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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).

minority cultures dissolves, but only by definitional fiat. That is not the case, however, for a democracy that claims to be guided by the tenets of liberalism, which invariably include some notion of *limited* government. Even winning majorities in such a system must ask themselves if certain cultural minorities—Failer calls them "enclave groups"—maintain a right basically "to segregate themselves from the larger community" rather than to enter into full relationship with it.[5]

No less a liberal hero than Louis D. Brandeis defined "the right to be let alone [as] the most comprehensive of rights and the right most valued by civilized men."[6] One way of conceptualizing Failer's inquiry is the extent to which socially marginal groups have a right to be left alone to march to their own drummers regardless of general social views as to the merits of their music. As is obvious from Failer's discussion of *Kiryas Joel*,[7] the question very much bears on practice as well as on theory. Our country is rife with (or blessed by) many cultures; it is therefore driven by what sometimes appears to be endless debates over what "multiculturalism" might entail for the very notion of a *united* American citizenry.[8] Given much of the hostility expressed by the public toward multiculturalism (especially as described by its enemies), perhaps what is most striking about *Kiryas Joel* is that it offers the example of a state most decidedly going out of its way to accommodate a remarkably marginal group within American society. The question is whether New York went *too* far and, if so, precisely why this is the case, either as a constitutional or a theoretical matter.

The depth of New York's commitment to the Satmars, whatever may be the political explanation for this,[9] is worth emphasizing. The New York State Legislature has demonstrated, even after the Supreme Court decision in that case,

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5. Failer, *supra* note 1, at 386. Failer notes that she borrows the term "enclave group" from Jane Mansbridge. *See* Jane Mansbridge, *Using Power/Fighting Power*, 1 CONSTELLATIONS 53, 64 (1994).

6. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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

8. *See generally* TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995); DAVID HOLLINGER, POST-ETHNIC AMERICA (1995); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1992).

9. The accommodation of the Satmars can scarcely be explained as part of a desire to help Jews as a group, for the Satmars are extraordinarily marginal even within the Jewish community. Indeed, major groups within the American Jewish community submitted amicus briefs in support of the decision of the court below which had invalidated the Kiryas Joel School District. *See* Brief Amici Curiae of the American Jewish Congress, National Jewish Community Relations Advisory Council, People for the American Way, General Conference of Seventh-Day Adventists, and the Union of American Hebrew Congregations, *Kiryas Joel* (Nos. 93-517, 93-527, 93-539); Brief Amicus Curiae of Americans United for Separation of Church and State, American Jewish Committee, Anti-Defamation League, American Civil Liberties Union, National Council of Jewish Women, and the Unitarian Universalist Association in Support of Respondents, *Kiryas Joel* (Nos. 93-517, 93-527, 93-539). This is, of course, not to suggest that the "mainstream" American Jewish community was united against the Satmars. *See, e.g.*, Brief for the National Jewish Commission on Law and Public Affairs ("COLPA") as Amicus Curiae, in Support of Petitioners, *Kiryas Joel* (Nos. 93-517, 93-527, 93-539). The principal point is that anyone offering a political analysis of the Kiryas Joel linedrawing must focus on "Satmar power" rather than "Jewish power."

a desire to accommodate this most distinctive Hasidic sect in maintaining their basically separate identity from the rest of the social order. Legislators, presumably backed by competent counsel, have chosen to read the Supreme Court's decision as an intensely formalistic one, reaching only the particular New York statute and its peculiarly limited scope, applying only to the Satmar Hasids in Orange County living within the Village of Kiryas Joel.[10] The legislature therefore responded to the decision by passing a statute that is on its face far more general,[11] although my colleague Douglas Laycock dismisses "the alleged generality of the new law [as] a sham."[12] In any event, the Satmars have taken full advantage of this new statute, and a New York state court, describing Chapter 241 as "a general law drawn in neutral terms," upheld the current

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10. *See* Kiryas Joel, Village of—School District, ch. 748, 1989 N.Y. Laws 1527:

> 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.
>
> 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, said members to serve for terms not exceeding five years.

To put it mildly, it would be hard to think of a less general statute than this one.

11. As described by the New York state court:

> Chapter 241 of the Laws of 1994 amends section 1504 of the Education Law, to permit every city, town or village, in existence as of the effective date of the amendment, wholly within a single central or union free school district, but whose boundaries are not coterminous with the boundaries of such school district, to organize a new union free school district consisting of the entire territory of such municipality whenever the educational interests of the community require it if certain additional requirements are fulfilled. (*See*, Education Law section 1504[3].) The additional requirements to be met by a municipality are: (1) the enrollment of the municipality seeking to organize such new school district equals at least 2,000 children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (2) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; (3) the enrollment of the existing school district from which such new school district will be organized equals at least 2,000 children, excluding the residents of such municipality; and (4) the actual valuation per total wealth pupil unit of such existing school district will not increase or decrease by more than ten percent following the organization of the new school district by such municipality.

Grumet v. Cuomo, 625 N.Y.S.2d 1000, 1003.

Though one might have one's suspicions about the actual reach of this statute—and its limitation to villages "in existence as of the effective date of the amendment"—this obviously makes no explicit reference to Kiryas Joel, and it is hard to believe that a state as large as New York does not have other communities that could, in theory, take advantage of the law. *But see infra* note 15 and text at note 16.

12. Douglas Laycock, *The Church-State Game: A Symposium on Kiryas Joel*, FIRST THINGS, Nov. 1994, at 38.

version of the Kiryas Joel school district.[13] However, a New York appellate court then reversed,[14] describing Chapter 241 as a "carefully crafted" attempt to achieve "exactly the same result" as the statute struck down in Kiryas Joel.[15] Because "[a]nalysis of census data and other public records establishe[d] that the current law's demographic criteria permit only one of the State's 1,546 existing municipalities to qualify for its special treatment, the Village of Kiryas Joel,"[16] Chapter 241 could not stand. Needless to say, the Village is appealing, which, under Chapter 241, stays any suspension of public funding until a final decision adjudicating its constitutitionality.[17]

So the important issues addressed by Failer are surely not going to go away. For better or worse, the separate schools at issue in *Kiryas Joel* are in full operation at this instant (August 1996), and there is no good reason to predict that five votes necessarily exist at the United States Supreme Court to overturn this result. *Kiryas Joel*, as a matter of pure legal doctrine, may be a practical nullity, serving the function only of reminding lawyers to be slightly more clever in statutory drafting than were the original New York legislators. But that will not, and should not, stop the discussion of the very troublesome questions raised by the case.

Any such questions take on special bite when the de facto subjects of the inquiry are children rather than adults. After all, the only feasible way that groups can maintain themselves into the future is by controlling, in some measure, the socialization of the young. Amy Gutmann notes that "[w]e"—and in this instance the "we" surely refers not to the particular "we" who constitute her readers but, in reality, *any* society—"are committed to collectively re-creating the society that we share. . . . The substance of this core commitment is conscious social reproduction."[18]

In this context traditional liberal notions like "choice" or "autonomy" are of minimal relevance, especially when we refer to the education of the *very* young.

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13. *Grumet*, 625 N.Y.S.2d at 1005.

> The challenged statute neither creates nor requires the creation of the KJVSD and does not foreclose the creation of other school districts pursuant to its provisions. The contention of the plaintiffs that the KJVSD is presently the only district that can satisfy the statute's requirements fails to demonstrate that no other municipality will be able to take advantage of the statute at a future time . . . .

Id. at 1006.

14. Grumet v. Cuomo, 647 N.Y.S.2d 565 (1996).

15. *Id.* at 568. The decision went on to quote a spokesperson for one of the legislative sponsors, Assembly Speaker Sheldon Silver, who stated that "[t]he trick for negotiators [was] to craft legislation so Kiryas Joel would be virtually the only village to take advantage of the opportunity to create a district—even though others technically could." *Id.* (alterations in original).

16. *Id.*

17. *See Time to Stop the Kiryas Joel Fight*, N.Y. TIMES (Nat'l ed.), Aug. 31, 1996, at 18.

18. AMY GUTMANN, DEMOCRATIC EDUCATION 39 (1987). Gutmann's view is discussed and criticized in Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 941 (1996). Gilles's article should be read by anyone interested in the issues Failer is discussing.

It may be possible, as in Justice Douglas's dissent in *Wisconsin v. Yoder*,[19] to imagine a sixteen-year-old, or even thirteen-year-old, child taking some control over her own education; it is surely difficult to make this notion credible in regard to the seven-year-old. The struggle is over who shall get to mold the youngster.[20] Will it be the parents, who may be simply a synecdoche for the highly particularistic communities within which the parents may feel themselves embedded and by whose traditional ways they may feel themselves, as Michael Sandel might put it, "encumbered"?[21] Or will it be the liberal state that, rejecting an unself-conscious acceptance of "encumberedness," speaks in the name of a far more comprehensive and universalistic social vision of the examined life that may well lead to the rejection of the views embraced by the parents and their own communities? Liberals often dismiss these communities as the "mere" products of thoroughly contingent socio-historical circumstances, whatever might be asserted by the internal "myths" of the group in question. Failer is fully aware of the potential conflicts that can arise when educating the young, as the general civic, and often assimilationist, aims of the state clash with the far more particularistic—and perhaps decidedly non-civic—aims of the "enclave community." And, whatever her sensitivity to the interests of the "enclaves," she ultimately casts her own lot, rather strongly, with the civic aims of the state and against anti-liberal particularism. As already suggested, it is unclear from studying her essay exactly how far reaching she wishes her argument to be.

Failer's general thesis is "that there are times when the regulation of *public* education can legitimately narrow the scope of the enclave group's activities."[22] But, as demonstrated by *Kiryas Joel* itself, the real question is not merely whether the state, under some circumstances, "*can* legitimately" engage in such narrowing activities, but, rather, whether the liberal democratic state *must* do so, at least when dispensing "public" education. After all, the issue in that case was the constitutional validity of a decision taken by the New York State Legislature to carve out a school district that gave a de facto monopoly of power to members of the Satmar sect within Hasidism. The Satmars were not claiming a constitutional right to such accommodation by the State of New York, as they might have if the Legislature had passed a statute significantly limiting what could be taught in non-public schools operated by the Satmars. Perhaps, for example, the legislature, captured by "English-only" ideologues, might have seen fit to require that all courses be taught in English, which would have obvious impact on the primarily Yiddish-speaking and Hebrew-text-analyzing Satmars.

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19. 406 U.S. 205, 244 (1972).

20. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

21. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 16 (1996); *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1982) (notion of the self as "constituted" by the community within which it develops rather than as the asocial "chooser" of personal identity).

22. Failer, *supra* note 1, at 386 (emphasis added).

Any such statute would clearly have generated a constitutional suit by the Satmars, which they almost undoubtedly would have won.[23]

First of all, the New York Legislature was presumably persuaded that by the clever redrawing of school-district political boundary lines it would, as a matter of public policy, be desirable to offer the Satmars the opportunity to operate their own mini-public school system in regard to educating those with mental disabilities. After all, the Satmars had several years before being allowed to "secede" from their surrounding community in order to establish the village of Kiryas Joel in the first place. Running their own school system simply enhanced the extent to which Kiryas Joel was a truly autonomous community. Secondly, it is obvious that New York also viewed itself as possessed with the authority to make that choice. Those opposed to the decision of the New York legislators were not only attacking the merits of the decision as a matter of public policy; in addition, they also asserted their constitutional right to have it invalidated.

One could, obviously, believe that the New York Legislature acted stupidly or even wrongly, as a matter of political theory, without believing that the Constitution precluded that decision. After all, the Constitution tolerates many stupidities.[24] Concomitantly, one might believe, as a matter of positive law, that New York's decision was unconstitutional without necessarily believing that it was wrong as a matter of political morality, unless one has an extremely robust theory that links together political morality, on the one hand, with the requirements of the Constitution, on the other. Failer certainly presents no such theory, nor is it clear that it could be successfully maintained.[25] In any event, it seems more worthwhile to focus on Failer's theoretical arguments than her constitutional ones.[26]

As already noted, Failer objects to decisions like that made by the New York Legislature. But one should note the careful way that she limits her objections to the provision of *public* educational resources. She does not, at least in this paper, offer any objections to the state's tolerating the operation by a group of decidedly anti-liberal schools, so long as they are "private" rather than "public." This very distinction, of course, is central to liberalism. Yet few aspects of liberal theory have been so subject to critique over the past quarter-century as the

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23. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down Nebraska law prohibiting teaching of German).

24. *See* Sanford Levinson & William N. Eskridge, Jr., *Constitutional Stupidities: A Symposium*, 12 CONST. COMMENTARY 139 (1995).

25. *See, e.g.*, SANFORD LEVINSON, *The Moral Dimension of Constitutional Faith*, CONSTITUTIONAL FAITH 54-89 (1988). Indeed, even Ronald Dworkin, who probably brings positive constitutional doctrine closer to moral argument than any other major jurisprudential figure, emphasizes that they are in fact two distinct domains that do not necessarily overlap. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36 (1996).

26. The constitutional issues surrounding *Kiryas Joel* are superbly delineated in an exchange among Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996); Abner S. Greene, Kiryas Joel *and Two Mistakes about Equality*, 96 COLUM. L. REV. 1 (1996); and Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996).

private/public distinction.[27] In regard to education, for example, it is absolutely clear that "private" education generates both positive and negative "externalities" that are of legitimate public concern. As she notes, "parents, educators, and the polity as a whole all share an interest in educating future citizens."[28] "Citizenship," obviously, is not only a formal term, relating to what passport one carries, but rather a sensibility that includes identification with millions of strangers, inculcation of complex loyalties, and adoption as one's own heroes of long-dead "founders."[29] These are only some of the reasons why states almost never accord "private" schools complete *carte blanche* but, rather, impose at least some constraints, including such curricular requirements as teaching basic civics and the like.[30] When a "private school" becomes a "nuisance," it is as subject to public regulation as any other use of private property deemed such a "nuisance." An anti-liberal school could, after all, be viewed as a social polluter whose obnoxious odors and toxic products are always subject to regulation even within a regime that strongly protects private property. Thus if one genuinely views the social reproduction of anti-liberal enclave groups as a menace to liberal democracy, why shouldn't the liberal state be entitled to root out the danger regardless of the formal venue—public or private—within which the young are being malsocialized? Perhaps, as Failer suggests, there is something worse about the state's financing those who are unwilling to accept full socialization into the tenets of liberal democracy (whatever these may be said to be), but this scarcely leads to the conclusion that strictly "private" education presents no dangers of its own. Failer's concentration on public education may be only pragmatic; if she believes it is more foundational, then much more needs to be said on what underlies the division between public and private education.

I turn now to her arguments about the limits on legitimate accommodation of marginal, especially anti-liberal, groups in public education. Let me say that I am not sure that *Kiryas Joel* is really the best case through which to address such issues. As she recognizes, the case deals entirely with special education, a small group of children with very particular (and quite expensive) needs. No one could cogently believe that the schools at issue in *Kiryas Joel* are truly central to the social reproduction of the Satmars—for that one would surely look to the private yeshivas—or, concomitantly, that the way that the mentally handicapped in general are educated has much to do with maintaining the general civic culture

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27. The work of persons associated with Critical Legal Studies is especially important in this regard. *See, e.g.*, DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, *in* SEXY DRESSING ETC. 83 (1993); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); *see also* Sanford Levinson, *Privacy*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 671 (Kermit L. Hall ed., 1992).

28. Failer, *supra* note 1, at 398.

29. *See* Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995).

30. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 227-30 (1983).

of New York State, however important the education clearly is to the children themselves.

Failer is not at all opposed to making public resources available to the Satmars in order to educate their handicapped children. She simply wants to place a condition on this aid: the education cannot take place within schools formally controlled by the Satmar community as a voting majority—in fact, courtesy of the New York Legislature's line drawers, the Satmars comprised 100% of the school district—or, presumably, within schools composed only of Satmar children. If they want public aid, they should be forced to attend "mixed" schools of Satmar and non-Satmar students; this presumably is functional to achieving the civic good of teaching the young that America is in fact a multicultural society in which persons of different backgrounds must interact and learn to get along with one another.

As suggested earlier, there is probably no winning argument, at least under current understandings of the Constitution as articulated by the United States Supreme Court, that the Satmars are entitled to anything more than a Failer-like offer. Still, New York decided to be more generous and draw a school district that obviated the necessity to put Satmar children together with non-Satmars, and Failer suggests that was a mistake. One must be absolutely clear, though, as a matter of both law and theory, precisely what counts as the mistake.

Kiryas Joel, after all, involved New York's drawing specific boundary lines with the *intent* to accommodate the Satmars. As already noted, competent lawyers can easily confine the majority opinion to its facts. But the Satmars might merely have taken advantage of pre-existing boundary lines to create a de facto all-Satmar school. Would she find *that* objectionable and, more to the point, would she argue that New York State ought, as a matter of sound policy (and, presumably, constitutional discretion) redraw the lines to make impossible the maintenance of the all-Satmar schools?

Failer notes that the Satmars, at least on the record before the Court, had scrupulously avoided any overt linkage between the school and the sect itself. Although the superintendent was Jewish, he was not Hasidic. Classrooms included both males and females, in contrast to standard Satmar practice. "The school closed on secular holidays. Religious articles (scrolls customarily hung on all doorposts, prayerbooks) were not available in the school."[31] Nevertheless, she insists, "[e]ven these outward compliances with state law . . . could not obscure the fact that this was a Satmar school"[32] and, therefore, presumptively dubious as a matter either of law or of political morality. And why is this the case? The answer presumably is that any onlooker would notice dress and other features that allowed the inference that the student body was in fact 100% Satmar in just the same way that a school composed of 100% African-Americans is "identifiably" African-American or 100% white is "identifiably" white.[33]

Racial "identifiability" is a term of art, and it is crystal clear, as a matter of positive law, that "identifiability" from the perspective of a sociologist or

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31. Failer, *supra* note 1, at 390.

32. *Id.*

33. *See, e.g.*, Green v. County Bd. of New Kent County, 391 U.S. 430 (1968).

anthropologist is not enough to trigger legal liability under the Fourteenth Amendment. Although *Brown v. Board of Education*[34] and its immediate progeny left hanging the question whether the state is liable for separate and "identifiable" schools that are not the product of its "intention" to bring about that demographic result, the Supreme Court has, for our generation at least, settled the matter by rejecting liability for "unintended" identifiability.[35] It is not enough to label a given school as identifiably "white" or "black" (or anything else) in order to trigger a state's duty to change the situation. And, as a matter of grim social fact, it is clear that almost no states today have any interest in using whatever legal powers they might possess to lessen the racial identifiability of public schools that is the product of anything else than intended action by the state.

Imagine, then, that *Kiryas Joel* had arisen in the following context: The Satmars, looking for a place to move to from an ever more overcrowded and tumultuously multicultural streets of Brooklyn, find a small rural county in upstate New York. They begin buying property, many of whose owners are delighted to sell because they are getting on in age, with grown children who have moved to cities. As the initial Satmar "immigrants" successfully settle the county, others follow, and the "natives" are increasingly willing to sell. In part this occurs because the remaining "natives" have no particular desire to live in what is rapidly becoming an "enclave" made up of people so dissimilar from themselves as the Satmars are. In due time, the Satmars become a political majority and "capture" control of the pre-existing public school system, though, as a matter of fact, they do not attempt to change the curriculum or otherwise "desecularize" the schools within the system. If one assumes that the remaining "natives" are childless and/or send their children to local private schools, the students attending the public schools will obviously be exclusively Satmars. Assume, finally, that this is absolutely fine with the Satmars themselves, who, after all, found the county attractive precisely because it offered them the possibility of being "left alone" by the wider society and thus confining their own interactions, as much as possible, only to other Satmars. In this way, of course, they will be helped in reproducing themselves into the next generation and, they hope, unto many generations.

Two questions immediately arise. First, is the final link in this chain of events—the homogeneous school—unconstitutional? Surely it cannot be anything earlier than the final link that raises constitutional questions. The Satmars certainly can choose to move *en masse* to a county and to engage in the purchase, from willing sellers, of land that will make it possible for them to live as a community. And there can be no cogent constitutional objection to the Satmars voting as a bloc to put their own favorite candidates into office. Of course, one can lament, as a political matter, the power over individual Satmar voters held by the Satmar *rebbe*; one can wonder, though, if this is significantly different from the influence that given charismatic ministers or priests—or even

34. 347 U.S. 483 (1954).

35. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973); *see* David Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

talk-radio hosts—might have over their respective listeners at election time. However, the question is whether either the Constitution of the United States or a sound understanding of liberal political theory prevents a religious sect, whether the Satmars in the present instance or, say, Christian evangelicals in another, from dominating a pre-existing political entity and therefore rendering it, from the sociologists' perspective, "identifiable" with that sect.

I believe there is little support within existing legal doctrine for the unconstitutionality of the school district as described in my hypothetical. However, that might simply serve as the predicate for criticizing the legal doctrine,[36] so the more important question, for Failer's purposes, is the second one: whether the best theoretical understanding of a liberal society would place New York under a duty to redraw the political boundary lines in order to make impossible the maintenance of the "identifiable" Satmar (or any other similar group's) public schools. Any such argument would obviously place on the State an extraordinarily strong duty to do whatever it can to achieve "mixed" schools, where the mixtures are presumably across a wide class of variables, including race, religion, social class, and the like.

For what it is worth, I prefer "mixed" societies to homogeneous ones,[37] and I have no personal grief for the Satmars. But that cannot be dispositive, at least in a liberal society predicated on the recognition that a basic precondition of modern life is an increasingly radical pluralism as to what counts as a life well lived and as to what kinds of communities best promote that life. As John Rawls writes, "[t]he first fact" learned by the student of modern society "is that the diversity of comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away . . . ."[38] Indeed, any political theory, especially one that describes itself as "liberal," must respect this as a "permanent feature of the public culture of democracy."[39] And a liberal society must maintain a stance of "neutrality" in regard to the various notions of the good life adopted by the constituent communities, assuming that none of these communities engage in practices that arguably constitute denials of what we might wish to call "fundamental human rights." Yet any duty of New York to mix groups that would prefer to remain detached from others would be based on the premise that a life lived with people significantly different from oneself is better than a life lived wholly within a particularistic community. The fact that I happen to believe this is the case does not make it any less of a distinctly non-neutral position, and thus in tension with any notion of liberalism that is suspicious of the right of the state to use its coercive powers (including grouping persons in specific political entities) in behalf of a favored vision of the good life.

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36. See, however, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

37. *See* Sanford Levinson, *Is Liberal Nationalism an Oxymoron? An Essay for Judith Shklar*, 105 ETHICS 626 (1995) (reviewing YAEL TAMIR, LIBERAL NATIONALISM (1993)).

38. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234 (1989).

39. *Id.* at 234-35.

There are, obviously, limits on the freedoms accorded any "enclave group" to use public power to promote its own way of life, and to maintain its separateness. But, as noted above, there are no allegations that the Satmars have gone beyond these limits in operating the public schools over which they have authority. From one perspective, Kiryas Joel is simply a more dramatic version of Round Rock, Texas, a suburb of Austin that has, according to some local observers, been "taken over" by religious conservatives who have preferred to settle there rather than inhabit the more Godless and hedonistic environs within which I live. As one might gather, I am delighted to live in Austin, and I wouldn't move to Round Rock even if I were given a free home there. But this is true of many places, and one of the glories of America is the ability of persons to select communities that broadly offer the kind of cultural mix (or in some cases, lack of mix) that one prefers. If one believes in cultural diversity, multiculturalism, or cultural pluralism,[40] then one has to accept the fact that some people—and organized communities—are living lives that one finds deficient, and that the vagaries of law, including the way that political boundary lines have been drawn in the past, may help to preserve these ways of life. And it is difficult to escape the conclusion that a due respect for multiculturalism requires that one tolerate, albeit with what might be great unhappiness in many instances, the ability of parents to socialize the children in ways of life that one regards as quite unattractive.[41]

My discussion of "enclave groups" has, up to now, focused, as in Failer's own paper, on religious sects. But, within American society, there is surely a far more important set of examples of "enclave groups" than the Satmars, Amish, or any similar groups: American Indians living on what are literally called "reservations." One could obviously write a full-length book, let alone a single article, on the problems posed to standard-form American constitutionalism *or* liberal political theory by the presence of Indian tribes within the American polity.[42] These brief comments scarcely purport to do justice to the issue. Still, I am eager to know how, if at all, Failer would apply her arguments to, say, the Navajo or to any other traditional tribe that has no apparent desire to adopt the way of life that she applauds.

One might say that the Navajos are indeed a conquered nation, with rights attaching to nationhood, in a way that is not the case with the Satmars or the

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40. I use all of these terms because I am not certain whether they are simply synonyms or subtly different from one another.

41. I am delighted to note that the opposite view—and an eloquent defense of the prerogatives of the liberal state to override parental desires—is presented in Meira Levinson, Autonomy, Schooling, and the Reconstruction of the Liberal Educational Ideal, D.Phil., Nuffield College (Oxford), 1996 (source on file with author). Among other things illustrated by the very existence of this dissertation is the inability of parents in a liberal society to assure that their own notions will necessarily be accepted by their children once they confront the reality that other legitimate views exist besides those of their parents.

42. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 7-30 (3d ed. 1993); *see also* Milner S. Ball, *Constitution, Court, Indian Tribes,* 1987 AM. B. FOUND. RES. J. 1 (1987); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,* 56 U. CHI. L. REV. 671 (1989).

Amish. Or one can focus simply on the dreadful American history vis-a-vis Native Americans displaced from their lands and point out the contrast with the Satmars, who were granted refuge by a generous United States from the persecutions they faced in Europe. These are, to be sure, important differences between the Navajos and the Satmars, but it is not clear to me that they blithely support, without further extended analysis, the official recognition given Indian tribal identity that is presumably denied the Satmars even if it takes the relatively benign form of the original New York statute at issue in *Kiryas Joel.*

Indian tribes, for example, have been granted by statute the right to educate their children in tribal schools on the reservations.[43] And, given the fact that the Establishment Clause of the First Amendment does not apply to Indian reservations,[44] it would appear altogether proper, as a constitutional matter, for Indian "public" schools to include reference to the official religion of the tribe in their educational programs. To be sure, there are undoubtedly limits on the autonomy of tribes. One presumes, for example, that they have a duty to make their students proficient in reading and writing English—along with the right to teach the tribe's own language as well—and other basic skills, as well as to teach the students that they are, in addition to members of the Navajo Nation, citizens of the United States. But none of this lessens the extent to which schools on the Navajo Reservation are "identifiably" Navajo in an extremely strong sense and thus presumptively subject to at least some of Failer's critiques. If she would in fact allow all-Navajo schools and, perhaps, even endorse the creation of new "reservations" for tribes who wish to try to enjoy whatever benefits are attached to tribal "sovereignty" over land, then she must explain precisely why the Satmars are not permitted—recall, there is no claim whatsoever that they are "entitled"—to enjoy such a "reservation" of their own called the Kiryas Joel School District that will similarly enable them to withdraw from the wider society and cultivate their own cultural gardens.

CONCLUSION

Judith Failer is obviously sensitive to the interests of "enclave groups" in being left alone, and she appreciates as well the contributions that such groups might make to the very society that they in many ways disdain, precisely by demonstrating in their own lives alternatives to the conventional wisdom about how life should be lived. It is this sensitivity, I believe, that leads her to focus exclusively on what sorts of accommodations can be made in regard to *public* education, for she clearly wants to preserve a wide degree of autonomy in the private realm. That being said, her lack of sympathy for the Satmars in the specific circumstances of *Kiryas Joel* has implications going far beyond the

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43. *See* Tribally Controlled Schools Act of 1988, 25 U.S.C.A. 2501 (West Supp. 1996); GETCHES ET AL., *supra* note 42, at 18.

44. *See* GETCHES ET AL., *supra* note 42, at 499. The Indian Civil Rights Act of 1968, which guarantees to members of Indian tribes the protections of the Bill of Rights against infringement by tribes "exercising powers of self-government," quite strikingly omits the Establishment Clause in the section that otherwise tracks the First Amendment. *See id.* at 500 (setting out 25 U.S.C. § 1302(1) (1994)).

instant case. And there can be no doubt that the ordinary workings of American society will continue to generate problems (and legal cases) that will test our intuitions, whether as lawyers or as political theorists.