# FROM GHETTO TO EMANCIPATION:

## HISTORICAL AND CONTEMPORARY RECONSIDERATIONS OF THE JEWISH COMMUNITY

Edited by

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# THE PUZZLING PERSISTENCE OF COMMUNITY: THE CASES OF AIRMONT AND KIRYAS JOEL[1]

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The suburbs of America have changed. Long a site of cultural homogenization, they have become host to an increasingly diverse array of racial and ethnic groups. Immigrants from such countries as Haiti, Jamaica, Guatemala, and El Salvador have formed their own cultural outposts in areas that were formerly enclaves for predominantly white, middle-class aspirants of the American dream.[2] But rather than assimilate into the bland, undifferentiated cultural landscape stereotypically associated with suburban life, many of these groups have proven to be remarkably tenacious in maintaining traditional customs, languages, and lifestyles that distinguish them from other groups.[3] In this dynamic environment, no group has stood out more or displayed more of an inclination for cultural and political autonomy than the various Hasidic Jewish communities which have been moving out of New York City into the neighboring suburban counties for several decades. A new local radio station in Rockland County is emblematic of the demographic shifts: WLIR-AM advertises itself as "all Jewish all the time," but from Friday night through Saturday, in observance of the Jewish Sabbath, it plays Latin and Haitian music.

The resurgence of particularistic groups as exclusive and traditionalist as the Hasidim is puzzling, if one accepts the notion that modern, liberal principles of political organization inexorably lead to assimilation and the demise of traditional, close-knit communities. The basic constitutional principles of liberalism, which posit a split between the political and private realms, have long been viewed as a chief cause of the atomization of holistic communities. It is from this standpoint that

the persistence of traditional, separatist forms of community, like that of the Hasidim, appears enigmatic. In a milieu where the practices of local government, including zoning and public education, have historically served to foster secularization and cultural assimilation, the Hasidim living in the suburbs of New York have been strikingly effective in turning the mechanisms of local government to their advantage, even as they have been forced to struggle with considerable local opposition.

A close examination of these contests over local government, including the legal disputes that ensue, presents a picture of the relationship between liberalism and community that differs from the commonplace vision of liberalism's "atomizing" effect. Not that this commonplace is false, but it expresses an oversimplification—a truth, but not the whole truth. Careful analysis of the disputes over local government between the suburban Hasidim and their neighbors reveals that, in addition to posing a threat to traditional communities, liberal principles of government can also serve to protect and empower them.

The possibility that liberal principles might operate to the advantage of an exclusive, separatist, holistic community is illustrated in the recent Supreme Court case of *Kiryas Joel*.[4] *Kiryas Joel* involved a challenge to the constitutionality of a public school district that was created to serve an exclusively Hasidic community. The Supreme Court upheld the challenge, holding that the formation of the Hasidic school district constituted an unconstitutional state establishment of religion. An analysis of *Kiryas Joel* that gives due attention not only to its immediate outcome, but also to the structure of its underlying reasoning, demonstrates that the effects of liberal law upon community are complex. These effects become visible when we juxtapose the case against another legal contest over local government between Orthodox Jews and their neighbors—the case of *United States v. Village of Airmont*.[5] Although *Airmont* raises questions about a newly incorporated village, rather than about the formation of a school district, it is in many respects the mirror image of *Kiryas Joel* as it involves a political secession from a larger town by a group of residents who sought to minimize the presence and political influence of Orthodox and Hasidic Jews. Like *Kiryas Joel*, it rests on legal reasoning that implicitly justifies



the incorporation of an exclusionary local government under certain circumstances.

The *Airmont* litigation serves as a particularly useful point of comparison because it arose out of the same general milieu as *Kiryas Joel*. *Airmont* is one of a host of civil and criminal cases that deal with the growing tensions between traditionally observant Jews and their secular neighbors in the suburbs of New York.[6] Airmont lies in Rockland County, New York, which is adjacent to Orange County, the home of Kiryas Joel. In their exodus out of New York City, various Hasidic groups established separate footholds in different towns in Orange and Rockland Counties. Simultaneously, non-Hasidic Orthodox Jews also flocked to the suburbs, where, within close proximity to New York, they could escape the travails of city life. Although members zealously guard the boundary-lines dividing the different Hasidic and Orthodox groups, they have found themselves unceremoniously lumped together by their non-Orthodox suburban neighbors when it comes to the question of their compliance with prevailing norms of land use and education.

Two land-use controversies in particular have fueled the antagonism between Orthodox Jews and their opponents. First, many Orthodox and Hasidic Jews object to the single-family zoning requirements typical of the relatively affluent suburbs. Orthodox real estate developers spearheaded the demand to change the zoning laws in order to permit multiple family housing. In some cases, they purchased land and began to advertise "Torah Community" subdivisions containing apartment buildings even before variances from the customary single-family zoning requirements were obtained. In addition to the disagreement over multi-family dwellings, controversies arose over the placement of houses of worship. Some residents raised objections to plans to build new free-standing synagogues. A more pervasive conflict grew out of the newcomers' use of *shtiblekh*, informal worship congregations located in residential homes, which do not comport with customary zoning restrictions on the number, location, and size of houses of worship.

The cases of *Kiryas Joel* and *Airmont* illustrate an ever more popular response to these seemingly intractable disputes: political secession. Towns that embraced increasingly heterogeneous and

fractious populations have split apart, as new and smaller local governments were formed by subcommunities seeking a municipality of their own. In the town of Ramapo, which originally contained what is now the village of Airmont, no fewer than twelve communities seceded to form their own separate villages. Both Kiryas Joel and Airmont were created as part of the general movement for secession and village incorporation which swept across Rockland and Orange Counties, New York, and beyond.

The contrast between the two cases raises a question avoided in the *Kiryas Joel* litigation. We will see that a highly formalistic conception of religious neutrality enables exclusively Hasidic local government—villages *and* public school districts—to be formed and, furthermore, to be constitutionally justified. But that same view of neutrality serves equally well to justify the formation of local governments, like the village of Airmont, which are hostile to traditionalist Jews. Given that the same formalistic jurisprudence underwrites both these results, should the partisans of Jewish communal autonomy support or reject it? And, on the other side, what are the principles of the nonformalistic conception of neutrality that would support the conclusion that religiously exclusive local governments, like Airmont and Kiryas Joel, are constitutionally and legally defective? Confronting these questions opens our eyes to the complexity of liberal legalism's impact on exclusionary communities.

Kiryas Joel and Airmont provide an instructive contrast. Kiryas Joel was formed so that the members of the ultra-Orthodox Satmar sect of Hasidic Judaism could have their own local government, free not only from the competing political demands of non-Jews, but from other Orthodox and Hasidic Jews with whom they differ. Airmont was formed precisely in order to get away from "the Jews" (though some of those who sought this escape were non-Orthodox Jews). The Satmar Hasidim, who created the village of Kiryas Joel, compose the very picture of the tight-knit, pervasively regulated, traditional holistic community that references to *Gemeinschaft* conjure up. In contrast, the founders and inhabitants of Airmont are a loose and shifting assortment of individuals. Kiryas Joel is a religious community; Airmont is secular. Kiryas Joel is homogeneous—100% of its inhabitants are members of the Satmar sect;



Airmont is religiously and ethnically heterogeneous (though predominantly white, professional, and middle to upper-middle class). The community of Kiryas Joel is extremely cohesive, organized around the central figure of the *Rebbe*, the hereditary rabbinic leader who exercises charismatic authority over every aspect of his followers' lives. The residents of Airmont have no unifying organization other than their sporadic and optional involvement in the democratic procedures that state law prescribes for forming and governing local municipalities. Unlike Airmont, Kiryas Joel is fiercely opposed to assimilation and modern innovations. As the Supreme Court observed, the Satmars "interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls."[7] Adult men wear long beards, sidelocks, and the dark frockcoats and hats of late nineteenth–century Hungary.[8] Adult women dress modestly and cover their heads with scarves and wigs. In short, they look and act differently from most Americans, whereas Airmont residents conform to mainstream cultural norms.

Yet the communities are similar in one important respect. Both are exclusionary. The Satmars resist the penetration of the outside culture; Airmont's inhabitants resist the inclusion of the traditional Jewish way of life. Moreover—and this is the key point for purposes of understanding liberalism's impact upon community—both communities use the coercive powers of collective regulation to secure and conserve their respectively favored ways of life. Not only is each community able to exercise considerable power over how land will be used (and hence by whom) through the coordinated exercise of individual rights of private property and contract, but each community has also been able to use the powers of local government toward its exclusionary ends. The questions that remain to be explored are how such exclusionary groups are able to assume the form, and command the levers of an official governmental body—i.e., a municipal incorporation or a public school district—and how such results have been justified as being consistent with the requirements of a liberal constitutional order.

Answers to these questions are suggested by the judicial opinions

issued in *Airmont* and *Kiryas Joel*. These opinions exhibit four specific modes of liberal legal reasoning that are commonly employed in interpreting the requirements of anti-discrimination and anti-establishment law. Each of these modes of reasoning takes the form of a conceptual distinction: the distinction between (1) public and private realms, which has historically played a central role in liberal thought; (2) religious and nonreligious "cultural" or "secular" domains; (3) neutral *intentions* and neutral *effects*, a distinction more technical and perhaps less familiar, to the reader who is not versed in legal doctrine or political theory; and (4), probably the least familiar of all, laws or mechanisms of government that are *generally* available to all groups on an equal basis, and laws or governmental mechanisms that are *particularistic*, i.e., that advantage or disadvantage a particular group or groups. The distinction here is not that between the general and the particularistic, but rather between *two different ways of understanding the difference* between general and particularistic governmental action. One we shall call *formalistic*, the other we dub *nonformalistic* for reasons that will become clear in the following pages.

Together, these four conceptual distinctions—public versus private; religious versus secular; neutrality of intent versus neutrality of effect; the formalistic distinction between general and particularistic laws versus a non-formalistic version of the same—explain how, in a liberal constitutional order, the material foundations of exclusionary communities are assembled. Beyond that, they explain how some communities are able to assure their continued survival by capturing their own piece of governmental power, in the form of local government institutions. From this perspective, Airmont and Kiryas Joel appear less as aberrations in the American landscape than as particularly vivid—and, in their legal exposition, particularly explicit—examples of what, after all, is a fairly unexceptional phenomenon of American local democracy: the existence of culturally or religiously homogeneous (and, in that respect, exclusionary) municipal governments and public schools.

The distinction between private individual rights and public governmental power plays a particularly crucial role in explaining the establishment and legitimization of homogeneous, exclusionary communities. It is not simply that groups are permitted to exist in the



private realm of market transactions and free association. The theoretically prior private existence of associations is indispensable to the legal justification of *local governments* that "just happen" to contain and represent religiously or culturally homogeneous populations. The idea that public boundaries sometimes "just happen" to be congruent with the boundaries of "private" communities, and that public and private entities are *not*, therefore, equivalent, was crucial to the reasoning of *Kiryas Joel*. It also played a pivotal, albeit implicit, role in the trial judge's determination in *Airmont* that the *government* of Airmont was not biased against Orthodox and Hasidic Jews, even though many of the "private" citizens who founded it—and were subsequently elected to run it—quite clearly were.

In *Airmont*, the court was called upon to consider whether illegal discrimination against Orthodox and Hasidic Jews was involved in the actions of a newly incorporated village. The federal government joined the litigation in support of the private plaintiffs' complaint that the village of Airmont, and its officers and founders, discriminated against Orthodox Jews, in violation of the Federal Fair Housing Act and the First Amendment. In the end, the trial judge, Gerhard Goettel, exonerated the village of charges of anti-Semitism. (The decision was eventually overturned by the Court of Appeal.)

Evidence that leaders and supporters of the movement to incorporate Airmont were animated by a desire to separate themselves from the new Orthodox arrivals was abundant. Judge Amalya Kearse, writing for the U.S. Court of Appeals in *Airmont II*, quoted a string of statements made by members of the Airmont Civic Association (ACA), the citizens' organization formed to promote the establishment of Airmont as a separate village. In her summary of findings, she found that:

> Throughout the period prior to Airmont's incorporation, ACA emphasized the need for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community. For example, ACA leaders polled Airmont residents as to their views, and one response, read aloud by ACA leaders at an August 1986 ACA meeting, stated as follows:

> [W]hat would be better, for us to loose [*sic*] our homes for a religious sect or for us to live as we have lived for the past 25 years. . . .
> . . . [L]et the people in the unincorporated Area of Ramapo, go ahead and fight for what they believe in. Instead of giving up for what we've worked very hard for, to a bunch of people who insist on living in the past. I am not prejudice [*sic*] in any way, shape or form but I [*sic*] *will not* have a hasidic community in my backyard. (Emphasis in the original.)

The minutes of the same meeting forecast "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan counties." At a September 1986 meeting shortly after a Hasidic developer had bought land in the Airmont area, one of those attending referred to that purchase and stated that

> everybody knows . . . why the Airmont Civic Association was formed. What does the Airmont Civic Association and the proposed village plan to do to keep these Hasidum [*sic*] out? (Trial Transcript ("Tr.") at 2989).

The developer testified that in 1987, ACA's original president, James Filenbaum, stated that "the reason of forming this village is to keep people like you out of this neighborhood." (Tr. at 890.) At an ACA meeting in the spring of 1989, shortly after the Airmont area residents had voted for incorporation, the suggestion of one resident that ACA get involved in planting trees was met with

> a lot of grunts and groans from the audience and everything, and I heard Mr. Fletcher [one of ACA's more strident leaders] sitting in the back of the room respond to that by saying, you know, let's face it, the only reason we formed this village is to keep those Jews from Williamsburg [a Hasidic community in Brooklyn, New York] out of here. (Tr. at 4031.)[9]



In Judge Kearse's presentation, these words, quoted at length from the trial transcript, speak for themselves. The trial judge, Gerhard Goettel, made no mention of them, however. The reason Judge Goettel did not see fit to introduce this evidence, given such prominence in the appellate court's opinion, can be gleaned from what he did write in his opinion.

With respect to the plaintiffs' contention "[t]hat the Village of Airmont has developed a reputation as a community hostile to Orthodox and Hasidic Jews," Judge Goettel responded, "[i]f it has, it is largely the result of the lawsuits brought against it by the various plaintiffs and the extensive publicity plaintiffs have intentionally generated."[10] Judge Goettel's judgment against the plaintiffs is particularly notable because it required setting aside part of the jury's verdict, an imposition of judicial authority which is rarely exercised and subject to severe constraints. While refusing to render verdicts against the *individual* defendants who served as the village's elected officials and trustees, the jury found that the *village* had violated the plaintiffs' constitutional right to the free exercise of religion, as well as the Fair Housing Act's prohibition against religious discrimination. Judge Goettel justified modifying the jury's verdict on the grounds that it was internally inconsistent. He resolved this "inconsistency" between the jury's treatment of the village as a corporate political entity and of the individuals who served as its officials in favor of a blanket verdict of innocence. In his view, whatever "anti-Orthodox underlay"[11] might be found could only be ascribed to individuals as such, in their private capacity, and not to public actions.

An exceedingly formalistic distinction between the public (government) and the private (individuals) is operative in this reasoning. Rather than recognize that the individual citizens who mouthed patently anti-Semitic views were the same individuals who *led* the political movement for the village's incorporation and then served as its officials, and rather than draw the inference that the village's new zoning code would likely be interpreted consistently with these officers' professed intentions, Judge Goettel dismissed the plaintiffs' complaint on the

ground that it amounts to nothing more than an argument that "the Village was conceived in sin and cannot escape the taint of its illegitimate birth."[12] In other words, whatever preceded the political "birth" of the village is a purely private matter. The use of this metaphor implies that the public and private roles of individual citizens are sharply divided. As a result, statements of bias made by village officials are not attributable to them in their official role, let alone to the government which they represent, in the absence of independent evidence of public discriminatory action. Only on the basis of such a strict public-private bifurcation could Judge Goettel deny that the village's zoning code was adopted, at least in part, in order to thwart the Orthodox and Hasidic community. His implicit reliance on the public-private distinction led him to the equally tacit conclusion that the anti-Semitic remarks of the defendants were, if not technically irrelevant, unworthy of judicial remark.

*Airmont I* thus illustrates how a strict conceptual compartmentalization of public and private actions works to exculpate a government entity of charges that its motives are discriminatory. In effect, the public-private distinction strips the "taint" of bias from the municipality and its officers by locating it in the emanations of the private realm (in which the same individuals who serve as municipal officers reappear in their private roles). Such a formalistic way of assigning motivations to one side or another of a purely conceptual division of domains denies the realities of local politics, in which voters, vote and officials run for election precisely on the basis of the candidates known "personal" views. It flies in the face of the very idea of active citizenship in a democracy, the object of which is to engage individual citizens in political action, and thereby to blend private and public roles. Recalling the evocative analogy employed by Judge Goettel, it is as if the "birth" of a political jurisdiction did not occur through human processes of intercourse, gestation, midwifery, and delivery, but instead sprang from the *deus ex machina* of a stork's visitation—as if there were no connection between the people and activities bringing about the birth and the subsequent actions of a political entity.

The public-private distinction worked similarly in the litigation of *Kiryas Joel*. In 1989 Mario Cuomo, then governor of New York,



authorized the creation of a new public school district within the confines of an existing suburban village, made up exclusively of members of the ultra-orthodox Satmar sect of Hasidic Judaism.[13] The distinctive character of the village is reflected in the very name that its inhabitants bestowed upon it, when, in 1977, they seceded from the larger, more diverse town of Monroe.[14] They named the newly separated municipal incorporation Kiryas Joel—in Hebrew, "the town of Joel"—after the community's religious leader, *Rebbe* Joel Teitelbaum.[15]

Though the Satmars generally rely upon private religious schools to educate their children, they petitioned the state to authorize the creation of a public school system within the village in order to obtain state-funded special needs education for the community's disabled children. Given the existing constitutional prohibition on providing state funds for private sectarian schools,[16] the existing alternatives were to forfeit the financial subsidy from the state and educate the disabled children in religious schools, or to send them to mainstream regional public schools. With the former option ruled out as being prohibitively expensive, Satmar parents first tried and then rejected the second option on the grounds that exposing their disabled children to a foreign cultural environment was psychologically traumatic, religiously offensive, and disruptive of the children's ability to learn. Of particular concern was the fact that the established public schools do not use Yiddish, the children's mother tongue. It was in response to the community's plea for linguistic, cultural, and religious accommodation that the state granted its petition to form a new public school district, with boundaries perfectly coterminous with the Satmars' village.

The Supreme Court's judgment in *Kiryas Joel* that this state act violated the constitutional prohibition against state "establishments" of religion was widely covered by the media.[17] Many observers insisted that such a ruling was required by the First Amendment's establishment prohibition. To these observers, a contrary ruling would have represented an astounding and lamentable departure from the sacred principle of the separation of religious and public realms. But unbeknownst to most casual observers, the Supreme Court's grounds for striking down the creation of the school district in Kiryas Joel were actually quite narrow, and left open the possibility that new state legislation could be

passed, supplying constitutionally valid authorization for a public school district with precisely the same geographic boundaries and constituency. The interpretation of the establishment clause articulated in *Kiryas Joel*, which underwrites this possible result, reflects a highly formalistic conception of state neutrality which, in fact, allows religiously exclusive groups to incorporate themselves as local governments, while it simultaneously affirms the sacred principle of the separation of religious and public realms.[18]

As in *Airmont I*, the public-private distinction functions in the reasoning of *Kiryas Joel* to shift the blame for acts of religious exclusion away from public actors by locating them in the "private" realm. This use of the public-private distinction appears most clearly in the Court's acceptance of the constitutionality of the *village* of Kiryas Joel and in its suggestions for how a constitutionally valid school district in Kiryas Joel might be created. In brief, the Supreme Court's reasoning appears to be this: Boundaries of political jurisdictions that are drawn along religious lines violate the establishment clause of the Constitution. Political boundaries that are drawn along other lines, e.g., territorial or geographic, do not violate the establishment clause. But what does it mean to draw a boundary "along" religious lines? If a state act explicitly invokes a religious criterion, i.e., membership in a particular religion or adherence to certain religious practices or beliefs, as the basis for political line-drawing, that is clearly a violation of the establishment clause. But in most cases, the state does not expressly rely on such religious criteria on the face of its authorizing statutes. If a state act does not make religious criteria an *express* basis for political line-drawing, but, for example, articulates a strictly territorial basis which nonetheless *coincides* with the boundaries of a religiously exclusive community, does that violate the establishment clause? This was the problem confronted by the Supreme Court in *Kiryas Joel*. In this case, it found that the state had delegated its "discretionary authority over public schools to a group defined by its character as a religious community,"[19] even though the state did not delegate this power "by express reference to the religious belief of the Satmar community, but to residents of the 'territory of the village of Kiryas Joel.'"[20] The Court concluded that the Act authorizing the public school was "substantially equivalent to defining a political



subdivision . . . by a religious test" because it was *intentionally* drawn to exclude all but Satmars.[21] This raises the question of why the village of Kiryas Joel was not found to be similarly constitutionally defective, since it, too, was deliberately formed to exclude all but Satmars.[22] The answer to this question, which seems to have been assumed by all the members of the court but which was explicitly articulated by Justice Kennedy in his concurring opinion, relies on the same kind of public-private distinction that we saw in *Airmont I*. According to Justice Kennedy:

> the Establishment Clause does not invalidate a town or a state "whose boundaries are derived according to neutral historical and geographic criteria, but whose population *happens* to comprise co-religionists." [citation omitted.] 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. There is more than a fine line, however, between the *voluntary* association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of people's faith.[23] (Emphasis added.)

According to Justice Kennedy, "[i]n creating the Kiryas Joel Village School District, New York crossed that line," but not in creating the village of Kiryas Joel itself.[24] Justice Kennedy's opinion implies that the Village just "happened" to be made up exclusively of Satmars, but that the school district's homogeneous composition was deliberate. This distinction between accidental and intentional religious homogeneity interacts with and presupposes a prior distinction between voluntary (private) associations and public ones.

After all, it could hardly be maintained that the religious character of the territory of Kiryas Joel was accidental, in the sense of a spontaneously occurring (or even more implausibly, *recurring*) phenomenon, beyond human control. The religious character of Kiryas Joel is obviously not a freak accident, but rather something which is actively managed and maintained. But by what mechanism? It is not, and constitutionally could not be, upheld by a village charter, zoning law, or any other official governmental mechanism requiring membership in the Satmar community. Indeed, the Satmars had no need for any such public law of exclusion. Through the exercise of standard rights of private property, individual contract, and the various components of familial and religious control over education and socialization that are constitutionally recognized and protected as "privacy rights," the objective of excluding non-Satmars had already been accomplished prior to the formation of the village.

New York state law, like the law of most states, allows any territorially defined population to incorporate itself as a village so long as it meets certain minimal population and procedural requirements.[25] The Satmars only came to be in a position to form a separate village because a sufficient number of individual members had acquired a set of contiguous lots of private property. As more and more Satmars moved in and purchased properties in the area, more and more non-Satmars moved out, selling to the Satmars as they left. Once enough Satmar families acquired these privately held properties, they could ensure that occupancy would remain exclusively Satmar in the future through a variety of formal and informal "private," albeit collective, controls. On a formal level, private property owners could enter into reciprocal mutually restrictive covenants, pledging not to transfer rights of ownership or occupancy to non-Satmars in the future.[26] Such covenants, which represent a specialized form of contract used in the context of real estate, and which bind successive owners as well as the original parties to the contract, are no different in form from the ubiquitous covenants, conditions, and restrictions standardly employed to give condominium owners and private homeowners associations the power to consent to, veto, or otherwise control new members. They are also no different in form from the racially restrictive covenants that white



owners used for decades to keep private property from getting into "non-Caucasian" hands.

The idea that these voluntary agreements do not constitute state action, and that state action forms no part of them, depends upon a highly formalistic distinction between private and state action. On the basis of the public-private distinction, the state, as such, is cleared of any responsibility for religious exclusion that results from their enforcement.[27] According to this mode of reasoning, state officials bear no responsibility for acts of exclusion or self-exclusion that reflect the private preferences of individuals operating in the market for real estate, and in the parallel "marketplace of ideas," in which religious affiliations are supposedly selected. Of course, from a sociological perspective we know that such preferences are not the product of purely voluntary, individual choice but the carefully regulated outcomes of diffuse yet pervasive and powerful processes of socialization, controlled by communal institutions such as families, churches, cultures, and schools. Yet, from the standpoint of the traditional liberal distinction between public and private realms, individual preferences are properly considered to be accidental, that is to say, incidental to the powers of collective regulation that are formally recognized and exercised only in the public realm.

By defining behavioral preferences, like the choice to live "with your own kind," as private factors of individual choice, the public-private distinction obscures the community's reliance on legally protected collective forces of regulation and enforcement. In the case of Kiryas Joel, not only was the Satmar community endowed with considerable power over the socialization of its children; it also exercised significant powers of "private" control regarding the punishment of internal dissenters. Despite the high degree of conformity and cohesion generally exhibited by the community, the decision to establish a Satmar public school in fact provoked strong internal dissent. Dissenters faced severe communal sanctions: social shunning and the denial of access to the village cemetery and places of worship. Such sanctions are enormously powerful, even though they are not directly enforced by official courts of law. Despite the fact that they are not directly enforced by civil legal institutions, the private enforcement of

these sanctions does require exercising the rights of private property (in the cemetery and places of worship) which *are* backed by the state's civil authority. The efficacy of these sanctions further depends on the disciplined members' ongoing desire to participate in the community's prescribed cultural and religious practices—a desire induced by the community's constitutionally protected "private" powers of socialization and education. The powers of private punishment themselves play an inestimable role in producing and enforcing the very beliefs, desires, and preferences which make these private sanctions effective. Individual rights of property and choice, communal institutions and practices, and collective sanctions thus form part of a seamless cultural web in which individual beliefs and preferences are produced. From this standpoint, it is sheer folly to try to separate private individual choice from the products of state-backed collective regulation.

Nonetheless, that is exactly what the reasoning of *Kiryas Joel* and *Airmont I* purports to do. Insisting on a formalistic distinction between the public and the private serves a dual function in these cases. On one hand, as already noted, it serves to remove the responsibility for acts of exclusion from state or local government by imputing them to purely private preferences, agreements, and property relations. On the other hand—yet by the same token—the public-private distinction defines the nature of the material basis of a community's means of territorial control in a liberal society. Only by amassing a sufficient amount of *private property* does a community like the Satmars' put itself in a position in which members can exercise their individual rights of political participation in a way that establishes effective local political control. Establishing residence in a particular area is ordinarily a prerequisite for participating in that area's local political elections and other democratic processes.[28] Once enough members of a community have established their private residence, majoritarian procedures of democratic politics more or less ensure either that the existing political jurisdiction will become subject to that community's control, or, alternatively, that the community can secede to form its own local political jurisdiction. Occupying private property is the essential underpinning to political—territorial control in either of these two scenarios. But as long as the formalistic distinction between public power and private rights is



maintained, the resulting character (in these cases, the religiously exclusive character) of the political jurisdiction can be regarded as a happenstance.

This is apparently the reasoning that underlies the courts' acceptance of the constitutionality of the villages of *Airmont I* and *Kiryas Joel*. What remains a puzzle, then, is why the Supreme Court nonetheless found the original school district of Kiryas Joel to be unconstitutional, since the religiously exclusive character of the school district's population was no less a happenstance of the private realm than was the homogeneous character of the village. Indeed, the composition of the school district's and the village's populations had to result from precisely the same forces (of private socialization and property relations) because the school district and the village contain the *same* population. It is one and the same community that first established itself in the private precincts of Monroe, then seceded to form the village of Kiryas Joel, and later petitioned the state to form its own school district.

It is true that the Satmar community is required to comply with certain constitutional and legal constraints whenever it exercises its official powers of government (as either a village or a public school). Whereas the private community is permitted to run itself hierarchically, the village and the school district must be run in conformity with the democratic procedures prescribed by state law. (Elections must be held, hearings must be open, and so on.) Similarly, the private institutions of the community are not subject to precisely the same constitutional and statutory prohibitions against discrimination on the basis of race, creed, religion, etc. that bind all governmental entities.[29] Nor are the community's private actions bound by the establishment clause's prohibition against employing governmental power toward religious ends or becoming "entangled" with religion.[30] Under this constitutional prohibition, the village and the school district may pursue "secular" or even "cultural" *but not religious* ends, through secular or cultural *but not religious* means—limitations which do not bind the private religious institutions of the Satmar community.

The distinction between the "religious" and the "secular" drawn under the establishment clause tracks the public-private distinction which we have been discussing, and serves as another essential com-

ponent of the legal reasoning by which the legitimacy of religiously exclusive local governments is explained. The public domain in which government operates must remain secular; religion is relegated to the private realm. But how are secular/cultural functions distinguished from religious ones? The prevailing liberal legal understanding of the difference between religious and secular/cultural functions clearly differs from ways of conceptualizing the relationship of the sacred to the secular embraced by certain other cultures, including the Hasidic culture. In the conventional liberal view, religion is relegated to the private realm of church and community and, ultimately, to the inner sanctum of the individual conscience.[31] The Satmars' way of understanding the place of the sacred in quotidian life is a perfect illustration of a holistic approach that challenges such a formal or categorical distinction between religious and secular realms. From its inception, Hasidism was based on the notion that the sacred pervades all of life, including the most mundane activities. This is not to say that Hasidic belief systems like the Satmars' lack any notion of the profane. But this is quite different from categorizing activities as intrinsically religious or nonreligious. The conventional liberal designation of political and adjudicative activities as public, and by that token, secular, simply makes no sense from the holistic viewpoint of traditional Judaism, according to which the exposition and application of the law are a quintessentially religious, and at the same time, communal activities.

As a device for identifying which activities are endowed with religious significance for the Satmars, the liberal religious-secular distinction is simply too rigid, asserting bright-line classifications in a cultural context where none is to be found. It imposes a false order, at odds with the reality of the Satmars' experience. In the Satmars' self-understanding, goals such as linguistic separation and cultural self-preservation are inseparable from religious aims.

And yet the conventional liberal distinction between the secular and the religious was essential to the Satmars' defense of the constitutionality of an exclusively Hasidic school district, and they did not hesitate to rely upon it. They attested at length to the "merely cultural" *as opposed to religious* character of the school district, as summarized by the dissenting judges in *Kiryas Joel*:



> The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students. The superintendent, who is not Hasidic, is a 20-year veteran of the New York City public school system, with expertise in the area of bilingual, bicultural, special education. The teachers and therapists at the school all live outside the village of Kiryas Joel. While the village's private schools are profoundly religious and strictly segregated by sex, classes at the public school are co-ed and the curriculum secular. The school building has the bland appearance of a public school, unadorned by religious symbols or markings; and the school complies with the laws and regulations governing all other New York State public schools.[32]

In the same vein, proponents of the school district argued that it was established to accommodate the cultural and psychological—*not* the religious—needs of the community. They asserted that the goal was to spare disabled Satmar children the "emotional trauma" they suffered in the regional public schools from the "additional handicap of cultural distinctiveness."[33] The use of Yiddish in the school was similarly defended as a way to achieve the basic educational goals of bilingual education, rather than religious ends, just as being in the exclusive company of Hasidic children was defended as a way to create a culturally and psychologically comfortable learning environment.

By enabling the community to describe its project as one of cultural rather than religious separatism, the formalistic liberal distinction between secular and religious realms lent essential support to the argument that public officials were not themselves engaged in religious exclusion, or in any other kind of religion-oriented activity. To defend the school district against the charge that it was essentially a religious enterprise, it was not enough to locate the mechanism for excluding non-Satmars in the private realm, for even if the homogeneity of the population is secured through private means, the school district officials that represent that population are still required to comply with the edicts of constitutional law. A formalistic distinction between religious and secular functions makes these requirements relatively easy to satisfy. So

long as the community's goals of self-perpetuation and insulation can be described as cultural and secular functions, the public school (and other government) officials can legally implement them.

A similar distinction between religious and nonreligious concerns supported the argument that the village of Airmont was *not* established to implement anti-Semitic policies. Judge Goettel acknowledged that Airmont's "new" zoning code was just a resurrection of Ramapo's old town zoning code, which, the founders of Airmont had complained, was only laxly enforced against the new Jewish arrivals. But, as in Kiryas Joel, local government activities that "happened" to favor or disfavor a certain religion's way of life were deemed to be religiously neutral, so long as they assumed the form of typical secular governmental functions. If Orthodox Jews found that they were guaranteed to be a political minority, predictably unable to prevail in land use regulation disputes after the incorporation of the village of Airmont, that was not due—according to this argument—to any *religious* animosity. It simply reflected the newly carved-out majority's preference for certain patterns of land use over others, a cultural preference, not a religious (or anti-religious) one.

The willingness to accept such a categorical distinction between religiously biased and religiously neutral functions played an obvious role in supporting Judge Goettel's conclusion that Airmont did not disfavor Jews. This distinction played a more subtle role in the Supreme Court's decision in *Kiryas Joel*, which did, after all, rest on the conclusion that the original school district authorization was "substantially equivalent" to a religious establishment. The crucial point here is that this conclusion was *not* based on a rejection of the school district's claim to be serving secular functions. Nor was it based on refuting the basic concept of a bright-line distinction between religious and secular domains. It certainly involved no recognition of the religious significance attributed to mundane activities in the Satmars' worldview. On the contrary, the majority of the Supreme Court tacitly agreed with the dissenting justices' characterization of the "secular" (*ipso facto* non-religious) character of the school. This agreement presupposed the Court's acceptance of the secular-religious distinction, which, in turn,



informed its prescription for how to make a religiously homogeneous school district, like the Satmars', constitutional.

Indeed, while striking down the original state act which authorized the creation of Kiryas Joel's Hasidic school district, the Supreme Court provided a virtual blueprint for how to do it again, properly. This blueprint was based upon the conventional liberal view of the distinction between secular and religious realms, in addition to three other conceptual distinctions analyzed throughout this paper (the public-private distinction; the distinction between neutral intentions and neutral effects; and the distinction between formalistic and nonformalistic understandings of particularistic, as opposed to general or universalist, political regimes).

The recipe for a *constitutional* religiously homogeneous public school district (or local governmental institution of any sort) received its most explicit articulation in the concurring opinion of Justice O'Connor. As she noted, "[f]ortunately for the Satmars, New York state law had a way of accommodating their concerns"—to wit, *general* enabling statutes, as opposed to statutes that benefit only one group. The difference between general and special legislation that O'Connor is pointing to here can be illustrated by comparing the form of New York's village incorporation statute, under which the village of Kiryas Joel was constitutionally incorporated, to the constitutionally defective legislation under which the school district was originally formed. The village incorporation act enables *any* community to form a village, so long as it meets certain basic requirements, such as territorial contiguity, minimum population size, and the manifestation of popular consent which have no bearing on the identity of the group. By contrast, the state act that originally authorized the creation of the school district of Kiryas Joel singled out the Satmars' village for the privilege of incorporating its own public school system; no other villages were allowed to form their own school districts under current state law.[34] According to the Supreme Court, it was this particularistic, as opposed to general character, that was constitutionally fatal. But then, as Justice O'Connor explained, in drawing out the implications of the Court's reasoning, there was an obvious remedy:

> There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village which was consciously created by its voters as an enclave for their religious group.[35]

In other words, if the state would just replace the special legislation, which singled out the village of Kiryas Joel, with general legislation giving all similarly situated village-communities the right to form their own public schools, without regard to their particular group identity, the guarantee given by the establishment clause of no religious favoritism would be satisfied. Not surprisingly, the state of New York lost no time in following Justice O'Connor's explicit advice.

Justice O'Connor's blueprint gave concrete form to an otherwise bewildering general proposition, articulated by Justice Souter, that must have given advocates for the strict separation of church and state cause for grave concern. According to Justice Souter, the Supreme Court does not, in expounding the meaning of the establishment clause, "disable a religiously homogeneous group from exercising political power."[36] Rendered in the affirmative, this means that the constitution, as interpreted and applied by the Supreme Court, *permits* a religiously homogeneous group to exercise political power. One could hardly conceive of a starker contradiction of the truism that liberalism denies holistic communities the capacity for political autonomy and their traditional powers of self-regulation. Indeed, in this context it appears that the very principles of liberalism which are most often assigned the blame for the atomization of community—the bifurcating principles of the public-private and secular-religious distinctions—are the ones that



justify state actions that effectively delegate political power to religiously exclusive groups.

Of course, liberal principles, as expounded by Justice Souter and Justice O'Connor, do not justify delegating the powers of government to religiously exclusive communities in every case. *Kiryas Joel* and *Airmont* are, above all, a lesson in the complexity of liberalism. Far from providing blanket approval or disapproval for religiously homogeneous political jurisdictions, these cases suggest a set of principles for distinguishing circumstances in which such jurisdictions satisfy the requirements of liberal state neutrality from circumstances in which they do not. Although the *Kiryas Joel* Court indicated that it would endorse the constitutionality of a *general* village school district enabling statute on grounds similar to those which validated the villages of Airmont and Kiryas Joel, it did, after all, strike down the act which authorized the formation of the school district of Kiryas Joel. Given the Court's acceptance of the secular/nonreligious character of Kiryas Joel's public school, what led it to conclude that the original act was unconstitutional?

Answering this question shows the critical role played by two other conceptual distinctions in the courts' construction of the meaning of official religious neutrality in addition to the more familiar public-private and secular-religious distinctions. What rendered the original act authorizing the Kiryas Joel school district a "religious" establishment in the eyes of the majority was not the *character* of the school's activities, which, the Court agreed were secular, but, rather, the *intentions* behind its formation. In other words, what distinguishes the *legally acceptable* local government institutions that have a decidedly pro- or anti-religious orientation from those that are constitutionally illegitimate (despite their pronounced religious orientation) is the conceptual distinction between government actions that are *intended by the government* to favor or disfavor religion and ones that do so only as an "unintended" effect.

The distinction between intentional, de jure discrimination and unintended, de facto discriminatory effects has had a long and controversial career in the jurisprudence of racial discrimination. Less attention has been paid to the use of the same distinction in the analysis of claims of religious discrimination. Notwithstanding this neglect, *Airmont I* and *Kiryas Joel* exhibit the tendency of some contemporary

courts to define the requisite position of state religious neutrality narrowly and formalistically, in terms of this distinction between neutrality of intent and neutrality of effect.

*Kiryas Joel* provides a clear illustration of how this distinction is applied in the context of religious discrimination claims, and what its practical consequences are. According to the Supreme Court, we recall, the act that was challenged in *Kiryas Joel* was declared unconstitutional because it *intentionally* excluded all but Satmars from the newly drawn jurisdiction, whereas the exclusion of all but Satmars from the village of Kiryas Joel was taken to be, in some jurisprudentially satisfactory sense, accidental. In much the same way, Judge Goettel seems to have regarded the coincidence of Airmont's boundaries and policies with its citizens' "privately" expressed antipathy to "those Jews from Williamsburg" as just that—a coincidence, not a deliberate governmental design. The intent-effect distinction was a key element in the judicial explanation of the legitimacy of the religiously exclusive villages of Airmont and Kiryas Joel.

Clearly, however, there is something odd going on in the legal usage of "intention" when courts are able to maintain, with a straight face, that the exclusion of non-Satmars from the village of Kiryas Joel, and the dilution of the political influence of the "Jews from Williamsburg" in Airmont, were unintentional on the part of political actors who brought the incorporation of these villages about. Only a very technical, specialized usage of the term "intention" could account for the judicial conclusion that drawing the boundary lines around Airmont in a way that *guarantees* the political weakness of the "Jews from Williamsburg" was an accident—or that the homogeneity of Kiryas Joel was an accidental or unintentional effect.

The nature of this technical usage, and its highly formalistic character, cannot be fully understood without further reference to Justice O'Connor's distinction between general (universalist) and group-specific (particularist) legislation. As Justice O'Connor's opinion makes clear, judicial reasoning commonly conflates intentionally biased legislation with group-specific or "special" legislation; conversely, it often equates official neutrality with "general" legislation, that is, legislation that does not single out a particular group, but rather, distributes legal privileges



(or disabilities) on a nongroup-specific basis. There is no denying that legislation in the second category may well have the *effect* of advantaging some particular (and even particularistic) groups over others. It may even be that the immediate stimulus to adopting such general legislation is the government's desire to respond to one such particular group. Certainly, no one could deny that this was the case when New York took Justice O'Connor's cue, and passed new legislation enabling all villages to form public school districts at their option. To deny the obvious reality that the new enabling legislation was *intended* by the state to allow the Satmars' school district to continue to exist, in the customary sense of intent, would be the hollowest of formalisms. But Justice O'Connor seems not to be relying on the customary sense of intent. Rather, she implicitly linked the distinction between neutrality of governmental intentions and neutrality of governmental effects to a highly formalistic understanding of the difference between group-specific and general legislation.

It is here that we confront the existence of two competing views of the difference between group-specific and general laws. According to one common view, legislation is group-specific or "particularistic" if it advances the values and objectives of one particular group to the exclusion of others.[37] Particularistic political systems are defined as ones in which members are closely linked by loyalties and obligations to one another, and to the shared heritage and projected future of their group. Political acts are particularistic (in this view) precisely insofar as they reflect a culturally specific belief system, including its conception of morality, its social and political norms, and its criteria of membership. Particularistic governments tend to impose more far-reaching obligations and restrictions on individual members than the merely "negative" (classically liberal) duty to leave other individuals alone. And through the enforcement of such obligations, and of the underlying cultural beliefs and values which these obligations represent, particularistic political systems act to exclude (or at the least, disadvantage) competing value systems. In contrast, governments are nonparticularistic insofar as they refrain from exclusion and bias against competing values, cultures, and beliefs. In short, nonparticularistic governments are inclusive rather than exclusive, internally pluralistic, rather than constituting one of a

number of diverse (but internally homogeneous) islands of cultural separatism.

It should be clear that the distinction between general and particularistic legislation implied by the *Kiryas Joel* Court, and enunciated by Justice O'Connor, completely contradicts the way of understanding the distinction which we have just elaborated. Far from inhibiting the establishment of group-specific local government institutions—i.e., local government institutions that advance the aims, and help to perpetuate the existence, of particularistic groups—the *Kiryas Joel* approach to differentiating general from special legislation enables and even encourages the establishment of particularistic municipalities and public schools. Rather than requiring local government units themselves to be nonparticularistic, the Court, in effect, gave particularistic groups both a license and an incentive to establish their own local government institutions. All that is required, according to *Kiryas Joel*'s understanding of the difference between general and particularistic legislation, is that *every* particularistic group be given an equal opportunity to set up its own equally particularistic government institutions. Political separatism, is thus, ironically, regarded as a form of universalism.

Judge Goettel's reasoning in *Airmont I* relied on a similar equation of equal opportunity, separatism, and nonparticularistic law. In this view, so long as the powers of separate incorporation that permit exclusionary communities to secede are made available to other communities, the government's intent to favor or disfavor a particular community simply does not register as the invidious sort of discriminatory intent prohibited by law. The practical outcome of this sort of reasoning, vividly illustrated by the holding in *Airmont I*, is the legitimation of general village incorporation enabling statutes that permit the establishment of local governments that are, in point of fact, biased against a particular religious group. One might well conclude that it is a highly formalistic conception of nonparticularism that licenses particularistic government in the name of neutral, nonparticularistic, "general" legislation.

We see now how positions that are standardly adopted in liberal legal reasoning can work to exonerate local public institutions that in



effect serve to promote the particular ways of life of exclusionary communities. The public-private, the secular-religious, and the intent-effect distinctions, together with the formalistic differentiation between nonparticularistic (neutral) and particularistic (biased) governmental action, permit religiously homogeneous and/or exclusionary communities, legally and in fact, to exercise state-delegated powers of government.

This is not to say that liberal legal reasoning unequivocally endorses this outcome. Liberal thought is not monolithic. It contains within itself competing, and even contradictory, strands of reasoning. Each of the four conceptual distinctions examined above has been subjected to criticism, not only in external critiques of liberalism (e.g., Marxist, communitarian, and conservative critiques), but also in critiques that are internal to liberalism, some of which have been adopted in judicial opinions. In 1948, for example, the Supreme Court issued the important ruling of *Shelley v. Kraemer*, which invalidated the use of racially restrictive covenants by private property owners, on the grounds that they violated the constitutional guarantee of equal protection of the law. In bringing the equal protection clause to bear on private restrictive covenants, the Supreme Court rejected the formalistic distinction between private and state action.[38] And in a 1984 case dealing directly with the conversion of a religious community into a municipality, *Oregon v. City of Rajneeshpuram*, a federal court in Oregon held that the state's recognition of the community's municipal status would constitute the "establishment of a theocracy" because it would *effectively* "confer power on an entity subject to the actual and direct control of a religion and its leaders."[39] In so finding, the court rejected the formalistic distinctions between secular and religious functions, intentionally and accidentally biased effects, and between public and private action asserted in the religious community's defense. Regarding the defendants' claim that "municipal power is in the hands of a body elected according to state law," and therefore has not been "given directly to a religious organization," the Court responded: "Given the . . . control of religious organizations and leaders over all property and all residents in Rajneeshpuram, this distinction may be more formal than substantive." Pursuing this explicitly anti-formalist method of legal

analysis, the Oregon court rested its conclusion on the actual *effect* produced by the general state legislation, enabling a religious community to establish its own city, rather than on the intentions behind the general state legislation which "inadvertently" enabled this effect. Refusing to elevate form over substance, the *Rajneeshpuram* court focused on the realities of power relationships within the ostensibly private community, which, in practice, rendered the formal boundary between the private sphere of purely voluntary relations and the public sphere of coercive regulation a fiction.

The conclusion that the establishment clause was *effectively,* albeit not intentionally, violated by the state's recognition of Rajneeshpuram's municipal status could easily be applied to the case of Kiryas Joel—should a court adopt the anti-formalist style of analysis which eschews categorical distinctions between public and private, religious and secular, intentional and accidental matters.[40] Indeed, just such an anti-formalist analysis led to the reversal of *Airmont I* on appeal. Writing for the appellate court in *Airmont II*, Judge Amalya Kearse rejected the formalistic distinctions which undergirded Judge Goettel's conclusion that the *village* of Airmont was not hostile to Orthodox Jews even though its leaders and supporters clearly were, and even though the village was clearly poised to exercise its zoning and other regulatory powers in a manner calculated to thwart the Orthodox way of life. Like *Rajneeshpuram* and *Shelley v. Kraemer*, *Airmont II* recognizes that the boundary-line between public and private action is unclear. Instead of relying on a formalistic equation between religiously biased state action and *special* legislation that *intentionally* singles out one group, *Airmont II* blurs the distinction between intent and effect by adopting the position that discriminatory intent

> may be inferred from the totality of the circumstances, including the fact, if it is true, that the law bears more heavily on one [group] than another as well as the "historical background of the decision . . . ;" "[t]he specific sequence of events leading up to the challenged decision" . . . ; "contemporary statements by members of the decision-making body" . . . ; and "[s]ubstantive departures."[41]



This style of analysis, which opposes the formalistic distinctions asserted in classical liberal thought, also has a liberal pedigree. Liberalism is a rich and variegated tradition, which provides arguments for and against the proposition that religiously homogeneous communities should be entitled to exercise political power for their own ends. Recognizing this malleability confronts both advocates and critics of Jewish communities like Kiryas Joel with a stark choice: Should they endorse the categorical distinctions of a formalist style of liberal reasoning, which can be deployed in defense of anti-Semitic communities like Airmont, as well as of autonomous Jewish villages like Kiryas Joel? Or should they endorse the anti-formalistic style of analysis, under which both *Airmont* and *Kiryas Joel* stand condemned?

## NOTES

1. A longer version of this essay, which considers the relation of the "formalist" jurisprudence analyzed here to contemporary liberal political theory, in particular, the work of John Rawls and Joseph Raz, appears in *Nomos XXXIX Ethnicity and Group Rights* (N.Y.U. Press) under the title "A Tale of Two Villages (or, Legal Realism Comes to Town)." The author would like to express her gratitude to Tony Lebe, Laura Cadra, and Eugene Sheppard for their helpful assistance.

2. Factual information about the suburbs of New York described in these pages has been drawn from Elizabeth Lorente, "Haitians in Rockland Back Intervention," *The Bergen Record*, September 15, 1994, A20; Raymond Hernandez, "Storm-Tossed on a Sea of Emotions, New York's Italians Feel Betrayed, Angry and Confused by New Policy on Refugees," *The New York Times*, July 8, 1994, Section B, 1, col.2; Id., "Once a Resort, Village Struggles with Urban Problems," *The New York Times*, June 15, 1994, late edition, Section B, 6, col.1; Ari L. Goldman, "Religion Notes," *The New York Times*, October 9, 1993, late edition, Section 1, 11, col.1.

3. Ari L. Goldman, "Religion Notes," *The New York Times*, October 9, 1993, A11.

4. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481 (1994).

5. *U.S. v. Village of Airmont*, 839 F. Supp. 1054 (S.D.N.Y. 1993) (referred to here as *Airmont I*), rev'd, 67 F. 3d 412 (2d Cir. 1995) (referred to here as *Airmont II*).

6. See e.g., in the *Matter of North Shore Hebrew Academy v. Leonard S. Wegman*, 105 A.D. 2d 702 (1984); *Jewish Reconstructionist Synagogue of the N. Shore Inc. v. Incorporated Village of Roslyn Harbor* 352 N.E. 2d 115 (N.Y. 1976).

7. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2585 (1994).

8. Jerome R. Mintz, *Hasidic People: A Place in the New World* (1992) 51.

9. *LeBlanc-Sternberg v. Fletcher*, 67 F. 3d 412, 418–19 (2d Cir. 1995).

10. *U.S. v. Village of Airmont*, 839 F. Supp. 1054, 1062–63 (S.D.N.Y. 1993).

11. Id., at 1061.

12. Id., at 1064.

13. See Chapter 748 of the 1989 New York Session Laws.

14. See 114 S.Ct. at 2485.

15. *Board of Education of Kiryas Joel v. Grumet*, at 2484–85 (1994).

16. This principle was established in the previous U.S. Supreme Court decisions, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985).

17. Linda Greenhouse, "The Supreme Court: The Decision," *The New York Times*, June 28, 1994, A14; Associated Press, *Chicago Tribune*, June 27, 1994, C1; David G. Savage, "High Court Upholds Church-State Split," *The Los Angeles Times*, June 28, 1994, A14.

18. For a discussion of the growing controversy over whether the establishment clause is properly interpreted as implicitly incorporating the principle of separation between Church and State see "Development in the Law—Religion and State," 100 *Harvard Law Review*, at 1609, 1633 (1987).

19. *Kiryas Joel*, 114 S.Ct. at 2484.

20. Id., at 2489.

21. Id., at 2490.

22. Non-Satmar "[n]eighbors who did not wish to secede with the Satmars objected strenuously [to being included] and after arduous negotiations the proposed boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by the Satmars." Id., at 2485. When the boundaries of the village were originally drawn by the state they included some non-Satmars, but they were redrawn to exclude them. Jeffrey Rosen, "Village People," *The New Republic*, April 4, 1994, 11.



23. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2504–05 (1994) (Kennedy, J., concurring). Id., at 2505.

24. Id., at 2505.

25. "[The] right [to form a new village within a town is one] that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties." *Kiryas Joel*, 114 S.Ct. at 2485. (*citing* N.Y. Village Law, Art.2 {McKinney 1973 and Supp. 1994}).

26. In his article in *The New Republic*, Jeffrey Rosen asserts that the community established numerous restrictive housing policies, including (1) the requirement that "anyone who wants to build within its borders pay a tithe of $10,000 to Congregation Yetev Lev"; (2) a prohibition against selling or renting to a new resident without receiving written permission in advance; and (3) a requirement that new residents "sign a contract promising 'to be guided by the laws and ways of the Grand Rabbi' [and] 'only to go to the synagogues under the control of our congregation' and to send their children 'only to the school of Torah Veyreh, and Bais Rachel, that was founded and built by the Grand Rabbi (Joel) and is under the control of the present Rabbi (Moses).'" Rosen, *supra* note 22, 11.

27. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held that the enforcement of *racially* restrictive property covenants is unconstitutional on the basis of an anti-formalistic mode of reasoning. In particular, *Shelley v. Kraemer* rejected the formalistic distinction between private discrimination and state enforcement of laws which allow discriminatory action in holding that when a consummated contract of sale between willing buyers and willing sellers is thwarted due to the "active intervention of the state courts, supported by the full panoply of state power," it is absolutely clear that state action has occurred. According to *Shelley* judicial action enforcing private rights "bears the clear and unmistakable imprimatur of the State." Id., at 19–20. However, the court has never addressed the applicability of *Shelley* to religiously restrictive covenants.

28. Scholars have explained that a "state or municipality may restrict the franchise to its bona fide residents." Laurence Tribe, *American Constitutional Law*, (2nd ed. 1988) at 1088–89, (discussing *Dunn v. Blumstein*, 405 U.S. 330, 334, 1972); Pope v. Williams, 193 U.S. 621 (1904).

29. The Fair Housing Act of 1968's strict prohibitions against discrimination in sale or rental of housing based on race, color, sex, familial status, or national origin, do apply to private as well as public actors. However, exemptions are allowed for religious organizations and private clubs as well as for individual

owners of not more than three single family houses, who do not rely on the services of any broker, agent, or sales person. Fair Housing Act of 1968 803, 42 U.S.C. 3603, 3607 (1994).

30. Tribe, *supra* note 28, 1226–27.

31. The Hasidic conceptual system comprehends a distinction between religious and secular affairs but conceives of the two as interrelated parts of the whole rather than as separate, distinct entities. The distinction is typically described by the Satmar (in Yiddish) as one between *yiddishkeit* (Jewishness) and *mentschlichkeit* (humanness). Israel Rubin, *Satmar: An Island in the City* (Chicago, 1972) 103. The distinction between *yiddishkeit* and *mentschlichkeit* refers less to a difference between religious or sacred, and nonreligious or profane affairs, than to the separation between Jewish and non-Jewish realms.

As for the Hasidic conception of the sacred and the profane within the domain of *yiddishkeit*, it has more of the character of a dialectical relationship than that of a sharp distinction between two fixed realms. For example, a central theological concept of Hasidism is that of *avodah be-gashmiyut* (worship through corporeality), which "call[s] for man's worship of God by means of his physical acts," such as "eating, drinking and sexual relations." *Encyclopedia Judaica* (Jerusalem, 1971) 7: 1407. According to this doctrine, matter is transformed into spirit, the profane is transformed into the holy, through communal worship centered around the figure of the *Rebbe* or *zaddik*, as the charismatic leader is also called. But—and this is a critical point in refuting the translation of Hasidic concepts into the English terms of "secular" and "religious"—"[t]hose who surround the *zaddik* are incapable of individually discerning the moment in which the transformation of secular into holy occurs." Id., 1408. As a result, it is impossible to assign any particular human activity or experience into one domain or another, categorically, or even to separate the two domains, either practically or conceptually.

32. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2506 (1994) (Scalia, J., dissenting).

33. Id., at 2509 (Scalia, J., dissenting).

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

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

36. Id., at 2493.

37. A compelling articulation of this view of particularism, in contrast to universalism (and of the complexities of the contrast), is contained in Robert M. Cover, "The Supreme Court, 1982 Term—Forward: Nomos and Narrative," 97 *Harvard Law Review* 4 (1983).



38. See note 27 above.

39. *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1217 (U.S.D.C., District of Oregon, 1984).

40. After this essay was written, the state legislation newly authorizing the Kiryas Joel school district was challenged in *Grumet v. Cuomo*, and found to be unconstitutional, on the basis of precisely the sort of anti-formalist style of analysis exhibited in *Airmont II*, and argued for above.

41. *Airmont II*, 67 F.3d at 425 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976) and *United States v. Yonkers Board of Education*, 837 F.2d 1181, 1221 (2d Cir. 1987).