

“Separate, Therefore Equal”: American Spatial Segregation from Jim Crow to Kiryas Joel



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In rejecting Plessy v. Ferguson’s “separate but equal” doctrine in Brown v. Board of Education, the U.S. Supreme Court created a presumption that segregation equals discrimination. However, alongside this assertion, American space has become increasingly separate. A socio-legal analysis identifies three generations of spatial segregation in the United States and calls for recognizing the fourth generation—separate, therefore equal—in which minority communities require voluntary self-segregation to achieve equality. This fourth generation of spatial separation requires the law to embrace a protective role, by which it will defend the ability of minority communities to segregate spatially, the autonomy of individual community members, and the welfare of the society at large.

Keywords: segregation, “separate but equal,” Kiryas Joel, ultra-Orthodox, First Amendment

Spatial segregation involves the “separation of socially defined groups in space, such that members of one group are disproportionately concentrated in a particular set of geographic units compared with other groups in the population” (Massey, Rothwell, and Domina 2009, 74). Although the segregation of social groups is present and expressed in a wide range of fields and spheres, spatial segregation carries with it the unique characteristic that every person needs a living space in the first instance. Unlike other spheres, such as education or pub-

lic services, no one does not take up space. Thus, although segregation in some areas may affect sections of the population, spatial segregation affects the entire population. Second, given the physical characteristics of space, spatial segregation can be more clearly identified, diagnosed, and measured than in other spheres (Massey and Denton 1988). Third, control of space and its distribution is a prime source for the development of segregation and discrimination on other levels (Massey 1990; powell 2002; Acevedo-Garcia and Lochner 2003; Klar-

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man 2004; Myers, Darity, and Marsh 2009; Bischoff and Reardon 2014; Williams and Collins 2001). Finally, spatial separation presents unique difficulties related to the possible reparation of historical distortions (Rothstein 2017). Therefore, although spatial segregation is both influenced by and affects the separation of social groups in other spheres, its unique characteristics enable a distinct socio-legal investigation into the role of the law in establishing and maintaining spatial separation. This analysis enables the identification of three generations of American spatial segregation; in each, the law plays a different role in the construction of space. The different roles the law plays in these three generations enable the operation of different mechanisms and form a different perception of spatial justice (Soja 2010). Several caveats are important to recognize. First, this article is socio-legal and thus does not pretend to be absolute or ultimate. A socio-legal approach analyzes the law as directly linked to the analysis of the social situation to which the law applies and examines the role that the law plays in creating, maintaining, and changing the social situation (Schiff 1976). Such analysis recognizes other possible classifications and categorizations of space construction and separation in American space. Its aim is to contribute to the understanding of separation in American society in general and separation in space in particular, a perspective that enables a discussion on the various functions of law and its impact on society and space. Second, although analysis of American space cannot ignore the powerful governmental and private economic mechanisms used to preserve space separation (Gotham 2000a; Klarman 2004; Lamb 2005; Massey 2008; Brooks and Rose 2013; Rothstein 2017; Taylor 2019), the goal here is to provide a socio-legal examination of spatial processes. Thus the article does not include in-depth analysis of the mechanisms and economic measurements that have affected it. The analysis instead offers a broad-brush characterization of the role of law in each generation. In each period, instances sometimes contradict the main characteristics of the generation. These

instances are discussed as part of the bigger picture.

THREE GENERATIONS OF A CONSTANT STRUGGLE BETWEEN SEPARATION AND EQUALITY

The first generation of American spatial segregation began with the founding of the United States and lasted until the Court's decision in *Plessy v. Ferguson*.¹ Over this extended period, American society underwent significant changes and transformations, both politically and economically. The decision to include this period within a single generation is based on the similarities in both the social groups involved and the characteristics of spatial separation. Throughout the period, racial subordination was prevalent in most spheres of American life (Smith 2006; Omi and Winant 2014). Relationships between social groups have been examined in a prism of slavery, its abolition, and the social and economic processes that followed abolition (Woodward and McFeely 2002, 12; Van Cleve 2010; Guelzo 2012; Rael 2015). Abolition did not end racial subordination in American society; in fact, in a variety of areas, subordination remained and even intensified (Smith 2006). It is therefore surprising to find that, in terms of space, separation was relatively marginal (DuBois 1899; Weaver 1948; Bauman 1974; Woodward and McFeely 2002). The data show that until the end of the nineteenth century, separation in the American space was relatively low, and separate neighborhoods in urban or rural environments were not the norm (Weaver 1948; Kushner 1979; Cutler, Glaeser, and Vigdor 1999). The literature suggests a number of explanations for this, the most prominent being that spatial segregation would have been an inconvenience and an obstruction to slavery (Taeuber and Taeuber 1965; Woodward and McFeely 2002, 12). Recognition that space was integrated does not contradict the systematic race-based discrimination and subordination practiced throughout the first generation; on the contrary, integration was one of the constitutive components of the racial subordination system (Woodward and

1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

McFeely 2002, 12). The role of law in the first generation was therefore less concerned with racial segregation and more with preserving and legitimizing racial inequality and subordination. The spatial concept dominating American space during the first generation was thus “unequal though integrated.” The abolition of slavery, alongside the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution between 1865 and 1870 not only changed the formal legal status of African Americans throughout the United States, but also marked a substantive change in the role the law played in the construction of space.

This undermining of the racial subordination system led southern states and local governments to create legislation that enforced racial segregation (Kennedy 2011). Racial segregation, therefore, enabled white supremacists to preserve the discriminatory and subordinate racial system that had been lost with the abolition of slavery and the enactment of constitutional amendments (Emerson 1994; Klarman 2004; Brown and Webb 2007, 180–81; Brooks and Rose 2013). Jim Crow laws mandated racial segregation in all public facilities in southern states from the 1870s and 1880s forward (Brown and Webb 2007; Woodward and McFeely 2002, 12). In 1896, the Supreme Court approved the discriminative concept underlying these laws, rejecting constitutional challenges against the discrimination they would generate. In *Plessy v. Ferguson*, the Court established the “separate but equal” doctrine, which suggested that as long as the facilities provided to each race were equal, state and local governments could apply policies that separated different races (Klarman 2004). In this sense, *Plessy v. Ferguson* is the mirror image of the law’s role; whereas the aim in the first generation was to legitimize racial inequality rather than to be concerned with spatial segregation, in the second generation, the law, which was bound to constitutional equality duties, not only approved but also facilitated racial segregation. Therefore, *Plessy v. Ferguson* marks the

beginning of the second generation in American spatial separation, in which allegedly equally funded segregation had become legitimate, if not worthy (Klarman 2004). Although *Plessy v. Ferguson* did not deal with spatial separation per se, its impact on spatial and residential separation was significant. The reason is that the ruling—although not directly dealing with spatial separation—established the principle that guided the Supreme Court throughout the entire second generation, according to which racial segregation, in itself, is not legally ineligible. Implementing *Plessy v. Ferguson*’s insight into the spatial dimension was accomplished through two landmark 1926 Supreme Court cases. In *Village of Euclid v. Ambler Realty Co.*, the Court provided municipalities with the right to zone land use.² The Court found that the government had a valid interest in maintaining the character of a neighborhood and in regulating where certain land uses should occur. In *Corrigan v. Buckley*, the Court ruled that a racially restrictive covenant was a legally binding document.³ These two cases incorporated *Plessy v. Ferguson*’s insight regarding the legality of segregation into the spatial plane and affirmed discriminatory and separative spatial practices. Data show that American cities in 1890 were not exceptionally segregated (Weaver 1948; Cutler, Glaeser, and Vigdor 1999). However, the rapid spread of the Jim Crow laws, now constitutionally backed by the Supreme Court, changed the American space, making it more segregated than it ever had been (Cutler, Glaeser, and Vigdor 1999; Massey, Rothwell, and Domina 2009). In the South, the abolition of slavery and the expansion of white supremacy sentiments increased spatial separation in the main cities (Taeuber and Taeuber 1965; Emerson 1994). In the North, where demand for labor in industrial cities was strong, an influx of southern African Americans escaping the Jim Crow laws settled in separate areas within the cities (Scott 1986; Cutler, Glaeser, and Vigdor 1999). The spatial separation in the North was a result not only of prejudices on the part of veteran residents, but also economic and social

2. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

considerations on the part of the migrants (Weaver 1948; Lieberman 1980; Klarman 2004). The legal backing for spatial segregation granted by the Supreme Court in *Plessy v. Ferguson*, *Village of Euclid v. Ambler Realty Co.*, and *Corrigan v. Buckley* found expression in a variety of legal practices, which were designed to establish and maintain this separation. To prevent racial spatial integration, local governments made use of racial zoning ordinance (Aloi, Goldberg, and White 1969; Rabin 1989; Silver 1997), as well as enforcing racially restrictive covenants (Dean 1947; Jones-Correa 2000; Gotham 2000b). Although racial zoning ordinances were declared unconstitutional by the Supreme Court in *Buchanan v. Warley* as early as 1917,⁴ courts constantly rejected challenges to the enforcement of racially restrictive covenants (Brooks and Rose 2013). These practices were widespread by 1940, and all the major industrial centers in the North had ghettos, which kept African Americans segregated spatially (Massey and Denton 1993; Cutler, Glaeser, and Vigdor 1999). The Supreme Court's support for segregation, even if purportedly only with equal funding, as well as its legitimization of discriminatory and spatially segregating practices, made the law an active agent in the implementation of spatial segregation. In the second generation, therefore, the law facilitated the creation and maintenance of racial-based spatial segregation (Klarman 2004).

The third generation of spatial segregation began with the Supreme Court's rejection of the "separate but equal" doctrine in *Brown v. Board of Education*.⁵ After more than half a century of steady rise in the rate of spatial separation, the Court in *Brown* ruled that racially based separation should be considered categorically as discrimination and therefore as unconstitutional. However, it can be argued that this was only the symbolic beginning of the third generation, for two reasons. First, although the "separate but equal" doctrine was officially rejected in *Brown*, from a spatial perspective, this ruling was preceded by another in *Shelley v.*

Kraemer.⁶ Here, the Supreme Court forbade racially restrictive housing covenants, denying the ability of state authorities, including courts, to enforce racial segregation, though it was privately initiated (Brooks and Rose 2013). As Richard Rothstein argues, *Shelley v. Kraemer* was to spatial segregation what *Brown* was to education (2017). Second, the first practical expression of the principled determination given in *Brown* came only after more than a decade, in the enactment of civil rights laws that outlawed housing discrimination based on race, color, religion, sex, or national origin. But *Brown*'s symbolism is important not only in the question of the starting point of the third generation, but also in the role of the law in perpetuating spatial separation in this generation. The third generation of American spatial segregation is distinct from the previous two concerning both the social groups involved and the role that the law played in perpetuating separation in space. Unlike the previous generations, the third generation of American spatial separation made the issue of separation more extensive in all aspects related to the social groups involved. Thus, whereas the first two generations focused on race- and ethnicity-based segregation, the third expanded the potential for spatial segregation along economic lines (Abramson, Tobin, and VanderGoot 1995; Jargowsky 1996; Massey and Fischer 2003; Massey 2008). Shifting the basis for spatial separation from race and ethnicity to income widens the circle of those involved in spatial separation, although differences in income level are often proxies for racial and ethnic affiliation (Reeves, Rodrigue, and Kneebone 2016). This ongoing change in the basis for segregation, however, was a direct result of the role the law played in the third generation.

The beginning of the third generation was encouraging in terms of the role of law in the construction of space. On a declarative, constitutional level, the law denied the legitimacy of segregation and established the legal presumption that separation is categorically unequal. *Brown* was followed by several important civil

4. *Buchanan v. Warley*, 245 U.S. 60 (1917).

5. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

6. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

rights laws, which had a significant impact on American society. These laws, especially the Civil Rights Act of 1964⁷ and the Fair Housing Act of 1968,⁸ changed basic principles in American law and outlawed discrimination with regard to residence or employment on grounds of race, color, religion, gender, and national origin. However, although in its constitutional capacity the law rejected separation and advocated equality, in its private capacity it legitimized separation and arguably turned it into a constitutive feature of the American space. In this sense, the law created a gap between the declarative dimension and the practical one. The prohibitions on discrimination and segregation, which the law established on a public-constitutional level, disappeared when they were implemented in private law. The public-private distinction was introduced for the first time at *Shelley v. Kraemer*, which allowed racial restrictive covenants but forbade their state enforcement. However, even after the enactment of the Fair Housing Act, which prohibited discrimination on a private level, various exemptions were prescribed in the act itself that allowed the preservation and perpetuation of spatial separation (Schwemm 1978; Walsh 1999; Powell 2008). These exemptions continue to allow spatial separation despite the Supreme Court ruling in *Jones v. Alfred H. Mayer Co.*⁹ that overturned *Corrigan v. Buckley* and upheld the constitutionality of the Fair Housing Act. The public-private distinction led to a number of significant spatial processes, the effects of which are still evident in the American space. One of these processes is known as *white flight*, the large-scale migration of white populations from racially mixed urban areas to more racially homogeneous suburban regions (Frey 1979; Conley 2010; Woldoff 2011). Although the reasons for the white migration are varied (Frey 1979), the legal possibility of limiting entry into residential projects by private proprietary mechanisms has enabled the preservation of separation between the suburbs and urban space (Rothstein 2017). Another interrelated

spatial process was the flourishing of homeowners associations (HOAs); private associations formed for managing residential subdivision. HOAs were first established in the United States in the mid-nineteenth century but flourished in the third generation of spatial segregation (Reichman 1976; Ellickson 1982; Brooks and Rose 2013). Along with the development in infrastructure and transportation, the main reason for the frequent use of HOAs since the 1960s was their identification as frameworks for exclusion and spatial separation, which were protected by private law (Ellickson 1982; Massey and Denton 1993, 36; Ford 1993; Roithmayr 2010). Another process that has gained momentum since the 1970s is gentrification; the spatial process of changing the character of neighborhoods through the influx of more affluent residents and businesses (Smith 2005; Lees, Slater, and Wylie 2013). Gentrification often increases the economic value of a neighborhood but forces low-income residents out because of the increased cost of rent and goods (Smith 2005; Boyd 2008; Goetz 2011; Lees, Slater, and Wylie 2013). This involuntary residential displacement of economically weak population groups is a prominent expression of the third generation of American spatial segregation (Powell and Spencer 2002). It is the result of the abandonment of space for private law and the market forces which, despite the declarations of integration and equality, establish and perpetuate spatial segregation on the ground. The third generation of American spatial separation is ongoing; income-based separation is becoming both rooted in the American space and an integral part of social stratification in the United States (Massey and Eggers 1993; Abramson, Tobin, and VanderGoot 1995; Fischer 2003; Reardon and Bischoff 2011). The characteristics of the three generations of American spatial separation (table 1) reveal significant differences in terms of the basis for separation and the mechanisms used to implement it.

At the same time however, it seems that the United States has recently entered the fourth

7. Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964.

8. Pub.L. 90-284, 82 Stat. 73, enacted April 11, 1968.

9. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Table 1. Three Generations of American Spatial Segregation

Generation	De Jure	De Facto	Segregation Bases	Legal Instruments Applied	Milestone Supreme Court Rulings	Segregation Mechanisms
First	Unequal though integrated	Low-level segregation	Racial-based subordination	Thirteenth, Fourteenth, and Fifteenth Amendments		Racial subordination through slavery
Second	Separate but equal	High-level segregation	Racial-based segregation	Jim Crow laws	<i>Plessy v. Ferguson</i>	Separation in public facilities (transportation, schools, hotels, and restaurants)
Third	Separate is inherently unequal	High-level segregation	Racial, ethnic, and economic-based segregation	Civil Rights Act of 1964 Civil Rights Act of 1968	<i>Shelley v. Kraemer</i> <i>Brown v. Board of Education</i>	Private law mechanisms (HOA, gated communities, restrictive covenants) Suburbanization and local policies (white flight) Federal policies (redlining mortgages)

Source: Author's tabulation.

generation of spatial separation, a generation characterized by the voluntary separation of minority groups holding a distinct religious or cultural conception of the good.

FROM NEW YORK TO LOUISIANA: THE EMERGENCE OF THE FOURTH GENERATION

In a referendum held in November 2017 in the upstate New York town of Monroe, the majority of residents voted to separate from the village of Kiryas Joel. This decision ended a long period of clashes between the two groups of residents, which was mainly related to cultural differences between the two populations. It also marked the beginning of the fourth generation of spatial separation in the United States.

To understand the depth of the differences between the two social groups involved, we need to look closely at the Kiryas Joel community and its defining characteristics. Kiryas Joel was founded in the early 1970s as a semi-rural outpost of the Satmar Hasidic sect based in Brooklyn, and grew rapidly, creating the need for multifamily housing and additional land for it (Stolzenberg 2011; Grumet, Caher, and Kaye 2016). The Satmar are the largest, most devoted Hasidic community in America (Mintz 1992; Rubin 1997). Even among ultra-Orthodox sects, it is considered one of the most zealous in its implementation of Jewish law and opposition to reforms or innovation (Magid 2014; Wood and Watt 2014). The Satmar brought their way of life with them from Hungary to Brooklyn after World War II, where the separation of religion and state, combined with Brooklyn’s housing opportunities, enabled the expanding Satmar community and other Central European Jewish immigrants to establish isolated, illiberal communities that functioned independently of many state-regulated structures (Rubin 1997). Satmar families, eschewing birth control, typically have eight to ten children (Mintz 1992; Wood and Watt 2014; Stolzenberg 2015). They speak Yiddish, dress in long clothes to avoid revealing body parts in public, engage in full gender separation outside the home, and generally refrain from consuming American media or publications that do not come from within the community (Minow 1995).

The Satmar community proliferated so rap-

idly that lack of housing acted as a catalyst for the 1974 establishment of the second location of the Satmar sect in the town of Monroe, New York. This community was named Kiryas Joel (Stolzenberg 1993; Minow 1995; Myers 2013). The establishment of the village of Kiryas Joel symbolized not only a split in the American Satmar community but also a turning point in the community’s struggle for spatial separation (Stolzenberg 1993; Minow 1995; Myers 2013). The village saw value in convergence within itself, providing for its needs autonomously, and maintaining spatial and social separation from external populations. These characteristics naturally led to a distance between residents of the village of Kiryas Joel and residents of the town of Monroe, so that even before the referendum on municipal separation, the residents of Kiryas Joel were spatially and culturally separated. At the same time, attempts to obtain legal approval for this separation were repeatedly rejected.

The most striking legal confrontation concerned the Kiryas Joel residents’ aspirations to establish a separate and independent board of education. Although most of the village children attended private schools that were gender segregated in accordance with the religious norms of the community, the children who had disabilities were sent to a Monroe public school. Because of Monroe’s refusal to gender segregate its public school, the New York legislature authorized Kiryas Joel to establish a public school that would serve the village’s children with disabilities. Citizen taxpayers and the New York School Board Association sued, claiming that the statute creating this special school district was not neutral and violated the requirement to separate church and state as mandated by the First Amendment. The case went to the Supreme Court, which in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet* ruled that the special school district gave too much authority over a secular function of society to a religious group and unconstitutionally delegated a secular function to a religious body. The New York legislature responded by adopting new legislation that appeared to be more general and more neutral, but the suit was also taken to the Supreme Court. The *Grumet* case is one prominent example among many of the tension be-

tween the two social groups, which arose from fundamental differences in their worldviews and ways of life. The case also attests to the fact that spatial and cultural separation existed between the village of Kiryas Joel and the town of Monroe even before the 2017 referendum. However, I argue that the municipal separation, to which both the residents of Monroe and the residents of Kiryas Joel agreed, marked a new era of spatial separation in the United States.

The reason for seeing Kiryas Joel's case as the beginning of the fourth generation of American spatial separation is not that the separation between the groups was allegedly voluntary. Consider another case of an alleged voluntary separation—St. George and East Baton Rouge Parish, Louisiana. In October 2019, after years of trying to create a separate school system, residents of a white suburb of Baton Rouge voted to become a new city called St. George. Fifty-four percent of voters in the community approved the amendment, but other Baton Rouge residents were not allowed to express their position (due to state laws). St. George was accordingly incorporated as a separate city and gained control over its taxes and schools (Wilson 2016). Although the case of St. George is timely and occurs, expectedly or not, in Louisiana, which has been the focus of *Plessy v. Ferguson*, it is not a unique case. According to recent research, most of the cases in which communities aim to self-segregate themselves from their parish do so to control their taxes and school systems (Wilson 2016; EdBuild 2017; Taylor, Frankenberg, and Siegel-Hawley 2019). Thus, states set different statutory processes for school district secessions that isolate students and resources (Shoked 2013; Wilson 2016; EdBuild 2017). Thirty states have a policy defined in law. Some require actions by voters; others require the state's approval and even constitutional amendment. Since 2000, no fewer than seventy-three U.S. communities have attempted to secede from schools in an effort to strengthen resources (EdBuild 2017). Some, like St. George, aimed to achieve school segregation by promoting municipal secession.

The case of St. George and similar communities that struggle to segregate themselves from their less affluent surrounding parishes

should not be considered as part of the fourth generation because for the most part they have maintained the characteristics of segregation in previous generations. Thus, St. George, a largely white and more affluent suburb of Baton Rouge, seeks to separate spatially from the majority of nonwhite, less affluent residents of the East Baton Rouge Parish (Runnels 2016). Spatial separation is promoted by the powerful to avoid integration with the less powerful on racial and economic grounds. These are precisely the characteristics of the separation against which the *Brown* Court came out, and the same bases for separation in the post-*Brown* generation. Therefore, seeing such a separation, despite being ostensibly voluntary, as one that deserves any protection cannot be justified. The case of Kiryas Joel, however, is quite different.

The reason to view the municipal separation of Kiryas Joel and the town of Monroe as the beginning of the fourth generation of American spatial segregation is that it altered the roles of the social groups involved as well as the legal and social implications of this decision. The official separation of the village from the town created, in practice, the first town in the United States exclusively for ultra-Orthodox Jews. Moving to the present day, the new town of Palm Tree is expected to be run according to the rules and the religious norms held by residents of Kiryas Joel. These norms, as well as the characteristics of the residents, are expected to affect the town's zoning laws—to emphasize apartments for large families as well as the provision of public institutions for study and ritual—and the educational institutions and the norms according to which they will operate (Minow 1995). Therefore, the establishment of Palm Tree marks the emergence of a new generation of segregation in the American space, one that differs from the three generations that preceded it. This fourth generation is not based on race, religion, ethnicity, or income. Instead, the social groups involved are, respectively, a majority group in American society and a minority community that seeks to live in accordance with its unique, often illiberal norms. In the case of Kiryas Joel, the group is defined as a minority because of its religious affiliation, but future cases that rely on the Kiryas Joel prece-

dent will not necessarily be limited to religious minorities. Indeed, the fourth generation provides the opportunity for various minority communities—religious, ethnic, cultural, and even economic—to demand spatial separation from the majority group. Focusing on the majority-minority tension justifies viewing the Satmar community’s struggle for spatial segregation as manifesting a fourth generation of American spatial separation and not just as another link in the historical chain of religious communities seeking to differentiate on a religious basis. American history is replete with multiple struggles on behalf of religious communities to maintain their religious practices and to preserve their religious freedom. Kiryas Joel’s separation illustrates a broader struggle for spatial autonomy that does not settle for religious freedom but instead demands a spatial expression of government.

Placing the majority-minority tension at the core of the fourth generation of American spatial segregation, however, requires us to recognize that Kiryas Joel is not the first case where this tension was the basis for a claim. African American separatists opposed integration and called for the concept of self-segregation of blacks out of community empowerment (Hamilton and Ture 1967; Hall 1977; Pettigrew 1977). In the late nineteenth and early twentieth centuries, African American activists established several black-only towns, believing that blacks would never find peace or prosperity living in white-dominated areas. The assumption behind such towns—such as Boley and Langston in Oklahoma and Mound Bayou in Mississippi—was that only by controlling the governmental institutions would the empowerment of the community be possible (Meier 1954; Tolson 1970; Stuckey 2009). Almost a century later, minority communities in East Palo Alto, California, and Boston, Massachusetts, made several efforts to incorporate as independent municipalities (Goel et al. 1988). These attempts, though abandoned eventually, were symptomatic of the negative reaction to the implementation of integration that had been guaranteed by law in the third generation of American spatial segregation, as well as the desire to assert political control over their community (Goel et al. 1988). However, these separatist calls and

self-segregation attempts were rejected, either because of the belief that segregation is unequal and inappropriate or a more practical understanding that granting such a possibility would make it possible to preserve the discriminatory situation in effect at the time. The failure of previous self-segregation attempts, therefore, should be attributed to the message conveyed by both *Plessy v. Ferguson* and *Brown v. Board of Education*. Although these two judgments did not deal directly with spatial separation, they did link separation and equality. In that sense, the judgments made segregation the ultimate cause for inequality in American society. Although the place of racial-, religious-, ethnic-, or income-based segregation in creating and preserving inequality in American society is undisputable, labeling it as the ultimate and perhaps even the only cause of inequality is problematic for two reasons. First, it hides other political, economic, and social causes of inequality and therefore prevents those causes from being identified and treated. Second, and more important, it does not allow for a more distinct observation of the circumstances of each case (Bayer, Fang, and McMillan 2014). Setting an irrefutable presumption that segregation is unequal denies claims for spatial separation that may not only not harm equality but instead—as in self-segregation claims on behalf of suppressed minority communities—enhance it.

The Kiryas Joel case changed this common understanding by allowing minority communities to segregate themselves voluntarily from general American society. In this sense, the fourth generation opens anew the discussion about the applicability of the *Plessy v. Ferguson*’s “separate but equal” doctrine in American spatial policy. However, it not only reinforces the debate but also suggests that the implementation of this doctrine may be legitimate and even desired if a minority community requests it. The fourth generation, therefore, presents a different concept of spatial justice in which a separate space may be required for a minority community to gain equality. Spatial separation, therefore, is no longer an obstacle to equality but instead a condition for it—in other words, “separate, therefore equal.” This is, of course, a meaningful change in the Amer-

ican spatial policy, one that has both legal and social implications.

Kiryas Joel was the first town to be incorporated as an ultra-Orthodox-only settlement, but many other towns face a similar threat. The experience of New York towns such as East Ramapo and Bloomingburg and New Jersey towns such as Riverdale, Mahwah, Jackson, Upper Saddle River, and Montvale is much the same as what led to Kiryas Joel’s municipal separation. In all these cases, the ultra-Orthodox community argues that segregation will reflect justice and equality by serving the unique community’s needs. “Separate, therefore equal” is slowly becoming a normative claim for spatial justice for many communities (see table A1). The return to the forefront of the legitimate connection between separation and equality in space poses significant legal challenges and requires investigation of its implications for society as a whole, for the segregated community, and for the individual members of the community. This examination must be based on arguments about the justifications of or objections to the spatial separation of minority communities, as discussed in the following section.

JUSTIFICATIONS FOR FOURTH-GENERATION SPATIAL SEGREGATION

Can the spatial segregation of minority communities, especially those organized around illiberal norms, be socially and legally justified? Should the liberal state allow such segregation, or should it struggle to prevent it? Should the fact that the segregation is voluntary affect the answer to these questions?

Stronger Alone: Empowerment

Minorities have often been the victims of spatial and residential segregation (Nelson 1996; Seitles 1998). As Douglas Massey, Jonathan Rothwell, and Thurston Domina demonstrate, minorities such as African Americans, Latinos, and Asians were the most prominent victims of spatial separation, based, at least until the 1970s, on race and ethnicity (2009; Jennings 2000). The change in the characteristics of American spatial segregation, from that based on race and ethnicity to that based on income,

did not significantly change the location of minorities in this equation. Then, as today, minorities in American society lived with spatial exclusion (Yinger 1995; Seitles 1998; Trifun 2009) as well as repeated attempts by government and private parties to create spatial separation (Trifun 2009). The social and legal battle to diminish racial and ethnic spatial segregation in the United States was primarily the battle of minorities seeking to be considered as equals in society (Valocchi 1996). The rejection of the “separate but equal” doctrine has been a significant yet symbolic milestone in the struggle for equality for minorities in the United States, in effect declaring that a worthy society cannot legitimize separation between people because of their racial, ethnic, or religious difference. The Court’s legal declaration in *Brown* celebrates equality and inclusiveness. It failed to recognize, however, that sometimes spatial separation empowers minorities instead of marginalizing them.

Attempts to prevent racial and ethnic spatial segregation over the years led both state and local governments to adopt inclusive spatial policies, such as subsidized housing, inclusionary zoning, and restrictions on discrimination. In response to these efforts, some scholars argue that in the quest for equality, the right of minorities to not integrate was obscured. The law, as expressed in the Supreme Court ruling in *United States v. Fordice*—where Justice Clarence Thomas’s concurring opinion suggesting that historically black colleges should not be destroyed or severed of their traditions and histories was not adopted by the opinion of the Court—showed little tolerance for these claims.¹⁰ However, scholars as well as social activists suggest that in some cases segregation may be desirable (Jennings 2000). Take, for example, a situation in which integration strips the minority community of essential characteristics, history, and values (Goel et al. 1988; Jennings 2000). Another argument is that separation may in times empower minorities, whether because they are able to preserve their history and values, or because they may develop a sense of belonging and social affiliation (Brooks 1996; Tomlins 2000; Kaplan and Woodhouse

10. *United States v. Fordice*, 505 U.S. 717 (1992).

2004). The empowerment justification was at the core of both the black separatism movement of the 1960s and the incorporation attempts of black communities in the 1980s. These arguments still find expression in the recent flourishing of Afrocentric schools in Brooklyn, New York. Approximately six Afrocentric schools in Brooklyn, in which about 2,300 children are enrolled, decided to provide African American children with an educational framework that would celebrate black culture and history. As Rafiq Kalam Id-Din II, the founder of the Ember Charter School, described its mission, “Everything you do needs to be focused on agency and empowerment” (Shapiro 2019).

Segregation as empowerment justifies spatial segregation when it contributes to a minority’s ability to flourish. This understanding echoes some of the arguments on behalf of multiculturalism, which support limited segregation of minorities from general society. However, the empowerment justification depends on the characteristics of the community and the need, insofar as it exists, for spatial segregation to preserve those characteristics. Such a demand must come from the minority community and cannot be imposed by an external party (Goel et al. 1988). The significance of these qualifications is that the empowerment justification for spatial segregation cannot and should not be broadly exercised. It requires a careful examination of the circumstances of each case and the characteristics of each community.

Live and Let Live: Pluralism

Another justification for the spatial segregation of minority communities is rooted in a fundamental pluralistic approach, which imposes a duty on liberal states to allow all citizens to live their lives in accordance with whatever concept of good they deem appropriate (Anderson 1995; Stern 2015). At the core of this approach is the understanding that every person may hold different beliefs and values. Elizabeth Anderson identifies this principle, saying that “people experience the world as infused with many different values” (1995, 1). She also explains that the state should therefore be obligated to allow all people to live by their values through the estab-

lishment of diverse social institutions, which people can use to promote these values (Anderson 1995; Stern 2015). Anderson thus argues that the state has an obligation “to expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of goods” (1995, 149).

Applying Anderson’s pluralistic approach to the spatial discourse means that the liberal state must be prepared to allow spatial segregation if it contributes to individuals’ actualization of their values and norms (Stolzenberg 2002). It also requires the state to preserve the ability of all individuals and communities to realize their values and norms and therefore should be done in a way that prevents externalizing one group’s norms over another’s (Stern 2015). The case of Kiryas Joel is a good example of the pluralistic justification. The ultra-Orthodox community of Kiryas Joel maintains strict adherence to *halakhah* (Jewish religious law), which affects all aspects of their lives, from spiritual concepts to everyday life (Mintz 1992; Norgren and Nanda 2006). To maintain their religious worldview in accord with the community, members of the community cannot integrate with institutions in general society (Rubin 1997). It was no accident that the main legal event in which the Kiryas Joel community was involved had to do with the schools to which the community sent its children (Rubin 1997). A community that meticulously preserves gender segregation in its schools cannot exercise its religious worldview if the community’s children enroll in mixed-gender institutions (Mintz 1992). It should not be surprising, therefore, that the tension related to the educational institutions between the residents of Monroe and the residents of Kiryas Joel eventually led to a decision on separation. Thus the community’s requirements for maintaining its values and norms give rise to the pluralistic justification for spatial segregation.

The pluralistic justification and the empowerment justification have certain similarities. Both seek to enable communities to preserve their characteristics, values, and norms. Neither applies to forced spatial segregation, but instead conditions separation on the commu-

nity's free will or demand. However, the two justifications also differ. The most prominent of these differences relates to the characteristics of communities that may require spatial segregation. The empowerment justification holds that only minority communities that have historically experienced oppression, discrimination, and exclusion by a majority population should be permitted to implement spatial segregation in the name of empowerment. The legitimization of spatial segregation, a policy perceived as discriminatory and socially harmful, stems from a long history of discrimination and exclusion. According to this justification, minority communities can now correct past injustices by using tools to which they are accustomed. It is different, however, if the pluralistic justification is examined. The pluralistic justification holds that spatial segregation is not unique to minority communities. Any community whose unique characteristics and ability to realize that its members' worldview requires spatial separation should be permitted to do so. Whereas the empowerment justification is based primarily on using the past to construct the future, the pluralistic justification aims mainly to foster the ability of communities to function properly in the present.

Good Fences Make Good Neighbors: Utilitarianism

Another way to justify spatial segregation both in general and between particular communities is utilitarian. This justification assumes that the inability of two or more parties to reach an agreement about the proper use or management of shared resources requires division and separation (Ostrom 1990). This assumption underlies Garrett Hardin's "tragedy of the commons" (1968), in which he advocates adopting a private property regime rather than a common one (Demsetz 1967; Hardin 1968). To overcome the collective action problem in regard to shared resources, and to avoid inefficiency, it would be better to divide ownership of the resource so that each owner is able to use and manage their own plot efficiently (Ostrom 1990). This rationale, which calls for division and separation to ensure efficiency, may also justify spatial separation between different communities. When communities holding dis-

tinctly different values and norms are required to share resources, such as schools, they may face ongoing conflicts that prevent any of them from deriving the proper and desired benefit of those institutions.

This argument also holds true for decision making in the design of common space. Consider the various needs of the Monroe and the Kiryas Joel populations. Those of the Monroe population were more or less identical to those of any average American community, but those of Kiryas Joel were quite different. The large number of children per family, the gender segregation in educational institutions and the public sphere, and their need for various institutions of worship all led to ongoing conflicts regarding local zoning and the characteristics of public institutions. From the utilitarian point of view, these confrontations and therefore this partnership were undesirable. Protracted confrontations between parties not only caused significant delays in the satisfaction of public needs but also resulted in the failure to satisfy either side. Economic losses related to litigation or constant threats of it were a factor (Trubek et al. 1983; Ribstein 2001), as was frustration on all sides with the inability to implement programs and services (Michelman 1967) that, in a sense, paralyzed the shared city. These costs, all embedded in the collective action problem, militate for the separation of communities that have been paralyzed and depleted by costly sharing. In this sense, spatial segregation may efficiently ease tensions and confrontations among communities, or, as one Kiryas Joel official said, "We can each have our own town and be good neighbors."

The empowerment and pluralistic justifications have numerous similarities, but the utilitarian justification involves a completely different view. According to it, segregation should also be implemented if one of the communities using a common space does not wish to implement it. The reasoning here lies in the perspective that characterizes utilitarian perceptions, which is the consideration of aggregate welfare, regardless of the will of those who make up the equation. This aspect of the utilitarian justification has the potential to facilitate the imposition of spatial segregation on various communities, ignoring their characteristics and the

implications of that separation on the conduct of the community. In a sense, the utilitarian justification’s disregard for the volitional choice of spatial segregation is reminiscent of the dark ages, when racial segregation was justified for utilitarian reasons, in service of perceived aggregate welfare (Hayman 2002; Klarman 2004). These and other objections are the focus of the next section, which explains the reasons for opposing spatial separation.

OBJECTIONS TO FOURTH-GENERATION SPATIAL SEGREGATION

Each of the three justifications for spatial segregation, though differing in scope and scale of application, holds that communities should be allowed to segregate spatially in certain circumstances. Whether because segregation is required to empower long oppressed communities, because of its essential role in preserving a community’s norms and values, or because it contributes to the aggregate welfare, spatial segregation may be legitimized despite its moral flaws and its historic role in fostering discrimination.

Influences on Society

One objection to legitimizing it, despite its potential contribution to minority communities or to society generally, is that it imposes costs and inappropriate norms. This objection has multiple layers. The first, often referred to as the slippery slope argument, suggests that legitimizing spatial separation will not successfully be restricted within defined boundaries, as in the case of a voluntary demand of a minority community. Instead, it will cross borders and expanses, eventually spreading to the entire American space (Kymlicka 1997, 80).

According to this view, even under the allegedly egalitarian spatial policies of the third generation of spatial segregation, racist and discriminatory attitudes remain, if dormant. Widening the prohibitions on segregation in public law has led to discriminatory and racist views being expressed mainly through market forces and private law. Reinstating the possibility of spatial separation could, on a public level, therefore incite racist and discriminatory behaviors, and drive spatial segregation even in situations for which no justification is possible.

In a sense, the slippery slope argument seeks to prevent the return of America to the second generation, in which spatial separation was legitimate and justified in various ways by a large portion of the population (Edmonds 1957). Spatial separation should therefore be prohibited now just as it has been.

A second aspect of the influence objection concerns the possibility that community norms, for the sake of which the community has separated from society, will bleed into the common space outside the community. Communal norms will cross the boundaries of the community and affect the external space. For example, it is possible that different religious or cultural norms, some of which could conflict with liberal norms such as gender segregation and gender discrimination, would affect the liberal space outside the community. The community that differentiates itself spatially in order to continue and even intensify its practices of nonliberal norms within its discrete communal space will, somewhat paradoxically, exert greater influence on the general space from which it withdrew (Stolzenberg 2002). Although it is possible to argue that communities such as Kiryas Joel exercised nonliberal norms even before separating from the town of Monroe, separation increases its ability to do so, both in terms of enforcement and scope, because segregation facilitates the practice of nonliberal norms in the public sphere. The influence objection, then, calls for the prohibition of spatial separation in the fourth generation out of concern that such separation would impose improper costs and norms in the space around the community.

Harm to Community Members’ Autonomy

A different objection to legitimizing spatial segregation stems from a concern for the individual autonomy of members of the segregated community (Buchanan 1989; Pildes 1998; Dagan and Heller 2001). According to this argument, the three justifications for spatial segregation ignore both the interests of individual members of the community and their autonomy. The objection to spatial segregation out of concern for the individual autonomy of community members recognizes that communities, although important to their members,

may violate their autonomy to the point of claiming that individuals will sacrifice themselves for the sake of the community. In such cases, communities, however important they may be, can effectively become prisons for individuals.

Spatial segregation does not create communities or shape their characteristics. The various justifications discussed earlier refer to existing communities that seek to differentiate themselves spatially. However, spatial separation of the community from other communities intensifies, or is likely to intensify, the violation of the autonomy of individual members of the community, for two reasons (Stern 2015). First, spatial segregation empowers the community as a whole and its leaders in particular (Phillips 2005). Empowering community leaders creates the potential for further reduction of individual autonomy, subordinating the individual's discretion to the directives of leadership. Second, and equally important, spatial segregation creates a barrier between those who belong to the community and those who do not. This barrier, although it may have existed socially or covertly when the communities intertwined, prevents individual members of the community from being exposed to other norms and to those who believe in them (Stern 2014). Exposure to alternatives generally develops the ability to think autonomously. As noted, this barrier also reduces the ability of individual members of the community to create social, economic, and cultural affiliations with those who do not belong to the community, and thus has a chilling effect on their ability to exit the community as they choose (Simmel 1955; Bolt, Burgers, and Van Kempen 1998).

The Utilitarian Objection

Another objection to the spatial segregation of minority communities involves society as a whole. This utilitarian objection has many aspects, the common denominator of which is the conclusion that granting legitimacy for spatial segregation may harm aggregate welfare (Glyn and Miliband 1994; Carr and Kutty 2008). One suggests that segregation involves an inherent reduction in the ability of isolated communities to maximize their economic activity.

Another is that spatial segregation creates enclaves that, over time, will become completely disconnected from general society, so that society loses significant forces that might otherwise contribute to aggregate welfare. The first objection focuses on the segregated communities and the implications of spatial separation on their economic situation. Most of the research regarding the economic implications suggests that segregation leads to severe consequences for the separatist community and its members (Massey, Gross, and Eggers 1991; Massey and Fischer 2000; Wilson 1990). These consequences are the result of poor education, poor health, and lack of training and mobility, but also stem from the lack of economic ties with nonmembers (Massey, Gross, and Eggers 1991; Massey and Denton 1993; Massey and Fischer 2000). Segregation impairs the economic strength of the community because it radically restricts the opportunities available to its members. An examination of the ultra-Orthodox communities in the New York area reveals that their economic conditions are significantly worse than those of the national and state average. According to the 2014–2018 American Community Survey, all-ultra-Orthodox communities, such as Kaser, New Square, and Palm Tree, have per capita incomes one-quarter to one-third of the state average and poverty rates three to four times that of the state. The childhood poverty in these communities is almost three times that of the state (U.S. Census Bureau 2019, annex 1). From a utilitarian point of view, the economic weakness of the community is not expected to remain an intracommunal problem. Communities that collapse impose a heavy economic burden on the state to subsidize and support them through various educational, health, and rehabilitation programs (Massey and Denton 1993). The concern for economic damage, then, justifies its prevention from a utilitarian point of view. However, the utilitarian objection has a second aspect, which is related to the disengagement of those segments of the population from general society. According to this argument, the state's labor capacity and productivity are impaired when segments of the labor force disengage. The spatial segregation of minority communities may lead to enclaves be-

coming completely detached from the general economic activity in the country as a whole. Whereas earlier this concern was the motive for increasing mobility and improvements in the ways in which minority groups were integrated into the economy, complete separation implemented voluntarily by the community today can lead to the loss of significant parts of the labor force, thus harming aggregate welfare.

SEPARATE, THEREFORE EQUAL: THE PROTECTIVE ROLE OF LAW

As discussed, in each of the three previous generations, the law played a different role regarding separation in space. In the first generation, it functioned as the guardian of racial subordination through the institution of slavery and was therefore indifferent to spatial separation. In the second generation, after the abolition of slavery, it preserved white supremacy, legitimizing and even facilitating spatial segregation. In the third generation, it became a constituent component of spatial separation, because despite its declarations regarding the prohibition on separation, it supported and expanded its existence through private law and market forces. The fourth-generation characteristics no longer allow the law to continue playing a dual role in the same way. Incorporation as a municipality prevents minority communities from continuing to use private law as a method of segregation and discrimination. The choice to incorporate as a municipality changes the status of those communities, shifting them from private to public law. The meaning of incorporation as municipalities goes beyond attempts of individuals and private developers to exclude others and forces the law to consider the implications of such segregation on the community, its individual members, and society at large. The justifications and objections for spatial separation in the fourth generation require that the law intervene in the construction of space and play a major, protective role in maintaining the boundaries of separation and its consequences.

Three constitutional challenges require a rethinking of the role of the law in establishing the separate, therefore equal policy. The first lies in the connection that fourth-generation

spatial segregation creates between community authority and government authority. Such a connection expands the authority given to community leaders, therefore extending the threat posed to the autonomy of individual community members, as well as their constitutional rights. The second challenge is the role of the law in ensuring the ability of a minority community to maintain its activities and characteristics. This challenge sharpens when the community that seeks to segregate spatially is a religious community, a reality that evokes the Establishment Clause of the First Amendment and concerns state contribution to the establishment of religion. The third challenge relates to the protection that the law should provide to those who are not community members. In this context, the law should accommodate the concern that spatial segregation of minority communities will establish discriminatory norms between those who are members of the community and those who are not; for example, in the fields of housing, employment, and education. Protecting the community, the individual community members and society at large, therefore becomes a significant part of defining the role of the law in the fourth generation of spatial separation.

The Role of Law in Protecting Community Members

The first challenge the fourth generation of spatial segregation poses before the law is the extension of the authority and power of the community and its leaders. If before incorporating as a municipality the community benefited mostly from community forces, which were based on internal community norms maintained primarily by social sanctions, its incorporation as a municipality adds a governmental layer to the variety of methods available to the community and its leaders when seeking to impose their judgment on community members. In this sense, empowering a minority community to be incorporated as a municipality connects community authority and governing authority, a connection that raises concern about the preservation of the autonomy and constitutional rights of the community members. One example of such a challenge may be the design of public space in accordance with

community norms. In 2013, the New York Civil Liberties Union and the American Civil Liberties Union sued the village of Kiryas Joel after press reports documented a public park in which women and girls were confined to an area with red benches and playground equipment, with boys and men to a blue area. The lawsuit was settled after the town of Monroe government agreed not to endorse segregation of the sexes in the public sphere. However, the separation of Kiryas Joel from Monroe raised concerns that providing governing powers to the Satmar community would reawaken its leaders' desire to shape the public sphere to align with community norms. Another challenge concerns the enforcement of community norms through governing powers. In this sense, the concern is that establishing the connection between community authority and government authority would extend the violation of the autonomy of individual community members, especially when it comes to their right to oppose the leadership, to protest against it, and to suggest alternatives to a path chosen by the community leadership. These concerns become more acute because the sanctions held by the municipal government are no longer informal, social sanctions, but instead governmental and legal ones.

The concerns reinforce the notion that the law should play a protective role that would protect individual members of the community from extending the infringement to their autonomy, as well as from the loss of their constitutional rights. To fulfill its protective role, the law should address these concerns primarily through strict adherence to the constitutional rights of the community members, emphasizing the rights enumerated in the First Amendment: freedom of expression, freedom of speech, and freedom of association. Thus any attempt by the municipal government to restrict or limit the exercise of individual members' constitutional rights should be under strict scrutiny and under the assumption that the restrictions on these rights should be reduced as far as possible. When illiberal minority communities incorporate as municipalities,

they bind together both communal and governing authorities. This consolidation of powers diminishes the ability of individuals, as community members, to exercise their autonomy. If community members who violated community codes were primarily subject to community and social sanctions until the community's incorporation as a municipality, they would be subject to government sanctions after incorporation. The unification of powers, therefore, sharpens the importance of the role of law as the protector of community members' rights.

THE ROLE OF LAW IN PROTECTING COMMUNITIES' ABILITIES TO SELF-SEGREGATE

The Establishment Clause is a limitation placed on governments to prevent actions that may contribute to the establishment of religion, making it illegal for the government to promote theocracy or a specific religion. Government support for spatially segregated religious minority communities could trigger Establishment Clause concerns because the segregation could be seen as a way of realizing religious community norms. This question was at the core of the *Grumet* case, in which the New York legislature's special state statute established a separate board of education along the village boundaries of Kiryas Joel to serve this distinctive religious population.¹¹ Justice David Souter reached the conclusion that the legislators' decision, one counter to regular state practice, was undermining the state's constitutional obligation to act in neutrality, therefore violating the Establishment Clause. Although the ruling in *Grumet* was widely criticized (Minow 1995; Greene 1996),¹² it seems that the challenge that the Establishment Clause poses to fourth generation spatial segregation claims should be examined differently. As noted, the fourth-generation of spatial separation does not necessarily concern religious communities exclusively, though it is reasonable to assume that these may play a major role in community quests for segregation. Instead, the main characteristic of the community that seeks to seg-

11. *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

12. *Kiryas Joel Village School Dist.*, 512 U.S. 687 (Scalia, A., dissenting).

regate itself voluntarily is that it is a minority community. An examination of the justifications for spatial separation also reveals that none are unique to religious communities. All three justifications may apply to religious communities but do not depend on religious affiliation, only concerns relating to minority status. A decision on whether the state should permit, support, or regulate self-segregated communities should thus be based on nonreligious justifications as specified. In the context of spatial segregation, the state should accommodate religion as long as segregation is justified according to secular (social) justifications. Such recognition should also be accompanied by the verification that the social costs highlighted in the objections specified do not impose too heavy a burden on society. When the state acts according to this principle, it does so out of a secular respect for the needs of religious communities or any other minority community. It does not violate the Establishment Clause because it is motivated by secular and social concerns rather than religious ones.

THE ROLE OF LAW IN PROTECTING SOCIETY AT LARGE

American law established antidiscrimination duties through several antidiscrimination laws, among them the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1990. These laws provide protection for race, color, religion, sex, and national origin in the areas of voting, education, employment, public accommodation, and housing. In addition to federal legislation, numerous state and local laws address discrimination that is not covered by these laws (Hunt 2012). This set of rules challenges a minority community that seeks to segregate spatially because it reinforces its commitment to equality, even to those who are not members of the community or who do not share the conception of good that it holds. Consider, for example, a situation in which a minority community seeks to segregate spatially because of its unique cultural characteristics. Antidiscrimination laws

require the community to refrain from discriminating against those who are not members of the community in regard to housing, employment, and education, but allowing such a possibility could thwart the purpose of segregation in the first place. In the case of Kiryas Joel, the main motive for segregation was the reluctance of members of the community to compromise their religious worldview on gender segregation in schools and public spaces. Applying antidiscrimination laws in the new town of Palm Tree, therefore, would frustrate the entire purpose of segregation. Spatial segregation in the fourth generation thus poses a significant challenge to the law because it is forced to examine the boundaries of segregation as well as its implications for the community, its members, and those who are not members of the community.

As a result, the law in the fourth generation of spatial segregation needs to take a protective role. On the one hand, it should protect the ability of minority communities to exercise their right to spatial segregation, whether for empowerment, pluralism, or utilitarian purposes. On the other hand, it should protect individual members of the community, as well as those who are not members of the community, from the discriminatory consequences that this separation may have. This tension sharpens when the community that seeks to self-segregate is a religious one. When it comes to a religious minority community, the attempt to compel it to comply with antidiscrimination laws provokes an additional constitutional challenge—the Free Exercise Clause, which aims to limit the state’s actions to restrict religion-related activities. Over the last few years, the extent of exemption from antidiscrimination laws granted for religious reasons has expanded. After the Supreme Court’s ruling in *Oregon v. Smith*,¹³ which held that judicially mandated religious exemptions from generally applicable legislation are normally inappropriate, the Congress offered a swift counterresponse, enacting the Religious Freedom Restoration Act of 1993.¹⁴ This was followed by the

13. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

14. 42 U.S.C. § 2000bb.

Religious Land Use and Institutionalized Persons Act of 2000.¹⁵ These acts elevate the Free Exercise Clause over antidiscrimination laws and provide additional exemptions for religious reasons. Additional expansion of the religion-based exemptions from antidiscrimination laws come in two recent Supreme Court rulings: *Burwell v. Hobby Lobby Stores*¹⁶ and *Masterpiece Cakeshop v. Colo. Civil Rights Commission*.¹⁷ It seems, therefore, that the Court's tendency is to extend the application of exemptions by virtue of the Free Exercise Clause, meaning that in more and more cases, individuals or companies arguing that a regulation or a legislation violates their religious faith may be exempted from compliance (Luchenister 2015; Sepper 2015). In other words, religious people can use their beliefs to evade the application of antidiscrimination laws. The legal tendency to expand the scope of religious exemptions may also be significant in the fourth generation of spatial segregation, especially as far as religious communities are concerned.

In regard to the Free Exercise Clause, it can also be argued that to determine the appropriate role of the law, it is necessary to consider the justifications for and objections to spatial segregation in general, and in regard to minority communities in particular. However, this question is different from the one discussed earlier, which focuses on state support or funding of such communities. This question relates to the ability of the community to exclude others or to discriminate against them by preventing them from purchasing housing within the segregated town, or from employing them in its institutions. Although such actions may contribute to fulfilling the justifications for segregation, they nevertheless pose threats to individual insiders, outsiders, and society as a whole, thus requiring a strict examination of their circumvention of the inherent objections to segregation. In other words, although the question of state funding should be examined primarily for its contribution to the fulfillment of the justifications, the question of the com-

munity's exemption from antidiscrimination laws should depend on its ability to answer the objections described in regard to spatial separation, especially those that impose costs on outsiders.

CONCLUSION

The separation of Kiryas Joel from the town of Monroe and the establishment of the new town of Palm Tree as an exclusive ultra-Orthodox town have spawned a new generation in the American spatial segregation chronicle. This generation is characterized by minority communities that demand self-segregation from their surroundings as part of their quest for spatial justice. Although fourth-generation claims might be justified for various reasons, they are also objected to for various reasons. This article outlines both the justifications and objections to examine the role of the law in the fourth generation of spatial segregation.

Voluntary segregation on behalf of minority communities requires the law to play a protective role, to protect the communities' ability to exercise their aspiration to segregate spatially, the individual members of the community, and those who are not members of the community from the consequences that this separation may have. A hard look at the justifications for and objections to spatial segregation forces a rethink of how to address the legal challenges facing spatial segregation, which have fourth-generation characteristics. The proliferation of minority communities seeking to segregate spatially, as well as the various challenges these actions pose, required the law to address the challenges and to become a dominant player in the field. In this sense, the challenges that the fourth generation of American spatial segregation poses allow the law to ensure that the renewed legitimacy for spatial segregation will not restore the application of the "separate but equal" doctrine, but instead serve as a basis for separation only in those instances in which separate, therefore equal is in play.

15. 42 U.S.C. § 2000cc.

16. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).

17. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

Table A1. Ultra-Orthodox Towns and Villages in New York and New Jersey

	Municipal Status	Population	Ultra-Orthodox Population	Steps Taken Toward Separation	Major Friction Points
Palm Tree (Kiryas Joel), N.Y.	Town	25,292	100%	October 2017, incorporation as a new town	Control over Board of Education, territorial annexation
Lakewood, N.J.	Township	104,157	>50	—	—
Mahwah, N.J.	Township	26,380	>30	—	Calls to avoid selling apartments to the ultra-Orthodox, struggle for prevention of gender segregation in the public sphere
Bloomingburg, N.Y.	Village in town of Mamakating	450	>60	—	Territorial annexation, public institutions
New Square, N.Y.	Village in town of Ramapo	8,586	100	1961, incorporation as a village	Struggles around planning laws and building large houses suitable for ultra-Orthodox families, legal clashes over incorporation as a village
Kaser, N.Y.	Village in town of Ramapo	5,380	100	1990, incorporation as a village	Incorporation as a village approved without conflict
Spring Valley, N.Y.	Village in towns of Ramapo and Clarkstown in Rockland County	32,261	30	—	Control over Board of Education, territorial annexation
Ramapo, N.Y.	Town	136,848	50	—	Control over Board of Education, financing school transportation to private schools, territorial annexation

Source: Author's tabulation from U.S. Census data.

Note: The data are taken from the 2018 census. Estimated population data for Bloomingburg, N.Y., are from "Population and Housing Unit Estimates."

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