continue. At present the fate of the district is once again being litigated.<sup>3</sup>

A substantial amount of commentary has already been written about *Kiryas Joel*. Student notes on the case are frequently concerned with the implications of *Kiryas Joel* for Supreme Court standards in deciding religious establishment cases—an area of law that has been notoriously troublesome to the Court in recent decades.<sup>4</sup> Professors and other legal scholars have analyzed the case as

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

2. See *id.* at 2483.

3. See Grumet v. Cuomo, 647 N.Y.S.2d 565 (App. Div. 1996)

4. See, e.g., Scott S. Thomas, Note, *Beyond a Sour Lemon: A Look at Grumet v Board of Education of the Kiryas Joel Village School District*, 8 B.Y.U. J. PUB. L. 531 (1994) (claiming that *Kiryas Joel* “perpetuated the current problems involved in Establishment Clause jurisprudence”); Susan E. Acklin, Casenote, 41 LOY. L. REV. 43 (1995) (viewing *Kiryas Joel* as another in series of cases moving away from “Lemon test” for establishment of religion, first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). To survive scrutiny under the *Lemon* test, a legislative enactment must 1) reflect a secular purpose, 2) have a primary effect that does not advance or inhibit religion; and 3) avoid excessive governmental entanglement with religion. See *Lemon*, 403 U.S. at 612–13.

an example of the current Court's secularist bias<sup>5</sup> and as an example of the need to examine constitutional issues from the perspective of minority groups.<sup>6</sup> The most exhaustive exchange on *Kiryas Joel* began with a 1996 article by Professor Abner Greene, who argued strongly for the right to semi-autonomy of groups that demonstrate their commitment to their own principles by separating themselves geographically.<sup>7</sup> Greene's article sparked responses from Christopher Eisgruber, who claimed that assimilation is a constitutional value,<sup>8</sup> and Ira Lupu, who was concerned that the current arrangement masks abuses of democratic process within Kiryas Joel.<sup>9</sup>

This Note argues that the judicial opinions and the legal commentary on *Kiryas Joel* share a common underlying conception of the relationship between identity (the nature of the subject of rights) and polity (the constituency of the state). In that underlying conception, the polity is understood as consisting of all the citizens of a neutrally bounded territory (a municipality or state), while the subject of rights is taken to be the individual person.<sup>10</sup> This Note explores the ways in which the assumptions of neutral territory and the individual subject have shaped the literature on *Kiryas Joel*. It articulates an alternative underlying conception of political identity as organized around diaspora (primary orientation somewhere other than a group's present residence) and genealogy (family and group descent and upbringing). It claims that this alternative underlying conception animates the residents of Kiryas Joel in their search for the culturally acceptable provision of special education.

This Note claims that jurisprudence on this case should attend to genealogy and diaspora as the cultural contexts of the *Kiryas Joel* dispute. Moreover, it claims that the search for principles of religious "neutrality" in constitutional jurisprudence is inseparable from Protestant traditions of individual liberty of belief and thus may be ill-suited to determining the religious rights of many Americans today. The argument is neither in favor of one of these conceptions of identity nor against the other; it seeks to demonstrate the contingency (rather than universality) of individualism and territoriality on the one hand and the coherence of genealogy and diaspora on the other.

Part II of this Note discusses the origins of the dispute and the history of the legislation. Part III explains the contrasting conceptions of polity and identity informing discussions of *Kiryas Joel*. Part III also discusses Robert

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5. See, e.g., Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433 (1995).

6. See, e.g., Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1 (1995).

7. See Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 43-51 (1996).

8. See Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996).

9. See Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996).

10. See *infra* Part III.

Cover's *Nomos and Narrative*,<sup>11</sup> an essay in jurisprudence that has influenced much of the existing literature on *Kiryas Joel*. Part IV looks closely at the rhetoric used in that existing literature to demonstrate how individualist and territorial assumptions subtly influence accounts of the case. Part V reviews the divergent processes that led to the creation of the Village of Kiryas Joel and to the creation of the Kiryas Joel School District from the alternative perspective of genealogy and diaspora. Part VI focuses on the dilemma of the community and the children, and suggests that the tension between the territorialist-individualist and the genealogical-diasporic frameworks of identity is perhaps most powerfully revealed in disputes involving jurisdiction over children. The Conclusion argues that satisfactory adjudication of the case may not be possible as long as the individualist and territorialist conceptions implicit within the Court's analysis remain unexamined.

## II. THE PLACE AND THE CASE

This Part of the Note briefly outlines the origins of the Kiryas Joel community and the conflict leading to the *Kiryas Joel* litigation.<sup>12</sup> The residents of the Village of Kiryas Joel in New York State are known as Satmar Hasidim. Their lifestyle and social organization are devoted to the observance of the Torah, Rabbinic teachings, and their ancestral communal traditions. They identify with other groups of Satmar Hasidim in the United States, Europe, and Israel, with related (and generally smaller) Hasidic communities, with all Orthodox Jews, and to a lesser extent perhaps, with all persons whom they regard as Jewish.<sup>13</sup> Their relations with the non-Jewish populations among which they live are, by contrast, often distant.<sup>14</sup>

After World War II, Joel Teitelbaum, known as the Satmarer *Rov* or *Rebbe*,<sup>15</sup> settled in the Williamsburg section of Brooklyn, New York. He was a dynamic and charismatic leader who managed to reconstitute a community of Satmar Hasidim. In the decades following World War II, Williamsburg became a thriving center of Hasidic life, containing numerous Hasidic groups

11. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword Nomos and Narrative*, 97 HARV L. REV. 4 (1983).

12. Any attempt at "cultural translation," including this one, is shaped by the situation of the writer and his intended audience. Hence, while I attempt to be accurate here, this account should not be presumed objective. See generally Talal Asad, *The Concept of Translation in British Social Anthropology*, in WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 141 (James Clifford & George E. Marcus eds., 1986).

13. See MAUD B. WEISS ET AL., *THE CHALLENGE OF PIETY: SATMAR HASIDIM IN NEW YORK* 26 (1995).

14. See JEROME R. MINTZ, *HASIDIC PEOPLE: A PLACE IN THE NEW WORLD* 249 (1992) (stating that in Williamsburg, Brooklyn, Kiryas Joel's "parent" community, Hasidic and Latino "societies appear as far apart as winter and summer").

15. In Yiddish, *Rov* in this context refers to the rabbi of a town, *Rebbe* to the leader of a group of Hasidim. Rabbi Teitelbaum had been the rabbi of the town of Satu Maru in Hungary, but as the leader of Hasidim, he was also thought of and referred to as *Rebbe*.

living in close proximity to each other.<sup>16</sup> As communities were reassembled and the survivors' families multiplied, that area of Williamsburg readily available to Hasidic residents became extremely crowded. This fostered the establishment of various "satellite" communities in upstate New York.<sup>17</sup>

One such satellite was established by Satmar Hasidim in an area of Monroe, New York. Several years later, a zoning dispute arose, leading to the establishment in 1977 of the separate Village of Kiryas Joel.<sup>18</sup> The new Village was composed exclusively of Satmar Hasidim, substantially because neighbors did not want to secede with the Satmars.<sup>19</sup>

Because of the universal preference for private religious schooling among the Satmar Hasidim in Kiryas Joel, particular arrangements have been made for the provision of publicly funded special education services to handicapped Satmar children there. For one year beginning in 1984, such services were provided by the Monroe-Woodbury School District at an annex to the Bais Rochel girls' school,<sup>20</sup> but this arrangement was ended<sup>21</sup> after the Supreme Court decisions in *School District of Grand Rapids v. Ball*<sup>22</sup> and *Aguilar v. Felton*.<sup>23</sup> Instead, the Monroe-Woodbury district offered special education for the Satmar children in regular public schools, which their families found highly unsatisfactory.<sup>24</sup> Ultimately, the New York legislature passed the statute at issue in *Kiryas Joel*, specifically naming the Village of Kiryas Joel as an independent school district with plenary powers.<sup>25</sup> Thus, unlike the Village, which was established by residents acting in accordance with existing state law, the school district was created by a special act of the legislature. Special education services have been provided to Hasidic children from Kiryas Joel as well as neighboring districts.<sup>26</sup> The head of the school is not Jewish, and the school's curriculum is thoroughly secular. Not all of the residents of the

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16. See WEISS ET AL., *supra* note 13, at 13–17.

17. See DAVID LANDAU, *PIETY AND POWER: THE WORLD OF JEWISH FUNDAMENTALISM* 277–78 (1993).

18. The Village was incorporated pursuant to a statute providing for the incorporation as a village of a territory meeting certain population and area requirements, subsequent to a petition for incorporation and an election to determine the question of incorporation. See N.Y. VILLAGE LAW §§ 2-200, 2-202, 2-212 (McKinney Supp. 1996).

19. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994).

20. See *id.*

21. See *id.*

22. 473 U.S. 373 (1985) (holding that supplementary classes provided at public expense to religious school students at religious schools violated Establishment Clause).

23. 473 U.S. 402 (1985) (holding that New York City's use of federal funds to pay public school employees to teach educationally deprived children in parochial schools violated Establishment Clause because of inevitable excessive entanglement of church and state).

24. See *Kiryas Joel*, 114 S. Ct. at 2485. The stated reason for their dissatisfaction is discussed below. See *infra* text accompanying notes 153–54. Actual reasons are suggested below. See *infra* text accompanying notes 156–58.

25. See *Kiryas Joel*, 114 S. Ct. at 2486 (citing 1989 N.Y. Laws 748, titled "An Act to establish a separate school district in and for the Village of Kiryas Joel, Orange County").

26. See *id.*

Village support this arrangement for the education of Kiryas Joel's handicapped children.<sup>27</sup>

Justice Souter announced the judgment of the Court.<sup>28</sup> Finding anomalous the creation of the smaller school district when the general trend was toward consolidation,<sup>29</sup> and concerned that the residents of Kiryas Joel had benefited from a special act of the legislature, the Court held the legislation creating the District to be an unconstitutional establishment of religion.<sup>30</sup> Justice O'Connor's concurrence, however, suggested that government action accomplishing the same end but "implemented through generally applicable legislation"<sup>31</sup> would be acceptable. Promptly following the announcement, the New York legislature redrafted the legislation in terms that did not refer specifically to Kiryas Joel and purported to lay out neutral criteria under which a community could apply for separate school district status.<sup>32</sup> The new legislation was soon challenged, however. In August 1996, the Appellate Division of the New York Supreme Court held the new legislation unconstitutional, finding that "in enacting the current law, the Legislature simply resurrected the prior law by achieving exactly the same result through

27. See *infra* text accompanying note 77.

28. The bulk of his opinion was joined by four other Justices, and another part by only three. There were four separate concurring opinions. See *Kiryas Joel*, 114 S. Ct. at 2494 (Blackmun, J., concurring) (disagreeing "with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman* [403 U.S. 602 (1971)]"); *id.* at 2495 (Stevens, J., concurring) (arguing that State could have alleviated children's fear "by teaching their schoolmates to be tolerant and respectful of Satmar customs"); *id.* at 2498 (O'Connor, J., concurring) (expressing concern about "the nature of the legislative process" leading to establishment of school district); *id.* at 2500-01 (Kennedy, J., concurring) (expressing concern that opinion goes too far in limiting constitutionally permissible accommodation of religion). Justice Scalia filed a dissent, joined by Chief Justice Rehnquist and Justice Thomas. See *id.* at 2506 (Scalia, J., dissenting) (declaring himself "not surprised" at Court's use of Establishment Clause "to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect").

29. See *id.* at 2490.

30. See *id.*

31. *Id.* at 2498 (O'Connor, J., concurring).

32. The statute reads in part:

3. Any municipality situated wholly within a single central or union free school district, but whose boundaries are not coterminous with the boundaries of such school district, may organize a new union free school district, pursuant to the provisions of this subdivision, consisting of the entire territory of such municipality, whenever the education interests of the community require it.

a. No such new school district may be organized unless (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality; (iv) the actual valuation per total wealth pupil unit of such existing school district will not increase or decrease by more than ten percent following the organization of the new school district by such municipality.

N.Y. EDUC. LAW § 1504(3) (McKinney Supp. 1996).

carefully crafted indirect means.”<sup>33</sup> That court’s reference to the earlier Supreme Court decision as “Kiryas Joel I”<sup>34</sup> perhaps anticipates that the litigation is likely to rise through the courts once again.

### III. FRAMES OF JURIDICAL IDENTITY

This Part details the alternative concepts underlying different understandings of the relation between polity and identity. First I discuss the notions of individualism and territory. I then revisit Cover’s essay *Nomos and Narrative* as a critique of the neutralist jurisprudence associated with individualism and territory. The last Section of this Part articulates the notions of diaspora and genealogy, which are absent from Cover’s own account of jurisprudence, but complementary with and critical to his project.

#### A. Individualism and Territory

The notion of identity implicit in U.S. constitutionalist discourse relies on two interlinked principles. The first of these is the normativity of Protestant individualism in all its denominational variety.<sup>35</sup> The notion of religious freedoms—from the coercion of state religion or to exercise religion—contemplated by the drafters of the First Amendment doubtless reflected the Protestant emphasis on individual faith as the bedrock of religious integrity. Faith and individualism both facilitated the separation of a public sphere substantially shaped by state law from a more autonomous private sphere.<sup>36</sup>

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33. *Grumet v. Cuomo*, 647 N.Y.S.2d 565, 568 (App. Div. 1996). The Appellate Division found that the demographic criteria in the new law, *see supra* note 32, were in fact designed to apply only to the Kiryas Joel situation and “fulfill[ed] no existing educational purpose.” *Grumet*, 647 N.Y.S.2d at 569. The new law thus served only to maintain the status quo which the Supreme Court had declared unconstitutional. The Appellate Division stated that Justice O’Connor’s formula would only have been met “[h]ad the current law permitted any existing municipality, or even any village, to form a school district if it obtained appropriate approvals and also fulfilled statutory criteria designed to evidence a special educational need for a separate school district.” *Id.* at 570.

34. *Id.* at 567.

35. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 373 (1996) (presenting citations from end of eighteenth century identifying range of toleration with varieties of Christian beliefs). The frequent emphasis on religious voluntarism in constitutional jurisprudence is identified by Witte primarily with the evangelical view and Enlightenment thought, two of the four major strands (along with Puritanism and civic republicanism) that contributed toward policies on religious freedom in the early United States. *See id.* at 377, 382–83. As Witte writes: “These lofty protections of individual religious rights went hand-in-hand with the close restrictions on corporate religious rights that were also advocated by enlightenment exponents.” *Id.* at 385.

36. *See* Berg, *supra* note 5, at 442 (“[W]ith a general Protestant ethos underlying society, government could remain separate from any particular church without unnaturally constricting the contribution made to public life by the citizenry’s general religious values.”). Subsequently, however, “[t]he vigorous pursuit of these aspects of separation in the context of an active state created the fundamental problem of Religion Clause interpretation: it put nonestablishment at war with free exercise.” *Id.* at 443.

Few Protestant groups have relied solely on recruitment of individual adults to sustain themselves, and thus the association of Protestantism with pure individualism can easily be overstated. In terms of

The second of the two interlinked principles is “the long-standing Anglo-American commitment to organizing political representation around geography.”<sup>37</sup> Governments and their constituencies are thus bounded by geographic lines. This commitment is so deeply ingrained in our normative political culture that it is often difficult to see how representation could be conceived otherwise.<sup>38</sup> As the political philosopher William Connolly explains: “The democratic, territorial state sets itself up to be the sovereign protector of its people, the highest site of their allegiance, and the organizational basis of their nationhood.”<sup>39</sup> However, “few states, if any, actually maintain close alignment between this image of the sovereign, territorial, national, democratic security state and their actual practices.”<sup>40</sup> Connolly’s point may be extended: In fact, all states are riven by failures to guarantee personal security and democratic freedoms, by hierarchizing myths that systematically exclude certain categories of persons from full participation within the presumed national collective, and by the existence of profound

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constitutional jurisprudence, however, the exception goes some distance toward proving the rule here. Thus the Supreme Court ruled in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that Amish families could not be forced to send their children to school beyond the eighth grade. Yet in his dissent, Justice Douglas insisted that

[w]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.

*Id.* at 242 (Douglas, J., dissenting in part). I see Justice Douglas’s *Yoder* dissent as one of the sources of Justice Stevens’s concurrence in *Kiryas Joel*. See *infra* text accompanying notes 164–65.

37. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 483 (1993).

38. Tribal “governments” are, of course, not based on principles of individualism and neutral territory. See, e.g., PIERRE CLASTRES, *SOCIETY AGAINST THE STATE* (1987). Such face-to-face groups do not confront complex questions of representation. One alternative model, which cannot be explored in detail here, is the Ottoman Empire’s strategy of representation by ethnic communities within the territory of the empire. See Gayatri Chakravorty Spivak, *Constitutions and Culture Studies*, 2 YALE J.L. & HUMAN 133, 138 (1990) (“What characterizes the [Ottoman Empire] is the extraordinarily active and vastly heterogeneous diasporic activity that is constantly afoot on its terrain.”). Another model is that of the “Gypsies.” See Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies”*, 103 YALE L.J. 323, 325 (1993) (using “the law of the Gypsies as an example of an autonomous legal system, one which operates outside the parameters of state law.”) For an extended reconsideration of the principle of “one nation per state” in the context of *Kiryas Joel* and *Shaw v. Reno*, 509 U.S. 630 (1993), see James U. Blacksher, *Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 444–49 (1996).

39. WILLIAM E. CONNOLLY, *THE ETHOS OF PLURALIZATION* 135 (1995). According to Connolly, two of the key elements of the democratic, territorial state are:

(2) the recognition of a people (or nation) on [a contiguous] territory, bound together by a set of shared understandings, identities, debates, and traditions that, it is said, makes possible a common moral life and provides the basis upon which citizen/alien and member/stranger are differentiated; [and]

(3) the organization of institutions of electoral accountability and constitutional restraint that enable the territorialized people with shared understandings to rule themselves while protecting fundamental interests and freedoms . . .

*Id.* at 136.

40. *Id.*

competing loyalties among their constituents.<sup>41</sup> Given especially this last gap between state ideal and state practice, it is no surprise that constitutional debates frequently turn on the degree of accommodation the state will make to the “actual practices” of its citizens.<sup>42</sup>

Litigation strategies may reflect implicit awareness of individualist and/or territorial conceptions of identity. Thus one of the signal ironies of *Kiryas Joel* is the reflection of individualist bias in the court papers on behalf of the school district. “The Satmar<sup>43</sup> did not claim that separation from non-Satmar was religiously required, explaining that they live together and avoid integration with the larger community ‘to facilitate *individual* religious observance and maintain social, cultural and religious values.’”<sup>44</sup> This stance on the part of the legal representatives of the Kiryas Joel residents is cast in terms of a value-neutral, territorial choice. It seems designed, on the one hand, to avoid any overtones of the kind of segregation discouraged in racial discrimination cases and, on the other hand, to emphasize the individual subject of the right to religious freedoms.<sup>45</sup> It is true that when the Village of Kiryas Joel was originally set up, the village boundary lines were drawn “so as to exclude all but Satmars.”<sup>46</sup> However, this was done at least in part because “[n]eighbors who did not wish to secede with the Satmars objected strenuously.”<sup>47</sup>

### B. *Robert Cover's Intervention*

The extent to which the dossier on *Kiryas Joel* assumes that the particular values and collective understandings—the “*nomos*”—of the residents of Kiryas Joel are relevant to the case points to the influence of Cover’s classic essay,<sup>48</sup>

41. See, e.g., BRUCE KAPFERER, LEGENDS OF PEOPLE, MYTHS OF STATE: VIOLENCE, INTOLERANCE, AND POLITICAL CULTURE IN SRI LANKA AND AUSTRALIA (1988); REMAPPING MEMORY: THE POLITICS OF TIME SPACE (Jonathan Boyarin ed., 1993).

42. See Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

43. The papers and commentaries refer to the residents variously as “the Satmar,” “the Satmar Hasidim” (most commonly), and “the Satmarer Hasidim” (which is closest to the Yiddish designation for the group).

44. Alison Wheeler, *Recent Development*, 30 HARV. C.R.-C.L. L. REV. 223, 242 (1995) (citing Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2492 n.9 (1994) (quoting Brief for Petitioner at 4 n.1)) (emphasis added).

45. One possible alternative would be to claim such separation as a group or community right. See, e.g., Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 149 (1990) (“Religions represent communities as well as individual identities.”). Such a claim would have entailed even greater exposure to a charge of violation of the Establishment Clause. Furthermore, it is impossible to make categorical distinctions between “communities” and “individuals” as subjects of religious or other representation. Because the boundaries of the individual and of the group are at stake within and beyond *Kiryas Joel*, Brownstein’s remark brings us no closer to an understanding of the links among religion, identity, and polity.

46. *Kiryas Joel*, 114 S. Ct. at 2489.

47. *Id.* at 2485.

48. Cover, *supra* note 11.



published a decade before the *Kiryas Joel* litigation was moving through the courts. *Nomos and Narrative* is relevant to *Kiryas Joel* because *Kiryas Joel* throws into question the individualist and territorial assumptions underlying the ideal of an objective, rule-based, and universally valid body of law, an ideal which Cover's critique eloquently undermines. *Nomos and Narrative* challenges a purely formalist or proceduralist conception of liberal state jurisprudence. Cover in effect denies that any judgment can be made on the basis of purely objective, universally valid legal principles. Rather, Cover asserts that the state should take seriously self-governing communities' claims to interpret the Constitution as it applies to them.

The essay begins with the announcement that "[w]e inhabit a *nomos*—a normative universe."<sup>49</sup> This "normative universe is held together by the force of interpretive commitments—some small and private, others immense and public."<sup>50</sup> Those interpretive commitments are contained in "narratives in which the corpus juris is located"<sup>51</sup> and thus determine the meaning of law.<sup>52</sup> *Nomos and Narrative* thus presents a theory of tensions within constitutional jurisprudence that makes strong claims for the jurisprudential authority of largely self-governing communities such as the Hasidic community of Kiryas Joel.<sup>53</sup> While Cover's analysis centers on the dynamics of such autonomous or semi-autonomous communities, he insists that "the *nomos* of officialdom is also 'particular.'"<sup>54</sup> On the other hand, regarding the state as the only origin of law "confuses the status of interpretation with the status of political domination."<sup>55</sup>

Furthermore, *Nomos and Narrative* centers on a case, *Bob Jones University v. United States*,<sup>56</sup> which has been cited by at least one authority as presenting issues analogous to those in *Kiryas Joel*.<sup>57</sup> *Bob Jones* was not the

49. *Id.* at 4.

50. *Id.* at 7.

51. *Id.* at 9.

52. *See id.*

53. In a key passage, Cover takes the contemporary Mennonites as exemplary of such nonstate *nomos* orders:

I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a 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. First, the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy. Each group must accommodate in its own normative world the objective reality of the other. There may or may not be synchronization or convergence in their respective understandings about the normative boundary and what it implies. But from a position that starts as neutral—that is, nonstatist—in its understanding of law, the interpretations offered by judges are not necessarily superior

*Id.* at 28–29.

54. *Id.* at 33.

55. *Id.* at 43.

56. 461 U.S. 574 (1983).

57. *See* Lupu, *supra* note 9, at 109–10. For more discussion of the association of the two cases in

easiest test of Cover's thesis that the claims of self-governing communities should be taken seriously vis-à-vis the "imperial" state. In that case, Bob Jones University claimed the right to maintain tax-free status as well as the right to practice racial exclusion in its admissions process. Cover, who had participated in the twentieth-century fight for civil rights, would hardly have shared the University's value of white separationism. In this light, the *nomos* in *Bob Jones University* appears unattractive in comparison to the imperial lawmaking authority of the democratic state. That the argument for taking *nomoi* seriously,<sup>58</sup> so to speak, could be made by taking such an unattractive *nomos* as exemplary adds continuing resonance to Cover's argument. Nevertheless, many commentators recognize *Kiryas Joel* as a more poetically appropriate test of Cover's argument in *Nomos and Narrative*.<sup>59</sup>

This Note argues, however, that *Kiryas Joel* points toward flawed or incomplete points in *Nomos and Narrative*. First, one of Cover's major foci is the concept of "jurisgenesis," by which he means the creative aspect of jurisprudence, the "principle by which legal meaning proliferates in all communities."<sup>60</sup> That creative process is largely contained in narratives that the juridical community tells to itself. For Cover, jurisgenesis seems to be the province of authoritative adult males creating law through discourse. Thus, the concept of jurisgenesis, as of *nomos*, is as applicable to the "community" of Supreme Court Justices as it is to the Mennonites or the Satmar Hasidim. Furthermore, Cover's jurisgenesis seems to take place at one remove from the full reproductive processes of kin-based communities. Nowhere in *Nomos and Narrative* does Cover relate meaning-creating narratives to generation in its more immediate sense—to the biocultural reproduction of groups owing allegiance to their own *nomoi*. That form of generation or genealogy, as I argue below, is crucial to understanding the situation of the people of the Village of Kiryas Joel.<sup>61</sup> Without it, the question of including handicapped children in the community might seem less urgent. They are, after all, arguably less likely than other children to be the community's future jurists. Furthermore, Cover's exclusive focus on covenantal communities reinforces a

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Lupu's argument, see *infra* text accompanying note 112.

58. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1980).

59. See, e.g., Greene, *supra* note 7, at 43 ("*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*."). Christopher Eisgruber uses the term "ethical diversity" rather than "*nomos*," but apologizes (perhaps tongue in cheek) for the substitution. See Eisgruber, *supra* note 8, at 88 n.7.

60. Cover, *supra* note 11, at 40.

61. Suzanne Stone argues that Cover's alternative model of the Jewish relation to identity in and through law is of only limited potential application to a liberal jurisprudence such as that of the United States: "According to Jewish legal tradition, many Jewish legal principles are neither appropriate nor necessary for conventional politics because these principles are tied to particularist religious ideals." Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 821 n.39 (1993).

tendency to misunderstand the Kiryas Joel community by analogy to groups of Protestant dissidents, with their emphasis on conscience and faith, and tends to obscure the importance of family loyalty and persistent ways of life that are as crucial as explicit "law" in maintaining the Satmar community.<sup>62</sup>

Second, Cover's eloquent account of the interpretive and meaning-producing claims of small-scale communities facing the liberal state casts these as claims about interpretation of the United States Constitution. Thus, discussing the rights of Mennonite religious communities, he asserts, "I am making a very strong claim for the Mennonite understanding of the first amendment."<sup>63</sup> He does not address the possibility that communal self-understandings (such as those I call diasporic, as explained below) may ignore, rather than contest or seek to conform to, the broader jurisprudential *nomos* of the state. This helps enable a claim that *only* those communal understandings that overtly contest and hence invigorate the majority consensus are worthy of any constitutional deference.<sup>64</sup>

Cover's broad arguments about the relation between meaning-generating communities and the conflicts of individual and group rights can and should be given added focus and vigor through the concepts of genealogy and diaspora, to which I now turn.

### C. Genealogy and Diaspora

Against the schema of individualism and territory may be counterposed another way of linking polity and identity. This alternative logic relies on the principles of genealogy and diaspora. Genealogy contrasts rather sharply with individualism. Rather than being suspicious of claims to group allegiance based on facts of birth, genealogy favors the assumption that much of what people *are* and *should do* is determined by the families into which they are born.<sup>65</sup> Rather than assuming that associations are made primarily by autonomous persons who determine that they have shared interests, it ultimately views communities along the model of extended kinship groups. Rather than assuming that facilitation of each person's self-fulfillment is the proper goal of social organization, it aims toward the maximization of collective integrity,

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62. See *infra* Section IV.A.

63. Cover, *supra* note 11, at 28.

64. See *infra* text accompanying note 109.

65. The Hasidic obsession with children and family is a rare example of an accurate stereotype. See MINTZ, *supra* note 14, at 68 ("The major focus of the Hasidic family is to produce, nurture, and educate the children. This is a virtue sustained by law and custom and reinforced by a commonly understood need to replace the generation that vanished [in the Holocaust]."). Here the functional link between genealogy and diaspora is clear. An emphasis on the primary value of loyalty to earlier generations and their replacement as continuity through child-rearing reinforces the imperative of communal identity. Genealogy thus provides the historical continuity that a diasporic group cannot obtain from the security of territorial exclusivity and dominance.

security, and perpetuation.<sup>66</sup> Rather than positing a bright line separating nurture from nature, or culture from biology, it assumes continuity among birth, upbringing, and identity.

Diaspora broadly describes the phenomenon by which groups of people identify with each other on the basis of certain shared characteristics and a shared place of origin from which (in the recent or legendary past) they or their ancestors have been removed.<sup>67</sup> There may be profound dislocations not only between peoples in diaspora and their ancestral homeland, but also between communities of the same diaspora in different parts of the world. Diasporas resist any scheme in which primary allegiances are supposed to be determined by local contiguity with the surrounding population, regardless of differing ancestry and background. Lacking the means of coercion available even to democratic territorial states, diasporic communities stress and “enforce,” to the extent they can, the genealogical constraints on their members’ identities.<sup>68</sup>

Having identified the notions of diaspora (in which territory is not a neutral ground for citizenship) and genealogy (in which identity is substantially determined by ancestry), it becomes possible to see how mainstream American notions of polity and identity depend on a subordination of ancestry and “foreign” geographical origin. Thus the individualist bent of American politics is tied to a historically grounded rejection of genealogy. The forms of genealogy involved in this Americanist rejection were primarily those determining hereditary social stigmas and privileges. In English political theory at least, by the turn of the eighteenth century, “genetic justification and the identification of familial and political power were becoming dead issues.”<sup>69</sup> The rejection of inherited stigmas is explicit in the U.S. Constitution’s provision that no citizen shall suffer from “corruption of blood,”<sup>70</sup> that is, that no one will be deprived of privileges enjoyed by any other citizen because of his or her parent’s treason. Likewise, there are to be no titles of nobility conferred or recognized by the United States.<sup>71</sup> Metaphorically, the newly

66. See generally Daniel Boyarin & Jonathan Boyarin, *Diaspora: Generation and the Ground of Jewish Identity*, 19 *CRITICAL INQUIRY* 693 (1993) (discussing relevance of Jewish diasporic experience for transnational identities in contemporary world). Because of the centrality of reproduction in genealogy, it cannot be conflated with the notion of “the group” as a cross section of mutually affiliated individuals at any given time. See JONATHAN BOYARIN, *Self-Exposure as Theory: The Double Mark of the Male Jew*, in *THINKING IN JEWISH* 34 (1996).

67. See generally James Clifford, *Diasporas*, 9 *CULTURAL ANTHROPOLOGY* 302 (1994) (discussing difficulty of formulating definition of “diaspora” which accurately captures experiences of different groups).

68. See Jonathan Boyarin, *Powers of Diaspora* (Nov. 1, 1994) (unpublished manuscript, on file with the *Yale Law Journal*); see also SOLOMON POLL, *THE HASIDIC COMMUNITY OF WILLIAMSBURG* 81 (1962) (“Upward social mobility [in the Hasidic community] is in direct relationship to strict religious conformity. The Hasidic basis for upward mobility is remarkably similar to that of the American soldier, who has a better chance for promotion if he conforms to established military norms.”).

69. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 24 (1988) (quoting GORDON SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT* 276 (1975)).

70. U.S. CONST. art. III, § 3, cl. 2.

71. See *id.* art. II, § 9, cl. 8; *id.* § 10, cl. 1.

united states could be seen as acting to dissolve ties to England as the "mother country."<sup>72</sup>

However, the rejection of genealogy is inconsistent with constitutionalist arguments about the fundamental "commitments" of "the American people," such as those made by Eisgruber.<sup>73</sup> There is no peoplehood without at least some recourse to rhetorical genealogy, as our common reference to the "Founding Fathers" makes clear.<sup>74</sup> The claim that something called "the American people" has made fundamental commitments to the Constitution introduces through the back door a genealogical fiction that we are all descendants of the Founders. The claim that American citizens today are bound by compacts made in the late eighteenth century betrays the antigenealogical premises animating the conception of personal freedom that informs the Constitution. Perhaps *Kiryas Joel* ultimately is constitutionally "anomalous" because it undermines the foundational notion of a genealogically open, territorially defined peoplehood.

Considering *Kiryas Joel* in terms of diaspora and genealogy also helps to clarify the conflict *within* Kiryas Joel and the larger Satmar community. That conflict, which surrounded the succession to rabbinic leadership of the Satmar after the death of Rabbi Joel Teitelbaum, extends beyond the school board issue, and includes questions of accommodation or resistance to Zionism,<sup>75</sup> the movement of Jewish territorial nationalism.

This conflict also encompasses an agonizing debate over the degree of "accommodation" to the surrounding State that should govern the Satmar community's policy. Kenneth Karst has argued that "[a] cultural group's active participation in politics is a step along the path to assimilation."<sup>76</sup> Implicitly, this is the theory adopted by—and the fear motivating—the integrist minority in Kiryas Joel that did not want any state involvement in the education of any

72. See Spivak, *supra* note 38, at 144 ("Under the circumstances it was necessary to efface another signature of state by "dissolving" the lines of colonial paternity or maternity") (quoting JACQUES DERRIDA, *OTOBIOGRAPHIES: L'ENSEIGNEMENT DE NIETZSCHE ET LA POLITIQUE DU NOM PROPRE* 24 (1984)). The Protestant notions of freedom and subjectivity at play in the foundation of the republic and the writing of the Constitution were also informed by the Gospel's explicit ideal of subordinating, if not totally rejecting, genealogy. The new "children of God" are those who "were born, not of blood, nor of the will of the flesh, nor of the will of man, but of God." *John* 1:13. *Hebrews* 7:3 states that God's priest is not only "fatherless" and "motherless," but even "without genealogy" (*agenealogetos*). See Anton Schutz, *Sons of Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving*, 16 *CARDOZO L. REV.* 979, 1005 (1995); see also DANIEL BOYARIN, *A RADICAL JEW: PAUL AND THE POLITICS OF IDENTITY* (1994) (exploring implications of Paul's antigenealogical universalism for politics of identity in West).

73. See Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 *NW. U. L. REV.* 408–10 (describing how structurally embedded commitments of American people trench secularism).

74. The height of this inconsistency is reached in Justice Scalia's superficially eloquent but ultimately absurd dictum: "In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Scalia, J. concurring in part and concurring in judgment).

75. See WEISS ET AL., *supra* note 13, at 25.

76. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 *N.C. L. REV.* 303, 331 (1986).

of Kiryas Joel's children. That minority sees state-provided education as a disservice to the handicapped and the beginning of a slippery slope toward assimilation.<sup>77</sup> Ironically, the constitutionality of the school board is attacked in turn because of evidence of repression of that anti-assimilationist dissent within the Village.<sup>78</sup> This repression of dissent is seen as evidence that creating the school board constituted "granting political authority to a religious group."<sup>79</sup>

I suggest that the foundations of both the Village and the school district appear problematic not because they constituted the granting of political authority "to a religious group" (which facially, of course, neither did), but because the close identification among the constituents of both entities precluded the fiction of an otherwise neutral and purely territorial circumscription of polity. Contrary to what we would expect from this quote, communal repression was not and is not exercised by the majority in Kiryas Joel against those who would threaten the boundaries separating the residents from the outside society. Instead, repression is aimed at those attempting to perpetuate an older notion of greater separation, who also remain personally loyal to the memory of the old leader, Rabbi Joel Teitelbaum. This faction in the community associates the strategies of managerial accommodation, negotiation, and resource maximization evident in the process leading to the establishment of the Kiryas Joel Village School District with the new leadership.<sup>80</sup> Thus not only the constitutional theorist Karst,<sup>81</sup> but to this extent perhaps the dissident faction as well, ignore the possibility that active participation in politics might be the most effective way for a group to negotiate the social space for its continued collective existence. Such is the strategy pursued by the Satmar majority under the new *Rebbe*.

Viewing *Kiryas Joel* schematically as a conflict between principles of territorial citizenship and individualism on one hand, and principles of diasporic and genealogical allegiance on the other, thus helps to account for

77. During the earlier *Kiryas Joel* litigation, members of the minority demonstrated against the secular, special education public school in Kiryas Joel. See Photograph, N.Y. TIMES, July 20, 1993, at B4 (showing posters bearing texts such as "Handicapped children are loved by God. Do not deny Him to them!"). The caption to the photograph mistakenly claims: "The protestors are asking that the school be allowed to remain open." *Id.*

78. Dissidence was not limited to the issue of special education, and it was actively repressed. When in 1988 some parents attempted to start an independent *religious* school, "[t]elephone threats were made to the dissidents; automobile tires were slashed; and on occasion rocks were hurled through the window of a shul or household." MINTZ, *supra* note 14, at 315. Furthermore, dissidents who have run for election to the school board have faced ostracism, vandalism, and death threats. See Jeffrey Rosen, *Kiryas Joel and Shaw v. Reno: A Text-Based Interpretivist Approach*, 26 CUMB. L. REV. 387, 392 (1996).

79. Charles B. Schweitzer, Recent Decision, 33 DUQ. L. REV. 1007, 1030 n.181 (alluding to "fusion test" of giving power to religious institution traced by Justice Souter to opinion in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)).

80. As one anonymous informant reported: "'The [new] Rebbe is losing the respect of the people. [Under him] [t]he community works like a well-established business.'" MINTZ, *supra* note 14, at 211. The extent of this "loss of respect," however, should not be exaggerated.

81. See *supra* note 76.

disturbing aspects of the Kiryas Joel community without necessitating a conclusion that its governmental powers are illegitimate. Furthermore, this schematic account makes it possible to see more clearly the contingent and usually implicit assumptions underlying the “particular universalism” of the Constitution. The next Part of this Note examines the traces of those assumptions in the texts constituting the *Kiryas Joel* debate.

#### IV. TELLING TALES IN (CONSTITUTIONAL) SCHOOL

This Part of the Note examines figures of speech used to mold different accounts of the *Kiryas Joel* conflict to varying positions within the spectrum of constitutional discourse. This shaping process is central to the “schooling” of judges, their clerks, law students, and their professors into the constitutional *nomos*. This Part will first undertake a broad assessment of this shaping process, then examine a few key terms more closely. I argue that seemingly neutral or even sympathetic categorizations of Kiryas Joel assume a general American community as the standard against which *Kiryas Joel* is to be judged.

##### A. *Metaphors We Judge by*

As contemporary language theory asserts, metaphors and narratives are not mere ornamentations, but are central to the construction of meaning in and through language.<sup>82</sup> We will therefore miss important aspects of the literature surrounding *Kiryas Joel* unless we attend to the way in which the story is told, the social categories into which the residents are placed, and the images employed in descriptions of the conflict. In *Kiryas Joel*, as discussed below, much turns on the political implications of territorial boundaries presumed to be neutral.<sup>83</sup> Hence analyses of *Kiryas Joel* frequently involve recourse to spatial metaphors and narrative models that help structure our conceptions of the issues involved.

Constitutional debates about religion are often cast against the legendary background of the Puritan colonists in North America. The Protestant founding communities explicitly understood themselves as analogous to Israelites, and thus as being in a “covenantal” relationship vis-à-vis God and each other.<sup>84</sup> It is easy to connect the Jewish Satmar group as a further link in this chain of covenantal communities, and there are numerous reasons why it is tempting to analogize the residents of Kiryas Joel to the Pilgrim migrants to America. The move of a segment of the Satmar Hasidic community from Williamsburg,

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82. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); Hayden White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE 1* (W.J.T. Mitchell ed., 1981).

83. See *infra* Part V.

84. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (1988).

Brooklyn to upstate New York is sometimes referred to as an “exodus.”<sup>85</sup> Quite different but equally powerful narratives are evoked here—on the one hand, leaving Babylon (the city), on the other, leaving Egypt for the Promised Land of Monroe.

Such an association, even if implicit, lends credibility to Abner Greene’s notions of complete exit (exemplified by the *Yoder* case, which established the right of Amish parents to keep children out of school) and partial exit (as in *Kiryas Joel*) as legitimate grounds for communal autonomy.<sup>86</sup> At least one commentator has made the further, and clearly erroneous, association between Satmar Hasidim and Protestant groups on the basis of Biblical literalism.<sup>87</sup> The connection that makes this a peculiarly American exodus, however, is the evocation of the Puritan errand into the wilderness<sup>88</sup> in search of a place to be faithful and pure. The model for such an exodus within the American continent would be Roger Williams, who left to found a new religious/political/geographic community, made up of people who shared his dissident faith.<sup>89</sup>

Martha Minow uses a different spatial metaphor to illustrate why *Yoder* is perhaps a less “hard case” than *Kiryas Joel*. She argues that the Amish parents’ claims to the right to be left alone are congenial to the terms of the Constitution. For Minow the situation in *Yoder* “supports an image of Russian nesting dolls in which each subcommunity fits comfortably within the larger enclosure of the dominant state.”<sup>90</sup> *Kiryas Joel*, in Minow’s view, represents a conflictual model illustrated by “an image of spinning tops, each pursuing its own orbit but occasionally running into another, with such collisions setting each off balance.”<sup>91</sup>

Yet another spatial metaphor is employed by Nomi Stolzenberg. Drawing on Emily Dickinson’s poem, *He Drew a Circle That Shut Me Out*, Stolzenberg employs a dynamic metaphor of inclusive and exclusive circles. At the center of such imaginary circles are the members of either larger and usually

85. Craig L. Olivo, Note, *Grumet v. Board of Education of the Kiryas Joel Village School Dist.—When Neutrality Masks Hostility—The Exclusion of Religious Communities from an Entitlement to Public Schools*, 68 NOTRE DAME L. REV. 775, 778 (1993).

86. See *infra* text accompanying note 108.

87. See Wheeler, *supra* note 44, at 224 (“They believe in a literal interpretation of the Torah . . .”). Literal interpretation of the Torah is disavowed by Rabbinic Judaism, which dictates instead rigorous reliance on a long tradition of authoritative *interpretation*. Nor do Christian Fundamentalists necessarily believe in a literalist reading of the Bible. See Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 615 (1993). Yet that misconception seems the most likely source of Wheeler’s distortion of the actual statement in *Kiryas Joel*: “They interpret the Torah strictly . . .” Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994).

88. See PERRY MILLER, *ERRAND INTO THE WILDERNESS* 12 (1956) (explaining that Puritans’ “first aim was . . . to realize in America the due form of government, both civil and ecclesiastical”).

89. See THOMAS J. CURRY, *THE FIRST FREEDOMS* 19 (1986) (narrating Roger Williams’s departure).

90. Martha Minow, *Rights and Cultural Difference*, in IDENTITIES, POLITICS, AND RIGHTS 347, 357 (Austin Sarat & Thomas R. Kearns eds., 1995).

91. *Id.*



dominant or smaller and often subordinate groups—e.g., “the people of Monroe” or “the Satmar Hasidim.” In some situations the circles are drawn large to include even those who do not share the identity at the center of the circle. In other situations they are drawn narrowly to circumscribe the core group. When they are large, they can be tolerant (“feel free to join us”) or coercive (“you must become like us”). When small, they may be protective (“leave us to ourselves”) or, again, coercive (“you may not go outside”).<sup>92</sup>

These spatial metaphors suggest a more nuanced view of group relations and cast in a new light the insistence in the school district’s brief that mixing with nonreligious children was not “against the religion” of the Satmar Hasidim.<sup>93</sup> Nothing in Biblical or Rabbinic law mandates total segregation from non-Jews. Yet various Jewish laws, maxims, and customs have been deployed since Biblical times in order to enforce the cultural boundaries of the group. Indeed, efforts to minimize contact with non-Jewish culture could plausibly be claimed as a religious mandate.<sup>94</sup> Had the case been defended on free exercise grounds, the claim for such a religious mandate might have been sound strategy.<sup>95</sup> The failure to make such a claim might have resulted from the school board’s primary concern to fend off an adverse ruling based on the Establishment Clause. If so, this would also explain the board’s insistence that the children’s emotional discomfort in the public schools was the full reason for legislative action to allow separate public schools for handicapped children.<sup>96</sup> Given that there is a balance of interests and claims here, if our understandings of the Establishment and Free Exercise Clauses force a party in a dispute under the religion clauses to distort what the party wants to say about itself, it becomes harder for a court to resolve a dispute in a fair and principled way. In other words, it is harder for the court to respond both to the Constitution and to the needs of citizens.<sup>97</sup> Spatialist formalism

92. See Stolzenberg, *supra* note 87, at 585.

93. See *supra* text accompanying note 44.

94. See ISRAEL RUBIN, *SATMAR: AN ISLAND IN THE CITY* 92–93 (1972)

95. See Stolzenberg, *supra* note 87, at 601 (“*Sherbert* and its progeny defined the pressure to act in violation of a religious command as the paradigmatic free exercise burden.”) If this is true, the Kiryas Joel school board might have been well advised to argue that before their school was set up, parents of children who required special education were pressured to violate the “religious command” to raise their children in as exclusively Orthodox an atmosphere as possible. That a plausible case could be made either way suggests how difficult it is to separate a “command” from a “preference” in matters of communal religious culture.

96. See *Petition for a Writ of Certiorari for Petitioner at 4–5, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-529, 93-539)

97. For example, Brownstein discusses the relation between establishment and free exercise in linear terms, claiming to “attack the problem of finding a middle ground at its roots by developing a doctrinal foundation for determining when the accommodation of free exercise rights ends and the prohibition of establishment clause preferences begins.” Brownstein, *supra* note 45, at 90; see also Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 *YALE L.J.* 1127, 1146 (1990) (“[T]he free exercise principle defines the limits of the anti-establishment principle.”). It is equally plausible to speak in terms of “a delicate and elusive balance,” Welton O. Seal, Jr., Note, “*Benevolent Neutrality*” *Toward Religion: Still an Elusive Ideal After Board of Education of Kiryas Joel v. Grumet*, 73 *N.C. L. REV.* 1641, 1641 (1995), rather than tension, but here

applied to the facts of a given situation is likely to detract from awareness of the situated and complex nature of identity, an awareness that I claim is essential to more effective jurisprudence. Objective judicial “equilibrium” is in any case an impossibility.<sup>98</sup>

If in 1791 there was “a general Protestant ethos underlying society,”<sup>99</sup> it is harder to make the claim that a broad Protestant ethos characterizes the population of the United States at the end of the twentieth century. Hence, jurisprudence implicitly based on this assumption will inadequately safeguard the religious freedoms of United States citizens. True, inasmuch as religious beliefs and practices are founded on inclusions and exclusions, such jurisprudence can never be perfect. In cases like *Yoder* and *Kiryas Joel*, a court will always have to draw the circle somewhere. Yet it seems that forcing accounts of *Kiryas Joel* into categories derived from Protestant religious experience—such as the Puritan Exodus model discussed above or the notion of “sect” examined below—limits unnecessarily the possible responses to forms of difference within a unitary constitutional frame.

### B. Sect, Subgroup, and Subcommunity

Consistent with Cover’s assertion that meaning is created in language, this Note assumes that in a broad sense the opinions and surrounding legal

balance and tension effectively function the same way. Both strategies envision the ideal possibility of specifying that narrow appropriate space wherein the distinction between the realms of the two clauses can be discerned.

Another dilemma concerning the relation between the Establishment and Free Exercise Clauses can be traced at least in part to the individualist bias. It seems natural enough, in a jurisprudence of religion founded on Protestant experience, to identify the establishment of religion with collectives and free exercise with individual rights. “Rights of free exercise are quintessentially rights of autonomy. . . . [They are about] living in accord with one’s deepest presuppositions about humankind and nature.” Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 319, 422 (1987). Although *Kiryas Joel* is neither about “one’s . . . presuppositions” nor about personal autonomy, but about a generational community, it is not obvious why we should not view it as raising free exercise claims. Indeed, it has been suggested that the decision in *Kiryas Joel* was right as an Establishment Clause case, but that the case should have been brought as a Free Exercise Clause case. See Schweitzer, *supra* note 79, at 1029–30. If so, it is another example of the jurisprudential constraints to which the representatives of the Village fit their case to their own disadvantage.

Alternatively, free exercise may be associated with “exit” (not in the sense of a literal move away from society, but in the preservation of religious distinction through social detachment, as in *Yoder*), while the attempt by a religious group to retain certain perquisites of “proximity” by obtaining social benefits available from the government will be considered in the framework of establishment, as in *Kiryas Joel*. See Joanne Kuhns, Note, Board of Education of Kiryas Joel Village School District v. Grumet: *The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599, 1665–66 (1995). This will hardly be a principle adequate to the range of claims adjudicated under the constitutional rubric of “religion.” By declaring what is done away from the broader society (even by a collective) as “private” free exercise, and what is done in interaction with the broader society as “establishment,” it essentially extends outward the Protestant notion of the freedom of individual, private conscience.

98. See Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 YALE J.L. & FEMINISM 137, 169 (1995) (“Because the line between lifting a burden and conferring a benefit depends so crucially upon perspective, the line serves as an unreliable and inappropriate measure of the constitutionality of government action.”).

99. Berg, *supra* note 5, at 442.

discussions of *Kiryas Joel* are the case. As discussed in the next Part of this Note, a good deal of the judicial and scholarly discussion of the case hinges on the putative neutrality of the criteria by which the Village and school district were established.<sup>100</sup> The putatively neutral categories used to describe the Kiryas Joel Satmar as a group require a similar examination. Here, I argue that the seemingly neutral terms “sect,” “subgroup,” and “subcommunity” betray an assumption that citizens should identify primarily as “individual Americans.”

Justice Souter’s opinion begins quite carefully, merely referring to the Satmar Hasidim as “practitioners of a strict form of Judaism.”<sup>101</sup> Later in the opinion, however, he refers to them as a “sect.”<sup>102</sup> This terminology is echoed in the various student-written pieces on *Kiryas Joel* and on *Grumet*.<sup>103</sup> Why this term should seem apt is not immediately evident. Its definition in the *American Heritage Dictionary* emphasizes distinctness within a larger group, religious character, and shared interests or beliefs, and traces the term to the Latin *secta*, meaning “course, [or] school of thought.”<sup>104</sup> *Roget’s 21st Century Thesaurus* confirms the intellectual and religious emphases of the term.<sup>105</sup> Both of these definitions rely on the notion of a religious group as a set of otherwise autonomous individuals coming together in shared faith. Nothing in them suggests the likelihood of kinship bonds among members of “sects.” Nothing about “subgroup,” “subcommunity,” or “sect” adequately suggests the genealogical ties that are crucial to maintaining a diasporic communal *nomos*.<sup>106</sup>

100. See *infra* Part V.

101. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S Ct 2481, 2484 (1994)

102. *Id.* at 2492.

103. See Kuhns, *supra* note 97, at 1599; Seal, *supra* note 97, at 1642; Schweitzer, *supra* note 79, at 1007; Wheeler, *supra* note 44, at 223 (“The Satmar are the most ascetic sect of the Hasidim . . .”). Thomas, *supra* note 4, at 532, refers to the community as “the Satmarer Hasidim, a sect of the Jewish faith.” He continues: “The Satmarer, in addition to separation from an outside community, practice separation between sects [sic] and follow a male and female dress code. Radio, vision [sic], and publications in English are not widely used.” *Id.* at 532–33. The substitution of “sects” for “sexes” and of “vision” for “television” are obviously copyediting errors, not ethnographic inaccuracies. Nevertheless, the fact that they slipped through the article’s editing process suggests that a canned, sound-bite like description of the Satmar Hasidim has been formulated. Similarly noteworthy is Acklin’s reference to the Village itself as a (presumably collective) religious actor: “The Village of Kiryas Joel (Village), a religious enclave of Satmar Hasidim, practices a strict form of Judaism.” Acklin, *supra* note 4, at 43. Budding legal scholars’ reliance on outmoded ethnographies may be the cause of other distortions, such as the claim that “the Satmar Hasidic sect . . . eschew all modern conveniences such as . . . cars.” Laura M. Hempen, Note, Board of Education of Kiryas Joel School District v. Grumet: *Accommodationists Strike a Blow to the Wall of Separation*, 39 ST. LOUIS U. L.J. 1389, 1403 (1995), and the exotic suggestion that they are “considered strangers even in the Jewish community . . .” *Id.*

104. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1232 (3d ed. 1993).

105. See ROGET’S 21ST CENTURY THESAURUS 742 (Barbara Ann Kipfer ed., 1992)

106. Even Souter’s initial reference to the Satmar as practitioners of strict Judaism may be misleading, insofar as it may be taken to mean that Satmar is a subset of the “Jewish faith.” Describing the Satmar *nomos* as a form of “Judaism” might imply a particular heightened standing for other groups designating themselves as “Jewish” when appearing as *amici* in a case involving Satmar Hasidim. As suggested above, much of the liberal Jewish organizations’ motivation can be explained by their continuing belief that a state truly respectful of individual rights is the best guarantor of the safety of peoples such as Jews. That belief

The title of Martha Minow's article, *The Constitution and the Subgroup Question*,<sup>107</sup> suggests her intention to place the case in the context of Jewish "minority" status. As her prefatory thumbnail sketch of Jewish history suggests, Jews seem to be a sort of paradigm "subgroup" for her, and she states that her title is meant "to allude . . . to the phrase, 'The Jewish Question.'"<sup>108</sup> More generally, Minow's account suggests that "Americans," that group constituted by the Constitution, are the primary group with respect to whom the residents of Kiryas Joel might appear as a subgroup. Minow's phrase is troubling, for in marking only the "subgroup" for question, it may leave the impression that this larger group may be taken for granted as sharing a normative identity that makes them American. If the group is "Americans" and subgroups are subject to question, are they part of the group or not? The use of the term "subgroup" effectively undermines Minow's stated goal of explaining the background to *Kiryas Joel* from the subgroup's own perspective. In suggesting that its members are less than fully members of the group, Minow's use of "subgroup" betrays a subtle and doubtless inadvertent assimilationist bias.

Christopher Eisgruber, responding to Abner Greene's essay in defense of the right to partial exit, relies on a claim of American collective identity as a positive social phenomenon that the Constitution is designed to foster. Because he believes that collective identity is sustained in part by challenges to its own self-justification, he finds that the Constitution has a place for what he calls "sub-communities."<sup>109</sup> The place normative constitutionalism grants to subcommunities is, in Eisgruber's view, therefore dependent on those subcommunities' ability to provoke reflective self-questioning within the constitutional polity: "[B]ecause reflective constitutionalism is self-critical about the good, it values such sub-communities as sources of dissent and respects them as sincere efforts to pursue a vision of the good that might, after all, prove correct."<sup>110</sup> Eisgruber forces all distinctive groups into the model of principled dissenters. This is particularly unfortunate for the evaluation of

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is not necessarily shared by diasporist-integrist Jewish communities like Satmar. Such communities are less likely to share general liberal assumptions about a tendency toward increasing rationalization of society and increasing recognition of human and civil rights, and partly for that reason, they are less likely to make Kantian or Rawlsian investments in a vision of the general good. Given that the dispute concerned the putative establishment of religion by the small and local group of Satmar Hasidim in Kiryas Joel, it is worth recalling that while even the name of Satmar reflects particularity rather than any universal pretensions, the names of the liberal organizations imply generality and hence a greater tendency toward the articulation of nationwide norms regarding religion.

The list of joint filers of one of the *amicus* briefs illustrates this universalist tendency. See Brief *Amicus Curiae* of Americans United for Separation of Church and State, American Jewish Committee, Anti-Defamation League, American Civil Liberties Union, National Council of Jewish Women, and the Unitarian Universalist Association, In Support of Respondents, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-529, 93-539).

107. Minow, *supra* note 6.

108. *Id.* at 1.

109. Eisgruber, *supra* note 8, at 91.

110. *Id.*

the Satmar Hasidim. They are more interested in carrying out a contract that they believe their ancestors made with God than in promoting the universal correctness of their "vision of the good." Given Eisgruber's criteria, it is not clear why the United States should accommodate groups "which, like the Satmars or the Amish, reject[] principles of justice fundamental to the American regime."<sup>111</sup> If subcommunities are to be tolerated only because of the benefits they provide to an invigorated constitutionalism, they may be subtly but inevitably forced to present themselves and to understand themselves on the terms of the putative general community. Eisgruber may endorse such a process, yet even on his own terms, the pressure of assimilation diminishes the space available for the dissent whose challenge he values.

Ira Lupu employs the notion of subcommunities as well, but questions whether such subcommunities are really governed by the integrity of an internal *nomos*. Unlike Eisgruber's by now more conventional association of the Satmar Hasidim and the Amish, Lupu analogizes *Kiryas Joel* not only to *Bob Jones University*, but to much more ominous names in the news. Thus Lupu claims that Greene's analysis is not helpful with regard to "the sort of problems presented by *Kiryas Joel*, *Bob Jones University*, the Waco Branch Davidians, the Montana Militia, and the myriad sub-communities to which it might be applied."<sup>112</sup> Here "sub-community" acquires some of the same negative connotations as does "sect." Consistent with Lupu's title, *Uncovering the Village of Kiryas Joel*, the subcommunity here seems almost *beneath* community, surreptitious, underground. In fact, the ominous connotations of sectarianism<sup>113</sup> and the actuality of bitter struggles within *Kiryas Joel* are at the heart of Lupu's article.<sup>114</sup> Lupu argues that "the structure of authority in the Village presented an unusually high risk of unconstitutional governance. So uncovered, the Village appears to be a poor candidate for the dual rule of *nomos* community and repository of state power."<sup>115</sup> Lupu means to demystify the idea of the Satmar "*nomos*." His title thus represents a complex pun. At one level, it has an aggressively investigative connotation. Lupu purports to dig beneath the surface of the official court representation of the issues, bringing in the "dirt" about the heart of darkness constituting *Kiryas Joel*'s undemocratic structure. Lupu also aims to dispel Justice Scalia's

111. *Id.*

112. Lupu, *supra* note 9, at 109–10.

113. These connotations may be seen in the lists of terms associated with the noun form of sectarian, "person who is narrow-minded" ("adherent, bigot, cohort, disciple, dissenter, dissident, dogmatist, extremist, fanatic, henchman/woman, heretic, maverick, misbeliever, nonconformist, partisan, radical, rebel, revolutionary, satellite, schismatic, separatist, supporter, true believer, zealot") and with the adjective form of sectarian, "narrow-minded, exclusive" ("bigoted, clannish, cliquish, dissident, doctrinaire, dogmatic, factional, fanatic, fanatical, hidebound, insular, limited, local, nonconforming, nonconformist, parochial, partisan, provincial, rigid, schismatic, skeptical, small-town, splinter"). ROGET'S 21ST CENTURY THESAURUS, *supra* note 105, at 742.

114. Lupu, *supra* note 9.

115. *Id.* at 104–05.

suggestion that it is ludicrous to think of the Satmar Hasidim as enjoying anything like the degree of power that could make them likely candidates for the establishment of religion.<sup>116</sup> Responding to Scalia, Lupu stresses that Hasidic Jews are a well-organized “non-ideological swing vote group” that was well-connected to the administration of Governor Mario Cuomo.<sup>117</sup> Ultimately, Lupu aims to demystify the more romantic readings of Cover’s original idea of “*nomos* communities.” Thus Lupu suspects “that so-called *nomos* communities are likely to reveal a high frequency of constitution-flouting.”<sup>118</sup> That is, the *nomos* may be nefarious.

Doubtless he is correct on this point. Cover himself acknowledged that Jewish communities in diaspora have perpetuated themselves partly through the deployment of forms of coercion, albeit forms short of the state power for which he reserved the term “violence.”<sup>119</sup> Speculations about the frequency of Constitution-flouting should not determine the constitutionality of granting different governmental powers to different kinds of communities. Actual violations of voting rights or free speech should be dealt with by ordinary police powers. This is the mechanism dictated by the balance in the United States between state police powers and the range of relations between politics and identities.<sup>120</sup> If metaphors constitute meaningful language, we must be

116. Here at least, Justice Scalia rhetorically adopted the “Satmarer perspective”:

The Grand Rebbe [Joel Teitelbaum] would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an “establishment” of the Empire State.

Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2506 (1994) (Scalia, J., dissenting).

117. Lupu, *supra* note 9, at 118. Lupu links Cuomo’s support for the creation of the Village school district and Cuomo’s support for “a taxpayer-financed ‘bereavement fund’ for the Crown Heights Hasidic community after the death of its revered Rebbe, Menachem Schneerson.” *Id.* Only from the outside is it plausible to characterize the Lubavitch community in Crown Heights and the Satmarers of Williamsburg or Kiryas Joel as part of a single “Hasidic community.” Minow is aware of the rift between Satmar and Lubavitch. She suggests that “given the historical tensions between the Satmar and Lubavitch Hasidic communities, an intriguing experiment in integration would bring Lubavitch children with disabilities into the Kiryas Joel public school.” Minow, *supra* note 6, at 23. There is something repugnantly unrealistic about Minow’s suggestion. Such an experiment might be “intriguing,” but it might well be a painful failure. Were I a Satmar or a Lubavitch parent, I would not readily volunteer my disabled child as a subject of such an experiment. One may share the values of integration and inclusion, yet question here (as I also do regarding Justice Stevens’s dissent) why children with disabilities should be the subject of such experiments merely because they are entitled to and need state services. *See infra* text accompanying note 163.

118. Lupu, *supra* note 9, at 112. Lupu acknowledges that such extra-record considerations should not have influenced the Supreme Court’s decision. *See id.*

119. ROBERT COVER, *Obligation: A Jewish Jurisprudence of the Social Order*, in NARRATIVE, VIOLENCE AND THE LAW 239, 242 (1993). The recent case of apparent arson at a maternity-convalescent center in Kiryas Joel run by the dissident faction might have given even Cover pause. *See* Robert Hanley, *In the Ashes of Arson at Kiryas Joel, Tensions of Bitter Factionalism*, N.Y. TIMES, July 29, 1996, at B1.

120. Unlike Justice Scalia’s summary dismissal of the notion that a group like the Satmar Hasidim could “establish” religion in America, Judge Bellacosa of the New York Court of Appeals noted carefully in his dissent there that “no claim is made of any alleged restrictive covenants among the village’s property owners, or of any alleged irregularity in the conduct of municipal or school district elections . . . .” *Grumet v. Board of Educ.*, 618 N.E.2d 94, 113 (N.Y. 1993) (Bellacosa, J., dissenting). One might say Justice Bellacosa was being obtuse or formalistic. I am suggesting that how to deal with such claims may depend substantially, and legitimately, on how and where they are raised. *See* Berg, *supra* note 5, at 488 n.249

careful of the metaphors we use. Here at least the “uncovering” pun has lead Lupu’s conception astray.

The emphasis on metaphors and categories in this Part of the Note is not meant to suggest that such terms and phrases uniquely or ultimately *determine* judicial or scholarly opinions. They range widely from overt suspicion of the Kiryas Joel setup to frank sympathy for the “right to be different.” Yet all of them cast the Kiryas Joel community in some sort of “sub-,” secondary status vis-à-vis the normative group putatively governed by and faithful to the Constitution. The term “sect,” even where it is not pejorative, focuses on the feature of individual belief and occludes the genealogical dynamic, while “subgroup” and “subcommunity” imply “outsider” status. Whether to keep them out or pull them in, these categories draw subtly coercive circles.

#### V. DIFFERENT ESTABLISHMENTS

This Part of the Note examines the apparent discrepancy between the creation of the Village of Kiryas Joel, which all judges and commentators agree is constitutionally permissible, and the creation of the Kiryas Joel school district, which is thoroughly controversial. Here I question the presumption of politically neutral territory to suggest that the establishment of the Village may have more complex implications than the literature has yet acknowledged. I likewise point out that the suppression of genealogy in constitutional discourse leads in effect to the recoding of genealogy as “race,” which may make the establishment of the school district considerably more troubling than it need or should be.

The relation between the establishment of the Village and of the school district is discussed in Justice Souter’s opinion for the Court. Souter distinguishes the creation of the Kiryas Joel district from two related and permissible processes. On one hand, “[t]he district in this case is distinguishable from one whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists.”<sup>121</sup> On the other, the creation of the district “contrasts with the process by which the Village of Kiryas Joel itself was created, involving, as it did, the application of a neutral state law designed to give almost any group of residents the right to incorporate.”<sup>122</sup> Yet these two statements appear to contradict one another. If the Village was created in accord with a “neutral

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(“The proper action would have been to sue to enjoin the coercive actions, not to strike down an independent piece of legislation that is secular on its face and in its operation.”). After all, while the commitment of *nomie* communities to American constitutionalism may be questioned, it is a settled principle of Jewish diasporic communities that *dina de-malkhuta dina*—the law of the state is [binding] law BABYLONIAN TALMUD, TRACTATE BABA BATHRA 54b.

121. *Kiryas Joel*, 114 S. Ct. at 2491 n.6.

122. *Id.* at 2491 n.7.

state law” and the school district conforms to the boundaries of the Village, how do the boundaries of the district differ from “boundaries . . . derived according to neutral . . . criteria”? To see how this contradiction could pass unnoticed in Justice Souter’s opinion, we must look more carefully at the implicit concepts governing the different views of the establishment of the Village and of the school district.

#### A. *Establishment of the Village*

Individual and territorial notions of the relation between space and identity are at the base of the amici briefs filed against the school district by several liberal Jewish organizations. It is generally understood that such organizations pursue a legal agenda of the strictest separation of church and state, on the premise that any weakening of the constitutional ban against religious establishments, even in favor of a minority group, is likely to inure sooner or later to the general detriment of religious minorities. These organizations may also have been less sympathetic to the Satmar Hasidim in general because of the Satmarers’ reputation for standoffishness vis-à-vis other Jews.<sup>123</sup> Remembering that these Jewish organizations argued against the Village should make us wary of claims that the Court evidences “hostility” toward religion in general.<sup>124</sup>

The liberal Jewish organizations, like everyone else, jumped on the bandwagon too late. For those concerned with religious establishment, the litigation over the special school district in *Kiryas Joel* really should have followed the litigation over the establishment of the Village.<sup>125</sup> As Richard Ford has recently suggested, local municipal lines and school districts should be held to the same standard of constitutional scrutiny: “For example, if the states are not free to establish a system of segregated schools, they should not be allowed to accomplish the same objective by delegating state power to segregated localities.”<sup>126</sup> The problems inherent in the establishment of the Village of Kiryas Joel were politically invisible because of our political culture’s habitual failure to consider local space as a politically contingent issue, rather than a given fact of nature.<sup>127</sup>

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123. Aloofness has been part of the public depiction of the Satmar Hasidim in America at least since the publication of RUBIN, *supra* note 94.

124. Hence the title of Olivo, *supra* note 85; see also Acklin, *supra* note 4, at 59 (“As the noted case illustrates, the Court’s professed ‘neutrality’ has resulted in hostility towards religion.”).

125. Judge Bellacosa argued that if the Village was constitutional, so was the district. See Grumet v. Board of Educ., 618 N.E.2d 94, 113 (N.Y. 1993) (Bellacosa, J., dissenting).

126. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1865 (1994). Ford makes the same point that Judge Bellacosa did in *Grumet*—that municipal and school district boundaries should be held to the same standard—but to opposite effect.

127. See *id.* at 1857–60.



It is true that the primary motivation for the original establishment of the separate Village of Kiryas Joel in 1979 rested on nothing so lofty as a desire for a pure and separate existence.<sup>128</sup> Rather, the issues were quite mundane, centering on taxation, concentration of extended families in areas with single-family zoning, and the proximity of houses of worship to residential areas.<sup>129</sup> These issues are not inherent to any religious separatism but do have much to do with genealogy, given the tendency of Hasidic families to live in multigenerational households and to have numerous children per married couple. The practice of holding prayer services *in* houses (and the taxation disputes that may arise therefrom) likewise demonstrate the actual inseparability of “religion” from genealogy and ethnicity for a group like the Satmar Hasidim.

These mundane issues show that, while spatial metaphors may be powerful ways of talking about identity, space is more than just a metaphor. Diaspora is not a nonspatial existence, but a concrete relation between genealogy and space. Ironically, the residents of Kiryas Joel seceded because their land-use patterns were like those that, in the general secession case, we would expect a group to secede in order to *avoid*—land-use patterns engaged in by poor people and their lower ratio of tax input to service demands.<sup>130</sup>

Nevertheless, the successive organization of the neighborhood, Village, and school district of Kiryas Joel (whatever the external constraints) have plausibly been construed as a form of social “exit.” Abner Greene thus sees *Kiryas Joel* as exemplifying the problem of “‘partial exit.’ The . . . 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 new community.”<sup>131</sup> Greene suggests that exit is indicative of commitments,<sup>132</sup> so partial exit might imply less than total

128. See Robert A. Destro, “By What Right?,” *The Sources and Limits of Federal Court and Congressional Jurisdiction over Matters “Touching Religion”*, 29 IND. L. REV. 1, 61 (1995) (explaining that Satmars, unlike Amish, “clustered in urban neighborhoods and did not hesitate to call upon the local community for the goods and services they needed”).

129. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2495–96 (1994) (O’Connor, J., concurring); see also MINTZ, *supra* note 14, at 207–08 (“We believe we are complying with the law. Our family units are large and closely knit, leaving understandable doubt by those who do not know us and our customs.”) (quoting Kiryas Joel resident Leibush Lefkowitz).

An instructive comparison is the establishment of the Village of Airmont in recent years out of a portion of the Town of Ramapo in Rockland County, New York, by an association of homeowners (including a number of non-Orthodox Jewish members) concerned about Ramapo’s adoption of zoning measures favorable to Hasidic Jews, including “multiple-family housing in areas zoned for single family residences . . . [and] the allowance of home synagogues (‘shteebles’) in residential areas” *LeBlanc-Sternberg v. Fletcher*, 922 F. Supp. 959, 960 (S.D.N.Y. 1996).

130. Cf. Ford, *supra* note 126, at 1870–71; see also *supra* note 129

131. Greene, *supra* note 7, at 4–5.

132. See *id.* at 50; see also James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 56 (1995) (explaining that in earlier American model of literal group removal to frontier, “it was typically the denial of such significant liberties, not trivial ones, that prompted individuals and groups to pull up stakes and ‘exit’ to the frontier”). If so, perhaps there is an inclination to give more leeway to practices exercised as part of complete exit. Partial exit might be suspect in its motives: Are these people trying to

commitment.

The mundane issues leading to the creation of the Village of Kiryas Joel help make it clear that it is not simply "religious" separation that is at issue here. This point, however, does not necessarily confirm Justice Scalia's argument that the creation of the Village constituted "a classic drawing of lines on the basis of communality of *secular governmental desires*."<sup>133</sup> The mundane issues do not necessarily imply the absence of concerns we would commonly designate as religious. Ford's diagnosis of the blind spots in constitutional jurisprudence and scholarship stemming from our common naturalization of territory and geography<sup>134</sup> suggests that here, reading back from the fact that there *was* a village leads to the presumption that its foundation must have had a religiously neutral, "secular" basis. True, unlike the school district, the Village "was formed pursuant to a religion-neutral self-incorporation statute."<sup>135</sup> Again, however, the relative ease by which a municipality can be established suggests a low level of concern for the differential political impact on different groups of citizens of the redrawing of local political boundaries.<sup>136</sup>

#### B. *Establishment of the School District*

One of the complicating aspects of *Kiryas Joel* is that religious establishment and equal protection issues appear to be closely intertwined in the case.<sup>137</sup> The vocabulary of judges and constitutional scholars lacks a concept like that of genealogy, in which rhetoric and institutions of kinship are inseparable from the biology of reproduction. For these lawyers' *nomos*, any determination of a personal identity by descent is easily seen as "racist." This conflation of genealogy with race prevents a sympathetic perception of descent-based identities as a strategy of diasporic continuity.<sup>138</sup> Thus the separation of the Hasidic school children inevitably comes to be seen as analogous to an acceptable or unacceptable form of racial segregation.

Justice Kennedy draws on the legacy of equal protection decisions in distinguishing between the creation of the Village and that of the school district, according to an implicit criterion of state action.<sup>139</sup> On the one hand

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get something for nothing?

133. *Kiryas Joel*, 114 S. Ct. at 2511 (Scalia, J., dissenting); see also Seal, *supra* note 97, at 1668.

134. See Ford, *supra* note 126, at 1888-92.

135. *Kiryas Joel*, 114 S. Ct. at 2504 (Kennedy, J., concurring).

136. Ford paraphrases the holding of *Wright v. Council of Emporia*, 407 U.S. 451 (1972), "that local officials could be enjoined from carving a new school district from an existing district that had not yet been desegregated." Ford, *supra* note 126, at 1905-06.

137. The parallels between these two areas of jurisprudence are noted by Minow, *supra* note 6, at 15 n.73.

138. See Boyarin & Boyarin, *supra* note 66, at 717.

139. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to others.").

he describes the process by which "voluntary association . . . leads to a political community comprised of people who share a common religious faith."<sup>140</sup> He contrasts this to the enactment of state legislation having the same result: "[G]overnment [may not] use religion as a line-drawing criterion . . . . In this respect, the Establishment Clause mirrors the Equal Protection Clause."<sup>141</sup> Justice Kennedy's analogy is somewhat misleading. In equal protection cases, the line is not drawn between "voluntary" and "governmental" actions, but between private and state actions. The creation of the Kiryas Joel school district, while pursuant to a governmental action, nevertheless was carried out consistent with the will of the majority of Kiryas Joel residents and in that sense may be said to have been "voluntary" on their part.<sup>142</sup> On the other hand, even if government's role in the creation of the Village was essentially nondiscriminatory, the establishment of the Village was hardly a private action. The analogy to *Shelley v. Kraemer* thus works neither to "exonerate" the Village nor to "convict" the school district.

Equal protection analogies are also at the heart of Abner Greene's argument for the constitutionality of the Kiryas Joel arrangement. Greene suggests that *Kiryas Joel* is consistent with the fact pattern ruled on by the Supreme Court in *Keyes v. School District No. 1*<sup>143</sup> and *Milliken v. Bradley*:<sup>144</sup> "[I]f private citizens move to relatively homogeneous

140. *Kiryas Joel*, 114 S. Ct. at 2505 (Kennedy, J., concurring).

141. *Id.* (Kennedy, J., concurring). As pointed out by Berg, *supra* note 5, at 489, the reference to electoral lines entails an analogy to the previous term's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Berg argues the importance of Kennedy's failure to point out

that the special school district fell within the guidelines of *Shaw*. The New York legislature drew a district that was compact and contiguous, reflecting the lines of an existing political subdivision, the village. If *Shaw* is taken seriously, those facts should be crucial. *Shaw* rests on and redoubles the commitment that the primary guideline for districting in America should be geography, that is, the location where people choose to live

Berg, *supra* note 5, at 492. The last sentence here relies on the assumption that people's geographical situation, as a matter of choice, is the principle determinant of their political identity. In support of the localist principle, Abner Greene draws on Michael Walzer's argument that since "politics is always territorially based . . . [t]he 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." Greene, *supra* note 7, at 50 (quoting MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 225 (1983)). Greene's reliance on "exit" allows him to have his cake and eat it too; for Greene, once a group of people has sufficiently demonstrated its commitment to its separate group existence by physical removal, it should be allowed social separatism as well. What troubles one respondent to Greene in particular, and more generally motivates those troubled by the implications of the Kiryas Joel district, is precisely the fear that those schooled parochially will, when they become adults, only "come together as citizens" for the furtherance of parochial interests. See generally Eisgruber, *supra* note 8.

142. Would the establishment of a separate village withstand a constitutional test if it appeared patently designed to establish an "all-white" municipality in part of a preexisting municipality already divided into black and white neighborhoods? That is, how far does the right of "almost any group" to create its own village extend? Applying Justice Kennedy's analogy from the requirement for state action in equal protection cases to cases involving religious establishment to this hypothetical might suggest that under New York's law, the "voluntary" separation of a group of white citizens would be upheld, regardless of racist intent.

143. 413 U.S. 189 (1973).

144. 418 U.S. 717 (1974).

neighborhoods, government is not required to draw school attendance zones across neighborhoods."<sup>145</sup> Greene assumes that municipal boundaries should not be taken as evidence of intent to segregate.<sup>146</sup> However, in his very next sentence, Greene quotes the Court's statement in *Keyes* that the distinction between impermissible de jure and permissible de facto segregation is "'purpose or intent to segregate."<sup>147</sup> It is by no means clear that the racial divisions across municipal boundaries in *Milliken*, for example, pass this "intent" test. Territory and geography should not be presumed to be socially neutral or "noninvidious." In any case, even if separation is not an essential tenet of Satmar beliefs, it would be disingenuous to claim that the Kiryas Joel community did not "intend" to "segregate" its children from non-Hasidic children. *Kiryas Joel* would fail the "intent" test, since the desire to maintain an integral community underlies the series of legal maneuvers involved. Thus the constitutionality of the Kiryas Joel school board is not best defended by analogy to *Milliken* and *Keyes*.

This Part of the Note has claimed that supposedly neutral territorial divisions are actually rife with political significance. The constitutional question concerning the establishment of Kiryas Joel Village is intimately tied to the corresponding question concerning the school district. At the same time, distinguishing genealogy as a strategy of cultural maintenance from the racial discrimination known in United States history suggests that the district should not be defended on the basis of decisions such as *Keyes* and *Milliken*, nor should the district be suspect by analogy to racial segregation. At this point, we finally reach the question of the well-being of the children who receive special education in Kiryas Joel.

## VI. SHOULD SPECIAL CHILDREN MAKE HARD CASES?

As noted above, a diasporic and genealogical community that finds itself litigating constitutional rights may not be interested primarily in the constitutional principles involved. Likewise, legal debates about constitutionally permissible education may not have the children in mind. This Part of the Note describes the debate over special education in *Kiryas Joel* in terms of a changing conception of genealogy within the Hasidic community. At the same time, it points out how this context was inevitably obscured in court papers conforming to individualist and territorialist notions of identity.

Whatever segregation obtains between the municipalities of Kiryas Joel and Monroe or between the school districts of Kiryas Joel and

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145. Greene, *supra* note 7, at 33.

146. *See id.* at 42 n.165 ("I agree that the legislature may not district in such a way as to ensure segregated public schools—unless such distancing can legitimately be said to respond to a noninvidious category, which (centrally for my argument) includes geography.")

147. *Id.* at 33 n.138 (quoting *Keyes*, 413 U.S. at 208).

Monroe-Woodbury is not solely the result of the voluntary political withdrawal of the residents of Kiryas Joel. Thomas Berg correctly notes that, after the Supreme Court decisions in *School District of Grand Rapids v. Ball*<sup>148</sup> and *Aguilar v. Felton*<sup>149</sup> cast doubt on the arrangement by which special education services had been provided by public school teachers at Kiryas Joel religious schools,

[t]he [Monroe-Woodbury] district then turned recalcitrant. It refused to offer classes elsewhere in the village, even though the Supreme Court had approved such programs at "a neutral site off the premises of [religious] schools," and instead required the Kiryas Joel children to come into the public schools for their tutoring.<sup>150</sup>

Christopher Eisgruber also notes that this option was available to the Monroe-Woodbury School District, but then goes on immediately to claim that it was "[t]he Kiryas Joel School District [sic] [that] refused to offer such classes."<sup>151</sup> Indeed, Berg is almost alone among commentators in mentioning the "recalcitrance" of the Monroe-Woodbury district in his narrative of the case.<sup>152</sup>

The recalcitrance of the Monroe-Woodbury administrators lends credence to the claim on behalf of Kiryas Joel that when the handicapped students of Kiryas Joel were forced to attend special education classes in Monroe-Woodbury public schools, they suffered "'panic, fear and trauma . . . in leaving their own community and being with people whose ways were so different.'"<sup>153</sup> Generally the legal commentaries, regardless of their ultimate stance on the constitutionality of the district, accept at face value the Kiryas Joel residents' claim that the unfeasibility of having Hasidic handicapped children attend class with public school children was attendant on outside discrimination.<sup>154</sup>

The stated objections to sending the Kiryas Joel handicapped children to Monroe-Woodbury public schools thus emphasize the external barriers faced by those children; in Stolzenberg's formulation, these barriers were the "circle

148. 473 U.S. 373 (1985).

149. 473 U.S. 402 (1985).

150. Berg, *supra* note 5, at 436-37 (quoting *Wolman v. Walter*, 433 U.S. 229, 248 (1977)) (first alteration added).

151. Eisgruber, *supra* note 8, at 93 n.37. This cannot be correct, since at this time there was no Kiryas Joel School District. Presumably this was a copyediting error.

152. *But see* Destro, *supra* note 128, at 61 (reporting that Monroe-Woodbury district "felt constrained" not to accommodate).

153. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994) (quoting Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).

154. *See, e.g.*, Eisgruber, *supra* note 8, at 94 (accepting this claim despite recognition of some equivocation in record on whether or not Satmar is per se separatist); Greene, *supra* note 7, at 41 (accepting this claim despite his emphasis on overall Satmar community's "partial exit"); Lupu, *supra* note 9, at 117 n.56 (accepting this claim despite his general lack of sympathy for Satmar "separatism")

that shut [the children] out.”<sup>155</sup> Evidently this was consistent with the Village’s strategy of de-emphasizing separatism as a Satmar tenet. It is difficult to believe, however, that the Satmar parents did not *want* to keep the children in the community. Indeed, it cannot be stressed enough how these children’s “specialness” places them “at the mercy” of the Satmar community, and the state and public school officials. Attention to the needs of handicapped children, rather than a general tendency to hide them as an embarrassment and a potential bar to the marriage possibilities of other family members, is a relatively recent phenomenon in Hasidic communities.<sup>156</sup> Handicaps are a stigma in society at large. If anything, they are an even greater stigma in communities obsessed with genealogy and everything that genealogy represents: the possibility of improving social standing through strategic links of extended families in marriage; the “quality” of a given person’s ancestry as a valid aspect of that person’s own value; the imperative to be fruitful with its attendant emphasis on healthy, capable children who will themselves become fully participating and valued members of the community.

The fight for special education under appropriate terms should thus be seen not simply as a dispute over how to handle needs the existence of which is taken for granted, but rather as part of a growing acknowledgment within the Hasidic community itself.<sup>157</sup> The problems of handicapped children are still enmeshed within a genealogical conception of identity, but whereas these children were once hidden away for fear of “tainting” the family, now they are more fully included as among the fruits of generation.<sup>158</sup> The community has increasingly been drawing a circle to keep these children in. The need for state support for special education, and its availability on terms other than those dictated solely by parents within the Hasidic community, made it vastly more complicated to act upon the growing acknowledgment of the value and special needs of handicapped children. Already stigmatized for their handicap, could they be forced to undergo the extra stigmatization that would surely attend their regular exposure to the secular community, an exposure shared by none of their fellow children? This extra dimension of internal stigmatization

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155. Stolzenberg, *supra* note 87, at 581.

156. See MINTZ, *supra* note 14, at 310–13. This book contains a clear narrative overview of the establishment of Kiryas Joel and of the school controversy. Generally there has been a dramatic expansion of schools and other institutions providing special education services in Hasidic and other Orthodox communities.

157. Minow acknowledges that “[d]efining inclusion in public education for children with disabilities takes a different form . . . than inclusion for racial minorities.” Minow, *supra* note 6, at 18. She fails to recognize that the very existence of a debate among Kiryas Joel residents about how best to provide special education represents a massive step toward inclusion.

158. See MINTZ, *supra* note 14, at 217 (“[Formerly] [t]hey kept these kids at home because they were worried about the marriages they would have to do with the rest of the children”—that is, developmental problems in one child were hidden for fear of harming other children’s marriage prospects.) (quoting informant “AG”). *But see id.* at 228 (“[Now] [t]here is an increasing effort at early detection, treating and providing services to those children who have what are viewed as . . . varying developmental disabilities . . .”) (quoting Dr. Harvey Kranzler).

compounds the "panic, fear and trauma" at the hands of other public school children explicitly alluded to in the court papers.<sup>159</sup> The brief for the school board, itself consistent with the individualist tenets of First Amendment jurisprudence, could not express how important separate special education was for the purpose of fostering the inclusion of these children within the Kiryas Joel community.

Recognition of this dilemma is relevant to understanding the position of the dissenting group of Kiryas Joel residents. This faction's original and continuing motivation was loyalty to the ways of the deceased *Reb* Joel Teitelbaum. Their stance in the school board dispute took the form of active resistance to the education of Kiryas Joel's handicapped children under *any* secular state auspices, and was expressed in an *amicus* brief against the school board.<sup>160</sup> Almost none of the parents of handicapped children in Kiryas Joel found it possible to continue sending their child to a "mixed" public school. The dissident group within Kiryas Joel further objected to separating the handicapped children within a public school, whose curriculum had no religious character, even though that school consisted solely of children from Hasidic families. The separate school district arrangement still resulted in the education of handicapped children according to substantially different cultural values than those governing the education of their nonhandicapped peers, and this dilemma fostered a sharp division of views on the best way to maintain the Satmar community in diaspora. Sending children to the secular school district thus potentially risks a milder version of the exposure to double internal stigmatization I have just identified with regard to the sending of handicapped children to "mixed" public schools.<sup>161</sup>

Leonard Levy, commenting on the New York Court of Appeals ruling in *Grumet*, argues that the question of the children's best interests should have been paramount in the decision, yet it was not.<sup>162</sup> In the context of this dispute, the best interests of the children were to be sought within an arrangement keeping them within the Satmar community as much as possible. Justice Stevens expresses concern for the children in his concurrence, but not on terms we would expect from the considerations I have just outlined. Stevens

159. See *supra* text accompanying note 153.

160. Brief of the Committee for the Well-Being of Kiryas Joel, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527, 93-539). The Committee "represents over 500 members of the Satmar Jewish community of Kiryas Joel who support the decision below." *Id.* at i.

161. Minow points out that "[a]dvocates for disability rights might criticize the Village of Kiryas Joel for failing to provide inclusion or appropriate education for their disabled children within their own private, religious schools." Minow, *supra* note 6, at 19. Perhaps the majority of parents in the Village would prefer to take government money and use it for special education within the yeshivas, thus promoting "inclusion" and "mainstreaming" of handicapped children within their home community. This the Village cannot do. Again, what the Kiryas Joel dissenters object to are the constraints placed on the education of handicapped Hasidic children who benefit from state funding.

162. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 256 (2d ed. 1994).

argues that the “panic, fear and trauma” of the students in the mixed public schools could have been alleviated by the state’s taking steps to “teach[ ] their schoolmates to be tolerant and respectful of Satmar customs.”<sup>163</sup> Aside from the practical doubt about whether such hypothetical “steps” would be effective, this recommendation once again ignores the double stigma placed on handicapped Hasidic children attending outside public schools. In any event, it appears that the main aspect of the children’s welfare about which Justice Stevens is concerned is that of “associating with their neighbors.”<sup>164</sup> However, this value does not apply uniquely or particularly to handicapped children. If anything, it seems handicapped children have more to gain than other children from enmeshment within a close-knit, supportive community. Justice Stevens’s assertion would be more appropriate in the context of a law journal debate about the constitutionality of *any* parochial schooling.<sup>165</sup>

Meanwhile the Satmar Hasidim of Kiryas Joel—people closely knit in their daily relations, kin networks, and shared practices, but otherwise liable to sharp internal divisions—seek to preserve their group identity and simultaneously to obtain government benefits in a manner that conforms to the religious sociology of Protestantism, and to the religious establishment and equal protection concerns of constitutional jurisprudence. A new judicial resolution of the dispute should not come at the expense of Satmar children’s ability to receive special education in a setting consistent with the particular context of their lives. While this Note does not suggest appropriate judicial strategies, it urges judicial notice—and support—of the community’s fledgling efforts to draw circles keeping in “special” children. More broadly, rather than continuing the search for a bright-line rule to cover fundamentally different conflicts arising under the Establishment Clause, courts should be prepared to adjudicate particular cases with much greater awareness of the shifting identity of the very subject of rights. Here, the rights in question are those of handicapped children in Kiryas Joel—to receive appropriate educational services without being further marginalized in their home community.

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163. *Kiryas Joel*, 114 S. Ct. at 2495 (Stevens, J., concurring). Minow notes that Justice Stevens’s concurrence in *Kiryas Joel* is “consistent with Justice Stevens’ view expressed in *Wallace v. Jaffree*, 472 U.S. 38, 50–55 (1985), that protection of individuals’—here, the schoolchildrens’—freedom of conscience is the central focus of all the clauses of the First Amendment.” Minow, *supra* note 6, at 15 n.76.

164. *Kiryas Joel*, 114 S. Ct. at 2495 (Stevens, J., concurring).

165. It is certainly possible to mount a forceful argument for the Protestant model of toleration and freedom of religion as freedom of conscience but without separation of groups. Yet if “[t]he children of both Kiryas Joel and Monroe-Woodbury will be worse off if they grow up to fear or despise their fellow citizens on the other side of the town line,” Eisgruber, *supra* note 8, at 100–01, does this mean that any form of parochial schooling is ultimately violative of children’s rights and well-being? Against this it has been suggested that if “secular humanism” as a public school ideology were held to “result[] in the establishment of a ‘religion’ . . . [i]t might even lead to the radical conclusion that public education is unconstitutional per se.” Stolzenberg, *supra* note 87, at 589. The plausibility of claiming that either public education or parochial education is illegitimate under the general principle of “freedom of religion” shows the near impossibility of reconciling the individual’s “freedom to choose and change religion,” Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 227, with parental “freedom to transmit and implant religion in children,” *id.* at 228.



## VII. CONCLUSION

Three major approaches are reflected in the Supreme Court opinions in *Kiryas Joel*. One is Justice Scalia's rhetorical dismissal of the Establishment Clause complaint.<sup>166</sup> The second approach, significant primarily because it reflects the heritage of Supreme Court jurisprudence in the post-World War II decades, is Justice Stevens's almost nostalgic insistence on the handicapped children's overriding right to interact with non-Hasidic children from the surrounding area. The third approach is Justice Souter's and Justice O'Connor's narrowly technical reading of unconstitutionality, which (at least until August 1996) appeared to permit the school board to continue once the New York Legislature rewrote the enabling legislation in terms less specific to the Village of Kiryas Joel.

If there is indeed a *Kiryas Joel II*, the Court may face a harder choice. Perhaps it will assert that, regardless of fine points of legislative procedure, the First Amendment's commitment to free exercise of religion may in certain situations entail a limitation of the power of the state to prevent local or parochial "establishments of religion."<sup>167</sup> It might also admit that there are inevitable limitations on the free exercise of religion, when such free exercise is deemed incompatible with a predominant concern for preventing the establishment of religion. Based on the notions of polity and identity that have underlain constitutional jurisprudence until now, the Constitution may not be able to resolve the *Kiryas Joel* paradox. *Kiryas Joel* might well be an object lesson in the claim that "liberalism's deep structure precludes it from explaining and justifying the toleration of non-liberal cultures."<sup>168</sup>

That so much debate centers on the case indicates not only that it is a hard one, but that it turns on central dilemmas of what we still call the American polity.<sup>169</sup> This Note has argued that *Kiryas Joel* presents a challenge to two

166. See *supra* note 116.

167. Lupu suggests that the inducement presented by "special benefits not readily available elsewhere" to remain within "the Village and its religious ambience" in itself tends toward establishment of religion. Lupu, *supra* note 9, at 108. Yet the benefits are "special" only to those who value being in the Village and its religious ambience. In fact, students from *outside* the Village are bused in to the Kiryas Joel special public school, and leaving the Village would not deprive any child of special education within a secular public school setting.

168. Robert Justin Lipkin, *Liberalism and the Possibility of Multi-Cultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 U. RICH. L. REV. 1263, 1265 (1995)

169. This is despite the (frequently noted) irony that the Kiryas Joel school district litigation resulted from an attempt—albeit perhaps not entirely a good faith attempt, at least on the part of the Monroe-Woodbury School District, see *supra* text accompanying note 150—to overcome the original solution, which appeared unconstitutional after *Aguilar* and *Ball*. Justice O'Connor is most forthright in asserting that the pre-*Aguilar* scheme was permissible, in regretting the *Aguilar* decision from which she had dissented, and in inviting the court "in a proper case. [to] be prepared to reconsider *Aguilar*." 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). Indeed, a challenge to *Aguilar* by the residents of Kiryas Joel might have resolved the situation in favor of the status quo before *Aguilar* and *Ball*, a situation that is arguably preferable to the separate school district arrangement. See Eisgruber, *supra* note 8, at 95 ("It would be better if the handicapped children of Kiryas Joel were enrolled in religious schools (even

underlying assumptions of constitutional jurisprudence: first, that political participation is determined according to territorial boundaries which are politically neutral in themselves; and second, that the subject of rights can always be specified as the individual person. This Note does not speculate on whether or not constitutional jurisprudence will indeed prove flexible enough to accommodate a broader range of notions of identity than the schema of territoriality and individualism.<sup>170</sup> It does claim that such jurisprudence can and must be enriched by revelation of the particularity of the premises about personhood and belonging which have guided constitutional interpretation until now. *Kiryas Joel* fosters such revelation by pressing the claims of an identity dependent on genealogical and diasporic loyalty rather than individual and territorial liberty.

*Kiryas Joel* is another in a series of cases that, as Cover teaches, press the lawmaking claims of particular *nomoi*, sometimes in conflict with the *nomos* of the territorial state. It teaches us as well that lawmaking is inseparable from the conditions of cultural and generational continuity, and that a *nomos* grounded even in the most passionate tradition of *individual* freedoms may be cast into confusion when the freedoms in question are those of children. Nevertheless, the continuing litigation of *Kiryas Joel* might yet foster the kind of creative constitutionalism that Cover called *jurisgenesis*.

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segregated religious schools), as New York's first accommodation allowed them to be." As it turns out, the school board may not have to face this choice. On October 30, 1996, petitioners New York City and parents of parochial school students, with support from the Clinton Administration, in an unprecedented motion under Rule 60(b) of the Federal Rules of Civil Procedure, asked the Supreme Court to overrule *Aguilar*. See Linda Greenhouse, *High Court Asked to Reverse Ruling in a Religion Case*, N.Y. TIMES, Oct. 31, 1996, at A1. On January 17, 1997, the Court announced that it would consider the appeal. See Linda Greenhouse, *Court to Consider Reversing Decision on Parochial Aid*, N.Y. TIMES, Jan. 18, 1997, at A12.

170. Nor is there any necessary implication here that opinions should rest on judges' perceptions of the self-understandings of communities that appear before them in Establishment Clause cases. The vexing question of who "represents" a community is not at issue here. Certainly I do not mean that judges should *cede* to those purported communal self-understandings, on the analogy of federal appeals courts' judgment consistent with the law of the state from which the appeal arises. The Supreme Court neither should nor could sit in place of a rabbinical court.