

# PUTTING GOD BETWEEN THE LINES

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*In the tempestuous process of defining communities of interest for legislative redistricting—a process that will inevitably spark disagreement, dissatisfaction, and dissent—deferring boundary-setting to a physical, objective metric established by a community itself would appear to be a safe harbor, insulating line-drawers from criticism. The eruv—a physical structure encircling a Jewish community which allows observant Jews to carry items outside the home on Shabbat—presents redistricters with an attractive way to craft districts that give political voice to the Jewish community. However, this Note argues that rather than serving as a safe harbor, this use of the eruv in redistricting presents a constitutional hazard, as it may run afoul of the Establishment Clause. The Supreme Court’s Establishment Clause jurisprudence clearly forbids a state from “delegat[ing] its civic authority to a group chosen according to a religious criterion.” The use of an eruv as a basis for redistricting, this Note argues, is precisely such a delegation: The state delegates its power to determine the boundaries of a community and the resultant district lines to religious authorities and a religious community, bucking the neutrality commanded by the Establishment Clause. While the precise shape of a particular district and the inputs leading to its creation will determine the presence of an Establishment Clause violation, the potential for such a violation in the case of eruv-based districts—and the concomitant potential for the politicization of religion and increased political division—has heretofore gone unnoticed.*

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\* Copyright © 2022 by Evan A. Ringel. J.D., 2022, New York University School of Law; B.A., 2017, Williams College. I owe an immense debt of gratitude to Professors Zalman Rothschild, John Sexton, and Richard Pildes, who nurtured the ideas within this Note, and provided invaluable insight throughout the drafting process. Special thanks to my friends and colleagues on the *New York University Law Review*, particularly Jack Hipkins, Aine Carolan, Paige Rapp, and Deven Kirschenbaum, who have worked tirelessly and improved this Note immeasurably. Most of all, this Note—and everything that came before it and will come after it—would not be possible without the unwavering and unceasing love and support I receive from my family on a daily basis. I dedicate this Note to the memory of my grandfather, Sherman Pessin. May his memory be a blessing.

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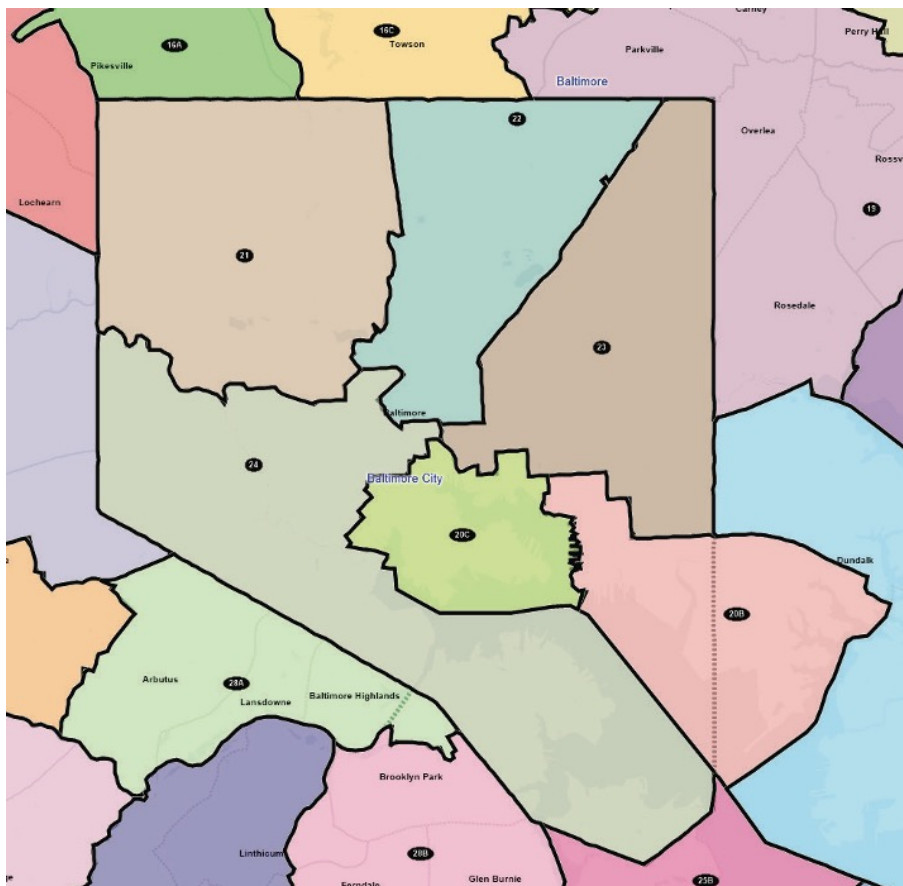
INTRODUCTION

In the 2021 redistricting cycle, the Maryland Citizens Redistricting Commission faced a conundrum. Bound by a state constitutional requirement to minimize the number of legislative districts crossing the border between Baltimore City and the surrounding Baltimore County,<sup>1</sup> the Commission fielded competing complaints. Residents of Dundalk, just off the southeastern edge of Baltimore City in Baltimore County, objected to a districting plan that split their community into two districts, one of which extended outward from Baltimore City into Dundalk, and another which contained the rest of Dundalk.<sup>2</sup> Meanwhile, Jewish residents of Pikesville, bordering the City in the northwest, argued that the Commission’s drawing of districts respecting the border between the City and the County split their community, which is dispersed between the City and the County.<sup>3</sup> Figure 1 displays this districting plan, with Dundalk split in the lower right-hand corner, and Pikesville divided in the upper left-hand corner.

<sup>1</sup> See MD. CONST. art. III, § 4 (“Due regard shall be given to . . . the boundaries of political subdivisions.”). See generally *In re Legis. Districting of the State*, 805 A.2d 292 (Md. 2002) (invalidating Maryland’s redistricting plan for, inter alia, failing to respect the boundaries of political subdivisions).

<sup>2</sup> *Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM’N, at 59:50 (Oct. 13, 2021) [hereinafter Oct. 13 Meeting Video], [https://us06web.zoom.us/j/753aHKhQBiloLGG4esA\\_WGW8V64mUuw9ci9sRJLP\\_5yA7kPyk.FzYZ\\_SgFOyKO9Pro?autoplay=true](https://us06web.zoom.us/j/753aHKhQBiloLGG4esA_WGW8V64mUuw9ci9sRJLP_5yA7kPyk.FzYZ_SgFOyKO9Pro?autoplay=true) [https://perma.cc/HJ8S-ARGK] (explaining community concerns about the split of Dundalk and discussing ways of resolving them); see also *Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM’N (Oct. 13, 2021) [hereinafter Oct. 13 Meeting Transcript], <https://redistricting.maryland.gov/Documents/Meetings/2021-1013-Maryland-Citizens-Redistricting-Commission-Round-03-transcript.pdf> [https://perma.cc/GDW2-UYFL] (transcript of video).

<sup>3</sup> See Oct. 13 Meeting Video, *supra* note 2, at 1:01:30 (discussing concerns about splitting Jewish communities); see also Oct. 13 Meeting Transcript, *supra* note 2.

FIGURE 1. THE ORIGINAL DISTRICTING PLAN<sup>4</sup>

The Pikesville Jewish community's desire for representation was understandable: It is highly geographically concentrated, its residents are more religiously observant, and they hold particular policy preferences distinct from those of Baltimore's less observant Jews.<sup>5</sup>

Despite the fact that Dundalk and Pikesville border Baltimore City at opposite ends, the cascade of adjustments resulting from a change to one proposed district meant that the Commission could

<sup>4</sup> *Draft Hybrid Delegate District Map*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 13, 2021), <https://redistricting.maryland.gov/Documents/Library/mcrc-drafts-2021-1013/2021-1013-Hybrid-Delegate-Map-Regional-Images.pdf> [<https://perma.cc/F2AL-AHYM>].

<sup>5</sup> See ERIC L. GOLDSTEIN & DEBORAH R. WEINER, *ON MIDDLE GROUND: A HISTORY OF THE JEWS OF BALTIMORE* 306–14 (2018) (describing the contemporary Jewish communal landscape and tensions in Baltimore); *infra* Part II (providing an overview of the redistricting process and the communities of interest inquiry). For an overview of the history of Pikesville's status as the locus of Baltimore's Jewish community, see generally GOLDSTEIN & WEINER, *supra*, at 244–300.



In reaching this solution, tough decisions had to be made. As Professor Nathaniel Persily, tasked by the Commission to create the districts using online mapping technology, put it, much “depend[ed] on how we define the Jewish community.”<sup>8</sup> This is a paradox inherent in the redistricting process: Districts can be drawn to keep “communities of interest”—here, Pikesville’s Jewish community—whole, but it can often be difficult to define and delineate the boundaries of such communities.<sup>9</sup> The Commission heard testimony noting that the preliminary, objected-to districting scheme split Pikesville’s *eruv*, a physical wire encircling the Jewish community and established by the community that allows observant Jews to carry items outside the home on Shabbat.<sup>10</sup> Here, the community had set a boundary for itself.<sup>11</sup> The area contained within Pikesville’s *eruv* is displayed below in Figure 3.

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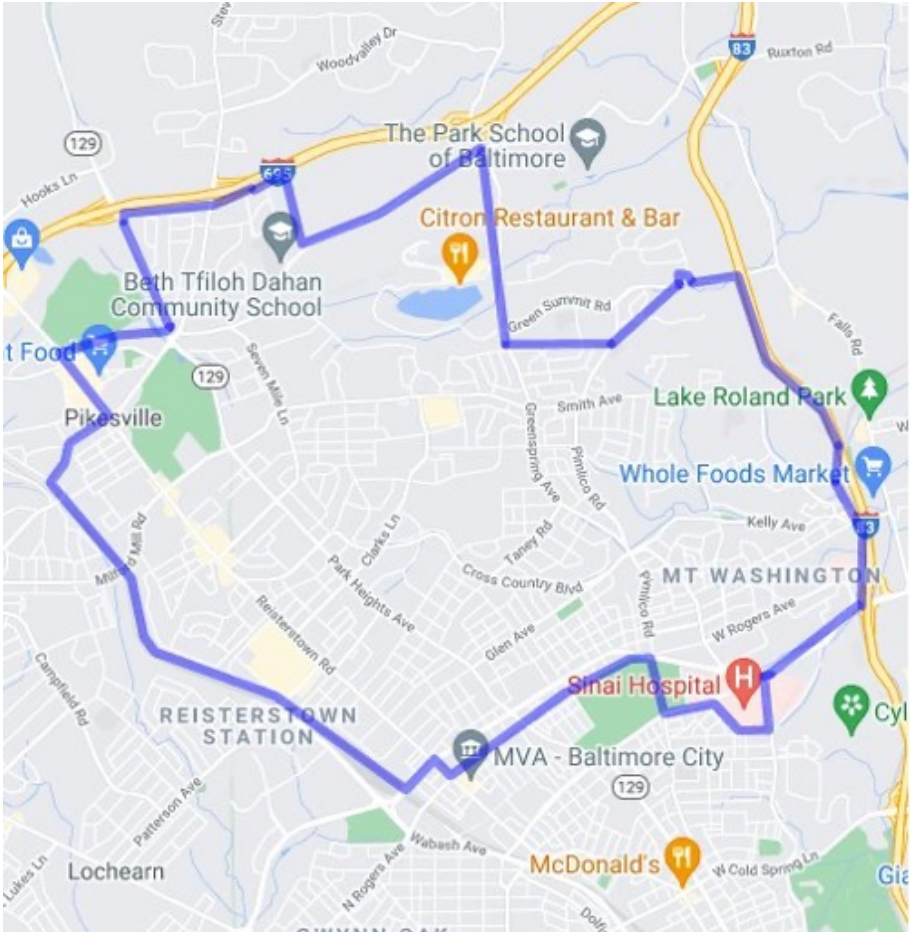
<sup>7</sup> *Citizens Commission Final Recommended Maps Interactive Viewer*, MD. CITIZENS REDISTRICTING COMM’N (Nov. 5, 2021), <https://apps.planning.maryland.gov/redistricting/commissionproposedmaps.html> [<https://perma.cc/WZP9-CQAN>].

<sup>8</sup> *Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM’N, at 1:58:18 (Oct. 27, 2021) [hereinafter Oct. 27 Meeting Video], [https://us06web.zoom.us/rec/play/oeJTzoZfmTtS7fKFVG5PznrBODWNQVXZospNtMiO9DWo9DX3ocCx8QZisCsow36h7mVGf\\_fdyI246BfZ.b9\\_oWlqnYWjsTMB5?autoplay=true](https://us06web.zoom.us/rec/play/oeJTzoZfmTtS7fKFVG5PznrBODWNQVXZospNtMiO9DWo9DX3ocCx8QZisCsow36h7mVGf_fdyI246BfZ.b9_oWlqnYWjsTMB5?autoplay=true) [<https://perma.cc/H38U-C5NW>]; see also *Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM’N (Oct. 27, 2021) [hereinafter Oct. 27 Meeting Transcript], <https://redistricting.maryland.gov/Documents/Meetings/2021-1027-Maryland-Citizens-Redistricting-Commission-Round-3-Public-Meeting-transcript.pdf> [<https://perma.cc/6X94-F973>] (transcript of video).

<sup>9</sup> See *infra* Section II.A. Communities of interest are “groupings of people who have similar values, shared interests, or common characteristics.” Glenn D. Magpantay, *A Shield Becomes a Sword: Defining and Deploying a Constitutional Theory for Communities of Interest in Political Redistricting*, 25 BARRY L. REV. 1, 1 (2020).

<sup>10</sup> Shabbat is the Jewish sabbath. For more on the religious background of the *eruv*, see *infra* notes 16–35 and accompanying text.

<sup>11</sup> See GOLDSTEIN & WEINER, *supra* note 5, at 307 (identifying the purpose of Pikesville’s *eruv* as a means “to unite a community and bring its inhabitants closer together” (citations omitted)).

FIGURE 3. THE PIKESVILLE *ERUV*<sup>12</sup>

The Commission was interested in using the *eruv* as a starting point for determining the district's boundaries when it redrew the district lines to preserve the Pikesville Jewish community.<sup>13</sup> Ultimately, the area covered by Pikesville's *eruv* was the size of 1.2 districts and could not be followed exactly because of equipopulation concerns.<sup>14</sup> But in presenting the final redistricting plan, Professor Persily explic-

<sup>12</sup> *Baltimore MD Eruv Map*, GOOGLE MAPS (June 15, 2015), [https://www.google.com/maps/d/u/0/viewer?ie=UTF8&oe=UTF8&msa=0&mid=1eLRnHBNpeHtJxk1VOBLO\\_NZ2SmA&ll=39.37478180833499%2C-76.70482653186033&z=12](https://www.google.com/maps/d/u/0/viewer?ie=UTF8&oe=UTF8&msa=0&mid=1eLRnHBNpeHtJxk1VOBLO_NZ2SmA&ll=39.37478180833499%2C-76.70482653186033&z=12) [https://perma.cc/567M-FEEX].

<sup>13</sup> Oct. 27 Meeting Video, *supra* note 8, at 2:01:06; Oct. 27 Meeting Transcript, *supra* note 8.

<sup>14</sup> Oct. 28 Meeting Video, *supra* note 6, at 21:45; *see also* Oct. 28 Meeting Transcript, *supra* note 6. The equipopulation principle in districting, requiring that legislative districts across a state contain roughly equal numbers of residents, emerged in *Reynolds v. Sims*, 377 U.S. 533 (1964). *See infra* note 173 and accompanying text.

itly noted that most of the *eruv* was contained in the Pikesville district.<sup>15</sup>

The *eruv* is a religious practice that is vital to observant Jewish communal life. Jewish law is replete with prohibitions against engaging in various activities on Shabbat.<sup>16</sup> Particularly relevant here is the prohibition against the “lifting, carrying, or pushing of objects outside of the private space of the home” on Shabbat.<sup>17</sup> Such objects include, inter alia, strollers, wheelchairs, books, and keys.<sup>18</sup> Carrying such items is permitted within the home and synagogue, but “[t]he problem, for the observant Jew, involves travel from one private area to another across an area where carrying is forbidden.”<sup>19</sup> By the letter of the law, many observant Jews would be effectively homebound on Shabbat, unable to transport themselves or their loved ones to synagogue or relatives’ homes, and unable to lock their doors.<sup>20</sup>

Enter the *eruv*. From the Hebrew for “mix or join together,”<sup>21</sup> the *eruv* is “a symbolic and physical extension of the ‘private domain’ and thus enables religiously observant Jews to do acts that would normally be only permitted in such a domain, like carrying or pushing, without violating” the laws of Shabbat.<sup>22</sup> *Eruvim*<sup>23</sup> are physical structures, constructed by hanging wires or strings on utility poles, or by

<sup>15</sup> *Final Maryland Citizens Redistricting Commission Meeting - Summary of Events and Final Maps*, MD. CITIZENS REDISTRICTING COMM’N, at 12:45 (Nov. 3, 2021) [hereinafter Nov. 3 Meeting Video], [https://us06web.zoom.us/rec/play/tYJ74Vb3UlcFWssqs8GxxlxA1O44UaeO8mCFlwR857bImAOYGMR-4slGqUTCmwo8J\\_syy78GXW3xTSgM.NhSNnREK2B897xHK?autoplay=true](https://us06web.zoom.us/rec/play/tYJ74Vb3UlcFWssqs8GxxlxA1O44UaeO8mCFlwR857bImAOYGMR-4slGqUTCmwo8J_syy78GXW3xTSgM.NhSNnREK2B897xHK?autoplay=true) [https://perma.cc/MS3M-WHTS]; *Final Maryland Citizens Redistricting Commission Meeting - Summary of Events and Final Maps*, MD. CITIZENS REDISTRICTING COMM’N (Nov. 3, 2021) [hereinafter Nov. 3 Meeting Transcript], <https://redistricting.maryland.gov/Documents/Meetings/2021-1103-Final-MD-Citizens-Commission-Meeting-Summary-and-Final-Maps-transcript.pdf> [https://perma.cc/K6CG-YCH4] (transcript of video).

<sup>16</sup> See Alexandra Lang Susman, *Strings Attached: An Analysis of the Eruv Under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 97–98 (2009) (listing prohibitions). There are thirty-nine prohibitions in total, including those against “the raising or lowering of a flame, which includes turning lights on and off,” “writing with a pen or a computer,” and “driving.” *Id.* at 98.

<sup>17</sup> *Id.* at 98.

<sup>18</sup> *Id.* (“Commonly used articles that would be prohibited from lifting or carrying without an *eruv*, but are permitted to be carried outside the home within an *eruv*, include baby carriages, strollers, canes, walkers, wheelchairs, food, prayer books, handkerchiefs, gloves, rain hats, house keys, and medicines.”).

<sup>19</sup> Zachary Heiden, *Fences and Neighbors*, 17 LAW & LITERATURE 225, 231 (2005).

<sup>20</sup> See *id.* (“[I]f you have a small child, how could you leave the house if you cannot carry her or push him in a baby carriage? How could you leave the house at all, if you are unable to . . . carry a key so that you might get back in?”).

<sup>21</sup> *Id.*

<sup>22</sup> Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 438 (2001).

<sup>23</sup> *Eruvim* is the Hebrew plural of *eruv*.



using plastic strips to designate existing wires as part of the *eruv*.<sup>24</sup> Meant to symbolize the walls of a dwelling, an *eruv* must be continuous, completely encircling what is to become the “private” space.<sup>25</sup> Often surrounding entire Jewish communities,<sup>26</sup> the presence of an *eruv* is a necessary prerequisite for full participation in the various aspects of Shabbat observance in conformance with Jewish law.<sup>27</sup>

The salience and importance of the *eruv* depends on one’s own level of religious observance. Observant Jews, often identifying as Orthodox or Haredi (ultra-Orthodox) are particularly desirous of *eruvim*—but such Jews are a minority in the United States, albeit a fast-growing one.<sup>28</sup> Less observant Jews, including those belonging to the Conservative and Reform denominations,<sup>29</sup> do not place as much weight on following the laws of Shabbat: Among all American Jews, only thirty-nine percent reported that they sometimes or often mark

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<sup>24</sup> See Shira J. Schlaff, Comment, *Using an Eruv to Untangle the Boundaries of the Supreme Court’s Religion-Clause Jurisprudence*, 5 U. PA. J. CONST. L. 831, 832–33 (2003) (describing the process of creating an *eruv*). For a visual depiction of a portion of New York City’s *eruv*, see Norberto Briceño (@norbertobriceno), *Kinda Interesting Things* #8: *The Fishing Line Above Manhattan*, ТІКТОК (Dec. 4, 2021), <https://www.tiktok.com/@norbertobriceno/video/7037912277638466821> [<https://perma.cc/C3MB-SD79>].

<sup>25</sup> Schlaff, *supra* note 24, at 832–33; Susman, *supra* note 16, at 94.

<sup>26</sup> Some can be particularly large: The *eruv* in Los Angeles contains about eighty square miles. Susman, *supra* note 16, at 94 n.6.

<sup>27</sup> See Schragger, *supra* note 22, at 439 (describing the utility of the *eruv* in allowing for communal gatherings). For examples of guidance and stories pertaining to Shabbat observance without an *eruv*, see Letter from David Wolkenfeld, Rabbi, Anshe Sholom B’nai Israel Congregation, <https://images.shulcloud.com/626/uploads/Guide%20to%20Shabbat%20Without%20Eruv.pdf> [<https://perma.cc/TC2X-USVU>]; Blu Greenberg, *Eruv & Women*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/eruv-women> [<https://perma.cc/GP79-ZH9U>]. Another notable practice to get around the more restrictive aspects of the laws of Shabbat is the use of a *shabbos goy*, a non-Jew who is asked to perform forbidden tasks. See Rachel Druck, *The Shabbos Goy to the Rescue*, ANU: MUSEUM OF THE JEWISH PEOPLE (Feb. 11, 2018), <https://www.anumuseum.org.il/blog-items/shabbos-goy-rescue> [<https://perma.cc/2PMQ-M2YT>].

<sup>28</sup> See PEW RSCH. CTR., *JEWISH AMERICANS IN 2020*, at 8 (2021), [https://www.pewforum.org/wp-content/uploads/sites/7/2021/05/PF\\_05.11.21\\_Jewish.Americans.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2021/05/PF_05.11.21_Jewish.Americans.pdf) [<https://perma.cc/SPY6-4NN4>] (finding that nine percent of Jews in the United States identify as Orthodox, but among those between the ages of eighteen and twenty-nine, that number jumps to seventeen percent).

<sup>29</sup> Seventeen percent of American Jews consider themselves to be Conservative, and thirty-seven percent consider themselves to be Reform. *Id.* at 14. Thirty-two percent of American Jews do not identify with any religious denomination. *Id.* While beyond the scope of this Note, it is important to recognize that Judaism is more than just a religion, and Jews differ as to what it means to be Jewish. See *id.* at 56 (“U.S. Jews do not have a single, uniform answer to what being Jewish means. When asked whether being Jewish is mainly a matter of religion, ancestry, culture, or some combination of those things, Jews responded in a wide variety of ways . . .”).



Shabbat in a way that is personally meaningful.<sup>30</sup> Accordingly, there is a lower likelihood that less observant Jews will feel bound by the carrying prohibition, and thus will have less of a need for an *eruv*.

Importantly, a degree of community organizing is required to establish an *eruv*. According to Jewish law, in order for an *eruv* to be properly considered a private space for religious purposes, the Jewish community must “go public”<sup>31</sup>—a public authority must recognize the *eruv* as such, and “lease” the area contained within the *eruv* to the Jewish community in exchange for (nominal) consideration.<sup>32</sup> Such a leasing arrangement furthers the fiction that the area contained within the *eruv* is a single dwelling and symbolically transforms the public space into a private domain.<sup>33</sup> *Eruvim* often go unnoticed<sup>34</sup>—part of the web of wires that are a fixture of modern life—but for those who utilize them, “[t]he space within the *eruv* takes on social meaning: it becomes a religiously identified, normatively ‘restricted’ space,” emphatically, though subtly, defined as Jewish.<sup>35</sup>

The allure of using the *eruv* as a basis for drawing district lines is clear: In the tempestuous process of defining communities of interest<sup>36</sup>—a process that will inevitably spark disagreement, dissatisfaction, and dissent—deferring boundary setting to a physical, objective metric established by a community itself would appear to be a safe harbor, insulating line drawers from criticism.<sup>37</sup> However, this Note argues that rather than serving as a safe harbor, this use of the

<sup>30</sup> See *id.* at 25 (reporting rates of participation in cultural and religious activities); see also *id.* at 15 (“Conservative and Reform Jews tend to be less religiously observant in traditional ways . . .”).

<sup>31</sup> Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 CHI.-KENT L. REV. 63, 64 (2015).

<sup>32</sup> See Susman, *supra* note 16, at 95 (“In order to create a valid *eruv* under Jewish law, a secular official with jurisdiction over the area in question must issue a ceremonial governmental proclamation ‘leasing’ the enclosed public and private property to the Jewish community for a small fee.” (footnote omitted)); Fonrobert, *supra* note 31, at 64 n.3 (providing rationales for and examples of such agreements).

<sup>33</sup> See Susman, *supra* note 16, at 95 (“Leasing is essential because it permits Orthodox Jews to treat a whole city, or the portion of a city that is enclosed in an *eruv*’s space, as if it were a single household, symbolically converting the public domain into private domain.”).

<sup>34</sup> *Id.* at 94.

<sup>35</sup> Schragger, *supra* note 22, at 440.

<sup>36</sup> Representation of communities of interest is one of the traditional districting criteria that mapmakers consider when drawing legislative districts. See *infra* Section II.A.

<sup>37</sup> See Schragger, *supra* note 22, at 440 (“The *eruv* literally attaches normative weight to jurisdictional lines; it represents the rare situation in which the normative community is coextensive with the descriptive neighborhood (as defined by the limits of the *eruv*).”); see also Charlotte Elisheva Fonrobert, *The Political Symbolism of the Eruv*, JEWISH SOC. STUD., Spring/Summer 2005, at 9, 10 (“[The *eruv*] operates as a boundary-making device, quite concretely in relationship to the residential space of the neighborhood that the *eruv* community inhabits.”).

*eruv* in redistricting presents a constitutional hazard, as it may run afoul of the Establishment Clause. The Supreme Court's Establishment Clause jurisprudence clearly forbids a state from "delegat[ing] its civic authority to a group chosen according to a religious criterion,"<sup>38</sup> a prohibition known as the Establishment Clause nondelegation doctrine. The use of an *eruv* as a basis for redistricting, this Note argues, is precisely such a delegation: The state delegates its power to determine the boundaries of a community and the resultant district lines to religious authorities and a religious community, bucking the neutrality commanded by the Establishment Clause.<sup>39</sup> Yet, the mere *potential* for such a violation from such a use has not been explored until now. With Jewish communities across the country rightfully seeking representation in the redistricting process,<sup>40</sup> and with more than 130 *eruvim* in the United States,<sup>41</sup> line drawers ought to seriously consider these constitutional implications.

This Note proceeds in three Parts. Part I outlines the Supreme Court's Establishment Clause jurisprudence. Part II explores the tensions inherent in the redistricting process, focusing on the communities of interest inquiry. Finally, Part III shows how the use of the *eruv* in redistricting can violate the Establishment Clause and crafts a standard for finding such a violation.

## I

### THE ESTABLISHMENT CLAUSE

The First Amendment prohibits Congress<sup>42</sup> from making a "law respecting an establishment of religion."<sup>43</sup> The Supreme Court's modern Establishment Clause jurisprudence—and colloquial understanding of the Clause as mandating a separation of Church and

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<sup>38</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) (plurality opinion).

<sup>39</sup> See *infra* Sections III.A–B.

<sup>40</sup> See, e.g., Louis Keene, *L.A. Redistricting Plan Empowers Jewish Voters*, FORWARD (Sept. 30, 2021), <https://forward.com/news/476153/la-city-council-redistricting-plan-explained-k2> [<https://perma.cc/N49Q-FGWW>] (describing the efforts of the Jewish community in Los Angeles to obtain representation in the latest round of redistricting for the Los Angeles City Council).

<sup>41</sup> Susman, *supra* note 16, at 93.

<sup>42</sup> The Establishment Clause has been found to be applicable to the states via the Fourteenth Amendment. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). But see *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (arguing that because the Establishment Clause was originally meant to protect the states from a federal establishment of religion, "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government").

<sup>43</sup> U.S. CONST. amend. I.

State—begins with Justice Black’s quotation of Thomas Jefferson in *Everson v. Board of Education of Ewing Township*: “[T]he clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”<sup>44</sup> Yet as the Court continued to wrestle with Establishment Clause cases, the Justices acknowledged that “we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,”<sup>45</sup> and thus sought a means by which to concretize the wall described by Justice Black, and Thomas Jefferson before him.<sup>46</sup> This Part traces the Supreme Court’s efforts to craft an Establishment Clause jurisprudence in Section I.A, and then details lower court decisions applying this doctrine to allow both the establishment and maintenance of *eruvim* in Section I.B. Finally, Section I.C addresses what can be considered the purest form of Establishment Clause jurisprudence, the arguably *sui generis* context of the prohibition against the governmental delegation of civic authority to religious groups.

### A. *The Rise and Fall of Lemon*

The Supreme Court’s Establishment Clause jurisprudence is notoriously tangled. The modern doctrine was rooted in the neat, relatively bright-line test set forth in *Lemon v. Kurtzman*,<sup>47</sup> yet has grown more complex as the inadequacies and criticisms of *Lemon* mounted over time.<sup>48</sup> In *Lemon*, the Court set forth a troika of Establishment Clause requirements that a challenged statute must satisfy, emanating from its prior jurisprudence: (1) “[T]he statute [at issue] must have a secular legislative purpose,”<sup>49</sup> (2) “its principal or primary effect must be one that neither advances nor inhibits religion,”<sup>50</sup> and (3) “the statute must not foster ‘an excessive government entanglement with

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<sup>44</sup> 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164 (1878)); see also GREGORY A. SMITH, PEW RSCH. CTR., IN U.S., FAR MORE SUPPORT THAN OPPOSE SEPARATION OF CHURCH AND STATE 12 (2021), [https://www.pewforum.org/wp-content/uploads/sites/7/2021/10/PF\\_10.21.21\\_fullreport.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2021/10/PF_10.21.21_fullreport.pdf) [<https://perma.cc/ETU6-FZ2B>] (finding majority support amongst Americans for the principle of separation of church and state and revealing the resonance of the *Reynolds* quote among the American public).

<sup>45</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>46</sup> See Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html> [<https://perma.cc/3LU6-F5Y5>] (containing the “wall of separation” quote).

<sup>47</sup> 403 U.S. 602 (1971).

<sup>48</sup> See *infra* notes 53–56 and accompanying text.

<sup>49</sup> *Lemon*, 403 U.S. at 612 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

<sup>50</sup> *Id.* (citing *Allen*, 392 U.S. at 243).

religion.’”<sup>51</sup> Under *Lemon*, a failure to satisfy any of these three prongs constituted an Establishment Clause violation.<sup>52</sup>

The *Lemon* test attracted much judicial<sup>53</sup> and scholarly<sup>54</sup> criticism, with many openly advocating for its demise.<sup>55</sup> Yet for decades, despite such disparagement, the *Lemon* test still served as an analytical touchstone in Establishment Clause jurisprudence, even if it was no longer mechanically applied.<sup>56</sup> Nevertheless, *Lemon*’s place in Establishment Clause jurisprudence was certainly diminished in the wake of Justice O’Connor’s endorsement test, set forth in *Lynch v. Donnelly* as a refinement of the *Lemon* test.<sup>57</sup> As a general rule, the endorsement test

<sup>51</sup> *Id.* at 613 (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970)).

<sup>52</sup> *See id.* at 612–13 (describing these tests as each protecting against a different evil which would violate the Establishment Clause); *see also* Jun Xiang, Note, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts*, 113 COLUM. L. REV. 777, 780–82 (2013) (describing the *Lemon* test and its requirements).

<sup>53</sup> Justice Scalia described the *Lemon* test as “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *see also* *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (collecting Establishment Clause cases in which the Supreme Court did not apply *Lemon*, and arguing that they are reflective of the test’s “shortcomings”).

<sup>54</sup> *See, e.g.*, Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 800 (1993) (describing criticism of *Lemon* as “well deserved” and claiming that each of its prongs is fraught with a “major analytic flaw or ambiguity”); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119, 128 (1992) (arguing that *Lemon* can lead to “almost any result” and “has an inherent tendency to devalue religious exercise”).

<sup>55</sup> *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2092–93 (Kavanaugh, J., concurring) (noting the variety of contexts in which *Lemon* had not been applied).

<sup>56</sup> *See, e.g., id.* at 2094 (Kagan, J., concurring in part) (“Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere . . . .”); *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (describing *Lemon* as a “guidepost[]”); *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015) (per curiam) (noting the continued applicability of *Lemon* despite criticism); Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383, 421 (2021) (“While *Lemon* captures certain essentials about the Establishment Clause, a rigid application of its steps leads occasionally to results that a majority of the Court considers unacceptable. As a result, . . . the Court is willing to disregard it in . . . cases where its straightforward application would lead to the ‘wrong’ result.”).

<sup>57</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring) (“Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.”); *see also* Joanne Kuhns, Comment, *Board of Education of Kiryas Joel Village School District v. Grumet: The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599, 1645–49 (1995) (describing the history of the endorsement test).

dispenses with the “entanglement” prong of the *Lemon* test and collapses its “purpose” and “effect” prongs into a single inquiry: would a reasonable, informed observer, *i.e.*, one familiar with the history and context of private individuals’ access to the public money or property at issue, perceive the challenged government action as endorsing religion?<sup>58</sup>

In *Kennedy v. Bremerton School District*, the Supreme Court officially “abandoned” *Lemon* and left the status of the endorsement test in limbo.<sup>59</sup> In its place, the six-Justice majority advanced an originalist and historical view of the Establishment Clause,<sup>60</sup> while also noting that the Clause prohibits the government from impermissibly coercing religious belief, practice, or exercise.<sup>61</sup> Given the recency of the *Kennedy* decision, the full scope of its impact on Establishment Clause jurisprudence is yet to be seen,<sup>62</sup> but it is predicted to winnow the field of viable claims.<sup>63</sup>

The following Section shows how lower courts have applied these tests to actions involving both the establishment and maintenance of *eruvim*.

### B. *The Eruv and the Establishment Clause*

The Supreme Court has never ruled on the Establishment Clause implications of the *eruv*. However, both the Second<sup>64</sup> and the Third<sup>65</sup>

<sup>58</sup> *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 174 (3d Cir. 2002) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 654–55 (2002)). Entanglement was found to still be relevant in two specific contexts: aid to religious schools and delegation of governmental authority to religious groups. *See id.* at 174 n.36 (describing contexts in which entanglement still applies).

<sup>59</sup> *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (“[T]he ‘shortcomings’ associated with this ‘ambitiou[s],’ abstract, and ahistorical approach to the Establishment Clause became so ‘apparent’ that this Court long ago abandoned *Lemon* and its endorsement test offshoot.” (second alteration in original) (quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion))).

<sup>60</sup> *See id.* at 2428 (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))).

<sup>61</sup> *Id.* at 2429.

<sup>62</sup> Writing for the majority, Justice Gorsuch noted that “[m]embers of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause” and did not expound on the subject because the majority found the conduct at issue to not be coercive. *Id.* In dissent, Justice Sotomayor wrote that “the Court’s history-and-tradition test offers essentially no guidance . . .” *Id.* at 2450 (Sotomayor, J., dissenting).

<sup>63</sup> *See id.* at 2434 (Sotomayor, J., dissenting) (describing the “short shrift” given to the Establishment Clause in the decision).

<sup>64</sup> *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015) (per curiam).

<sup>65</sup> *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002).

Circuits have opined on the matter, finding that the erection and maintenance, respectively, of an *eruv* did not violate the Establishment Clause. In the Second Circuit action, plaintiffs sought a declaratory judgment and an injunction preventing the construction of a proposed *eruv* in Westhampton Beach, New York, claiming that it would be an Establishment Clause violation.<sup>66</sup> In the Third Circuit action, plaintiffs claimed that Tenafly, New Jersey's selective enforcement of an ordinance prohibiting the placing of "any sign or advertisement, or other matter" on top of utility poles<sup>67</sup> against an already established *eruv* violated the Free Exercise rights of Tenafly's Orthodox Jewish residents.<sup>68</sup>

Both Circuits found that the *eruvim* at issue did not implicate Establishment Clause concerns, but each took a different route to arrive at this conclusion. The Second Circuit applied the three-prong *Lemon* test.<sup>69</sup> First, it found the presence of a secular governmental purpose: In permitting the construction of the *eruv*, the Long Island Power Authority (LIPA)—the state actor on whose utility poles the *eruv* was constructed—accommodated religious observance in a neutral manner.<sup>70</sup> As the case involved a "religious display," the Second Circuit construed *Lemon*'s effect prong as an inquiry into whether a reasonable third party would perceive governmental endorsement of religion from the action.<sup>71</sup> The court found that "[n]o reasonable observer who notices the strips on LIPA utility poles would draw the conclusion that a state actor is thereby endorsing religion."<sup>72</sup> Finding

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<sup>66</sup> *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 393. For a satirical take on the factual background of the Second Circuit case, see *The Daily Show with Jon Stewart: The Thin Jew Line*, COMEDY CENT. (Mar. 23, 2011), <https://www.cc.com/video/1jsrl7/the-daily-show-with-jon-stewart-the-thin-jew-line> [<https://perma.cc/4U6G-9YMQ>]. For a more detailed overview of the facts, see generally Fonrobert, *supra* note 37, at 65–71.

<sup>67</sup> *Tenafly Eruv Ass'n*, 309 F.3d at 151 (quoting TENAFLY, N.J., MUNICIPAL CODE § 20-5(f) (2004)). In full, the ordinance reads: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." TENAFLY, N.J., MUNICIPAL CODE § 20-5(f).

<sup>68</sup> *Tenafly Eruv Ass'n*, 309 F.3d at 151. The court noted that Tenafly had, in practice, made case-by-case exceptions to the Ordinance, including for house number signs, church directional signs, and holiday decorations. *Id.* at 151–52.

<sup>69</sup> The Second Circuit noted, however, that the *Lemon* test is "much criticized." *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395 (quoting *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 n.12 (2d Cir. 2014)). *Lemon*'s overruling does not likely change the outcome of this case, as Establishment Clause challenges are predicted to be less viable in the wake of the *Kennedy* decision. See *supra* note 63 and accompanying text.

<sup>70</sup> *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395.

<sup>71</sup> *Id.* at 396 (citing *Skoros v. City of New York*, 437 F.3d 1, 29 (2d Cir. 2006)).

<sup>72</sup> *Id.*

no risk of entanglement,<sup>73</sup> the court held that “LIPA’s action permitting the . . . erect[ion of] the *eruv* is not an unconstitutional establishment of religion.”<sup>74</sup>

In the Third Circuit action, Tenaflly’s enforcement of its no-placing ordinance against an *eruv* was subject to strict scrutiny.<sup>75</sup> Tenaflly argued that maintaining the *eruv* would violate the Establishment Clause, and thus its enforcement of the ordinance against the *eruv* satisfied strict scrutiny’s compelling interest requirement.<sup>76</sup> The Third Circuit noted that *Lemon* had been eschewed by the Supreme Court in favor of the endorsement test—“dispens[ing] with the ‘entanglement’ prong of the *Lemon* test and collaps[ing] its ‘purpose’ and ‘effect’ prongs into a single inquiry: would a reasonable, informed observer . . . perceive the challenged government action as endorsing religion?”<sup>77</sup> In applying the endorsement test, the court found that “if the Borough [of Tenaflly] ceased discriminating against the plaintiffs’ religiously motivated conduct to comply with the Free Exercise Clause, a reasonable, informed observer would not perceive an endorsement of Orthodox Judaism[,]” but rather a permissible, neutral accommodation of religion.<sup>78</sup> Moreover, the construction of the *eruv* by private actors, not the government, and its maintenance via private funds militated against a finding of endorsement.<sup>79</sup> Even if

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 172 (3d Cir. 2002). In the Free Exercise context, incidental burdens on religion from neutral and generally applicable state laws are not actionable. *See Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (noting that free exercise does not exempt an individual from complying with an “otherwise valid law”); *see also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), to be unconstitutional as applied to the states, thus leaving the *Smith* test in place for Free Exercise challenges to state laws). However, if a law discriminates against religion or is not generally applicable, strict scrutiny is triggered. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 543 (1993). Strict scrutiny was triggered in the *Tenaflly Eruv Ass’n* case because the selective enforcement of the ordinance belied its generally applicable language, evincing differential treatment of religion. *See Tenaflly Eruv Ass’n*, 309 F.3d at 168 (comparing the situation in *Tenaflly* to that of *Lukumi*); *see also id.* at 165–66 (“[I]n situations where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator’s conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.”).

<sup>76</sup> *Tenaflly Eruv Ass’n*, 309 F.3d at 174.

<sup>77</sup> *Id.* (collecting cases that exemplify this shift in the *Lemon* test).

<sup>78</sup> *Id.* at 176. While the vitality of the endorsement test is in question following the *Kennedy* decision, this does not likely change the outcome of this case as Establishment Clause challenges are predicted to be less viable in the wake of the *Kennedy* decision. *See supra* note 63 and accompanying text.

<sup>79</sup> *Tenaflly Eruv Ass’n*, 309 F.3d at 177.



one were to gain a misperception of endorsement, the court ruled that “there is a much greater risk that the observer would perceive hostility toward Orthodox Jews if the Borough removes the [*eruv*].”<sup>80</sup> In a footnote, the court noted that allowing the *eruv* to remain would also satisfy the *Lemon* test.<sup>81</sup> Thus, as Tenaflly was unable to show that leaving the *eruv* in place would violate the endorsement test, avoiding an Establishment Clause violation could not serve as a compelling interest for Tenaflly’s actions to remove the *eruv*.<sup>82</sup>

Having set forth the (admittedly indeterminate) scope of what the Establishment Clause prohibits and examined the application of the Clause’s jurisprudence to the particular context of the *eruv*, the next Section turns to a particularized area of Establishment Clause jurisprudence: the nondelegation doctrine.

### C. *Nondelegation: Grendel’s Den and Kiryas Joel*

The Establishment Clause’s nondelegation doctrine is perhaps its most “clear and obvious”<sup>83</sup> prohibition: “[G]overnment cannot delegate governmental power to religious institutions.”<sup>84</sup> This Section explores the two Supreme Court cases that respectively establish and apply the nondelegation doctrine: *Larkin v. Grendel’s Den, Inc.*<sup>85</sup> and *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>86</sup> As a doctrinal matter, nondelegation under the Establishment Clause remains underdeveloped, in no small part because examples of such delegations are rare.<sup>87</sup> Indeed, it is the task of this Note to highlight the broader applicability of the Establishment Clause nondelegation doctrine and particularly the applicability of its prohibitions in voting rights jurisprudence.

The precise interaction between the *Lemon* test and the prohibition against delegation is unclear: Nondelegation can be considered both an application of the *Lemon* test and a freestanding

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 177 n.41.

<sup>82</sup> *Id.* at 178.

<sup>83</sup> Xiang, *supra* note 52, at 777.

<sup>84</sup> Zalman Rothschild, *Fulton’s Missing Question: Religious Adoption Agencies and the Establishment Clause*, 100 TEX. L. REV. ONLINE 32, 35 (2021).

<sup>85</sup> 459 U.S. 116 (1982).

<sup>86</sup> 512 U.S. 687 (1994).

<sup>87</sup> See *id.* at 697 (plurality opinion) (describing *Grendel’s Den* as “present[ing] an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America”); see also Rothschild, *supra* note 84, at 36 (“[T]he precise contours of the delegation prohibition have not been drawn . . . .”); Xiang, *supra* note 52, at 777–78 (arguing that state court experience shows that the doctrine is less straightforward than it might seem).

Establishment Clause principle.<sup>88</sup> Accordingly, the demise of *Lemon*<sup>89</sup> does not necessarily lead to a corresponding decline of the applicability of the Establishment Clause's nondelegation prohibition.<sup>90</sup> The doctrine itself has been justified as an expression of the Framers' view of the proper roles of government and religion,<sup>91</sup> and a compelling argument can be made that the fusion of government and religion would work to coerce the citizenry into practicing a particular religion.<sup>92</sup>

### 1. Grendel's Den

The Supreme Court's first foray into Establishment Clause nondelegation jurisprudence occurred in *Larkin v. Grendel's Den, Inc.*<sup>93</sup> Grendel's Den was (and still is<sup>94</sup>) a restaurant in Cambridge, Massachusetts, which had applied for a liquor license.<sup>95</sup> At the time, Massachusetts law dictated that a liquor license would be denied if a church or school within five hundred feet of the applying establishment filed a written objection.<sup>96</sup> The Holy Cross Armenian Catholic Parish, located next door to Grendel's Den, objected to the liquor license, and on that basis, the application was denied.<sup>97</sup>

The restaurant appealed, and in an 8–1 decision, the Supreme Court found the statute violated the Establishment Clause.<sup>98</sup> While Massachusetts defended its statute as a zoning regulation designed to “protect diverse centers of spiritual, educational and cultural enrichment,”<sup>99</sup> Chief Justice Burger, writing for the majority, found the statute to be more than just a zoning ordinance because it “dele-

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<sup>88</sup> See Xiang, *supra* note 52, at 784–85 (explaining these dual understandings of nondelegation).

<sup>89</sup> See *supra* Section I.A.

<sup>90</sup> Indeed, the “clear and obvious” nature of such a prohibition would seemingly caution against such a demise. Xiang, *supra* note 52, at 777; see Rothschild, *supra* note 84, at 35 (“[O]ne thing is clear under all interpretations [of the Establishment Clause]: The government . . . may not formally establish a state religion. A principle stemming from this doctrine is that the government cannot delegate governmental power to religious institutions.”).

<sup>91</sup> See *infra* text accompanying notes 108–10.

<sup>92</sup> Cf. *supra* note 62 (describing the difficulty in defining coercion).

<sup>93</sup> 459 U.S. 116 (1982).

<sup>94</sup> GRENDEL'S DEN RESTAURANT & BAR, <https://www.grendelsden.com> [<https://perma.cc/URK6-29WJ>].

<sup>95</sup> *Grendel's Den*, 459 U.S. at 117.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 117–18.

<sup>98</sup> *Id.* at 120.

<sup>99</sup> *Id.*; see also Brief of the State Appellants at 28–29, *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (No. 81-878) (summarizing similar laws in other states that enact protections for churches, schools, and other institutions). The Supreme Court had previously blessed the use of zoning laws to effectively prohibit the establishment of adult

gate[d] to private, nongovernmental entities power to *veto* certain liquor license applications,” a power normally exercised by governmental agencies.<sup>100</sup> Thus, the ordinary deference typically accorded to zoning regulations did not apply.<sup>101</sup>

Applying the *Lemon* test,<sup>102</sup> Chief Justice Burger found that the statute assigning the veto power to churches had a secular purpose.<sup>103</sup> However, because these purposes could have been accomplished in other ways,<sup>104</sup> because there was no guarantee that churches’ “standardless” veto power would be used in a religiously neutral way,<sup>105</sup> and because churches accrued “a significant symbolic benefit” by virtue of this conferral of power,<sup>106</sup> the statute was found to have “a ‘primary’ and ‘principal’ effect of advancing religion.”<sup>107</sup>

Furthermore, the Court noted the statute’s entanglement implications, reasoning that “[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”<sup>108</sup> Indeed, avoiding this was “the core rationale” for the Establishment Clause itself: the Founders saw “preventing ‘a fusion of governmental and religious functions,’ ”<sup>109</sup> as crucial given that such entanglement risked the fomentation of religious strife.<sup>110</sup>

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theaters. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 62–63 (1976) (finding that the zoning laws restricting adult theaters did not offend the First Amendment).

<sup>100</sup> *Grendel’s Den*, 459 U.S. at 122 (emphasis added).

<sup>101</sup> See *id.* at 121 (“The zoning function is traditionally a governmental task requiring the ‘balancing [of] numerous competing considerations,’ and courts should properly ‘refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.’ ” (alteration in original) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977))).

<sup>102</sup> As discussed above, commentators have read *Grendel’s Den* as suggesting the nondelegation prohibition can be construed as existing independent from *Lemon*. See Xiang, *supra* note 52, at 784–85, 785 n.54 (explaining various reasons for understanding the nondelegation prohibition as independent of *Lemon*).

<sup>103</sup> See *Grendel’s Den*, 459 U.S. at 123 (“There can be little doubt that this [statute] embraces valid secular legislative purposes.”).

<sup>104</sup> *Id.* at 123–24. Such measures included a flat ban on liquor sales within a certain distance from schools and churches and having hearings where churches and schools could present their views—but where such views would not automatically be controlling. *Id.* at 124.

<sup>105</sup> *Id.* at 125.

<sup>106</sup> *Id.* at 125–26.

<sup>107</sup> *Id.* at 126.

<sup>108</sup> *Id.* at 127.

<sup>109</sup> *Id.* at 126 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)).

<sup>110</sup> See *id.* at 127 (noting that the statute at issue created too central a role for religious institutions in governance).

## 2. Kiryas Joel

*Board of Education of Kiryas Joel Village School District v. Grumet*<sup>111</sup> placed the fractured nature of the Court's Establishment Clause jurisprudence—and particularly Establishment Clause nondelegation jurisprudence—on full display. The facts of the case emanate from the aftershocks of the Court's decisions in *School District of the City of Grand Rapids v. Ball*<sup>112</sup> and *Aguilar v. Felton*,<sup>113</sup> companion cases which held that government funds could not be used to finance secular, remedial educational programs taught by public school teachers in religious schools.<sup>114</sup>

Kiryas Joel is a village in Orange County, New York, that is nearly exclusively comprised of Satmar Hasidim, an ultraorthodox Jewish sect that

make[s] few concessions to the modern world and go[es] to great lengths to avoid assimilation into it. [Satmar Hasidim] interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls.<sup>115</sup>

The village itself was incorporated in 1977, splintering off from the adjacent town of Monroe as the result of a zoning dispute.<sup>116</sup> The

<sup>111</sup> 512 U.S. 687 (1994).

<sup>112</sup> 473 U.S. 373 (1985) (finding that the provision of public funds for classes taught by public school teachers in religious schools violated the Establishment Clause), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>113</sup> 473 U.S. 402 (1985) (holding that a remedial education program funded by taxpayers and taught by public school teachers could not take place on religious school grounds), *overruled by* *Agostini*, 521 U.S. 203.

<sup>114</sup> *Id.* at 413–14; *Ball*, 473 U.S. at 397–98. *Aguilar* and *Ball* represent the high-water mark of the separation of church and state, taking a decidedly formalistic view of the *Lemon* prohibitions. See *Aguilar*, 473 U.S. at 408–14 (discussing past cases dealing with Establishment Clause jurisprudence and explaining the rationale behind the Court's approach). Just over a decade after deciding these companion cases, the Supreme Court reversed course in *Agostini v. Felton*—a case involving the same parties as *Aguilar*—holding that in the intervening years, the Court's Establishment Clause jurisprudence had cut away at the doctrinal underpinnings of the decisions in *Aguilar* and *Ball*. *Agostini*, 521 U.S. at 223 (“What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.”). *Agostini* thus blessed the use of government funds and public school teachers to provide remedial educational services to religious school students on the premises of religious schools—which would have obviated the need for the districting arrangement in *Kiryas Joel*. See *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring) (calling for a reconsideration of *Aguilar* and noting that the *Aguilar* decision blocks other possible means of addressing the harm at issue in *Kiryas Joel*).

<sup>115</sup> *Kiryas Joel*, 512 U.S. at 691.

<sup>116</sup> *Id.*; see also *id.* at 712 (O'Connor, J., concurring) (noting that the zoning dispute arose because the Satmars “subdivided their houses into several apartments” to

children of Kiryas Joel attend sex-segregated religious schools, but such schools did not “offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools.”<sup>117</sup> Prior to the Court’s *Aguilar* and *Ball* decisions, the Monroe–Woodbury Central School District funded programs that provided these services at one of Kiryas Joel’s religious schools.<sup>118</sup>

In the wake of *Aguilar* and *Ball*, these programs were discontinued, and the children requiring these services received them at the Monroe–Woodbury public schools—the first exposure to the secular world for the students.<sup>119</sup> Parents withdrew their children, traumatized by culture shock, from the secular schools, and the children either received services through private funding or did not receive services at all.<sup>120</sup> To address this situation, the New York State Legislature passed a special statute establishing a separate school district for Kiryas Joel.<sup>121</sup> The statute read:

The territory of the village of Kiryas Joel in the town of Monroe . . . 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.<sup>122</sup>

The school district was unique in that it did not provide general educational programs, as the overwhelming majority of children in Kiryas Joel received their education at religious schools, “relying on the new school district only for transportation, remedial education, and health and welfare services.”<sup>123</sup> The school district only ran a special education program, which attracted students not only from Kiryas Joel, but also Hasidic children from the surrounding area.<sup>124</sup> The

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accommodate their large, close-knit family groups, and because basements of buildings were used as schools and synagogues).

<sup>117</sup> *Id.* at 692 (majority opinion).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* (“Parents of most of these children withdrew them from the Monroe–Woodbury secular schools, citing ‘the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different . . . .’” (alteration in original) (quoting Bd. of Educ. of Monroe–Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988))).

<sup>121</sup> *Id.* at 693. To find the relevant statute, see 1989 N.Y. Sess. Laws 748 (McKinney).

<sup>122</sup> *Kiryas Joel*, 512 U.S. at 693 n.1 (citing 1989 N.Y. Sess. Laws 748 (McKinney)). The statute also contained provisions regarding the composition of the school board and the effective date of the legislation. *Id.*

<sup>123</sup> *Id.* at 694.

<sup>124</sup> *Id.* As many as two-thirds of the students came from outside the school district. *Id.*

statute creating the school district was challenged as impermissible under the Establishment Clause.<sup>125</sup> The Court found, by a 6–3 vote, that the creation of the district violated the Establishment Clause. However, stark divisions in conceptions of delegation and the true nature of the violation were laid bare by the various opinions.

a. Justice Souter’s Majority and Plurality Opinion

Three Justices (Blackmun, Stevens, and Ginsburg) signed onto the entirety of Justice Souter’s *Kiryas Joel* opinion, and Justice O’Connor joined all but one section.<sup>126</sup>

The four-Justice plurality found the statute to present a variant of the problem raised in *Grendel’s Den*: Justice Souter cast the lesson from that case as instructing that “a State may not delegate its civic authority”—here, the authority over public schools—“to a group chosen according to a religious criterion.”<sup>127</sup> Justice Souter noted that while the delegation in *Grendel’s Den* was to a church council and the delegation at issue in *Kiryas Joel* was to the “qualified voters of the village of Kiryas Joel,” as far as the Establishment Clause is concerned, this was a distinction without a difference.<sup>128</sup> Rather than focusing on the identities of the recipients of state power, Justice Souter emphasized that, just as in *Grendel’s Den*, the delegation occurred *on the basis of religion*—“[w]here ‘fusion’ is an issue, the difference lies in the distinction between a government’s purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.”<sup>129</sup> The fear animating both decisions was the same: the potential for unconstrained exercise of political power that works to advance religious ends.<sup>130</sup>

The plurality went beyond the text of the statute—which only delegated power to the residents of Kiryas Joel—to tease out its constitutional defects.<sup>131</sup> The plurality found that this was an instance of delegation on the basis of religion, despite the statute’s facial neu-

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<sup>125</sup> *Id.* at 690.

<sup>126</sup> *Kiryas Joel*, 512 U.S. at 688–89.

<sup>127</sup> *Id.* at 698 (plurality opinion).

<sup>128</sup> *Id.* (internal citations omitted).

<sup>129</sup> *Id.* at 699.

<sup>130</sup> See *id.* at 698 (referencing “political control”); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 125 (1982) (“The churches’ power under the statute is standardless . . . . [I]t could be employed for explicitly religious goals . . . .”).

<sup>131</sup> See *Kiryas Joel*, 512 U.S. at 699 (plurality opinion) (noting that the “context here,” such as the district lines running along religious divides, surfaced constitutional concerns).

trality.<sup>132</sup> To come to this conclusion, the plurality focused on various factors bearing on the statute's uniqueness, which reflected its impermissible features. Justice Souter cited the legislature's awareness that Kiryas Joel's population was exclusively Satmar;<sup>133</sup> the fact that the district's establishment involved dividing an existing school district, rather than consolidating school districts, bucking New York's general districting trends;<sup>134</sup> and the act's passage as a special act, rather than under New York's general laws regarding school districting<sup>135</sup> as evincing the impermissibly delegative quality of the school district. He reasoned that "customary and neutral principles would not have dictated the same result."<sup>136</sup> Ultimately, the plurality found the creation of the school district to be "substantially equivalent to defining a political subdivision and hence the quality for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"<sup>137</sup>

The majority, with Justice O'Connor in tow, found issue with another impermissible aspect of the school district statute: Its unique nature raised concern that such a benefit would not be provided equally to others, so there was no "'effective means of guaranteeing' that governmental power [would] be and ha[d] been neutrally employed."<sup>138</sup> The majority was concerned that there was no way to ensure that the next similarly situated group would receive such a legislative benefit, a situation that would, troublingly, be judicially unreviewable.<sup>139</sup> The scheme here was more than an accommodation, and instead, was "an adjustment to the Satmars' religiously grounded preferences."<sup>140</sup> Proper accommodations would include receiving the necessary instruction at a public school run by the Monroe–Woodbury

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<sup>132</sup> See *id.* (noting that the statute on its face addresses district residents); *supra* note 122 and accompanying text.

<sup>133</sup> *Kiryas Joel*, 512 U.S. at 699–700 (plurality opinion).

<sup>134</sup> *Id.* ("Indeed, the trend in New York is not toward dividing school districts but toward consolidating them.").

<sup>135</sup> *Id.* at 700–01 ("The origin of the district in a special Act of the legislature, rather than the State's general laws governing school district reorganization, is likewise anomalous." (footnote omitted)).

<sup>136</sup> *Id.* at 702.

<sup>137</sup> *Id.* (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982)).

<sup>138</sup> *Id.* at 702–03 (majority opinion) (quoting *Grendel's Den*, 459 U.S. at 125).

<sup>139</sup> See *Kiryas Joel*, 512 U.S. at 703 ("[W]e have no assurance that the next similarly situated group seeking a school district of its own will receive one; . . . a legislature's failure to enact a special law is itself unreviewable."); see also *id.* ("The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way.").

<sup>140</sup> *Id.* at 706.



school district or a separate program taught at a neutral site near the religious schools.<sup>141</sup>

Despite the superficial uniformity of a 6-3 opinion, the Court's inability to settle on a rationale for the impermissibility of the Kiryas Joel scheme was evidenced by the divide between the majority and the plurality, as well as the presence of multiple contradictory concurrences.

## b. The Concurrences

Justice Stevens's concurrence was joined by Justice Blackmun and Justice Ginsburg.<sup>142</sup> In addition to the reasons given by the majority and plurality, he found the creation of the school district to be an establishment of religion because, rather than promote interreligious and intercultural tolerance and understanding,<sup>143</sup> the creation of the school district entrenched the Satmars' separation from the wider world, thus "provid[ing] official support to cement the attachment of young adherents to a particular faith."<sup>144</sup> Moreover, Justice Stevens found it significant that most of the students in the school district came from outside Kiryas Joel, indicative of the fact that religion, not geography, was the predominant focus in creating the district.<sup>145</sup>

Justice O'Connor, in a solo concurrence, noted that equal treatment is the *sine qua non* of the Establishment Clause.<sup>146</sup> She reasoned that accommodations must not be for the purpose of "making life easier for a particular religious group as such," but rather, accommodation must be rooted in the fact that religious adherents have a "deeply held belief."<sup>147</sup> For Justice O'Connor, the law at issue "single[d] out a particular religious group for favorable treatment,"

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<sup>141</sup> *Id.* at 707.

<sup>142</sup> *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., concurring).

<sup>143</sup> *See id.* (explaining that after parents expressed concern about causing distress to children by putting them in the classroom with "people whose ways were so different," New York could have required teachers to instruct students on religious tolerance rather than create a new school district).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ("It is telling . . . that two-thirds of the school's full-time students are Hasidic handicapped children from outside the village; the Kiryas Joel school thus serves a population far wider than the village—one defined less by geography than by religion.").

<sup>146</sup> *See id.* at 715 (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) ("[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community.").

<sup>147</sup> *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

and thus was not a general accommodation.<sup>148</sup> She opined that if there were a generally applicable, neutral law setting forth the criteria for establishing a school district, the creation of this district under such criteria would pose no Establishment Clause issue.<sup>149</sup> Like the majority, she was concerned that another group in a similar position would not receive such treatment from the legislature.<sup>150</sup> Picking up the thread from her *Aguilar* dissent<sup>151</sup> and presaging *Aguilar*'s reversal in *Agostini*,<sup>152</sup> Justice O'Connor argued that providing such services on the grounds of religious schools using public funds would be a permissible accommodation, and the refusal to do so weaponized the Establishment Clause to display hostility toward religion, instead of the required neutrality.<sup>153</sup>

Justice Kennedy, concurring in the judgment only, resisted the majority's view of the case because it unduly constrained the legislature from addressing the unique burdens imposed on a religious group—in effect, “adjudg[ing] the New York Legislature guilty until it proves itself innocent.”<sup>154</sup> Instead, what transformed an otherwise permissible accommodation into an Establishment Clause violation was the necessity of drawing political lines based on religion.<sup>155</sup> For Justice Kennedy, a “fundamental limitation” of the Establishment Clause

is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal

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<sup>148</sup> *Id.* at 716.

<sup>149</sup> See *id.* at 717 (claiming that a school district created under a generally applicable legislative scheme would not pose an Establishment Clause violation even if it was consciously created for a community that is a religious enclave for a particular group).

<sup>150</sup> *Id.* at 716; see also *supra* Section I.C.2.a.

<sup>151</sup> Justice O'Connor disagreed with the presumption that public school teachers would not remain religiously neutral when teaching in a religious school. See *Aguilar v. Felton*, 473 U.S. 402, 428 (1985) (O'Connor, J., dissenting). (“Just as the risk that public school teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk.”).

<sup>152</sup> *Agostini v. Felton*, 521 U.S. 203, 209 (1997).

<sup>153</sup> *Kiryas Joel*, 512 U.S. at 717–18 (O'Connor, J., concurring). Justice O'Connor also noted, with satisfaction, that in her view, the Court's opinion evinced a lessened reliance on the *Lemon* test—enabling more circumstance-specific tests to arise that would lead to more reasoned decision-making. *Id.* at 718–21. It was this portion of Justice O'Connor's concurrence that prompted Justice Blackmun to concur separately, arguing for the continued vitality of the *Lemon* test. *Id.* at 710–11 (Blackmun, J., concurring).

<sup>154</sup> *Id.* at 722, 726 (Kennedy, J., concurring in the judgment).

<sup>155</sup> See *id.* at 728 (“This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries.”).

Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.<sup>156</sup>

Justice Kennedy distinguished the creation of the town itself from the creation of the school district, as the former was accomplished through a generally applicable, neutral law, whereas the latter required a special legislative act.<sup>157</sup> Thus, there was a difference between a town whose residents happen to share the same religion, and “the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples’ faith.”<sup>158</sup> In this “unusual action,”<sup>159</sup> such “explicit religious gerrymandering” violated the Establishment Clause.<sup>160</sup>

### c. Justice Scalia’s Dissent

Justice Scalia wrote a fiery dissent, joined by Chief Justice Rehnquist and Justice Thomas.<sup>161</sup> He trained his focus on the Kiryas Joel school itself, noting how it looked and functioned like any other school, rendering the issue one of “public aid to a school that is as public as can be. The only thing distinctive about the school is that all the students share the same religion.”<sup>162</sup> Justice Scalia claimed that Justice Souter misinterpreted *Grendel’s Den* by ignoring the difference between a delegation of civil authority to a church (impermissible) and the delegation of civil authority to members of a particular faith (permissible).<sup>163</sup> The school district at issue fell into the latter category, and Justice Scalia saw the Court as acting to disfavor religion by finding it unconstitutional, something forbidden by the Religion Clauses.<sup>164</sup>

For Justice Scalia, this was simply a “special case, requiring special measures.”<sup>165</sup> And the existence of special measures alone did not prove the presence of religious favoritism—indeed, Justice Scalia quarreled with the supposition that religious differences formed the

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 729.

<sup>158</sup> *Kiryas Joel*, 512 U.S. at 729.

<sup>159</sup> *Id.* at 730.

<sup>160</sup> *Id.* at 729.

<sup>161</sup> *Id.* at 732 (Scalia, J., dissenting).

<sup>162</sup> *Id.* at 733.

<sup>163</sup> *Kiryas Joel*, 512 U.S. at 735.

<sup>164</sup> *See id.* at 736 (noting previous instances where the Court had found that “disfavoring of religion [was] positively antagonistic to the purposes of the Religion Clauses”).

<sup>165</sup> *Id.* at 740. Justice Scalia also disputed the extent to which the school district was special, noting the existence of a similar arrangement for hospitalized children. *See id.* at 738.

basis of New York's action.<sup>166</sup> Instead, he argued that the basis was *cultural*: “[I]t was not theology but dress, language, and cultural alienation that posed the educational problem for the children.”<sup>167</sup> Regardless, even if religious differences animated the Legislature's action, Justice Scalia viewed this as a “permissible accommodation”<sup>168</sup> and criticized the majority for its desire for “‘up front’ assurances” of legislative neutrality<sup>169</sup>: “Making law (and making exceptions) one case at a time . . . violates, *ex ante*, no principle of fairness, equal protection, or neutrality simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of.”<sup>170</sup>

Importantly, Justice Scalia recognized the existence of the Establishment Clause nondelegation doctrine but conceived of it in a much narrower manner than the plurality and majority did.<sup>171</sup> Thus, at the end of *Kiryas Joel*'s bitterly divided opinions, we see nine Justices contemplating the cognizability of Establishment Clause nondelegation claims while disagreeing about what circumstances constitute an impermissible delegation.

## II

### BETWEEN THE LINES: COMMUNITIES OF INTEREST

The decennial redistricting process is fraught with controversy, consistently spawning a multitude of lawsuits.<sup>172</sup> The roots of such disputes are manifold: At a base level, the constitutional command of one person, one vote—requiring that congressional and state legislative districts have roughly equal populations<sup>173</sup>—inherently engenders a view of redistricting as a zero-sum endeavor, where every exercise of line-drawing has the potential to spell political gain or disadvantage. Of course, this view is reinforced by the Supreme Court's *Rucho v. Common Cause* decision, holding partisan gerrymandering claims federally nonjusticiable.<sup>174</sup>

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<sup>166</sup> See *id.* at 740 (asserting that there was clearly a secular purpose behind creating the school district).

<sup>167</sup> *Id.*

<sup>168</sup> See *id.* at 743–45 (summarizing past instances of accommodation).

<sup>169</sup> *Id.* at 747.

<sup>170</sup> *Id.* at 748.

<sup>171</sup> See *supra* note 163 and accompanying text.

<sup>172</sup> See, e.g., *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> [<https://perma.cc/L3QE-HMNB>] (documenting that seventy-two total cases have been filed as of July 2022, challenging legislative and congressional maps in twenty-six states).

<sup>173</sup> See generally *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (setting forth the one person, one vote standard).

<sup>174</sup> 139 S. Ct. 2484, 2500 (2019). In the wake of *Rucho*, claims that a particular district was drawn for partisan gain are no longer judicially cognizable in federal court, increasing

Layered on top of the one person, one vote baseline are the sometimes conflicting requirements of both the Constitution and the Voting Rights Act: Race must be taken into account in redistricting to comply with the Voting Rights Act and to avoid racial vote dilution,<sup>175</sup> but an excessive consideration of race in redistricting raises constitutional concerns and triggers strict scrutiny.<sup>176</sup> In effect, a Goldilocks scenario results: Too little of a consideration of race raises the specter of running afoul of the Voting Rights Act, and too much of a consideration of race risks a constitutional violation. Race needs to be considered in a way that is “just right,” namely, to comply with the Voting Rights Act.<sup>177</sup>

Later cases have clarified that in order for strict scrutiny to be triggered, race-based considerations must predominate over nonracial, traditional districting criteria.<sup>178</sup> Traditional districting criteria include “compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.”<sup>179</sup> This Part focuses on the last criterion: Section II.A describes the difficulties and vagaries inherent in defining communities of interest, and Section II.B explores the practice and permissibility of considering religious groups as communities of interest.

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the political stakes of redistricting, as politicians can draw districts to maximize partisan advantage without fear of federal court oversight. *See* Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html> [<https://perma.cc/X3N8-S4Y3>] (characterizing *Rucho* as a statement from the Court that it will not intervene to address gerrymandering and will not second-guess the judgments of lawmakers on how to construct voting districts).

<sup>175</sup> *See* Thornburg v. Gingles, 478 U.S. 30, 43–51 (1986) (establishing the criteria for determining the presence of racial vote dilution, which in turn requires remedial action under the Voting Rights Act).

<sup>176</sup> *See* Shaw v. Reno, 509 U.S. 630, 644 (1993) (holding that voting rights laws are subject to strict scrutiny when citizens are classified according to race).

<sup>177</sup> The Supreme Court has “long assumed” that Voting Rights Act compliance is a compelling interest, and to satisfy narrow tailoring, a state must “show . . . that it had ‘a strong basis in evidence’ for concluding that the statute required its action,” which is to say, it needs to show there were “‘good reasons’ to think that it would transgress the Act if it did *not* draw race-based district lines.” *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (emphasis added) (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)).

<sup>178</sup> *See* Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017) (“[A] plaintiff alleging racial gerrymandering bears the burden ‘to show . . . that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’” (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995))).

<sup>179</sup> *Miller*, 515 U.S. at 916.

### A. *Defining Communities of Interest*

There is a central paradox inherent in any study of communities of interest: While the Supreme Court has noted that consideration of communities of interest is a traditional input in the redistricting process,<sup>180</sup> its definition of communities of interest is itself quite abstract.<sup>181</sup> Generally, communities of interest are “groupings of people who have similar values, shared interests, or common characteristics.”<sup>182</sup> Various states have sought to provide more concrete definitions of communities of interest.<sup>183</sup> For example, Colorado considers “racial, ethnic, and language minority groups” as potential communities of interest, among other groups.<sup>184</sup> Many states, such as California, task their redistricting commissions with taking public testimony to identify communities of interest.<sup>185</sup>

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<sup>180</sup> See *id.* (listing some of the factors courts consider in whether a group constitutes a community of interest). Many states also independently require a consideration of communities of interest. See *Communities of Interest*, BRENNAN CTR. FOR JUST. (NOV. 2010), <https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf> [<https://perma.cc/56AB-VVFG>] (listing, as of 2010, twenty-four states requiring consideration of communities of interest in districting); Magpantay, *supra* note 9, at 7–8 (listing thirty-three states in 2020).

<sup>181</sup> See, e.g., Stephen J. Malone, Note, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 462 (1997) (“Miller provides no definition for community of interest . . . .”); David Willner, Comment, *Communities of Interest in Colorado Redistricting*, 92 U. COLO. L. REV. 563, 564 (2021) (“The communities of interest criterion has been regularly criticized for its vagueness and lack of a definable standard.”).

<sup>182</sup> Magpantay, *supra* note 9, at 1.

<sup>183</sup> The Colorado Constitution, for example, defines a community of interest as “any group in Colorado that shares one or more substantial interests that may be the subject of federal legislative action, is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective representation.” COLO. CONST. art. 5, § 44(3)(b)(I); see also Willner, *supra* note 181, at 564 (describing Colorado’s recent expansion of the definition, emerging from a voter initiative).

<sup>184</sup> COLO. CONST. art. 5, § 44(3)(b)(II)–(III); see also *infra* Section II.B. While beyond the scope of this Note, the consideration of race in determining communities of interest creates a tension within the constitutional voting rights jurisprudence, which holds that racial considerations must not predominate over other considerations. See Malone, *supra* note 181, at 462 (“On one hand, consideration of race is unconstitutional if it is the predominant factor. On the other hand, the intentional consideration of race and deliberate creation of districts with a certain racial composition may be acceptable if the district genuinely is drawn . . . [to recognize a] community of interest.”).

<sup>185</sup> See JUSTIN LEVITT, BRENNAN CTR. FOR JUST., A CITIZEN’S GUIDE TO REDISTRICTING 56, 77 (2010), <https://www.brennancenter.org/media/280/download> [<https://perma.cc/UU8L-56RN>] (describing the role of public testimony in defining and locating communities); Karin MacDonald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609, 611 (2013) (“Given that a finite number of commission members cannot possibly reflect all the nuanced, varied interests that arise in a large state redistricting, public input is critical to providing line-drawing guidance.”).

Yet despite such efforts, defining communities of interest is inevitably an imprecise practice.<sup>186</sup> As Professor Glenn Magpantay notes, the practice involves blending the objective, externally imposed geography of neighborhoods with the subjective, internally defined conception of communities.<sup>187</sup> Difficulties and ambiguities abound. For starters, definitions of communities shift over time.<sup>188</sup> Even if these definitions were somehow static, there remains the more stubborn problem of community members often having differing conceptions of who is considered part of the community.<sup>189</sup> Not only will different views of community membership often lead to competing conceptions of a community's geography, but conceptions of communities are not always easy to translate geographically in the first place.<sup>190</sup> Tradeoffs in community representation are practically unavoidable due to the zero-sum nature of redistricting: Unifying one community in a district often entails spreading another community across districts.<sup>191</sup> The existence of such tradeoffs highlights the fundamental subjectivity that lies at the core of defining communities of interest.<sup>192</sup>

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<sup>186</sup> See LEVITT, *supra* note 185, at 56 (“In practice, defining particular communities of interest can be notoriously fuzzy, because shared interests may be either vague or specific, and because people both move locations and change their interests over time.”); MacDonald & Cain, *supra* note 185, at 612 (observing that communities of interest “are harder to identify a priori because there is a subjective component to the interests and boundaries of a given [community]”).

<sup>187</sup> Magpantay, *supra* note 9, at 8.

<sup>188</sup> LEVITT, *supra* note 185, at 56.

<sup>189</sup> Cf. Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1949 n.217 (2012) (“It is possible (though not very likely) that objectively dissimilar groups of people nevertheless think of themselves subjectively as a unified community. Analogously, it is possible (though again unlikely) that objectively similar groups of people feel subjectively that they belong to different communities.”). Relatedly, one can imagine the proliferation of questions of who can legitimately speak for and define a community.

<sup>190</sup> See MacDonald & Cain, *supra* note 185, at 612 (“[Community of interest] geography is ultimately subjective as well. The boundaries of an interest ‘community’ do not usually coincide neatly with government jurisdictions or follow fixed, uniform patterns.”); see also Magpantay, *supra* note 9, at 9–10 (arguing that communities often exist based on shared experiences, even if members are geographically dispersed).

<sup>191</sup> See Willner, *supra* note 181, at 606 (“The upshot of the process is that by choosing one community of interest to unify in a district, the commission may end up dividing another.”). One noteworthy example of such a tradeoff can be found in the facts of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). There, in order to comply with the Voting Rights Act’s command of nonretrogression in minority voting power, Hasidic Jews in Brooklyn, who previously had been located within one state senate and one state assembly district, were divided into two state senate and two state assembly districts to create districts with nonwhite majorities. *Id.* at 152.

<sup>192</sup> See Willner, *supra* note 181, at 604 (“Commissioners should be aware that they are making inherently subjective decisions when deciding which communities should be considered for redistricting purposes and which ones should not.”).



### B. Religious Communities as Communities of Interest

As the Maryland example from the Introduction shows, religious communities often serve as communities of interest.<sup>193</sup> States routinely consider religious communities as communities of interest,<sup>194</sup> with some going so far as to explicitly include religious groups in their definition of communities of interest.<sup>195</sup> The Supreme Court has also intimated that religion may properly be considered in the redistricting process. In *Shaw v. Reno*, the first case to declare that excessive consideration of race in redistricting could give rise to a constitutional violation, the majority wrote:

[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.<sup>196</sup>

However, consideration of religious groups in the community of interest analysis has the potential to raise constitutional concerns. In *Shaw*, the majority cited with approval a passage from Justice Douglas's dissent in *Wright v. Rockefeller*, where he argued:

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld

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<sup>193</sup> See *supra* Introduction.

<sup>194</sup> See Jeffrey Rosen, Kiryas Joel and *Shaw v. Reno: A Text-Bound Interpretivist Approach*, 26 CUMB. L. REV. 387, 394 (1996) ("Surely, Justice Kennedy does not mean to suggest that the Constitution prohibits state legislatures from being conscious of religion [during redistricting] . . . . As Justice Ginsburg noted in . . . *Miller*, predictions about how Catholics, or Jews, or Irish Americans would vote have been a staple of American districting ever since the Founding." (citing *Miller v. Johnson*, 515 U.S. 900, 944–45 (1995) (Ginsburg, J., dissenting))); Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 780 (2002) (highlighting how districting bodies regularly consider religion, race, and other factors when defining communities of interest); see also Holt v. 2011 Legis. Reapportionment Comm'n, 38 A.3d 711, 746 (Pa. 2012) (quoting Gormley, *supra*, at 779–81).

<sup>195</sup> See *Definitions*, ARIZ. INDEP. REDISTRICTING COMM'N (2011), <https://azredistricting.org/2001/Definitions.asp> [<https://perma.cc/HZ3S-VKCC>] (defining communities of interest, for the 2001 redistricting cycle, as "group[s] of people in a defined geographic area with concerns about common issues (such as *religion*, political ties, history, tradition, geography, demography, ethnicity, culture, social economic status, trade or other common interest) that would benefit from common representation" (emphasis added)); see also NATE PERSILY, MD. CITIZENS REDISTRICTING COMM'N, PRINCIPLES AND CRITERIA FOR THE MARYLAND REDISTRICTING PROCESS 15 (2021), <https://redistricting.maryland.gov/Documents/Meetings/2021-0901-Persily-to-MCRC.pdf> [<https://perma.cc/TTV8-QZNH>] (incorporating the Arizona definition into materials for Maryland's 2021 redistricting cycle).

<sup>196</sup> *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis omitted).

together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.<sup>197</sup>

Similar concerns were expressed in the Establishment Clause context by Justice Powell in *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>198</sup> who, in an opinion invalidating a New York statute providing aid to parochial schools, feared the “potentially divisive political effect of an aid program” and the possibility for resultant civil strife as religious groups vie with one another in pursuit of such aid.<sup>199</sup> Indeed, he noted in *Lemon* that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”<sup>200</sup>

At the same time, a total refusal to take religion into account in the community of interest analysis might itself raise Free Exercise concerns. Discrimination against religion has animated much of the Supreme Court’s current Free Exercise jurisprudence,<sup>201</sup> with members of the current Court especially solicitous of such claims.<sup>202</sup> Justices and commentators have noted that the Roberts Court’s receptiveness to Free Exercise claims has often led to a shrinking of the

<sup>197</sup> *Id.* at 648–49 (quoting *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

<sup>198</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

<sup>199</sup> *Id.* at 795–96; *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (“The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.”).

<sup>200</sup> *Lemon*, 403 U.S. at 622.

<sup>201</sup> *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”).

<sup>202</sup> *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–31 (2018) (finding that the Colorado Civil Rights Commission engaged in religious discrimination based on the statements of two of seven commissioners); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (“Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” (first citing *Masterpiece*, 138 S. Ct. at 1730–32; and then citing *Lukumi*, 508 U.S. at 533)); *Does 1–3 v. Mills*, 142 S. Ct. 17, 19 (2021) (mem.) (Gorsuch, J., dissenting) (arguing, in an opinion joined by Justices Thomas and Alito, that Maine’s lack of religious exemption in its COVID-19 vaccine mandate for healthcare workers constituted discrimination against religion); Linda Greenhouse, Opinion, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html> [<https://perma.cc/UH5H-MW9R>] (“*Lukumi* has now come to stand for the idea that the government needs a compelling reason for making any distinction between religion and nonreligion if the burden on religion can be described as even slightly heavier.”).

applicability of the Establishment Clause.<sup>203</sup> In addition to this doctrinal thrust in favor of Free Exercise claimants, the fact that consideration of communities of interest is balanced against other criteria in the districting process likely serves as insulation against constitutional challenge, paralleling the balancing of racial considerations against traditional districting criteria.<sup>204</sup> However, while incorporating religious communities in the communities of interest analysis is not a *per se* constitutional violation, as the next Part will show, the use of the *eruv* in the redistricting process can be unconstitutional.

### III

#### PUTTING GOD BETWEEN THE LINES

The allure of using the *eruv* as a basis for redistricting is clear. In light of the difficulties inherent in defining and delineating communities of interest,<sup>205</sup> having a clear, objective boundary for a community of interest is an asset in the redistricting process. And the *eruv* “represents the rare situation in which the normative community is coextensive with the descriptive neighborhood.”<sup>206</sup>

Yet this presents a constitutional conundrum. As discussed above, erecting an *eruv* does not present Establishment Clause concerns.<sup>207</sup> Nor has incorporating religious groups in the communities of interest analysis been found impermissible.<sup>208</sup> So, in using an *eruv* as a basis

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<sup>203</sup> See, e.g., *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2288 (2020) (Breyer, J., dissenting) (chastising the majority, in a Free Exercise decision, for failing to properly account for the “‘play in the joints’ between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, . . . leav[ing] [the Establishment Clause] doctrine a shadow of its former self” (first quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005); and then quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970))); see also Linda Greenhouse, Opinion, *The Supreme Court, Weaponized*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/opinion/supreme-court-trump.html> [<https://perma.cc/7762-AWGJ>] (describing the oral argument in *Carson v. Makin*, 142 S. Ct. 1987 (2022), a Free Exercise case involving taxpayer funding for religious education, as one where “[t]he Establishment Clause, long understood as a barrier to taxpayer subsidy of religious education, was almost completely absent from the argument”).

<sup>204</sup> See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (holding that racial considerations must predominate over traditional districting criteria, including consideration of communities of interest, for there to be a constitutional violation); *infra* Section III.C.

<sup>205</sup> See *supra* Section II.A.

<sup>206</sup> Schragger, *supra* note 22, at 440; see also Fonrobert, *supra* note 37, at 10 (noting that “[s]ince the *eruv* as a ritual system entails forming an *eruv* community, it also operates as a tool to structure the relationship between insiders and outsiders, and it does so in relationship to residential space” and concluding that it thus “operates as a boundary-making device, quite concretely in relationship to the residential space of the neighborhood that the *eruv* community inhabits”).

<sup>207</sup> See *supra* Section I.B.

<sup>208</sup> See *supra* Section II.B.

for redistricting, how does the combination of two constitutional rights make a constitutional wrong? Sections III.A and III.B will sketch the contours of the impermissibility of using an *eruv* as a basis for redistricting, with the former rooted in the concerns raised by Justice Souter's majority opinion and Justice O'Connor's concurrence in *Kiryas Joel*, and the latter using Justice Souter's *Kiryas Joel* plurality opinion and Justice Kennedy's concurrence as touchstones. Section III.C will seek to craft a standard by which this unconstitutionality can be judged, using the Supreme Court's voting rights and Establishment Clause doctrines as a starting point.

A. *Who Gets Religious Lines?: Justice Souter's Majority Opinion and Justice O'Connor's Concurrence*

The majority in *Kiryas Joel* was concerned that the "special and unusual" circumstances giving rise to the creation of the school district meant that there was no way to ensure that future groups would receive a similar arrangement, raising the threat that the government would not act in a religiously neutral manner.<sup>209</sup> Justice O'Connor raised similar concerns in her concurring opinion.<sup>210</sup> Both Justice Kennedy and Justice Scalia took umbrage with this rationale, as it "reverse[d] the usual presumption that a statute is constitutional and, in essence, adjudge[d] the New York Legislature guilty until it proves itself innocent."<sup>211</sup> Incipient in such a critique was the rare nature of the challenged action, raising the question of if there would ever be a second coming of such an arrangement.<sup>212</sup>

In the redistricting context, the concerns raised by the majority are amplified, and those raised by Justices Kennedy and Scalia are minimized. As discussed above, tradeoffs are inherent in the redistricting process—considerations of communities of interest must be balanced against desires for compactness, contiguity, and compliance with the Voting Rights Act.<sup>213</sup> If an *eruv* is used as a touchstone for the boundaries of one district, the zero-sum nature of the redistricting

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<sup>209</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 702 (1994); see also *supra* Section I.C.2.a.

<sup>210</sup> See *Kiryas Joel*, 512 U.S. at 716–17 (O'Connor, J., concurring); see also *supra* Section I.C.2.b.

<sup>211</sup> *Kiryas Joel*, 512 U.S. at 726 (Kennedy, J., concurring in the judgment); see also *id.* at 746–47 (Scalia, J., dissenting) ("The Court's demand for 'up front' assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role.").

<sup>212</sup> See *id.* at 747 (Scalia, J., dissenting) ("[M]ost efforts at accommodation seek to solve a problem that applies to members of only or a few religions.").

<sup>213</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (setting forth traditional districting criteria); *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (assuming that compliance with the Voting Rights Act can serve as a compelling governmental interest); *supra* Part II.

process means that a cascade of adjustments will need to be made to accommodate that district—and such adjustments are not limited to adjoining districts.<sup>214</sup> If an *eruv* is used in redistricting, it is not difficult to imagine, *in the same redistricting cycle*, a situation where another religious group would not be afforded similar treatment.<sup>215</sup> Indeed, it is conceivable that a religious arms race of sorts could develop, with different groups rushing to demarcate “their” territory in a manner similar to the *eruv*—precisely the kind of interreligious tension feared by various Justices in prior Establishment Clause cases.<sup>216</sup>

Even assuming that there is no interreligious analogue to the *eruv*, a district drawn along the *eruv* raises the potential of *intrareligious* strife—such as between Orthodox Jews and Reform, Reconstructionist, Conservative, and nondenominational Jews, who may have differing views of the salience of the *eruv* as a means of defining the boundaries of a community;<sup>217</sup> between Jewish groups disagreeing on the validity of a particular *eruv*;<sup>218</sup> or between geographically separate Jewish communities, one of which has a legislative district tracking the *eruv*, and the other without such a district. This would add an unwelcome theological dimension to the already thorny task of determining the degree to which intracommunity variation will rupture a community’s cohesion.<sup>219</sup> Much as Justice O’Connor feared in *Kiryas Joel*, in this framework, “the government makes adherence to religion relevant to a person’s standing in the political community.”<sup>220</sup> Given the impracticality of satisfying all demands in the redistricting process, when the *eruv* is used as a basis

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<sup>214</sup> See *supra* note 191 and accompanying text. Though such adjustments satisfied the desires of both the Dundalk and Pikesville communities in Maryland, a mutually beneficial outcome is by no means guaranteed. See *supra* Introduction.

<sup>215</sup> Indeed, it can be argued that this might be more likely if the *eruv* is used for redistricting, given the *eruv*’s utility in delineating a community’s boundaries. See *supra* text accompanying notes 205–06.

<sup>216</sup> See *supra* notes 197–200 and accompanying text.

<sup>217</sup> See *supra* notes 28–30 and accompanying text.

<sup>218</sup> See JNi.Media, *Newcomer Rabbinic Organization Launches Lower East Side Eruv Against Establishment View*, JEWISH PRESS (Sept. 30, 2016), <https://www.jewishpress.com/news/breaking-news/newcomer-rabbinic-organization-launches-lower-east-side-eruv-against-establishment-view/2016/09/30> [<https://perma.cc/6NJH-2PCY>] (describing an intrareligious disagreement over the validity of an *eruv* in the Lower East Side).

<sup>219</sup> Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434–35 (2006) (criticizing, in a Voting Rights Act analysis, the failure to account for community divisions within a racial group).

<sup>220</sup> *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring in the judgment)).

to draw district lines, the Establishment Clause's "emphasis on equal treatment" becomes untenable.<sup>221</sup>

*B. Drawing Religious Lines: Justice Souter's Plurality Opinion and Justice Kennedy's Concurrence*

The rationales of Justice Kennedy's *Kiryas Joel* concurrence and Justice Souter's plurality opinion lend further support to the unconstitutionality of this use of the *eruv*. As discussed above, Justice Kennedy's chief qualm about the Kiryas Joel school district was that political lines were drawn on the basis of religion<sup>222</sup>: "[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. . . . Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion."<sup>223</sup> Similarly, the plurality was concerned with "the way the boundary lines of the school district divide residents according to religious affiliation."<sup>224</sup>

Drawing a legislative district around an *eruv* is qualitatively different than merely taking religion into account in the communities of interest analysis. Where the government is merely *aware of* religion in districting, the religious composition of a district is wholly the result of private actions<sup>225</sup>—akin to the logic the Supreme Court used to find that desegregation in schooling did not require the traversing of school district lines, even though this resulted in individual school districts being racially homogenous.<sup>226</sup> Such an analogy is particularly apt considering that in *Kiryas Joel*, Justice Kennedy envisioned the Establishment Clause as "mirror[ing]" the Equal Protection Clause.<sup>227</sup> But Justice Kennedy saw "more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."<sup>228</sup> This is, in effect, the dif-

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<sup>221</sup> *Id.*

<sup>222</sup> See *supra* Section I.C.2.b.

<sup>223</sup> *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).

<sup>224</sup> *Id.* at 699 (plurality opinion).

<sup>225</sup> This was Justice Scalia's chief criticism of Justice Kennedy's concurrence: He argued that because the boundaries of Kiryas Joel were themselves constitutionally permissible (as Justice Kennedy conceded), a school district drawn along those same lines should also survive constitutional scrutiny. See *id.* at 749 (Scalia, J., dissenting).

<sup>226</sup> See Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 33 (1996) ("Government may not officially segregate whites and African Americans, but if private citizens move to relatively homogeneous neighborhoods, government is not required to draw school attendance zones across neighborhoods.").

<sup>227</sup> *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).

<sup>228</sup> *Id.* at 730.

ference between government awareness of religious segregation and active governmental segregation on the basis of religion. Or, as the plurality put it: “Where ‘fusion’ is an issue, the difference lies in the distinction between a government’s purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.”<sup>229</sup>

Using an *eruv* as a basis for redistricting is precisely the constitutional violation that Justices Souter and Kennedy described. If a legislative district is drawn to track the path of an *eruv*, then, by definition, the district is drawn according to religious lines to affirmatively cater to the Jewish community, which *itself* determines the *eruv*’s path—a “purposeful delegation on the basis of religion.”<sup>230</sup> As described in Section I.B, the permissibility of government action in allowing both the establishment and maintenance of *eruvim* stems from the fact that the government’s aura of neutrality remained intact despite (or because of) such actions.<sup>231</sup> The government’s actions did not endorse the *eruv* or the Jewish religion, but merely accommodated a community’s desire to remove impediments to its religious practices.<sup>232</sup> Such neutrality, however, is ruptured when an *eruv* is used as a redistricting basis. Of course, religious practices are not aided or accommodated by such an action. Rather, the creation of such a district serves to imbue a religiously significant jurisdictional demarcation<sup>233</sup> with political significance, raising the prospect and perception of government commingled with religion.

But the roots of the unconstitutionality of such a district are deeper. By choosing to use the boundaries of an *eruv* as the contours of a legislative district, the state is delegating its line-drawing determination to a religious entity—the state, by definition, *follows* the boundaries that a religious community has set up for itself. This is a variant of the concern expressed by the majority in *Grendel’s Den*, as

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<sup>229</sup> *Id.* at 699 (plurality opinion).

<sup>230</sup> *Id.*

<sup>231</sup> See *supra* Section I.B.

<sup>232</sup> See *supra* Section I.B; *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 176–77 (3d Cir. 2002) (holding that the perception of governmental endorsement of religion is unlikely when the government acts to accommodate Orthodox Jewish religious practice in maintaining an *eruv*).

<sup>233</sup> See Schragger, *supra* note 22, at 466 (“The *eruv* territorializes by defining a particular geography as normatively significant. It emphatically constitutes an act—albeit small—of jurisdictional arrogation.”); see also BARBARA E. MANN, *SPACE AND PLACE IN JEWISH STUDIES* 138–39 (2012) (“[T]he *eruv*’s effects are largely dependent on the belief that it exists. In a way that powerfully challenges even the most concrete forms of dwelling, the *eruv* transforms space into place. . . . It is undeniable to those who need it, dismissible to those who don’t.”).



a “power ordinarily vested in agencies of government”—drawing the boundaries of legislative districts—is being exercised by a religious group.<sup>234</sup> Or, to cast it in the terms of the *Kiryas Joel* plurality, using the *eruv* as a basis for redistricting “defin[es] a political subdivision . . . by a religious test, resulting in a purposeful and forbidden ‘fusion of governmental and religious functions.’”<sup>235</sup>

Admittedly, the delegation here is not as clear-cut as the ones in *Grendel’s Den* and *Kiryas Joel*, given the role played by government officials in the redistricting process. Yet both *Grendel’s Den* and the *Kiryas Joel* plurality caution against the *sharing* of power amongst government and religious institutions.<sup>236</sup> Such a sharing has taken place in this scenario when a religious group determines, in the first instance, the path that district lines should take. Just as in the Pikesville example from the Introduction, in all likelihood, the impetus for using the *eruv* as a basis for a district’s boundaries will come from the Jewish community itself,<sup>237</sup> given redistricters’ inherently limited capacities.<sup>238</sup> In this framework, government officials are acquiescing and deferring to a community’s self-defined boundaries, with true power in the hands of the community. By definition, this delegated power is not being used in a religiously neutral manner—the express purpose of such a district is to grant representation and political power to Jewish communities.

Furthermore, the fact that the government retains authority over future changes of district boundaries should not militate against a finding of unconstitutionality if the *eruv* serves as a template for a district’s boundaries. Just because district lines might be changed in the future does not mean that present constitutional issues should be minimized—there would be no present guarantee of a religiously neutral exercise of power.<sup>239</sup> Of course, the delegations at issue in

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<sup>234</sup> *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 122 (1982); *see also Kiryas Joel*, 512 U.S. at 698 (plurality opinion) (“[A] State may not delegate its civic authority to a group chosen according to a religious criterion.”).

<sup>235</sup> *Kiryas Joel*, 512 U.S. at 702 (plurality opinion) (quoting *Grendel’s Den*, 459 U.S. at 126).

<sup>236</sup> *See Grendel’s Den*, 459 U.S. at 127 (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”); *Kiryas Joel*, 512 U.S. at 702 (plurality opinion) (describing a “forbidden ‘fusion of governmental and religious functions’” (quoting *Grendel’s Den*, 459 U.S. at 126)).

<sup>237</sup> *See supra* notes 10–13 and accompanying text.

<sup>238</sup> *See MacDonald & Cain, supra* note 185, at 611 (“Given that a finite number of commission members cannot possibly reflect all the nuanced, varied interests that arise in a large state redistricting, public input is critical to providing line-drawing guidance.”).

<sup>239</sup> *See Kiryas Joel*, 512 U.S. at 697 (plurality opinion) (highlighting the inability to ensure religious neutrality as a key flaw of the statutes at issue in *Grendel’s Den* and the case at bar).

*Grendel's Den* and *Kiryas Joel* could have conceivably been revised and undone by the same legislative practices by which they arose. That legislative change in the redistricting context is more easily contemplated given its decennial nature should not change the constitutional analysis.

Moreover, the collective, communal action required to establish the *eruv*<sup>240</sup> defangs one of the concerns Justice Scalia raised in his *Kiryas Joel* dissent: The decision, in his view, erased the distinction “between civil authority held by a church and civil authority held by members of a church.”<sup>241</sup> Here, by contrast, the Establishment Clause delegation concerns inherent in using an *eruv* as a basis for redistricting result in a constitutional violation, but merely taking a Jewish community into account as a community of interest is permissible<sup>242</sup>—hewing precisely to the divide envisioned by Justice Scalia. Constitutional concerns are only implicated when a religious group, not the government, effectively determines the shape of a legislative district. The mere fact that coreligionists live within a district is, to use a term, kosher.<sup>243</sup>

### C. Searching for a Standard

Having sketched the contours of the constitutional impermissibility of using the *eruv* as a basis for redistricting, one task remains: crafting a standard to determine when such an unconstitutional practice has occurred. Admittedly, this is a fraught task, and the nearly limitless permutations of district shapes and degrees of following an *eruv*'s path frustrate attempts to set forth a clear, bright-line rule. Accordingly, the proper standard to employ here is analogous to that governing the consideration of race in redistricting: An Establishment Clause violation is present when a desire to follow the path of an *eruv* to grant political representation to a Jewish community predominates over traditional districting criteria in the drawing of legislative boundaries.<sup>244</sup> Of course, inquiries into predominance can be riddled with

<sup>240</sup> See *supra* Introduction.

<sup>241</sup> See *Kiryas Joel*, 512 U.S. at 735 (Scalia, J., dissenting) (lamenting Justice Souter's flattening of the distinction).

<sup>242</sup> See *supra* Section II.B.

<sup>243</sup> See *Kiryas Joel*, 512 U.S. at 708 (“We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion.”). As suggested by the Court in *Grendel's Den*, there remain nondelegative means by which such representation could be achieved. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123–24 (1982); cf. *infra* Section III.C.

<sup>244</sup> Cf. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (“[A] plaintiff alleging racial gerrymandering bears the burden ‘to show . . . that race was the predominant factor motivating the legislature’s decision to [create] a particular district.’ To

tangles,<sup>245</sup> but such a fact-based standard provides a needed measure of flexibility to adapt to the myriad possibilities contained within the districting process<sup>246</sup>—in addition to providing the benefit of doctrinal uniformity vis-à-vis considerations of race and religion.<sup>247</sup>

The main benefit, however, of the predominance standard in this context is that it can serve as a proxy for undue governmental coercion of religious belief and the very fusion of governmental and religious authority so feared by the Framers. In *Kiryas Joel*, the plurality criticized the school district because it, much like the statute in *Grendel's Den*, conferred a “significant symbolic benefit to religion,” namely, the “appearance of a joint exercise of legislative authority by Church and State,” which implied a “‘primary’ and ‘principal’ effect of advancing religion,”<sup>248</sup> and the delegation of governmental power to religious authorities “impermissibly entangl[ed] government and religion.”<sup>249</sup>

The predominance inquiry works to measure the salience of the government’s use of the *eruv* in redistricting. If traditional districting criteria predominate over considerations of the *eruv*, the salience of the use of the *eruv* in redistricting is low, lessening the likelihood that

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satisfy this burden, the plaintiff ‘must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.’” (citation omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995))).

<sup>245</sup> See *supra* note 184. Tensions over predominance are not limited to voting rights jurisprudence. See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (displaying differing views of the proper meaning of “predominance” in the class action context).

<sup>246</sup> Cf. Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2507 (1997) (“Whatever the merits of more rigidly ‘consistent’ approaches in other institutional areas—approaches that argue for colorblindness or race-consciousness in all-or-nothing terms—within the legal system, contextual variations must be attended to if courts are to develop coherent, administrable legal doctrines.”). For this reason, more evidence would be needed to determine whether the Maryland redistricting plan described in the Introduction violates the Constitution. See *supra* Introduction. Certainly, there is a plausible argument to be made that the reliance on the *eruv*, coupled with Professor Persily’s statement that the new district contained most of Pikesville’s *eruv*, is indicative of predominance. See Nov. 3 Meeting Video, *supra* note 15, at 12:45; see also Nov. 3 Meeting Transcript, *supra* note 15, at 4.

<sup>247</sup> See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1870–71 (2012) (noting the “modest flexibility” provided by the *Shaw* line of cases).

<sup>248</sup> *Kiryas Joel*, 512 U.S. at 697 (plurality opinion) (quoting *Grendel's Den*, 459 U.S. at 125–26).

<sup>249</sup> *Id.* (citing *Grendel's Den*, 459 U.S. at 126–27). This quote and the previous quote were the *Kiryas Joel* plurality’s characterizations of the issues inherent in the *Grendel's Den* statute, but the plurality noted that “[c]omparable constitutional problems inhere in the statute before us.” *Id.* While such language is rooted in the *Lemon* criteria, it still remains relevant given the nondelegation doctrine’s capacity to serve as a freestanding Establishment Clause test. See *supra* notes 88–92 and accompanying text; *supra* note 153.

such a “significant symbolic benefit to religion”<sup>250</sup> will be found. However, were considerations of the *eruv* to predominate over traditional districting criteria, the salience of the *eruv*’s use would be high, thus increasing the likelihood of a perception that the government is conferring a benefit on religion, given the significance of the *eruv* to observant Jews—with all the attendant coercive effects that such a benefit entails.<sup>251</sup> In this manner, the predominance inquiry serves as a means by which harms comparable to those described in *Kiryas Joel* and *Grendel’s Den* can be approximated.

This standard in no way compels the conclusion that these discrete and insular minorities will go unrepresented in the political process. It only cautions against one particular method of achieving such representation. Jewish communities remain able to seek communal representation through other advocacy channels.<sup>252</sup>

### CONCLUSION

As jurisdictions such as Maryland seek to include Jewish communities in their redistricting processes, the *eruv* can serve as an appealing and convenient way to create legislative districts that provide these communities with political representation. While the desire to provide such representation is laudable (and constitutionally permissible), state legislatures and redistricting commissions ignore the Establishment Clause implications of using the *eruv* in the redistricting process at their peril. When the *eruv*’s boundaries are used as a basis to draw district lines, the state delegates its discretionary line-drawing authority to organized religious communities in violation of the Establishment Clause. Of course, the particularities of an individual district’s lines and composition will determine the presence of a constitutional violation under the fact-based predominance standard this Note proposes. Nevertheless, the potential for such a violation—and the concomitant potential for the politicization of religion and increased political division—has heretofore gone unnoticed.

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<sup>250</sup> *Kiryas Joel*, 512 U.S. at 697 (quoting *Grendel’s Den*, 459 U.S. at 125–26).

<sup>251</sup> See *supra* note 233 and accompanying text.

<sup>252</sup> See Jacob Kornbluh, *No ‘Super Jewish’ District, but Increased Orthodox Influence in New York’s Capital*, FORWARD (Feb. 2, 2022), <https://forward.com/news/481896/no-super-jewish-district-but-increased-orthodox-influence-in-new-yorks> [https://perma.cc/9ZPJ-U6P4] (describing both the successes and shortcomings of Orthodox Jewish efforts to achieve representation in New York’s latest redistricting cycle).