The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel

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INTRODUCTION

Recent work in political and constitutional studies has celebrated the salutary effects of robust civil societies for democracies.[1] Robert Putnam, for example, has described how Italian communities with stronger civic traditions have political leaders who are less "elitist" and are "more enthusiastic supporters of political equality" while their citizens' political involvement is characterized by "greater social trust and greater confidence in the law-abidingness of their fellow citizens than . . . citizens in the least civic regions."[2] William Galston makes a case for how civic organizations in civil society can foster the development of liberal virtues.[3] Jean L. Cohen and Andrew Arato have argued that civil society is "the primary locus for the potential expansion of democracy under 'really existing' liberal-democratic regimes."[4]

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1. For the purposes of this paper, I am following John Gray's definition of "civil society" as "that sphere of autonomous institutions, protected by a rule of law, within which individuals and communities possessing divergent values and beliefs may coexist in peace." JOHN GRAY, POST LIBERALISM: STUDIES IN POLITICAL THOUGHT 157 (1993).

2. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 102, 111 (1992). For a discussion of the general effects of civic life on the community, see *id.* at 99-116. As he summarizes his findings, Putnam writes that in areas of Italy where there is a higher density of the voluntary associations associated with civil society:

> Most citizens . . . read eagerly about community affairs in the daily press. They are engaged by public issues, but not by personalistic or patron-client politics. Inhabitants trust one another to act fairly and to obey the law. Leaders in these regions are relatively honest. They believe in popular government, and they are predisposed to compromise with their political adversaries. Both citizens and leaders here find equality congenial. Social and political networks are organized horizontally, not hicrarchically. The community values solidarity, civic engagement, cooperation, and honesty. Government works. Small wonder that people in these regions are content!

Id. at 115.

3. WILLIAM A. GALSTON, LIBERAL PURPOSES (1992).

4. JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY at viii (1992).

Rather than focus on how it promotes belief in democratic values, particular qualities in political participation, or democratic morals and virtues, others have focussed on how the absence or inefficacy of civil societies can weaken democracies. Putnam, for example, has argued that the decline in membership in civic associations in the United States is associated with the country's "democratic disarray," a finding he finds unsurprising since the "consolidation of democracy" is facilitated by a strong and active civil society characterized by social networks.[5] Cohen and Arato, too, worry that "civil society indicates a terrain in the West that is endangered by the logic of administrative and economic mechanisms," thereby endangering the health of Western democracies.[6] Or Sidney Verba and his colleagues have explained low levels of democratic participation by pointing to weak civic skills—participatory and social skills that are most commonly acquired by participating in organizations in civil society.[7]

Of course these observations about the connections between civil society and democracy are hardly new. James Madison, for example, thought that while any group in civil society might have factional tendencies, the existence of many such groups would help prevent the creation of a permanent tyrannical majority.[8] Tocqueville attributed the vitality of the American democracy he encountered some fifty years later to the robust character of its civil society. "Americans of all ages, all stations in life, and all types of disposition are forever forming associations," he observes;[9] and these civic groups helped to make the United States "the most democratic country in the world," by making their members more public-spirited and more practiced at "[k]nowledge of how to combine" for both private and public purposes.[10]

From these contemporary and historical celebrations of the importance of civic associations, it seems natural to derive the lesson that polities wanting to foster and nurture their democracies should foster and nurture the health of the private associations that comprise their civil societies. If Putnam is right that robust civil societies make "democracy work" and "citizens happy," then it seems we should take care to encourage the activities of the groups that make up civil society. Joshua Cohen and Joel Rogers seem to advocate just such a lesson when they conclude that government should recognize, and even fund, groups that make important contributions to democratic discussions about the common good. They

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5. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

6. COHEN & ARATO, *supra* note 4, at viii.

7. *See* SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995); *see also* Henry E. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271 (1995); Sidney Verba et al., *Race, Ethnicity, and Political Resources: Participation in the United States*, 23 BRIT. J. POL. SCI. 453 (1993); Sidney Verba et al., *Citizen Activity: Who Participates? What Do They Say?*, 87 AM. POL. SCI. REV. 303 (1993).

8. THE FEDERALIST No. 10, at 53-62 (James Madison) (Modern Library College Ed. n.d.).

9. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (c. 1835).

10. *Id.* at 514, 517. Tocqueville claims that these groups make "the heart enlarged" and made their "understanding developed." *Id.* at 515.

claim that such financial backing would both amplify voices that might not be heard otherwise and motivate other groups to be more public-minded.[11] At the other end of the political spectrum, Michael McConnell has also advocated public funding of many organizations in civil society (including religious schools) to maintain the democracy's health.[12] Others deriving similar lessons include Nancy Rosenblum (who claims that government should "create a climate for the ongoing formation of new associations and for shifting involvements among them" because "[f]reedom of association will often lead to democratic participation and to mediating structures that foster concrete moral beliefs and provide caring communities")[13] and Benjamin Barber (who, looking beyond both governmental efforts and economic reforms, urges citizens themselves to "reconceptualize and reposition existing institutions [in civil society]" so that we might recapture the nation's "civic soul").[14]

Although I do not dispute the salutary possibilities of civil society for democracies, I use the case of *Board of Education of Kiryas Joel v. Grumet*[15] to explore some of the ways in which civic associations are not always healthy for democracies, specifically for constitutional democracies such as that in the United States.[16] The association in question was the group of Satmar Hasidic Jews who comprise the Village of Kiryas Joel in New York State.[17] These very religious people convinced the State Legislature to pass Chapter 748,[18] a law creating a public school district exclusively for them.[19] Shortly thereafter, the district opened its only school: a set of classrooms designed to provide special education to Satmar children and to help the children avoid the "panic, fear and trauma" they had previously suffered upon leaving "their own community and being with [non-Satmar] people whose ways were so different."[20]

The New York State School Board Association and two of its members, Grnmet and Hawk, challenged the constitutionality of the law, charging that it

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11. Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 421-25 (1992).

12. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

13. Nancy L. Rosenblum, *Civil Societies: Liberalism and the Moral Uses of Pluralism*, 61 SOC. RES. 539, 556 (1994).

14. Benjamin R. Barber, *Searching for Civil Society*, 84 NAT'L CIVIC REV. 114, 118 (1995).

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

16. From hereon in, when I refer to the "democratic" advantages and disadvantages of civic associations, I am referring to the extent to which these organizations are helpful for the kind of democracy we have in the United States: a *constitutional democracy.*

17. The Village itself was drawn to include only Satmar Jews. For an interesting discussion of the development of the community, see JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD 206-09 (1992).

18. 1989 N.Y. Laws 748.

19. *Kiryas Joel*, 114 S. Ct. at 2486.

20. *Id.* at 2485 (quoting Board of Educ. of Monroe Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).

violated the Establishment Clause of the First Amendment.[21] In his opinion of the Court, Justice Souter held that Chapter 748 did violate the Establishment Clause because it violated the "constitutional command" that "'compels the State to pursue a course of "neutrality" toward religion.'"[22] Although the case raises many difficult doctrinal questions about the proper interpretation of the Establishment Clause, my primary concern here is not doctrinal. Rather, I look to an important set of questions the case provokes for political and constitutional theory. In particular, I examine the limits to the role that groups such as the Satmars of Kiryas Joel play in our constitutional polity. Although this group has many of the qualities that theorists have celebrated in civil society, it is unclear what role "enclave" groups, or groups seeking to segregate themselves from the larger community, play in a constitutional democracy.[23] Even assuming the existence of antidemocratic groups is not undemocratic, the case provides an opportunity to explore the ways in which they are—and are not—good for democracies. By helping to illuminate the limits that constitutional democracies place on civil society, the case should help evaluate the extent to which constitutional democracies need robust civil societies in order to thrive.

In this Article, I shall argue that although democratic and constitutional theory admits a legitimate role for enclave groups, I shall also argue that the extent to which a constitutional polity must tolerate such groups' activities will turn, in part, on the activity in which the group is engaged. Because public education plays such a foundational role in maintaining our constitutional democracy, I shall argue that there are times when the regulation of public education can legitimately narrow the scope of the enclave group's activities, including those of the Satmars in Kiryas Joel.

I. KIRYAS JOEL AS AN "ENCLAVE" COMMUNITY

The Satmar sect of Hasidic Jews developed in turn-of-the-century Hungary when Joel Teitelbaum became Rebbe,[24] or religious leader, of the town of Satu-Mare. Like other groups of Hasidic Jews, the Satmars lead lives of "intense piety" which are "distinguished by their distinctive social organization centered around [their] Rebbe[]."[25] Like all Hasidic Jews, Satmars aspire to follow all of

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21. Messrs. Grumet and Hawk sued both as citizens and as officers in the School Board Association. After New York State's Appellate Division ruled that only citizens had standing to bring the litigation, however, only Grumet and Hawk remained parties to the litigation. *Id.* at 2486 n.2 (describing the holding of Grumet v. Bd. of Educ. of Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123, 126 (App. Div. 1992)).

22. *Kiryas Joel*, 114 S. Ct. at 2487 (quoting from Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973)).

23. *See* Jane Mansbridge, *Using Power/Fighting Power*, 1 CONSTELLATIONS 53 (1994) (discussing "enclave" groups).

24. For Hasidic Jews, a Rebbe is more than a rabbi. While rabbis are congregational leaders and individuals who can settle disputes in religious law, a Rebbe is an uncommonly wise and holy man typically deemed to have special powers because of his "holiness, his devotion to the law and to prayer, and his lineage linking him to the great Rebbes of past generations." MINTZ, *supra* note 17, at 3.

25. *Id.* at 2.

Jewish laws. Since they believe that failure to comply with all of God's commandments has adverse effects on the Jewish community, they often take on additional obligations of segregation to minimize contact with any influence that might distract them from fulfilling their religious obligations. In his excellent study of Hasidic Jews, Jerome R. Mintz notes, "[t]o protect the community from contaminating offenses, the Hasidim post additional strictures as a protective buffer to the law. These may be precepts regarding clothing, customs, diet, and the separation of the sexes. Each new situation encountered is measured to determine if it is in keeping with the law."[26] Thus, even though Jewish law does not require Jews to live apart from non-Jews or to eschew modern conveniences, many Hasidic Jews assume the responsibilities of these additional requirements in order to ensure that they are living as holy a life as they can. The Satmars' approach to following Jewish law and the extra strictures was stricter than most Hasids', however. As Hasids, they took on those responsibilities identified by their Rebbe, and Teitelbaum's vision of additional requirements was particularly conservative. Not only did he urge his followers "to defend the laws of the Torah from change and to reject any view that was not based on the law;" he also "determined to maintain contemporary Hasidic life as it had existed in the past, and he sharply rejected Zionism and secularism."[27]

In December, 1944, the Satmar Rebbe was fortunate enough to be one of a trainload of Hungarian Jews who had been ransomed for $1000 per person for release from Bergen-Belson concentration camp. After escaping from the Nazis, he eventually moved to New York where he and his community began to rebuild. They settled primarily in the Williamsburg section of Brooklyn. As they had done in the Old Country, the Satmars "went to extraordinary pains to protect their identity as ultra-Orthodox Jews. Distinctiveness from the American community, rather than acculturation, was the keystone of their social strategy."[28] Not only did they aim to follow all of God's commandments. They also assumed the additional requirements common to Hasidic life. That meant that in addition to building synagogues, ritual baths, and "glat" (unquestionably) kosher butcheries and stores, they also constructed separate private schools for their children, and banned modern "intrusions . . . such as television and movies."[29] Although this assumption of additional religious responsibilities was not explicitly required by their religion, it was the taking on of these responsibilities, identified by their Satmar Rebbe, that made them *Satmar* Hasids. As one Satmar put it:

> There's the Torah [the written law], the Talmud [the oral law], and the 613 *mitzvot* [commandments]. If you do more than what's required, that's when one is a Hasid. That's how we understand Hasidism. You can't go to the Rebbe with a question that doesn't follow the laws. With the Satmar Rebbe first you have to be a complete Jew: "Don't ask me anything that transgresses on the 613 *mitzvot*!"[30]

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26. *Id.*
27. *Id.* at 28.
28. *Id.* at 29.
29. *Id.* at 30.
30. *Id.*

By following all of the commandments and assuming the many additional responsibilities their Rebbe advocated, the Satmars gained the reputation of being "the most conservative and traditional Hasidic court."[31]

When life in Williamsburg became too crowded, the Satmars bought land in Monroe, New York. Naming the settlement "Kiryas Joel" (Village of Joel) after their Rebbe, the group hoped to fulfill Teitelbaum's long-held dream of "founding a community a safe distance from the city which would be governed by ultra-Orthodox religious tenets."[32] By moving into Orange County, the "isolated and remote location" as well as the "invisible barriers of culture and language would shield residents from outside forces. In this traditional environment the children would grow up safe from . . . heretical influences."[33] The community they built was indeed distinct from the rest of Monroe. They not only dressed differently, but they also spoke Yiddish in the streets, their homes, and schools. The children did not learn to speak English until they went to school (where New York State Education law requires all students, whether educated in public or private schools, to learn English).[34]

When settling into the community, however, the group did not always follow local zoning ordinances. They converted single-family dwellings into multiple-family units. They also put synagogues, bakeries, and schools in the basements of private houses and apartments. When the Town Board accused the Satmars of violating the local housing code, the Satmars moved to incorporate their housing into a separate village. After the group succeeded in creating the Village of Kiryas Joel, they were not only free to zone their village as they preferred—they had also succeeded in making a village exclusively of Satmar Jews.

After Kiryas Joel had been incorporated for several years, the villagers realized that the private schools they had established were unable to provide adequate special education to the handicapped children living in their community. Special education is very expensive, both because it requires teachers and aides with special qualifications and because it requires a small ratio of teachers to pupils. In 1983, some families created a school for handicapped children, Sha'arai Hemlah (Gates of Compassion), that met in an annex to the girls' school. The local public school district provided special education teachers to instruct the Satmar children, but this practice was suspended after the Supreme Court held that it violates the Establishment Clause to spend public money on educating the handicapped in private, religious schools.[35] The community then asked the school

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31. *Id.* at 31.

32. *Id.* at 206-07. The Satmars shared their Rebbe's desire to avoid the contaminating effects of contact with non-Satmars. As one parent put it in an unrelated lawsuit, "It's not that these Hispanic people are bad, it's that they're different. . . . They are not a good influence on our girls . . . . If we have our kids learning with them, they'll be corrupted. . . . We don't hate these people but we don't like them." Jeremy Rabkin, *The Curious Case of Kiryas Joel*, COMMENTARY, Nov. 1994, at 58, 61 (quoting the Brief of Amicus Curiae by the American Federation of Teachers for *Kiryas Joel*).

33. MINTZ, *supra* note 17, at 206.

34. N.Y. EDUC. § 3204.2 (McKinney 1995).

35. Aguilar v. Felton, 473 U.S. 402 (1985); *see also* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

district to move the special education program to a "neutral" (non-Satmar) site where the Satmar children could nevertheless learn apart from the other children. Such an accommodation was interpreted to be consistent with federal law, but New York State Education law forbade the practice. Since only state monies funded the program, the school board felt obligated to comply with New York's guidelines. As the District Superintendent put it, "[w]e cannot segregate children on the basis of religion or anything else when we recommend a program for them."[36]

Rather than do without these services, many parents opted to send their handicapped children to existing special educational classes in the public school district. According to Mintz, this could hardly prove a satisfactory option:

> From the Hasidic point of view busing the children to the public school presented impossible hurdles for a religious community: classes were not segregated by sex, there were linguistic and cultural barriers, and the danger existed that the children would absorb secular knowledge that would conflict with community values. There were social ills as well: the children attending a secular school would suffer humiliation at the school because of their dress, sidecurls, and customs, and they would be stigmatized at home in the village for having been contaminated by secular contacts.[37]

Indeed, the experiment proved disastrous. When the parents withdrew their children from the schools, they cited "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."[38]

It was this very "panic, fear and trauma" that led the Village of Kiryas Joel to apply for its own school district. New York State then passed Chapter 748, constituting the village as a separate school district.[39] When signing the bill into law, Governor Cuomo recognized that all the citizens in the district were "all members of the same religious sect," but said the bill could solve a "unique problem" involving special education.[40] Once the law took effect, the Village

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36. MINTZ, *supra* note 17, at 313 (quoting Monroe-Woodbury School District Superintendent Daniel D. Alexander).

37. *Id.* at 311.

38. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994) (quoting Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988)).

39. The statute in full reads:

> § 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.
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> § 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, and members to serve for terms not exceeding five years.
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> § 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

Id. at 2486 n.1 (citing Act of July 24, 1989, ch. 748, 1989 N.Y. Laws 748).

40. *Id.* at 2486 (quoting Governor Mario Cuomo, Executive Memorandum filed with A. 8747, 212th leg., 1989 N.Y. Laws 748).

took care to ensure that they complied with all state and federal educational laws. In its only program, aimed at special education for handicapped children, the district taught only secular subjects, and employed non-Satmar teachers whom the state had certified to teach special education. The superintendent was Jewish, but not Hasidic. Children from both sexes learned in the same classrooms. The school closed on secular holidays. Religious articles (scrolls customarily hung on all doorposts, prayerbooks) were not available in the school. The program admitted Hasidic children who lived outside the district.[41] Even these outward compliances with state law, however, could not obscure the fact that this was a Satmar school.

By segregating themselves both religiously and politically from the rest of the community with whom they lived, the Satmars of Kiryas Joel were effectively making themselves into an "enclave" group. Their withdrawal was hardly complete, of course. After all, they clearly defined themselves—at least on occasion—as part of the larger democratic polity of New York State and the United States. For example, the group used state law to help them create their own village and their own school district. Similarly, they had, at times, turned to federal law to stake out their claims for religious freedom.[42] Abner S. Greene describes their withdrawal as a "partial exit," which he defines as occurring when "a group of like-minded people leaves one geographical location for a new place, establishes a set of private institutions, and also seeks the accouterments of governmental power for its new community."[43] Nevertheless, even when they did make claims as citizens of New York or of the United States, they did so only to strengthen their separation from the larger community. As one rabbi described his community's exercise of their rights as American citizens, "It's not a question of law. It's a question of a whole social attitude based on *halakhah* considerations, of course, and a desire to maintain a certain lifestyle which has no intrusions upon it. It's *worth it* for a community to assert its basic rights."[44] In other words, it is "worth it" to risk the potential costs associated with asserting civil rights (i.e., venturing into the corrupting non-Jewish world) if that will allow them to secure their world from those corrupting influences. In general, unless their separate lifestyle were in danger, they tried to have as little to do with this outside community as possible.

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41. *See* MINTZ, *supra* note 17, at 319-20.

42. For example, the Kiryas Joel school district employed only men to drive the boys' school busses. When women with greater seniority as bus drivers won a grievance enabling them to drive these routes, too, the Satmar parents objected because their religious practices did not allow them to expose their boys to female bus drivers. The bus drivers brought the case to federal court, alleging sex discrimination. The Satmars responded by asserting their constitutional rights, as citizens of the United States, to the free exercise of religion. Although the Court ruled in the bus drivers' favor, the fact that the Satmars identified First Amendment rights as theirs illustrates at least one way in which they saw themselves as members of the larger constitutional polity. For a description of this litigation, see *id.* at 213-14.

43. Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4-5 (1996).

44. MINTZ, *supra* note 17, at 214 (quoting Rabbi Morris Shmidman) (emphasis added).

As an enclave group, it is not clear how healthy the Satmars are for the larger democratic community, especially when they exercise political power. Clearly their internal values are not democratic. They do not aspire to participate in the democratic governance of the larger polity. As a general rule, they do not follow political matters outside their own community. They believe in sexual segregation (outside the home) and govern themselves in a hierarchical way that allows the Rebbe's judgment to trump all others'. To what extent should constitutional democracies permit such antidemocratic groups to exercise democratic powers—especially if that exercise tends to strengthen their cohesion as an enclave group in civil society?

II. THE DEMOCRATIC DRAW OF ENCLAVE GROUPS

There are at least three reasons why constitutional democracies might want to allow enclave groups such as the Satmars in Kiryas Joel to exercise some forms of democratic power. First, as Abner S. Greene has argued, it is inherently discriminatory to privilege heterogeneous groups to homogeneous groups for public governance.[45] When mixed communities are allowed to "take the reins of public power" by, for example, creating school districts, that effectively "relegate[s] more idiosyncratic, homogeneous communities to an inferior status."[46] This discrimination is bad, he argues, for several reasons. To begin, in an argument echoing one of John Stuart Mill's arguments for free speech, Greene recognizes that constitutional democratic polities are fallible.[47] Hence, even though we want to pass good laws, "we're always somewhat unsure whether we've gotten things right," and this leads us to "leave open significant avenues for change and dissent."[48] Important among the avenues for change and dissent are groups such as Kiryas Joel—groups he calls "normative communities" and likens to what Robert Cover called "*nomoi*."[49] These normative communities (including religious communities, private associations, and families) both "provide power bases for challenging value choices in the public arena" and "allow separate visions of the good to coexist, in the private arena, alongside those established by government."[50] In other words, these communities might get the Constitution or the Good "right" when the polity does not. If the polity allows such groups to persist, they might either convince the polity to change its mind or at least continue in what might well be the "right" practice.

Insofar as this rationale relies on the residents of Kiryas Joel constituting a *nomos*, the argument is unpersuasive. In Cover's analysis, a *nomos*, or interpretive community, defines itself by reference to the historical and/or religious narratives that give it life. These narratives create worldviews from

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45. *See* Greene, *supra* note 43, at 4.

46. *Id.*

47. *See generally* JOHN STUART MILL, ON LIBERTY 77 (Gertrude Himmelfarb ed., Penguin 1974) (1859).

48. Greene, *supra* note 43, at 8.

49. *Id.* (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)).

50. *Id.* at 8; *see also id.* at 83-86.

which they generate their own readings of the Constitution (an act Cover calls "jurisgenesis"). Because their constitutional understandings reflect their own *nomoi* and worldviews instead of the larger polity's, conflict sometimes results. When these conflicts over constitutional interpretation end up in court, judges may use their power to privilege one view over the other (an act Cover calls "jurispathic"). But the fact that a judge might rule against them on a particular interpretation of the Constitution and its requirements does not indicate that they stop believing their own view of what the Constitution means. Rather, the state's superior power to enforce its own reading may well "escalate the commitments of those who remain to resist"[51] both to their worldview and to what their worldview implies for constitutional meaning.

This commitment to the Constitution and their own reading of it does not exist for the Satmars, however. Although we have seen that they were willing, on occasion, to assert their rights, they did not do so as engaged constitutional citizens. Rather, they adopted a more "realist" approach to the law, believing the old adage that "The law means what the judge says it means."[52] When the Satmars wanted to know what the law was, they asked lawyers to identify existing judicial interpretations—interpretations the Satmars accepted as binding. Unlike the *nomoi* Cover discusses, the Satmars were not motivated by what they thought the Constitution required of them. Neither did they experience the painful conflict other *nomoi* had experienced when they believed that their personal beliefs and the Constitution required different things from them.[53] Rather, their religious beliefs led them to prefer a particular policy (separate schools for Satmars) which they wanted to pursue within the existing structure of judicial interpretations of the Establishment Clause. To see their acceptance of existing interpretations, one need look no farther than the ways they altered their religious practices to conform to the legal precedents guiding educational law in New York State. When they taught only secular subjects, for example, or employed non-Satmar teachers, integrated the classrooms by sex, closed on secular holidays, or refrained from hanging *mezuzot* (religious scrolls) on their door frames and providing students with prayer books, the Satmars were tailoring their behavior to the law as the judges saw it, not as they interpreted it as engaged constitutional citizens. By treating the law as an instrument for realizing a policy goal, even one that is religiously motivated, the Satmars do not qualify as an engaged *nomos* whose adherence to the Constitution furthers the experiment of finding a true or even better constitutional meaning.

If we regard the Satmars as just another homogeneous group that wants to exercise state power for its own benefit, however, then it is not difficult to imagine a way in which Greene's central point might still have some validity. The Satmars in Kiryas Joel essentially constitute an enclave group that does not

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51. Cover, *supra* note 49, at 40-44, 53-60.

52. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

53. Cover, *supra* note 49, at 26-29 (citing Brief of Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite, Bob Jones v. United States, 461 U.S. 574 (1983)).

want to participate in constitutional or democratic deliberation. Nevertheless, if they are able to express their political preferences through democratic governance within their own community, that governance might, in a sense, act as a (perhaps) passive voice in the democratic debate that takes place in the larger community. Even if they do not shout out their ideas to the non-Satmars in New York State, their lived expression of those ideas might well affect the debate among the non-Satmar New Yorkers who see the citizens of Kiryas Joel leading their lives in a different way. Hence, the non-Satmar observers of Kiryas Joel may well learn something from the Satmars that they can then contribute to the larger democratic deliberations in the state. As Mill might point out, whether the Satmars get it "right," partly-right, or not at all right, seekers of Truth will always have something to gain from confronting the ideas expressed (if not stated) by those in Kiryas Joel.[54]

Second, the democratic polity might well owe it to certain enclave groups to allow them to exercise some power over their own communities. As Jane Mansbridge has argued, even the best-run democracies will inevitably create injustices for some of their members. Deliberation may settle many conflicts in democratic polities, but there will always be some conflicts that even the best democratic deliberation cannot resolve. In response to these remaining conflicts, Mansbridge notes, democracies face two choices, "to remain at the status quo or to act, [both of which are accomplished] by coercing some to go along with others."[55] Although this coercion can be more or less legitimate,[56] the conditions that make coercion legitimate can only "mitigate, rather than eradicat[e], the necessary and valuable imposition of democratic coercion."[57] Given the additional fact that few democracies are able to meet the conditions (for example, of genuine equality) that make coercion legitimate, it is unsurprising that democratic practice involves "considerable substantive injustice."[58] In short, even though most democratic polities are willing to "accept some coercion as 'reasonably just under the circumstances,'" Mansbridge reminds us that "in matters of justice and injustice we should not just forget that our act is, in part, unjust, and simply go forward. We must find ways of going forward while

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54. MILL, *supra* note 47, at 75-118. But Amy Gutmann argues that there are important limits to the value of pluralism for the sake of pluralism:

> Pluralism is an important political value insofar as social diversity enriches our lives by expanding our understanding of differing ways of life. To reap the benefits of social diversity, children must be exposed to ways of life different from their parents and—in the course of their exposure—must embrace certain values, such as mutual respect among persons, that make social diversity both possible and desirable.

AMY GUTMANN, DEMOCRATIC EDUCATION 33 (1987).

55. Mansbridge, *supra* note 23, at 56.

56. For Mansbridge, the legitimacy of coercion depends on whether it is "exercised equally and in the context of certain limiting conditions, such as the protection of individual rights, the 'rule of law,'and perhaps the constitutional requirements of some formal 'public purpose' for the decision." *Id.* at 60.

57. *Id.*

58. *Id.* at 61.

keeping that recognition of injustice present."[59] One important way we can do this, she argues, is to allow groups who are treated unjustly in the democratic arena to form enclaves in which they can re-group, re-assess, and perhaps plan new ways to enter the democratic forum. Indeed, she says, in order to retain their commitments to justice, "democracies need to foster and value enclaves of resistance in which those who lose in each coercive move can rework their ideas and their strategies, gathering their forces and deciding in a more protected space in what way or whether to continue the battle."[60]

Although Mansbridge's point about the inherent injustice of democratic coercion is probably overstated,[61] her main point does suggest one reason why polities might want to be attentive to the needs of enclave groups. Sometimes democracies have to make hard choices that preclude the polity from fulfilling all of its duties toward all of its citizens. For example, should the polity fulfill its duty to promote equality among citizens by prohibiting hate speech or should it fulfill its duty to allow free speech? Enacting hate speech codes will enable the polity to fulfill its duties regarding equality but not regarding liberty. Failing to enact hate speech codes will discharge its duty to allow free speech, but not to promote equality. It is in conflicts such as this that Mansbridge's central point is quite helpful: Even when democracies resolve conflicts in a justified and principled way, they might nonetheless fail to fulfill one of their duties toward some of their citizens. In such cases, those unfulfilled duties do not disappear. That persistence, and the democracy's (albeit justified) inability to discharge that duty, should lead the polity to seek alternative ways to satisfy its requirements. When that is not possible, it might nevertheless suggest that the disappointed citizens, as Mansbridge says, ought to be able to gather forces in a protected space where they can "rework their ideas and their strategies."[62] If enclave groups need a certain amount of power to protect themselves so they might engage in this kind of behavior, then it seems that democratic governments should try to grant them that space and power (as long as other governmental duties do not trump those grants).

In the case of Kiryas Joel, for example, the State of New York faced a choice between fulfilling two competing governmental duties. On one hand, it had a duty to the Satmars in Kiryas Joel to allow them to exercise their religion freely. This duty stems from (and correlates with) the Satmars' civil right to exercise their religion, grounded both in the Constitution's Free Exercise Clause and in the nature of a democratic citizenship that recognizes individuals as possessing conscientious and/or religious duties they are bound to fulfill.[63] Because their

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59. *Id.* at 54, 62.

60. *Id.* at 53.

61. It is unclear, for example, why just procedures for democratic deliberation and governance necessarily yield unjust results. Losing is certainly not fun, but it need not be unfair. In order for losing to be unjust, it would have to be that the loser was entitled to win. But no one has a right to win, only to an opportunity to compete fairly.

62. Mansbridge, *supra* note 23, at 53.

63. Although the Satmars of Kiryas Joel did not appeal to their rights to free exercise when justifying their desire to create a separate school district for their handicapped children, their appeal to the children's "emotional" trauma is just an indirect way of making the same claim.

religious practice required them to live apart from non-Satmars, it would seem that the government had a duty to allow them to segregate themselves.[64] On the other hand, the state also has a duty to the general citizenry in New York to ensure that its public schools do not discriminate on the basis of religion. As I shall discuss at greater length in the next Part, this duty derives from specific clauses in the Constitution (such as the Fourteenth Amendment) as well as from the Constitution's structural commitment to equality. This duty would seem to prohibit the state from allowing the Satmars to run a segregated public school. Because the State of New York is unable to fulfill both of these duties, its efforts at reconciling these competing aspects of its governmental responsibilities will lead the government to fail to fulfill one of these duties. That the government cannot fulfill both duties need not imply that it acts unfairly toward either one of the parties to whom it owes this duty, however. The state may well be able to justify its reconciliation (e.g., by appealing to an ordering of constitutional values if the duties are grounded in different values, or by balancing if they are grounded in the same or in comparable values). If it can justify its failure to fulfill one of its duties, however, the reconciliation may be just but there is still a governmental duty that remains unfulfilled. And if the government still has a duty to the Satmars to let them practice their religion, it is possible that New York State would try to give the Satmars as much room as they need to both practice that religion and reconsider how they might propose an alternative reconciliation to the State that is less harmful to their religious practices.

A third reason for allowing enclave groups to exercise political power stems directly from the very core of the Constitution's commitment to democracy: the intrinsic value of personal sovereignty.[65] If democracy is just, in part, because it allows individuals to follow rules of their own making, then it would seem democratically valuable for the Satmars to live together in a community where they can more easily follow rules they make themselves. Even though the Constitution is committed to much more than democratic self-rule, it is nevertheless true that the document as a whole demonstrates a remarkable commitment to different forms of self-sovereignty. Many enumerated constitutional rights (as well as many "non-enumerated" rights) protect a space

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The only reason why the children felt "panic, fear and trauma" upon leaving "their own community and being with people whose ways were so different," Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994), was that the Satmars, as a religious community, had assumed the responsibilities of withdrawing from the larger community. Their religion made them assume the added strictures their Rebbe identified, and when their Rebbe told them to follow customs that were very different from those of the mainstream, it can only be deduced that it was their religious practices (even if they were "extra" requirements) that made them experience non-Satmars as so different from themselves that the encounters induced panic, fear, and trauma.

64. *But see* Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1325-26 (1994) (arguing that the fact that the Village of Kiryas Joel itself is drawn on the basis of religious lines destroys political unity by perpetuating caste-based political divisions and is therefore unconstitutional).

65. James E. Fleming calls the concept "deliberative autonomy," or the "right or power to make decisions concerning central attributes of personhood." James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 50 (1995).

in which citizens can make and act on the fundamental decisions that shape their lives. Among these rights are those of conscience, thought, association (whether expressive, political, or intimate), travel, marriage, deciding whether to have children, procreation, use of contraceptives, termination of a pregnancy, directing the education and rearing of one's children, bodily integrity, and death.[66] In his important new article, *Securing Deliberative Autonomy*, James E. Fleming places these values at the very core of the Constitution. In his words, these rights are like the bones that form the Constitution's skeleton:

> All of these bones constitute rights that reserve to persons the power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over a complete life. Put another way, the bones represent basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and they span a complete lifetime. Hence, . . . [the] Constitution . . . embodies both deliberative autonomy and deliberative democracy as aspects of "a political ideal . . . of a society of citizens both equal and free."[67]

In short, our constitutional democracy is deeply committed to allowing self-governance as a way to ensure that the polity attends to both liberty and democracy. This commitment would seem to suggest that the polity ought to allow the Satmars to exercise their own "deliberative autonomy" in making "fundamental decisions" affecting their "destiny," "identity," and "way of life."[68]

There is a certain irony involved here. Because the Satmars' own values tend to be undemocratic, it is unlikely that their self-government will further democratic values by adding to the country's store of democratically controlled villages. Because they do not want to participate in any political matters outside their community (unless absolutely necessary), we are also unable to conclude that allowing them to rule themselves would necessarily contribute to the democratic politics between villages and towns in New York State's larger democracy. Nevertheless, allowing this undemocratic enclave group the power to govern themselves might further democracy by reinforcing the Constitution's commitment to the value of self-sovereignty. In short, there is a sense in which it might be "good democracy" to allow the Satmars to govern themselves, even if they do not do so for the reasons democrats might prefer.

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66. *Id.* at 7.

67. *Id.* at 9 (quoting Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 382 (1992)).

68. *Id.* With the exception of converts (to Judaism or the Satmar sect), it is unlikely that the Satmars would experience their Hasidic lives as the product of a "choice." Indeed, Stephen Carter argues that it is misleading to analyze what is essentially extra-rational (religious faith) as a rational choice. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993). Even if the Satmars do not use a rational, Enlightenment method to choose their lifestyle, it is nevertheless true that the lifestyle they lead reflects something that is as an intrinsic part of their identity, as do the lifestyles that more "rational" people "choose."

III. THE DEMOCRATIC DRAWBACKS OF ENCLAVE GROUPS

Although the existence of enclave groups might help further the democratic values of debate, continued attention to citizens toward whom the polity was unable to fulfill its duties, and self-sovereignty, it is not clear that allowing enclave groups to run a public school district is good for constitutional democracies. In this Part, I shall argue that even though Kiryas Joel may well engender the three values of enclave groups discussed in Part II, its efforts to exercise state power in the arena of public education are inherently problematic. This is true because public education in a constitutional democracy requires a commitment to a particular substantive value—a value that the Satmars of Kiryas Joel cannot teach in a religiously segregated school district.

It should come as no surprise that citizens of the United States disagree vehemently about the appropriate goals for public education. This is true for many reasons, not least of which is the fact that as citizens, we disagree about the qualities we should try to instill in our future citizens. While some aim to make students into "good people,"[69] others think that moral education has no legitimate place in public schools. Still others aim at the development of civic virtues.[70] These debates are far from academic. Frequently, they spill over into school board meetings and courts when parents dispute the kind of education their children receive at local public schools. For example, parents, educators, and citizens often debate whether and how to teach sex education in the schools. At other times the battles emerge in requests for exemptions from established educational programs. For example, Vicki Frost did not want her children to be exposed to what she believed to be the "un-Christian" lessons of toleration of other cultures and fought with her school board to exempt them from required reading groups.[71] Or, consider Jonah Yoder who wanted to pull his children out of his local public schools after the eighth grade in order to shield them from

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69. William Bennett comes to mind as one of the more articulate proponents of this position (from a politically conservative perspective).

70. *See, e.g.*, Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468 (1995); *see also* STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 269 (arguing that education should aim to develop students' "self-governing reflective capacities," which in turn leads "toward the ideal of autonomy and that ideal is the source of other liberal virtues").

71. Frost and other parents challenged the local school board for refusing to exempt their children from reading class where they were required to read from books that discussed other religions without asserting the "truth" of Frost's religion. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). For an excellent discussion of the facts of the case, see Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

religiously corrupting lessons; he challenged his state's policy of mandatory schooling first in his community and then in court.[72]

What distinguishes democratic education from other forms of education is not its resolutions of particular battles over the content of the curriculum or the wisdom of allowing exemptions from existing educational practices. Rather, it is the system's recognition that parents, educators, and the polity as a whole all share an interest in educating future citizens. Consequently, democracies debate, deliberate, and decide how to run their schools, and it is that deliberative process that makes decisions democratic.[73]

Of course, different democratic polities will arrive at different understandings about how best to educate future citizens. While some polities will adopt the "Rainbow Curriculum," other districts will take a more traditional approach.[74] Although there is a wide range of discretion in which democratic polities can decide how to run their schools, the possible organizational schemes and curricula are not infinite. Rather than promote a preferred structure or content for that education, however, I intend instead to advance a substantive limit on what democracies may *not* choose for their schools. This constraint, derived from the Constitution's commitment to both democracy and constitutionalism, prohibits schools, whether in their organization, curriculum, or any other way, from advocating or even passively expressing support for a caste-system of citizenship.

By caste-system of citizenship, I mean to invoke the idea that Justice Harlan opposed in his famous dissent in *Plessy v. Ferguson*:[75] that there are distinct groups of citizens whose legal standing depends on their group's social standing—standings that are based on "cultural identit[y]" rather than a "commonalit[y] of interests."[76] That famous dissent, read without the phrase referring to the Constitution as colorblind, highlights the ways in which the Constitution forbids the translation of social and economic castes into political hierarchies:

> [I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution . . . neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[77]

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72. The Supreme Court exemptcd members of the Old Order Amish from a state law that required all children to attend school until the age of sixteen. Wisconsin v. Yoder, 406 U.S. 205 (1972).

73. GUTMANN, *supra* note 53, at 11. Gutmann also idcntifies substantive limits on what democratic education can include.

74. *See* Josh Barbanel, *School Chancellor Modifies Curriculum on Gay Families*, N.Y. TIMES, Jan. 27, 1993, at A1; Sam Dillon, *Tension on Queens School Board That Fought Fernandez*, N.Y. TIMES, Feb. 19, 1994, at 23; Sam Roberts, *In Brooklyn's District 15, Divisions of the City Are Reflected in the Campaign*, N.Y. TIMES, May 2, 1993, at 49.

75. 163 U.S. 537 (1896) (Harlan, J., dissenting).

76. Eisgruber, *supra* note 64, at 1303 n.21.

77. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

The idea that all citizens are equal before the law reflects the Constitution's democratic belief that all citizens are politically equal. It also reflects the constitutionalist belief that all citizens are morally equal.

These values find their home in specific passages of the Constitution. For example, the Fourteenth Amendment recognizes "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" as "citizens of the United States" and then prohibits any state from abridging citizens' "privileges or immunities."[78] That Amendment also forbids the states from denying any "person within its jurisdiction the equal protection of the laws."[79] Article 1, section 9 disempowers the national government from granting titles of nobility.[80] The Constitution's anticaste principle also emerges from a structuralist reading of the document as a whole,[81] and from a historical reading of the purposes of the Fourteenth Amendment.[82]

When public schools divide students based on racial, ethnic, or cultural identities, they violate the Constitution's anticaste principle. By the very fact that the school includes only students of one religious group, the students in those classrooms look around and see only students who look like them. This conveys the message: This is your community; these are the people in your constitutional, democratic polity; these are your fellow future citizens who, like you, are here to receive their public education. This is a bad message for at least two reasons.

First, it separates. If part of what it means to be in a political caste is to receive the incidents of citizenship on the basis of membership in your group, then the Satmars of Kiryas Joel who attend this public school are members of a political caste. All children, by virtue of their residence in the United States,[83] are entitled

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78. U.S. CONST. amend. XIV, § 1. After the Supreme Court's decision in The Slaughter-House Cases, 83 U.S. 36 (1873), the "Privileges or Immunities" Clause of the Fourteenth Amendment no longer has any legal effect. Its language nevertheless demonstrates the framers' commitment to ensuring that all citizens enjoy equal rights. Note that Article IV has its own "Privileges and Immunities" Clause, which states that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

79. U.S. CONST. amend. XIV, § 1.

80. U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any . . . Title, of any kind whatever, from any King, Prince or foreign State.").

81. For an excellent structuralist justification of the Constitution's commitment to equality as an opposition to caste, see Eisgruber, *supra* note 64. In his analysis, Eisgruber emphasizes the virtues of political unity, a value that castes tend to destroy. My argument here is less about the value of political unity than the vice of educating citizens to believe that it is intrinsically good to divide citizens on the basis of their racial, ethnic, or cultural identities. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 338-45 (1993).

82. *See* SUNSTEIN, *supra* note 81, at 340 ("Originally the Fourteenth Amendment was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race.").

83. As the Supreme Court has held, even children who are not citizens are entitled to a public education. Plyler v. Doe, 457 U.S. 202, *reh'g denied,* 458 U.S. 1131 (1982). I do not intend my use of the word "citizen" here to connote only those members of the polity who are U.S. citizens in the sense of formal members of the state (whether native born or naturalized).

to receive a public education. If the Satmar children in Kiryas Joel receive this civic incident in a particular form because they are Satmars, then their receipt of this civic incident in this distinct way distinguishes them from non-Satmars. Even though the members of Kiryas Joel went to great pains to ensure that the public education they provided conformed to state educational law, the fact remains that their district followed the political lines of their village, a political entity whose boundaries were drawn explicitly to include only Satmars. The curriculum of the education they received may not have differed from the special education curricula used in other parts of New York State, but the structure of their district made their classrooms very different. This structure, in and of itself, conveys a powerful message to the children.[84] It says, the State of New York believes that Satmars can receive the incidents of their civic membership as Satmars. This willingness to give the Satmars political entitlements because of their group membership runs the risk of establishing and/or reinforcing castes in a polity that is otherwise committed to eradicating caste as the basis for distributing basic political incidents.

Second, it gives a false picture of who is in the political community. Public schools reflect the larger political community in which they are situated. The presence of children from different parts of this larger community tells the children in these classrooms that they share a political association with people who are different from them. If the State of New York gives its imprimatur to a public school district in which all the children are, by express political design, members of the same enclave group, it gives the students in that classroom the mistaken impression that the political community in which they live and with whom they need to interact for political purposes includes only members of their own group. This is a false message not only because the Satmars are not a relevant group for political purposes. It is also wrong because it obscures the very real presence of non-Satmars in the Orange County and larger New York State polities with whom the Satmars do, in fact, share a political community. The Satmars may not want to venture into this larger political community unless absolutely necessary to vindicate their rights so that they might retreat still further and more effectively. Nevertheless, this is the larger political community with whom they do have to interact in those ventures. It is also the political

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Rather, I aim at the broader sense of the word as a member of the polity.

84. The idea that the structure of education conveys an educational message is nothing new. See, for example, Amy Gutmann's analysis of the implications of the fact that in primary education, men dominate educational administration while women predominate as classroom instructors:

> [A]s long as women are hired as elementary-school teachers in far greater proportions than men, and men are hired as school administrators in far greater proportions than women, schools will teach children that 'men rule women and women rule children.' . . . [This is problematic because] schools do not simply reflect, they perpetuate the social reality of gender preferences when they educate children in a system in which men rule women and women rule children . . . .

GUTMANN, *supra* note 54, at 113-14 (quoting LETTY COTTIN POGREBIN, GROWING UP FREE: RAISING YOUR CHILD IN THE 80'S at 491 (1980)).

community that shapes the laws that affect them whether they venture out of their enclave or not.

Further, when Satmar children receive a false impression of who is in their political community, they also receive a false impression about the skills they need to develop in order to negotiate their public lives. That the Satmar children experienced "panic, fear and trauma" at "being with people whose ways were so different"[85] is a very strong indication that they do not have the skills they need to interact with non-Satmars in those few instances in which the enclave group does venture out into the larger political community. If these children are to grow up to be the kind of citizens who *can* come into the larger polity, they ought to be able to approach the people with whom they need to negotiate without being overcome by "panic, fear and trauma." Even if they venture forth only in rare, brief episodes, and only to convince the rest of the polity that it has a duty to let them retreat, they should be able to be in the same room with these people as well as to recognize that these others have a legitimate claim to be in that room, too. To disable the children from acquiring these skills will make it very difficult for them to be effective as even the minimal citizens they choose to be in the constitutional democracy. In short, it stunts their growth as citizens.

I want to emphasize here that my argument is about the role of public schools. As my arguments in Part II suggest, democratic polities have good reasons to make room for enclave groups to retreat from the rest of the polity. It also seems reasonable to conclude that this retreat might include the opportunity to run parochial schools, including schools whose structures teach undemocratic values. Nevertheless, the undemocratic structures in a parochial school would not convey its undemocratic messages in the same way that a public school would. Unlike parochial schools, public schools explicitly reflect the polity's educational judgments and values. When a public school's structure sends a message, it is the polity's own message. When it models democratic contact, the public implicitly endorses that structure. Consequently, when a public school teaches that social castes matter for politics, that lesson has a different—and democratically less legitimate quality—than the lesson a separate structure would convey through a parochial school. This is true, not least of all, because public schools are funded through public funds. If private groups choose to educate their children in enclave groups, they are entitled to do so (as long as they are willing to meet the requirements of state educational law). But they do this without receiving the public monies that imply public approval. As soon as public approval and public money are involved, the public may insist that the education they provide refrains from condoning political castes—an unconstitutional value that will hinder the students' development as effective future citizens. In short, public education can—and should—avoid religious segregation.

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

CONCLUSION

When the Satmars retreated into their own village in Kiryas Joel, they were not aiming to create a more perfect democracy. Nevertheless, constitutional democrats have good reasons for letting them alone in their enclave. Their experiment in democratic governance contributes to the larger polity's knowledge about the scope and nature of democratic politics. Their religious beliefs include religious duties that the larger polity has a duty to respect, even if the occasional need to encroach on their religious practices disables the polity from honoring that duty to the full extent that the Satmars need. They are enjoying the value of self-government even if that is not their aim. For all of these reasons, the Satmars' enclave group seems relatively salutary for the larger democracy.

But when they aim to control public education, its advantages become infirm. When enclave groups, such as the Satmars, emerge from their retreat, they cannot do so on their own terms if those terms are inimical to the larger polity.[86] They may want to make their own lives as little democratic as possible. But they may not insist that democracies become less democratic, or they risk creating citizens who are unprepared for life in the larger democracy. When it comes to public education, enclave groups must be willing to receive their education on the public's own terms.

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86. Their claim against the polity would be stronger, I suspect, if they were willing to state that their religious duties required them to run their own school district. If this were the case, then the arguments that allowed the Amish to exempt their children from formal education after the eighth grade might lead us to reconsider the need for making a special accommodation to their religious needs. The Satmars of Kiryas Joel made no such claim, however. Regardless of what we may think was motivating their claims (*see supra* note 62 and accompanying text), their own way of framing their argument for a separate district depended on non-religious grounds (i.e., the children's "emotional trauma"). Thus, we need not worry here about how to reconcile government's duty to respect the Satmars' religious duties with its duty to avoid giving its imprimatur to caste-based citizenship education (as well as its duty to educate future citizens who are capable of even the most basic requirements of democratic deliberation).

On Political Bonndary Lines, Multicultnralism, and the Liberal State

SANFORD LEVINSON*

The duty of a discussant is to discuss; more precisely, it is, if at all possible, to take issue with what has been said by the principal author or speaker. Presumably the function is not merely personal display or point-scoring, but, rather, to help the audience grapple with tough issues that are unlikely to be definitively resolved even in the most brilliant article or book. I will therefore comply with standard expectations in offering some reflections on Judith Lynn Failer's extremely interesting paper.[1] She is addressing an absolutely central issue in political theory: What accommodation ought a liberal democracy offer, or, as a constitutional matter, is it even permitted to offer, to groups that appear in significant ways to reject some of the basic views of polity and society associated with liberal democracy? Given the magnitude of the questions she raises, it can scarcely be surprising that she does not resolve all of them. In the pages that follow, I am interested not so much in disputing Failer's arguments as in suggesting that they need much greater elaboration if one is to know precisely how radical she means them to be.

Aptly noting that "civic associations are not always healthy for democracies,"[2] Failer obviously rejects a certain form of purportedly Tocquevillian argument that suggests that *any* participation in a rich associational life helps to nurture democratic institutions. Instead, only some associations serve that function, while others are at best indifferent or even, at worst, overtly hostile to their flourishing.[3] It bears emphasis that Failer's concern is really "*liberal* democracies," that is, those majoritarian political systems that, nonetheless, recognize limits on the legitimate power even of the majority. After all, if "democracy" is given a minimalist definition simply as majority rule—including an unproblematic "right" of the majority, simply because it *is* the majority, to impose its own cultural hegemony on the minority (especially if the losing minority is free to "vote with its feet" by moving to some presumably more attractive environs)[4]—then the tension between democracy and protection of

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1. Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383 (1997).

2. *Id.* at 385.

3. A similar point is made in a recent paper by Nancy L. Rosenblum, *The Right of Association and Paramilitary Groups: Conspiracism and Clear and Present Danger* (presented at the 1996 meeting of the American Political Science Association, San Francisco, Cal.) (source on file with author), in which Rosenblum analyzes the current "militia" movement within the context of an American tradition of anti-democratic secret societies.

4. See, for example, the rich literature generated by the "Tiebout" hypothesis relating to local governments as selling particular packages of goods, including cultural ones, that consumers are free to buy, by settling or staying put, or reject, by moving away. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 415 (1956).