

The Constitution and the Subgroup Question[†]

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INTRODUCTION

I had to announce a title before I knew what I would say here, and I knew “question” had to be in my title because my latest favorite saying is by James Thurber, who said, “It is better to know some of the questions than all of the answers.”¹

There was also the aging law professor who, students noted, always asked the same questions on the exams, year after year. Finally one year, a student approached the professor before the exams and said, “Don’t you know that we all know that you always ask the same questions and we find them out ahead of time?” To which the professor replied, “Ah, that doesn’t trouble me, because the questions are the same, but the answers change.”

So I’m opting for “questions” more than answers today. But I also mean to allude, with my title, “The Constitution and the Subgroup Question,” to the phrase, “The Jewish Question.”

There are three references here. The first is the elephant joke: a number of people were confronted with an elephant and asked to write a report. The Frenchman wrote about “The Elephant and Its Loves”; the German wrote about “A Preliminary Investigation into the Metaphysical Implications of the Elephant”; the Englishman wrote about “Hunting Elephants in India”; the Indiana University law school dean wrote about “The Global Community and the Elephant”; and the Jew wrote “The Elephant and the Jewish Question”—asking whether the elephant is good or bad for the Jews.

Now, there is another version of the joke in which this last line is not about a Jew, but an Irishman, who says, “The Elephant and the Irish Question”—at which point a Jewish listener objects, “Hey, that’s our elephant.” I like this version especially because it helps to raise “the subgroup question” in general. How do issues of group identity and interests arise for the variety of subgroups in this country? Does each subgroup have such particular and unique experiences, paradoxically rendering problematic even their grouping together as “subgroups”? I suggest so, and will emphasize the need to pay attention to particularity.²

At the same time, I do not want to lose the echoes of the phrase, “the Jewish question.” Karl Marx wrote a famous, perhaps notorious, essay entitled “On the Jewish Question.”³ Some say it is evidence of his own anti-Semitism, as he associated the problems of capitalism with Jews; but others suggest that it is a powerful exploration of the general

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1. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 831 (Emily M. Beck ed., 15th ed. Little Brown & Co. 1980) (1855).

2. Still another joke: An excited young boy announces to his family that “Babe Ruth hit another home run!” The boy’s grandfather replies, “This Babe Ruth—is what he did good or bad for the Jews?”

3. Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26 (Robert C. Tucker ed., W.W. Norton & Co. 2d ed. 1978) (1843).

tension or even contradiction between abstract citizenship and membership in private subcommunities like religions. As Marx put it, emancipation of the Jews from second-class status cannot be separated from human emancipation. Human emancipation in turn requires separation of the political state from religion. The emancipatory ideal thus requires displacement of religion from the state to civil society.⁴ “The contradiction in which the adherent of a particular religion finds himself in relation to his citizenship is only *one aspect* of the universal *secular contradiction between the political state and civil society.*”⁵ Therefore, Marx rejected the view that the only emancipation possible for Jews would require renouncing Judaism. He instead argued that Jews and all others must join together to transform human nature.⁶ When viewed as a citizen, each individual must be released from the particularisms of religious identity and commitment.⁷ This general claim is indeed what I mean to discuss here, in the shadow of a third reference to the Jewish question.

It was Hermann Goering in Nazi Germany who wrote, “[S]ubmit to me as soon as possible a draft showing the . . . measures already taken for the execution of the intended *final solution* of the Jewish question.”⁸ In this country, we have never faced anything as severe as the “final solution.” But Indians, Blacks, Chicanos, Japanese and Japanese-American West coast residents, other immigrants, people with disabilities, gays and lesbians, and women of all subgroups have experienced official and unofficial exclusions and degradations rendering problematic the ostensible promises of tolerance and pluralism. Subgroup identity therefore often seems to collide with the vision of abstract citizenship. Notable conflicts arise between groups and the state established to protect individual freedoms, even though those individual freedoms specifically include freedom of association.⁹

The “Constitution” appears in my title as a promise that I will get around to the United States Constitution. But my topic is deliberately broader. Since their beginning, constitutions and democratic societies have posed problems for subgroups—pockets of people who seem different from the norm or the majority. It is true that liberal constitutions offer opportunities; but they also pose problems for subgroups. The provisional South African Constitution, the Constitution of India, and the constitutions emerging in Eastern Europe all attest to this dilemma.

I hypothesize that these questions about the constitutional treatment of subgroups can be illuminated by exploring the problem posed by Marx, by attending to the perplexity invited by the elephant story, and by remembering the highest possible stakes, as in the chilling reminder of Goering. I restate it this way: When must members of a subgroup suppress their group affiliation to enjoy the benefits accorded by the state?

4. *Id.* at 35.

5. *Id.* at 39 (emphasis in original).

6. Marx asserted:

Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (*forces propres*) as *social powers* so that he no longer separates this social power from himself as *political power*.

Id. at 46 (emphasis in original).

7. Marx claimed that securing the individual right of religious freedom as a civil right would only perpetuate a Christian state. *Id.* at 42-46.

8. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH*, 964 (1962) (emphasis in original) (quoting instructions sent from Reich Marshall Hermann Goering to S.S. Security Service Chief Reinhard Heydrich on July 31, 1941).

9. For a superb treatment of these issues, see AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995).

Religious subgroups pose special issues under a constitution devoted both to free exercise of religion and to avoiding the establishment of religion. But analogous issues arise for other groups. May people exercise their freedom of association without jeopardizing other legal protections? May people claim rights of full inclusion in the society without giving up their identities as members of ethnic and racial subgroups? May people with disabilities obtain access to mainstream institutions without jeopardizing claims to special accommodations?

Therefore, where religious subgroups are at issue, my question can be cast this way: Does the secular, democratic state require assimilation as the price of membership? Is separatism the only option for those who wish to preserve their group-based identity?¹⁰

With these concerns in mind, a recent case decided by the Supreme Court begs for attention. This is *Board of Education of Kiryas Joel Village School District v. Grumet*.¹¹ You may know it as the Hasidic community school's case—the Supreme Court struck down a state statute creating a special school district used to set up a school for the disabled children in a village in upstate New York composed entirely of ultra-orthodox Jews. Issues of religious, linguistic, and cultural identity animated the community's desire for the school. Yet the parents and the community also invoked the rights of students with disabilities to a free, appropriate public education.

My method for analyzing the case reveals my hypothesis about how to deal with the tension between a general constitutional scheme and the special claims of a subgroup: we all need to hear the claims of the subgroup from its perspective, but also from the perspective of outside observers. Further, we need to explore how individuals and members of contrasting groups can live together under one constitutional scheme committed to both liberty and equality. And we need to keep vivid and vocal the tensions between and among these perspectives so that no one of them succeeds in permanently defeating the others.

Thus, I will offer two frames for analysis. The first is a narrative of particularity: sketching the history of the subgroup as understood by members of the subgroup and a description of Kiryas Joel's claims tempered by the observations of outsiders. I will use this frame to offer an analysis of the Supreme Court's treatment of the controversy. Then I will reframe the issue by exploring the contrasting public commitment to inclusion developed by social movements seeking equality under the law. The commitment to inclusion offers a contrasting vantage point to consider not only the case of Kiryas Joel's school district, but also the larger issues that subgroups raise for the political order. The two frames—particularity and inclusion—by themselves and by their joint consideration introduce tensions that underscore the subgroup question. It is less my purpose to resolve than to illuminate the question.

10. Or does the secular commitment to preserving spheres of private, religious freedom itself threaten the secular state and its guarantee of universal equality and liberty? Do many pockets of separateness jeopardize the liberal state? Does a failure to emancipate the state from religion leave so much of Christianity imbuing public life that non-Christians in particular remain excluded from liberty and equality?

11. 114 S. Ct. 2481 (1994).

I. NARRATIVE OF PARTICULARITY

Of course as long as there has been a Diaspora—the dispersion of Jews from Palestine after the destruction of the Second Temple nearly two thousand years ago¹²—there has been the Jewish question: how can the Jews survive as a nation within other nations?

Christians have had the same problem when they were (and where they are today) minorities within a state. That was the context for the classic response to the problem in *Mark* 12:17: “Render unto Cacsar what is Caesar’s, and unto God what is God’s.”

For Jews, devising a way to relate to Caesar, or Napoleon, has remained a persistent issue. In Babylonia, and in mcdieval Europe, Jews and the governing authorities often devised a truce of sorts and the authorities granted the Jews relative autonomy. These societies were accustomed to groupings or to feudal structures. In addition, Christian doctrine required some degree of respect for Judaism, even if the Christian view deemed Judaism an inferior religion.¹³ With regard to domestic legal affairs, such as religion, education, family law, economic regulation, and civil litigation, the Jews were often granted substantial control over their conduct.¹⁴ As kings consolidated their power in the Middle Ages,¹⁵ they treated Jews as chattels, denied the rights of free men but assured protection by the king from interference by the king’s vassals—an early example of a domestic choice of law rule.¹⁶ In 13th-century England, the king devised a tribunal to manage his transactions with Jews and to resolve disputes with the use of mixed Christian and Jewish juries—unless the dispute arose between two Jews, and then could be left to a Jewish tribunal.¹⁷

From the vantage point of Jewish law, the rule that emerged was similar: that the Law of the kingdom is the Law. From the perspective of the Jews, however, this rule meant something quite different from what the kings meant. The Jews claimed the power to interpret the boundary between state and religion.¹⁸ Recognition of the king’s law was treated not as submission to a superior authority, but instead as acknowledgment of “foreign law” specified and permitted by Jewish law.¹⁹

Jewish authorities thereby interpreted Jewish law to require compliance with basic tax laws, but also to permit resistance. They did this, especially, through the technique of considering the law of the kingdom to mean traditional, customary law, rather than any

12. 15 ENCYCLOPEDIA JUDAICA 1168 (1971) (Flavius Vespianus Titus, Emperor of Rome, destroyed the Second Temple in 70 C.E.).

13. NAOMI W. COHEN, *JEWIS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* 11 (1992).

14. *Id.* Rabbinical courts in theory retained only power over religious matters, yet Judaism made no clear distinction between religious and secular spheres, and therefore medieval European rabbinical courts routinely handled commercial, family, criminal, and other disputes. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 77-78 (1983).

15. See CHARLES REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 134-35 (1980). Kings declared that the law of the land governed the Jews, but the kings still accorded them specific grants of autonomy. See also COHEN, *supra* note 13, at 11.

16. Shael Herman, *Legacy and Legend: The Continuity of Roman and English Regulation of the Jews*, 66 TUL. L. REV. 1781, 1804 (1992).

17. MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 20-21 (1994).

18. The boundary between state and religion is monitored in Jewish law through the notion of *Dina de-malkhuta Dina*: the Law of the kingdom is the Law. See generally GIL GRAFF, *SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW, 1750-1848* (1985).

19. Jewish law directs respect for the king’s laws, but the boundary is interpreted by the Jews as a limited recognition of “foreign law” based upon the authority of Jewish law. *Id.* at 10.

new law invented by a sovereign. This permitted Jewish objections to a particular king's imposition of new, onerous taxes.

Rulers often granted Jews permission through specific charters to live according to their own laws, to engage in trade and some other businesses, and thus to create the revenues that could be taxed. For the most part, community integrity was not an issue. Jews had no option of integration or acceptance in the rest of the society.

It may seem paradoxical, but in retrospect, the period *before* the invention of liberal, secular constitutions granted Jewish communities relative stability and autonomy—except, of course, when interrupted by pogroms, periodic expulsions, and mass slaughters such as those occasioned by the Crusades. One observer described this paradox in these terms:

Despite abuses of power on the part of communal leaders, an autonomous, tradition-bound *kahal* [community] provided psychological sustenance to its members, sheltered their existence, and nurtured collective Jewish survival. It is no wonder that, when faced later with the reality of Jewish emancipation, some Jewish leaders feared that the attendant abolition of the legal community was too high a price to pay.²⁰

As medieval kings grew more powerful and won the approval of the Pope and other clerical authorities, they used their sovereignty to displace customary law in the name of Christianity. This caused greater difficulties for the Jews and prompted mass emigrations to the East. The plague also contributed to mass migrations. So did the expulsions from England in 1290 and from Spain in 1492.

Further disruption occurred in the 16th century with the beginning of Protestantism. The revolt by Martin Luther and other Protestants in the 16th century had the unintended effect of advancing secularism in Europe. The Protestant Revolution displaced the one dominant religion with many religious views and groups. The challenge for governments everywhere became how to maintain order without doing constant battle over religion. One technique depended upon and strengthened emerging nationalism. The Peace of Augsburg of 1555, for example, resolved that the faith of the monarch would be the official faith of the realm and its citizens.²¹ When varieties of Protestants began to challenge the dominance of Catholicism, however, Jews and Moslems were no longer the only heretics.

Order fell, however, before the religious wars of the 17th century. Bloody and tumultuous, the wars convinced many that no single religion would ultimately prevail and therefore leaders ushered in an era of greater tolerance. At the same time, the tight order of feudal society broke down. Growing conceptions of a secular state relied on positive law and eroded earlier notions of community-based norms. These changes corroded respect for Jewish communal autonomy and rabbinic court power. From without, the Jewish community faced reductions of the privileges of autonomy; from within, the Jewish communities confronted declining commitments to separatism. More Jews moved to cities and participated in the Industrial Revolution, with experiences then of working side-by-side with non-Jews.

The general secularization of society permitted many Jews and Christians to meet on neutral ground. The ideas of the Enlightenment justified this common ground on the theory that all men have reason and access to truth, unaffected by class or religious

20. COHEN, *supra* note 13, at 11.

21. SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 49 (1968); *THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH* 108 (F.L. Cross & E.A. Livingstone eds., 2d ed. 1983).

distinction. Thus, Jews who accepted this program could themselves be accepted. But what would it mean to "sign on to the program"? This crystallizes my question: How are Jews to live in a world that offers equality and freedom if the Jews would simply assimilate?

Spinoza faced excommunication for his answer in the 1650's. He advised keeping the natural law as divine, but in recognizing its universality and giving up the ceremonial law, he designed to convert Hebrew slaves into an obedient body politic in a defunct kingdom of Israel.²² A more popular answer within Jewish circles appeared in formulations by Moses Mendelssohn. Mendelssohn argued that the modern state is compatible with Judaism. He counseled Jews to "devote yourselves to the constitution of the land in which you have settled, but remain steadfast in the religion of your fathers."²³

Now it was the very Jewish-looking Moses Mendelssohn who inspired this classic story. Mendelssohn was walking down a busy street in Berlin, where he accidentally bumped into a large Prussian officer—who erupted angrily, saying, "Swine!" Mendelssohn returned with a courtly bow, replying, "Mendelssohn."²⁴

What is this story about? Is it a parody of what happens when a subgroup adopts the mores of the majority? A bittersweet commentary on what happens when a despised group claims equality, while retaining identity? Perhaps the story foreshadows by 150 years what happened in Berlin under the Nazis.

In Mendelssohn's still-hopeful era of the late 18th century, ideals of freedom, equality, and fraternity brewed and spilled into the French and American revolutions. Unanswered then, and unanswered today, are questions about what the promise of liberal constitutions should mean for the Jews, especially in three areas:

1. The education of children. Should the state be able to compel participation in state-directed education? Should any group, like the Jews, be able to seclude their children from secular, state-run education? Should education aim to prepare young people for participation in the larger polity or should it seek to preserve distinctive traditions? Does the effort to do both risk doing neither? Christians for centuries have argued that exposing Jews to Western civilization will lead to an abandonment of Jewish ways and to conversion. Have they been right or wrong?

2. Family law. Should the state be in charge of the rules governing entrance into and exit from families through marriage, divorce, and adoption? Should the state control the definition of family obligations and prerogatives and take charge of the care of dependents, those who cannot care for themselves? If not, should a religious group be able entirely to control such intimate matters, even if some of its members would like to opt out and to use secular rules? This is an issue in Israel today. A thriving industry helps Israelis travel outside the country when they wish to be married beyond the control of religious law. There is also a great problem for women who have not obtained religious divorces and yet wish to remarry. This becomes a question of gender equality when the secular state offers different guarantees from what the religious one accords. Consider,

22. See also COHEN, *supra* note 13, at 12 (stating that Spinoza recommended "a national . . . rational and ethical religion, which the state would translate into positive law").

23. MOSES MENDELSSOHN, *JERUSALEM* (1783), reprinted in *A TREASURY OF JEWISH QUOTATIONS* 89 (Joseph L. Baron ed. 1985).

24. *THE BIG BOOK OF JEWISH HUMOR* 82 (William Novak & Moshe Waldoks eds., 1981).

as another example, the choices of state versus family control of domestic violence that Orthodox Jewish women face in the United States.

3. Religious accommodation versus neutrality in public settings. Should a subgroup be able to secure special treatment when its members serve in the military or elsewhere in the government? When does accommodation become inconsistent with the government's commitment to neutrality concerning religion? Should Jews demand an entirely neutral government and oppose the use of prayer at the beginning of a legislative session or during a public high school graduation ceremony—or, instead, should Jews seek periodic rotation of Jewish clergy alongside a full array of leaders of other religions? Can Jews who serve in the military disobey the requirement of wearing a specified uniform by wearing yarmulkes? Our Supreme Court said “no,” but Congress stepped in and said “yes.”

As sovereignty has passed from kings to the people, the Jewish community has also been transformed from the Other to individuals of the Mosaic persuasion, individuals like everyone else. This only poses the Jewish question still more starkly: Can integration of the Jews into the common world of citizens be compatible with retaining adherence to the law of Moses and with Jewish communal autonomy?

The French Revolution put this question sharply. As part of the revolutionary commitment to equality, France specifically offered citizenship to its Jews if they met certain conditions, took civic oaths, canceled exemptions from general rules and obligations, and relinquished privileges of community autonomy.

One Jewish leader of this period, Berr-Isaac-Berr de Turique, wrote to his brethren in Lorraine and proclaimed that the Jews must “divest [them]selves entirely of that narrow spirit, of corporation and Congregation, in all civil and political matters, not immediately connected with our spiritual laws, in these things we must absolutely appear simply as individuals, as Frenchmen.”²⁵

Under Napoleon, Jews in France faced the loss of their newly gained citizenship unless they could reconcile their religious beliefs with their duties as members of the French polity. Official pressure produced rabbinic rulings finding religious authority permitting Jewish soldiers to eat legumes during Passover. In the United States, beginning in the 1830's, groups of Jews advocated changing Sabbath observance to Sunday in order to avoid conflict with the prevailing Sunday laws.²⁶

Does the relatively tolerant and open setting of France explain why the Dreyfus Affair erupted in 1794? The court martial and banishment and then the trial and retrial revealed how even a Jew who assimilated in all notable respects, who attended French schools and served as a career officer in the French army, risked anti-Semitic attack. The event foreshadowed the Nazi era's final solution of extermination that treated genealogy as the key aspect of identity. After these events, many Jews concluded that assimilation is illusory and destructive to the Jews.

Jewish groups who tell their history are likely to cast their eyes on this trail of crises and still feel beleaguered. Contemporary Jews know that Jews for centuries have lived

25. Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehilah*, 25 U. MICH. J.L. REF. 633, 643-44 (1992) (quoting letter from Berr-Isaac-Berr to the Jews of France (1791), translated in FROM EXPULSION TO EMANCIPATION: TEXT AND DOCUMENTS ON JEWISH RIGHTS 16TH - 18TH CENTURIES 141 (Yosef H. Yerushalmi ed.) (collection of photocopied sources for use in courses at Columbia University)).

26. MORTON BORDEN, *Jews, Turks, and Infidels* 110 (1984).

as minorities within non-Jewish nations and asked: How much accommodation should occur from the Jewish side? How much from the side of the state?

This reminds me of this story from the Talmud, the rabbis' commentaries on the Bible:

Caesar said to Rabbi Tanhum, "Come let us become one people."

Rabbi Tanhum replied, "By my life, we who are circumcised cannot be like you. You, then, should become circumcised and be like us."

"A very good answer," Caesar replied, "unfortunately, anyone who defeats the Emperor in an argument must be thrown to the lions." So they threw Rabbi Tanhum to the lions. But the lions did not eat him.

An unbeliever, who was standing nearby, said, "The reason the lions do not eat him is that they are not hungry."

To test this theory, they threw the unbeliever to the lions, who ate him.²⁷

We are probably meant to think that the lions got it right. One thing they, and Rabbi Tanhum, got especially right is that neutrality is impossible given the relation between religion and politics. Simply calling for neutrality by the state does not tell us what the starting point is: Is the starting point a position compatible with or antagonistic to religion? Consider such neutral-sounding rules as: no one may get unemployment benefits who lost a job due to drug use; and no one may get unemployment benefits who was fired for any reason at all. If the drug use in question was ritual use of peyote under religious auspices²⁸—or if the employee was fired for refusing to work on her Sabbath²⁹—the rules no longer seem neutral.

The state must *not* be neutral, in the sense of doing nothing to accommodate those with religious beliefs, where the state's own starting point excludes or burdens them. Otherwise, anyone with religious beliefs simply must dispense with them in order to operate in the secular, public sphere.

From this vantage point, some—but far from all—observant Jews resist accommodating the state, and ask instead how the state can accommodate religion. This historical narrative reveals some of the views held by residents of the Village of Kiryas Joel whose recent Supreme Court case deserves interpretation in light of the historical narrative I have offered.

III. BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET

How can "the story" of a dispute be told given the fact that its participants have different and conflicting perspectives? When a group's experiences are reported, familiar questions about who may speak for whom and how multiple experiences can be summarized can and should surface. These difficulties become especially pronounced when the dispute moves through the adversarial legal system, further polarizing participants and their supporters. Nonetheless, a story can be constructed through the points of convergence in the narratives of opposing sides and through efforts to honestly report the points of divergence. No doubt, the story will be incomplete and will inspire revisions or new stories. However, in my view, that is a strength of the use of stories, not

27. THE BIG BOOK OF JEWISH HUMOR, *supra* note 24, at 84 (quoting *Sanhedrin* 39a). Assuming the unbeliever is supposed to be a Jew, the story says something about divisions within as well as divisions without.

28. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

29. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

a weakness. These features of stories help to reveal the significance of perspectives to efforts to make sense of experience, while also inviting elaboration, rejoinder, and conversation.

So, here is a provisional story of the case of *Board of Education of Kiryas Joel Village School District v. Grumet*³⁰ presented both from the perspective of the Satmar Hasidim and from the views of some outside observers, including opponents in the litigation and critics more generally.

When the story began would itself be a likely subject for dispute, depending on which side is consulted. Did it start when residents of the Village of Kiryas Joel successfully pressed the New York State Legislature to adopt a statute that created a school district for the village which is composed entirely of followers of Satmar Hasidim? Or did it start when a group of Satmar Hasidim, a group of ultra-Orthodox Jews, moved to upstate New York and faced charges of zoning violations in the city of Monroe? The Satmar used housing in ways that reflected their close-knit group practices and prior experiences of highly dense urban living. They ultimately avoided the zoning issue by seeking, gaining, and defending incorporation as a separate local government under New York law.³¹

Members of the Satmar community would probably say that the story began with the history of the Jews, or at least with the history of the Teitelbaum family leadership of a sect of Hasidic Jews in Hungary in the 19th century.³² Emerging in hostile, non-Jewish settings, this Orthodox sect subscribed in Europe, and then in the United States, to the idea that the Law of the land is the Law—but only as a choice of law rule within Jewish law.³³ The Satmar are the largest, most traditional Hasidic community. They established themselves in the United States to honor the memory of those murdered in the Holocaust by recreating separate communities resembling the Eastern European villages that the survivors fled after World War II.³⁴ The community has resisted the assimilation offered by modern secular Europe, and promoted by the economic and civic opportunities afforded in the United States. The Satmar view the United States as a government of grace which is just and kindly disposed to them, but which is also a threat due to the larger society's lures and lawlessness.³⁵

The Satmar believe that “[t]he Torah forbids the new.”³⁶ They transported their way of life from Hungary to Brooklyn, and then some moved to what became Kiryas Joel. They speak Yiddish; they dress in clothes more typical of medieval communities than late 20th-century America; they segregate the sexes outside the home; they eschew television, radio, and English-language publications.³⁷

30. 114 S. Ct. 2481 (1994).

31. The incorporation followed the procedures established by state law. 114 S. Ct. 2481, 2485-87 (1994). The procedure involved no substantive review of the justifications for or desirability of a newly incorporated town. Indeed, the supervisor who approved the petition did so with regret about the lack of authority for a substantive basis for review and criticized the incorporation as a misuse of incorporation to bypass the intense and litigated conflict over the Satmar's zoning violations. *In re* Formation of a New Village to be Known as 'Kiryas Joel,' Supervisor, Town of Monroe, Orange County, New York, (Decision on Sufficiency Petition), Dec. 10, 1976, *reprinted in* Joint Appendix at 15-16, Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (No. 93-517) (challenging the validity of the village incorporation petition). The supervisor also treated claims by the Satmar of religious persecution as spurious.

32. ISRAEL RUBIN, *SATMAR: AN ISLAND IN THE CITY* 28 (1972).

33. Allan L. Nadler, *Piety and Politics: The Case of the Satmar Rebbe*, 31 *JUDAISM* 135, 145 (1982).

34. JEROME R. MINTZ, *HASIDIC PEOPLE: A PLACE IN THE NEW WORLD* 29 (1992).

35. RUBIN, *supra* note 32, at 171.

36. *Id.* at 152.

37. WILLIAM M. KEPHART & WILLIAM W. ZELLNER, *EXTRAORDINARY GROUPS* 161-75 (4th ed. 1991).

The Satmar community educates its children in private, single-sex religious schools. The disabled children in the community, however, are entitled under federal and state law to special educational services using public funds.³⁸ Briefly during the mid-1980's, those services were provided by the state in the religious schools, but Supreme Court decisions announced at the time forbade the provision of such direct public services on the site of religious schools.³⁹ Some of the parents of disabled Hasidic children then sent their children to the public schools in the next town,⁴⁰ but found it unacceptable because of the "panic, fear and trauma" experienced by children sent away from their community to be with people so different.⁴¹ Some of the parents had challenged the provision of services in the public schools as inadequate and insensitive to the needs of their children.⁴²

At the request and urging of residents of Kiryas Joel, the New York legislature authorized the Village of Kiryas Joel to establish public schools. The village exercised this authority solely for disabled students since the Satmar Hasidim in the village had no interest in any other public schools. Citizen taxpayers and the New York School Board Association sued, claiming that the statute creating this special school district was not neutral and violated the requirement to separate church and state mandated by the First Amendment.⁴³ Viewed in this way, the case presents a problem squarely within all three questions left unanswered by the history of Jews in Western constitutional societies: the education of children, the governance of families and care of dependents, and the acceptable degree of accommodation of religion in public settings.

It may well be that the Hasidic community had complex motives. Many outside observers think that the Satmar are a contentious and difficult group, with authoritarian rabbis, internal schisms, and a willingness to use devious tactics of appeasement, bribery,

38. 28 U.S.C. §§ 1400-1402, 1404, 1409, 1411-1414 (Supp. V 1993); N.Y. EDUC. LAW §§ 4004-4005 (McKinney 1995).

39. A set of cases forbids state aid to parochial schools and even the provision of state services, such as publicly funded services for students with disadvantaged backgrounds or with disabilities, on the grounds of parochial schools. In 1985, the Court ruled that public services such as remedial programs for disadvantaged students cannot be provided by employees of public schools on parochial school property. *Aguilar v. Felton*, 473 U.S. 402 (1985). The Court similarly ruled in 1977 that although diagnostic services would be permissible on the site of a religious school, therapeutic and remedial services could only be provided on a neutral site off the premises of a sectarian institution. *Wolman v. Walter*, 433 U.S. 229 (1977).

In contrast, in 1993 the Court found no constitutional bar to the provision of a sign language interpreter for a deaf student who attended a parochial school. The Court reasoned that this public provision of a service defrayed none of the usual costs of the parochial school, nor did the interpreter participate in the actual instruction of the student. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

Justice O'Connor's concurrence in *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring), suggested reconsidering *Aguilar* and *Wolman*. See *infra* text accompanying notes 63-65. There may be reasons to support this view apart from obviating the motive for the statute at issue in *Kiryas Joel*. I will suggest, however, that problematic as it is, the statute affords a greater chance for connecting an insular religious community to others in society.

40. Some of the parents had tried this option in the neighboring Monroe-Woodbury school district. Earlier, the Satmar community had used an annex to the religious school for delivering special education services, but this use of public funds was forbidden by Supreme Court decisions in the mid-1980's. See *supra* note 39 and accompanying text.

41. *Kiryas Joel*, 114 S. Ct. at 2495.

42. This claim animated the lawsuit that became *Monroe-Woodbury Central School District v. Wieder*, 527 N.E.2d 767 (N.Y. 1988) (alleging inadequate one-on-one services). In addition, some of the parents claimed that their children's language needs were not met. See Affidavit of Abraham Wieder in Support of Motion to Intervene, app. H at 127a, *Attorney Gen. of N.Y. v. Grumet*, 114 S. Ct. 1046 (1994) (No. 93-539).

43. The First Amendment to the Constitution combines a commitment to separate church and state and a guarantee to individuals that they remain free to exercise their own religion. These two goals often seem to conflict. An individual may ask the government to devise a special accommodation to permit free exercise of religion, but then the government faces objections that such an accommodation favors that religion, or favors religion over no religion. This tension has produced a variety of resolutions. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14-4 to 14-5, at 1166-79 (2d ed. 1988).

and manipulation.⁴⁴ Some outside observers also argue that the Satmar never really wanted a public school; that instead, they wanted the state to pay for a private school, entirely segregated from the rest of the world.⁴⁵

There is evidence outside the court record of preferences for self-segregation by the community. One Satmar residing in New York City was quoted as saying: "If we have our kids learning with [others], they'll be corrupted. We don't hate these people, but we don't like them. We want to be separate. It's intentional."⁴⁶ Jerome Mintz quotes another Satmar from Williamsburg, New York who said:

If you raise a child for eighteen years, sacrifice and sweat blood, and someone comes along and tries to influence them in a different way from yours, what would you do? . . . Our community is built on religion. You can't understand it with your mind. It's more important than any other thing.⁴⁷

Significantly, this defense of separatism was offered to defend the Satmar against another Hasidic group, the Lubavitch. Indeed, this particular statement was offered in defense of Satmars in Williamsburg who assaulted a Lubavitch rabbi for offering lessons to an eighteen-year-old Satmar. This certainly portrays a vivid sensibility of the outside world as a threat, and the inside world as very particular to the Satmar Hasidic community.⁴⁸

Yet "separatism" is not an accurate way to describe the Satmar, who engage in commercial activities, such as the diamond industry, both in New York as well as in the rest of the world. In court, on the record, the Satmars emphasized that separatism is not a tenet of faith. Before the Supreme Court of the United States, the Satmar specifically disputed the plaintiffs' claim that the Satmar faith requires its adherents not to mix with persons of other faiths.⁴⁹ The brief for the Satmars stated: "While we have never disputed that the Satmar prefer to live together, they do so to facilitate individual religious observance and maintain social, cultural, and religious values, not because it is 'against their religion' to interact with others."⁵⁰ One Hasidic observer notes that ambivalence about America leads them to threaten or bristle for fear that friendships with outsiders could undermine their separatism.⁵¹

Moreover, whatever views toward separatism some members of the community may hold, the community did request authorization for a public school. Furthermore, the school they set up was administered by people from outside the community and offered

44. See, e.g., Nadler, *supra* note 33, at 145-47. Viewers of CNN may have acquired their own evidence on such matters while the case was pending. As the case was argued in the Supreme Court, members of the Satmar community vied for the opportunity to speak with reporters about fights internal to the community as well as views about the case. Oral tradition among the New York Jewish community also reflects these views of the Satmar. The story is told of one group of Satmar who, during a battle over incorporation of another village, were able to convince the Presiding Judge that they were patriotic Americans by naming their streets after U.S. Presidents. Daniel D. Alexander, *Political Influence of the Resident Hasidic Community on the East Ramapo Central School District 48* (1982) (unpublished Ph.D. dissertation, New York University).

45. Suzanne Fields, *Public School District for Sect Denied*, ATLANTA J. & CONST., June 30, 1994, at A2.

46. Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235, 1238 (2d Cir. 1986) (recounting quotation from media coverage of the case).

47. MINTZ, *supra* note 34, at 162.

48. A joke circulated within other Jewish communities about the Satmar conveys another side of this story—the picture of the Satmar as self-righteous fanatics: a Satmar rebbe dies and goes to Heaven where the angels offer him a meal. The rebbe says, "Excuse me, who said this food is kosher?" "God himself," answers an angel. "Hm, very interesting, could I maybe have a salad?" replies the rebbe (to avoid eating anything that is not kosher).

49. Brief for Petitioner at 4 n.1, Board of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (No. 93-517) ("The record does not support this contention, and it is wrong as a matter of fact.")

50. *Id.*

51. ALEXANDER, *supra* note 44, at 52 (citing Hasidic informant).

entirely secular instruction by teachers from outside the community.⁵² The superintendent, who has direct control over the school, is a person with twenty years of experience in the field of bilingual/bicultural education in the New York City public schools—and a person who, himself, is not Hasidic.⁵³

No religious instruction occurred at the school. Moreover, as evidence that the Satmar did mean to seek public education, the school is co-ed, despite the religiously mandated sex segregation in the religious schools.⁵⁴

In its lawsuit, the New York School Board Association claimed that it was not the school per se, but its creation by the state which violated the Establishment Clause. As it turns out, the majority of the organized Jewish community, and most Jews I know, agreed with this position and disagree with the creation of the special district for Kiryas Joel. In amici briefs filed with the Supreme Court, representatives of the Orthodox Jewish community supported Kiryas Joel, but all other Jewish groups—and 500 citizens of Kiryas Joel itself—opposed the special school district on constitutional grounds.⁵⁵

The amicus briefs are filled with learned analyses of the Supreme Court's religion clause cases. Looking behind them, however, to ask why most organized Jewish groups opposed Kiryas Joel, again illuminates the subgroup question.

A deeply religious Jewish professor suggested to me that the Satmar should not ask for special education from the state, but should instead take care of their own, and secure their independence. Other Jews might worry that accommodating members of the Kiryas Joel community could unleash Christian animosity toward all Jews. Even if accommodation helps in the short run, in the long run it breeds jealousy and resentment. Some may even fear that non-Jews will think that all Jews are like the Satmar: bearded, intense, antiseccular, and rigid. Others may fear that letting pro-Jewish legislation go forward will prompt a backlash against religious Jews or Jews in general.

In the long run, permitting the special school district could have further negative results for Jews, including the Satmars. Accommodation of this Hasidic community could lead to accommodation of other fundamentalist groups—and the others might not be Jews. This prospect threatens the liberal, secular state with takeover by enclaves of illiberal, fervently religious groups. In an era of growing Christian fundamentalist political movements, these are not imaginary worries. For many Jews, the commitment to separate church and state is so basic a precondition for freedom from state-sponsored oppression that the analysis stops there. Anything that smacks of state-sponsored

52. Telephone Interview with Nathan Lewin, Counsel for Kiryas Joel (Nov. 4, 1994).

53. Affidavit of Steven M. Benardo, app. J at 115-17a, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 544 (1993) (No. 93-517).

54. Brief for the Petitioner at 4 n.1, *Kiryas Joel* (No. 93-517). Consistent with their view that religious law is central, the Satmar also argued that their acceptance of co-education for disabled children is permitted by "Satmar religious observance." *Id.* This convenient answer to some may raise questions about sincerity, as did the change in Church policy following the Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983) (refusing a tax exemption to a religious institution that discriminated on the basis of race).

55. Siding with Kiryas Joel Village School District were Agudath Israel of America and other advocates for Orthodox Jewish groups, the Roman Catholic Archdiocese of New York, and a variety of other Christian groups. Siding against them were the American Jewish Congress, the Union of American Hebrew Congregations, the American Jewish Committee, the Anti-Defamation League, the National Council of Jewish Women, People for the American Way, a variety of other religious groups, groups committed to the separation of church and state, and teachers' unions. The opposition also included 500 members of the Committee for the Well-Being of Kiryas Joel, a committee formed by village residents to support the rejection of the school district.

religion—no matter what the religion—must be stopped.⁵⁶ Some Jews may also support this conception of separation apart from its instrumental value to Jewish communities, simply seeing it as a principled opposition to state-sponsored or even state-favored religion.

This conception of a strict separation between church and state underlies the decision of the state trial court in *Grumet v. New York State Education Department*.⁵⁷ The trial court held that the state statute creating the special district violated the Establishment Clause of the United States Constitution. The appellate court affirmed, as did the highest court of the state.⁵⁸ The majority reasoned that the statute created an unacceptable symbolic union of church and state, implying endorsement of Satmar Hasidim.⁵⁹ The chief judge of New York's highest court is herself an Orthodox Jew; Chief Judge Judith Kaye wrote a concurrence rejecting the school district as too broad a measure to address the specific issue of the requirement to separate church and state because the statute created a special school district rather than simply a local school.⁶⁰

The United States Supreme Court agreed, though it could not agree on its reasoning.⁶¹ There are several opinions and there is a vigorous dissent. A majority joined Justice Souter in concluding that the special school district gave too much authority over a secular function of society to a religious group, and unconstitutionally delegated a secular function to a religious body. Justice Kennedy's opinion, in contrast, analogizes the problem to recent disputes about apportioning voting districts along racial lines.⁶² This opinion reasoned that the special school district just looks too artificial, too carved out, to be neutral toward religion.

56. Along these lines, most Jews have traditionally opposed the introduction of prayer in public schools on the theory that it will not be Jewish prayer said there, whether implicitly or explicitly, and instead will be a boost to the majority religions. As Shakespeare told us, however, misery makes strange bedfellows; so does politics. Thus, some Jews join with the Christian fundamentalists to oppose a Supreme Court perceived as hostile to religion. Such coalitions were needed to get Congress to adopt the Religious Freedom Restoration Act. 42 U.S.C. §§ 2000bb-2000bb(4) (Supp. V 1993). Fundamentalist Christians have also solicited support from Jewish groups for their proposals to permit prayer in public schools and more generally enlarge the role of religion in public life. See, e.g., Mona Charen, *A Wise Effort to Unite Christians and Jews*, TAMPA TRIB., Apr. 10, 1995, at 7; Clifford D. May, *Separation Need Not Mean Alienation*, ROCKY MOUNTAIN NEWS, Apr. 9, 1995, available in 1995 WL 3186479; Steve Rabey, *Some Conservative Jews Join Hands with Religious Right*, DALLAS MORNING NEWS, Feb. 18, 1995, at 1G.

57. 579 N.Y.S.2d 1004 (N.Y. Sup. Ct.), *aff'd*, 592 N.Y.S.2d 123 (N.Y. App. Div. 1992), *aff'd in part*, 618 N.E.2d 94 (N.Y.), *cert. granted*, 114 S. Ct. 544 (1993), *aff'd*, 114 S. Ct. 2481 (1994).

58. The appellate division affirmed on both state and federal constitutional grounds. *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 592 N.Y.S.2d 123 (N.Y. App. Div. 1992). The highest state court affirmed on the federal question while reserving the state constitutional issue. *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94 (N.Y. 1993).

59. *Kiryas Joel*, 618 N.E.2d at 100.

60. *Id.* at 102 (Kaye, C.J., concurring).

61. Justice Souter delivered the opinion of the Court, maintaining that (1) there is no assurance that another religious community seeking a special district would obtain one from the legislature, and (2) this accommodation of religion crossed the border into unacceptable establishment which could be avoided by other measures. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2491-95 (1994). Three Justices joined Justice Souter's additional theory that the state's delegation of authority to a group defined by its common religion produced an impermissible fusion of governmental and religious functions. *Id.* at 2487-90. Justices Blackmun, Stevens, O'Connor, and Kennedy each wrote separate concurring opinions.

None of the Justices explored another twist in the case, perhaps because it is so complicated. Consider parsing the federal law concerning the rights of disabled children whose parents opt, as the Constitution permits, for private schooling. Federal law specifically requires states to assure that special education and related services are extended to children placed by their parents in private schools. BONNIE P. TUCKER, *FEDERAL DISABILITY LAW: IN A NUTSHELL* 334 (1994). But who is to pay for this: the parents or the public? This is an issue still in dispute in the courts. *Id.* at 337-38. If the private schools are religious, may parents obtain public support for the education and related services needed by their children with disabilities? The parents here could not afford private tutoring. Petitioner's Brief at 23, *Kiryas Joel* (No. 93-517).

62. *Kiryas Joel*, 114 S. Ct. at 2504-05 (Kennedy, J., concurring in the judgment).

Concurring, but writing only for herself, Justice O'Connor worried about the appearance of a legislature that favored one religious group over other groups.⁶³ She used her concurrence to suggest ways to provide permissible accommodations, including a general statute permitting groups such as the Satmar to apply for permission to set up independent school districts.⁶⁴ She also called for reconsideration of prior Supreme Court cases forbidding public special education services on the sites of religious schools.⁶⁵ In her view, such public services would be a permissible accommodation of religion. In his concurring opinion, Justice Stevens, joined by Justice Ginsburg, objected to shielding of the Satmar children from secular influences.⁶⁶

Justice Scalia wrote an impassioned dissent, joined by Chief Justice Rehnquist and Justice Thomas.⁶⁷ Anyone who knows me knows this is not my crowd. But I think the dissenters rightly argued that the rest of the Court in this case was overly suspicious of or even opposed to religion. The dissent reasoned that the state of New York came up with a reasonable accommodation for a special case. Nothing in the record or in experience suggests that the State would refrain from accommodating another religious group that asked for it. While one might worry about the unequal access to the power necessary to mobilize sufficient legislative support for such a special statute, it would be wrong to assume that the legislature acted with unacceptable favoritism toward the Satmar and would disfavor another religious group's request for a similar accommodation.

The immediate response of the New York legislature was to adopt new legislation encompassing something like the Kiryas Joel special district into a statute that looks more general and more neutral.⁶⁸ New York thus took up the suggestions in some of the Justices' opinions to avoid an appearance of favoritism by changing the form, but not the substance, of the law authorizing the Kiryas Joel school district.

This new statute has already been challenged in court; the trial court rejected the plaintiffs' request for a preliminary injunction.⁶⁹ Therefore, the school is still operating while the lawsuit proceeds.⁷⁰ The challengers claim that the requirements of the new statute make it useful in practice only to the Village of Kiryas Joel; the state claims that many other municipalities could comply.⁷¹ This is a hard one to call.

63. *Id.* at 2495-2500 (O'Connor, J., concurring in part and concurring in the judgment).

64. *Id.* at 2498.

65. *Id.*

66. *Id.* at 2495 (Stevens, J., concurring).

67. *Id.* at 2505 (Scalia, J., dissenting).

68. Act of July 6, 1994, ch. 241, 1994 N.Y. Laws 827. The statute directs that any municipality located wholly within but not coterminous with a single large school district can organize a new school district if certain conditions are met. Those conditions include: regulation of both absolute student enrollment (minimum 2000) and the reduction from the preexisting school system (no more than 60%), assurance that the creation of the new district will not produce a school system (the new one or the remains of the old one) with per pupil expenditures below the statewide average, and required approval by a majority of the requesting municipality and a majority of the preexisting school board. *Id.* The legislature also adopted an Act that abolished the Kiryas Joel Village School District but ensured continuing operation of its school until consolidated with or replaced by a new or existing school district. Act of July 6, 1994, ch. 279, 1994 N.Y. Laws 888.

69. *Grumet v. Cuomo*, 617 N.Y.S.2d 620, 632 (N.Y. Sup. Ct. 1994).

70. Telephone Interview with Nathan Lewin, *supra* note 52; see also *Grumet*, 617 N.Y.S.2d at 632 (denying temporary restraining order to enjoin the funding and further operation of the Kiryas Joel Union Free School District pending results from the new lawsuit). The trial court read the Supreme Court's decision to permit Kiryas Joel to form its own school district "provided that it results from enabling general legislation that is based on neutral and non-religious criteria. This would dissolve the impermissible fusion of government and religion" under the prior authorizing legislation. *Id.* at 625. "Facially at least the conditions established by the Legislature for the creation of new school districts . . . are religion-neutral, reasonable, and appropriate, and effectuate a legitimate state function." *Id.* at 627.

71. *Grumet*, 617 N.Y.S.2d at 626; Telephone Interview with Nathan Lewin, *supra* note 52.

The problem of the Kiryas Joel School District can be discussed as an example of the narrow, or nonexistent, distance between the constitutional command to avoid establishing or favoring religion and the constitutional command to protect religious liberty. As many observers note, government efforts to accommodate religious individuals run the risk of looking like favoritism or preference for religion.⁷² The case could also be examined in terms of the relative power of different groups in legislative politics. The judicial response might be defended as an effort to restrict unfair advantages secured by a group when similar advantages have not—or have not yet—been secured by others.⁷³

But the historical narrative I have offered locates this case in the broader context of the subgroup question. Does the legal order extend support to subgroups or force them to choose between separatism and assimilation? The Supreme Court's decision in *Kiryas Joel* fits the second alternative. The community is told that it must choose either separatism—and refrain from exercising the statutory right to public support for the education of children with disabilities—or else pursue greater contact with the larger society than its use of a secular, special, local school district receiving only Satmar children.⁷⁴ The case suggests what the subcommunity must give up to enjoy the rights extended to others.⁷⁵

Justice Stevens' opinion was the most explicit in this regard. He said that the separate school system wrongly shields the disabled children from association with their neighbors and thereby gives “official support to cement the attachment of young adherents to a particular faith.”⁷⁶ Justice Scalia understandably, though sarcastically, responded in the dissent, “[s]o much for family values. If the constitution forbids any state action that

72. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 4; Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 716 (1992); *supra* note 43.

73. This argument, while similar to an Establishment Clause argument, also mirrors some equal protection analysis. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 41-48 (1990) (drawing parallels between equal protection and religious protection issues).

The argument more basically proceeds with this line of reasoning: At its core, our Constitution is a document against the domination of any religious groups by others or by nonreligion, against the domination of the individual by the state, and, perhaps, also against the domination of the states by the federal government. Legislative favoritism toward any one group is suspect. At the same time, neutrality is a mistaken way to articulate these goals, for the state is inevitably preferring one position among the entire possible range in evaluating claims of domination, inequality, or disadvantage. Therefore, the judiciary is charged with the important task of monitoring the legislative results to assure that no group systematically prevails over others.

This line of analysis is not especially easy to apply. Indeed, consider the difficulty of comparing the power and privileges of the Satmar Hasidic community, American Jews in general, and children with disabilities to resolve the challenge to the Kiryas Joel School District. At the same time, the analysis renders explicit the goals of a liberal state in a pluralist society.

74. It is not entirely clear that “choice” is the right concept here, if members of a community like the Satmar feel compelled by, rather than “choosing,” their way of life. Yet choice is a constant framework for analysis in United States law and culture, and one that even fundamentalist religious groups deploy when it is helpful to them. Thus, a third alternative that many, including many religious leaders, endorse would be vouchers which would permit parents to select their own preferred school. The separation of church and state question would arise with vouchers if the parent selected a religious school. Efforts to construct a constitutional voucher scheme are underway in many parts of the country. For a review of the arguments, see James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 495.

75. Perhaps, as Robert Cover has suggested, the state's interest in social control threatens and at times even destroys the meanings created by subcommunities. ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 109-13 (Martha Minow et al. eds., 1992).

76. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2495 (1994) (Stevens, J., concurring). This was consistent with Justice Stevens' view expressed in *Wallace v. Jaffree*, 472 U.S. 38, 50-55 (1985), that protection of individuals'—here, the schoolchildren's—freedom of conscience is the central focus of all the clauses of the First Amendment.

incidentally helps parents to raise their children in their own religious faith," this is a "manifesto of secularism" and "hostility to religion."⁷⁷

The answer the Constitution gives to the subgroup question hangs very much on this exchange. How much must the subgroup accommodate or give up to participate in the public sphere and to lay claim to benefits offered to everyone? Special education entitlements are assured to every child who needs them. To get them, how much must the Satmar parents give up?⁷⁸ To suggest that the Satmar parents must choose between their religious ways and the public special education entitlement assumes wrongly that religious ways are themselves matters of choice.⁷⁹

Michael Sandel, the political philosopher, has commented that the Supreme Court's jurisprudence on religion wrongly protects only religious freedom of choice rather than religious freedom of conscience.⁸⁰ Sandel argues that the Court treats religious beliefs as worthy of respect because they are "the product of free and voluntary choice."⁸¹ As a result, the Court may fail to assure freedom of conscience, which he describes as religious liberty "for those who regard themselves as claimed by religious commitments they have not chosen."⁸² For those who regard themselves as claimed by religious commitments beyond human choice, our secular constitutional order assures not neutrality but only the offer of the benefits of citizenship for those who fit the state-condoned forms of life.⁸³ Consider the landmark case of *Wisconsin v. Yoder*⁸⁴ in which the Supreme Court granted an exemption from compulsory school laws for the Amish community on the grounds that such laws threatened the Amish way of life. Many view this as the exemplar of our Constitution's respect and tolerance for religious difference.⁸⁵

The historical perspective reminds us that subcommunities exist before and after the rise of particular nation states. It reminds us to ask not only how best to design a legislative or constitutional scheme for everyone, but also to consider how subcommunities will experience and respond to that scheme of general design. Analysis of subgroups and the Constitution must at least consider the perspective of the

77. *Kiryas Joel*, 114 S. Ct. at 2514 (Scalia, J., dissenting). Indeed, Justice Stevens' argument is strikingly at odds with the precedents assuring religious liberty of parents to raise their children in their religion. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

78. To answer the question, "Where are the Satmar children in this analysis?" is no more simple than to answer all other questions about children in a legal system that does not treat them as self-determining. It is noteworthy that concern for children's own choices arise more commonly when their parents are members of minority religions than in the more common circumstances of most children. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part); *Prince*, 321 U.S. 158.

79. Some observers may question whether the Satmar compromised religious beliefs, for example the requirement of sex-segregated education, in order to gain public funds, but this would question the sincerity of their own stated religious reasons for accepting co-education for their children with disabilities. See *supra* note 54. Such questions have an appropriate place, but not within the workings of the government's judiciary.

80. Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597, 597.

81. *Id.* at 610 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)).

82. *Id.* People with disabilities may be the most obvious instance of people who do not choose their condition.

83. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

84. 406 U.S. 205 (1972).

85. See, e.g., TRIBE, *supra* note 43, § 14-5, at 1176 n.44. Justice Douglas worried about the failure to consult the children in *Yoder*, 406 U.S. at 241, 243 (Douglas, J., dissenting in part), but this attention to children's choices presumes that asking them about their schooling preferences—or indeed, any effort to open choices for them—is costless and simply enlarges their possibilities. From some perspectives, however, exposing them to choice undermines their conception of their lives as ordained, founded, or constructed by something larger than themselves. Both alternatives give and take away options.

subgroup.⁸⁶ Otherwise, without thinking, we give a large part of the answer to questions about the proper relationship between the subgroup and the larger society; we presume that the vantage point that matters is outside the subgroup itself.⁸⁷ From the perspective of the Satmar community of Kiryas Joel, there is a position between complete separatism and full assimilation, a position requesting not just public funding but actual public schooling.⁸⁸ We can, and should, return to the perspectives of other groups—and to the requisites of rules for everyone—after considering the vantage point of the subgroup.⁸⁹

IV. THE INCLUSION NARRATIVE: THE STORY OF THE DISABILITY RIGHTS MOVEMENT

Shifting from the perspective of the Satmar, one could speak of “society’s” perspective, but I worry that this is so vague as to cover up the views of the particular speaker. Historical experience suggests an important contrasting perspective that has become a part of the public culture, as well as the laws of the United States. This is the view advanced through specific social reform efforts to conceive of equality as inclusion. If inclusion is a central goal for a diverse society, the symbolic significance of the *Kiryas Joel* case is admirable: it signals disapproval of school systems created to assure segregation of any one group involved in public schools. As I shift now from the frame of particularity to the frame of inclusion, I will explore the conception of and commitment to inclusion as a constitutional, legal, and political value and as a starting point for evaluating the school district in Kiryas Joel.

Ongoing social movements challenge exclusion and discrimination on the basis of group characteristics and seek to promote inclusion. The paradigmatic social movement in this country is the struggle for racial justice during both the movement to abolish slavery in the 19th century and the civil rights movement in the 20th century. Attacking first the legal structures of slavery and then the segregation laws, the racial justice movement epitomizes the view that the Constitution fundamentally forbids state action that segregates and oppresses on the basis of certain immutable group-based characteristics.⁹⁰ As the National Association for the Advancement of Colored People

86. The question could be put in the form, what is good for the Jews, or more particularly, for the Satmar Hasidim, or even more specifically, for the Satmar Hasidim of Kiryas Joel? Putting the question this way is very different than asking what is good for the general society, or even, what are the best ways to interpret the Constitution across the range of possible subcommunities in the society. Indeed, asking what is good for the Jews sounds like a mistake if constitutional interpretation is at hand, because it looks like special pleading, or a pre-liberal attachment to group membership. It may sound as if I do not comprehend or subscribe to the idea of a constitutional liberal state which protects individuals by not preferring one group over others. But I suggest that the constitutional liberal state must consider the perspective of subgroups if it wishes to realize its commitments to tolerance, respect, and religious freedom. See also SOIFER, *supra* note 9.

87. I am not suggesting that we stop after eliciting a subgroup’s view and defer to it, only that this is a crucial step in analysis that itself must be followed by consideration of external views. See *infra* part IV.

88. The choice between separation and efforts to assimilate or at least mix with the larger community would fade if the Court took up Justice O’Connor’s suggestion to overrule its earlier precedents forbidding the provision of public services on the site of religious schools. Most likely, then, Kiryas Joel would dissolve its single public school and take the public funds to provide services for children with disabilities on the sites of the religious schools for boys and the religious schools for girls. This would result in more separation than the solution afforded by the special school district, and, given the arguments in Part IV, I find it less satisfactory.

89. For a careful argument about why a person or group should be consulted but cannot be the sole judge of their own interests, see Elizabeth V. Spelman, *On Treating Persons as Persons*, 88 ETHICS 150 (1978).

90. Usually those characteristics are those viewed by the Court as “suspect classes.” See TRIBE, *supra* note 43, §§ 16-13 to 16-23, at 1465-1553 (describing suspect class jurisprudence), but at times other groups have also received constitutional protection against segregation and oppression. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that exclusion of a group home for persons with mental retardation under city ordinance breached rational

Legal Defense Fund constructed its brilliant legal strategy to desegregate public education, culminating in the 1954 decision in *Brown v. Board of Education*,⁹¹ it affirmed the central importance of public schools to this vision of inclusion. Inclusion in this context represented both a strategy and an end in itself. Thus, the phrase “green follows white” became a shorthand for the idea that black children would most likely gain access to equal resources if seated next to white students in public school classrooms. Many reformers also believed that integration would be good in and of itself. Moreover, many advocates believed that through sharing actual day-to-day experiences, negative stereotypes about others could be overcome. Despite the fact that critics charge that the desegregation effort has either failed or was always misdirected, the inclusion vision has become a basic national response to subgroups.

Thus, inclusion movements for women, for people whose primary language is not English, and for people with disabilities have all, to some degree, been built upon the movement for racial justice. Again, reformers have taken the public schools as a critical focus. Some have challenged the exclusion of girls from elite public high schools and, more generally, all same-sex education; others have fought for language programs to render public education accessible to people who do not yet speak English. Test case litigation attacked the exclusion of children with disabilities from public education and built the foundations for both state and federal legislation assuring a free appropriate public education which emphasizes special education and related services.⁹² Part of a dramatic social and legal movement to bring about the inclusion of people with disabilities throughout the society,⁹³ the disabilities rights movement pushes for both the opening of mainstream institutions to people with disabilities and the renovation of those institutions, or for the creation of accommodating alternatives where necessary.⁹⁴

Defining inclusion in public education for children with disabilities takes a different form, however, than inclusion for racial minorities. On the one hand, each child with a disability, including each Satmar child in Kiryas Joel who has a disability, is entitled to “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.”⁹⁵ Congress adopted this guarantee in 1975 after hearings, noting that more than half of the eight million children with disabilities in the country were not receiving appropriate education services and that approximately one million were excluded entirely from public schools.⁹⁶

relationship required between regulation and its purposes). In addition, the Fourteenth Amendment authorizes Congress to adopt legislation to remedy invidious discrimination that may reach into private conduct, not just state action.

91. 347 U.S. 483 (1954).

92. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c) (1988 & Supp. V 1993) (originally entitled the Education for All Handicapped Children Act of Nov. 29, 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773 (1975)).

93. This inclusion movement secured judicial and legislative victories declaring the rights of people with disabilities against discrimination and exclusion, and rights to accommodation within employment, schools, and places of public accommodation. TUCKER, *supra* note 61, at 4-5.

94. The inclusion movement yielded the most significant piece of national civil rights legislation in 30 years—the Americans with Disabilities Act of 1990—which was enacted with phased-in enforcement provisions, now in full force. 42 U.S.C. §§ 12101-12102, 12111-12117, 12131-12134, 12141-12149, 12161-12165, 12181-12189, 12201-12212 (Supp. V 1993). Other federal disabilities rights laws include: sections of the Rehabilitation Act of 1973, 29 U.S.C. §§ 790-797(b) (1988 & Supp. V 1993); the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1988); and the 1988 amendments to the Fair Housing Act, 42 U.S.C. §§ 3610-3614a (1988).

95. 20 U.S.C. § 1400(c).

96. TUCKER, *supra* note 61, at 266. The federal law provides funds to the states following the submission of state plans to meet the full educational needs of all disabled children; the state plans in turn must develop facilities and programs to include specially tailored education and related services, conforming to individualized educational programs devised for each child. *Id.* at 268-77.

At the same time, the federal law directs that each child with a disability must be educated in the "least restrictive environment" appropriate to meet his or her needs.⁹⁷ There is thus tension between the dual commitments to assure an appropriate, individually tailored education for each child,⁹⁸ and to assure that the child is educated to the extent possible in an inclusive setting affording contact with other kinds of children in the mainstream classroom. This creates a presumption in favor of integrating children with disabilities into mainstream classrooms. That presumption is overcome, however, if an appropriate education for the child's individual needs calls for instruction and services in a specialized setting.⁹⁹

These provisions reflect the struggle to overcome two kinds of discrimination experienced by people with disabilities—the total exclusion from opportunities afforded to others, and the failure to adjust and alter existing opportunities so that those with disabilities can take advantage of them. Both imply a particular vision of equality. Both also perpetuate negative images about people with disabilities. Advocates for persons with disabilities thus argue that inclusion in mainstream institutions affords a real share in life's opportunities while also offering the chance to alter the negative attitudes toward people with disabilities that in turn produce exclusion, condescension, and degradation. Historic struggles for racial and gender desegregation provide both analogies and wellsprings of shared purposes and inspirations. It was not by accident that Justice Thurgood Marshall explicitly drew the analogy between exclusions of blacks and women when he analyzed a city's exclusion of a group of mentally retarded people from housing in the community.¹⁰⁰ Justice Marshall saw similar legacies of social isolation that reinforced inequalities of power, ignorance, irrational fears, and stereotyping.¹⁰¹

The perspective of the inclusion movement complicates the analysis of subgroups and of the school district of Kiryas Joel. Advocates for disability rights might criticize the Village of Kiryas Joel for failing to provide inclusion or appropriate education for their disabled children within their own private, religious schools. The moral commitment advanced by the inclusion movement demands both inclusion and accommodation of those with disabilities. The residents of Kiryas Joel diverge from these commitments by seeking to send their children with disabilities outside their private school's system.¹⁰² Similarly, advocates for disability rights could criticize the Village of Kiryas Joel for failing to enroll their children with disabilities in a neighboring school which would afford, even in special education classes, a different experience of inclusion—inclusion with students who are not Satmar Hasidim. From the perspective of inclusion, both criticisms raise questions about the creation of a special school for Satmar children with disabilities.

97. *Id.* at 275.

98. Such special education is not limited to the traditional classroom, "but may be provided in any setting, such as a physical education classroom, at home, in a hospital, or other institution." *Id.* at 273.

99. *Id.* at 275-77, 316-17; see 20 U.S.C. § 1412(5)(B) (1988 & Supp. V 1993) (guaranteeing the right to free, appropriate education to children with disabilities). One district has emphasized that the burden is on those who would exclude the child from an integrated setting to establish that a segregated setting is appropriate for the child. *Oberti v. Board of Educ. of Clementon Sch. Dist.*, 801 F. Supp. 1392 (D.N.J. 1991), *aff'd*, 995 F.2d 1204 (3d Cir. 1993).

100. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461-71 (1985) (Marshall, J., concurring in part and dissenting in part).

101. *Id.* at 464.

102. This raises the argument that they, as a religious community, have an obligation to care for their own. See *supra* text following note 55.

The first of these criticisms revisits the dilemma facing members of a religious subgroup seeking the benefits afforded to other citizens. The second raises a new question. I will consider each briefly, in turn.

Who might criticize the Satmar for failing to accommodate their disabled children in their own religious schools? If the criticism comes from other Hasidim or Orthodox Jews, the response may turn to religious or communal sources of ethics, family, and community duty, beyond the expertise of outsiders. If the criticism comes from secularists or even from participants in litigation challenging the legislation creating the special school district, the Satmar parents might respond that they are constitutionally protected in their choice of private parochial schools, but certainly not required to send all of their children to such schools.¹⁰³ The choice is for the parents, not the government, to make. Especially for severely disabled students, education and related services are not only expensive, but also require special kinds of expertise that public schools have developed. Seeking access to such tailored educational opportunities—to appropriate education—is the central vision of the federal law. Inclusion is a goal to be achieved only insofar as it is compatible with an appropriate education. The Satmar parents claim only to be availing themselves in a public setting of public benefits that every student with disabilities is entitled to receive.¹⁰⁴

But how can the villagers of Kiryas Joel defend their resistance to allowing their children with disabilities to experience inclusion in a public school enrolling others besides Satmar Hasidim?¹⁰⁵ Even assuming that the appropriate education for all disabled children involves all or much of the school day in classrooms designed for students with disabilities, enrollment in the neighboring school would permit contact with other disabled students from different religions, cultures, and backgrounds. This extends beyond the idea of including students with disabilities in settings with nondisabled students. It taps into a broader vision of inclusion. This vision treats the public school as the meeting ground for the variety of groups living in this country, and a place to assure equality, overcome prejudices, and forge bonds of common experience.¹⁰⁶

The defenders of the School District of Kiryas Joel can respond that some of the purposes of inclusion are met in their village district, and that other purposes may be the ideals of some people, but not the requirements mandated by law. Thus, the fact that the faculty of the public school is itself ethnically and religiously heterogeneous¹⁰⁷ provides no small measure of exposure to diversity. It exposes young, impressionable students to role models, helpers, and mentors from backgrounds quite different from their own.

The students all share a religion and a culture. This reflects the precisely tailored nature of a bilingual special education program for students who are Yiddish-speaking as well as disabled; it also reflects the separated residential patterns of the Satmar and the non-

103. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

104. In addition, as a technical legal matter, the directive to seek inclusion is placed not on parents but on the public school system; the challenge is for the public educators to devise the proper balance between inclusion and appropriate education in light of each child's needs.

105. The parents also claimed that the Monroe-Woodbury Central School District failed adequately to meet the language needs and otherwise assure individualized programs for the Satmar children with disabilities. Petitioner's Brief at 6, *Kiryas Joel* (No. 93-517).

106. See JONATHAN MESSERLI, *HORACE MANN: A BIOGRAPHY* (1971); see also RICHARD PRATTE, *THE PUBLIC SCHOOL MOVEMENT 75-124* (1973) (describing the ideology behind the movement for public schools as including a mix of assimilationism, equality, and preparation for jobs as rationales).

107. Petitioner's Brief at 28, *Kiryas Joel* (No. 93-517).

Satmar.¹⁰⁸ This is not a result of decisions made within a school district sorting only one group from a diverse enrollment into segregated special education classes. Such practices—segregating within the school students whose primary language is not English or whose race is not white¹⁰⁹—conflict directly with constitutional commitments to guard against racial and ethnic segregation in the schools.¹¹⁰ Furthermore, the design of special education programs must always guard against misuse of testing to treat as disabled nonwhites or those whose primary language is not English.¹¹¹

But where the homogeneity of the students grows from residential segregation, exclusions stem not from the law but from private choices.¹¹² Citizens of a town incorporated under state law have no duty to participate in school desegregation across town lines. The Supreme Court itself has refused to authorize remedies for racial segregation in the schools if those remedies require crossing municipal borders absent a showing of intentional segregation by the authorities in the relevant communities.¹¹³ Some of us prefer communities that voluntarily participate in efforts to overcome residential segregation through cross-district busing and other programs. But it is another matter altogether to blame the parents of Kiryas Joel for failing to pursue regional integration programs, especially with disabled students as the test case for such a social experiment. Federal regulations direct that the relevant public agencies are to assure each disabled child a placement “as close as possible to the child’s home”¹¹⁴ if that placement is appropriate. More fundamentally, parents who tried the neighboring public school attested, and no one in the record challenged, that the children risked panic, fear, trauma, anxiety, and distress in that setting.¹¹⁵ Parents claimed that their children were ridiculed

108. Those residential patterns could hardly be called accidental but, in this respect, the facts here do not differ from many other communities in which people choose, or, due to the exclusionary practices of others, are forced to live only with others of the same race, same ethnicity, or same religion.

109. The rationale of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny has been extended to Mexican-American students, *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973), and to American Indian students, *Natonabah v. Board of Education of Gallup-McKinley County School District*, 355 F. Supp. 716 (D.N.M. 1973).

110. Even ability grouping, or “tracking,” cannot be used if its effect is to segregate. *Smuck v. Hobson*, 408 F.2d 175, 189 (D.C. Cir. 1969); *Hobson v. Hansen*, 269 F. Supp. 401, 443 (D.D.C. 1967), *cert. denied*, 393 U.S. 801 (1968). This principle is consistently breached in practice, however.

111. See generally SEYMOUR B. SARASON & JOHN DORIS, *EDUCATIONAL HANDICAP, PUBLIC POLICY, AND SOCIAL HISTORY: A BROADENED PERSPECTIVE ON MENTAL RETARDATION* (1979) (observing that the rise of tracking coincided with the rise in the number of immigrants).

112. Thus there is no duty for school authorities to take action to correct racial imbalances due to housing patterns, although school authorities may choose to do so. E. EDMUND REUTER, JR., *THE LAW OF PUBLIC EDUCATION* 880-87 (4th ed. 1994). It is difficult to estimate the number of public schools and communities largely homogeneous by religion, race, or ethnicity due to residential segregation, but they are not rare in the United States. Public and private choices both contribute to the patterns of segregation, so, once again, individual choice does not capture the full story.

113. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974). *But see* *Hart v. Community Sch. Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975) (expanding the court’s inquiry in school segregation cases to include an evaluation of the effects of segregated living patterns in public housing). I would join those who have criticized the *Milliken* decision. *See, e.g.*, David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U.L. REV. 1, 53 (1983); Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U.L. REV. 1, 57-73 (1982). Others with similar political objectives have refrained from criticizing *Milliken*, perhaps due to a more basic criticism of constitutional litigation as a means to achieve racial justice. *See* H.N. Hirsch, *Race and Class, Law and Politics*, 69 B.U.L. REV. 457, 459-60 (1989) (discussing the failure to criticize *Milliken* in *DERRICK BELL, AND WE ARE NOT SAVED* (1987), and *HAROLD CRUSE, PLURAL BUT NOT EQUAL* (1987)). Contrasting with *Milliken*, interdistrict remedies have been approved where intentional segregation occurred due to actions and decisions by the relevant authorities in the affected districts. *See, e.g.*, *Hoots v. Peunsylvania*, 672 F.2d 1107 (3d Cir.), *cert. denied*, 459 U.S. 824 (1982); *Newberg Area Council, Inc. v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

114. 34 C.F.R. § 300.552(a)(3) (1994).

115. Petitioner’s Brief at 6-7, *Kiryas Joel* (No. 93-517) (summarizing affidavits and earlier case).

for their different customs and appearances. The vision of inclusion does not and should not place the burden of overcoming prejudice on the backs of the most vulnerable in the society. Severely disabled members of a religious minority look quite vulnerable in this context.

The most telling criticism from the perspective of inclusion appears in Justice Stevens' opinion in the *Kiryas Joel* case.¹¹⁶ He writes that it cannot be that the only choices here are to expose the disabled Hasidic children to ridicule, "panic, fear and trauma" in the neighboring public school system or to create a special school district for them.¹¹⁷ Instead, "the State could have taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs."¹¹⁸ Such steps would not risk violating the Establishment Clause. At the same time, they would advance the larger vision of inclusion represented by the public schools.¹¹⁹

Indeed, if we doubt such steps can be taken, then we doubt the inclusionary mission of the public schools affecting all children with disabilities, and indeed, all children who seem "different" to other children. A crucial premise of racial desegregation in the schools as a constitutionally mandated remedy for segregation is that steps indeed can be taken to teach tolerance and mutual respect. The most basic of those steps is the sheer creation of integrated settings. Psychologists have argued that when people are forced to change behavior so that it is incongruent with their attitudes, those attitudes will change to harmonize with the behavior.¹²⁰ On this theory, integrated schools will be more likely than segregated schools to elicit mutual tolerance even among groups that distrust one another.

But other steps are important to promote mutual respect in integrated schools settings. One review of the literature on the efficacy of racial desegregation programs concludes that reduction of racial prejudice is most affected by significant contact with members of other groups "under conditions of equal status that emphasize common goals and de-emphasize individual and intergroup competition."¹²¹ Important kinds of contact include group academic projects and shared membership on an athletic team.¹²² Contact with nondisabled children is especially important for children with disabilities if they are ever to learn how to interact with others and find out what behaviors are viewed as normal by

116. *Kiryas Joel*, 114 S. Ct. at 2495 (Stevens, J., concurring). It is curious that both the most powerful and most vulnerable positions in the case appear in Justice Stevens' opinion: his point about the schools' duty to prevent trauma from inclusion and his view that the parents should not be able to shield their children from competing religious influences. *Id.* His two views are compatible because they arise from an expanded view of cosmopolitanism, or what historian David Hollinger calls a "postethnic" conception of individual freedom to affiliate and disaffiliate from groups within a democratic society. See DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 4 (1995). That view is, however, corrosive of an older conception of American pluralism devoted to assuring the continued vitality of existing subgroups. See *id.* at 85-100 (discussing views of Horace Kallen and other pluralists).

117. *Kiryas Joel*, 114 S. Ct. at 2495 (quoting Board of Educ. of Monroe Woodbury Ctr. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).

118. *Id.*

119. I have proposed nearly the mirror image of Justice Stevens' suggestion by suggesting that, as the "magnet school," the one located within Kiryas Joel would draw students from other communities by the strength of its programs and by its welcoming stance.

120. Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?*, 12 J. LEGAL STUD. 69, 94-95 (1983). But others have argued that only behaviors change, not the prejudiced attitudes which may underlie behavior. John B. McConahay, *Reducing Racial Prejudice in Desegregated Schools*, in *EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY* 35, 48 (Willis D. Hawley ed., 1981).

121. McConahay, *supra* note 120, at 35.

122. *Id.* Such joint activities are more effective than instructing teachers about race relations and changing the curriculum to reflect multicultural traditions, although such measures might also be useful. *Id.* at 37, 44.

other students.¹²³ Yet it also seems the case that prejudices are more readily decreased where there are few points of difference between groups. Prejudice about racial difference, for example, may be more easily altered where there are not also social class differences among the groups.¹²⁴ Support from the community,¹²⁵ especially from neighbors and family members, is important in influencing the attitudes of students toward the experience of integration.¹²⁶

How much did the Satmar parents support their children's enrollment in the neighboring school outside their village? Could they alter their children's negative experiences by supporting the integration effort more fully? The evidence from racial desegregation suggests that the parents and neighbors of the non-Satmar must join in supporting the integration effort, and the school must undertake to construct joint projects with common purposes for students with many points of difference from one another. The perspective afforded by inclusion would press all the relevant actors to try to make it work, but would emphasize the importance of assuring each individual child an appropriate educational setting.¹²⁷

Perhaps the public school officials responsible for the entire state plan for special education should explore the possibility of expanding the diversity of students in the Kiryas Joel school district. This might include secular programs for the nondisabled Satmar children joined in common projects with the disabled children on the site of the public school; English language instruction and exercises using English might provide a good topic. It might also include non-Satmar children with disabilities, where appropriate, in programs at the Kiryas Joel school. In the record before the Supreme Court, two-thirds of the full-time students enrolled in programs at the school reside outside the district, but all of them are Hasidic.¹²⁸ Perhaps others from outside the district could join in programs to the extent that the bilingual dimension of the school permits. Indeed, given the historic tensions between the Satmar and Lubavitch Hasidic communities, an intriguing experiment in integration would bring Lubavitch children with disabilities into the Kiryas Joel public school.

Above all, the commitment to inclusion raises questions about the special school district. These are questions as much for the communities outside as for the community inside Kiryas Joel. If we view the Satmar parents as making a good faith request for secular public school education, their children are entitled to it. That includes education in a safe environment, free from ridicule. That includes accommodation for disabilities. That includes accommodation for language differences. Then the public school faces dilemmas of integration and segregation that pervade schools: when should groups of children be sorted to learn together, whether by ability, language or other traits, and when should integration be the name of the game? These are hard questions. They require accommodation by the state, not just by the families, to make the vision of freedom and equality not dependent on families giving up who they are.

123. Robert J. Goodwin, *Public School Integration of Children with Handicaps After Smith v. Robinson: "Separate but Equal" Revisited?*, 37 ME. L. REV. 267, 272 (1985).

124. McConahay, *supra* note 120, at 41.

125. *Id.* at 38.

126. Rossell, *supra* note 120, at 99-100.

127. Once again there is the alternative, endorsed by Justice O'Connor, of judicial reconsideration of the decisions forbidding provision of publicly funded services on the site of parochial schools. This would meet the needs of religious accommodation and special education programs and services, but give up on any efforts to bridge the gap between the religious community and other communities.

128. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2486 (1994).

V. THE CHALLENGE TODAY

As I near a conclusion, I hope it is clear that I care more about the questions than the answers. Yes, I think the case of *Kiryas Joel* was wrongly decided, but there is already a new lawsuit, under a new statute. The more important issues concern accommodating the competing frames of reference afforded by particular narratives of subgroup experiences and the strong commitment to inclusion as the vision of equality. In light of these competing perspectives, I have suggested a challenge to the Supreme Court: to reinterpret the Constitution to ask not just what people must give for a constitutional society, but also what the government must give.

There is a challenge to the subgroups like the Satmars and to their neighbors: can they pursue a good faith effort to work something out? Would they accept a truly public school, in the sense of some integration during some parts of the day or week, with other kinds of children?¹²⁹

There is a challenge to the special education movement: to be attentive to the risks of resegregation in the name of an appropriate education while also being attentive to the dangers of denying an appropriate education in the interests of keeping diverse students together.

There is a challenge to all of us:

- (a) to keep all sides alive in these debates;
- (b) to keep vital a liberal state committed to inclusion but also one that respects subgroup affiliations; *and*
- (c) to keep vital subgroups that may themselves both respect *and* resist the state.

Can we protect what makes us different without contributing to the misunderstandings that grow from segregation, even if it is voluntary segregation?¹³⁰ Can we articulate our own perspectives in ways that others can understand, and also work on the project of devising and revising a collective form of life for all groups?

We must each be alert to the dangers that crude notions of identity support: balkanization, fragmentation, fundamentalism, illiberalism, segregation, and prejudice around the world. We must guard against institutionalizing ways of thinking about difference that in turn produce irreconcilable conflicts and violence.

129. Their strict and even litigious adherence to their own traditions in all other contexts as well as their usual practices of staying among themselves cast such willingness into doubt. For example, members of the village engaged in a long dispute over the state-funded bus driver assigned to transport school children to a private religious school. The United Talmudic Academy, a private religious school for boys in the Village of Kiryas Joel, objected to the assignment of a female bus driver on the public bus provided under state law to transport the children between their homes and the school; the boys refused to board the school bus because of a Hasidic religious practice which prohibits social interaction between the sexes. The school district tried to accommodate the Hasidim by replacing the female bus driver with a male driver out of the seniority order. The bus driver union filed and won a grievance against the district under the collective bargaining agreement; members of the community obtained a restraining order against removing the male driver. This was only an initial phase of a lengthy controversy resulting in a successful sex discrimination suit by female bus drivers. *Bollenbach v. Board of Educ. of Monroe Woodbury Ctr. Sch. Dist.*, 659 F. Supp. 1450 (1987).

130. Perhaps different considerations arise where the subgroup identity is invented as part of a larger political struggle, as at least some observers argue is the case in Bosnia and other parts of Eastern Europe. Efforts by individuals to claim allegiance to an identity that has had no meaningful dimensions for a long period of time involve a complex process of invention and denial of competing conceptions or multiple aspects of identity. Thus, even patterns of intermarriage across religious and ethnic lines in Bosnia have not prevented the assertion of distinctive and hostile identities by the children of such marriages.

In this context, I invite you to consider how to approach the very live proposals for special public schools for African-American males only,¹³¹ the recent litigation challenging a public all-male military academy,¹³² arguments for public school math classes for girls only, requests for bilingual schools concentrating on Japanese and attracting large numbers of Japanese-Americans, and calls for public vouchers to pay for varieties of private and parochial education. What narratives of particularity and narratives of inclusion can and should contribute to public evaluations of these proposals?

I offer simultaneous attention to particular stories and to the commitment to inclusion so that we acknowledge that each of us stands at the crossroads between secular and religious society, between the vision of political emancipation and the autonomous community in jeopardy of assimilation or continued exclusions, between subgroup membership and affiliation with the larger society. Can we be narrators of particular histories of specific subgroups to render the stories comprehensible to others and defend claims for accommodation and recognition? Can we also author the story of inclusion and its vision of a society open to all? Can we weave these stories together productively?

Supreme Court Justice Charles Evans Hughes once wrote that "the history of scholarship is a record of disagreements, and when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty."¹³³ I offer no icy certainty, and perhaps no answers, but I propose some of the questions.

131. See, e.g., Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992); Michael J. Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993).

132. See *Faulkner v. Jones*, 51 F.3d 440 (1995) (affirming district court's ruling that a state run military academy, The Citadel, cannot exclude a qualified female candidate); *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *on remand*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3861 (U.S. May 26, 1995) (challenging Virginia Military Institute's policy excluding women). For commentary on the case, see Robert N. Weiner & Mark Eckenwiler, *Arms and the Woman: The Case for Equal Access to Military Colleges*, LEGAL TIMES, Nov. 7, 1994, at 25; Ellen Willis, VILLAGE VOICE, Sept. 13, 1994, at 8.

133. Charles E. Hughes, *Address of the Chief Justice, Honorable Charles Evans Hughes*, 13 A.L.I. PROC. 61, 64 (1936).