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Chapter 10

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT *v.* GRUMET

A Religious Group's Quest for Its Own Public School

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A. Introduction: The Creation of Kiryas Joel

Few cases have done more to confound the separation of church and state than *Board of Education of Kiryas Joel Village School District v. Grumet*.[1] Decided by the Supreme Court in 1994 during a period of conservative political mobilization and intense controversy over the principle of church-state separation, *Grumet* presented the unusual spectacle of a public school district established in a village populated almost entirely by members of one religion, ultra-Orthodox "Satmar" Jews. "Satmars" are members of a branch of "Hasidic" Judaism, dedicated to the strict observance of Jewish law and the preservation of their traditional way of life. Transplanted to New York from Romania in the wake of World War II, the Satmar community has continuously strived to form enclaves in which its members can live in obeisance to their spiritual leader, the Grand Rabbi or Satmar "Rebbe," and insulate themselves from exposure to modern, secular culture. Based in the Williamsburg neighborhood of Brooklyn, New York, their dream was to establish an insular and homogeneous enclave in which they could recreate the way of life of the European "shtetl." This dream came to fruition in the mid-1970s, when agents of the community bought property in Monroe Township, about 50 miles northwest of New York City, and developed the tract as a residential subdivision for members of the Satmar community.

Once settled in Monroe, the Satmar population quickly grew, as did conflicts with their neighbors. By 1976, following the procedures prescribed by state law, the Satmars had accrued enough signatures to put the question of seceding on the

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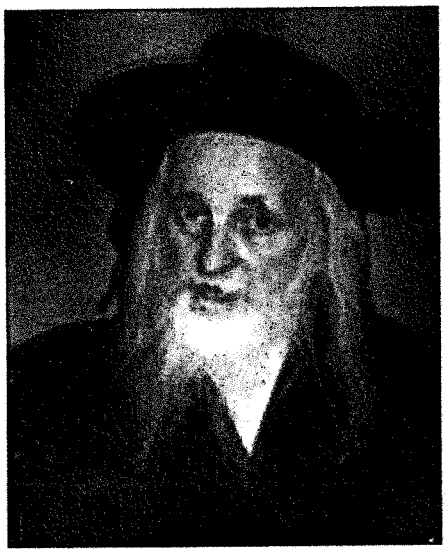


Rabbi Joel Teitelbaum
Courtesy of Jews Against Zionism

local election ballot. In 1977, by majority vote, the petition to incorporate a new local government was approved, and Kiryas Joel (Hebrew for "the Village of Joel," named after the founding Rebbe, Joel Teitelbaum) was born.[2]

Despite the fact that the population of this officially recognized village was 99 percent Satmar, the constitutionality of the municipality was not challenged.[3] But ten years after the Village of Kiryas Joel was formally incorporated, a movement to establish a public school district in the village emerged, which led to the legal challenge presented in *Grumet*. The effort to establish a separate school district was propelled by the parents of special needs children. Convinced that sending the Yiddish-speaking religiously observant Satmar children to the regional public school resulted in "pain and trauma," representatives of the Satmar community appealed to the state legislature to establish a public school district within the confines of the Village. The New York state legislature passed a bill, and in July 1989, New York Governor Mario Cuomo signed into law Chapter 748, the special legislative act that authorized the creation of the Kiryas Joel Public School District.

B. The Issue: Is Creating a Public School District in/for a Religiously Homogeneous Community a Violation of the Establishment Clause?

Brought by the presiding officials of the New York State School Board Association, the legal case against Chapter 748 challenged the Act as a violation of the Establishment Clause and raised the question of whether a public school district created for and within a village with a religiously homogeneous population violates the principles of government neutrality and separation of church and state enshrined in Establishment Clause doctrine. More generally, the case broached the question of whether the Establishment Clause demands strict neutrality and strict separation between religion and state, and if so, whether those principles are violated or upheld when the state delegates powers of local government to a municipal unit with a religiously homogeneous population. Advocates for the religious right, eager to soften the principle of strict separation between church and state, saw *Grumet* as a propitious occasion for overturning the so-called "*Lemon* test," established in *Lemon v. Kurtzman*,[4] according to which state actions can neither have the intent nor the effect of promoting or inhibiting religion nor excessively "entangle" government in religious affairs. Civil libertarians and other defenders of the *Lemon* test waited with baited breath to see if the Court would uphold it.

While seeming to answer these questions with a definitive yes, *Grumet*'s holding was not quite what it seemed. The Court struck down Chapter 748 on

the grounds that it violated the principle of neutrality and constituted an impermissible "fusion" of political and religious authority in contravention of the Establishment Clause. Many contemporary observers heralded this as a vindication of the civil libertarian position. But in fact, the Court's decision affirmed neither the civil libertarian nor the conservative position. The problem with Chapter 748, the Court suggested, was not that it created a public school district *in* Kiryas Joel, but rather, that the public school district was created by the legislature *for* the particular benefit of a particular religious community. The Court explicitly stated that there was nothing wrong with a school district *in* a local community that just "happened to be" all Satmar, so long the legislature's aim in authorizing such a school district wasn't to benefit a particular religious community, and so long as the opportunity to opt out of regional school districts and form more local, village-based districts was not restricted to any particular religious group.

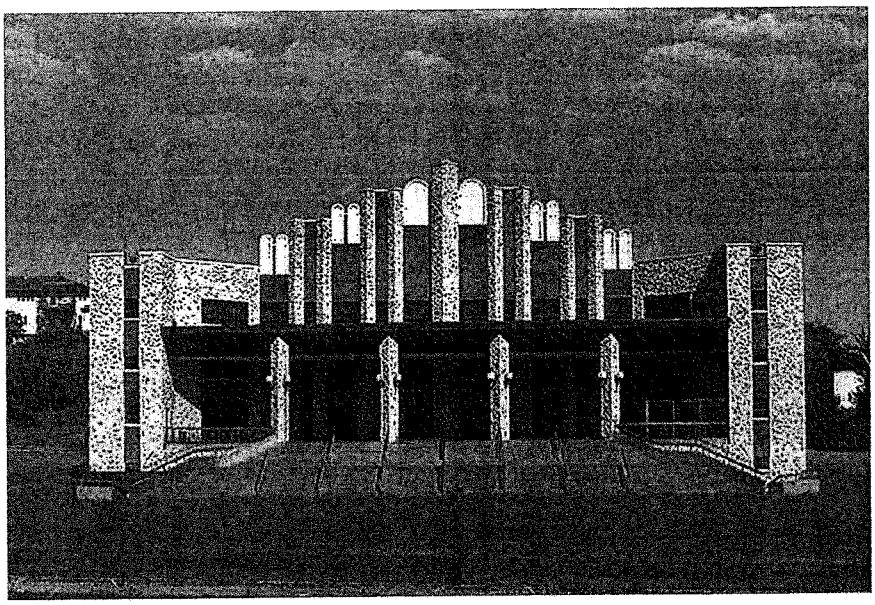
Thus, contrary to the over-eager interpretation of some of its civil libertarian opponents, the Supreme Court did *not* hold that the school district itself was unconstitutional. On the contrary, it left a wide opening for the state legislature to reauthorize the Kiryas Joel School District. Nor did it repudiate *Lemon* and the principles of neutrality and strict separation between church and state with which that notorious decision is associated. Disappointing both *Lemon*'s defenders and its critics, the Supreme Court simply sidestepped the controversy, maintaining that no single test should govern all Establishment Clause controversies. Leaving *Lemon* to the side, the multiple opinions in *Grumet* offered a confusing array of different reasons for striking down Chapter 748 and provided little guidance for the future apart from a refusal to reduce Establishment Clause doctrine to a single test. In the end, the *Grumet* decision raised more questions than it answered.

C. The Facts: The History of the Satmars and Kiryas Joel

The facts of *Grumet* are noteworthy not only because they feature a group of people who, much like the Amish, adhere to old-fashioned and "peculiar" ways, but also because the Satmar community offers a particularly vivid illustration of the various ways that religion and politics can intertwine. Notwithstanding their commitment to living apart from society, the Satmars are in fact deeply enmeshed in state and local politics. Indeed, their devotion to separatism led the Satmars to enter into the fray of American interest-group politics. It was precisely through the deft exercise of the political and private rights accorded by our legal system that the Satmars were able to carve out their separatist enclave in Kiryas Joel, replete with all manners of cultural and legal institutions and mechanisms of political self-governance. Ironically, it was this separatism that thrust these institutions into the public eye and ultimately put them on trial.

The separatism that has proved to be so troubling to outsiders is a legacy of the vision of Satmars' founding rabbi, the "Rebbe," Rabbi Joel Teitelbaum. Rabbi Teitelbaum was the scion of a distinguished Hasidic family who first established a community of followers in the Romanian town of Satu Mare in 1928.[5] He promulgated a brand of Hasidic Judaism that called for the preservation of the Jews' traditional way of life, the shunning of modern secular culture and technology, and the strict observance of traditional Jewish law. Most of the Satmar Rebbe's

original followers perished in Nazi death camps. Rabbi Teitelbaum himself evaded this fate when, along with 1,368 other Jews, he was rescued from Bergen-Belsen, the Nazi concentration camp in which he had been interned, as part of the famous transport organized by the Hungarian Zionist activist, Rudolf Kasztner, in 1944.[6] In 1946, Rabbi Teitelbaum arrived in Williamsburg with the few surviving members of his community, and it is there that he established himself as one of the key figures in introducing a new regime of stringent piety into Orthodox Judaism in America after the Second World War.



Kiryas Joel Synagogue
Courtesy of Kiryas Joel Voice

The community that Rabbi Teitelbaum established in Williamsburg quickly grew from a few hundred followers in the 1940s to a worldwide membership that today numbers over 100,000 members.[7] The spectacular growth of the Satmar community over the last six decades has been fostered not only by a literal interpretation of the biblical injunction to "be fruitful and multiply," but also by the willingness of the Rebbe and his chief political lieutenants to engage with New York city and state authorities in the rough and tumble of American interest-group politics.[8] The ability of the community to deliver a reliable bloc of votes to whichever politician the Rebbe endorses has enabled the Satmars to attain a remarkable degree of political clout notwithstanding the fact that, even with their exponential growth, they make up a tiny (and disproportionately poor) minority of the voting population.

This political adeptness is all the more remarkable given the Satmars' professed commitment to living apart from society and holding themselves aloof from worldly politics. Even among other branches of Hasidic Judaism, the Satmars' founding rebbe was notable for the strength of his commitment to separatism. When the state of Israel was established, while other Jews were celebrating, Rabbi Teitelbaum denounced Zionism on theological grounds.[9] Instead of arrogating the right to establish a state in the ancestral homeland, the Rebbe advocated the building up of Satmar communities in the Diaspora, where religious observance and Torah study would shape communal norms.[10]

In pursuit of this vision, the Rebbe's fondest dream was to recreate the Eastern European "shtetl" on American soil.[11] Shtetls, as they were known in Yiddish, were the traditional Jewish communities found in villages, towns and small cities throughout the Pale of Settlement in Central and Eastern Europe. Immortalized in "Fiddler on the Roof," the shtetl connoted not just a physical place but an entire way of life that was left behind by the Jewish immigrants from Europe in the late nineteenth and early twentieth centuries, and then wiped out by the Nazis. To implement the dream of reviving shtetl life, the Rebbe's followers bought land, developed subdivisions, and settled in the township of Monroe in Orange County, New York. Just two short years after they acquired their first piece of private property in Monroe, the Satmars were populous enough to prevail in a vote to establish their own separate municipality.[12]

The creation of the Village of Kiryas Joel, an officially recognized local government endowed with all of the powers of municipal government, was in many ways the fulfillment of Rabbi Teitelbaum's dream — a place where Satmars could live, away from the temptations and corruptions of modern, secular society, in conformity with the edicts of Jewish law, under the guiding authority of the Rebbe. The Rebbe himself was not able to enjoy the full fruits of this vision, as he died in 1979 just two years after the formal incorporation of the Village and days before the completion of a house built in Kiryas Joel especially for him. But the residents of Kiryas Joel continued to follow the Rebbe's strict injunctions to obey traditional religious law, to avoid exposure to modern technology, and to shun participation in the outside world — with the crucial exceptions of economic activity and the political activities of the members of the community who serve as liaisons with state and local politicians and hold office in the municipal government of Kiryas Joel.

Ironically, the community's success in implementing the Rebbe's dream of an insular, autonomous community governed by its own officials and by Jewish law thrust it into the harsh spotlight of public and legal condemnation and led to its most direct confrontations with the outside world. Not only are the Village's elected officials answerable to, and responsible for implementing, the secular law of the land, but they also are responsible to the demands of their constituents, such as the demand of parents of special needs children for the provision of special education.[13] This demand gave rise to the petition to establish a public school within the Village of Kiryas Joel, which led in turn to the legal challenge to the community's assumption of municipal powers.[14]

The school controversy might have been avoided had the law of the land permitted special needs education to be provided on sites other than public schools. Prior to 1983, special needs children in Kiryas Joel were sent to the same private schools that the non-special needs children in the village attended: yeshivas for boys and a separate religious school for girls.[15] In 1983, in response to the growing size of the special needs population, an annex to the girls' school was set up to house the community's special needs children and their teachers. The teachers were sent in by the regional school district.[16] These public school teachers provided the various special education and remedial services to which the children were entitled until 1985, when the Supreme Court handed down two decisions that declared the practice of providing publicly funded special education on the site of private parochial schools unconstitutional.[17] In *Grand Rapids School District v. Ball*,[18] the Court held that providing publicly funded educational services on the site of parochial schools was unconstitutional.

In *Aguilar v. Felton*,[19] decided that same year, the Supreme Court held that sending public school teachers into private religious schools to provide supplemental special education was a violation of the Establishment Clause. These decisions produced a large clamor of protest and eventually, in 1997, they were reversed.[20] But during the intervening 12 years, the two decisions made it impossible for special education to be provided on the site of private religious schools. Programs like those previously in place in Kiryas Joel, where public school teachers from the Monroe-Woodbury Central School District held classes in a private school annex, were terminated.

At this point, it seemed that the only option was for the parents of special needs children in Kiryas Joel to send their children to the regional public school[21] — a "solution" to which the parents strenuously objected. Children who were accustomed to a traditional religious way of life, had never watched television, seen a movie, used the Internet, or even spoken English naturally experienced the utmost difficulty in being integrated into the school. Their parents, moreover, objected to their children's exposure to the secular culture of the public school.[22] Caught in the double bind of having (and wanting) to provide their children with publicly-funded special education, but not being allowed, under existing law, to provide that education on the site of a private school, the community decided to seek the creation of its own separate school district as a way of satisfying the legal requirements governing the provision of special education without endangering its culture and subjecting their children to the "trauma" of exposure to the outside world.[23] Backed by the school board of the regional public school district, which had come to share the community's assessment that the Satmar children couldn't be successfully integrated, the Satmars appealed to their friends in state government to create a public school district within Kiryas Joel.[24]

The reaction of the outside world to this unusual request was split, reflecting the deep fissures that were beginning to emerge in the general population's views about the proper relationship between religion and the state and between groups and individuals. On one side were those sympathetic to the Satmars, who viewed the creation of a separate school district as an appropriate response to their predicament. This included not only religious conservatives who objected to the whole idea of a "wall of separation" between religion and state, but also some liberals, particularly those who were influenced by the newly fashionable theories of multiculturalism and communitarianism, which argued for respecting cultural differences and granting meaningful forms of cultural autonomy to subgroups rather than making assimilation and integration into mainstream culture a condition of individual rights.[25] Many members of the New York legislature who voted to pass the special act appear to have been motivated not only by the desire to win the Satmar Rebbe's coveted political endorsement, but also by a genuine sympathy for the children's and the community's plight. As one legislator's memorandum to then-Governor Mario Cuomo put it, "The bill represents a legislative response to [the problem of not being able to provide special needs education in the community's private schools] by providing a mechanism through which students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the State."[26] The bill was passed by a vote of 197 to 1.

For these lawmakers, as for many advocates of religious rights and group rights, Chapter 748 was a necessary and appropriate accommodation to the

needs and traditions of a valued religious subculture. Much like the Amish, the Satmars were seen not merely as individuals who happened to share the same beliefs, but as members of a group bound together by common traditions, which deserved protection in its own right. It was the group's "way of life" that was endangered, not necessarily any individual's ability to follow a religious commandment or dictate of religious law. The value of religious freedom invoked to protect the group from this danger was thus linked to the broader values of cultural pluralism and cultural preservation then gaining currency in the broader culture.[27]

This represented a profound shift in the way religious freedom historically had been conceptualized. Throughout most of the history of the United States, the prevailing view of religious freedom was based on a much more individualistic conception of religion, which focused exclusively on the existence of an individual's belief in divinely-ordained moral duties which might come into conflict with the duties prescribed by law. The paradigm was the conscientious objector whose private beliefs conflicted with the values embodied in public policy. Under this paradigm, unless the Satmars could pinpoint a particular religious commandment that they believed in, which was violated by sending their children to the regional public school,[28] there was no violation of their religious rights, regardless of whether exposure to the outside world upset or confused their children or imperiled the survival of their culture. It took the substitution of this individualistic model of religion with a more communitarian conception of religion as *culture* to see that the value of religious freedom demanded allowing the group to withdraw from the larger secular society and shelter its children from exposure to people with different cultures and values.

In 1988, when the Satmars first started lobbying the New York State Assembly to pass legislation carving out a separate school district in Kiryas Joel, this communitarian conception was not yet a mainstream view. The long-entrenched individualistic conception of rights remained dominant, expressed in religious rights doctrines that conceived of religious freedom as a matter of private belief and conscientious objection and in various integrationist policies that called for turning a blind eye to ethnic and cultural differences. Yet the more communitarian conception had steadily been gaining ground. In 1972, the Supreme Court seemed to have provided tacit approval for this conception in the case of *Wisconsin v. Yoder*,[29] which granted the Amish the right to keep their children out of school after the eighth grade on the grounds that requiring them to follow compulsory education laws would threaten the survival of their distinctive way of life. This seemed to suggest that preserving a religious way of life was not just a value but also a right, an aspect of the free exercise of religion protected by the First Amendment.[30]

As one of a small number of legislative or judicial declarations of the value of protecting a group's "traditions," Chapter 748 stood out as a prominent instance of government support for cultural rights or, as its detractors would put it, group "separatism." Yet it also partook of broader social trends coming to the fore in the 1980s: increased racial and economic residential segregation, growing support for black nationalism and separatism within the African-American community where disillusionment with the failures of integration was setting in, and corresponding movements in white ethnic communities which simultaneously emulated "black pride" and served to rationalize white resistance to racial equality and integration. These visions of ethnic and racial pride converged with a

resurgent religious conservative vision of religious freedom that focused on reversing the secularization of the public sphere in support of the multiculturalist agenda of recognizing and celebrating different cultural identities and granting more autonomy to sub-groups. Chapter 748 was one of the most prominent expressions, and hence one of the most prominent test cases, of these convergent ideals.

But if support for Chapter 748 was strong, opposition was swift and intense. Most prominent among the opponents of the bill was the New York State School Boards Association, led by Louis Grumet, whose name would come to be associated with the case. Unlike the regional school district, which stood on the frontlines of the failed attempt to integrate the Satmar children into the wider community and strongly supported Chapter 748, the statewide organization, representing all the school boards of New York, was adamantly opposed to this "retreat" from the ideal of "the common school."[31] In its view, carving out a separate school district to accommodate separatist beliefs violated the public school's historic mission of educating children to become citizens of a heterogeneous liberal pluralist democracy.[32] No doubt Grumet and the School Boards Association also had practical concerns in mind, such as the economies of scale gained by consolidating local schools into regional school districts.[33] And most likely, it had in mind other contemporary threats to the integrationist melting pot, such as white flight, chronic de facto segregation, and the growing popular demand for private schools, home schooling, and the nascent voucher movement.

D. The Parties, the Lawyers, and the Lawsuit

Whatever its motivations, the School Boards Association lobbied heavily against the Act, and, when it failed to defeat its passage, immediately brought suit challenging its constitutionality. The suit was initially brought in New York state court,[34] but because it raised important federal questions of constitutional law, its appeal ultimately reached the United States Supreme Court. The School Boards Association was joined in its legal effort by numerous organizations, including the teachers union, the National School Boards Association, the New York Civil Liberties Organization, and various other religious and secular organizations devoted to preserving civil liberties and religious freedom. Most notable in this regard were the Jewish organizations that submitted briefs as friends of the court arguing that Chapter 748 should be struck down as a violation of the Establishment Clause. Organizations such as the American Jewish Congress and the Anti-Defamation League had a long history of defending a principle of strict separation between church and state. It was therefore not at all surprising to see these organizations file briefs in support of the School Boards Association's case against the Kiryas Joel School District.

What was somewhat curious to behold, in light of this long history of staunch Jewish support for the civil libertarian position, was the sight of other Jewish organizations and Jewish lawyers lining up on the opposite side of the debate. Until that point, the advocates for softening or overturning the principle of separation between church and state had chiefly been conservative Christians. In the 1980s, it was evangelical Christians who were leading the charge against

"secular humanism" and calling for more room "in the public square" for religion.[35] And it was to conservative Catholics that these evangelicals first reached out as allies, not Jews.[36]

The attack on the judicial doctrine of separation between religion and politics was not initially a Jewish cause, and it was still something of a novelty at the time *Grumet* was litigated for a Jewish group to be joining the religious right's attack on the principle of separation. But fissures were emerging within the American Jewish community that reflected the widening cultural gap in society at large. Already, in 1986, the Lubavitch (Chabad) Hasidic group had staged a legal battle to get the courts to approve public displays of religious symbols including its own Hanukah Menorah alongside the nativity scenes favored by Christian evangelicals.[37] This Establishment Clause case showcased an emergent alliance between conservative Christians and conservative Orthodox Jews that disrupted the longstanding association between Jewish institutions and liberal causes. In other cases, as well, Jewish lawyers representing Jewish causes joined in the effort, spearheaded by conservative Christian advocacy groups, to restore religion to the public sphere.[38]

The most prominent of such lawyers was Nathan Lewin. Educated at Yeshiva College and Harvard Law School, and a highly regarded litigator who had represented clients as diverse as John Lennon, Edwin Meese, and Jodie Foster, Lewin was also an Orthodox Jew known for representing various Orthodox Jewish causes and Orthodox Jewish clients.[39] It was to Lewin that the Satmars turned for representation when they joined the *Grumet* litigation, and it was Lewin who would argue the case for the defendants before the Supreme Court.

The first ruling in *Grumet* was a procedural one, addressing a challenge to the legal standing of the New York State School Boards Association to bring the suit. The suit had been filed in state court by Louis Grumet and Albert Hawkins, in their official capacity as Executive Director and President of the School Boards Association, respectively, as well as in their individual capacity. Also listed as a plaintiff was the School Boards Association itself. Named as defendants were the State Education Department and its officials.[40] The legal standing of the School Boards Association to bring suit was immediately challenged. The court accepted this challenge, dismissing the School Boards Association and likewise denying Grumet and Hawkins standing to bring suit in their official capacity as officers of the School Boards Association, but permitting them to continue the lawsuit as plaintiffs in their individual capacity.[41] The School Boards Association was thus formally effaced from the legal record, though it remained a prime mover in the litigation behind the scenes.

Meanwhile, the Kiryas Joel Village School District, which was not originally named as a defendant, made a motion to intervene, as did the Monroe-Woodbury Central School District, which also wanted to play a role in defending the constitutionality of Chapter 748.[42] The State Supreme Court for Albany County granted both parties' motions to intervene as defendant.[43] It also accepted the parties' stipulation to remove the State Education Department from the list of named defendants. By the time all the motions to deny standing and intervene were resolved, Grumet and Hawkins stood as the plaintiffs (in their individual capacity) and the Kiryas Joel Village School District and Monroe-Woodbury Central School District stood as the defendants, while the original plaintiff (the State School Boards Association) and the original defendant

(the State Education Department) had been formally removed from any official role as party to the suit. The plaintiffs were represented by Jay Worona, an Albany-based lawyer specializing in education law. Lawrence Reich, an Orange County lawyer, served as counsel for the Monroe-Woodbury School District, while Lewin represented the Kiryas Joel School District. Notwithstanding the dismissal of the State Education Department as a party to the suit, the state's Attorney General, Robert Abrams, continued to appear to defend the constitutionality of the statute as well.[44]

E. The Arguments

All of the lawyers, from their first briefs to the final appeal to the Supreme Court, based their arguments on *Lemon*. Taking *Lemon*'s tripartite test as the controlling standard, the briefs for the plaintiffs (and the amici who supported them) were crafted to make the case that Chapter 748, (1) lacked the requisite "secular purpose"; (2) had a "primary effect" of advancing religious beliefs by appearing to "endorse" the Satmars' religion; and (3) impermissibly "entangled" government with religion. The defendants and the attorney general likewise treated *Lemon* as the governing framework, arguing that Chapter 748 satisfied the three prongs of its test. At the same time, they also suggested that the ongoing vitality of *Lemon* had been thrown into question by recent and contemporaneous cases[45] and raised the possibility that the courts might consider overturning *Lemon*.[46]

Regarding the first prong of *Lemon*, which demands that the challenged governmental action have a secular purpose, the defendants' lawyers had to counter the assertion that Chapter 748 needed to be struck down because it *intentionally* conferred a benefit on a particular religious community, making the promotion of a religion its purpose. The plaintiffs argued that the true purpose of the Act was to enable the community to follow the separatist tenets of their religious faith.[47] Against this argument, Reich, Lewin, and Abrams claimed that Chapter 748 had a perfectly valid secular purpose, namely, "ensuring that handicapped children residing in Kiryas Joel receive the appropriate secular education to which they are statutorily entitled."[48] To achieve that access, they argued, it was necessary to remove the barriers that resulted from the distinctive cultural and linguistic features of the community, which set it apart from the rest of society. Using the classic lawyer's technique of arguing in the alternative, the lawyers contended that this could be characterized as either a religious or a non-religious accommodation. If viewed as designed to lift the burdens on the Satmars' exercise of *religion* that resulted from attending the regional public schools, then the accommodation could be characterized a *religious* accommodation. Alternatively, it might be viewed as an accommodation of needs and features of the Satmar community that were not essentially religious or theological in nature. On this theory, the policy adopted in Chapter 748 was not an accommodation to the Satmars' *religion*, but rather, of their culture (and of the psychological needs to which their culture gave rise). Either way, the defendants argued, precedents established that such accommodations were permissible, and further, that they satisfied the secular purpose prong of the *Lemon*

test.[49] Even a religious accommodation (that is, an accommodation of their religious beliefs) could be characterized as a secular purpose if the legislature's aim in accommodating a religion was not to favor it or advance its beliefs, but rather, to remove a disadvantage suffered by its adherents and to thereby *equalize* the treatment of the group. Or so the briefs for the defendants and the attorney general contended.[50]

This characterization of Chapter 748 as an accommodation fed directly into the arguments about the second prong of *Lemon*, which requires that the primary effect of the government action be neither to inhibit nor advance religion.[51] The plaintiffs argued that the legislature's act in this instance had the effect of doing precisely what it intended to do, to wit, give support to a particular religious community. More particularly, they argued that Chapter 748 had the effect of creating a "symbolic union" of government and religion and of "sending a message" of government "endorsement" of the Satmar religion.[52] In making this argument, they applied the "endorsement" theory developed by Justice O'Connor in earlier Establishment Clause cases.[53] According to this theory, because it "sends a message" to members of disfavored religions that they are not full and equal members of society, the "endorsement" of religious beliefs by government violates the fundamental democratic principle of equal citizenship, and must be recognized as a harm proscribed by the Establishment Clause.[54]

The plaintiffs and supporting amici in *Grumet* relied heavily on this doctrinal theory, claiming that Chapter 748 communicated the state's "endorsement" of the Satmars' "separatist" religious beliefs. Against this theory, the defendants argued that no objective observer would draw a message of endorsement from a policy of accommodation, since any objective observer would understand that accommodations are not meant to promote the religious beliefs of the group being accommodated, or to otherwise "favor" it, but simply to equalize the treatment of the group by lifting burdens and barriers which result from its deviation from mainstream norms. As further refutation, the defendants and the attorney general stressed the secular character of the school district and the public school, noting that its teachers, curriculum, and programs were all secular, that it was coeducational and otherwise departed from the community's religious norms, and that it generally comported with the norms governing secular public schools (as it was required to do by law).[55]

Unfortunately for the defendants, these assertions about the school's secular character, adduced to show that the primary effects of Chapter 748 satisfied *Lemon*'s second prong, became grist for the plaintiffs' mill with regard to *Lemon*'s third prong. The plaintiffs' argument here was that there was no guarantee that the public school institutions would be secular in function and character absent some sort of monitoring system to ensure that the school in Kiryas Joel refrained from smuggling in religious content. But the monitoring required to ensure the secular character of the school district would necessitate precisely the sort of government "entanglement" with religion that the third prong of the *Lemon* test was designed to eliminate.[56]

This was precisely the sort of "Catch-22" argument that critics of *Lemon* had long decried.[57] Picking up on this criticism, the defendants claimed that it was unacceptable to interpret the third prong as prohibiting "the very supervision" that is undertaken "to assure that [the challenged act] does not further

religion"[58] in furtherance of the second prong. To avoid such a Catch-22, either the entanglement test would have to be thrown out (as the anti-*Lemon* forces advocated) or it would have to be interpreted in a way that did not preclude this sort of monitoring. In support of this more moderate conclusion, Attorney General Abrams contended that "[t]he monitoring done by the State to ensure that no public funds are expended to further religion in the public school need be no greater than for any other public school."[59]

The stage was thus set for a direct confrontation with the arguments for reversing *Lemon*. Either the Supreme Court would be persuaded to throw it out, gratifying conservative critics who saw *Lemon* and its underlying principle of church-state separation as expressive of liberal "hostility towards religion."[60] Or it would continue to uphold *Lemon* and apply it to the facts of *Grumet*.

F. The Court's Decision: The Holding and Its Ambiguities

But the Supreme Court refused the invitation to reconsider either the *Lemon* test or the broad principle of separation of church and state that *Lemon* was supposed to embody. Apart from concurring opinions by Justice Blackmun (who expressly affirmed "the general validity of the basic principles stated in *Lemon*")[61] and Justice O'Connor (who likewise confirmed its general validity but found it inapposite to the present case),[62] the Court said nary a word about *Lemon* other than to observe that the lower courts had relied on it when they decided the case.[63] The Court simply avoided the confrontation over *Lemon*.

What doctrine, then, did the Court rely on? Unfortunately, the text of the majority opinion is so ambiguous that it can support various characterizations. On a cursory reading, however, the ambiguities and ellipses in the Court's reasoning are not immediately apparent. The opinion for the Court, authored by Justice Souter, clearly announces two separate principles as the basis for finding Chapter 748 constitutionally defective. These two principles — (1) a prohibition on the "fusion" of political and religious authority and (2) a principle of governmental neutrality vis-à-vis different beliefs — appear to be straightforward applications of previously articulated principles. It is only on a deeper reading that ambiguities within each stated principle surface, and contradictions between the two are revealed.

The fusion theory, for example, which Justice Souter derives from the case of *Larkin v. Grendel's Den*,[64] is subject to at least two competing interpretations. One of these is what we might call a "functionalist" theory of fusion, which turns on how the public institutions created by law actually work in the real world rather than how they are formally defined. The other, seemingly favored by Justice Souter, is more aptly referred to as an "intentionalist" theory of fusion because it focuses on the purposes and intent of the government when it passed the law in question.

Likewise, the seemingly straightforward principle of neutrality is subject to at least two different interpretations: an "intentionalist" conception that converges with the intentionalist conception of religious-political fusion discussed above, and a substantive conception of neutrality. The latter eschews inquiry into whether the government's motives are neutral with respect to competing beliefs in favor of a view of neutrality that concentrates on actual effects.

G. Issues, Resolved and Unresolved

1. *Neutrality: Intent vs. Effects and Non-Preferentialism*

If there is any doctrinal clarity or consensus in *Grumet*, it is that an intent-based standard of neutrality is to be applied in this case rather than an effects test. All the Justices seem willing to permit disparate effects to result from state action, regardless of whether those effects are burdensome or beneficial for religion, so long as they result from government action that was not *intended* to bring about a benefit or a burden.

Beyond this point of agreement, however, the Justices appear to be just as divided over the proper definition of neutrality as they are over the meaning of "fusion" and "delegation." On one account, favored by the dissenting Justices (Justices Scalia and Thomas and Chief Justice Rehnquist), neutrality demands the equal treatment of all religions but not the equal treatment of non-religious beliefs. On a competing view, the principle of neutrality enshrined in the Establishment Clause demands that *all* people and *all* beliefs be treated the same, regardless of whether they are religious or non-religious. Writing for the Court, Justice Souter directly rejected the "non-preferentialist" principle of no favoritism *among* religious beliefs in favor of the stricter standard of neutrality according to which "government should not prefer one religion to another, *or religion to irreligion.*"[65] He was joined in this part of his opinion only by Justices Blackmun, Stevens, O'Connor, and Ginsburg, creating a bare majority in favor of the latter view.

2. *Neutrality and Accommodation*

Putting aside the dispute over whether the principle of neutrality permits denying the right to equal treatment to holders of non-religious beliefs, questions remain concerning what "treatment" consists of. What exactly counts as treating one group "differently" from another, or treating groups "unequally," particularly when accommodating the differences that distinguish groups from one another is recognized as a legitimate policy? The dissenters and Justice Kennedy in his separate concurrence all took the Court to task for failing to take the logic of accommodation to its logical conclusion.[66] On this view, "a legislative accommodation that discriminates among religions *may become* an establishment of religion"[67] or an act of unequal treatment in violation of the Equal Protection and Establishment Clauses — but isn't *necessarily* an act of unequal treatment. In some circumstances, at least, accommodation is a way of furthering equality. When the differences between a sub-group and the dominant culture impede the ability of members of the sub-group to access government benefits and rights that are supposed to be available to all, then special treatment designed to remove or compensate for those barriers may be necessary. Learning disabilities and physical disabilities are classic examples of these sorts of differences, which require accommodation for equality of access to be achieved. Religious practices are another. Like a disability, religious observance can create the sort of barrier to equal access that accommodation — special treatment — lifts. This is why, as both Justice Kennedy and Justice Scalia stressed in their respective opinions, "[g]overnment policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage," regarded as

consistent with the principles of neutrality and equality embodied in the Establishment Clause.[68]

Following this view, the dissent reasoned, it was wrong for the Court to treat the simple fact that the community of Kiryas Joel was singled out for special treatment as evidence of unequal treatment. According to the logic of accommodation, special treatment and unequal treatment are not the same. On the contrary, the different treatment accorded to the Satmars by Chapter 748 was an appropriate response to their unique culture, which gave rise to "unique needs."[69] Chapter 748 was therefore an act that furthered the principle of equal treatment rather than violating it.

The Court could have easily rejected this conclusion had it rejected the principle that legislative accommodations are constitutionally permissible. But it did not reject that principle. Instead, it explicitly embraced the proposition espoused by Kennedy and the dissent, that "the Constitution allows the State to accommodate religious needs by alleviating special burdens."[70] But if accommodations are permissible and special treatment is not *ipso facto* unequal treatment, then the question raised is how to distinguish between special treatment that shades into unequal treatment in violation of the Equal Protection and Establishment Clauses and special treatment that comports with the principle of equal, neutral treatment. Apart from its fusion theory, the content of which remained obscure, the Court offered no clear answer to this question.

3. *Neutrality and Delegation (the "Fusion" Theory)*

Indeed, the Court's definition of neutrality, or equal treatment, consisted almost entirely of a series of negatives (neutral treatment is *not* inconsistent with special accommodations, *not* limited to religious beliefs, *not* violated by accidental benefits or burdens resulting from neutral laws of general application, and *not* inconsistent with the actual or functional empowerment of separate religious groups). The only positive idea that the Court offered, which could conceivably provide a criterion for distinguishing accommodations that comport with the principle of equal treatment from ones that do not, was the vague notion of an intentional "delegation" of governmental power.

The notion of delegation formed the core of the Court's theory of fusion, according to which governmental actions violate the Establishment Clause if they create a "fusion" of political and religious authority. The Court's fusion theory merged with the neutrality theory insofar as it relied on a notion of intentionally drawing lines between different groups with the object of conferring political power on only some of them. Had this idea actually served to distinguish neutral from non-neutral accommodations, then it might have supplied the missing content to the definition of neutrality (albeit at the expense of collapsing the distinction between the two principles). Unfortunately, the Court's fusion theory suffered from fatal weaknesses that prevented it from filling up the gaps in the Court's theory of neutrality.

One weakness with the "fusion" theory is that the Court is never entirely clear on what it means; another is that, given the interpretation that the Court *appears* to favor, it seems to contradict the Court's other preferred theory, which is that the principle of "neutrality" allows government actions that accidentally enable religious groups to exercise political power in furtherance of their own ends. While blending with the idea that neutrality is consistent with

certain forms of special treatment (i.e., legislative accommodations), the fusion theory could not cohere with the Court's other big idea about neutrality, which is that what counts is the legislature's intentions, not accidental or unintended effects. The Court never reconciled, or even acknowledged, the tension between these two ideas. A careful analysis of the fusion theory, however, soon brings it to light.

Justice Souter's opinion begins by identifying the "fusion of political and religious authority" as the constitutional defect in the Kiryas Joel School District, citing *Larkin v. Grendel's Den* as the source for the proposition that fusions of political and religious authority violate the Establishment Clause.[71] *Larkin* involved a law that gave churches the power to approve or veto — in effect, to make — zoning decisions about whether to allow liquor to be sold in their vicinity. *Larkin* held that such a delegation of governmental decision-making authority to religious bodies constituted an impermissible fusion of religious and political authority. The difficulty with applying this argument to *Grumet*, as Justice Souter did, is that, unlike in *Larkin*, where governmental decision-making authority was delegated directly to churches (and their religious leaders), the powers of local government delegated by Chapter 748 were not delegated to a religious institution or to the religious leaders of the Satmars, but, rather, to the *people* of Kiryas Joel. As far as the legislative text was concerned, the people were defined in terms of their residency within the geographic territory and political jurisdiction of the Village of Kiryas Joel, not in terms of their membership in any particular religion, synagogue, or "church." And while the legislature knew full well that the residents of the Village were all Satmars, and had that in mind as a reason for enacting the legislation, it did not make that membership a qualification of the privilege bestowed by Chapter 748. As far as the requirements of the Act went, the residents of Kiryas Joel could cease to affiliate with the Satmar religion tomorrow, and still be part of the constituency entitled to its own separate school district under the Act. In other words, the powers of government associated with the formation of a public school district were given to the people of Kiryas Joel, not to their religious leaders or institutions. Furthermore, the people received those powers in their capacity as individual political citizens, not in their capacity as members of a particular religion. Pushing on this point, Justice Scalia argued in dissent that the fact that the residents of the Village "happened to be" of the same religion did not suffice to establish that the powers of government inherent in a public school district were being delegated *to* a religious group, as such. But if there was no delegation to the religious group, then there was no fusion of political and religious authority, and *Larkin* was inapposite.

There were several different ways of responding to this argument. The problem is that the Court was not very clear about which one it favored. The first way of refuting the anti-fusion argument was to characterize it as unduly formalistic and to argue for a functionalist understanding of fusion instead. This is the approach proposed by many of the amicus briefs written in support of the plaintiffs' position, which disputed the secular nature of the school district and pointed to the various ways in which the pervasively religious character of the Satmar community was bound to infuse the character of the public school with impermissible religious elements.[72] The basic idea here was that, while they might be secular *in form, in substance* the public school and the district could not help but reflect the religious values and practices of the surrounding community. Only a rigidly legalistic mindset that elevated form over substance,

opponents of the school district argued, could fail to see the "theocratic" nature of the political entity thus created.

According to this view, what matters — and the only thing that matters — is how things actually work in practice, not how they are formally or legally defined or how they were *intended* to work by the legislature. The opening paragraph of Justice Souter's opinion appeared to adopt this functionalist approach when it declared that "this unusual Act is *tantamount* to an allocation of political power on a religious criterion,"[73] and went on to argue that "the difference between . . . vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance."[74] Viewed in isolation, this language seems to imply that any legislation that has the *effect* of empowering a religiously homogeneous community to form its own municipal institutions violates the principle of no religious-political fusion and hence the Establishment Clause.

But if so, then the Village of Kiryas Joel also should be deemed unconstitutional — a position no one advocated. Countering Justice Scalia's accusation that he was endorsing this view,[75] Justice Souter expressly averred that "[w]e do not disable a religiously homogeneous group from exercising political power."[76] He thus repudiated the effects-based reasoning associated with the functionalist conception of fusion, and explicitly held that the Constitution allows political jurisdictions to be created that contain religiously homogeneous groups, so long as the group is defined "according to traditional political methodologies taking account of lines of latitude and longitude and topographical features."[77] In other words, so long as the political jurisdiction is defined in geographical terms, the fact that it just "happens" to contain a single religious group acting in accord with its religious values and spiritual leaders is no defect — and does not by itself constitute an impermissible fusion of religious and political authority. A clearer rejection of the functionalist approach could hardly be imagined.

4. A School District for *a Particular Religious Community* vs. *A School District* in *a Particular Religiously Homogeneous Community (an Intent Analysis)*

But then what does constitute the impermissible fusion of religious and political authority? What makes Chapter 748 "tantamount" to an allocation of political power to a religiously defined group? And how might that answer the question of when a legitimate policy of accommodating group differences shades into an unconstitutional practice of unequal treatment? By way of an answer to these interlinked questions, Justice Souter shifted his rhetoric from the language of substance over form to a focus on the *purposes* behind the Act. According to this part of Souter's opinion,

> Where "fusion" is an issue, the difference [between delegating political authority to a group of individuals who just happen to be religious and delegating it to a religious group] lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.[78]

The preferred interpretation of fusion thus merged with the preferred interpretation of the principle of neutrality: the government had to act, intentionally, on

principles that were neutral with respect to religious belief. The paradigmatic example of such a suitably neutral legislative act was the municipal incorporation statute under which the Village of Kiryas Joel had been formed.[79] That act was a general statute which gave the residents of any geographic area the right to vote to form their own municipal corporation, so long as they met certain objective criteria regarding size and topography — criteria that made no reference to the residents' beliefs or identity.

On this view, the constitutional virtue or defect of a religiously homogeneous political jurisdiction lies not in its character but in the character of the legislature's motives when it passes the legislation under which the creation of the jurisdiction is authorized. The fact that the people voting and holding office in the political jurisdiction are motivated by religious values or influenced by their religious leaders doesn't matter on this view so long as they observe the rules governing all political jurisdictions and observe the forms of secular democratic politics.

In taking this position, the Court was taking sides in a debate brewing among political theorists in the 1980s and 1990s over whether it was legitimate in a democracy subject to the Establishment Clause for voters and office-holders to act on their religious beliefs.[80] Many argued that making people suppress their religious values when they voted or engaged in other forms of political activity was both unfeasible and inconsistent with the ideal of democracy — a position the Court seemed to endorse. On this logic, it was perfectly acceptable for the people of Kiryas Joel to follow their religious convictions when voting on the propositions to secede and incorporate their own separate village, and equally acceptable for them to follow their religious convictions or heed their religious leaders when voting on candidates for the city council or the school board or the mayoral election. Likewise, there was nothing inherently wrong with the members of the city council, the school board, and the mayor following their religious convictions when formulating local government policies — so long as they observed the laws that govern the exercise of political power, such as the rules promulgated by the State Department of Education and all of the state and federal constitutional provisions that limit the exercise of governmental authority in the name of protecting individual rights.

Rejecting the functionalist theory of fusion, the Court was not willing to accept the characterization of the school and the school district as secular in form, but religious in function, just because the people who ran it and the people who voted for the people who ran it were religious and acted on their beliefs. It treated both the district and the school itself as presumptively secular political institutions, just as it regarded the Village as a secular local government entity notwithstanding the religious and homogeneous nature of its electorate.

5. Religious Gerrymandering: Justice Souter's Confusion and Justice Kennedy's Concurrence

At the same time, the Court insisted that the state government be neutral in its treatment of different religious and non-religious groups. This raised the question of what it means to treat groups equally or neutrally. While clearly a standard that focuses on the government's intentions or motives rather than on the unintended effects of its actions, Justice Souter's definition of unequal treatment was ambiguous. The intentional governmental act that he dwelt on was

"drawing political lines" or jurisdictional boundaries "on the basis of" a "religious criterion" — the defect he found in Chapter 748. But he left unclear what using a religious criterion to draw boundaries actually means. What exactly must the state have in mind to be found to have drawn lines "on the basis of" a religious criterion? Is it enough if it was aware that its authorizing legislation would or could result in a religiously homogeneous population being contained in a single political jurisdiction? Or does the government have to actively desire to empower (or disempower) a particular religious (or non-religious) group and make that the reason, and the basis, for its drawing of political boundaries?

The clearest answer to the question of how to define "religious line drawing" was provided not by Souter but by Justice Kennedy, who, in his concurring opinion, equated drawing political boundaries on the basis of religion with the practice of racial gerrymandering recently denounced by the Court in the landmark case of *Shaw v. Reno*.[81] On Justice Kennedy's view, deliberately drawing territorial boundaries in order to produce a religiously homogeneous population (as opposed to allowing boundaries to be drawn that just "happen" to contain a religiously homogeneous population) is as clear an act of intentional discriminatory treatment as the analogous act of deliberately drawing the territorial boundaries of voting districts to produce a majority of voters belonging to a racial minority group. In each case, the intention is to empower a minority group by allowing it to dominate a political jurisdiction. And it is that intention, according to Justice Kennedy, that infects Chapter 748 with a constitutional infirmity. "In this respect," Justice Kennedy asserted, "the Establishment Clause mirrors the Equal Protection Clause. Just as government may not segregate people on account of their race, so too it may not segregate on the basis of religion."[82] Quoting earlier cases that condemned racial gerrymandering, Justice Kennedy declared that "[w]hen racial or religious lines are drawn by the State, the multiracial and multi-religious communities that our Constitution seeks to weld together as one become separatist." He denounced that practice as being "at war with the democratic ideal."[83] On his analysis of the facts of Kiryas Joel, "[th]ere is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause."[84]

Kennedy's religious gerrymandering theory provides a relatively clear answer to the question of what purposes invalidate an act that creates political jurisdictions, and why. It likewise comports with the Court's general preference for intent-based standards of equality and neutrality ("formal neutrality") over functionalist effect tests ("substantive equality"). If, as Kennedy reasons, it is the State's intention to bestow political power on the Satmars that converts the geographically defined constituency into a delegation of power to a religious group, then the fusion theory and the neutrality theory converge into a single principle, forbidding government to make religious or racial classifications and requiring it to treat all people the same.

The problem is that this insistence on treating people the same sits uneasily with the Court's embrace of the practice of legislative accommodations, which, as shown above, rests on the very different view that differential treatment can be a form of equal treatment. A further problem with the gerrymandering theory is that, apart from Justice Kennedy, no one on the Court explicitly endorsed it. What Souter means by using religion as a "criterion," as he accuses the legislature of doing when it crafted Chapter 748, is left entirely vague. In the end, it is

not clear whether the Court is condemning the practice of religious gerrymandering, the practice of making religious classifications, or some other bad practice intentionally undertaken by the legislature.

A graver problem with the gerrymander theory is that it contradicts the rest of what the Court's and the concurring opinions say about the implications of the formal neutrality standard. It is here that the latent tension between the Court's fusion theory and the Court's neutrality theory comes into view. Much of the Court's neutrality analysis is occupied with the "uniqueness" of the case, not only the uniqueness of the Satmar community, but also the uniqueness of the treatment it received from the State. Here, the problem seems to be not that the legislature drew a line around a religious sub-group, but that it did not draw similar lines around other sub-groups. The clear implication is that if the Court were assured that the legislature would draw similar lines around every religious sub-group with a need for its own public schools, then there would be no violation of the principle of equal treatment, hence no violation of the principle of neutrality, and hence no violation of the Establishment Clause.

In other words, gerrymanders for everyone!

In taking this position (that the cure for the constitutional defect is to make the opportunity to establish a separate school district available to other "similarly situated" communities), the Court was implicitly agreeing with the dissent. Indeed, the main point of contention between the Court and the dissent concerned the state legislature's readiness to provide other groups with the same opportunity. From the fact that Chapter 748 was a "special act," specific and exclusive to Kiryas Joel, rather than a general act, granting all local communities meeting relevant criteria the authority to create their own school districts, the Court inferred that the state legislature was unwilling to extend the same benefit to other groups. The dissent, led by Justice Scalia, disputed this contention. On Justice Scalia's view, the fact that Chapter 748 was a special rather than a general act simply reflected the uniqueness of the Satmars' cultural situation and consequent practical needs. On this interpretation, no other community was granted the authority to create its own school district because no other community had asked for such authority, and no other community had asked for such authority because no other community *needed* such authority to accommodate its distinctive cultural practices. If another community with a similar need did come along in the future, there was no reason to assume that the state legislature would not recognize it and confer on it the same benefit. The Court's insistence on a guarantee up front that the legislature would respond fairly to similar demands in the future was, in the eyes of the dissent, preposterous and by no means necessitated by the principle of neutral/equal treatment.

Notwithstanding the intensity with which it was expressed, this disagreement between the Court and the dissent is quite narrow. There is no dispute over what the reigning standard is: the government is required to treat all groups equally, according to both the majority and the dissent.[85] "Neutrality," on this common view, consists in the absence of discriminatory treatment. Differential treatment of groups (treating different groups differently) is permissible if justified as an accommodation; but — and this is the key point of agreement between the majority and the dissent — differential treatment must be accorded to *every* group that requires an accommodation or else it is discriminatory.

On this view, there is no problem with creating "separatist" school districts, so long as every separatist group has an equal entitlement to one. In other words,

separate is okay, so long as separate is equal. There are a number of potential problems with this logic, not the least of which is that it sounds suspiciously similar to the logic of separate but equal, long defended but ultimately repudiated in the context of race relations.[86] Neither the Court's opinion nor the dissenting opinion addressed the possible objections to the logic of separatism embedded in their shared theory of neutrality/equality. Only Justice Stevens' concurrence directly confronted some of the normative objections to separatism. But even if they went unacknowledged, the embrace of a separatist conception of equality created a number of problems for interpreting *Grumet*, undermining the clarity of its holding.

6. The Tension Between Neutrality as Equal Opportunity Separatism (Accommodation) and the Anti-Gerrymandering and Anti–Line-Drawing Principles

One problem is that the logic of separate but equal implicit in the favored interpretation of neutrality contravenes the prohibition on gerrymandering invoked by Justice Kennedy and arguably (albeit ambiguously) also endorsed by the Court in its conception of fusion and delegation. If the deliberate drawing of political lines on the basis of race or religion is impermissible in one instance, multiplying the instances in which political boundary-lines are drawn on the basis of racial or religious classifications is not going to solve the problem — it is going to exacerbate it. Deliberately creating political jurisdictions in which the totality (or near totality) of the population belongs to a single racial or religious group is arguably even worse than the typical gerrymander, which contents itself with a mere majority of minority group members. If the problem lies in the use of religious or racial classifications with the intention of conferring political power on a group defined by such classifications, or helping a group classified by race or religion to dominate a political district, it is hard to see how universalizing the practice constitutes a solution. But that is exactly what the preferred interpretation of neutrality as equal treatment calls for.

Of course, the only one to explicitly embrace the anti-classification/anti-gerrymandering logic that contradicts the logic of equal treatment was Justice Kennedy. The meaning of the Court's repudiation of the use of a "religious criterion" in "drawing the lines" around the school district's jurisdiction was left unresolved. If the practice of religious line-drawing condemned by Justice Souter is the practice of religious gerrymandering condemned by Justice Kennedy, then it is subject to the same inconsistency with its neutrality theory as the gerrymandering principle. If it is not equivalent to a gerrymander, then the Court's definition of delegation according to a religious criterion was simply opaque; devoid of content, it fails to provide any explanation of how conferring local government authority on a territorially defined jurisdiction was "tantamount" to conferring political power on a religious group.

7. Anti-Separatism: Justice Stevens's Concurrence

Underlying the contradiction between the Court's neutrality theory (which permitted, if not encouraged giving every separatist sub-group a separate but equal local government of its own) and the Court's fusion theory (which seemed to frown on drawing political lines around groups) was the more fundamental

question concerning the legitimacy of the practice of providing state support for separatist cultures. This question was squarely addressed in only one opinion, Justice Stevens's, in which only two other Justices, Blackmun and Ginsburg, joined. Unlike the other opinions that concentrated on the principles of fusion and neutrality, this short and pointed concurrence was entirely devoted to denouncing the "[a]ffirmative state action in aid of segregation"[87] which Justice Stevens saw as the defect in Chapter 748.

On the surface, Stevens's concern with state-sponsored separatism echoed Justice Kennedy's concern with drawing lines to "separate" different groups. Hovering over Kennedy's and Stevens's opinions, though not explicitly cited, was the spirit of the landmark Equal Protection case, *Brown v. Board of Education*, which held, in the context of racially segregated schools, that separate is inherently unequal. But whereas Justice Kennedy focused on the legislative act of making racial or religious classifications, the concern that Justice Stevens expressed was with the separatist *effects* such classifications were designed to produce. As Stevens saw it, the "protection" that the Satmars were seeking for their culture was a form of "isolation" that was meant to "increase[] the likelihood that [the children] would remain within the fold, faithful adherents of their parents' religious faith."[88] Here, Stevens's opinion echoed Justice Douglas's famous dissenting opinion in *Yoder*, which lamented that the Court's decision to exempt the Amish from the compulsory education laws would have the effect of denying the Amish children "exposure to the new and amazing world of diversity," and thereby deprive them of their right to freedom of choice.[89] In much the same spirit, Stevens deplored the fact that the State was intentionally "support-[ing] a religious sect's interest in segregating itself and preventing its children from associating with their neighbors," rather than "tak[ing] steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs." In Stevens's view, it was the government's deliberate support of the Satmars' separatist practices and beliefs that made it fair to characterize Chapter 748 "as establishing, rather than merely accommodating, religion."[90]

This reasoning represents a different basis for condemning Chapter 748 than either the fusion or the equal treatment/neutrality theories highlighted in the other opinions. Under the equal treatment theory favored alike by the Court and the dissenters, there is an easy way to make the authorization of the separate school district in Kiryas Joel constitutional: simply extend the same benefit (of creating separatist public school districts) to all "similarly situated" communities. But if separatism (or more precisely, deliberate government support for separatism) is the problem, then this will be no solution at all. In much the same way that multiplying the occasions of gerrymandering exacerbates rather than alleviates the problem of gerrymandering, universalizing the opportunity to establish separate, and separatist, political jurisdictions exacerbates the problem of state-sponsored segregation.

The ultimate question in *Grumet* was whether the Court should accept the view that government-sponsored segregation is a practice prohibited by the Establishment Clause. In his concurrence, Justice Stevens made a forceful argument in favor of the proposition, focusing on the supposedly harmful effects of separatism on the community's children, whom he pictured as being "prevent[ed] . . . from associating with their neighbors," deprived of the experience of "diversity," and "cemented" to their parents' faith as a result of the state-supported "isolation."[91]

As Justice Scalia said in retort, "So much for family values!"[92]

But Scalia was hardly the only one to roundly repudiate the repudiation of separatism and to affirm the legitimacy of separatist accommodations. Not only did Justice Thomas and then Chief Justice Rehnquist join his dissenting opinion, but Justice Souter's opinion for the Court also endorsed the interpretation of the neutrality principle as a principle of nondiscriminatory treatment, which implicitly licenses separate but equal accommodations of separatist groups. The Court explicitly affirmed that religious groups have the right to establish their own local governments, and nowhere in the Court's opinion did it express the objections to separatism voiced in Justice Stevens's opinion. Apart from Justices Blackmun and Ginsburg, who joined Stevens's concurring opinion, none of the other Justices supported his anti-separatism theory, unless one can read Justice Kennedy's gerrymandering theory as providing a tacit endorsement. But, as we have seen, Kennedy's opinion was more concerned with the government's act of making racial and religious classifications than with the ground-level experience of living in a separatist community. As far as Kennedy's opinion went, it would seem to be permissible for a separate school district to be organized within the village of Kiryas Joel so long as the legislation authorizing village-level school districts was not written specifically for the religious community of Kiryas Joel but was instead made available to all similarly situated groups.[93] Directly countering the spirit of Stevens's anti-segregationist argument, Justice Kennedy stated:

> People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. Religion flourishes in community and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights.[94]

Justice Kennedy thus made clear that, far from rejecting the logic of separatism embedded in the Court's and the dissent's shared conception of neutral/equal treatment, his anti-gerrymandering principle rested on the same basic principle of separate but equal opportunities for separatist political jurisdictions as that endorsed by the Court and the dissent. Six Justices, therefore (Justices Souter, Kennedy, and O'Connor on the side of the Court, and Scalia, Rehnquist, and Thomas on the side of the dissent) sided squarely with the view that the Establishment Clause is properly interpreted as a principle of nondiscriminatory treatment, permitting accommodations of separatist religions so long as they are provided to groups on an equal basis. Yet this conception of neutrality sat uneasily with the Court's alternative theory, according to which delegations of governmental power to groups selected for their religious identity constitute impermissible fusions of political and religious authority.

H. Conclusion: Contradictions and Confusions and the Aftermath of *Grumet*

The foregoing analysis shows the contradictions and confusions hidden in the Court's reasoning in *Grumet*. In total, at least four different theories of the constitutional defect in the authorizing legislation were offered for

consideration: (1) a functionalist theory of religious and political fusion, which focuses on how the political institutions created by the legislation actually function in practice; (2) a formalist theory of fusion, which depends on the legislature intentionally allocating the powers of local government to a religious group, which in turn depends on something like a religious gerrymander, a deliberate use of religious classifications with the aim of creating a political jurisdiction populated mostly (or entirely) by members of a single religious group; (3) a formalist, i.e., intentionalist theory of neutrality, which demands that government treat all belief-systems equally, and neither favor nor disfavor any religious beliefs — a principle which permits the legislature to accommodate religious differences and special needs by authorizing the creation of separatist political jurisdictions so long as every group that "needs" such separatist institutions gets them; and (4) an anti-segregationist theory, which condemns the intentional creation of separatist political jurisdictions and likewise condemns active government support of group-based exclusion.

The first theory was roundly rejected. Depending on how the second theory is interpreted, the second and third theories either merge into or contradict each other. If the fatal intention condemned by the intentionalist theory of neutrality is the intention of drawing political lines around a group in order to empower it, then it makes no sense to demand that all groups that "require" separation must get it. Likewise, if the fatal intention is to facilitate separation and social isolation, then equal opportunities for separation are no cure for the defect. Justice Scalia derided Justice Souter's "position," saying that it "boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power but not if they all belong to the same religion."[95] Echoing the complaints of the religious right, he characterized this position as evincing hostility to religion in contradiction to the Court's professed neutrality towards competing religious and non-religious beliefs.[96] But the Court's decision did no such thing. In fact, Justice Souter expressly endorsed the position that Justice Scalia insisted on, holding that "we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens,"[97] and further, that "we do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion."[98] The Court thus directly repudiated the anti-segregationist theory espoused by Justices Stevens, Ginsburg, and Blackmun, while leaving the ambiguities of its fusion theory and the contradictions between its fusion theory and its neutrality theory unresolved.

As a result of these ambiguities and contradictions, the holding defies simple summarization. *Grumet* stands as a significant precedent, but it is hard to say what it stands for. With its convoluted reasoning, it reflects tensions within our fundamental ideals that remain unresolved to this day.

In the aftermath of the litigation, the Satmars and their supporters not surprisingly seized on the theory that was most favorable to resurrecting legal authority for the Kiryas Joel School District. Ignoring the conflicting principles in the Court's opinion, they focused on its definition of neutrality as a principle of nondiscriminatory treatment sanctioning equal opportunity accommodations of group separatism. Following the Supreme Court's implicit blueprint, the New York State Assembly lost no time in drafting new legislation modeled on the presumptively valid municipal incorporation law that took the form of a general statute granting every local community that meets certain neutral

criteria the right to carve out its own school district.[99] This new legislation was promptly challenged in state court on the grounds that, while general in form, the intention behind the legislation remained the same: to benefit the Satmars, and only the Satmars, of Kiryas Joel.[100] If the sole beneficiary, and the sole *intended* beneficiary, remained the Satmars, then, the challengers argued, the new authorizing legislation was as much a violation of the principle of equal treatment embodied in the Establishment Clause as the original authorizing legislation. Three times the New York state legislature enacted new authorizing statutes designed to conform to the *Grumet* Court's apparent demand for a general, as opposed to a special, statute, while providing authorization for the school district in Kiryas Joel.[101] Twice, the state court struck down the authorizing statutes enacted subsequent to Grumet as violations of the Establishment Clause.[102] Finally, in 2001 the state court ruled that the Kiryas Joel School District satisfied the requirements of the third authorizing statute passed by the state in the wake of *Grumet*. The record is silent as to why, in this last legal battle over the school district in Kiryas Joel, the challengers refrained from challenging the constitutionality of the latest authorizing statute and confined themselves to merely arguing that the Kiryas Joel school district failed to meet the statute's requirements. No appeal was taken from the state court's ruling to the contrary. The authorizing statute was left to stand and so ended seven years of litigation over the fate of the public school district in Kiryas Joel.

On June 23, 1997, almost four years prior to this final ruling on the validity of the Kiryas Joel Village School District, the Supreme Court handed down *Agostini v. Felton,*[103] reversing *Aguilar* and *Ball*, the two cases that had condemned the practice of providing state-funded special educational services on the site of private parochial schools. With the stroke of a pen (or a keypad), the circumstances giving rise to the need for a separate school district in Kiryas Joel were thus removed. Nonetheless, the Kiryas Joel Village School District continues to operate. From the day it first opened its doors after the passage of Chapter 748, the public school in Kiryas Joel has been in continuous operation. Today, it educates over 250 special needs students drawn from within the Village and from other Hasidic communities in the area, whose members also speak Yiddish and follow the same traditional way of life as the Satmars. For all intents and purposes, the constitutionality of the school district is now settled. What remains unsettled is the state of Establishment Clause doctrine in constitutional law.

ENDNOTES

1. 512 U.S. 687 (1994).
2. Jerome R. Mintz, Hasidic People: A Place in the New World 206-209 (1992); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 692-93 (1994).
3. Years after the *Grumet* litigation, a legal challenge was brought alleging that the Village itself was an unconstitutional establishment. Waldman v. Village of Kiryas Joel, 39 F. Supp. 2d 370 (S.D.N.Y. 1999), *aff'd,* 207 F.3d 105 (2d Cir. 2000). However, the court threw the case out on the grounds that it constituted a thinly disguised extension of a previously adjudicated private law dispute, barred by the doctrine of res judicata. Other than this lawsuit, there has been no serious legal challenge to the constitutionality or legal validity of the Village of Kiryas Joel.
4. Lemon v. Kurtzman, 403 U.S. 602 (1971).
5. *See* Mintz, *supra* note 2, at 28.
6. *Id.* at 27.

7. *Id.* at 29-30.
8. *Id.* at 34-35.
9. *Id.* at 36-38.
10. *See id.* at 36-38.
11. S.Y. Gelbman, *Ritson Tsadik*, at 6.
12. Mintz, *supra* note 2, at 309.
13. *Id.* at 310.
14. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 693 (1994).
15. Mintz, *supra* note 2, at 61; *see also* I. Rubin, Satmar: An Island in the City (1972).
16. Mintz, *supra* note 2, at 310.
17. *Id.* at 310; Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 692 (1994).
18. 473 U.S. 373 (1985).
19. 473 U.S. 402 (1985).
20. 521 U.S. 203 (1997).
21. Mintz, *supra* note 2, at 310. There was actually a controversy preceding the efforts to form a separate public school system over whether, in the wake of *Aguilar* and *Ball*, special education and other public school services could be provided at a "neutral site," neither public school nor parochial school. The Monroe-Woodbury School District claimed that this was not an option, but the State Supreme Court ruled to the contrary, holding that the school district should provide special education to the Satmar children at a neutral site. A few months later, the Appellate Division struck down this holding, denying that special education could be provided at a neutral site, and in July 1988, the New York State Court of Appeals overturned that judgment, ruling that the provision of special education was permissible but not obligatory on the part of the Monroe-Woodbury District. *See* Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 134 Misc. 2d 658, 512 N.Y.S.2d 305 (1987), *modified*, 132 A.D.2d 409, 522 N.Y.S.2d 878 (2d Dep't 1987), *rev'd*, 72 N.Y.2d 174, 531 N.Y.S. 2d 889 (1988). In the wake of that decision, the Monroe-Woodbury School District refused to educate the Satmar children at a neutral site, leading the parents to conclude that the establishment of a separate school district was their only option. *See* Brief of Defendant-Appellant Board of Education of the Kiryas Joel Village School District, submitted to the Court of Appeals, State of New York, March 13, 1993, at 8-9; Mintz, *supra* note 2, at 311-12. Bd. of Educ. of Kiryas Joel Vill. Sch. Dis't v. Grumet 512 U.S. 687, 692 (1994) (citing Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 180-181, 527 N.E.2d 767, 770 (1988)).
22. Mintz, *supra* note 2, at 311.
23. *See* Mintz, *supra* note 2, at 316; Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 692 (1994) (citing Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Weider, 527 N.E.2d 767, 770 (1988)).
24. Mintz, *supra* note 2, at 316.
25. *See, e.g.*, Michael Sandel, Liberalism and the Limits of Justice (1982); Alasdair MacIntyre, After Virtue (1981), Michael Walzer, Spheres of Justice (1983); Charles Taylor, Sources of the Self (1989); Will Kymlicka, Liberalism, Community and Culture (1989).
26. Grumet v. Bd. of Educ. of Village of Kiryas Joel School Dist., 618 N.E.2d 94, 107 n.1 (N.Y. 1993) (Hancock, J., concurring).
27. *See* Kymlicka, *supra* note 25, David Hollinger, Post-Ethnic America (1995).
28. The Satmars made no such claim. *See* Reply Brief of Defendant-Appellant Board of Education of the Kiryas Joel School District, at 4 ("Satmar Hasidim prefer their insular community in Kiryas Joel not because insularity is religiously mandatory, but because adherence to their traditional way of life is facilitated by a self-sustaining homogeneous neighborhood.") Yet the plaintiffs' argument assumed that they must make such a claim. *See* Respondents' Brief submitted to the New York Court of Appeals, at 47 ("Since Defendants-Appellants have not identified any specific religious precept infringed upon, they may not successfully assert that Chapter 748 . . . removes a deterrent to the free exercise right of Kiryas Joel residents.").
29. 406 U.S. 205 (1972).
30. For theoretical developments of this idea, see Ron Garet, *Communality and Existence: The Rights of Groups*, 56 Cal. L. Rev. 1001 (1983); Gerald Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 St. Louis U. L.J. 275 (1986).
31. Brief for New York School Board Association as Amicus Curiae, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527, and 93-539).
32. *Id.*
33. Anti-Catholic bigotry and the desire to prevent Catholics from dominating the school boards in communities where they were the majority had supplied the original impetus for regionalization of the public schools. *See* Diane Ravitch, The Great School Wars: A History of New York Public Schools (2000).

34. *See* Grumet v. N.Y. State Educ. Dep't, 579 N.Y.S.2d 1004 (N.Y. Sup. Jan. 22, 1992) (No. 2595).

35. On the fight against secular humanism and the role of the Moral Majority and other conservative Christian organizations, 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. 591 (1993). On the concept of "legal secularism," see Noah Feldman, Divided By God: America's Church-State Problem — And What We Should Do About It (2005).

36. *See* Stolzenberg, *supra* note 35.

37. Allegheny County v. ACLU, 492 U.S. 573 (1989).

38. *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

39. *See* http://www.lewinlewin.com/nathan.html; http://www.chiunesugihara100.com/eng/guest-speech.htm.

40. The State Education Department had opposed the passage of Chapter 748 in the legislature. *See* Mintz, *supra* note 2, at 316. But once Chapter 748 was passed, it found itself in the role of the official agency in charge of its implementation, and therefore was named as defendant in the legal challenge. *See* Grumet v. N.Y. St. Educ. Dep't, 579 N.Y.S.2d 1004 (N.Y. Sup. Jan. 22, 1992) (No. 2595).

41. 592 N.Y.S. 2d 123, 126 (1992). Grumet and Hawkins were granted standing in their individual capacity under the New York State Finance Law, N.Y. State Fin. Law §123 (McKinney 1989).

42. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 694 (1994).

43. *Id.*

44. *Id.*

45. Lee v. Weisman, 505 U.S. 577 (1992) (holding that a rabbi's recitation of a prayer at a public high school graduation ceremony was unconstitutional); Zobrest v. Foothills Catalina Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause does not bar the state from providing a deaf interpreter as an aid to a deaf child at a parochial school).

46. *See* Brief for Petitioner Bd. of Educ. of the Monroe-Woodbury Cent. Sch. Dist. at 9-11, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Monroe-Woodbury Brief]; Reply Brief for Petitioner Bd. of Educ. of the Monroe-Woodbury Cent. Sch. Dist. at 13, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Monroe-Woodbury Reply Brief].

47. Brief for Respondents at **24-31, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Respondent's Brief].

48. Brief for the Petitioner at *14, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Kiryas Joel Brief]; *see also* Monroe-Woodbury Brief at **18-21.

49. Monroe-Woodbury Brief at **16-21; Kiryas Joel Brief at **14-19; Petitioner's Reply Brief at *5, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Kiryas Joel Reply Brief].

50. *See* Monroe-Woodbury Brief at **43-50; Kiryas Joel Brief at **18-19; *see also* Brief for Petitioner Attorney General of the State of New York at *26, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Nos. 93-517, 93-527 and 93-539) [hereinafter Attorney General's Brief].

51. Lemon v. Kurtzman, 403 U.S. 602, 612 (1972).

52. Respondents' Brief at **32-40.

53. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that a public Christmas display including crèche, Christmas tree and Santa Claus house does not violate the Establishment Clause); *id.* at 687-94 (O'Connor, J., concurring).

54. *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

55. Kiryas Joel Brief at *11; Attorney General's Brief at **8, 18.

56. Respondents' Brief at **42-45.

57. *See, e.g.*, Paul Finkelman, Religion and American Law: An Encyclopedia 389 (2007); Richard B. Couser, Ministry and the American Legal System 38 (1993).

58. Kiryas Joel Brief at *35 (citing Bowen v. Kendrick, 487 U.S. 589, 615 (1988)).

59. Attorney General's Brief at, **31-32.

60. *See, e.g.*, *"Scrap the Lemon Test," Says Southern Baptists*, Christian Century, Mar. 2, 1994, at 219.

61. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 710 (1994) (Blackmun, J., concurring).

62. *Id.* at 718-721 (O'Connor, J., concurring).

63. *Id.* at 695 (*citing* Grumet v. N.Y. St. Educ. Dep't, 570 N.Y.S.2d 1004 (1992), 592 N.Y.S.2d 123 (1992), 618 N.E.2d 94 (1993)).

64. 495 U.S. 116 (1992).

65. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) (emphasis added). *Compare id.* at 748 (Scalia, J., dissenting) ("I have always believed that . . . the Establishment Clause prohibits the favoring of one religion over others") *with id.* at 709 ("An Establishment Clause diminished to the dimensions acceptable to Justice Scalia could be enforced with a few simple rules, and our docket would never see cases requiring the application of a principle like *neutrality toward religion as well as among religious sects*. But that would be as blind to history as to precedent, and the difference between Justice Scalia and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates the Court to exercise the judgment necessary to apply it" (emphasis added)).

66. *Cf. id.* at 716 (O'Connor, J., concurring) ("I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation.").

67. *Id.* (Kennedy, J., concurring) (emphasis added).

68. *Id.* at 723 (Kennedy, J., concurring) (quoting Allegheny County v. ACLU, 492 U.S. 573, 657 (1989)).

69. *Id.* at 738.

70. *Id.* at 705.

71. *Id.* at 696 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)).

72. This argument was made most forcefully in the amicus brief submitted by the Committee for Public Education and Religion. *See* Brief of Committee for Public Education and Religious Liberty as Amicus Curiae, at 1 (quoting the Appellate Division's opinion, which characterized the school board as "controlled by members of that sect."); *see also* Respondent's Brief at 34, fn. 4, p.44.

73. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994).

74. *Id.* at 698.

75. *See id.* at 736 (Scalia, J., dissenting.) ("Justice Souter's position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion").

76. *Id.* at 708.

77. *Id.* at 708.

78. *Id.* at 699.

79. N.Y. Village Law, Art. 2 (McKinney 1973 and Supp. 1994).

80. *See, e.g.*, Bruce Ackerman, *Why Dialogue?* 86 J. Philosophy 5 (1989); Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 Ethics 64 (1990); Stephen Holmes, *Gag Rules or the Politics of Omission, in* Constitutionalism and Democracy (Jon Elster & Rune Slagstad eds., 1989); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 Philosophy & Pub. Aff. 215 (1987); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 Cornell L. Rev. 747 (1993); Stephen Carter, God's Name in Vain: The Wrongs and Rights of Religion in Politics (2001); Daniel A. Dombrowski, Rawls and Religion: The Case for Political Liberalism (2001); *see also* Monroe-Woodbury Brief ("The notion that members of a governing body of a public institution must set aside their religious convictions before they enter the boardroom door has been uniformly rejected") (citations omitted).

81. 509 U.S. 630 (1993).

82. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 728 (1994).

83. *Id.* at 728-29 (Kennedy, J. concurring) (citing Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting) (quoted in Shaw v. Reno, 509 U.S. 630, 648-49 (1993)).

84. *Id.* at 728-29 (Kennedy, J., concurring).

85. There is a dispute over whether the obligation to treat all groups equally under the First Amendment applies only to religious groups or extends to non-religious groups as well. But there is no dispute that equal (nondiscriminatory) treatment is the relevant obligation.

86. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

87. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

88. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet 512 U.S. 687, 711 (1994).

89. Wisconsin v. Yoder, 406 U.S. 205, 241-246 (1972) (Douglas, J., dissenting).

90. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711-12 (1994).

91. *Id.* at 711 (Stevens, J., concurring).

92. *Id.* at 749 (Scalia, J., dissenting).

93. *See id.* at 729 (Kennedy, J., concurring) ("it is important to recognize the limits of this principle [i.e., the principle against religious gerrymandering]. We do not confront the constitutionality of the Kiryas Joel village itself, and the formation of the village appears to differ from the formation of the school district in one critical respect. . . . the village was formed pursuant to a religion-neutral self-incorporation scheme.").

94. *Id.* at 730 (Kennedy, J., concurring).
95. *Id.* at 736 (Scalia, J., dissenting).
96. *Id.*
97. *Id.* at 705.
98. *Id.* at 708.
99. Chapter 241, N.Y. Educ. Law §1504 (1994).
100. The case involving the constitutional challenge to Chapter 241 is known as Kiryas Joel II. *See* Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. Mar. 8, 1995) (holding Chapter 241 constitutional), *rev'd,* N.Y.S.2d 565 (N.Y. App. Div. Aug. 26, 1996), *aff'd,* 681 N.E.2d 340 (N.Y. May 6, 1997).
101. Chapter 241, N.Y. Educ. Law §1504 (McKinney 1994); Chapter 390, N.Y. Educ. Law §1504 (McKinney 1997); Chapter 405, N.Y. Educ. Law §83 (McKinney 1999).
102. For citations to Kiryas Joel II, see *supra* note 101. The citations for what is known as Kiryas Joel III, the litigation involving the challenge to Chapter 390, are Grumet v. Pataki, 675 N.Y.S.2d 662, (N.Y. App. Div. July 9, 1998) (holding Chapter 390 to be a violation of the Establishment Clause), *aff'd,* 720 N.E.2d 66 (N.Y. May 11, 1999), *cert. denied,* 528 U.S. 946 (1999).
103. 521 U.S. 203 (1997).