Board of Education of Kiryas Joel Village School District v. Grumet: A Religious Group's Quest for its Own Public School
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Introduction: The Creation of Kiryas Joel

Few cases have done more to confound the separation of church and state than Board of Education of Kiryas Joel v. Grumet.[i] Decided by the Supreme Court in 1994 during a period of conservative political mobilization and intense controversy over the principle of church-state separation, *Grumet* presented the highly unusual spectacle of a public school district established in a village populated almost entirely by members of one religion, ultra-Orthodox "Satmars," Jews. "Satmars" are members of a branch of "Hasidic" Judaism, dedicated to the strict observance of Jewish law and the preservation of the traditional way of life of their European forbears. Transplanted to New York from Romania in the wake of World War II, the Satmar community has continuously strived to form enclaves in which its members can insulate themselves from exposure to modern, secular culture and live in obeisance to their spiritual leader, the Grand Rabbi or Satmar "Rebbe," and his strict interpretation of Jewish law. While the Williamsburg neighborhood of Brooklyn, New York, served as the Satmars' original American base (and remains the center of the Satmar community), the Satmars started to explore ways of retreating from the city beginning in the 1960s. Their dream was to establish an insular and homogeneous enclave in which they could recreate the way of life of the European "shtetl" (the Yiddish term for the towns and villages that were home to thousands of Jews in Eastern Europe before these traditional Jewish communities were destroyed by the forces of urbanization, immigration and, ultimately, the Holocaust). This dream came to fruition in the mid-1970s, when agents of the community bought property in Monroe Township, about 50 miles northwest of New York City, and developed the tract as a

residential subdivision for members of the Satmar community. Once settled in Monroe, the Satmar population quickly expanded, as did the scope of its disputes with the non-Satmar residents of Monroe. The Satmars' preference for high-density housing (to accommodate their large, and largely poor, families), anathema to their non-Satmar suburban neighbors, ultimately led to the Satmars' secession from the existing township and the formation of their own separate municipality where they could enact zoning ordinances and municipal regulations that reflected their distinctive preferences and cultural norms. By 1976, following the procedures prescribed by state law, the Satmars had accrued enough signatures to put the question of forming a new legally recognized municipality on the local election ballot. In 1977, by majority vote, the petition to incorporate a new local government was approved, and Kiryas Joel (Hebrew for "the Village of Joel," and named after the founding Rebbe, Joel Teitelbaum) was born.[ii]

Despite the fact that the population of this officially recognized village (which stands today at roughly 18,000) was, and remains, 99% Satmar, the constitutionality of the municipality was not challenged.[iii] But ten years after the Village of Kiryas Joel was formally incorporated, a movement to establish a public school district in the village emerged, which led to the legal challenge presented in Board of Education of Kiryas Joel Village School District v. Grumet. The effort to establish a separate school district was propelled by the parents of special needs children in the Satmar community who needed to send their children to public school in order to receive state-mandated and –funded special education services. A brief period of sending the children to the regional public school had convinced both the Satmar parents and frustrated school officials that trying to integrate the Yiddish-speaking, religiously observant Satmar children was a misguided

effort, resulting in "pain and trauma" for the children and burdensome administrative difficulties for the school. As a solution to these problems, representatives of the Satmar community appealed to the state legislature to establish a public school district within the confines of the Village of Kiryas Joel. The New York state legislature quickly and overwhelmingly passed a bill to create the school, and on July 1989, New York Governor Mario Cuomo signed into law Chapter 748, the special legislative act that authorized the creation of the Kiryas Joel Public School District. It was this legislative act that ignited the controversy that ultimately led to the Supreme Court's decision in Board of Education of Kiryas Joel Village School District v. Grumet.

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

Brought by the presiding officials of the New York State School Board Association, the state-wide association of local school boards, the legal case against Chapter 748 challenged the Act as a violation of the Establishment Clause and raised the question of whether a public school district created for and within a village within a religiously homogeneous population violates the principles of government neutrality and separation of church and state embodied in Establishment Clause doctrine. More generally, the case broached the question of whether the Establishment Clause demands strict neutrality and strict separation between religion and state and, if so, whether those principles are violated or upheld when the state delegates the powers of local government to a municipal unit with a religiously homogenous population. More particularly, it called into question the continued viability of the so-called "*Lemon* test," established in Lemon v. Kurtzman[iv], according to which state actions can neither have the intent nor the effect of promoting or inhibiting religion, nor can the action excessively "entangle"

government in religious affairs. Advocates for the religious right, eager to soften the principle of strict separation between church and state, saw *Grumet* as a propitious occasion for overturning *Lemon*, while civil libertarians and other defenders of the *Lemon* test waited with baited breath to see if the Court would uphold it.

While seeming to answer these questions with a definitive yes, *Grumet*'s holding was not quite what it seemed. The Court struck down the statute that authorized the Kiryas Joel Village School District on the grounds that it violated the principle of neutrality and constituted an impermissible "fusion" of political and religious authority in contravention of the Establishment Clause, a holding which many contemporary observers heralded as a vindication of the civil libertarian position and a repudiation of the conservative effort to overturn or soften the principle of separation between church and state. But on close examination, the Court's decision affirmed neither the civil libertarian nor the conservative position. Its holding rested on narrow (and somewhat confused) grounds that left a wide opening for the New York legislature to reauthorize the school district of the Village of Kiryas Joel. The Court's reasoning suggested that the problem with Chapter 748 was not that it created a public school district *in* Kiryas Joel, a village with a religiously homogeneous population, but rather, that the public school district (a municipal institution) was created by legislature *for* the particular benefit of the Satmars (a religious community). The Court explicitly stated that there was nothing wrong with a school district *in* a local community that just "happened to be" all Satmar, so long the legislature's aim in authorizing such a school district wasn't to benefit a particular religious community, and so long as the opportunity to opt out of regional school districts and form more local, village-based districts was not restricted to any

particular religious group but was rather made available to any local municipality meeting neutral criteria, regardless of its religious or non-religious demographic character. Thus, contrary to the over-eager interpretation of some civil libertarian opponents of the Kiryas School district, the Supreme Court did *not* hold that the establishment of a school district within the religiously homogeneous of Village of Kiryas Joel was itself unconstitutional. Nor did it repudiate *Lemon* and the principles of neutrality and strict separation between church and state with which that notorious decision is associated. Disappointing both *Lemon*'s defenders and its critics, the Supreme Court simply sidestepped the controversy over the *Lemon* doctrine, maintaining that no single test, neither the tripartite test established in *Lemon* nor any other conceivable doctrine, should govern all Establishment Clause controversies. It thus eschewed the invitation to reverse that much-maligned decision, while refraining from applying it to the present case. Leaving *Lemon* to the side, the multiple opinions in *Grumet* offered a confusing array of different reasons for striking down Chapter 748 and provided little guidance for the future apart from a refusal to reduce Establishment Clause doctrine to a single test. In the end, the *Grumet* decision raised more questions than it answered, doing more to reflect the tensions contained within the Courts' conception of the Establishment Clause than to resolve them. And that is precisely what makes the decision in *Grumet* important: it revealed the fault-lines and points of disagreement that would bedevil interpretation of Establishment Clause norms for years to come – not only the points of disagreement that divide liberals from conservatives, but also points of ambivalence contained *within* the liberal point of view concerning the meaning of the vaunted values

of state neutrality and church-state separation and their implications for the assertion of political power by religious groups.

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

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

The separatism that has proved to be so troubling to outsiders is a legacy of the vision of Satmar's founding rabbi, the "Rebbe," Rabbi Joel Teitelbaum. Known for his stringent piety and erudition, Rabbi Teitelbaum was the scion of a distinguished Hasidic family who first established a community of followers in the Romanian town of Satu Mare (or, as it was known in its pre-World War I Hungarian form, "Szatmar") in 1928[ix] He promulgated a brand of Hasidic Judaism that called for the preservation of the Jews'

traditional way of life, the shunning of modern secular culture and technology, and the strict observance of traditional Jewish law. Most of the Satmar Rebbe's original followers perished in Nazi death camps. Rabbi Teitelbaum himself evaded this fate when, along with 1368 other Jews, he was rescued from Bergen-Belsen, the Nazi concentration camp in which he had been interned, as part of the famous transport organized by the Hungarian Zionist activist, Rudolf Kasztner, in 1944.[x] In 1946, after a brief stay in Switzerland, Rabbi Teitelbaum arrived in Williamsburg, Brooklyn, with the few surviving members of his community, and it is there that he established himself as one of the key figures in introducing a new regime of stringent piety into Orthodox Judaism in America after the Second World War.

The community that Rabbi Teitelbaum established in Williamsburg quickly grew from a few hundred followers in the 1940s to a worldwide membership which today numbers around 100,000 members.[xi] Williamsburg continues to stand at the center of the Satmar empire, hosting a wide range of social services, medical institutions, and religious and legal institutions, including, most notably, a *bet din* (the Jewish court of law run by rabbis that adjudicates internal disputes), cemeteries, religious schools ("yeshivas" for boys, and separate religious schools for girls), and a network of synagogues.[xii] At the center of this range of institutions, known as *mosdos*, stands the Rebbe himself, who is regarded as the overarching spiritual and political authority.[xiii] The spectacular growth of the Satmar community over the last six decades has been fostered not only by a literal interpretation of the biblical injunction to "be fruitful and multiply," but also by the willingness of the Rebbe and his chief political lieutenants to engage with New York city and state authorities in the rough and tumble of American interest-group politics.[xiv] The

ability of the community to deliver a reliable bloc of votes to whichever politician the Rebbe endorses has enabled the Satmars to attain a remarkable degree of political clout notwithstanding the fact that, even with their exponential growth, they make up a tiny (and disproportionately poor) minority of the voting population.

This political adeptness is all the more remarkable given the Satmars' professed commitment to living apart from society and holding themselves aloof from worldly politics. Even among other branches of Hasidic Judaism, the Satmar's founding rebbe was notable for the strength of his commitment to separatism and standing aloof from modern society and politics. When the state of Israel was established, while other Jews were celebrating, Rabbi Teitelbaum denounced Zionism on theological grounds. (On his view, only God has the authority to return the Jewish people to Israel and restore Jewish sovereignty, and that will only happen when the messiah comes; for mere mortals to attempt to hasten that event is an act of intolerable religious hubris).[xv] Instead of arrogating to themselves the right to return to the ancestral homeland, the Rebbe advocated the building up of Satmar communities in the Diaspora, where religious observance and Torah study would shape communal norms.[xvi]

In pursuit of this vision, the Rebbe's fondest dream was to recreate the Eastern European "shtetl" on American soil.[xix] Shtetls, as they were known in Yiddish, were the traditional Jewish communities found in villages, towns and small cities throughout the Pale of Settlement in Central and Eastern Europe. Immortalized in "Fiddler on the Roof," the shtetl connoted not just a physical place but an entire way of life that was left behind by the Jewish immigrants from Europe in the late nineteenth and early twentieth centuries, and then wiped out by the Nazis. To implement the dream of reviving shtetl

life, the Rebbe's followers bought land, developed subdivisions, and settled in the township of Monroe in Orange County, New York, and, just two short years after they acquired their first piece of private property in Monroe, were populous enough to prevail in a vote to establish their own separate municipality.[xxii]

The creation of the Village of Kiryas Joel, an officially recognized local government endowed with all of the powers of municipal government and political autonomy accorded to other units of local government, was in many ways the fulfillment of Rabbi Teitelbaum's dream – a place where Satmars could live separate and apart from the rest of society, away from the temptations and corruptions of modern, secular society, in conformity with the edicts of Jewish law, under the guiding authority of the Rebbe. The Rebbe himself was not able to enjoy the full fruits of this vision, as he died in 1979 just two years after the formal incorporation of the Village and days before the completion of a house in Kiryas Joel built especially for him. His followers, however, went on to live the dream for him. Under the auspices of the Rabbi Teitelbaum's nephew, Rabbi Moses Teitelbaum, who was appointed to succeed the Rebbe as spiritual leader of the worldwide Satmar community, the community of Kiryas Joel (and the larger Satmar community) continued to expand and flourish. The community's population grew by leaps and bounds—indeed, Kiryas Joel has the fastest rate of growth in the State of New York—even with the emergence of a faction of dissidents within the community (including R. Joel's widow, who never accepted the authority of the new Rebbe). Kiryas Joel continued to follow the Rebbe's strict injunctions to obey traditional religious law, to avoid exposure to modern technology, and to shun participation in the outside world - with the exception of economic activity (essential to the community's survival) and the

political sphere (in which a number of designated Kiryas Joel officials engaged as liaisons with state and local politicians or as government officials themselves.

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

The school controversy might have been avoided had the law of the land permitted special needs education to be provided on sites other than public schools. Prior to 1983, special needs children in Kiryas Joel were sent to the same private schools that the non-special needs children in the village attended: yeshivas for boys and a separate religious school for girls. (Like other Hasidic Jews, Satmars educate the sexes separately and have different forms of religious training for boys and girls, in keeping with their strict norms of sexual modesty and gender separation.)[xxv] In 1983, in response to the growing size of the special needs population and consequent demands on the part of parents for special education, an annex to the girls' school was set up to house the community's special needs children and their teachers. The teachers were provided by the Monroe-Woodbury School Public School District, the regional school district in

which the Village of Kiryas Joel was then encompassed.[xxvi] These public school teachers provided the various forms special education and remedial services to which the special needs children were entitled by law until 1985, when the Supreme Court handed down two decisions which declared the practice of providing publicly-funded special education on the site of private parochial schools unconstitutional.[xxvii] In Grand Rapids School District v. Ball,[xxviii] the Court held that the practice of providing publicly funded educational services on the site of parochial schools was unconstitutional. In Aguilar v. Felton,[xxix] decided that same year, the Supreme Court held that the practice of sending public school teachers into private religious schools to provide supplemental special education was a violation of the Establishment Clause. These decisions produced a large clamor of protest in subsequent years. Eventually, in 1997, they were reversed, reflecting the triumph of the Religious Right's objections to such a strict interpretation of the principle of separating religion from state funding.[xxx] But during the intervening twelve years, the effect of the two decisions made it impossible for special education to be provided on the site of private religious schools. Programs like those previously in place in Kiryas Joel, where public school teachers from the Monroe-Woodbury Central School District held classes in a private school annex, were terminated. The special needs children who had been going to private school in Kiryas Joel were now required to attend the regional public school.[xxxi]

At this point, it seemed that the only option was for the parents of special needs children in Kiryas Joel to send their children to the regional public school – a "solution" to which the parents strenuously objected. Children who were accustomed to a traditional religious way of life, who had never watched television, seen a movie, used

the internet, or even spoken English – children who "dressed funny" in the eyes of their classmates, spoke Yiddish, adhered to the norms of their insular, culturally and religiously traditional community, and suffered from a variety of learning, emotional, mental and physical disabilities to boot would naturally experience the utmost difficulty in being integrated into the school. Their parents, moreover, objected to their children's exposure to the secular culture of the public school.[xxxii] Caught in the double bind of having (and wanting) to provide their children with publicly-funded special education, but not being allowed, under existing law, to provide that education on the site of a private school, the community decided to seek the creation of its own separate school district as a way of satisfying the legal requirements governing the provision of special education without endangering its culture and subjecting their children to the "trauma" of exposure to the outside world.[xxxiii] Backed by the school board of the Monroe-Woodbury regional public school district, which had come to share the community's assessment that the Satmar children couldn't be successfully integrated into the school's population, the Satmar community appealed to their friends in state government to create a public school district within Kiryas Joel. The public school they had in mind would only serve the children who required special education, as non-special needs children in the Village would continue to attend the community's gender-segregated religious schools. But the school district they petitioned the legislature to create would be endowed with the same powers and jurisdiction as any other public school district in the state; the only difference would be that this one, organized on a village-based level rather than the multi-municipality regional level generally favored by New York State, would be able to

accommodate the special cultural needs of the local community in addition to accommodating the special educational needs of the children.[xxxiv]

The reaction of the outside world to this unusual request was split, reflecting the deep fissures that were then beginning to emerge in the general population's views about the proper relationship between religion and the state and between groups and individuals. On one side were those sympathetic to the Satmars, who viewed the creation of a separate school district as an appropriate response to their predicament. This included not only religious conservatives who objected to the whole idea of a "wall of separation" between religion and state, but also some liberals, particularly those who were influenced by the newly fashionable theories of multiculturalism and communitarianism, which argued for respecting cultural differences and granting meaningful forms of cultural autonomy to sub-groups rather than making assimilation and integration into mainstream culture a condition of individual rights.[xlvi]

Among the supporters of the Satmars in the legislative process was the Monroe-Woodbury Central School District, which advocated passage of Chapter 748 on both moral and pragmatic grounds. On the strictly practical level, the regional school district welcomed the opportunity to transfer responsibility for educating the special needs children of Kiryas Joel, and to put an end to its ongoing legal battles with the Satmars over how and where to educate them.[xlvii] The Monroe-Woodbury school district also appeared to have concluded, after years of trying to integrate the Satmars and engaging in the challenge of trying to bridge the cultural differences, that a separate school district was the best way of respecting those cultural differences.[xlviii] Likewise, many members of the New York legislature who voted to pass the special act appear to have been

motivated not only by the desire to win the Satmar Rebbe's coveted political endorsement, but also, at least in some cases, by a genuine sympathy with the children's and the community's plight. As one legislator's memorandum to then-Governor Mario Cuomo, put it: "The bill represents a legislative response to [the problem of not being able to provide special needs education in the community's private schools] by providing a mechanism through which students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the State."[xlix] In a similar spirit, Cuomo signed the act stating that it represented "a good faith effort to solve this unique problem."[l] The bill was passed by a vote of 197 to 1.[li]

For these lawmakers, as for many advocates of religious rights and group rights, Chapter 748 was a necessary and appropriate accommodation to the needs and traditions of a valued religious subculture. Much like the Amish, the Satmars were seen not merely as individuals who happened to share the same beliefs, but as members of a group bound together by common traditions, which deserved protection in its own right. By the same token, they were seen not merely as believers in a certain set of religious precepts, but as a cultural group whose distinctive way of life could not easily withstand exposure to the outside world. It was the group's "way of life" and its ability to pass on that way of life to the next generation that were endangered, not necessarily any individual's ability to follow a religious commandment or other dictates of religious law. The value of religious freedom invoked to protect the group from this danger was thus linked to the broader values of cultural pluralism and cultural preservation then gaining currency in the broader culture.[lii]

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

In 1988, when the Satmars first started lobbying the New York State Assembly to pass legislation carving out a separate school district in Kiryas Joel, this communitarian conception was not yet a mainstream view. The long-entrenched individualistic conception of rights remained dominant, expressed in religious rights doctrines that conceived of religious freedom as a matter of private belief and conscientious objection and in various integrationist policies that called for turning a blind eye to ethnic and cultural differences and instead celebrated the assimilation of different cultures into

America's "melting pot." Yet the more communitarian conception that Chapter 748 would give voice to had steadily been gaining ground. In 1972, the Supreme Court seemed to have provided tacit approval for the communitarian conception in the case of *Wisconsin v. Yoder*,[liv] which granted the Amish the right to keep their children out of school after the eighth grade on the grounds that requiring them to follow compulsory education laws would threaten the survival of their distinctive way of life. This seemed to suggest that preserving a religious way of life was not just a value but a right, an aspect of the free exercise of religion protected by the First Amendment.[lv]

Between 1972 and 1989 when Chapter 748 was passed, very few official acts recognized the communitarian value of preserving a group's "way of life" or the cultural pluralist ideal of giving subgroups cultural autonomy. Chapter 748 was one of a small number of legislative or judicial declarations of the value of protecting a group's "traditions" and as such it stood it out as a prominent instance of government support for cultural rights or, as its detractors would put it, group "separatism." Yet it also partook of broader social trends coming to the fore in the 1980s: increased racial and economic residential segregation, growing support for black nationalism and separatism within the African-American community where disillusionment with the failures of integration was setting in, and corresponding movements in white ethnic communities which simultaneously emulated "black pride" and served to rationalize white resistance to racial equality and integration. In a case of many strange bedfellows, the aims and ideals of white and black separatists, the more benign ideals of ethnic and racial pride asserted by white ethnic groups and blacks across the political spectrum, and a resurgent religious conservative vision of religious freedom that focused on reversing the secularization of

the public sphere all converged with the multiculturalist agenda of recognizing and celebrating different cultural identities and granting more autonomy to subgroups. Chapter 748 was one of the most prominent expressions, and hence one of the most prominent test cases, of these convergent ideals.

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

3. The Parties, the Lawyers, and the Lawsuit.

Whatever its motivations, the School Boards Association lobbied heavily against the Act, and, when it failed to defeat its passage, immediately brought suit challenging its constitutionality. The suit was initially brought in the New York state court,[lix] but, because it raised important federal questions of constitutional law, its appeal ultimately reached the United States Supreme Court. The School Boards Association was joined in its legal effort by numerous organizations, including the teachers union (the New York State United Teachers organization), the National School Boards Association, the New York Civil Liberties Organization, and various other religious and secular organizations devoted to preserving civil liberties and religious freedom, such as the National Council of Churches of Christ, the United Methodist Church, the American Jewish Congress, and Americans United for Separation of Church and State. Most notable in this regard were the Jewish organizations that submitted briefs as friends of the court arguing that Chapter 748 should be struck down as a violation of the Establishment Clause. Organizations such as the American Jewish Congress and the Anti-Defamation League had a long history of defending a principle of strict separation between church and state. They had played an important role in shaping the outcomes of the earlier court cases in which this principle had been established. From Everson v. Board of Education,[lx] the case in which the Supreme Court first enunciated the idea of a "wall of separation" between church and state, to Lemon v. Kurtzman,[lxi] the case which articulated the notorious 3-prong test which governmental actions had to meet to show that this wall was not being breached, Jewish organizations like the ADL, along with liberal Catholic and Protestant organizations, had been seminal in developing the litigation strategies and the legal theories that would codify their shared belief that the principles of religious freedom and

government neutrality demand strict separation between church and state. It was therefore not at all surprising to see these organizations file briefs in support of the School Boards Association's case against the Kiryas Joel School District.

What was somewhat curious to behold, in light of this long history of staunch Jewish support for the civil libertarian position, was the sight of other Jewish organizations and Jewish lawyers lining up on the opposite side of the debate. Until that point, the advocates for softening or overturning the principle of separation between church and state had chiefly been conservative Christians. In the 1980s, it was evangelical Christians who were leading the charge against "secular humanism" and "legal secularism" and calling for more room "in the public square" for religion.[lxii] And it was to conservative Catholics that these evangelicals first reached out as allies, not Jews.[lxiii] Organizations like the Moral Majority and other political organizations devoted to building a coalition among conservative Christians of different denominations were coming to play an increasingly large role in American politics by the 1980s.[lxiv] Some of these conservative Christian organizations were legal advocacy groups dedicated to attacking the judge-made doctrines crystallized by the liberal Warren Court.[lxv] In a series of Establishment Clause cases decided in the 1960s and 1970s, the Warren Court had enshrined the principle of separation between church and state and applied it to strike down cherished public religious practices, such as bible reading and prayer in public schools.[lxvi] This did more to galvanize the Religious Right than any other political development, save for Roe v. Wade[lxvii] (which, from the conservative Christian standpoint, was itself regarded as yet another instance of the anti-religious, anti-Christian liberal judicial activism that had deformed the Establishment Clause).

This attack on the judicial doctrine of separation between religion and politics was not initially a Jewish cause, and it was still something of a novelty at the time *Grumet* was litigated for a Jewish group to be joining the religious right's attack on the principle of separation. But fissures were emerging within the American Jewish community that reflected the widening cultural gap in society at large. Already, in 1986, the Lubavitch (Chabad) Hasidic group had staged a legal battle to get the courts to approve public displays of religious symbols including its own Hanukah Menorah alongside the Christmas tress and nativity scenes favored by Christian evangelicals.[lxviii] This Establishment Clause case showcased an emergent alliance between conservative Christians and conservative Orthodox Jews that unsettled the longstanding association between Jewish institutions and liberal causes. In other, less visible cases, Jewish lawyers with personal attachments to the Orthodox Jewish community had represented Orthodox and Hasidic communities in court cases dealing with various political issues, such as the reapportionment of voting districts and the doling out of government benefits.[lxix] These lawyers were reversing the decades-old course of Jewish assimilation in and through the legal profession. Instead of defining themselves as Americans and lawyers first, and Jews second (or, as Justice Felix Frankfurter famously said of himself, as an American and a lawyer who "just happened to be a Jew,")[lxx] they made their Jewish identity central to their professional identity and took on clients whose agendas more nearly matched their own personal values and sense of identity. Instead of advancing the civil libertarian cause of removing religion from the public sphere, they joined in the effort, spearheaded by conservative Christian advocacy groups, to restore religion to the public sphere.

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

Before concluding our description of the line-up of forces supporting and opposing the law creating the Kiryas Joel Village School District, one more curiosity, further complicating the internal politics of the Jewish community, should be noted. Of all the opposition groups, most of which represented either the civil libertarian position or the organized public schools, the most surprising opposition came from within the Satmar community. Notwithstanding the common depiction of the Satmars as a completely unified homogenous community, in fact, a dissident group of Kiryas Joel residents actually supported the effort to challenge the constitutionality of the Kiryas Joel school district. At least some of this internal opposition seems to have stemmed from a fight over the school board. One of the candidates, a Kiryas Joel resident by the name of Joseph Waldman, ran for a position in the first school board election in defiance of the rabbinic leaders of Kiryas Joel, who had endorsed their own slate of seven candidates. Earlier, Waldman had been publicly rebuked and expelled from his congregation for supporting the establishment of an independent school for boys that competed with the established yeshiva of Kiryas Joel.[lxxii] Facing the ongoing opposition of the established leaders of Kiryas Joel, Waldman failed to win a seat on the school board.[lxxiii] Waldman

and his supporters were so disgruntled that in 1999, Waldman would actually bring a lawsuit seeking to have the Village dissolved – the first and only time that the legal validity of the Village itself, rather than the school district, was questioned. This lawsuit would not be initiated until many years after the *Grumet* litigation, and it was summarily dismissed.[lxxv] But it is a telling indication of the internal animosities that were already festering in the community at the time *Grumet* was launched. It is difficult to tell what, if any, role the dissidents played in opposing the creation of the school district. The dissidents were not a party to the litigation nor did they file any amicus briefs. As far as the legal record is concerned, their opposition was silent. But the very fact of their opposition belies the common perception of the Satmars of Kiryas Joel as a tight-knit, wholly unified group.

The dissenters of Kiryas Joel were not the only silent party to the lawsuit. The first ruling in *Grumet* was a procedural one, addressing a challenge to the legal standing of the New York State School Boards Association to bring the suit. The suit had been filed in state court by Louis Grumet and Albert Hawkins, in their official capacity as Executive Director and President of the School Boards Association, respectively, as well as in their individual capacity. Also listed as a plaintiff was the School Boards Association itself. Named as defendants were the State Education Department and its officials.[lxxix] The legal standing of the School Boards Association to bring suit was immediately challenged. The court accepted this challenge, dismissing the School Boards Association and likewise denying Grumet and Hawkins standing to bring suit in their official capacity as officers of the State School Boards Association, but permitting them to continue the lawsuit as plaintiffs in their individual capacity.[lxxx] The School Boards

Association was thus formally effaced from the legal record, though it remained a prime mover in the litigation behind the scenes.

Meanwhile, the Kiryas Joel Village School District, which was not originally named as a defendant, made a motion to intervene, as did the Monroe-Woodbury Central School District, which also wanted to play a role in defending the constitutionality of Chapter 748.[lxxxi] The State Supreme Court for Albany County granted both parties' motions to intervene as parties defendant.[lxxxii] It also accepted the parties' stipulation to remove the State Education Department from the list of named defendants. By the time all the motions to deny standing and intervene were resolved, Grumet and Hawkins stood as the plaintiffs (in their individual capacity) and the Kiryas Joel Village School District and Monroe-Woodbury Central School District stood as the defendants, while the original plaintiff (the state School Boards Association) and the original defendant (the state Education Department) had been formally removed from any official role as party to the suit. The plaintiffs were represented by Jay Worona, an Albany-based lawyer specializing in education law. Lawrence Reich, an Orange County lawyer, served as counsel for the Monroe-Woodbury School District, while Lewin represented the Kiryas Joel School District. Notwithstanding the dismissal of the state education department as a party to the suit, the state's Attorney General, Robert Abrams, continued to appear to defend the constitutionality of the statute as well.[lxxxiii]

4. The Arguments

All of the lawyers, from their first briefs to the final appeal to the Supreme Court, based their arguments on *Lemon*. Taking *Lemon*'s tripartite test to be the controlling standard, the briefs for the plaintiffs (and the amici who supported them) were crafted to

make the case that Chapter 748 (1) lacked the requisite "secular purpose," (2) had a "primary effect" of advancing religious beliefs by appearing to "endorse" the Satmars' religion, and (3) impermissibly "entangled" government with religion. The defendants and the attorney general likewise treated *Lemon* as the governing framework, arguing that Chapter 748 satisfied the three prongs of its test. At the same time, they also suggested that the ongoing vitality of *Lemon* had been thrown into question by recent and contemporaneous cases,[lxxxiv] and raised the possibility that the courts might consider setting *Lemon* and its requirements aside.[lxxxv]

Regarding the first prong of *Lemon,* which demands that the challenged governmental action have a secular purpose, the defendants' lawyers had to counter the assertion that Chapter 748 needed to be struck down because it *intentionally* conferred a benefit on a particular religious community, making the promotion of a religion its purpose. The plaintiffs argued out that the true purpose of the Act was to enable the community to follow the separatist tenets of their religious faith.[lxxxvi] Against this argument, Reich, Lewin, and Abrams claimed that Chapter 748 had a perfectly valid secular purpose, namely, "ensuring that handicapped children residing in Kiryas Joel receive the appropriate secular education to which they are statutorily entitled."[lxxxvii] To achieve that access, the defendants' lawyers argued, it was necessary to remove the barriers that resulted from the community's distinctive cultural and linguistic features, which set it apart from the rest of society. Using the classic lawyer's technique of arguing in the alternative, the lawyers contended that this could be characterized as either a religious or a non-religious accommodation. If viewed as designed to lift the burdens on the Satmars' exercise of *religion* that resulted from attending the regional public

schools, then the accommodation could be characterized a *religious* accommodation. Alternatively, it might be viewed as an accommodation of needs (i.e., the children's emotional and educational needs) and features (i.e., the special cultural features of the Satmar community) that were not essentially religious or theological in nature. On this theory, the policy adopted in Chapter 748 was not an accommodation to the Satmars' *religion*, but rather, of their culture (and of the psychological needs to which their culture gave rise.) Either way, the defendants argued, precedents established that such accommodations were permissible, and further, that they satisfied the secular purpose prong of the *Lemon* test.[lxxxviii] Even a religious accommodation (that is, an accommodation of their religious beliefs) could be characterized as a secular purpose if the legislature's aim in accommodating a religion was not to favor it or advance its beliefs but, rather, to remove a disadvantage suffered by its adherents and to thereby *equalize* the treatment of the group. Or so the briefs for the defendants and the attorney general contended.[lxxxix]

This characterization of Chapter 748 as an accommodation fed directly into the arguments about the second prong of *Lemon*, which requires that the primary effect of the government action be neither to inhibit nor advance religion.[xc] The plaintiffs argued that the legislature's act in this instance had the effect of doing precisely what it intended to do, to wit, give support to a particular religious community. More particularly, they argued that Chapter 748 had the effect of creating a "symbolic union" of government and religion and of "sending a message" of government "endorsement" of the Satmar religion.[xci] In making this argument, they were applying the "endorsement" theory developed by Justice O'Connor in earlier Establishment Clause cases.[xcii] According to

O'Connor's theory, among the many harmful consequences of government actions prohibited by the Establishment Clause, the "endorsement" of religious beliefs by government is a particular, and particularly egregious, effect. It deserves to be singled out, according to O'Connor, because it is both a more common, and a more subtle and hence less obvious, risk of government action than more direct, material forms of aid to religion in a society that has forsworn conventional church establishment and the provision of government funding to religious institutions. Because it "sends a message" to members of disfavored religions that they are not full and equal members of society, it violates the fundamental democratic principle of equal citizenship, and therefore must be recognized as a harm proscribed by the Establishment Clause. More particularly, O'Connor argued in earlier cases that government endorsement of religious beliefs should be recognized and analyzed as a species of religious "effects" that fall under the second prong of the *Lemon* test.[xciii]

The plaintiffs and supporting amici in *Grumet* relied heavily on this doctrinal theory, claiming that Chapter 748 communicated the state's "endorsement" of the Satmars' "separatist" religious beliefs. Against this theory, the defendants argued that no objective observer would draw a message of endorsement from a policy of accommodation, since accommodations, as any objective observer would understand, are not meant to promote the religious beliefs of the group being accommodated, or to otherwise "favor" it, but simply to equalize the treatment of the group by lifting burdens and barriers which result from its deviation from mainstream norms. As further refutation of the allegation that Chapter 748 had the effect of promoting religion, the defendants and the attorney general stressed the secular character of the school district

and the public school, noting that its teachers, curriculum and programs were all secular, that it was coeducational and otherwise deviated from the community's religious norms, and that it generally comported with the norms governing secular public schools (as it was required to do by law).[xciv]

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

This was precisely the sort of "Catch-22" argument that critics of *Lemon* had long decried.[xcvi] Picking up on this criticism, the defendants claimed that it was unacceptable to interpret the third prong as prohibiting "the very supervision" that is undertaken "to assure that [the challenged act] does not further religion"[xcvii] in furtherance of the second prong. To avoid such a Catch-22, either the entanglement test would have to be thrown out (as the anti-*Lemon* forces advocated) or it would have to be interpreted in a way that did not preclude this sort of monitoring. In support of this more moderate conclusion, which would uphold *Lemon* while finding its requirements satisfied by the facts, Attorney General Abrams contended that "[t]he monitoring done by the State to ensure that no

public funds are expended to further religion in the public school need be no greater than for any other public school."[xcviii]

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

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

But the Supreme Court refused the invitation to reconsider either the *Lemon* test or the broad principle of separation of church and state that *Lemon* was supposed to embody. Apart from concurring opinions by Justice Blackmun (who wrote with the express purpose of affirming "the general validity of the basic principles stated in *Lemon*)[c] and Justice O'Connor (who likewise confirmed its general validity but found it inapposite to the present case, and insisted that *Lemon* should not be regarded as a "unitary approach" applicable to all Establishment Clause claims),[ci] the Court said nary a word about *Lemon* other than to observe that the lower courts had relied on it when they decided the case.[cii] It simply avoided the confrontation over *Lemon*.

What doctrine, then, did the Court rely on in deciding the case? Does the fact that it declined to apply *Lemon* mean that it relied on some other established principle or doctrinal test? Or did the Court announce a new doctrine? Or did it purport to be articulating new doctrine, but end up recycling *Lemon*'s ideas in other words?[ciii] Perhaps it failed to apply any coherent principle or test at all, as Justice Scalia accused Justice

O'Connor of doing in her concurrence.[civ] Unfortunately, the text of the Court's majority opinion is so ambiguous that it can support any of these various characterizations.

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

The fusion theory, for example, which Justice Souter derives from the case of Larkin v. Grendel's Den,[cv] is subject is to at least two competing interpretations. One of these is what we might call a "functionalist" theory of fusion, which turns on how the public institutions created by law actually work in the real world rather than how they are formally defined. The other, seemingly favored by Justice Souter, is more aptly referred to as an "intentionalist" theory of fusion because it focuses on the purposes and intent of the government when it passed the law in question. This intentionalist theory of fusion, which remains to be more fully described and analyzed below, may or may not be the same thing as a religious "gerrymander," which is how Justice Kennedy characterizes the constitutional defect in Chapter 748 in his concurrence. There are thus at least two, maybe three, different ideas of religious-political fusion considered by the Court.

Likewise, the seemingly straightforward principle of neutrality is subject to at least two different interpretations: one an "intentionalist" conception which converges

with the intentionalist conception of religious-political fusion discussed above; the other, a substantive conception of neutrality which eschews inquiry into whether the government's motives are neutral with respect to competing beliefs in favor of a view of neutrality which concentrates on actual effects. This contest between an intent-based standard and an effect-based standard of neutrality has obvious resonances with the first two prongs of the *Lemon* test, which focus respectively on the secularity (or neutrality) of a statute's purpose and of its primary effects. It also resonates with the well-known debate over intent- versus effect-based standards in the field of race discrimination law and Equal Protection jurisprudence, as noted by more than one Justice in the *Grumet* case.[cvi]

6. Issues, Resolved and Unresolved.

A. Neutrality: Intent vs. Effects

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

B. Neutrality: Non-Preferentialism (Not Preferring One Religion to Another) vs. Neutrality Among All (Religious *and* Non-Religious) Beliefs.

Beyond this point of agreement, however, the Justices appear to be just as divided over the proper definition of neutrality as they are over the meaning of "fusion" and "delegation." On one account, favored by the dissenting justices (Justices Scalia and Thomas and Chief Justice Rehnquist), neutrality demands the equal treatment of all religions, but not the equal treatment of non-religious beliefs. On another, competing

view, the principle of neutrality enshrined in the Establishment Clause demands that *all* people and *all* beliefs be treated the same, regardless of whether they are religious or non-religious. Writing for the Court, Justice Souter directly rejected the "non-preferentialist" principle of no favoritism *among* religious beliefs in favor of the stricter standard of neutrality according to which "government should not prefer one religion to another, *or religion to irreligion.*"[cvii] Justice Souter was joined in this part of his opinion by Justices Blackmun, Stevens, O'Connor, and Ginsburg, but not by Justice Kennedy. There was thus only a narrow majority in favor of the latter view.

C. Neutrality and Accommodation.

Putting aside the dispute over whether the principle of neutrality permits denying the right to equal treatment to holders of non-religious beliefs, questions remain concerning what "treatment" consists in, when it comes to interpreting the (intentionalist) principle of neutral or equal treatment. What exactly counts as treating one group "differently" from another, or treating groups "unequally," particularly when accommodating the differences that distinguish groups from one another is recognized as a legitimate policy? The dissenters and Justice Kennedy in his separate concurrence all took the Court to task for failing to take the logic of accommodation to its logical conclusion.[cviii] On this view, "a legislative accommodation that discriminates among religions *may become* an establishment of religion"[cix] or an act of unequal treatment in violation of the Equal Protection and Establishment Clause. But treating groups differently isn't *necessarily* an act of unequal treatment. In some circumstances, treating different groups differently is a way of furthering equality. When the differences between a subgroup and the dominant culture impede the ability of members of the

subgroup to access government benefits and rights that are supposed to be available to all, then special treatment designed to remove, or compensate for those barriers, may be necessary. Learning disabilities and physical disabilities are classic examples of these sorts of differences, which require accommodation for equality of access to be achieved. Religious practices are another. Like a disability, religious observance can create the sort of barrier to equal access that accommodation – special treatment – lifts. This is why, as both Justice Kennedy and Justice Scalia stressed in their respective opinions, "[g]overnment policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage" and are regarded as consistent with the principles of neutrality and equality embodied in the Establishment Clause.[cx]

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

The Court could have easily rejected this conclusion had it rejected the principle that legislative accommodations are constitutionally permissible. But it didn't reject that principle. On the contrary, the Court explicitly embraced the proposition espoused by Kennedy and the dissent, that "the Constitution allows the State to accommodate religious needs by alleviating special burdens."[cxi] But if accommodations are permissible

and special treatment is not *ipso facto* unequal treatment, then the question raised is how to distinguish between special treatment that shades into unequal treatment in violation of the Equal Protection and Establishment Clauses, and special treatment that comports with the principle of equal, neutral, treatment. Apart from its fusion theory, the content of which remained obscure, the Court offered no clear answer to this question.

D. Neutrality and Delegation (the "Fusion" Theory).

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

The notion of delegation formed the core of the Court's theory of fusion, which was ostensibly separate from the Court's theory of neutrality. According to the fusion theory, governmental actions violate the Establishment Clause if they create a "fusion" of political and religious authority, whereas the neutrality theory holds that a governmental action violates the Establishment Clause if it denies groups equal treatment. But the Court's fusion theory merged with the neutrality theory insofar as it relied on a notion of intentionally drawing lines between different groups with the object of conferring political power on only some of them. If this idea had actually served to distinguish neutral from non-neutral accommodations, then it might have supplied the missing

content to the definition of neutrality (albeit at the expense of collapsing the distinction between the two principles). Unfortunately, however, the Court's fusion theory suffered from fatal weaknesses that prevented it from filling up the gaps in the Court's theory of neutrality.

One weakness with the "fusion" theory is that the Court is never entirely clear on what it means; another is that, given the interpretation that the Court *appears* to favor, it seems to contradict the Court's other preferred theory, which is that the principle of "neutrality" allows government actions that accidentally enable religious groups to exercise political power in furtherance of their own ends. While the fusion theory might be consistent with the idea that neutrality is consistent with certain forms of special treatment (i.e., legislative accommodations), it could not cohere with the Court's other big idea about neutrality, which is that what counts is the legislature's intentions, not accidental or unintended effects. The Court never reconciled, or even acknowledged, the tension between these two ideas, perhaps because the tension is not readily apparent. A careful analysis of the fusion theory, however, soon brings it to light.

Justice Souter's opinion begins by identifying the "fusion of political and religious authority" as the constitutional defect in the Kiryas Joel School District, citing Larkin v. Grendel's Den as the source for the proposition that fusions of political and religious authority violate the Establishment Clause.[cxii] *Larkin* involved a law that gave churches the power to approve or veto – in effect, to make – zoning decisions about whether to allow liquor to be sold in their vicinity. The *Larkin* Court held that such a delegation of governmental decision-making authority to religious bodies constituted an impermissible fusion of religious and political authority. The difficulty with applying

this argument to *Grumet*, as Justice Souter did, is that, unlike in *Larkin*, where governmental decision-making authority was delegated directly to churches (and their religious leaders), the powers of local government delegated by Chapter 748 were not delegated to a religious institution or to the religious leaders of the Satmars. Rather, they were delegated to the *people* of Kiryas Joel. As far as the legislative text was concerned, the people were defined in terms of their residency within the geographic territory and political jurisdiction of the Village of Kiryas Joel, not in terms of their membership in any particular religion, synagogue, or "church." And while the legislature knew full well that the residents of the Village were all Satmars, and had that in mind as a reason for enacting the legislation, it did not make that membership a qualification of the privilege bestowed by Chapter 748. As far as the requirements of the Act went, the residents of Kiryas Joel could cease to affiliate with the Satmar religion tomorrow, and yet they would still be part of the constituency entitled to its own separate school district under the Act. In other words, the powers of government associated with the formation of a public school district were given to the people of Kiryas Joel, not to their religious leaders or institutions. Furthermore, the people received those powers in their capacity as individual political citizens, not in their capacity as members of a particular religion. Pushing on this point, Justice Scalia argued in dissent that the fact that the residents of the Village "happened to be" of the same religion did not suffice to establish that the powers of government inherent in a public school district were being delegated *to* a religious group, as such. But if there was no delegation to the religious group, then there was no fusion of political and religious authority, and *Larkin* was inapposite.

There were several different ways of responding to this argument. The problem is that the Court was not very clear about which one it favored. The first way of refuting the anti-fusion argument was to characterize it as unduly formalistic and to argue for a functionalist understanding of fusion instead. This is the approach suggested by many of the amicus briefs written in support of the plaintiffs' position, which disputed the secular nature of the school district established in Kiryas Joel and pointed to the various ways in which the pervasively religious character of the Satmar community was bound to infuse the character of the public school with impermissible religious elements.[cxiii] The basic idea here was that, while they might be secular *in form, in substance* the public school and the district could not help but reflect the religious values and practices of the surrounding community. As evidence, the briefs recounted the Waldman episode, in which the rabbis succeeded in drumming Waldman out of the school board election and getting their favored candidates elected instead. All of this supposedly added up to a public school subject to the undue influence of religious leaders, covertly but effectively serving religious functions and answering to religious authorities – a fusion of political and religious authority in fact if not in name. Only a rigidly legalistic mindset that elevated form over substance could fail to see the "theocratic" nature of the political entity thus created.

Such an anti-formalistic style of reasoning takes the effects-based logic of functionalist analysis to the extreme. What matters – and the only thing that matters – in such a view is how things actually work in practice, how they operate in reality, not how they are formally or legally defined or how they were *intended* to work by the legislature. What matters, in other words, is actual effects, facts, not legislative purposes or

intentions. The opening paragraph of Justice Souter's opinion appeared to adopt just such a functionalist analysis when it declared that "this unusual Act is *tantamount* to an allocation of political power on a religious criterion"[cxiv] – "tantamount" being one of the customary rhetorical signs of anti-formalist reasoning, signifying a readiness to look beyond form to substance, beyond texts to effects. In the same rhetorical mode, Justice Souter went on to argue that "the difference between […] vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance" and concluded that "[i]t is … not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group's leaders or officers."[cxv]

This language would seem to suggest that Souter had adopted the view propounded by the opponents of Chapter 748, to wit, that the public institutions of Kiryas Joel functioned as (or like) religious institutions, making the school district "in essence" a theocracy. But that would imply that any legislation that had the *effect* of empowering a religiously homogeneous community to form its own municipal institutions violated the principle of no religious-political fusion and hence the Establishment Clause. If so, then the Village of Kiryas Joel also should be deemed unconstitutional – a position no one advocated. Countering Justice Scalia's accusation that he was endorsing this view,[cxvi] Justice Souter expressly rejected this proposition, averring that "[w]e do not disable a religiously homogeneous group from exercising political power."[cxvii] He thus repudiated the effects-based reasoning associated with the functionalist conception of fusion, and explicitly held that the Constitution allows political jurisdictions to be created that contain religiously homogeneous groups, so long as the group is defined "according to

traditional political methodologies taking account of lines of latitude and longitude and topographical features."[cxviii] In other words, so long as the political jurisdiction is defined in geographical terms, the fact that it just "happens" to contain a single religious group acting in accord with its religious values and spiritual leaders is no defect – and does not by itself constitute an impermissible fusion of religious and political authority. A clearer rejection of the functionalist approach could hardly be imagined.

E. A School District *For* A Particular Religious Community vs. A School District *In* A Particular Religiously Homogeneous Community (An Intent Analysis).

But then what does constitute the impermissible fusion of religious and political authority? And what makes Chapter 748 specifically "tantamount" to an allocation of political power to a religiously defined group? And how might that supply an answer to the question of when a legitimate policy of accommodating group differences shades into an unconstitutional practice of unequal treatment? By way of an answer to these interlinked questions, Justice Souter shifted his rhetoric from the language of substance over form to a focus on the *purposes* behind the Act. According to this part of Souter's opinion, "[w]here 'fusion' is an issue, the difference [between delegating political authority to a group of individuals who just happen to be religious and delegating it to a religious group] lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[cxix] The preferred interpretation of fusion thus merged with the preferred interpretation of the principle of neutrality: the government had to act, intentionally, on principles that were neutral with respect to religious belief. The paradigmatic example of such a suitably neutral legislative act was the municipal incorporation statute under which the Village of

Kiryas Joel had been formed.[cxx] That act was a general statute which gave the residents of any geographic area the right to form their own municipal corporation, so long as they met certain objective criteria regarding size, topography, and secured the requisite majority vote in favor of the incorporation – criteria that made no reference to the residents' beliefs or identity and that were not intended to turn on the homogeneity or religiosity of the residents' beliefs.

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

F. Religion in the Public Square.

In taking this position, the Court was taking sides in a debate brewing among political theorists in the 1980s and 1990s over whether it was legitimate in a democracy subject to the Establishment Clause for voters and office-holders to act on their religious beliefs.[cxxi] The majority of participants in this debate took the view that making people suppress their religious values when they voted or engaged in other forms of political activity was not only unfeasible but also, inconsistent with the ideal of democracy – a position which the Court seemed to endorse. On this logic, it was perfectly acceptable for the people of Kiryas Joel to follow their religious convictions when voting on the propositions to secede and incorporate their own separate village, and equally acceptable

for them to follow their religious convictions or heed their religious leaders when voting on candidates for city council or school board or the mayoral election. Likewise, there was nothing inherently wrong with the members of the city council, the school board, and the mayor following their religious convictions when formulating local government policies – so long as they observed the laws that govern the exercise of political power, such as the rules promulgated by the State Department of Education and all of the state and federal constitutional provisions that limit the exercise of governmental authority in the name of protecting individual rights.

Rejecting the functionalist theory of fusion, the Court was not willing to accept the characterization of the school and the school district as secular in form, but religious in function, just because the people who ran it and the people who voted for the people who ran it were religious and acted on their beliefs. It treated both the district and the school itself as presumptively secular political institutions, just as it regarded the Village as a secular local government entity notwithstanding the religious and homogeneous nature of its electorate. At the same time, the Court insisted that the state government be neutral in its treatment of different religious and non-religious groups. This raised the question of what it means to treat groups equally or neutrally. While clearly a standard that focuses on the government's intentions or motives rather than on the unintended effects of its actions (such as the empowerment of a religiously homogeneous group), Justice Souter's definition of unequal treatment was ambiguous. The intentional governmental act that he dwelt on was "drawing political lines" or jurisdictional boundaries "on the basis of" a "religious criterion" – the defect he found in Chapter 748. But he left it unclear what using a religious criterion to draw boundaries actually means.

What exactly does the state have to have in mind to be found to have drawn lines "on the basis of" a religious criterion? Is it enough if it was aware that its authorization legislation would or could result in a religiously homogeneous population being contained in a single political jurisdiction? Or does the government have to actively desire to empower (or disempower) a particular religious (or non-religious) group and make that the reason, and the basis, for its drawing of political boundaries?

G. Religious Gerrymandering: Justice Kennedy's Concurrence

The clearest answer to the question of how to define "religious line drawing" was provided not by Souter but by Justice Kennedy, who, in his concurring opinion, equated drawing political boundaries on the basis of religion with the practice of racial gerrymandering recently denounced by the Court in the landmark case of Shaw v. Reno.[cxxii] On Justice Kennedy's view, deliberately drawing territorial boundaries in order to produce a religiously homogeneous population (as opposed to allowing boundaries to be drawn that just "happen" to contain a religiously homogeneous population) is as clear an act of intentional discriminatory treatment on the part of the government as the analogous act of deliberately drawing the territorial boundaries of voting districts to produce a majority of voters belonging to a racial minority group. In each case, the intention of the legislature (approved by the executive) is to empower a minority group by allowing it to dominate a political jurisdiction. And it is that intention, according to Justice Kennedy, that infects Chapter 748 with a constitutional infirmity. "In this respect," Justice Kennedy asserted, "the Establishment Clause mirrors the Equal Protection Clause. Just as government may not segregate people on account of their race, so too it may not segregate on the basis of religion."[cxxiii] Quoting earlier cases that

condemned racial gerrymandering, Justice Kennedy declared that "[w]hen racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist." He denounced that practice as being "at war with the democratic ideal."[cxxiv] On this view, what made Chapter 748 "in effect, a religious test," even though it was not a religious test in form, was the fact "the New York Legislature knew that everyone within the village was Satmar when it drew the school district along the village lines," and not only was aware but actively sought to give that religiously defined population a school district of its own. "There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause."[cxxv]

Kennedy's religious gerrymandering theory has many virtues, not the least of which is its clarity. It makes sense of the Court's fusion theory, and it makes sense of the decision, which clearly is concerned with the purposes behind the authorizing legislation and not its accidental effects. It provides a relatively clear answer to the question of what purposes invalidate an act that creates political jurisdictions, and why. Furthermore, the basic theory of gerrymandering, that intentionally drawing lines between groups defined by race or religion is discriminatory, fits well with the Court's hostility to racial, ethnic and religious classifications expressed in other areas of the law. It likewise comports with its general preference for intent-based standards of equality and neutrality ("formal neutrality") over functionalist effect tests ("substantive equality"). In this regard, the gerrymandering principle stands as an application of the principle of formal neutrality, thereby joining the Court's theory of fusion and its theory of neutrality and equal

treatment into one. If it is the State's intention to bestow political power on the Satmars that converts the geographically defined constituency into a delegation of power to a religious group, then the fusion theory and the neutrality theory converge into a single principle, forbidding government to make religious or racial classifications and requiring it to treat all people the same.

H. Gerrymandering, Religious Line-Drawing, and Religious Accommodation.

However, this insistence on treating people the same sits uneasily with the Court's embrace of the practice of legislative accommodations, which, as shown above, rests on the very different view that differential treatment can be a form of equal treatment. A further problem with the gerrymandering theory is that, apart from Justice Kennedy, no one on the Court explicitly endorsed it. As we shall see, Justice Stevens' separate concurrence, focused on the problem of separatism, in some ways seems to follow the logic of the anti-gerrymandering principle – but ultimately departs from it. Likewise, Justice Souter's opinion could be interpreted as implicitly adopting the view that the lines drawn around Kiryas Joel by the legislature amounted to a religious gerrymander. But at no point does he use this term, and indeed what he means by using religion as a "criterion," as he accuses the legislature of doing when it crafted Chapter 748, is left entirely vague. It might have something to do with the desire to create a majority-minority (or, in this case, an entirely homogenous) political constituency; it might have to do with the fact that the Satmar community was "singled out" for a benefit which no other minority community received; or it might reside in a different set of motivations altogether. In the end, it is just not clear whether the Court is condemning the practice of

religious gerrymandering, the practice of making religious classifications, or some other bad practice intentionally undertaken by the legislature.

I. Line-Drawing, Gerrymandering and Formal Neutrality: The Tension Between The Fusion Theory and the Theory of Formal Neutrality.

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

In taking this position (that the cure for the constitutional defect is to make the opportunity to establish a separate school district available to other "similarly situated" communities), the Court was implicitly agreeing with the dissent. The main point of contention between the Court and the dissent concerned the state legislature's readiness to provide other groups with the same opportunity. The Court asserted that the fact that Chapter 748 referred only to the Village of Kiryas Joel showed unwillingness on the part of the state legislature to extend the same benefit to other groups. The dissent, led by

Justice Scalia, disputed that contention. On Justice Scalia's view, the fact that Chapter 748 was a "special act," specific and exclusive to Kiryas Joel, rather than a general act, granting all local communities meeting relevant criteria the authority to create their own school districts, simply reflected the uniqueness of the Satmars' cultural situation and consequent practical needs. No other community was granted the authority to create its own school district, on this interpretation, because no other community had asked for such authority; and no other community had asked for such authority because no other community *needed* such authority to accommodate its distinctive cultural practices. If another community with a similar need did come along in the future, there was no reason to assume that the state legislature wouldn't recognize it and confer on it the same benefit. The Court was demanding a guarantee of this up front – a demand the dissent regarded as preposterous and by no means necessitated by the principle of neutral/equal treatment.

J. Common Ground Between Majority and Dissent: Non-Discriminatory Treatment Permits Accommodations ("Separatist" Opt-Outs) on an Equal Basis.

The important point here is to see how narrow the disagreement between the Court's and the dissenting opinion is. There is no dispute over what the reigning standard is: the government is required to treat all groups equally, according to both the majority and the dissent.[cxxvi] "Neutrality," on this common view, consists in the absence of discriminatory treatment. Differential treatment of groups – treating different groups differently – is permissible if justified as an accommodation; but – and this is the key point of agreement between the majority and the dissent - differential treatment must be accorded to *every* group that requires an accommodation or else it is discriminatory.

On this view, there is no problem with creating "separatist" school districts, so long as every separatist group has an equal entitlement to one. In other words, separate is okay, so long as separate is equal. There are a number of potential problems with this logic, not the least of which is that it sounds suspiciously similar to the logic of separate but equal long defended but ultimately repudiated in the context of race relations.[cxxvii] Neither the Court's opinion nor the dissenting opinion addressed the possible objections to the logic of separatism embedded in their shared theory of neutrality/equality. Only Justice Stevens' concurrence directly confronted some of the normative objections to separatism. But even if they went unacknowledged, the embrace of a separatist conception of equality created a number of problems for interpreting *Grumet*, undermining the clarity of its holding.

K. The Tension Between Equal Opportunity Separatist Opt Outs (Accommodation) and the Anti-Gerrymandering and Anti-Line-Drawing Principles.

One problem is that the logic of separate but equal implicit in the favored interpretation of neutrality contravenes the prohibition on gerrymandering invoked by Justice Kennedy and arguably (albeit ambiguously) also endorsed by the Court in its conception of fusion and delegation. If the deliberate drawing of political lines on the basis of race or religion is impermissible in one instance, multiplying the instances in which political boundary-lines are drawn on the basis of racial or religious classifications is not going to solve the problem – it's going to exacerbate it. Deliberately creating political jurisdictions in which the totality (or near totality) of the population belongs to a single racial or religious group is arguably even worse than the typical gerrymander, which contents itself with a mere majority of minority group members. If the problem lies in the use of religious or racial classifications with the intention of conferring

political power on a group defined by such classifications, or helping a group classified by race or religion to dominate a political district, it is hard to see how universalizing the practice constitutes a solution. But that is exactly what the preferred interpretation of neutrality as equal treatment calls for.

Of course, the only one to explicitly embrace the anti-classification/anti-gerrymandering logic that contradicts the logic of equal treatment was Justice Kennedy. But how else is one to understand the Court's own repudiation of the use of a "religious criterion" in "drawing the lines" around the school district's jurisdiction? In its attempt to explain what made Chapter 748's delegation of local governmental powers a delegation *to* a religious group, the Court insisted on the fact that the state intentionally employed a "religious criterion" in determining the boundaries of the school district. But this raised the question of what using a religious criterion means. Either it meant the same thing that Justice Kennedy meant when he spoke of religious gerrymanders, in which case the Court's definition of delegation, which formed the core of its fusion theory, was subject to the same inconsistency with its neutrality theory as the gerrymandering principle. Or the Court's definition of delegation according to a religious criterion was simply opaque or devoid of content, and simply failed to provide any explanation of how conferring local government authority on a territorially defined jurisdiction was "tantamount" to conferring political power on a religious group.

L. Anti-Separatism: Justice Steven's Concurrence.

Underlying the contradiction between the Court's neutrality theory (which permitted, if not encouraged giving every separatist subgroup a separate but equal local government of its own) and the Court's fusion theory (which seemed to frown on

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

On the surface, Stevens' concern with state-sponsored separatism echoed Justice Kennedy's concern with drawing lines to "separate" different groups. Hovering over both Kennedy's and Stevens' opinions, though not explicitly cited, was the spirit of the landmark Equal Protection case, Brown v. Board of Education, which held, in the context of racially segregated schools, that separate is inherently unequal.[cxxix] But whereas Justice Kennedy focused on the legislative act of making racial or religious classifications, the concern that Justice Stevens expressed was with the separatist *effects* such classifications were designed to produce. As Stevens saw it, the "protection" that the Satmars were seeking for their culture was a form of "isolation" that was meant to "increase[] the likelihood that [the children] would remain within the fold, faithful adherents of their parents' religious faith."[cxxx] Here, Stevens' opinion was echoing Justice Douglas's famous dissenting opinion in *Yoder*, which lamented that the Court's decision to exempt the Amish from the compulsory education laws would have the effect of denying the Amish children "exposure to the new and amazing world of diversity," and thereby deprive them of their right to freedom of choice.[cxxxi] In much the same spirit, Stevens deplored the fact that the State was intentionally "support[ing] a religious sect's

interest in segregating itself and preventing its children from associating with their neighbors," rather than "tak[ing] steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs." In Stevens' view, it was the government's deliberate support of the Satmars' separatist practices and beliefs that made it fair to characterize Chapter 748 "as establishing, rather than merely accommodating, religion."[cxxxii]

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

The ultimate question in *Grumet* was whether the Court should accept the view that government-sponsored segregation is a practice prohibited by the Establishment Clause. In his concurrence, Justice Stevens made a forceful argument in favor of the proposition, focusing on the supposedly harmful effects of separatism on the community's children, whom he pictured as being "prevent[ed] … from associating with

their neighbors," deprived of the experience of "diversity," and "cemented" to their parents' faith as a result of the state-supported "isolation."[cxxxiii]

M. Anti-Anti-Separatism

As Justice Scalia put it, in his withering estimate, "So much for family values!"[cxxxiv]

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

all similarly situated groups.[cxxxv] Directly countering the spirit of Stevens' anti-segregationist argument, Justice Kennedy stated:

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

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

N. Contradictions and Confusions: The Court's Convoluted Reasoning

The foregoing analysis shows the contradictions and confusions hidden in the Court's reasoning in *Grumet*. In the end, at least four different theories of the constitutional defect in the authorizing legislation were offered for consideration: (1) a functionalist theory of religious and political fusion, which focuses on how the political institutions created by the legislation actually function in practice; (2) a formalist theory of fusion, which depends on the legislature intentionally allocating the powers of local government to a religious group, which in turn depends on something like a religious gerrymander, a deliberate use of religious classifications with the aim of creating a political jurisdiction populated mostly (or entirely) members of a single religious group; (3) a formalist, i.e., intentionalist theory of neutrality, which demands that government treat all belief-systems equally, and neither favor nor disfavor any religious beliefs – a principle which permits the legislature to accommodate religious differences and special needs by authorizing the creation of separatist political jurisdictions so long as every group that "needs" such separatist institutions gets them; (4) last but not last, an anti-segregationist theory, which condemns the intentional creation of separatist political jurisdictions and likewise condemns active government support of group-based exclusion. The first theory was roundly rejected. Depending on how the second theory is interpreted, the second and third theories either merge into each other or contradict each other. If the fatal intention condemned by the intentionalist theory of neutrality is the intention of drawing political lines around a group in order to empower it, then it makes no sense to demand that all groups that "require" separation must get it. Likewise, if the fatal intention is to facilitate separation and social isolation, then equal opportunities for separation are no cure for the defect. Justice Scalia derided Justice Souter's "position,"

saying that it "boils down to the quite novel proposition that any group of citizens (say the residents of Kiryas Joel) can be invested with political power but not if they all belong the same religion."[cxxxvii] Echoing the complaints of the Religious Right, he characterized this position as evincing hostility to religion in contradiction to the Court's professed neutrality towards competing religious and non-religious beliefs. [cxxxviii] But the Court's decision did no such thing. In fact, Justice Souter expressly endorsed the position that Justice Scalia insisted on, holding that "we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens"[cxxxix] and, further, that "we do not disable a religiously homogeneous group form exercising political power conferred on it without regard to religion."[cxl] The Court thus directly repudiated the anti-segregationist theory espoused by Justices Stevens, Ginsburg and Blackmun, while leaving the ambiguities of its fusion theory and the contradictions between its fusion theory and its neutrality theory unresolved.

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

7. The Aftermath.

In the aftermath of the litigation, the Satmars and their supporters not surprisingly seized on the theory that was most favorable to resurrecting legal authority for the Kiryas School District. Ignoring the conflicting principles in the Court's opinion, they focused on its definition of neutrality as a principle of nondiscriminatory treatment sanctioning equal opportunity accommodations of group separatism. Following the Supreme Court's

implicit blueprint, the New York State Assembly lost no time in drafting new legislation modeled on the presumptively valid municipal incorporation law that took the form of a general statute granting every local community that meets certain neutral criteria the right to carve out its own school district.[cxli] This new legislation was promptly challenged in state court on the grounds that, while general in form, the intention behind the legislation remained the same: to benefit the Satmars, and only the Satmars, of Kiryas Joel.[cxlii] If the sole beneficiary, and the sole *intended* beneficiary, remained the Satmars, then, the challengers argued, the new authorizing legislation was as much a violation of the principle of equal treatment embodied in the Establishment Clause as the original authorizing legislation. Three times the New York state legislature enacted new authorizing statutes designed to conform to the *Grumet* Court's apparent demand for a general, as opposed to a special, statute, while providing authorization for the school district in Kiryas Joel.[cxliii] Twice, the authorizing statutes enacted subsequent to *Grumet* were struck down by the State Court as violations of the Establishment Clause.[cxliv] Finally, in 2001 the state court ruled that Kiryas Joel school district satisfied the requirements of the third authorizing statute passed by the state in the wake of *Grumet*. The record is silent as to why, in this last legal battle over the school district in Kiryas Joel, the challengers refrained from challenging the constitutionality of the latest authorizing statute and confined themselves to merely arguing that the Kiryas Joel school district failed to meet the statute's requirements. No appeal was taken from the state court's ruling to the contrary. The authorizing statute was left to stand. And so ended seven years of litigation over the fate of the the public school district in Kiryas Joel.

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

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[i] 512 U.S. 687 (1994).

[ii] Mintz at 206-209, *Grumet* at 692-93.

[iii] Years after the *Grumet* litigation, a legal challenge was brought alleging that the Village itself was an unconstitutional establishment. Waldman v. Kiryas Joel, 39 F.Supp. 2d. 370 (S.D.N.Y. 1999), *affirmed by* 207 F.3d 105 (2d Cir. 2000). However, the court threw the case out on the grounds that it constituted a thinly disguised extension of a previously adjudicated private law dispute, barred by the doctrine of res judicata. Other than this lawsuit, there has been no serious legal challenge to the constitutionality or legal validity of the Village of Kiryas Joel. See text TAN , *infra*,

[iv] Lemon v Kurtzman, 403 U.S. 602 (1971).

[ix] *See* Mintz, *supra* at 28.

[x] Mintz, at 27.

[xi] *See* .

[xii] Mintz, at 30.

[xiii] Mintz, 29-30.

[xiv] Mintz, 34-35.

[xv] Mintz, 36-38.

[xvi] *See* Mintz, *supra* note 4, at 36-38.
[xix] S.Y. Gelbman, *Ritson Tsadik*, at 6.

[xxii] Mintz, 309.
[xxiii] Mintz, 310.
[xxiv] *Grumet*, at 693.
[xxv] Mintz at 61. *See also* I. Rubin, Satmar: An Island in the City (1972).
[xxvi] Mintz, 310.
[xxvii] Mintz at 310, *Grumet* at 692.
[xxviii] 473 U.S. 373 (1985).
[xxix] 473 U.S. 402 (1985).
[xxx] Aguilar v. Felton, citation.
[xxxi] Mintz, 310. There was actually a controversy preceding the efforts to form a separate public school system over whether, in the wake of *Aguilar* and *Ball*, special education and other public school services could be provided at a "neutral site," neither public school nor parochial school. The Monroe-Woodbury School District claimed that this was not an option, but the State Supreme Court ruled to the contrary, holding that the school district should provide special education to the Satmar children at a neutral site. A few months later, the Appellate Division struck down this holding, denying that special education could be provided at a neutral site, and in July 1988, the New York State Court of Appeals overturned that judgment, ruling that the provision of special education was permissible but not obligatory on the part of the Monroe-Woodbury District. *See Wieder*, 134 Misc 2d 658, 512 N.Y.S. 2d 305 (1987), *modified*, 132 A.D. 2d 409, 522 N.Y.S.2d 878 (2d Dept. 1987), *reversed* in 72 N.Y.2d 174, 531 N.Y.S. 2d 889 (1988). In the wake of that decision, the Monroe-Woodbury School District refused to educate the Satmar children at a neutral site, leading the parents to conclude that the establishment of a separate school district was their only option. See Brief of Defendant-Appellant Board of Education fo the Kiryas Joel Village School District, submitted to the Court of Appeals, State of New York, March 13, 1993, pp. 8-9; Mintz at 311-312. Mintz, 311.
[xxxi] *Grumet* at 692 (citing Board of Ed. Of Monroe-Woodbury Central School District v. Weider, 72 N.Y. 2d 174, 180-181, 527 N.E. 2d 767, 770 (1988).
[xxxii] Mintz, 311.
[xxxiii] See Mintz, 316; *Grumet* at 692 (citing Board of Ed. Of Monroe-Woodbury Central School District v. Weider, 72 N.Y. 2d 174, 180-181, 527 N.E. 2d 767, 770 (1988).
[xxxiv] Mintz, 316.
[xlvi] *See, e.g.*, Michael Sandel, Liberalism and the Limits of Justice (1982), Alasdair MacIntyre, After Virtue (1981), Michael Walzer, Spheres of Justice (1983), Charles Taylor, Sources of the Self (1989), Will Kymlicka, Liberalism, Community and Culture (1989).
[xlvii] *See* Brief Submitted on Behalf of Appellant Board of Education of the Monroe-Woodbury Central School District, March 15, 1993, p. 6.
[xlviii] *See* Letter from Monroe-Woodbury Board of Education to Governor, *cited* in Brief of Defendant-Appellant Board of Education of the Kiryas Joel Village School District submitted to Court of Appeals, State of New York, March 13, 1993, p. 10.
[xlix] Governor's Approval Memorandum, *cited* in March 13 Brief, *id*. at 10.
[l] Memorandum filed with Assembly Bill Number 8747 (July 24, 1989), App. 40-41.
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[lii] *See* Kymlicka, *supra* note 25, David Hollinger, Post-Ethnic America (1995).
[liii] The Satmars made no such claim. *See* Reply Brief of Defendant-Appellant Board of Education of the Kiryas Joel School District, April 20, 1993, at 4 ("Satmar Hasidim prefer their insular community in Kiryas Joel not because insularity is religiously mandatory, but because adherence to their traditional way of life is facilitated by a self-sustaining homogeneous neighborhood.") Yet the plaintiffs' argument assumed that they must make such a claim. *See* Respondents' Brief submitted to the New York Court of Appeals, at 47 ("Since Defendants-Appellants have not identified any specific religious precept infringed upon, they may

not successfully assert that Chapter 748 … removes a deterrent to the free exercise right of Kiryas Joel residents.")
[liv] 406 U.S. 205 (1972).
[lv] For theoretical developments of this idea, see Ron Garet, "Communality and Existence: The Rights of Groups," 56 Cal. L. Rev. 1001 (1983), Gerald Bradley, "Dogmatomachy – A "Privatization" Theory of the Religion Clause Cases," 30 St. Louis U. Law J. 275 (1986).
[lvi] New York School Board Association Amicus Brief.
[lvii] New York School Board Association Amicus Brief.
[lviii] Anti-Catholic bigotry and the desire to prevent Catholics from dominating the school boards in communities where they were majority had supplied the original impetus for regionalization of the public schools. *See* Diane Ravitch, The Great School Wars: A History of New York Public Schools (Basic Books, 1974, second edition, 2000).
[lix] *See* Grumet v. New York State Education Dept., 151 Misc. 2d 60, 579 N.Y.S.2d 1004 (N.Y.Sup. Jan 22, 1992)(NO. 2595).
[lx] 330 U.S. 1 (1947).
[lxi] *Lemon*, *supra* note 3.
[lxii] On the fight against secular humanism and the role of the Moral Majority and other conservative Christian organizations, see Nomi Maya Stolzenberg, '*He Drew A Circle That Shut Me Out: Assimilation, Indoctrination, and the Paradox of a Liberal Education'*, 106 Harv. L. Rev. 591 (1993). On the concept of "legal secularism," see Noah Feldman, Divided By God: America's Church-State Problem – And What We Should Do About It (2005).
[lxiii] *See* Stolzenberg, *supra* note 40.
[lxiv] *See* Stolzenberg, *supra*, at .
[lxv] *See* Ann Southworth, Lawyers of the Right: Professionalizing the Conservative Coalition (2008).
[lxvi] Engel v. Vitale, 370 U.S. 421 (1962) (holding the practice of conducting prayers in public school to be a violation of the Establishment Clause), Abington v. Schempp, 374 U.S. 203 (1963) (holding that bible reading in public school violates the Establishment Clause).
[lxvii] Roe v. Wade, 410 U.S. 113 (1973).

[lxviii] Allegheny v. ACLU, 492 U.S. 573 (1989).
[lxix] *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144 (1977).
[lxx] *See* Nomi Maya Stolzenberg, *Un-Covering the Tradition of Jewish 'Dissimilation': Frankfurter, Bickel, and Cover on Judicial Review*, 3 Law &: Southern California Interdisciplinary Law Journal 809 (1994).

[lxxi] *See* http://www.lewinlewin.com/nathan.html; http://www.chiunesugihara100.com/eng/guest-speech.htm.
[lxxii] Mintz at 317.
[lxxiii] Mintz at 317.

[lxxv] *Id*. Waldman v. Kiryas Joel, 39 F.Supp. 2d. 370 (S.D.N.Y. 1999), *affirmed by* 207 F.3d 105 (2d Cir. 2000).
[lxxix] The State Education Department had opposed the passage of Chapter 748 in the legislature. *See* Mintz at 316. But once Chapter 748 was passed, it found itself in the role of the official agency in charge of its implementation, and therefore was named as defendant in the legal challenge. *See* Grumet v. New York State Education Dept., 151 Misc. 2d 60, 579 N.Y.S. 2d 1004 (N.Y. Sup. Jan. 22)(NO. 2595).
[lxxx] 187 App. Div. 2d 16, 19, 592 N.Y.S. 2d 123, 126 (1992). Grumet and Hawkins were granted standing in their individual capacity under the New York State Finance Law, N.Y. State Fin. Law, section 123 (McKinney 1989).
[lxxxi] *Grumet* at 694.
[lxxxii] *Grumet* at 694.

[lxxxiii] *Grumet* at 694.
[lxxxiv] Lee v. Weisman, 505 U.S. 577 (1992) (holding that a rabbi's recitation of a prayer at a public high school graduation ceremony was unconstitutional), Zobrest v. Foothills Catalina School District, 509 U.S. 1

(1993) (holding that the Establishment Clause does not bar the state from providing a deaf interpreter as an aid to a deaf child at a parochial school).
[lxxxv] *See* Brief Submitted on Behalf of Appellant Board of Education of the Monroe-Woodbury Central School District, March 5, 1993, p.p. 9-10; Reply Brief Submitted on Behalf of Appellant Board of Education of the Monroe-Woodbury Central School District, April 16 1993, p. 3.
[lxxxvi] Respondents Brief submitted to Court of Appeals, State of New York April 10, 1993, 24-31.
[lxxxvii] Kiryas Joel brief, 14; *see also* Monroe-Woodbury Brief, 18-21.
[lxxxviii] Monroe-Woodbury Brief, 16-21; Kiryas Joel Brief, 14-19; Kiryas Joel Reply Brief, 5

[lxxxix] *See* Monroe-Woodbury Brief, 43-50; Kirya Joel Brief, 18-19; *see also* Attorney General's Brief, 26.
[xc] *Lemon*, at .
[xci] Respondents' Brief, 32-40;
[xcii] See Lynch v. Donnelly, 465 U.S. 668 (1984), (holding that a public Christmas display including crèche, Christmas tree and Santa Clause house does not violate the Establishment Clause), at 687-94 (O'Connor, J., concurring).
[xciii] *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).
[xciv] Briefs
[xcv] Respondents' Brief, 42-45.
[xcvi] *See, e.g.*, Paul Finkelman, Religion and American Law, at 389, Richard B. Couser, Ministry and the American Legal System (1993) at 38.
[xcvii]
[xcviii] Attorney General's Brief, 31-32.

[xcix] *See, e.g.*, "'Scrap the Lemon Test,' Says Southern Baptists," *Christian Century*, March 2, 1994.
[c] *Grumet*, at 710 (Blackmun, J., concurring).
[ci] *Grumet*, at 718-721 (O'Connor, J., concurring).
[cii] *Grumet* at 695 (*citing* Grumet v. New York State Ed. Dept, 151 Misc. 2d 60, 570 N.Y.S. 2d 1004 (1992), 187 App. Div. 2d 16, 592 N.Y.S. 2d 123 (1992), 81 N.Y. 2d 518, 618 N.E. 2d 94 (1993).
[ciii] This seems to have been the view of Justice Blackmun, who filed a separate concurring opinion in which he argued that "the two principles on which the [Court] bases its conclusion that the legislative Act is constitutionally invalid essentially are the second and third *Lemon* criteria." *Grumet* at 710 (Blackmun, J., concurring)/
[civ] *See Grumet* at 751 (accusing Justice O'Connor of advocating the "replace[ment of] *Lemon* with nothing," and asserting that '[t]o replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle.")
[cv] 495 U.S. 116 (1992).
[cvi] *See Grumet* at 715 (O'Connor, J., "In my view, the Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art.VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice"); at 728 (Kennedy, J., "In this respect, the Establishment Clause mirrors the Equal Protection Clause.")
[cvii] *Grumet* at 703 (emphasis added). *Compare Grumet* at 748 ("I have always believed that … the Establishment Clause prohibits the favoring of one religion over others," Scalia, J., dissenting) *with Grumet* at 709 ("An Establishment Clause diminished to the dimensions acceptable to Justice Scalia could be enforced with a few simple rules, and our docket would never see cases requiring the application of a principle like *neutrality toward religion as well as among religious sects*. But that would be as blind to history as to precedent, and the difference between Justice Scalia and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates the Court to exercise the judgment necessary to apply it" (emphasis added)).
[cviii] *Cf. Grumet* at 716 ("I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation." (O'Connor, J.,concurring).
[cix] *Grumet* (Kennedy, J., concurring, emphasis added.)
[cx] Kennedy at 723 (quoting Allegheny County v. American Civil Liberties Union, 492 U.S. 573, 657 (1989)).

[cxi] *Grumet* at 705.
[cxii] *Grumet* at 696, *citing Larkin*, 459 U.S. 116 (1982).
[cxiii] This argument was made most forcefully in the amicus brief submitted by the Committee for Public Education and Religion. See Brief of Committee for Public Education and Religious Liberty as Amicus Curiae, at 1 (*quoting* the Appellate Division's opinion, which characterized the school board as controlled by members of that sect.") *See also* Respondents Brief at 34, fn. 4, p. 44
[cxiv] *Grumet*, at 690.
[cxv] *Grumet*, at 698.

[cxvi] *See Grumet* at 736 ("Justice Souter's position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion," Scalia, J., dissenting.)
[cxvii] *Grumet*, at 708.
[cxviii] *Grumet*, at 708.
[cxix] *Grumet*, at 699.
[cxx] N.Y. Village Law, Art. 2 (McKinney 1973 and Supp. 1994).
[cxxi] *See, e.g.*, Bruce Ackerman, "Why Dialogue?" *Journal of Philosophy* 86 (1989): 5; Amy Gutmann and Dennis Thompson, "Moral Conflict and Political Consensus," *Ethics* 101 (1990): 64; Stephen Holmes, "Gag Rules or the Politics of Omission," in Jon Elster & Rune Slagstad, eds., Constitutionalism and Democracy (Cambridge University Press, 1989); Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy & Public Affairs* 16 (1987): 215; Ruti Teitel, "A Critique of Religion as Politics in the Public Sphere," *Cornell Law Review* 78 (1993): 747; cited in Stephen Carter, God's Name in Vain: The Wrongs and Rights of Religion in Politics (Basic Books, 2001). Daniel A. Dombrowski, Rawls and Religion: The Case for Political Liberalis (State University of New York Press, 2001); *see also* Brief Submitted on Behalf of Appellant Board of Education for the Monroe-Woodbury Central School District, April 16, 1993, p. 4 ("The notion that members of a governing body of a public institution must set aside their religious convictions before the enter the boardroom door has been uniformly rejected" (citations omitted).
[cxxii]509 U.S. 630 (1993).
[cxxiii] *Grumet*, at 728.
[cxxiv] *Grumet*, at 728 (*citing* Wright v. Rockefeller, 376 U.S. 52, 67 (1964)(Douglas, dissenting)).
[cxxv] *Grumet*, at 728-29 (Kennedy, J., concurring).
[cxxvi] There is a dispute over whether the obligation to treat all groups equally under the First Amendment applies only to religious groups or extends to non-religious groups as well. See TAN, *supra note* 82. But there is no dispute that equal (nondiscriminatory) treatment is the relevant obligation.
[cxxvii] Brown v. Board of Education, 347 U.S. 483 (1954).
[cxxviii] *Grumet*, at 711 (Stevens, J., concurring).
[cxxix] *See* note 103, *supra*.

[cxxx] *Grumet*, at 711.
[cxxxi] *Yoder*, *supra* note 30, at 241-246 (Douglas, J., dissenting.)
[cxxxii] *Grumet*, at 711-12.
[cxxxiii] *Grumet*, at 711 (Stevens, J., concurring).
[cxxxiv] *Grumet*, at 749 (Scalia, J., dissenting).
[cxxxv] *See Grumet*, at 729 (Kennedy, J., concurring: "it is important to recognize the limits of this principle [i.e., the principle against religious gerrymandering.] We do not confront the constitutionality of the Kiryas Joel village itself, and the formation of the village appears to differ from the formation of the school district in one critical respect. … the village was formed pursuant to a religion-neutral self-incorporation scheme.")
[cxxxvi] *Grumet*, at 730 (Kennedy, J., concurring).
[cxxxvii] *Grumet*, at 736 (Scalia, J., dissenting).
[cxxxviii] *Id*.
[cxxxix] *Grumet*, at 705.
[cxl] *Grumet*, at 708.

[cxli] Chapter 241, Education Law Section 1504.

[cxlii] The case involving the constitutional challenge to Chapter 241 is known as Kiryas Joel 11. See Grumet v. Cuomo, 164 Misc.2d 644, 625 N.Y.S.2d 1000, 100 Ed. Law Rep. 252 (N.Y. Sup. Mar. 08, 1995)(holding Chapter 241 constitutional), *reversed* by Grumet v. Cuomo, 225 A.D.2d 4, 647 N.Y.S.2d 565, 113 Ed. Law Rep. 362 (N.Y.A.D. 3 Dept. Aug. 26, 1996), *affirmed by* Grumet v. Cuomo, 90 N.Y.2d 57, 681 N.E.2d 340, 681 N.E.2d 340, 659 N.Y.S.2d 173, 119 Ed. Law Rep. 603, 1997 N.Y. Slip Op. 04300 (N.Y. May 06, 1997).

[cxliii] Citations to authorizing statutes after Kiryas Joel I.

[cxliv] For citations to Kiryas Joel II, see note cxxxvi, *supra*. The citations for what is known as Kiryas Joel III, the litigation involving the challenge to Chapter 390, are Grumet v. Pataki, 244 A.D.2d 31, 675 N.Y.S.2d 662, 128 Ed. Law Rep. 801, 1998 N.Y. Slip Op. 06940 (N.Y.A.D. 3 Dept. July 09, 1998)(holding Chapter 390 to be a violation of the Establishment Clause), *affirmed by* Grumet v. Pataki, 93 N.Y.2d 677, 720 N.E.2d 66, 697 N.Y.S.2d 846, 139 Ed. Law Rep. 986, 1999 Slip Op. 04392 (N.Y. May 11, 1999), *cert. denied in* 528 U.S. 946, 120 S.Ct. 363 (1999). The citations for Kiryas Joel III addressing Chapter 405 are

[cxlv] 521 U.S. 203 (1997).