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ETHNICITY AND GROUP RIGHTS

Edited by

Ian Shapiro, *Yale University*

and

Will Kymlicka, *University of Ottawa*

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A TALE OF TWO VILLAGES (OR, LEGAL REALISM COMES TO TOWN)

NOMI MAYA STOLZENBERG

Introduction

The debate between liberals and communitarians seems to be at an impasse. The communitarian charge that liberalism atomizes community has become a commonplace, so much so that our most prominent defenders of the liberal tradition openly concede that a liberal state will adversely affect the ability of some belief systems to survive. Thus, John Rawls, in expounding his theory of "political liberalism" has acknowledged that

> it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are. We must accept the facts of commonsense political sociology.[1]

Rawls's tone here is that of a rueful but resolute realist, a Darwinist with a heart, who "regrets" but stoically accepts the disappearance of certain belief systems as an inevitable fact, like death and taxes.[2] (It is more difficult to adopt this attitude if you adhere to one of the threatened belief systems. Rawls never explains why those in

the suppressed position "must accept the facts.")[3] Others are less apologetic. Joseph Raz unabashedly defends a "perfectionist" ideal of a liberal state that promotes individual autonomy, pluralism, and toleration at the expense of nonliberal cultures by enforcing a code of morality (albeit a "morality which regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy . . . as one of the most important moral principles.")[4] Though "[a]utonomy requires that many morally acceptable options be available to a person," Raz states that "[t]he ideal of autonomy requires only the availability of morally acceptable options." Perhaps more important, Raz acknowledges that this ideal is "inconsistent with various alternative forms of *valuable* lives," and not just with morally unacceptable ones. This is because attaining an autonomous life "depends on the general character of one's environment and culture." Therefore, "[f]or those who live in an autonomy-supporting environment there is no choice but to be autonomous."[5]

Rawls aims to present an alternative to the perfectionist ideal of promoting a liberal morality through political means. But, like Raz, he recognizes that a liberal state will necessarily be incompatible both with morally impermissible *and* some morally permissible (or "reasonable") ways of life.[6] In sum, Raz and Rawls agree with the communitarians that a liberal state will exclude certain belief systems.

Remarkably, liberals concede the negative effects of liberalism on some communities. Indeed, they join with communitarians in extolling the positive value of community.[7] Rawls and Raz both call for community values to be expressed and protected at levels that correspond to the conventional division between "private" and "public" realms. As pluralists, both insist that a liberal political order must allow "nonpublic" space for a sufficiently wide variety of rival belief systems to exist (notwithstanding the exclusion of some). Furthermore, both recognize that the liberal state itself embodies the values of a particular group of people. It is precisely because the liberal state reflects and enforces certain cultural values that it excludes some subcultures while sustaining others.

Illiberal and antiliberal cultures, and more generally, cultures that do not abide by the division between public and private realms, would seem to be particularly vulnerable to the inevitable

demands of the liberal state. So it is not surprising that recent critics of liberalism have focused on the tensions between liberal principles and religious subgroups, especially "fundamentalist" ones, which actively oppose some of the tenets of liberalism, and seek to establish "group rights" to collective self-government and control over the transmission of beliefs. These critics lament what liberals concede: that the state enforcement of liberal principles has a "disproportionate impact" on the pursuit of such interests.

Largely unnoticed in this debate is a curious fact. Yes, the implementation of liberal principles has a disproportionate effect on such subgroups, but sometimes that effect is positive. That is, sometimes liberal principles *enable* groups that appear to be most directly in conflict with them. It has long been recognized that principles of liberal government justify the protection of some private forms of collective power that result from the coordinated exercise of individual rights. But critics of liberalism condemn the conventional divide between private and public realms, contending that it denies groups sufficient powers of collective regulation and autonomy. It is the very privatization of groups under liberalism that the defenders of community bemoan. Against this communitarian critique—or rather, as a modification of it—I will argue that critics and defenders of liberalism alike have overstated the extent to which religious and other groups are deprived of the means of collective self-regulation and self-perpetuation in a liberal political order. There are in fact two sources of power that enable such groups to survive and flourish under a liberal regime, both of which have been minimized or overlooked by both sides in the liberal-communitarian debate. First, the limits of private power have been exaggerated; individual rights sometimes congeal to produce highly effective forms of group control. Second, the ability of a group to assume the form and command the levers of an official governmental body has been virtually ignored. Sometimes the principles of liberal government work to justify the delegation of a portion of the powers of government (i.e., local government) to precisely the sort of exclusive, particularistic, holistic, and even separatist subgroup that seems to be most jeopardized in liberal society.

This possibility is illustrated by the recent case of *Kiryas Joel*. In a well-publicized opinion, the United States Supreme Court struck

down legislation that authorized the creation of a religiously homogeneous—Hasidic Jewish—public school district.[8] It held that the formation of the school district violates the constitutional prohibition against the "establishment" of religion by the state. It seemed obvious to many observers that the principle of separation of church and state, which has long informed the interpretation of the antiestablishment clause, requires such a ruling. But the Supreme Court's grounds for striking down the New York state legislation were actually quite narrow and technical. Unbeknownst to most casual observers, the reasoning offered by the Supreme Court permitted the very same public school district to be newly authorized by subsequent state legislation that took a different form from the original authorizing statute. The state of New York seized the opportunity to pass new legislation that enables every village meeting minimal procedural requirements to form its own public school district. The application of this new statute to support the continued existence of the Kiryas Joel school district has been upheld in state court,[9] underscoring the fact that, far from condemning the delegation of state power to a religious group in general, the Supreme Court in *Kiryas Joel* specifically affirmed that "we do not disable a religiously homogeneous group from exercising political power."[10]

Kiryas Joel reveals the employment by the current judiciary of a formalistic conception of religious neutrality that can, depending on the circumstances, work either to the advantage or disadvantage of a religiously exclusive community. That this is so, and how this is so—and how this formalistic jurisprudence fits with contemporary liberal theories—are the three main subjects of this article. Whether this is a good thing is another matter. But before we can even begin to assess the desirability of supporting insular holistic communities, we need to obtain a clearer picture of the extent to which the liberal state does support, as well as thwart, their survival.

The aim of this chapter is to present such a picture by analyzing the case of Kiryas Joel and an interesting contrast case, *United States v. Village of Airmont,* in which, in a similar milieu, a group of townspeople seceded in order to exclude their orthodox Jewish neighbors from their local government.[11] Together, these cases exhibit the staples of legal reasoning, including formalistic inter-

pretations of the establishment clause and of religious discrimination, which justify conferring governmental power on exclusive religious, or antireligious, groups. The essay proceeds in three steps. First, I will provide the factual background to the two cases. Second, I will elucidate the principles of legal reasoning which allow for the empowerment of exclusive, illiberal groups. Finally, I will consider whether this legal reasoning is consistent with the principles of liberalism, articulated in the theories of Rawls and Raz. Before proceeding, however, it may be helpful to alert the reader to some of the surprises and counterintuitive propositions that she will encounter along the way.

First, the very assertion that liberalism supports holistic communities may seem counterintuitive, given the joint assumption of liberals and communitarians that liberalism has an atomizing effect on community. From the standpoint of this common assumption, the continued existence of holistic, illiberal communities is a puzzle. On the other hand, the real puzzle may be why their obvious persistence has been ignored in the liberal-communitarian debates. A legal realist perspective on community, which I elaborate in this article, renders obvious the private and public sources of power that liberals and communitarians have ignored. The joint stake that liberals and communitarians have in denying or understating the resources available for group survival in a liberal state is one of the mysteries to be unraveled in this essay.

Another counterintuitive proposition is that the jurisprudence exhibited in *Kiryas Joel* is a formalistic one, since the judicial opinions of the majority in that case bear the surface emblems of an *antiformalistic* style of reasoning; and since much of the reigning establishment clause jurisprudence, applied in other cases, appears to be imbued with a nonformalistic conception of state neutrality.[12] Nonetheless, I will argue that *Kiryas Joel*, like the trial court's opinion in *Village of Airmont*, is at bottom based on a formalistic conception of state neutrality, which allows exclusive religious and antireligious groups to be incorporated as local governments.

The fact that liberal principles operate in some ways to empower communitarian groups does not contradict the fact that in other ways the principles of a liberal state disable them. The point

is not that liberalism has no negative effect on subcommunities, but that the negative effect is not the whole story. The whole story is far more complicated and interesting.

I. A Tale of Two Villages

Rockland and Orange are neighboring counties in the suburbs of New York City.[13] Here, the homogeneous subdivisions, long the habitat for upwardly mobile, assimilated, second and third generation Irish, Italian, and Jewish Americans, have become home to a suprisingly diverse array of tenaciously communal, culturally distinctive ethnic, religious, and racial subgroups.[14] For example, in one town, Spring Valley, thousands of Haitian immigrants have clustered to form one of the larger Haitian exile communities in the country. Its Main Street is now festooned with signs in Creole and French. Immigrants from Jamaica, Guatemala and El Salvador also have been attracted to Spring Valley's high proportion of relatively cheap rental units, unusual in the midst of this still predominantly white and affluent suburban county.

In this dynamic environment, no group has stood out more than the various Hasidic Jewish communities which have been settling in Rockland and Orange Counties for decades. Emblematic of the settlement patterns is the new religious broadcasting station in Rockland County. WLIR-AM advertises itself as "all Jewish all the time," but from Friday night through Saturday, in observance of the Jewish sabbath, it plays only Latin and Haitian music.

While the diverse subcommunities of Spring Valley have more or less hung together, the neighboring town of Ramapo has fractured. Twelve communities in Ramapo have seceded to form their own villages, spawning numerous litigations in the process. As federal trial judge Gerard Goettel observed in 1993 *Airmont* decision, "the last two villages to be formed were the Village of Kaser, an exclusively Orthodox/Hasidic village, and the Village of Airmont,"[15] which, the plaintiffs argued, is anti-Semitic. The exclusively Jewish village of Kaser is reminiscent of the better-known Hasidic village of Kiryas Joel, located in adjacent Orange County. The Village of Airmont, on the other hand, is the very opposite of Kaser and Kiryas Joel, having been formed so that residents could

escape the mounting pressure to accommodate the different kinds of land use favored by the orthodox and Hasidic inhabitants of the town of Ramapo.

Two land-use controversies in particular have fueled the village incorporation movement in Rockland and Orange Counties. First, many orthodox and Hasidic Jews object to the single-family zoning requirements typical of affluent suburbs and prevalent in many of the Rockland and Orange communities. Orthodox real estate developers, who in some cases bought land and advertised "Torah Community" subdivisions with apartment buildings before any variances from single-family housing zoning were obtained, spearheaded the demand for zoning laws to be changed to permit multiple family housing. In addition, the use of *"shtiblich,"* or informal worship congregations in basements and living areas of residential homes, as well as plans to build new free-standing synagogues, have posed conflicts with town zoning laws that strictly regulate the location and size of houses of worship.

The Village of Kiryas Joel, which is entirely composed of members of the ultraorthodox Satmar sect of Hasidic Judaism, makes a neat contrast with the Village of Airmont, which has sought to retain or recapture the typical suburban lifestyle of the American dream, replete with large lots, and well-separated single-family homes; safe, predominantly white and secular public schools; and churches and synagogues as carefully spaced out and separated from the secular realms as commercial uses have traditionally been separated from residential ones. The Satmar Hasidim of Kiryas Joel form the very picture of the tight-knit, pervasively regulated, holistic community. In contrast, the founders of Airmont were a shifting assortment of individuals. The trial judge in *Airmont* noted that "[m]any of the original core group were Jewish or had Jewish spouses albeit they were not Orthodox."[16] But the Airmont Civic Association, which was formed to promote the incorporation of a new village, was subject to internal disputes and changes in leadership, as the "old guard," whose main concern was simply to enforce the old zoning policies, came to be replaced by more vociferous (and apparently exclusively non-Jewish) opponents of the Orthodox community.

Like the Village's founders, the inhabitants of Airmont represent a loose association of individuals, united neither by religion

nor by any common secular code of values, save for their joint opposition to deviating from the low-density zoning regulations.[17] Kiryas Joel is a religious community; Airmont is secular. Kiryas Joel is homogeneous—fully 100 percent of its inhabitants are members of the Satmar sect; Airmont is heterogeneous. The community of Kiryas Joel is extremely cohesive, organized around the central, charismatic figure of its "rebbe," the hereditary rabbinic leader whose religious authority extends to all aspects of his followers' lives. The residents of Airmont, by contrast, have no unifying organization apart from their sporadic involvement in the democratic procedures that state law prescribes for forming and governing local municipalities. They are not hierarchically organized; indeed, they are hardly "organized" at all.

To continue the contrast, Kiryas Joel is antiassimilationist and opposed to modern innovations. The Supreme Court observed that its inhabitants "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 headcoverings and special garments for boys and modest dresses for girls."[18] Adult men grow long beards and sidelocks, and wear the dark frockcoats and hats of late-nineteenth-century Hungary.[19] Adult women also dress modestly and distinctively, covering their shorn heads with scarves and wigs. In short, they act and look different from most Americans, while Airmont residents conform to the cultural norm.

Yet both communities are alike in being exclusionary. The Satmars consciously resist the penetration of the outside culture; Airmont's inhabitants resist the inclusion of the traditional Jewish way of life, which conflicts with its prescribed low-density land uses. Moreover, both communities use the coercive power of collective regulation to secure and conserve their respectively favored ways of life. Perhaps the most striking fact that characterizes both villages is that they exist at all, in seeming defiance of the principle of separation of church and state. One might have thought that that principle would prohibit "a religious homogeneous group from exercising political power," yet, as we have seen, the U.S. Supreme Court insists that this is not the case. Similarly, the settled interpretation of the establishment clause as requiring that government should favor neither religion nor "irreligion"

might seem to preclude the formation of a local government that is specifically designed to exclude a certain religious way of life. Yet the Village of Airmont's existence is apparently secure under current understandings of the constitution, as is the Village of Kiryas Joel's.

In the case of *Kiryas Joel,* the constitutionality of the Village, as opposed to the school district, not only went unchallenged but was repeatedly affirmed, though, as the Court noted, the boundaries of the Village were deliberately "drawn to include just the 320 acres owned and inhabited entirely by Satmars."[20] The constitutionality of delegating the power of local government to religiously homogeneous groups may seem surprising, in light of the Supreme Court's holding that the formation of the exclusively Hasidic public school district violated the constitutional principle of separating church and state. But what the tale of our two villages tells us is that a liberal legal order allows for (perhaps, even depends on) legal mechanisms that facilitate the acquisition of governmental power by self-contained nonvoluntaristic groups. I now turn to the task of analyzing the precise legal mechanisms that enable this result.

II. Four Formalisms that Justify the Political Empowerment of Religiously Exclusive Groups

Special legislation specifically designed to enable the Village of Kiryas Joel to form its own public school district is unconstitutional. But general legislation enabling any village in the state of New York (that meets certain size and financial requirements) to form its own school district is constitutionally valid. Hence, the Kiryas Joel school district, newly authorized under such general legislation, is legally valid. So, too, is the Village of Kiryas Joel itself, though its boundaries were carefully drawn to include only members of the Satmar religion. Similarly, the Village of Airmont was exonerated at the trial level of charges of anti-Semitism, even though it was formed in order to escape the pressure to accommodate the Orthodox and Hasidic lifestyle.

What explains these results is a formalistic understanding of what official neutrality, or nondiscrimination, vis-à-vis religious

groups consists in. Four different formalistic views feed into this conception of governmental neutrality and justify the results noted above. An analysis of the judicial reasoning presented in *Kiryas Joel* and *Village of Airmont* elucidates each of these "formalisms."

A. The Neutrality of Intent—Neutrality of Effect Distinction

Neutrality is an essentially contested concept. A formalistic conception of neutrality competes with a "functionalist" conception. Like functionalist legal analyses generally, this one grows out of the first direct assault on "legal formalism" launched by the legal realists and their progressive forebears in the early part of this century. Legal realism characteristically pierces through legal formalities to look at the actual effects of actions under judicial scrutiny, and searches for functional equivalents or analogues to the types of action that the law explicitly condemns. A functionalist definition of neutrality requires the relevant action to have an "equal" effect on all of the relevant parties. According to this test, if an action helps one party, it should help the others to the same extent. Likewise, if it hinders one. Otherwise it should help or hinder none.

Though this functionalist view appeals to deap-seated notions of fairness and evenhandedness, and though it has its adherents, others reject it on the grounds that it is practically impossible to achieve. Still others reject it on the grounds that is undesirable to prevent the state from promoting values and discouraging vices, at least by noncoercive means. Neutrality itself, after all, is a value whose pursuit by the government necessarily affects different belief systems in differing degrees.

Those who reject an "effect test" for neutrality usually say that they are defining neutrality strictly in terms of "intent," "purpose," "intentions," or "motivation." These words are taken to refer to the *reasons* for a given action rather than the action itself. According to this line of thinking, the same action may be undertaken for different reasons and therefore may or may not be neutral, depending on the circumstances. If it is "intended" to favor or disfavor one party relative to others, then it is not neutral.

But if the same action merely has the "unintended" effect of favoring (or disfavoring) that party, then it satisfies the intent test for neutrality.

Devotion to such a test is one important aspect of the formalistic conception of religious neutrality responsible for the *Kiryas Joel* and original *Airmont* results. *Kiryas Joel* said in essence that the requisite position of neutrality is met if a state law confers powers of local government on an area that just "happens" to contain only "coreligionists."[21] It follows, as Justice O'Connor spelled out in her concurring opinion, that if the legislature were to replace the special act that singled out the Village of Kiryas Joel with "generally applicable legislation . . . allow[ing] all villages to operate their own school districts," then the constitutional defect would evaporate.[22]

The same distinction between neutrality of effect and neutrality of legislative purpose served to justify "the constitutionality of the Kiryas Joel Village itself."[23] According to the Court, the difference between the Village and the school district, as it was originally authorized, was that in the first case, "the religious community of Kiryas Joel . . . receive[d] its new governmental authority simply as one of many communities eligible for equal treatment under a general law," whereas in the second case it did not. "The fact that Chapter 748 [the original act authorizing the school district] facilitates the practice of religion is not what renders it an unconstitutional establishment." What does render it unconstitutional, in the eyes of the Court, is the fact that "the reference line chosen for the Kiryas Joel Village School District was one *purposely* drawn to separate Satmars from non-Satmars."[24]

Similar reasoning supported the trial judge's conclusion that Airmont was not discriminating against Orthodox and Hasidic Jews. The complaint against Airmont, based on allegations that the Village was violating constitutional protections of religion as well as federal laws against religious discrimination in zoning, also required the court to determine the content of a position of nondiscrimination vis-à-vis religious groups.[25] After toying with some alternative definitions, Judge Goettel ended up focusing on the government's "objectives." He concluded that the Village of Airmont had not engaged in anti-Semitic discrimination, because even if its regulations had the effect of burdening Jewish practices

and customs, they were adopted for independent reasons of public health and safety.[26]

Though essential to their holdings, the courts' reliance on the intent-based definition of neutrality is not easy to discern. This is because they also flirt with different, contradictory tests. Indeed, on the surface, both courts seem at times to reject the formalistic intent-based standard, and to employ the competing functionalist effect test, instead.

This is especially evident in Justice Souter's opinion for the Supreme Court in *Kiryas Joel*. He uses typically functionalist rhetoric to invalidate the special act by which the school district was originally created. At the level of the explicit holding, all of the classic buzz words associated with antiformalism or functionalism in legal reasoning are present from the very first paragraph: "this unusual act is *tantamount to* an allocation of political power on a religious criterion";[27] "our analysis does not end with the text of the statute at issue"[28] (which did not refer to a religious criterion but rather to the "territory" of the village of Kiryas Joel); "the context here persuades us that Chapter 748 *effectively* identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly."[29] In the end, the Court could not find any evidence that the government had defined the boundaries of the district in explicitly religious terms. Instead it rested its conclusion on finding "the legislature's Act to be *substantially equivalent* to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.' "[30]

How can these expressions of antiformalism be reconciled with my contention that the underlying view of official neutrality (in these cases) is based on the intent, as opposed to the effect, test? The last quotation from the Supreme Court's opinion in *Kiryas Joel* provides a starting point. The Court is using a functionalist methodology of *interpretation* to pierce through the outer shell of a religion-neutral statute to discover what it takes to be its real content: "a *purposeful* and forbidden 'fusion of governmental and religious functions.' " The Court is not uninterested in whether the fusion is "purposeful." Its antiformalism simply applies to the question of how to interpret a statutory text—whether to confine

oneself to its surface, explicit meaning, or to go "behind" the text to glean its "real" meaning from the context. It is a matter of figuring out what the meaning of the statute is, not a matter of defining the standard of constitutional validity to which that meaning will be subjected. On the contrary, Justice Souter clearly describes the standard of evaluation in terms of the formalist intent test. Thus, he states:

> Where "fusion" is an issue, the difference 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.[31]

There are, to be sure, other gestures that obscure the Court's commitment to an intent-based definition of governmental neutrality. For one thing, the controversial "*Lemon* test," which has governed establishment clause controversies since 1971, identifies the "effect" as well as the "intent" of advancing religion as two independent bases for finding an impermissible establishment of religion.[32] To the surprise of many, the Supreme Court in *Kiryas Joel* did not rely on *Lemon,* but it did not overturn it either. Though the Court did not explain why it found the *Lemon* test to be inapplicable, it is likely that it wanted to avoid subjecting local governmental bodies, which represent religiously homogeneous communities, to the effect test contained in *Lemon.*

The Court's repeated use of the language of "equal treatment" is a further clue to its commitment to the intent standard. Though this language might be interpreted to require equal effects regardless of intent, David Strauss has shown that in common usage, the notion of unequal treatment is "essentially equivalent" to the notion of discriminatory intent. Strauss finds that the most "plausible definition of discriminatory intent" is one that requires that the proscribed criterion (race for Strauss, religion for us) "play no role in government *decisions.*" The relevant question in applying the discriminatory intent standard is whether "the government would have made the same decision even if the [identities] of those affected had been reversed."[33] In other words, have the relevant groups been treated equally or have they been differentially preferred?

Though Strauss's concern is with the career of the intent-effect distinction in equal protection jurisprudence, particularly as it applies to race discrimination, his understanding of the original function of the intent test conforms to the analysis of Justice Souter's crypto-functionalism offered above. As Strauss sees it, the intent test was developed in the context of equal protection doctrine to cover "cases in which the government was using a racial classification but, in contrast to the classic Jim Crow laws of *Strauder* or *Plessy,* was trying to conceal the fact that it was doing so." In other words, the intent test is first and foremost a device for going "beyond fully explicit racial classifications to measures that, although neutral on their face, were obviously based on surrogates for race."[34] If we substitute "religious" for "racial," this seems to be exactly the reasoning that led to the condemnation of the special act challenged in *Kiryas Joel.*

As Strauss notes, "the discriminatory intent standard works reasonably well" as an interpretive heuristic in the category of cases, like *Kiryas Joel,* in which the government has disguised actual impermissible preferences in language that is neutral on its face.[35] But there are two problems with defining neutrality or nondiscrimination *exclusively* in terms of the government's intent. First, it remains unclear why unintended effects, either positive or negative, on religious and other subgroups should be acceptable, especially when they are consequential. If a state action has the *effect* of making a religious group into a governing agency, or creating a governmental body that only represents the interests of one religious group, why should that be a matter of constitutional indifference? Second, as Strauss notes, it is far from clear that the intent standard is coherent if taken seriously, rather than supplying an excuse for reining in judicial review. Many have noted the obvious evidentiary difficulties, and the fantasy involved in imputing a unified "intent" to a collective, political body, like a legislature. Beyond this, there often simply is no answer to the question, whether the "same" state action would have been undertaken if the identity of the groups affected were different. As Strauss notes, the question is usually meaningless.[36]

Furthermore, as every first year student of criminal law learns, there are many different levels of *mens rea,* ranging from deliberate intention, through knowingness of the consequences of one's

action, to reckless disregard or negligent indifference. Similarly, there are an infinite number of levels of generality at which the purpose or reason for an action can be articulated. For example, the Supreme Court justices characterized the goal of the separate school district variously as:

1. " 'A good faith effort to solve th[e] unique problem' associated with providing special education services to handicapped children in the village" (Justice Souter, quoting Governor Mario Cuomo).[37]
2. "An adjustment to the Satmars' religiously grounded preferences" (Justice Souter).[38]
3. "Providing bilingual and bicultural special education to Satmar children" (Justice Souter).[39]
4. "To separate Satmars from non-Satmars" (Justice Souter).[40]
5. To respond "to parental concern that children suffered 'panic, fear and trauma' when 'leaving their own community and being with people whose ways were different."' (Justice Stevens, concurring).[41]
6. To "isolat[e]" and "shield children from contact with others who have 'different ways' " (Justice Stevens).[42]
7. "To cement the attachment of young adherents to a particular faith" (Justice Stevens).[43]
8. "Religious toleration" and "accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect" (Justice Scalia, dissenting).[44]
9. "Family values" (Justice Scalia).[45]

Which of these appropriately characterizes the facts of the particular case, and which count as the kind of intention that stands condemned (or excused) under the intent test? Surely, all are plausible and valid descriptions of the goal.

Certainly, as Justice Kennedy and Justice Souter both explicitly acknowledged, "the New York legislature *knew* that everyone within the village was Satmar when it drew the school district along the village lines."[46] And it would not suddenly forget this fact when it came to applying the new general statute. Nor did it lack this knowledge when it approved the formation of the Village

under a general incorporation statute. Furthermore, as O'Connor notes, the Village was "consciously created by the voters as an enclave for their religious group."[47] Yet it is absolutely clear that none of the members of the Supreme Court expects such forms of consciousness to flunk the formalistic requirement of neutrality of intent. The irrelevance of the intent of the voters, on the brink of transforming themselves into a local government, goes unexplained, as does the newly formed government's own raison d'être.

Had the Court eschewed the intent standard, and instead defined state "establishments" of religion according to the functionalist test of neutrality of effect, the irrelevance of these factors would be understandable. But under a functionalist analysis, a court might be compelled to strike down general, as well as special, legislation that "effectively guarantees a religious community's control and operation of a unit of government."[48] The intent test in *Kiryas Joel* functioned simultaneously (1) to allow the Court to condemn the special act exclusively benefiting the Satmar community (despite the absence of an explicit religious classification), and (2) to leave the way open for the state to permit all subgroups meeting certain technical requirements to form their own local governments and public schools, even if this would have the effect of creating as much of an actual "fusion" of religious and political authority as in the first case.

However, the neutrality of intent test alone does not suffice to create the situation in which religious and antireligious groups can actually govern themselves in furtherance of their aims. Even if the formation of a governmental entity in a particular area is approved, its actions are still subject to the requirements of constitutional and statutory law, including the establishment clause, the free exercise clause, various antidiscrimination provisions, and state laws that require democratic procedures to be followed in local governance. Furthermore, a homogeneous population, sufficient to meet the technical size requirements for incorporation and to continue to control local democratic politics, cannot be secured in the absence of other legal mechanisms.

These other mechanisms are the subject of the remainder of part II.

B. The Religious-Secular Distinction

Even if an effect standard were followed, it would still be open to question whether allowing the formation of a school district (or a village), which is "coterminous with the boundaries of an insular religious community and . . . controlled by members of that sect,"[49] has the effect of delegating the authority to operate an agency of government to a *religious* group. By the same token, under an intent standard, even if the state's intent to delegate authority to the Satmar community is established, the question remains whether the resulting government is a religious one. Both of these questions hinge not on the intentions of the state (in authorizing the establishment of a local government) but rather, on the intentions—or better, the *functions*—of the governmental entity that is created. In particular, the answers to these questions hinge on whether the functions of the school district or village are deemed to be religious or secular.

The courts have employed the distinction between religious and secular functions in a variety of contexts. For example, a religious group's activities do not merit protection from governmental interference under the free exercise clause unless they are actually religious activities. (Presumptively, not all of a religious group's activities are religious activities.) On the other hand, governmental actions, like the sponsorship of public Christmas displays, are not deemed to violate the establishment clause unless their content is actually religious, as opposed to merely "cultural."

The chief problem with the distinction between the secular and the religious is knowing where draw to the line. In part, this results from the fact that different religious worldviews contain different conceptions of the content of the sacred and the secular, and of the boundary line between them. At the extreme, some religions draw no such distinction at all. According to such holistic religions, religion is not confined to activities such as prayer and church attendance; nor does it consist primarily in the conscience of the believer. Rather, it suffuses an entire way of life (thus obliterating the distinction between religion and culture.)[50]

Differing conceptions of the religious and the secular give rise to various problems. First, there is the risk of religious bias on the part of a judge whose job it is to apply the distinction. Domains

that one party sincerely believes to be invested with religious meaning may go unprotected, as a result of either outright animosity or simple obtuseness toward particular religious beliefs or parties.

Another problem is that even judges who are not prejudiced may nevertheless fail to properly discern the character of particular practices or beliefs. In part, this turns on issues of credibility. Religious parties have an incentive to be tactical, to characterize either their own practices or those of the government in a way that conduces to the desired legal result. Judges must therefore make determinations about the parties' personal sincerity, while simultaneously trying to make sense of the belief system which they represent.

But differing characterizations of the secular as opposed to religious nature of an activity or domain do not always (or even usually) reflect insincerity. They may instead reflect the inherent subjectivity and consequent malleability of those characterizations. For the question of whether something is religious or secular is not an objective matter but is itself entirely a matter of subjective belief—and beliefs will inevitably differ.[51] (Thus, a creche, for example, really "is" nothing more than a secular, cultural display to one person, and really "is" a religious spectacle to another). Furthermore, the same activity may serve *both* religious and secular functions simultaneously, or (what is the same thing) may come to be (sincerely) seen as doing so. Finally, the beliefs of individuals and groups regarding these matters are never static. Beliefs evolve, with the result that certain kinds of activities formerly regarded as secular become invested, by tradition, with religious significance. Conversely, activities that used to form part of a seamless web of religious life become separated from their religious significance (as has happened, for many people, with the institution of Saturdays or Sundays as work-free days). Changes occur not only in views about the character of a particular thing (i.e., whether *it* is religious or secular), but also in general views about the nature of the sacred and secular realms (i.e., what *is* religious and secular?). At any given point in time, the terms secular and religious are likely to bear more than one meaning even within a single conceptual or cultural framework. Consequently, sincere differences in views about whether a given

thing is secular or religious will obtain between different groups, between different members of the same group, and even within the mind of one individual.

The inherently subjective nature of the religious-secular characterization, and the difficulties of judgment that this creates, are well illustrated in the case of *Kiryas Joel.* The proponents of the Hasidic school district were at pains to characterize the school's functions as cultural and secular, rather than religious. Accordingly, they emphasized facts such as the following:

> 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.[52]

In the same vein, proponents argued that the school was established to accommodate the cultural and psychological, not the religious needs, of members of the Hasidic 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."[53] In this view, Yiddish, the spoken language of the Satmar community, serves the psychological, cultural, and basic educational goals generally associated with bilingual education rather than religious ends. So, too, being in the exclusive company of Hasidic children serves the end of creating a comfortable psychological and cultural learning environment, as opposed to a religious one.

Of course, there are counterarguments. Consider the character of Yiddish as a medium of instruction within the framework of the Hasidic worldview. In the world of Eastern European Jewry, whence the Satmars emanated, Yiddish was historically used, and consciously regarded, as a religiously suffused language. Although (and in part, because) Hebrew was always recognized as the sacred

language, Yiddish is the language in which discourse *about* the fundamental sacred texts is characteristically conducted. Not knowing Yiddish implies being cut off from this religious discourse. Accordingly, Yiddish instruction might well be regarded as religious rather than—or at least in addition to—secular in character.

A more sweeping refutation of the Satmar's characterization of their "secular" school stems from the holistic conception of religion embraced by Hasidic Judaism from its inception in the radical antielitist and antitextualist ideas of its nineteenth-century founder, the "Baal Shem Tov." Hasidism is a prime example of the holistic type of religion, which subscribes to the doctrine that religion pervades all of life. It was based on a rejection of the idea that religion consists exclusively, or even primarily, in the study of the sacred texts, an activity which was inevitably confined to a small rabbinic elite. Instead, Hasidism was born proclaiming that religion was everywhere, even—or especially—in the most mundane activities. According to this view, it makes no sense to refer to anything as "religious *rather than* secular." The conventional distinction between the religious and the secular realms is not a part of the Hasidic conceptual vocabulary.[54]

The Satmars' willingness to describe their public school in secular terms therefore creates a puzzle, to which several solutions may be offered. One possibility is that their description of the functions of their public institutions is strategic and insincere. According to the most cynical take on the Satmars of Kiryas Joel, they molded the curriculum of the school to omit the most obviously "religious" aspects of instruction in order to obtain legal certification, and they will covertly supply religious instruction to the fullest extent possible. Even if they adhere to the stated curriculum and announced structure of the school, these things are themselves suffused with religious meaning (for them) because, according to their religious doctrine, everything is. To deny this is merely a cynical move on the Satmars' part.

This understanding is not implausible, but it poses several difficulties and, in any event, is hardly the only plausible view. The most fundamental issue posed by this understanding is whether the religious party's view of the secular-religious characterization (supposing we know what it is) should be entirely controlling of

the analysis of legal controversies. To recognize that the characterization (secular versus religious) is intrinsically subjective does not determine *whose* characterization should control. The religious party's perceptions are surely relevant, but it is far from clear that its perspective should be dispositive of legal questions. Consider the consequences of settling all free exercise and establishment clause cases on the basis of the holistic religious view, which denies the existence of a secular realm, separate and apart from the religious. According to such a view, *no* government benefit—no public education, no social security payment, no tax subsidy, no access to a public park—could ever be granted to an adherent of such a religious doctrine without implicating the establishment clause. No government action could even occur without being laden with religious significance (in the eyes of adherents of such views). But it seems outlandish for the state to regard all of its activities as "religious" just because a religious subgroup does.[55] This suggests the need for some "objective" test of secular versus religious content—objective in the sense of being independent of any particular religious party's view (but not in the sense of being independent of *anybody's* view).

The dominant political *and* religious traditions in this country deny the holistic view, and assert a clear distinction between the religious and secular. If members of a subgroup, such as the Hasidim, adopt the dominant position, it need not be regarded as feigned. They may have come to absorb the dominant view.[56] And even if the Satmars continue to view all of life, or all of their own activities, as religious in some sense, that does not imply that the conventional distinction between the secular and the religious holds no sensible meaning for them. If they conform to the convention—if they play by the ordinary rules of the game and shear off the conventionally religious content from their public institutions—why should they be denied the legal protections and licenses that ordinarily accompany it?

Many questions have been raised here regarding the sincerity of the claims of religious believers, the nature of the beliefs of different religious subcultures, and the moral and political relevance of competing beliefs about the religious-secular distinction, none of which seem very well suited to judicial resolution. But courts are called on to supply answers to these kinds of questions

all the time. This may explain their attraction to another kind of formalism—a formalistic view of the religious-secular distinction itself. A consistent judicially applied division between secular and religious functions is not so much "objective" (except in the limited sense described above) as it is formalistic. It is formalistic in at least three senses. First, it does not necessarily match or get at the "real" religious meaning of the particular action that is being typed, if we understand that real meaning (in the manner of an anthropologist— or a realist) as consisting in the belief system of the religious party involved. This is particularly true since the content of the formalistic view employed by the courts is the polar opposite of the holistic view of religion. The view favored by the courts tends to restrict the category of the "religious" to things that touch directly on religious doctrines, theology, and the conscience of the individual believer, and to exclude such things as the "national" or "ethnic" feelings of a religious group, or its social customs and political traditions. Such a formalistic view denies the religious significance of, say, the Christian traditions summoned up by Santa Claus or, in some circumstances, even a creche. Likewise, it exempts the pursuit of self-perpetuation by a religious group from the category of religious activities (in the absence of an identifiable religious law commanding that pursuit), and it permits viewing mundane activities (e.g., zoning) that result in excluding nonmembers as something other than strictly religious.

Justifying religious exclusion as a secular activity also depends on a second formalistic aspect of the prevailing religious-secular distinction: the acceptance of *post hoc* rationalizations as reasons for state actions. So long as plausible reasons for a particular government action can be supplied, including the generic sort of reasons, such as "public health, safety, and welfare," that Judge Goettel invoked in *Airmont*, courts rarely insist on establishing that these reasons were actually what motivated the local government involved. Longstanding principles of judicial deference to local government permit their actions to be justified retroactively—which casts the pious references to government "intent" in an interesting light.

It was precisely this sort of *post hoc* reasoning that enabled Judge Goettel to deny that the Village of Airmont was anti-Semitic,

even though it was undeniably formed in order to minimize the presence and influence of Orthodox Jews. Judge Goettel noted that, despite palpable tensions between the Orthodox inhabitants and the Village leaders, Orthodox families and developments were included within the village boundaries. Furthermore, the Village had not yet taken any specific "actions against residential synagogues or [done] anything else which has an adverse effect on the availability of housing for Orthodox or Hasidic Jews"[57]—although leaders had early on announced their intention not to permit deviations from the old zoning code. In the absence of any specific projects being derailed, Judge Goettel found that the argument against the village boiled down to the complaint "that it was conceived in sin and cannot escape the taint of its illegitimate birth."[58] In other words, the problem was precisely the intent, or animating spirit, behind the formation of the village. But this the court clearly separated from actual official actions and discarded as legally irrelevant. Judge Goettel expressly stated that whether future village actions adverse to the interests of its Orthodox inhabitants would be deemed to be discriminatory "does not depend on 'motivation'; it depends on the nature of defendants' [village officials'] conduct."[59]

The willingness to accept *post hoc* general rationalizations for offical action, and the indifference to the "real" meaning of a challenged action within the framework of a particular belief system are two marks of the judiciary's formalistic approach to the religious-secular distinction. The prevailing distinction between secular and religious functions is also formalistic in a third way. Simply by virtue of its being a bright-line, categorical distinction, it supplies the formal qualities of an easily applicable, predictable, formally realizable rule, as opposed to a fuzzy standard.[60] This, rather than its intrinsic cultural and religious bias, may be the chief attraction of the distinction. After all, the cases of *Airmont* and *Kiryas Joel* bear out the possibility that the distinction can be biased in *favor* of a religiously exclusive subcommunity in so far as it helps it to escape having its institutions characterized as religious or antireligious, and hence in violation of the law.

The question remains how such a community assembles itself and acquires the political power, which requires legitimation, in the first place. How did the villages of Airmont and Kiryas Joel

come to be, and what role did state action play in their formation? More pointedly, does the state bear responsibility for the exclusionary forms that both villages assumed?[61] If so, what legal principles excuse that role from judicial condemnation under statutory or constitutional antidiscrimination and antiestablishment laws? To understand the answers to these questions, we must turn to our next distinction, the third legal formalism responsible for the *Airmont* and *Kiryas Joel* results.

C. The Public-Private Distinction

Villages, like all local governments, are territorially defined units. According to New York state law, any territorially defined population can incorporate itself as a separate political jurisdiction so long as it meets certain minimal population and procedural requirements.[62] Therefore, some form of territorial control over contiguous plots of land had to be exercised by the Satmars in order for them to assume the position of a homogeneous population that could then secede and establish its own local government. That preceding form of territorial control was, of course, private property.

Had the Satmars been scattered, they never could have established the Village of Kiryas Joel in the first place. The prerequisite of residing in a contiguous set of lots could have been gradually assembled though the piecemeal acquisition of numerous separate properties; or though the development of subdivisions, bound by restrictive covenants, like Ramapo's "Torah Community" real estate developments, sold exclusively to members of the group; or even through the establishment of communally or jointly owned property.[63] But somehow or other a Satmar presence had to be established through the customary forms of buying and renting private property before the Satmars could stand in the position of residents of a territorially defined area, eligible to petition for village incorporation.

What prevents non-Satmars from living in Kiryas Joel and attending its public school? Not—or not formally—the exercise of formal village or district regulatory powers. There is no explicit "zoning out" of non-Satmars, and any such attempt would most surely be struck down by the courts as illegal discriminatory state

action.[64] Likewise, the school district's mandate is to serve all of the children within its boundaries, without reference to religion as a criterion of eligibility. The school district and the Village are both regarded as subdivisions of the state and cannot deliberately exclude non-Satmars if they want to. True, the zoning power could be, and arguably is, used to exclude non-Satmars indirectly, by virtue of permitting types of housing to which Satmars are attracted and others are averse. Similarly, the school district's use of Yiddish as the official language of instruction, and admission of other Hasidic children from outside the Village is hardly a lure to most non-Hasidic families. But the *uniform* filtering out of non-Satmars, some of whom might be attracted to the area's less costly, multifamily housing, could be achieved only at the level of nongovernmental actions regarding the disposition of each piece of property.

The existence of Kiryas Joel as a homogeneous, exclusive, religious community depends crucially on the exercise of private rights, on the rights of private property and contract, by which real estate is obtained and controlled, and also on the rights of "family privacy" and private education, broadly construed to encompass the informal processes of enculturation as well as the formal education that is conducted by private educational and religious institutions. In the realm demarcated as private, families and educational institutions play a pivotal role in shaping the development of beliefs, preferences, and values. Such private forces are deeply embedded in, and strongly protected by, our system of law. Little controversy attends the reigning view that the constitution implicitly protects a "right of family privacy," which confers upon parents the authority to direct the upbringing of the children "under their control," including the authority to send their children to private and parochial schools, and more generally, to submit their children to a religious (or nonreligious) upbringing of their choosing.[65] It practically goes without saying that the Satmars' collective "choice" to live together, to form a community of shared practices, customs, and language, to worship and congregate in a particular manner, and to lead their distinctive way of life, was largely a product of their upbringing. Likewise, the continuation of this way of life and system of belief will depend, crucially, on their children's education and upbring-

ing. For most of their children, this is to be achieved by sending them to private, religious schools. But for the disabled children in the Satmar community, the cost of special needs education is prohibitive in the absence of governmental subsidies—hence, the importance of their own public schools.

The centrality of the three pillars of private power enumerated above—property, family, and education (broadly construed)—is highlighted in the treatment of the few members of the Satmar community who dared to object to the leadership's stand on various issues, including the establishment of a separate public school. The community disciplined the dissenters with social shunning, and by denying them access to the village cemetery and private places of worship.[66] Though these sanctions were not enforced at law, they were powerful nonetheless. But their efficacy depends jointly on the disciplined members' ongoing desire to participate in the community's prescribed cultural practices (a desire shaped by their acquired beliefs), and on the property rights in the cemetery and houses of worship, which gave the communal leaders (in their private capacity) the power of exclusion. Communal leaders may have even greater punitive powers at their disposal if the members' real estate is in fact subjected to the sorts of restrictive covenants and servitudes that commonly bind private property associations, which exercise significant control over the membership and the members' behavior.

The binding nature of these controls may explain why, though the Satmar community has been fractious, internal dissent was not expressed in the courts of law. The question is whether these controls are coercive, or invasive of individual autonomy, even though they result from the exercise of private individual rights. If so, the proposition that nonvoluntaristic communities are destroyed by the legal bifurcation between public and private realms would seem to be undermined. Beyond that, the public-private distinction would seem effectively to undo itself by justifying the creation and control of (public) local government institutions by a (private) "autonomy-rejecting" subcommunity.[67]

The questions raised here are precisely those upon which the original legal realist attack on legal formalism first focused. According to the familiar realist critique, the exercise of private rights involves the exercise of power, and not always the exercise

of free choice. Progressives and legal realists focused in particular on relations of unequal wealth and property, which, they held, transformed contractual relations, such as those between employer and employee, into coercive ones. More generally, they insisted that the reality of private power relations can negate the voluntariness of nominally consensual arrangements. To deny this—to accept the exercise of private rights at face value as a voluntary act—is, in the realist view, the hollowest formalism, or as Felix Cohen put it, "transcendental nonsense."[68]

Though always controversial, this realist critique of the conventional distinction between private and state action was incorporated into several important legal decisions. In *Marsh v. Alabama*, the Supreme Court subjected a company town to the government's first amendment obligation to allow religious proselytizers access to its "public" spaces, despite the technicality that the entire town was privately owned.[69] And in *Shelley v. Kraemer*, the Supreme Court held that the judicial enforcement of a neighborhood scheme of racially restrictive covenants violates the state's obligation to provide equal protection of the law to all citizens regardless of race, notwithstanding that covenants arise out of the exercise of individual property-owners' rights.[70] In both cases, the underlying rationale was that the private entities and actions involved were "functionally equivalent" to public ones.

In contrast to a formalist style of analysis, this version of functionalism focuses on the actual effects on people of an action, regardless of its formal status as private or public. In this respect, it is similar to the functionalist effect test, which vies with the intent test as a standard for evaluating the constitutionality of state action. But unlike the effect test considered above, this version of functionalism is not concerned with the question whether action attributed to the state comports with constitutional standards of neutrality, but rather, with the prior question of establishing what counts as "state action." With regard to this question, legal realism assimilates private rights to public authority both by recognizing that regulative or coercive effects can occur in the private realm, and by revealing that in some cases, public action may actually be involved in, or responsible for, private action, and vice versa.

As is well known, the realist critique of the public-private dis-

tinction has, since its inception, occupied a curious position in the law: simultaneously affirmed as the most banal truism and subject to unrelenting attack. The Supreme Court has refused to apply the reasoning of *Shelley* and *Marsh v. Alabama* in numerous cases, insisting instead that the line between "state action" and private rights must be defended.[71] Yet it also refuses to overturn these holdings. So there they remain, along with other accepted doctrines based on the premises of legal realism. In the absence of a willingness to completely disgorge them, these lumps of realist reasoning continue to inform analysis of private rights, as can be seen seen in the arguments of the parties opposing the Kiryas Joel school district, and, more dimly, in Justice Souter's crypto-functionalist rhetoric. The repeated assertions that the statute creating the district "was tantamount to" delegating public authority to a religious community in fact bear two different meanings. The first, considered in section A, amounts to the claim that the state *intended* to bestow its authority upon the religious community but disguised its intentions in nonexplicit language. Such an intention in and of itself violates the requirement of the establishment clause that the state be impartial vis-à-vis religious and nonreligious groups. But, as we have seen, this defect is easily remedied by the passage of general legislation that enables all communities to form school districts, regardless of their religious character.

Such general legislation fails to cure the defect posited in the second understanding of the allegation that the statute "effectively" empowers a religious community to rule. This is the essentially realist charge that the legislation has the effect of empowering a religious community, as such.[72] Since the realist concern is with the effect, regardless of legislative intention, it is just as applicable to the general as to the special legislation. The fact that the Satmar community is not singled out for special treatment is irrelevant to the question of whether the community comes in fact to exercise official, regulatory powers. What *is* relevant to that charge is the underlying arrangement of private power within the community. Were it not the case that the public and private leadership were virtually interchangeable; that all property was held by members of the Satmar community; that the members were subject to very powerful forces of socialization and regula-

tion within the community—then drawing local government boundaries around the community would not necessarily have the practical effect of empowering the religious community as such. Yet, given these factual conditions, that is precisely the effect of the general legislation under which the Village and school district of Kiryas Joel are now incorporated, no less than of the special legislation struck down by the Supreme Court.

The fact that the Supreme Court favored the first meaning of the functionalist allegation over the second is a sign of the ascendance of formalist over realist reasoning. The Court ultimately ignored the realist concern about practical effects and instead focused on what I earlier called a "crypto-functionalist" concern with non-express intent on the part of the legislature. In rejecting the effect standard of neutrality for purposes of evaluating the legitimacy of local governments under the establishment clause, the Supreme Court signaled its ongoing commitment to the formalist distinction between private and public action. From this perspective, the fact that only Satmars live in Kiryas Joel is an artifact, not of coercion or state action, but of the private preferences of Satmars and non-Satmars, respectively, to live with their own kind.

The case for the constitutional relevance of the underlying private preferences and arrangements would have been stronger if attention were paid to the existence of mechanisms of collective control within (and without) the Satmar community—in other words, if the realist critique of economic relations (and the realist effect standard of neutrality) were applied to the relations of cultural community. Conversely, the most powerful case for the autonomy of subcommunities would be one that directly defends their internal power structure and regulatory mechanisms. Yet, strangely, both sides of the liberal-communitarian debate have shied away from the realist critique that exposes the internal political structure and power relations within private groups. Reflecting the widening gap between the politics of class and the politics of identity, communitarians typically eschew the realist critique of liberalism's actual coercive effects in favor of the view that liberalism achieves what it purports to: namely, the enforcement of voluntary relations and individual choice in the private realm. That, after all, is the favorite target of the communitarian

critique, which vanishes if the realist critique of private power is accepted. On the other hand, defenders of liberalism also tend to refrain from staking their case on the (for them) normatively unattractive proposition that liberalism actually countenances involuntary relations and collective coercion in the private realm.[73] Yet, though both liberals and communitarians shy away from it, the realist understanding of the power of private property and other nominally voluntary relations is, as we have seen, highly germane to the case of *Kiryas Joel.* Private property, the family, and private educational institutions were the three pillars of legally protected private power that enabled Kiryas Joel to found and sustain itself as a strong, nonvoluntaristic community.

Airmont is a less clear-cut case. Judge Goettel expressly found that the Village was not exercising its formal, regulatory powers against the Jewish community, and that members of the Orthodox and Hasidic communities were (so far) able to own and develop property in the area, and to establish and attend synagogues. He drew no inferences from these private arrangements other than that official acts of discrimination were absent, thereby displaying his affinity for the formalist style of analysis. He also exhibited the formalist's disinterest in the actions and motivations of private citizens in his peremptory dismissal of the relevance of the argument that the village was "conceived in sin." What would *Airmont* have looked like in a realist framework of analysis? Unlike the Village of Kiryas Joel, in which property-ownership, residence, and consequently, political influence are entirely Satmar-dominated, and in which the community is holistic, pervasively regulated and strongly prescriptive, the situation in Airmont is less sharply defined. Orthodox and Hasidic Jews were deliberately made a minority, but they do own some property, and it remains hazy *how much* property-ownership (from a realist perspective) is enough to rebut a charge that their options are unacceptably restricted. The remaining property is held by a loose collection of individual families, among whom the resistance to letting it into the hands of Orthodox Jews varies. How strong (and how organized) must the collective resistance be to support a *Shelley v. Kraemer*-style charge of exclusion? The non-Orthodox residents are not a tight-knit community—do they share enough of a bond to support the characterization of an exclusive group? The realist

alternative to formalist reasoning supplies no certain answers to these questions; it only points to their relevance.

What is certain is that the majority of Airmont residents' aversion to the traditional Jewish way of life is as much a product of their upbringing as the Satmars' way of life is a product of theirs. The difference is only that one upbringing reflects the values of a tight-knit, insular, prescriptive group, the other, the values of a diffuse, atomized, modern, "liberal" society. In the end, a realist analysis may simply reveal that a strong community imposes stronger private controls on individuals than a weak one does. This may seem the sheerest tautology. But if so, it is a tautology that contradicts the truism that strong, nonvoluntaristic communities dissolve under the legally enforced division between public and private realms. The realist critique breaks through that truism; the formalist distinction between public and private action reinstalls it. The courts' preference for the latter is indispensable to their justification of general enabling laws, under which religiously exclusive local governments, like Airmont and Kiryas Joel, can be formed. The public-private distinction underwrites the very idea that these governments "just happen" to contain particular groups, and that they therefore bear no responsibility for the exclusion of outsiders from their borders.

D. The General-Particular Distinction

The three preceding formalisms aggressively defend bright-line distinctions from erosion by their corresponding antiformalist (realist) critiques. Together, they create and legitimate the legal resources by which strong communities, including non-voluntaristic ones like the community of Kiryas Joel, can arise in the private realm and in turn capture (or create) local public institutions. Under a formalist analysis, this phenemonon is legitimate when (1) the mechanisms of exclusion are formally private (the public-private distinction); (2) the mechanisms of government serve secular, not religious ends (the religious-secular distinction); and (3) the mechanisms of government are available on a "general" as opposed to a "special" basis (which is determined in part on the basis of the intent-effect distinction). Even when (1) and (2) obtain, the law will regard the delegation of governmental author-

ity to a religiously exclusive group as illegitimate if it has been authorized on a "special," i.e., group-specific basis (as in the case of *Kiryas Joel*).

Proposition (3) entails a fourth formalism, which pertains to the distinction between the general and the specific itself. This formalism differs from the others in two respects. First, the quality of generality versus specificity is not necessarily social in content, whereas the other qualities (intentionality versus effect, regardless of intent; religion versus secularism; public versus private) are. Generality and specificity are inherently formal characteristics. Consequently, the antiformalistic view of the distinction between generality and particularism does not dissolve the contrast, but rather, reconceives it. The realist critique blurs the distinction between public and private actions; it deconstructs the idea of the secular *as opposed to* the religious; it substitutes the functionalist test of neutrality of effect for the standard of neutrality of intent. But a realist view of generality and particularity preserves the distinction between them, even while it rejects a formalistic conception of what that distinction consists in.

These statements are themselves thus far utterly formal and in need of substantive content. Fortunately, an indication of the content of the formalistic view is at hand in an essay by the constitutional scholar Michael W. McConnell. More fortunately still, McConnell developed this conception as part of a vision of "multicultural" public education. In this vision:

> each school could teach from a coherent moral-cultural perspective—one that is *chosen* by its student body. Of course, educational choice is risky. It runs the risk that some will choose a moral education that is pernicious, and that many will choose ethnically and religiously particularistic alternatives that might exacerbate already-dangerous divisions. I suspect these fears are overblown, however, just as the similar fears of religious pluralism were overblown in the eighteenth century. With parents making the decisions, how likely is it that many will choose alternatives that are demonstrably worse than the results of the present system?[74]

This passage adumbrates the view implicitly adopted by the Supreme Court in *Kiryas Joel*. As McConnell notes, there are two different ways of understanding and implementing the call for

multiculturalism in public education. In one, multiculturalism is opposed to particularism or cultural bias, and consists in incorporating all subcultures in one common (general) culture and curriculum, which is then made available to all. The other version, endorsed by McConnell, "comes from those who deny the very desirability of a common curriculum and advocate a pluralistic system of schools dedicated to particular, and *particularistic*, traditions."[75] In this "more radical" view, the nondiscriminatory treatment of different cultural group consists not in *overcoming* particularism, but rather, in giving each group an equal right to *be* particularistic. Generality (nondiscrimination) and particularism thus ironically converge.

This definition of generality is formalistic from the standpoint of the competing view,[76] according to which particularism consists in the advancement of the values and objectives of one particular group to the exclusion of others. Members of a particularistic culture or political system have loyalties and obligations to one another, and to the shared heritage and projected future of their group. A political system is particularistic precisely in so far as it represents a culturally specific belief system, including its conception of morality, its social and political norms, and its criteria of membership. Often, such a political system will make symbolic references to the "imagined history" of the nation or cultural group which it represents. Particularistic groups also tend to impose more far-reaching restrictions and obligations on individual members than the merely "negative" duty to leave other individuals alone. By enforcing such obligations, by promoting its own values and culture, a particularistic group excludes (or is at least biased against) competing cultural value systems.

By contrast, a political system is nonparticularistic in so far as it refrains from exclusion and bias against competing values, cultures, and beliefs. Such a system is inclusive rather than exclusive, internally pluralistic rather than one of a number of diverse (but internally homogeneous) separatist islands of cultural autonomy. From the standpoint of this conception of particularism, McConnell's "radical" vision is formalistic because it allows exclusionary, particularistic politics to proceed unchecked, within each group's separate sphere, so long as each group has an equal opportunity to establish a particularistic political sphere of its own.

The formalistic distinction between particularistic and nonparticularistic political regimes functions similarly to the public-private distinction. Both serve to shift responsibility for exclusionary regulation away from judicially cognizable "state actors." Both thus deny the reality that the observable pheonomenon of social exclusion is a function of state-backed coercive regulations. The public-private distinction locates the mechanism for excluding outsiders from local government boundaries in a multitude of private, voluntary acts and preferences, for which the state bears no responsibility. The formalistic version of the general-particularistic distinction shifts responsibility away from the state to a multitude of local political communities. Though such local communities are formally *public* entities, the formalistic distinction acts, as it were, as a moral solvent, dissolving each local government's responsibility for enacting particularistic regulation into a larger political universe. Such is the salt-water alchemy of the formalistic view of general and particular.[77]

The contrast between formalistic and substantive views of the general-particular distinction is familiar to us from another context—the doctrine of "separate but equal" racial spheres. Like the controversy over the competing intent and effect tests of governmental neutrality, the conflict over the compatibility of separatism with equality developed in the context of race relations and the jurisprudence of the equal protection clause. In this setting, the doctrine of separate but equal was denounced as a specious formalism in a line of cases that culminated in the 1954 school desegregation decision *Brown v. Board of Education.* The unanimous Supreme Court decision, holding that racially segregated public schools are unconstitutional, was firmly (or unfirmly, as critics would have it) based on antiformalistic reasoning, the hallmark of which, as we have seen, is a concern with actual effects. According to the *Brown* analysis, racially segreated education is "inherently" unequal because of its inevitably stigmatizing "effect" upon "Negro" children.[78] The Court rejected the proposition that separatism could be reconciled with equality—that particularism could be reconciled with generality or neutrality—as a hollow formalism that ignores, masks, and ultimately justifies the real, pernicious psychological and social *effects* of segregation.[79]

Since *Brown v. Board* was decided, there has been a steady

stream of criticism against the integrationist philosophy upon which it is based. Black nationalists, resurgent white supremacists, and, increasingly, the moderate middle (white and black) have questioned the wisdom of rejecting the doctrine of separate but equal. Thus, McConnell has good reason to refer to the espousal of a version of this doctrine as a "radical" position, but could also, with equal accuracy, call it a conservative position. The interesting question, for our purposes, is in what sense we might regard it (as McConnell does) as a *liberal* position.

This is the matter to be considered in the final part of this essay. But before proceeding, it may be useful to take stock and review the role played by all four of our formalist doctrines in justifying the results of *Airmont* and *Kiryas Joel.*

The formalistic version of the general-particular distinction completes that justification in the following fashion. Religiously exclusive communities (i.e., communities that exclude a certain religion or religions or communities that include only one religion) can legally create or control their own local public institutions, such as villages and school districts, when (1) the mechanisms whereby the exclusivity of the community is maintained are formally private (the public-private distinction); (2) the public regulations serve secular, not religious ends (the religious-secular distinction); (3) the group is effectively, but not "intentionally," empowered to rule (the intent-effect distinction)—a condition which is interpreted in terms of (4): the authority to govern has been delegated to the group on a "general" rather than a "special" or group-specific basis (the formalistic general-particular distinction.) In other words, the state's effective political empowerment of a particular, religiously exclusive group is deemed to be unintentional—even if the state is perfectly aware of the effect of its action, and even if the state in some sense "desires" that effect—so long as the same opportunity is afforded to every group in the "same" situation (i.e., a sufficiently concentrated and sizable population, which votes democratically to form its own political institutions).

The formalistic distinction between specificity and generality functions as gloss on the meaning of the intent-effect distinction, and in doing so, explains two of our earlier puzzles. First, it explains the judges' lack of interest in the actual motives of the

local voters, of the founders of the local government, and of the local government itself, despite their professed interest in the state's intent. Notwithstanding the settled doctrine that local governments are units of the state, the formalistic general-particular distinction holds in effect that the (self-)promotion of a local community is not an intention attributable to the state so long as every local community is given an equal opportunity to promote itself. In short, generalize the group right to self-rule, and it no longer counts as the sort of particularism which violates the legal constraints placed on "state action."

Second, the formalistic distinction between general and particular gives content to the term "intent," which explains its deviation in judicial usage from more commonsense notions of the term. Coupled with the formalistic general-particular distinction, as it was in *Kiryas Joel,* "intent" is revealed to be a term of art. We recall that in *Airmont,* Judge Goettel insisted that the discriminatory nature of local government action "does not depend on 'motivation'; it depends on the nature of defendants' conduct." Yet at the same time he hewed to an intent standard of discrimination, focusing on the government's "objectives." The apparent contradiction between following the intent test and rejecting the relevance of motivation is resolved when we realize that, for Goettel, government "objectives" and government "conduct" are one and the same: to wit, actions, which are subject to *post hoc* rationalizations based on their perceived effects. If Airmont's actions are consistent with advancing the *general* health and welfare of the local community, they will not be deemed to be discriminatory (regardless of the actual "motivations" of the founders or leaders of the new village). Similarly, according to the reasoning of *Kiryas Joel,* the state will not be deemed to have intended to promote the welfare of the Satmar community (in particular) so long as it can be seen to be advancing the welfare of the general (statewide) community. The fact that it only enacted general legislation after the Supreme Court invalidated the original special legislation, and that it did so specifically in order to enable the Satmar school district to continue to exist, is simply irrelevant to this formalistic definition of intent.

The four formalisms listed above explain why general legislation empowering particularistic local communities is considered

constitutional, and why special legislation is not. They thereby explain the persistence of prescriptive-regulative communities in our legal order—a phenomenon whose existence contradicts the dire prognosis for non-voluntaristic communities posited by liberals and communitarians alike. But do they explain features of a *liberal* legal order? In order to answer this question, we must consider the relationship of each of our formalistic doctrines to the theory and principles of liberalism, a project which deserves far more expansive treatment than I can offer here. A brief consideration, however, may provide some tentative support for the thesis that these four formalistic doctrines are compatible with and expressive of contemporary liberal political thought.

III. The Liberalism in Formalism (Or Formalism in Liberalism)

The relationship of liberalism to the four formalist doctrines analyzed above is of course a matter of interpretation. John Rawls and Joseph Raz are liberal theorists whose commonalities and differences, taken together, seem representative of contemporary liberal thought. Accordingly, an analysis of the place our four formalisms have in the work of Rawls and Raz may shed light on their more general place in liberalism.

A. *The Intent-Effect Distinction*

Rawls, in his latest book, expressly endorses the intent test and, in the quotation with which this essay began, rejects the effect test on the grounds of "impossibility" and "the facts of commonsense political sociology." Rawls summarizes his position:

> As a political conception for the basic structure justice as fairness [Rawls's proposed interpretation of liberalism] as a whole tries to provide common ground as the focus of an overlapping consensus. It also hopes to satisfy neutrality of aim in the sense that basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine. Neutrality of effect or influence political liberalism abandons as impracticable, and since this idea is strongly suggested by the term itself, this is a reason for avoiding it.[80]

This epitaph for the effect test is followed by Rawls's observation, tucked in a footnote, that abandoning it may well allow us to justify a political environment that is hostile—*in effect*—to "religious sects that oppose the culture of the modern world."[81] He calls particular attention to the potential effects of liberalism on children's education and the possibility that "reasonable requirements for children's education" in a liberal regime may have "unavoidable" (negative) consequences for some groups. Rawls defines "reasonable" political requirements in terms of the contrast he asserts between "political" and "comprehensive" liberalism. A "comprehensive liberal" education would actively "foster the values of autonomy and individuality as ideals to govern much if not all of life," an activity which obviously—and unacceptably, to Rawls—implies driving out competing value-systems. Rawls favors "political liberalism," which is ostensibly more modest because it is pluralistic and seeks to govern only the political realm, and not "all of life." Unlike a comprehensively liberal education, a "politically liberal" education requires only the knowledge that constitutional and civic rights, such as liberty of conscience, exist. But even a politically liberal education, Rawls concedes, may end up promoting values that touch on all of life—in effect. Thus, he grants that "requiring children to understand the political conception . . . is in effect, though not in intention, to educate them to a comprehensive liberal conception," at least "in the case of some." From his earlier forswearing of the effect test, it follows that this "unintended" effect is legitimate.[82]

Rawls's discussion of neutrality is notable in one further respect. While he rejects the principle of neutrality of effect, he accepts another definition of neutrality in addition to neutrality of intent. The second definition he endorses is a version of the equal opportunity principle for competing belief systems that we referred to above as the formalistic view of nonparticularism or generality. Rawls qualifies the principle to allow citizens an "equal opportunity" to advance only each "permissible" belief system,[83] but it remains a recognizable version of the principle that there should be equal opportunity for citizens to promote their varying particularistic beliefs.

In *Kiryas Joel* and *Airmont*, the formalist standard of generality (equal-opportunity-for-particularism) combines with the intent

standard of neutrality to exonerate government of nonneutral intentions, and thus to legitimate its promotion of the objectives of particularistic, exclusive groups (so long as the opportunity for particularistic local government is apparently generalized). By contrast, for Rawls, the combination of the formalistic conception of nonparticularism with the intent standard serves to qualify the principle of equal opportunity for particularistic groups so as to permit the government to impose "unintended" obstacles to a group's effective implementation of its right to advance its conception of the good. This difference reflects the fact that Rawls considers only the negative effects visited by liberal government on subgroups. But the cases of our two villages show that the effect of implementing *these* principles of liberal government can be *advantageous* for groups in some situations, as it was for the Satmar community in Kiryas Joel and the anti-Orthodox community in Airmont, the consequences of which Rawls does not consider.

Joseph Raz rejects the intent test—but he does not adopt the competing effect test. Instead, Raz rejects all three of the conceptions of neutrality delineated above, making mincemeat of them by a series of *reductios.*[84] In his view, neutrality is a chimera best abandoned in favor of a principle of "pluralism," under which "it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones."[85] As a perfectionist principle, Raz's pluralism permits—nay, calls for—governmental action that will affect the viability of different belief systems differentially. The rationale for this is that to do otherwise "in practice would lead not merely to a political stand-off from support for valuable conceptions of the good. It would undermine the chances of survival of many cherished aspects of culture."[86] In other words, some belief systems must be sacrificed in order to enable other (autonomy-promoting) ones to survive. Neutrality of effect be damned!

In sum, both Rawls and Raz emphatically reject the principle of neutrality of effect as a measure of legitimate government action, though only Rawls endorses the formalistic intent test. As for Raz, it is as if he unearthed the value-laden content lurking behind the intent test's value-neutral shell, and turned it into a substantive, nonformalistic virtue. In doing so, he underscores

contemporary liberalism's antipathy to the antiformalist principle of neutrality of effect.

B. The Religious-Secular Distinction

Neither Rawls nor Raz specifically addresses the secular-religious distinction. Yet each treats the problem of religious "sects" in a way that reflects an implicit belief in that distinction, and in the fundamental assumption that the political realm should be a secular one.

For example, Rawls's notion of "comprehensive conceptions of the good" that are ruled out of bounds in the political sphere comprehends both nonreligious and religious philosophies of life, but it is religion that is his constant foil.[87] He repeatedly takes up the plight of "religious sects that oppose the culture of the modern world," a plight that he views as a consequence of the necessarily secular character of politics in a liberal regime.

But to hold that politics should be secular presumes a definition of what religion is (or at least what it is not). The holistic conception of religion, for example, is not available to Rawls because it denies the very possibility of a secular realm. Rawls's conception of religion resembles that of the courts. He invariably equates religion with theological doctrines of religious obligation, which bind the conscience of the individual believer. This doctrinal view of religion contrasts with a wider (more anthropological or realist) view of religion that sees it as a web of social practices that includes bonds of cultural or political solidarity, that may or may not be expressed in a theology of divinely prescribed individual obligations, and that may or may not require the individual to affirm a particular creed. Implicitly, Christianity (more specifically, Protestantism as it developed in the seventeenth century) serves as Rawls's paradigm or "model case" of religion.[88] Insisting upon the necessity of liberty of conscience, he makes it clear that his conception accommodates only "religious doctrines with an account of free faith." He defends this restriction on the ground that he supposes "perhaps too optimistically—that, except for certain kinds of fundamentalism, all the main historical religions admit of such an account."[89] Despite acknowledging the social dimension of religion, Rawls assumes a bifurcation between

the "nonpolitical" or private sphere of the individual conscience and the secular sphere of politics, and confines religion to the former.

Raz also addresses the problem of "religious sects" along with "immigrant communities" and "indigenous peoples" as part of a brief consideration of the "troubling problem" of "the treatment of communities whose culture does not support autonomy." Unlike Rawls, Raz adopts the wider anthropological/realist view of religion as a "culture," as opposed to the narrower, doctrinal conception of religion. This leads him to differ with Rawls over the treatment of autonomy-rejecting cultures and the problem of children's education. On the premise that some such cultures "enable members . . . to have an adequate and satisfying life," Raz counsels tolerance for their "continued existence," and the protection of their "separate schools" from coercive interference by the state.[90] Rawls's attitude is less forgiving. In his view, society owes no special treatment to people whose "preferences and tastes" are so different that they fail to be satisfied by the official arrangements of society. Instead, he suggests rather ominously, such deviations should be regarded as "a medical or psychiatric" condition and "treated accordingly." Reflecting his general reluctance to conceptualize religion as a culture worthy of protection in its own right, he admonishes the reader that "we don't say that because the preferences arose from upbringing and not from choice that society owes us compensation. Rather, it is a normal part of being human to cope with the preferences our upbringing leaves us with."[91]

The differing attitudes toward culturally conditioned beliefs exhibited here by Raz and Rawls echo the sharp exchange of views between Justice Stevens and Justice Scalia in *Kiryas Joel.* For Stevens, who condemned the special legislation forming the Hasidic school district on broader grounds than the majority, the problem is that separate schooling "isolates" the children from exposure to diverse ways of life, and serves to "cement" their attachment to their parents' faith—terms that hint at the kind of pathology which Rawls seems to have in mind. As Scalia tartly responded, "so much for family values."[92]

But, as with their disagreement over the intent standard, Raz's apparent disagreement with Rawls over the nature and value of

religion is deceptive. In the end, both are profoundly ambivalent about the merits of the claims of illiberal religious groups to control the education of "their" children, and to govern themselves. Rawls in fact vacillates between the doctrinal and the cultural conceptions of religion, and both Raz and Rawls vacillate over the fundamental issue of whether illiberal religious cultures deserve to be protected against the cultural influence of the liberal state. Like Stevens, Raz recognizes that "[s]ince they insist on bringing up their children in their own ways they are, in the eyes of liberals like myself, harming them." Therefore, "people are justified in taking action to assimilate the minority group, at the cost of letting its culture die or at least be considerably changed by absorption."[93] On the other hand, Rawls is anxious to limit state incursions on religious autonomy—a value which, he recognizes, protects associations and groups as well as individuals "all from one another."[94] Precisely because he does allow himself to recognize the cultural dimension of religion, he is content (in most cases) to wait out the gradual "adjustment or revision of comprehensive doctrines." He assumes that this is bound to occur because of the "looseness" and "slippage" he observes in our comprehensive views, and their adaptability to "shifting circumstances of time and place."[95] In short, like Raz, Rawls expects most religions (save for the obstinate "fundamentalist" ones) to assimilate the culture and political values of liberalism.

Neither Raz nor Rawls exactly endorses a formalistic conception of the secular and religious realms and hence neither supplies definitive proof that liberalism requires one. But their work is certainly redolent of such a distinction. The very notion, common to Raz and Rawls, that religious beliefs evolve as a result of mundane changes in external social and political circumstances bespeaks a fundamentally secular perspective from which the truth of any particular religious view, and the reality of its conception of divinity, are not denied—nor affirmed—but rather "bracketed." This mental operation of bracketing itself implies a bifurcation between secular and religious realms.

This bifurcation is formalistic in the sense that it does not fully comprehend the experience of religions that extend beyond the doctrinal model of a system of beliefs (in divinely commanded duties) adopted by the freely confessing individual. It is less clear

whether it is formalistic in the sense, posited in our earlier discussion, of making *post hoc* rationalizations of the secular character of governmental action; or in the third sense, also discussed above, of positing an impenetrable barrier or "bright line" between secular and religious realms. Perhaps the law requires more simplistic, air-tight categorical distinctions, and inclines more toward *post hoc* characterizations, than does the pure theory of liberalism itself, because of the practical demands of application. Even so, some version of the formal distinction between the secular and religious appears to be assumed by contemporary liberal political thought.

C. The Public-Private Distinction

The distinction between religious and secular realms implies a more fundamental distinction between the private and public spheres. Both Raz and Rawls consign religion to some version of the private or "nonpublic" realm, though each resists the simplistic conception of that realm as a domain of free-floating individual will, choice, and agency. Conversely, the political realm is, in both their views, implicitly secular (though suffused with moral content).

Enough ink has been spilled on the centrality of the public-private distinction to liberal thought.[96] Suffice it to say that some such distinction is clearly essential to liberalism, though not the naive variety which serves as strawman in many critiques. Raz's *Morality of Freedom* is one of the most serious attempts to wean liberalism from its dependency upon such a simple-minded distinction. Rawls, too, attempts to throw off the historical baggage associated with the distinction by replacing it with a distinction between the "political" and the "nonpolitical."[97] Despite these efforts, both continue to rely on (different) notions of a division between the affairs of government and those of the nonpolitical realm. Such notions are necessitated by the basic commitment to pluralism, which both posit as the essence of liberalism. No matter how much particular moral content each allows to be expressed in the political order, no matter how culturally-specific they recognize the liberal polity to be, the fundamental political objective upheld by both Rawls and Raz is to allow "space" for a plurality of

subcultures and value systems to exist. And that "space" *is* the private domain.

Does this mean that liberalism, as interpreted by Raz and Rawls, rejects the realist critique of the public-private distinction? On the contrary, they both qualify their respective conceptions of the nature of "choice," "autonomy" and individual "freedom" in the private realm in ways that recall realist critiques and undermine any simple opposition between voluntary action (or belief), on one hand, and coercion and constraint, on the other. For example, according to Rawls, "freedom" of conscience means only that our beliefs are freely accepted "politically speaking," not that we actually accept them "by an act of free choice, as it were, apart from all prior loyalites and commitments, attachments, and affections."[98] Rawls provides no further explication of this rather enigmatic distinction, but it seems to imply that he accepts the basic realist proposition that power abounds in the private realm, as well as the "communitarian" tenet that beliefs are conditioned by culture and collective entities.

Raz offers a fuller elaboration of the concepts of individual freedom, autonomy, and choice, which likewise expresses the basic insights of the realist critique. He echoes the realist position that a person whose options are severely restricted, such as a person who is constantly fighting for survival, is not free because "a choice between survival and death is no choice."[99] Insisting that "the autonomous life . . . depends on the general character of one's environment and culture," and recognizing that "an autonomy-supporting culture . . . lacks most of the opportunities" available in a traditional society, Raz concludes paradoxically that "the value of autonomy does not depend on choice."[100]

Rawls and Raz's evident inclination to qualify the public-private distinction to the point of undermining it, combined with their various attempts to dissociate liberalism from individualism and their suggestions of grounds of liberal support for social welfare programs, indicate a basic receptivity to the realist critique. Indeed, legal realism is properly regarded as an outgrowth of the liberal tradition. Nonetheless, it remains the case that both Rawls and Raz, representing the general trend of that tradition, continually return to and resurrect versions of the public-private distinc-

tion. For all that Rawls acknowledges the collective regulatory dimension of the "nonpublic" realm, he still reverts to asserting a "contrast" with "the government's authority" because the latter (presumably unlike the former) "cannot be evaded."[101] And for all that Raz denies that autonomy is a matter of individual choice, he still defines "an autonomous person's well-being" in terms of "self-*chosen* goals and relationships."[102]

The resolution of these contradictions remains obscure. Liberalism, interpreted by Raz and Rawls, displays profound ambivalence toward the public-private distinction. With one hand, the liberal deconstructs that formalistic distinction; with the other, she resurrects it. In the end, though the matter is complex, it seems proper to regard the courts' commitment to the formalistic distinction between public and private realms as an expression of (part of) contemporary liberal thought, and not as something foreign to it, even as the formalistic public-private distinction is challenged by a competing view within both liberal theory and judicial doctrine.

D. The General-Particular Distinction

Little systematic thought has been devoted to the general-particular distinction. The virtues of the doctrine of separate but equal have been subject to extensive discussion, especially in the context of race relations in the United States. In this context, some have floated a distinction between voluntary and self-imposed segregation (building on the public-private distinction) as a possible way of reconciling the separate but equal doctrine with the basic tenets of liberalism. Questions have been raised concerning the similarity, or lack thereof, between religion and race, which might support a revived doctrine of separate but equal self-government for religious groups, but not for racially defined ones. But the answers to these questions remain undeveloped.

More generally, the very definition of particularism has received little systematic discussion. Analyses of the meaning of "equality" and "neutrality" have been undertaken.[103] But even these fail to provide an adequate analysis of the meaning of the basic distinction between the specific and the general, or of the particular question of the legitimacy of group-specific government

within a liberal state. Further rounds of the liberal-communitarian debate are bound to be fruitless until we gain a better understanding of what particularism *is*—and what its opposite is. Is particularism fulfilled, or is it negated if every group is guaranteed equal opportunity to establish its own local political institutions? Does such a guarantee demonstrate or cancel out a particularistic (i.e., biased) state "intent"? What are the conditions of "voluntary" or "self-imposed" political separatism, and can they be coherently distinguished from forced segregation—especially when children are involved? (Remember Justice Steven's view.) Should the answers to these questions differ if religion, as opposed to race is involved? Why? What is the basis of *this* distinction?

Despite a tradition of liberal condemnation of the formalistic separate but equal doctrine, we have seen that both Raz and Rawls exhibit some sympathy for a version of the equal right to be separate and particularistic. It remains unclear how far this liberal right—this "equal opportunity"—goes, in particular, whether it goes so far as to support the right of a group to create its own particularistic *public* institutions, as was implicitly approved by the *Kiryas Joel* court and by Judge Goettel in *Airmont*.

Postscript: Getting Real

On September 21, 1995, the United States Court of Appeals for the Second Circuit overturned Judge Goettel's decision in *Airmont*. Writing for the court, and joined by Judges Jose Cabranes and McLaughlin, Judge Amalya Kearse reinstated the jury's verdict against the Village that Judge Goettel had set aside, and further held that "the evidence was sufficient to establish that Airmont violated the private plaintiffs' rights under the Fair Housing Act and the First Amendment."[104]

The evidence cited by Judge Kearse consisted largely of statements by members of the Airmont Civic Association, the citizen's organization that had promoted the incorporation of Airmont as a separate village. For example: "I am not prejudice [sic] in any way, shape or form but i [sic] will not have a hasidic community in my backyard"; "what 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"; "lets face it, the only reason we formed this village

is to keep those Jews from Williamsburg out of here."[105] Judge Goettel, we recall, had determined such statements to be irrelevant to the question of the Village's discriminatory motives because the Civic Association was an organization of private citizens. Judge Kearse's opinion jettisoned this formalistic distinction between private and public actions in favor of a more realist approach. From this standpoint, less important than the fact that these statements were made before the Village was even incorporated is the fact that they were made in order to *get* the Village incorporated; less important than the fact that the authors of these statements spoke as private citizens is the fact that they were leaders of the Village incorporation movement, and would eventually assume official positions as the Village's mayor, trustees, and planning board members.

Just as the second circuit opinion rejects the formalistic view of state action, it also adopts a more functionalist approach to the question of intent. It does not eschew the requirement of establishing discriminatory intent altogether, but it displays a basic affinity for the realist approach in holding that such 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."[106] In other words, discriminatory effects, like the prejudiced statements of "private" leaders of the incorporation movement, are evidence of the antireligious animus necessary to show a legal violation—a position which significantly blurs the distinction between neutrality of effect and neutrality of intent.

From the standpoint of this analysis, the idea that the same people who "forecast 'a grim picture of a Hasidic Belt from Rockland through Orange & Sullivan counties'" are not now inspired by anti-Hasidic sentiment is a hollow conceit. But if the exclusionary functions of the Village of Airmont stand condemned under the antiformalist approach, how could the Village of Kiryas Joel, and its public school system, survive under that same approach? The boundaries between public and private leadership in Kiryas Joel are at least as blurred, the exclusionary impact of their policies at least as strong as in Airmont; its official policies have at least as much of a religious function as do Airmont's zoning policies exhibit an antireligious function.

The antiformalist or realist analysis calls into question the legit-

imacy of any group separating itself from the larger community and establishing itself as a self-governing polity. Advocates for Hasidic and Orthodox Jews, along with other defenders of the rights of religious communities, have yet to confront the conflict between their own desire for political autonomy, which depends, as shown in our analysis, on a formalistic jurisprudence, and their opposition to religious discrimination, of the sort exhibited and eventually condemned under the realist jurisprudence of the Second Circuit in *Airmont*.

As calls for "community" proliferate, and as more and more groups actually separate themselves from the larger, more diverse political jurisdictions of which they have historically been a part, it behooves us all to be realists about the exclusion that secession entails. In my own view, *Airmont* teaches us that the implicit formalism embodied in the trial court's opinion and in *Kiryas Joel*, the formalism that underwrites the establishment and the legitimacy of the Village of Airmont, the Village of Kiryas Joel and its newly authorized school system, is wrong. Not necessarily wrong legally, nor even from the standpoint of the principles of liberal political philosophy, but wrong in terms of human consequences—in terms of its effects. One cannot take refuge in this statement of opposition to exclusionary effects, since we have seen that such opposition itself inevitably crowds out competing ways of life. But even if we cannot escape the paradox of liberalism and community, we have nothing to gain, and much to lose, by pretending that it doesn't exist, as a formalistic analysis would have it.

NOTES

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1. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 193.

2. Rawls expresses regret in several passages. See ibid., 197, 200.

3. Perhaps he doesn't consider them to be part of the "we."

4. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 415.

5. Ibid., 378, 381, 395, 391.

6. Note the asymmetry here. For both Rawls and Raz, it is clear that only some, not all, permissible ways of life can (and must) be excluded, whereas all impermissible ways of life must be excluded.

7. This raises the question of what precisely communitarian critics of liberalism want. Is it to divest the liberal state of its (no longer) hidden value-laden content, the better to protect subcommunities with rival values? Or is it to promote values and community at the state level?

8. Hasidism is a branch of Orthodox Judaism that arose in rebellion against the aridity of traditional Eastern European rabbinic culture. Since its inception in the eighteenth century, it has developed into a number of discrete "courts" which are characterized by extreme piety, distinct dress and language, and devotion to a hereditary charismatic leader. Israel Rubin, *Satmar: An Island in the City* (Chicago: Quadrangle Books, 1972), 18–20; Robert Mark Kelman, *Growing up Hasidic: Education and Socialization in the Bobover Hasidic Community* (New York: AMS Press, 1985), 2; Jerome R. Mintz, *Hasidic People: A Place in the New World* (Cambridge: Harvard University Press, 1992), 3–10.

9. *Grumet v. Cuomo and the Board of Education of Kiryas Joel Village*, 625 N.Y.S. 2d 1000 (N.Y., March, 1995).

10. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2493 (1994).

11. *United States v. Village of Airmont*, 839 F.Supp. 1054 (Second Circuit, 1993). After this chapter was written, the trial court's judgment in *Airmont* was overturned by the second circuit court of appeals in 67 F.3d. 412 (Second Circuit, 1995). The appellate court's opinion is discussed at the end of this chapter.

12. Examples of aspects of prevailing establishment clause doctrines that seem to eschew the formalistic view of neutrality, identified in this chapter, in favor of an inquiry into substantive effects include (1) the second and third prongs of the "*Lemon* test" (so-called after the case of *Lemon v. Kurtzman*, 411 U.S. 192 [1973]), which ask whether government action either has a nonneutral "effect" on religion or is "excessively entangled" in religion; (2) Justice Kennedy's alternative "coercion"-test,

used in his plurality decision in *Lee v. Weisman*, 112 S.Ct. 2649 (1992) (insofar as it looks beyond the formal character of legal coercion to ask whether, in the particular context, and taking into account the relationships of private individuals, the government's action had a coercive effect); and the "endorsement" test, expounded by Justice O'Connor and relied upon in *Lee V. Weisman, Capital Square Review and Advisory Board v. Pinette*, 114 S.Ct. 626 (1993) and *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S.Ct. 2510 (1995). The argument of this chapter is not that reigning establishment clause jurisprudence, as a totality, is unequivocally or even primarily dedicated to the formalistic conception of neutrality elaborated here. On the contrary, establishment clause doctrines are clearly animated by the tension between the formalistic and the more substantive conceptions. By contrast, contemporary free exercise jurisprudence, at least since *Employment Division v. Smith*, 494 U.S. 872 (1990), has come to rely much more exclusively upon the formalistic approach discussed here. The extent of the ascendance of the formalistic approach in religion clause jurisprudence, generally, and the relationship between religion clause jurisprudence and the jurisprudence of the free speech and equal protection clauses, with regard to the contest between substantive and formal conceptions of neutrality, are interesting questions, which are beyond the scope of this chapter. (I am indebted to David Cole for his help in clarifying these points.)

13. The information in the following four paragraphs is drawn from these newspaper articles: Elizabeth Llorente, "Haitians in Rockland Back Intervention," *The Bergen Record*, September 15, 1994, A20; Raymond Hernandez, "Storm-Tossed on a Sea of Emotions, New York's Haitians Feel Betrayed, Angry and Confused by New Policy on Refugees," *New York Times*, July 8, 1994, B1, col. 2; Raymond Hernandez, "Once a Resort, Village Struggles with Urban Problems," *New York Times*, June 15, 1994, late edition, B6, col. 1; Ari L. Goldman, "Religion Notes," *New York Times*, Late Edition, October 9, 1993, Section 1, p. 11, col. 1.

14. In calling this development "surprising," I am betraying my own personal perspective, that of a second generation Jew of European origins, who took for granted the equation of suburbia with assimilated, barely ethnic, white, relatively affluent Americans. To a teenager from Cambridge, Massachusetts, making visits to Rockland County in the 1970s, the suburbs seemed exotic indeed, the "American dream" come to life. But even then, the existence of "other" communities was penetrating the fringes of suburban consciousness. The Hasidim were already a noticeable, though peripheral presence. More striking changes were indicated when a friend's sister reported that a little Haitian girl had appeared in her elementary school, only to cry every day during the

recitation of the "pledge of allegiance." Investigation revealed that the girl wept in the belief that all the children were making fun, on a daily basis, of "the one Haitian under God." More recently, I learned that the house of the assimilated Jewish family I used to visit, which had been sold to a Hasidic family, had "accidentally" burned down when a pot of *shmaltz* (chicken fat) was left bubbling on the stove. A synagogue now stands in its place.

15. *Airmont* at 1056.

16. *Airmont* at 1061.

17. Whether they were also united by anti-Semitism is the question raised in the litigation.

18. *Kiryas Joel*, 114 S.Ct. at 2585.

19. Mintz, *Hasidic People*, 51.

20. 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 Satmars." *Kiryas Joel*, 114 S.Ct. at 2485.

21. *Kiryas Joel*, 114 S.Ct. at 2505 (Kennedy, J., concurring). Justice Kennedy here makes explicit what is implicit in Souter's opinion for the Court and in O'Connor's concurrence.

22. *Kiryas Joel*, 114 S.Ct. at 2498 (O'Connor, J., concurring).

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

24. *Kiryas Joel*, 114 S.Ct. at 2492, 2494.

25. Private plaintiffs claimed that individual defendants who incorporated the Village and served as its officers, and the Village itself, violated rights protected under the Fair Housing Act, 42 U.S.C. section 3604(a), and the First Amendment's guarantee of the Free Exercise of Religion. The federal government brought claims against the Village based exclusively on the Fair Housing Act. Though the complaint challenged the legal validity of the incorporation of the village, the litigation focused on the requests (1) to enjoin the village from denying the constitutional and legal rights of persons on account of their religion; (2) to enjoin the village to change its zoning code in ways that would accommodate the land uses favored by observant Jews; and (3) for "other affirmative relief . . . designed to ensure the responsiveness of village government to its observant Jewish residents. The plaintiffs also sought damages for alleged and anticipated anti-Semitic actions on the part of the village in areas such as zoning.

26. *Airmont* at 1068.

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

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

29. *Kiryas Joel,* 114 S.Ct. at 2489.
30. *Kiryas Joel,* 114 S.Ct. at 2490 (citing *Larkin v. Grendel's Den,* 459 U.S. at 126).
31. *Kiryas Joel,* 114 S.Ct. at 2489.
32. *Lemon v. Kurtzman,* 411 U.S. 192 (1973).
33. David A. Strauss, "Discriminatory Intent and the Taming of *Brown,*" *The University of Chicago Law Review* 56 (1989): 956–57.
34. Ibid., 953, 947.
35. Ibid., 953.
36. The question becomes less meaningless if we alter our notion of intent to factor in such considerations as "unconscious intent," as Charles Lawrence has advised. See Charles R. Lawrence III, "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* 39 (1987): 317–88. But to do so is to alter our "commonsense" notion of intent so considerably as to blur the very contrast between intended and unintended effects.
37. Memorandum filed with Assembly Bill Number 8747 (July 24, 1989), quoted in *Kiryas Joel,* 114 S.Ct. at 2486.
38. *Kiryas Joel,* 114 S.Ct. at 2492
39. *Kiryas Joel,* 114 S.Ct. at 2493.
40. *Kiryas Joel,* 114 S.Ct. at 2494.
41. Kiryas Joel, 114 S.Ct. at 2495 (quoting from *Board of Ed. of Monroe-Woodbury Central School Dist. v. Wieder,* 72 N.Y.2d 174, 180–81 (1988).
42. *Kiryas Joel,* 114 S.Ct. at 2495.
43. *Kiryas Joel,* 114 S.Ct. at 2495.
44. *Kiryas Joel,* 114 S.Ct. at 2506.
45. *Kiryas Joel,* 114 S.Ct. at 2514.
46. *Kiryas Joel,* 114 S.Ct. at 2504 (Kennedy, J., concurring); also see *Kiryas Joel,* 114 S.Ct. at 2489.
47. *Kiryas Joel,* 114 S.Ct. at 2498 (O'Connor, J., concurring).
48. Brief Amicus Curiae of Americans United for Separation of Church and State, American Jewish Committee, Anti-Defamation League, American Civil Liberties Union, National Council of Jewish Women, and the Unitarian Universalist Association, in Support of Respondents.
49. Ibid.
50. The courts have recognized the holistic conception of religion in a few cases, e.g., *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (protecting the Amish religion) and *Wilder v. Bernstein,* 49 F.3d 69 (1995) (recognizing the claims of Orthodox and Hasidic Jews), but they have failed to do so in others.
51. From some points of view, of course, the domain of the sacred is

emphatically *not* a matter of subjective opinion—but notice how this sentence began. A liberal state cannot adopt any such point of view because there are conflicting versions. The most it can do is to respect them *as* points of view. It is precisely in this respect that liberalism may fairly be seen as undermining certain belief systems (in "effect," if not by "intention.") But this argument will not be pursued in this essay.

52. *Kiryas Joel*, 114 S.Ct. at 2506 (Scalia, J., dissenting).

53. *Kiryas Joel*, 114 S.Ct. at 2509 (Scalia, J., dissenting).

54. This does not mean that there is no distinction drawn between the sacred and the profane, nor that the Hasidic conceptual system lacks the ability to comprehend the conventional distinction between religious and secular affairs. The latter, however, is typically described by Satmars (in Yiddish) as a distinction between *yiddishkeit* (Jewishness) and *mentschlichkeit* (humanness). Rubin, *Satmar*, 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 separate 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*, vol. 7 (Jerusalem: 1972), 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 the holy occurs." Id. at 1408. As a result, it is impossible to assign any particular human activity or experience into one domain or another, or even to separate the two domains, either practically or conceptually.

55. And in fact the Supreme Court has refused to do so in cases like *Bowen v. Roy*, 476 U.S. 693 (1986) (denying that religious belief that a Social Security number "robs the spirit" of the person whose number it is renders the practice of using Social Security numbers a religious one for the purposes of constitutional analysis), and *Lyng v. Northwestern Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (upholding the federal government's right to use property in ways that Native Americans believe will destroy the efficacy of important rituals and cause spiritual damage.)

56. There is a long tradition of traditionalist Jews adopting a position of acceptance of the dominant political order in a given society.

57. *Airmont* at 1064.

58. *Airmont* at 1064.

59. *Airmont* at 1066.

60. Much discussion has been devoted to the difference between rules and standards. See, for example, Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685–1778.

61. Louis Henkin has pointed out that the constitutionally relevant question may be not whether the state has acted but, rather, whether the state bears responsibility for the situation under legal challenge. Louis Henkin, "*Shelley v. Kraemer:* Notes for a Revised Opinion," *U. Penn. Law Review* 110 (1962): 473.

62. New York Village Law, Article 2.

63. The latter device was used by the religious community in the Oregon state case of Rajneeshpurham, which raised similar issues, but in which the court used an antiformalistic method of analysis to reach the conclusion that the incorporation of a religious commune into a local government created an unconstitutional state establishment of religion. *Oregon v. City of Rajneeshpurham,* 598 F.Supp. 1217 (1984). Kiryas Joel is not organized as a commune. However, according to an article in *The New Republic,* the community has established 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).'" Jeffrey Rosen, "Village People," *The New Republic,* April 11, 1994, at 11. The writer does not specify if the agency enforcing these requirements is public or private. If such requirements were actually codified in public law, they would surely be illegal. The question, which goes to the heart of the debate about the public-private distinction, is whether they should be any more tolerable if they are enforced by formally private functionaries of the community as private covenants, conditions, and restrictions.

64. Fair Housing Laws would be the probable basis for a challenge against explicit religious discrimination in zoning. Alternatively, discrimination could be challenged on constitutional grounds as a violation of the establishment, free exercise, free speech, or equal protection clauses.

65. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among the few voices disssenting from the approval of parental authority-family privacy are that of Justice Holmes, in his dissenting opinion in *Bartels v. Iowa*, 262 U.S. 404 (1922) (rejecting the Supreme Court's view that state laws prohibiting foreign language instruction are unconstitutional) and feminist critiques of the family privacy doctrine, such as Anne C. Dailey's "Constitutional Privacy and the Just Family," *Tulane Law Review* 67 (1993): 955.

66. Charges of harrassment of members were described in Rosen, "Village People."

67. The term belongs to Raz. It is an interesting question, given the paradoxical nature of autonomy in Raz, *what* precisely defines a community as autonomy-rejecting and, hence, whether Kiryas Joel qualifies as one. On the one hand, the community is hierarchically organized, and strongly committed to insulating its members to exposure to alternatives and apparently discourages internal critical scrutiny of the belief-system. On the other hand, the Satmar religion has been identified with the belief that "God wanted man to do good always, but He wanted him to do so on a completely voluntary basis." Rubin, *Satmar*, 50.

68. See Felix S. Cohen, "Transcendental Nonsense and the Functionalist Approach," *Columbia Law Review* 35 (1935): 809–49. The phrase echoes Jeremy Bentham's famous mockery of the concept of natural rights as "nonsense on stilts." "Anarchical Fallacies," *The Works of Jeremy Bentham* (John Bowring, ed., New York: Russell and Russell, 1962), vol. II, p. 501.

69. *Marsh v. Alabama*, 326 U.S. 501 (1946).

70. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

71. For example, see *Lloyd v. Tanner*, 407 U.S. 551 (1972).

72. This was precisely the argument advanced and accepted by the court in the Rajneeshpurham case.

73. Legal scholars have begun to develop realist-style claims in a burgeoning contemporary literature on the increasingly popular (and controversial) planned community developments, condominium associations, private homeowners associations and the like. See, e.g., Gregory Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community," *Cornell Law Review* 75 (1989): 1; Gerald Korngold, "Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination," *Wisconsin Law Review* (1990): 513.

74. Michael W. McConnell, "Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?" *The University of Chicago Legal Forum* 123 (1991): 150–51. Notice the

unexplained shift in this passage from the "student body" to the "parents making the decisions."

75. Id. at 125.

76. On the other hand, from the perspective of McConnell's "radical" view, *it* is the nonformalistic one, and the competing view, which disallows particularistic government, is the formalistic one.

77. This legal move is astutely analyzed by Gerald Neuman under the rubric of "The Single Decisionmaker Fallacy," in "Territorial Discrimination, Equal Protection, and Self-Determination," *University of Pennsylvania Law Review* 135 (1987): 261, 296–300.

78. *Brown v. Board of Education,* 347 U.S. 483 (1954).

79. Note that Herbert Wechsler's influential criticism of *Brown* was based precisely on resurrecting the formalistic equation of particularism, in the form of racially segregated public spheres, with the generality of "neutral principles." Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 9.

80. Rawls, *Political Liberalism,* 193–94.

81. Ibid., 194 n. 28.

82. Ibid., 199–200.

83. Rawls borrows the unqualified formulation from Raz. See Rawls, *Political Liberalism,* 192–93.

84. To be fair, it should be noted that Rawls also disfavors and generally eschews relying on the concept of neutrality (*Political Liberalism,* 191). Nonetheless, he does introduce and employ the concept, in the manner delineated above, albeit "with due precautions" and "using it only as a stage piece as it were." My thanks to Greg Keating for reminding me of Rawls's stated reluctance to invoke the concept.

85. Raz, *The Morality of Freedom,* 133.

86. Raz, *The Morality of Freedom,* 162.

87. Rawls's precise formulation is that "equal liberty of conscience takes the truths of religion off the political agenda." Rawls, *Political Liberalism,* 151. He elaborates two important (and potentially capacious) exceptions to this prescription, but these are not our concern here.

88. Ibid., 145–49.

89. Ibid., 170. It is worth noting here that Judaism has been described by friend and foe as lacking any doctrine or dogma. More specifically germane to our analysis, it is maintained that "[n]o formal theology exists among the Satmarer—no systematically compiled set of dogmas which would be available to someone who might wish to learn exactly what a Satmarer Hasid is required to believe. Theology, as a distinct subject, is not offered at any level of the school system, nor do adults

study it directly. In fact, the Satmarer decidedly shun discussion or inquiry in matters of belief. . . . The reluctance to probe into the logic of religious belief stems from the fear that, in the process, one may contaminate his pure belief. Furthermore, the act of inquiring or debating is in itself viewed as a testimony of doubt, for the sincere believer should feel no need for analysis or discussion." Rubin, *Satmar,* 46.

90. Raz, *The Morality of Freedom,* 423.

91. Rawls, *Political Liberalism,* 185 and n. 15.

92. *Kiryas Joel,* 114 S.Ct. at 2514 (Scalia, J., dissenting).

93. Raz, *The Morality of Freedom* , 423–24.

94. Rawls, *Political Liberalism,* 221 n. 8.

95. Ibid., 159–60.

96. See, for example, "A Symposium: The Public/Private Distinction," *U. Penn. Law Review* 126 (1982): 1289.

97. Rawls, *Political Liberalism,* 220 n. 7.

98. Ibid., 221–22.

99. Raz, *The Morality of Freedom,* 376.

100. Ibid., 391–94.

101. Rawls, *Political Liberalism,* 222.

102. Raz, *The Morality of Freedom,* 370 (emphasis added).

103. For example, see the chapters "Neutral Political Concern" and "Equality" in Raz, *The Morality of Freedom,* 110–33, 217–44; Ronald Dworkin, *A Matter of Principle,* part 3 (Cambridge: Harvard University Press, 1984); Rawls's *A Theory of Justice* (Cambridge: Belknap Press, 1973).

104. *Le Blanc-Sternberg v. Fletcher,* 67 F.3d. 412, at 424. The appellate court reinstated portions of the original jury verdict, in favor of the plaintiffs, that Judge Goettel had set aside on the ground that they were inconsistent with other jury findings against the plaintiffs.

105. *Le Blanc-Sternberg* at 418.

106. 1995 U.S. App. LEXIS 27174, at 425.