The Return of the Repressed: Illiberal Groups in A Liberal State

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I. THREE FACES OF LIBERALISM

Imagine a group of people bound together by common beliefs and values, a sense of shared fate, and a strong ethic of mutual support. Imagine that these people reject the values of the modern, liberal state. They do not regard their faith and affiliation as a matter of personal choice. They do not regard their sense of obligation for one another as voluntary. Marriages are arranged. Children are taught to live according to the traditional values. Parents and community elders anxiously guard the children against the influence of outside cultures. A strong social code governs all aspects of daily life, from diet to dress, from work to rest, from birth to death. Communal leaders apply this social code to dispense advice, adjudicate disputes, and preside over the public ceremonies and rituals that infuse the group with its distinctive ethos and way of life. Call this group the Traditionalists.

Now imagine another, non-traditional group. Its members also reject the values of the modern, liberal state. They oppose the values associated with the free market, self-interest and individual rights. They seek to establish a community of equals dedicated to the mutual welfare of its members and self-fulfillment through service to others. Collective ownership, direct democracy, and a principle of allocating resources on the basis of need are expected to replace the institutions of private property, managerial control and the uneven distribution of resources produced by the market. New forms of relations are envisaged between children and adults, men and women, women and women, men and men. New forms of cultural and artistic expression are cultivated to combat the dominant culture and reflect the group's sense of common purpose,

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social solidarity and spirit of innovation. Mindful of the previous utopian experiments that succumbed to the dominant culture, the members of this group sharpen their critiques of the economic and culture forces of liberal individualism, and zealously guard against their encroachment. Call this group the Radicals.

Is there room for either of these two "illiberal groups," the Traditionalists or the Radicals, in a liberal state?

There are at least three possible responses to this question. The first reflects what we might call the "standard view" of liberalism. According to the standard view, liberal societies simply are what they say they are: tolerant, inclusive, and pluralistic. The liberal state neither favors nor disfavors any particular belief-system; it is neutral. By the same token, individuals have the right to adhere to whatever belief system they want. Therefore, illiberal groups are in no way excluded or disadvantaged by the state. If groups like the Traditionalists and the Radicals do end up floundering—if people cease to hold their illiberal beliefs—that's not an outcome for which the liberal state (or liberalism as such) bears responsibility. People are free to believe or disbelieve what they like.

A second response to the question posed above reflects a much more skeptical view of liberalism. Generations of critics have argued that, despite—and indeed because of—its commitments to diversity, tolerance, and pluralism, liberalism is intolerant and inhospitable to certain ways of life and beliefs, especially traditional and illiberal ones. According to this "classic critique," liberalism generates forces which subtly (and sometimes not so subtly) pressure illiberal cultures to "wither away" even as it purports to tolerate them. In the name of state neutrality and individual freedom of choice, subcultures are pushed out of the public realm of law and politics, denied the powers of (self-) governance, and restricted to a private realm of strictly voluntary association and individual confessions of faith. These restrictions are profoundly at odds with groups like the Traditionalists and the Radicals, for whom the power to regulate, educate, adjudicate, and celebrate according to their own social code is essential.

Indeed, according to the classic critique, the very bifurcation of private and public realms threatens groups like the Traditionalists and the Radicals, as does an official posture of neutrality vis-à-vis competing beliefs. Liberalism thus appears to be deeply paradoxical: preventing the state from discriminating against any belief-system and interfering with individual freedom of choice is precisely what undermines illiberal beliefs and illiberal ways of life. The demise of illiberal cultures is thus not merely a *possible* outcome of individuals' exercising their freedom

of belief, but rather, the predictable and inevitable consequence of the operation of the "free" marketplace of ideas. The freedom of the liberal market is illusory. Neutrality is biased. Tolerance is, as Marcuse once put it, "repressive."[1]

But if Freud has taught us anything, it is always to be on the lookout for the return of the repressed. A third response to the question posed above, less familiar than either the classic critique or the standard view, takes the view that that which is "repressed" in a liberal state inevitably "returns," and indeed is actively nourished and sustained by the liberal state. For reasons to be explained shortly, I will refer to this position as the "reverse critique" of liberalism.

The basic point of the reverse critique is that liberalism enables people to establish relatively autonomous, self-governing cultural enclaves within which standard liberal principles can be flouted. Contrary to the view that liberalism protects the rights of individuals at the expense of the rights of groups, the reverse critique maintains that the exercise of individual rights *produces* group rights. Within the confines of the cultural enclaves created through the exercise of private rights, powers of socialization and governance are exercised by groups in defiance of the lines conventionally drawn (by liberals) between public and private, coercive and voluntary, domains. Although the groups that establish these enclaves are formally denied the status of political entities—they appear, from a legal point of view, to be no more than assemblages of autonomous individuals freely exercising their independent rights of free association and belief—they are able to impose significant forms of collective control on individuals, thereby constraining the exercise of individual rights. Thus, illiberal groups like the Traditionalists and the Radicals can, and in fact do, form in a liberal state.

At first glance, the reverse critique may sound like nothing more than a convoluted restatement of the standard view. Both the reverse critique and the standard view of illiberalism maintain, *contra* the classic critique, that the liberal state makes room for illiberal belief-systems and ways of life. In other words, they deny that liberalism invariably atomizes illiberal groups. But the standard view goes further in denying the exclusionary nature of liberalism. According to the standard view, far from excluding or "repressing" illiberal values, liberalism allows people to hold whatever values they want. By contrast, the reverse

1. Herbert Marcuse, *Repressive Tolerance*, *in* Robert Paul Wolff, Barrington Moore, Jr., & Herbert Marcuse, A CRITIQUE OF PURE TOLERANCE (1969).

critique accepts the basic critical idea that the liberal state excludes or "represses" illiberal values and groups. This may seem contradictory: if illiberalism is included/protected by the liberal state, how could it be excluded/repressed or otherwise undermined by the same political order? The answer is: such is the paradoxical nature of liberalism. If liberalism really is paradoxical, as the classic critique maintains, it should be no surprise that the very same liberal principles that oppress, repress and otherwise interfere with illiberal groups also have precisely the opposite effect: actually opening space up for illiberal groups—space to exist, space to flourish, space to live according their own way of life, space to transmit their code of laws and values to new generations, even the space to govern according to their own legal code.

Hence the label: the "reverse critique" is part of the critical tradition inasmuch as it agrees with the classic critique of liberalism, which holds that liberal principles and practices undermine illiberal values and ways of life. But it reverses the critique by showing that the paradox of liberalism cuts two ways. The classic critique exposes the exclusionary, intolerant, "repressive" side of liberalism, and reveals its latent hostility toward illiberal groups. The reverse critique exposes liberalism's more "user-friendly" side, its (to some, surprising) openness to illiberal beliefs and ways of life. Each stance toward illiberalism is paradoxical in its own way. It is paradoxical when the liberal state is intolerant of intolerance (i.e., illiberalism). But it is also paradoxical when the liberal state tolerates intolerance, and permits intolerance to be practiced by "private" groups. Individuals end up subjected to coercion and exclusion either way. And individuals are freed from coercion and exclusion either way.

Readers seeking a sustained exposition and defense of the classic critique will have to look elsewhere. The paradoxically intolerant side of liberalism has been discussed before, and is simply assumed here. This essay is focused instead on the other side of the paradox, the illiberal-friendly side. The point to be made is *not* that the liberal doctrines of equal respect and tolerance for diverse viewpoints are un-paradoxical (as the standard view would have it), but rather, that liberalism is even *more* paradoxical than the classic critique makes out. To put it otherwise, demonstrating liberalism's openness to illiberal groups (the project here) does not amount to a refutation of its exclusionary or atomizing effects. Hence the paradox: the very same features of liberalism that, in an ironic twist, hurt illiberal groups *also*, in a further twist, help them.

The basic features of liberalism that accomplish this paradoxical result include the bifurcation of private and public realms, the relegation of

religion to the private domain, and the withholding of the coercive, regulative powers of government from private groups. They further include a system of individual rights which reflects the primacy accorded by liberalism to the individual and his or her decision-making autonomy, and his or her freedom from state coercion and social control. In the private realm marked out by liberal theory, the value placed on individual freedom gives rise to rights of privacy and property, as well as rights to freedom of belief and association and freedom of contract. In the public realm, it gives rise to a powerful ideal of self-government, imagined as "a form of political association . . . in which each individual human being remains or becomes his or her own governor, providing from within his or her own will and judgment the direction and regulation of his or her own life."[2]

The puzzle to be worked out in the remainder of this article is *how* these features of liberal regimes, which clearly elevate the individual over the group in principle, serve in practice to subject individuals to group control within a landscape of separate and (somewhat) autonomous illiberal subcultures. Or, to put the same point in more positive terms, the question is how these features of liberalism fulfill the communitarian ideal of preventing groups from being engulfed by the surrounding liberal culture, and enabling them to function as relatively autonomous, self-governing political units.

The communitarian effects of liberalism can be observed in three areas of law, which, together, provide the fundamental underpinnings—the legal infrastructure—of illiberal communities in a liberal state. The laws of private property, the constitutional doctrine of a right of privacy, and the legal principles of local government all reflect the basic liberal ideal of individual autonomy. Yet, in each of these areas, the principle of individual freedom from collective control has been turned inside out to sanction the imposition of "private" social control over the individual. If the classic critique gives us a picture of the liberal state swallowing up illiberal groups in the private realm, a critical analysis of the laws of property, privacy, and self-government (the reverse critique) shows the private realm secreting illiberal groups back out.

The following section of this essay traces these "secretions" and the routes that they travel, leaving veins of illiberalism laced throughout the terrain of the liberal state. A better understanding of the relationship of liberalism to community may be gained by following one of these

2. FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 10 (1999).

"veins" back to its source—in other words, by reconstructing the genesis of an illiberal community, as it emerges through the exercise of the "individual" rights of property, privacy, and self-government.

II. THE MAKING OF A TRADITIONALIST TOWN

Take, by way of example, the "Hasidic town" of New Square, New York, which recently made headlines when four if its residents received pardons from then-departing President Clinton, apparently in exchange for the town's voting for Hillary Clinton in the state senatorial race.[3] New Square exhibits all of the basic features built into our model of a Traditionalist group. (Indeed, the abstract type of the Traditionalists, introduced at the beginning of this essay, was modeled on communities like New Square.) The residents of New Square are all members of the same religion, a particularly stringent and insular form of that branch of Orthodox Judaism known as Hasidism. For followers of Hasidism, all areas of life are governed by religious law and tradition—which is to say that the conventional (liberal) distinctions between public and private, secular and religious domains are not observed. In the Hasidic world-view, even the most mundane activities are infused with religious significance, and every aspect of personal conduct is subject to religious regulation. Members submit their decisions to their "Rebbe," the chief expositor of the community's religious code, whose charismatic authority is supposed to guide everything from the upbringing of children and the selection of marital partners to the choice of a vocation, from appropriate diet and dress to correct social, economic, and political behavior. Under the Rebbe's guiding authority, a religious court adjudicates disputes between members and issues rulings regarding appropriate conduct within the community and with the outside world. Generally, the New Square community shuns contact with the outside world. Its members have succeeded in creating a highly insular, homogeneous cultural enclave, within which they run their own institutions (e.g., religious court, houses of worship, cemeteries, schools, ritual bathhouses), follow their own tightly regulated, highly prescriptive way of life, and are governed by their own municipal government.[4]

The extraordinary cohesion of the community, and the Rebbe's

3. See Randal C. Archibald, *Investigation into Commuting of Sentences for Four Hasidim Raises Thorny Legal Issues*, N.Y. TIMES, Mar. 23, 2001, at B5.

4. See David Landau, PIETY AND POWER 278 (1993). It should be noted that not all Hasidic groups are equally insular. The New Square community is more insular than others.

control over voting behavior, were both on display when the population of New Square voted as a bloc for Hillary Clinton. (The residents of neighboring Hasidic communities also voted as a bloc—but for Clinton's opponent.).[5] The incident sparked controversy, not only over the particular matter of presidential pardons being traded for votes, but over the more general issue of the proper relationship between religion and politics. On one side of this more general controversy, there are those who champion a larger role for religion in politics under the banner of "freedom *of* religion, not freedom *from* religion."[6] On the other side of the controversy, critics voice alarm about breaching the "traditional" separation between religious and political spheres. According to them, communities like New Square violate basic liberal principles: religion, and values generally, should not be legislated, but rather, relegated to the private realm of voluntary associations, where individuals are free to choose their values and beliefs. From this point of view, the specter of clerical control of voting behavior, exhibited in New Square, is only the tip of the iceberg. The more fundamental problem ascribed to communities like New Square is that they are in essence "miniature theocracies"—not just private, voluntary associations, but political entities, within which religious and political authority are (inappropriately) merged.[7]

This general debate over the relationship of religion to politics is typically presented as a normative one: *should* religion be confined to the private realm of presumptively voluntary action? Or should there be a relaxation of the principle of separation between church and state, permitting religion to influence public policy, or allowing public powers —in particular, the powers of local government—to be delegated to religious groups? But this way of framing the debate conceals more fundamental questions, which are more conceptual and interpretive than normative in nature. It is less a question of whether a liberal state *should*

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5. George Birnbaum & Vincent Morris, *Did Hill Nab Votes with Clemency Hits?*, N.Y. POST, Jan. 24, 2001, at 2.

6. *See, e.g.*, Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986).

7. *See, e.g.*, Suzanne Fields, *Public School District for Sect Denied: No matter how sad the story, taxpayers shouldn't support a theocracy*, ATLANTA J. & CONST., June 30, 1994, at A22.

permit communities like New Square to be formed than whether it just *does,* by virtue of its commitment to individual rights and democratic procedures. Did New Square grow out of those rights and procedures, or despite them? And, on a more basic level, what do we *mean* when we call New Square a Hasidic town? In what sense is the township itself, as opposed to the population, appropriately described Hasidic, religious, or bearing the character of any particular group?

These are questions that require us to unravel the actual consequences —the practical implications—of liberal principles like the bifurcation of public and private realms, and the "privatization" of religion. They require us to examine whether these principles in fact preclude the emergence of self-regulating religious communities that are authoritarian or "theocratic" in nature—or not. They require us to investigate whether clerical influence over voting behavior represents a deviation from the liberal democratic ideal of self-government, or on the contrary, a fulfillment of that ideal. In sum, they require us to identify and analyze the liberal legal regimes that allow, indeed enable, towns like New Square to be created.

Ultimately, these questions require the recognition of a relationship between liberalism and Traditionalist communities that is more complex than the relationships posited by either the standard view of liberalism or the classic critique. After all, the sheer fact that a town like New Square exists in a liberal political order seems to contradict the classic critique, which assumes that self-governing, politically autonomous, illiberal communities will wither away in a liberal state. New Square also poses a challenge to the standard view of liberalism, which purports to tolerate different kinds of groups, but conceives of the subgroups contained by the liberal state as voluntary associations that individuals can freely exit and enter. Communities like New Square are distinguished precisely by their possession of effective mechanisms of social control, in other words, political mechanisms, which shape and constrain individual choice.

The initial question, then, is how did a town like New Square ever get established in the United States? Or, to put it a different way, in what sense is New Square, the town (as distinguished from its population) Hasidic? What exactly do we mean when we say that New Square is a Hasidic town?

It may be easiest to begin by specifying what we don't mean. New Square, and other Hasidic townships and villages like it,[8] are not

8. Numerous Hasidic and Orthodox Jewish communities, of diverse sects, have been established in the counties of Rockland and Orange. *See generally: A Tale of Two Villages (Or, Legal Realism Comes to Town,* in NOMOS XXXIX: ETHNICITY AND GROUP

precisely theocracies, if by that term we mean to refer to a system of government in which official power is used to legislate or otherwise mandate religious law and religious faith. New Square does not use the powers of local government to require the performance of religious obligations, or to enact religious prohibitions. Nor does it use its official powers to restrict the ownership or occupancy of property to members of the group. There are no zoning laws excluding outsiders from residing in its jurisdiction. Nor does the municipality fund the community's religious schools or its other religious institutions, such as the synagogue, the religious court or the ritual bathhouse. If the municipality did exercise its powers in any of these ways, such actions would no doubt be overturned as violations of the first amendment.[9] But —and this is the crucial point—there is no need for the municipality of New Square to act in these (obviously illiberal) ways because all of the functions that would be served by the municipal actions contemplated above are already being performed—not by any governmental entity, but rather, by the community's private institutions. The articulation and fulfillment of religious obligations; the observance of religious rituals; the establishment of a religious court, and the submission of disputes to its jurisdiction; the creation and preservation of a homogeneous community, and the exclusion of outsiders which homogeneity entails; religious education; the inculcation of religious faith and values, and a sense of identification and allegiance to the community—all of these practices and institutions are to be found in robust form in New Square, but none is the product of actions by the municipality.

To see this, just imagine what New Square would be like if the municipality were to be dissolved. Would any of these functions cease if the *township* no longer existed? There is no reason to think so. Indeed, under the prevailing rules for forming local governments in the United States, just the opposite must be the case: the community must be capable of existing and sustaining itself independently of the town because the *town* of New Square, as we know it, could not have been created had not the *community* of New Square already existed beforehand. The reason for this is that municipal governments are created by local populations. Technically, municipalities are created by state legislation; they are, according to prevailing legal doctrine,

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RIGHTS 295-96 (Ian Shapiro & Will Kymlicka, eds., NYU Press 1997).

9. *See, e.g.*, City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) (First Amendment challenge to denial of renewal of license for adult-oriented shop.)

"creatures of the state."[10] But New York, like virtually every other state in the nation, prescribes local, democratic processes for proposing the establishment of new local governments, for determining their boundaries, and for approving their incorporation. State law requires that proposals for municipal incorporation be generated by local initiatives supported by a substantial number of voters in the local population, and it requires that such proposals be submitted to a local referendum in order to be approved. A majority vote in favor of the proposal is the essential prerequisite. Beyond specifying the voting procedure, the role of the state is limited to overseeing the process, ensuring compliance with its procedural requirements, and certifying the local community's vote.[11]

Allowing local majorities to decide on the formation of local governments gives geographically concentrated communities a chance to establish local governments jurisdictions in which they form a majority, if not a totality, of the population—in a word, local governments of their own. Basically, all that is required of a community is to command a majority of the local vote, a requirement whose satisfaction is of course greatly facilitated when the boundaries of the community that votes on the proposal coincides with the boundaries of the jurisdiction proposed. New Square was created when members of the preexisting community there initiated the democratic process for local government incorporation prescribed by state law. If the community had not already existed, and had its members not been sufficiently concentrated in the area to constitute an effective voting bloc, then a town with the particular shape and character of New Square would never have been proposed or created. It was only because the local population was (already) homogeneous and desirous of political autonomy—in other words, because the community was already there—that this particular township was formed. (Indeed, the very name of the township reflects its roots in a pre-existing community. The Hasidic community in New Square traces its origins to the Russian city of Skvira—"New Square" is the

10. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

11. N.Y. Village Law § 2 (McKinney 1996). *See* New York Senate Finance Comm., Remedies of a Proud Outcast: The Legal Probability and Implications of Restructuring the Government and Boundaries of the City of New York (Staff Report, July 1993). For other state municipal incorporation laws, *see, e.g.*, Russel M. Lazega & Charles R. Fletcher, *The Politics of Municipal Incorporation in South Florida*, 12 J. LAND USE & ENVTL. LAW 215, 217-20 (1997); Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 DAYTON L. REV. 533 (1994); Note, *Secession as a Connecticut Story: The Feasibility of Intramunicipal Secession in New Haven*, 14 QUINNIPIAC L. REV. 781 (1994).

anglicized version of New Skvira.[12]). Before the town ever came into existence, the "Skvirer" community was there, possessed of all of the basic features of communal life described above. The town, in the other words, is the offspring of the community, and not the other way around.

The history of the incorporation of New Square illustrates how a community that is itself anything but individualistic and democratic in terms of its internal organization can nevertheless make use of individualistic, democratic procedures (local initiatives, the right to vote) to create a political entity, subject to its exclusive control. Far from posing an impediment, the democratic principles of local government law allow highly unified communities to establish municipalities, sub-departments of the state, of their own. Indeed, the more illiberal the community (the more insular, exclusive and homogeneous; the more tightly regulated; the more submissive to a single clerical or communal authority), the more likely it is to succeed in establishing its own local government—and subsequently to exercise control over it—since the key to political success under the reigning (liberal democratic) legal system is to vote as a unified bloc. It is one of the ironies of liberal democratic politics that the more illiberal the community is, the more readily it can translate its private power into public authority, simply by virtue of constituting a majority of the local population and voting the same way.

But how does the community come to constitute a majority of the local population? At one level, the answer to this question is simple—

12. The Encyclopedia Judaic's entry on Skvira has this to say: "Skvira, city in Kiev oblast, Ukrainian S.S.R. Skvira was an ancient town which was completely destroyed at the end of the 16th century. In 1736 it was mentioned as a village leased by a Jewish lessee. In 1789 there were 37 Jewish houses out of a total of 197 houses counted that year. In 1847 Jews registered in Skvira numbered 2,184. During the 1840s, the *zaddik* R. Isaac Twersky (of the Chernobyl dynasty) settled in Skvira. The Jewish community was primarily engaged in the trade of grain and other agricultural products. In 1897, there were 8,910 Jews (49.5% of the population) in Skvira. During the Civil War, Jews suffered severely from belligerent armies and during the programs which frequently occurred, several hundred Jews were killed. The number of Jews decreased considerably after World War I and in 1926 there were only 4,681 Jews (33.6% of the population) remaining. Under the Soviet regime the religious and communal life of the Jews of Skvira was dissolved. The Germans entered the town in September 1941. Almost 1,000 Jews who did not succeed in escaping were murdered. The Jewish population was estimated in the late 1960s at about 500. The Twersky hasidic line emanating from Skvira eventually settled in the U.S. where they founded their own township called New Square (Skvira) in Rockland County, New York." ENCYCLOPEDIA JUDAICA, vol. 14, 1651 (1972).

deceptively so. If constituting a majority of the local population is the essential prerequisite for establishing a local government, then residency —in sufficiently concentrated numbers—is the essential prerequisite for constituting a majority. The Skverer community in the area now known as New Square was formed by virtue of enough members of the community buying or renting homes there to constitute a majority of the residents (and by virtue of a corresponding number of former residents moving out).

Initially, this may seem to be the sheerest tautology, devoid of explanatory power. The community gets there by going there. What could be more obvious? But how does the community *get* to go there? Notice that there are two separate aspects to this question: (1) how does it get to *go*?, and (2) how does it go *as a community*? To break it down even further, we can ask: how do members of a particular community come to settle in a certain area? How do they come to settle in a sufficiently thick concentration as to constitute a majority (if not a totality) of the residents in the area? And how do they establish and maintain their presence *as a community*, replete with all of the regulative institutions and prescriptive practices that characterize Traditionalist groups, as opposed to a random collection of individuals and individual families who bear little relation to one another beyond inhabiting the same area?

Again, the answer to these questions is at one level straightforward: members of a given community settle in an area by acquiring property—by buying or renting homes. They establish themselves as a majority by clustering together, and buying or renting most of the residential property in a given area.[13] At the most basic level, this simply means getting your hands on the property. Private property constitutes the legal as well as the literal, material, territorial base of the community. By the same token, though perhaps less obviously, private property undergirds the cultural institutions, which produce (and reproduce) the community's distinctive way of life and beliefs. In short, private property rights are the legal foundation on which Traditionalist communities, like the Skverer Hasidim, stand.

In the liberal political order, private property law is the legal regime that determines how (and, as we shall see, whether) a community gets to go to any particular place, and, therefore, how (and whether) it hangs

13. Owning, as opposed to renting, property is no longer a requirement for participation in most local government entities. *See generally*, Frank Michelman, *Universal Resident Suffrage*, 130 U. PA. L. REV. 1581 (1982); but see Robert C. Ellickson, *Cities And Homeowners Associations*, 130 U. PA. L. REV. 1519, 1539-1547 (1982) and Robert C. Ellickson, *A Reply To Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982).

together as a community. But the significance of private property law in this regard is easily missed. Accustomed as we are to the norms of liberal democracy, it is easy for us to mistake the regime of private property rights for no regime at all. It is hard for us to see that private property is a legal regime (albeit a liberal one), which plays a critical role in determining where people live and what sorts of communities get formed—a regime which places collective constraints on individual choice as well as providing individuals with opportunities to make choices for themselves. After all, liberal political thought conceives of private property as a right possessed by individuals, as an individual liberty. As such, it would seem to be very the antithesis of a political regime, which controls where people live. In the liberal imagination, the mobility of property (embodied in the "free market") fosters the mobility of people (embodied in the individual right to freedom of movement, the "right to travel"), and vice verse. Together, the mobility of property and social mobility have long been regarded as the twin pillars of a liberal society.[14] Conversely, political systems that place limits upon the right to travel and impose legal controls on where people live would seem to be illiberal by definition.

Consider some of the various ways that illiberal regimes have historically dictated settlement patterns, and kept minority groups confined to a certain area. Some illiberal regimes have adopted laws restricting minorities to a particular territory as a means of excluding them from participation in the general society. The original ghetto, for example, was the only area where Jews were allowed to live in medieval Venice. By design, it constituted a form of internal exile or banishment —a sort of quarantine—although in practice, it also provided the residents of the ghetto with a way of sheltering their religious culture, fostering community, and governing their own affairs.[15] (The system of apartheid which reigned in South Africa, and the United States' reservation policy

14. On the centrality of the "mobility of property" to liberalism, see J.G.A. Pocock, *The Mobility of Property and the Rise of Eighteenth-Century Sociology, in* VIRTUE, COMMERCE, AND HISTORY (1985).

15. See Salo Baron, *Ghetto and Emancipation: Shall We Revise the Traditional View?*, 14 MENORAH J. (1928); David B. Ruderman, The Cultural Significance of the Ghetto in Jewish History, in FROM GHETTO TO EMANCIPATION: HISTORICAL AND CONTEMPORARY RECONSIDERATIONS OF THE JEWISH COMMUNITY (David N. Myers & William v. Rowe, eds., Scranton, 1997) 1-4, 7-9; Robert Bonfil, *Change in Cultural Patterns of Jewish Society in Crisis: The Case of Italian Jewry at the Close of the Sixteenth Century*, 3 JEWISH HIST. 11 (1988).

for Native Americans, are further variations on this theme).[16] In other illiberal regimes, being restricted to a particular area has been viewed as the grant of a privilege as much as a form of discrimination. The classic example is the Ottoman system, which carved out separate political jurisdictions ("millets") for Jews and other favored minorities, providing them with official protection as well as the opportunity to govern themselves, largely according to their own laws.[17]

Obviously New Square is not a ghetto or a millet—or is it? The differences between a political system that produces a town like New Square and one that deliberately creates ghettos or millets are undeniable, but what those differences actually amount to on the ground is not so clear. To put it another way, the differences between liberal and illiberal regimes that exist at the level of official law and policy produce less of a difference in practical results than one might imagine. That is not to say that there is *no* difference at the level of outcomes, but the flat claim that Traditionalists are prevented from forming their own political entities in a liberal state (a claim implicit in both the standard view of liberalism and the classic critique) is surely far too crude. In fact, as simple observation confirms, Traditionalist entities do manage take root in liberal societies. Moreover, the distinction between the kinds of Traditionalist political entities that emerge in a liberal order and illiberal entities (such as the ghetto, or the millet) is less sharp than either the standard view of liberalism or the classic critique would lead us to expect.

The persistent perception that the distinction is sharper than it actually is largely owing to the differences in the official legal regimes that produce them. Certainly, there was no deliberate government plan to settle the Skverer Hasidim in the area now known as New Square. The Skverer Hasidim were not herded there (as Indians once were herded onto reservations). Nor were the Skverer Hasidim prohibited from living elsewhere by law (as were the Jews of the medieval Italian ghetto). Notwithstanding the large and growing number of exclusively Jewish townships and villages that today dot the landscape, the suburban counties of Orange and Rockland, New York, are not by any stretch of imagination a pale of settlement. By the same token, the state of New York did not bestow the municipal charter of New Square upon the

16. *See* JULIAN KUNNIE, IS APARTHEID REALLY DEAD?, 18-19, 64-65 (2000); VINE DELORIA, JR., & CLIFFORD M. LYTLE, THE NATIONS WITHIN (1998).

17. *See generally* CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY, VOL. 1: THE CENTRAL LANDS (Benjamin Braude & Bernard Lewis, eds., 1982); Will Kymlicka, *Two Models of Pluralism and Tolerance*, *in* TOLERATION: AN ELUSIVE VIRTUE, *cited in* Michael Walzer, ON TOLERATION 4 (1997).

Skverer Hasidim as a corporate privilege or group right—indeed, the charter was not bestowed upon the *Skverer community* at all. Whereas the corporate charter which constituted a millet in the Ottoman Empire was granted directly to an officially-designated group (e.g., "the Jews" or "the Greeks"), and was thereafter possessed by that group as a group right, New Square's municipal charter was granted to no entity other than the municipal incorporation itself. From the standpoint of state law, the residents of the municipality who authorized its creation via the prescribed democratic process "just happened" to be co-religionists.[18] Their religious character could neither qualify nor disqualify them from availing themselves of the established procedures for forming local governments under the prevailing norms of liberal neutrality toward citizens' beliefs.

One might expect the distinction between liberal and illiberal regimes to consist in something more substantial than a difference in attitude. But it is precisely the attitude of official indifference vis-à-vis the character of the community in a particular local jurisdiction which seems to distinguish our liberal system from regimes like the Ottoman millet system or the more persecutory policies of the reservation, the buntestan, or the ghetto. What both the tolerant and the persecutory illiberal regimes have in common is the gesture of official acknowledgment of the group as such: the state officially recognizes a group, and grants it jurisdiction over (or confines it to) a certain area. There is no comparable gesture of official recognition in a liberal democracy. Nor can there be in keeping with the norms of democracy and liberalism, at least as those norms are currently generally understood.[19] According to the prevailing understanding, it would be just as inconsistent with these norms for the state intentionally to create a Skverer township (a township *for* the Skverer Hasidim) as it would be for the state to keep the Skverer Hasidim from leaving New Square and living elsewhere. It would be equally inconsistent with the norms of liberal democracy for the state to refuse to incorporate New Square because of the religious homogeneity of its original population, or to dissolve the township if it ceased to be populated by Skverer Hasidim in the future.

To return to the metaphor drawn earlier, we might say that just as the

18. This is how Justice Kennedy characterized the nature of the population of Kiryas Joel, another Hasidic municipality in the New York suburbs. *See* Board of Education of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2505 (Kennedy, J., concurring).

19. *But see* Kymlicka, *Two Models of Pluralism and Tolerance*, *supra* note 17.

town is the offspring of the community, and not the other way around, the town is allowed to become emancipated from the community which gave it birth, in other words to outlive—and to live without—it. From this point of view, what chiefly distinguishes New Square from a millet is the fact that, in keeping with the liberal norms of official neutrality and the separation of church and state, which require the state to turn a blind eye toward the beliefs of private citizens, the state grants the municipal charter to the municipality, without (official) regard to the character of its population, rather than granting the charter directly to the group. That does not prevent (well-organized, propertied) groups from incorporating their own municipalities—*contra* the classic critique—nor does it prevent such groups from exercising control of a municipality, once established. But the group as such is possessed of no entitlement to political control. Group control over local government is merely an artifact of the aggregate of the preferences of individual residents expressed through their votes, which is to say that is it is contingent on the voters' self-identification with a group.

This brings us to the question of how the group's identity *as a community* is fostered, which is another way of asking how certain voters come to identify with a particular group. We have established a preliminary understanding of how a group "gets to get there" (wherever there may be)—namely, by its members' exercising their individual rights (i.e., the right to travel and the right to acquire private property). But we have yet to address the question of how the group "gets there *as a group*," that is, how it establishes its presence *as a community*. Here again, there is a seemingly straightforward answer. In a liberal state, which refrains from itself assigning individuals to groups, group affiliation is a matter of self-identification, in other words, of individual choice. So long as there are individuals who identify themselves as members of the Skverer Hasidim, there will be a Skverer Hasidic group (and no longer). So long as the individuals who self-identify as Skverer Hasidim choose to live with others who identify themselves in the same way, they may exercise their rights to travel and acquire property in the market in tandem with each other, and thereby establish a community with a physical, territorial presence (and no longer). Once formed, a geographically-concentrated community of self-identifiers can then incorporate a local government whose boundaries are coterminous with the community, so long as the self-identifiers constitute a decisive majority of the voters in the area—that is, so long as individuals who do *not* self-identify as Skverer Hasidim are reduced to a minority of the local population or altogether excluded. And so long as the majority of inhabitants *continue* to be people who self-identify as Skverer Hasidim,

they will be able to control the local government, in accordance with democratic principles, through the aggregation of their individual rights to vote, and hold political office. And no longer.

All this would be too obvious to belabor were it not for the fact that it begs crucial questions, which reveal the limitations of the picture of liberalism common to both the standard view of liberalism and the classic critique. The classic critique and the standard view share the understanding that liberalism makes belief and affiliation matters of private opinion subject to individual choice. (The classic critique's disagreement with the standard view is strictly over whether this consequence is morally acceptable and consistent with liberalism's own values, not over whether this *is* the consequence of a liberal political order). But what is it that leads an individual to "choose" to "self-identify" with one group rather than another (or none)? "Self-identification," "voluntary" as opposed to "ascriptive" identity, and all the other catch-phrases that have been employed by sociologists and political theorists over the years to convey the notion of self-chosen beliefs are woefully inadequate as terms for describing the way in which individuals actual acquire beliefs and form communal attachments. Of course, these phrases are not completely off the mark; they capture something important about the contrast between modern, liberal societies and traditional ones. But the language of voluntariness and privacy and the individual self—the language of liberal individualism—renders invisible the social and political mechanisms used by groups to insulate themselves from outside forces, and to transmit and enforce their system of beliefs. And it fails to convey the extent to which individual "choices" regarding group-affiliation and belief are shaped and limited by these collective mechanisms of exclusion and internal social control.

The fact that such mechanisms exist in the private realm is yet another of those commonplaces, which would seem too obvious to bear mention, except for the fact that it is diametrically opposed to the other commonplace under discussion. According to the first commonplace discussed (the idea of "self-identification"), group affiliations and beliefs are determined by an individual's own choices. According to the second (the commonplace of "private regulation"), the choices of individuals are determined by their (pre-existing) group affiliations and beliefs. We seem to be caught in an infinite loop. The kinds of private regulation that the second commonplace points up include both the exclusionary mechanisms of groups, which serve to keep the beliefs and practices of outsiders (and

outsiders themselves) out, and their internal mechanisms, which function to secure a uniformity of belief and practice within.[20] On the level of daily observation, the operation of both of these kinds of private regulatory mechanisms is widely recognized, and the fact that they exist is hardly controversial. But the banality of the observation should not blind us to the fact that it entails an implicit rejection of some of the classic premises of liberal thought.

Indeed, the recognition of effective mechanisms of regulation in the private realm reflects a tacit acceptance of a longstanding tradition of *critique* of liberal thought—but not the classic critique. The classic critique, as we have seen, accepts the standard view of liberalism as a form of political ordering, which, by relegating matters of belief (and group affiliation) to the private realm, deprives groups of political authority and means of social control, leaving individuals free to make choices for themselves. In other words, the classic critique takes the self-presentation of liberalism embodied in the standard view at its word. Its basic claim is not that private regulation occurs, but, to the contrary, that liberalism atomizes private groups by *dissolving structures of private regulation* (upon which illiberal groups, confined in a liberal political order to the private realm, depend). The basic claim underlying the commonplace observation of private regulation is just the reverse: that private forms of regulation exist in a liberal order; that, far from being "atomized," collective entitites are sheltered in the private realm; and that, far from being required to conform to liberal principles (e.g., of equal liberty or respect for individual rights), they are freed from constraints on the exercise of political power (and thereby enabled to take on illiberal, authoritarian and exclusionary forms). These claims are of course the staple criticisms of Marxist, legal realist, and other progressive schools of thought. Indeed, what links otherwise diverse schools of political thought together in the long tradition of subjecting liberalism to progressive critique is that they share the premise that the principles of classical liberalism, beginning with the basic division of public and private realms, allow private power run rampant. This is a familiar critique of liberalism, but not, it should by now be clear, the "classic critique." The classic critique and the progressive critique of liberalism are indeed more contradictory than complementary, although they share a common target. The point of the progressive critique is just the reverse of the classic critique—it is, in short, the "reverse critique," which posits the existence of regulative, prescriptive, and coercive

20. By this I mean not total uniformity (which I take to be impossible and is anyhow unnecessary), but rather, just enough uniformity to differentiate belief-systems/ways of life from one another.

institutions in the private realm that the classic critique denies.

What distinguishes the way the reverse critique has traditionally been deployed in progressive thought from the version advanced here is that, historically, progressives have focused mostly on the economy, and not on the question of the fate of diverse groups in a liberal order, which occupies us here. Progressives generally use the reverse critique of liberalism to expose the existence of private power in the economic realm, rather than in the broader cultural realm. They reveal the exercise of power by economic actors (e.g., corporations, employers, owners, economic classes); they do not tend to highlight the parallel exercise of power by the kinds of cultural actors (e.g., religious or cultural groups), which are the subject of analysis here. But, although progressives have not often applied their analysis of liberalism in this fashion, the reverse critique is readily, and profitably, to be applied to cultural groups.[21]

Applied to the domain of cultural relations, the reverse critique helps us to answer the question left hanging: how does a group not only "get there" (wherever there may be), but how does it get there, and stay there, "as a group"? How does a private group, like the Skverer Hasidim, manage to establish a cultural as well as a physical presence? What mechanisms of exclusion and internal control does liberalism make available to groups to sustain their identity in the private realm? How is cultural power exercised in this realm, such that a community possessed of all the cultural and political institutions characteristic of Traditionalist groups can take root without the state creating an official jurisdiction, like the ghetto or the millet? Turning to our specific example, how do the Skverer Hasidim prevent outsiders from intruding, enforce the strict observance of religious customs and law, and inculcate their beliefs and values, without the use of state or municipal power? So long as we rely exclusively on the picture of the private sphere as a realm free of restrictions on individual choice, it is difficult to comprehend how any of these functions can be performed consistently with liberal norms. By supplying a corrective to this picture of private sphere, the reverse critique provides an explanation of how that sphere accommodates the regulative functions that characterize Traditionalist groups.

In the absence of the reverse critique, it is easy to overstate the nature

21. For a similar argument, with application to race relations, see Note, *Legal Realism and the Race Question: Some Realism about Realism on Race Relations*, 108 HARV. L. REV. 1607 (1995).

of the difference between liberal and illiberal regimes. For example, when it comes to the matter of exclusion, one might well think that the same principles which prevent the liberal state from delegating municipal power directly to private groups would also prevent group-based barriers from being imposed on access to property in a particular area. Indeed, there is little question that legally-enforced segregation—state-mandated apartheid—violates the most fundamental tenets of liberalism.[22] It is tempting then to think that the elimination of legal restrictions on access to property required by liberal norms results in a system (or better still, a non-system) in which individuals are perfectly free to live wherever they want—and that *this* is what distinguishes liberal from illiberal regimes. But the matter is not so simple, as the history of racially-restrictive covenants and zoning laws in this country bears out.

What that history demonstrates is a significant difference in the treatment of publicly- and privately-imposed restrictions on access to property, which creates opportunities for group-based exclusion to be performed by private actors even when legislators and other official government actors are prevented from doing so. Thus, when racially-restrictive zoning ordinances were declared to be unconstitutional by the United States Supreme Court in the early part of the twentieth century,[23] citizens committed to maintaining racial residential segregation lost no time in writing up private agreements which would have precisely the same effect as the previous zoning laws.[24] The liberal logic underlying these "racially restrictive covenants" seemed to be impeccable. Although the *government* was bound to respect the principle of racial equality enshrined in the constitution, private property owners should be free to do whatever they liked with regard to their own property, including entering into voluntary agreements with other, like-minded property owners. These agreements would take the form of "covenants," documents attached to deeds recording the owner's pledge never to permit the property to be owned or occupied by "non-Caucasians."[25] What distinguishes covenants from ordinary contracts is that they obligate not only the original parties to the agreement, but all subsequent owners of property subject to a covenant as well. The participation of the subsequent owners in observing the racial restrictions is seen as no less voluntary than the participation of the original parties to the

22. Of course, little question is not the same as no question. On the possibility of reconciling separatism with liberalism, see Kymlicka, *supra* note 17.

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

24. *See* Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U.L.Q. 737, 739-40 (1989).

25. *Id.*

agreement, on the theory that subsequent owners do not have to assume ownership of property subject to racially-restrictive covenants if they prefer not to. In theory, they can acquire unrestricted properties instead, if they so choose. On the basis of this logic, networks of racially-restrictive covenants among large numbers of property owners were set up all across the country, swathing whole neighborhoods, and operating as the functional equivalent of zoning ordinances.[26] But, unlike zoning ordinances and other conventional forms of governmental action, covenants were seen as having been created by individuals freely exercising their individual rights (specifically, their right to acquire property of their own volition, and their right to control the future use of the property they acquired). For the law to deny private property owners the right to form racially-restrictive covenants would, according to the prevailing logic of the day, amount to a violation of what ought to be an inviolable private sphere, an impermissible infringement on the liberty of private property owners. The rights of private property and contract thus seemed to provide an effective means for whites to deny access to property to blacks (and other reviled groups),[27] while the public-private distinction seemed to provide a solid basis for insulating these exclusionary actions from the reach of anti-discrimination laws, or any other laws that might prohibit the creation of racial barriers in the real estate market.

As is well known, the United States Supreme Court rejected this logic, and held the practice of racially-restrictive covenants to be unconstitutional, in the landmark case of *Shelley v. Kraemer* in 1948.[28] The passage of the civil rights statutes in 1964, including the Fair Housing Act, which prohibits discriminatory practices in the real estate market, and other anti-discrimination laws, further confirmed the illegality of private discrimination in the housing market.[29] And so, it is easy to be lulled into thinking that the gradual triumph of liberal laws guaranteeing equal rights in the housing market spelled the demise of privately-imposed

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26. *Id.*

27. *See* Corrigan v. Buckley, 271 U.S. 323 (1926)(dismissing challenge to racially-restrictive covenants for lack of a federal question); *see generally*, Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping: A Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 67-76 (1998); *Realism on Race Relations*, *supra* note 21.

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

29. 42 U.S.C.S. § 3604 (2001). For state fair housing laws, *see, e.g.*, CAL. CIV. CODE § 51 (2001); *see* Saxer, *supra* note 27, at 117-18.

group-based restrictions on access to property, as well as the end of legally-imposed segregation. It is this perception that underlies the overly facile distinction drawn between liberal and illiberal regimes. In fact, the laws governing private property still leave ample room for private property owners to group together and refuse to transfer their collective holdings to non-members of their group, notwithstanding the constraints imposed by *Shelley v. Kraemer* and other laws. Moreover, and more importantly, the laws that enable group-based barriers to be imposed by private actors are at least as expressive of the norms and principles of liberalism as they are in tension with them.

The exact scope of the freedom to exclude that survives *Shelley v. Kraemer* and other laws cannot be stated with precision. In part, this vagueness results from the fact that certain legal questions have yet to be resolved. For example, while *Shelley* made it clear that *racially*-restrictive covenants would not be tolerated, the courts have not specifically addressed the question whether *religiously-* or *ethnically*-based, or other types of group-based restrictions necessarily fall under the same constitutional logic.[30] And, although federal and state fair housing statutes expressly prohibit discrimination on the basis of religion, national origin, and a number of other group-based characteristics, these laws also expressly exempt single-family houses sold or rented by the owner from their coverage in addition to exempting religious organizations and private clubs.[31]But the point is not simply that exceptions to laws against private discrimination have been drawn, or that certain interpretive questions regarding the scope of those laws have been left open. The point is that there is a tension within the liberal norms of private property law which *cannot* be resolved. This tension gives rise to an instability in the law governing privately-imposed barriers on access to property, which is not ephemeral, not transitory, but rather perpetual and *inherent in* (liberal) law. This tension ensures the constant availability of *some* private means of exclusion by individuals, which in turn, permits groups to exclude other groups.

The tension can be seen most sharply outside the context of modern anti-discrimination law, in the shifting contours of traditional common law doctrines regarding the private property owner's right to place limits on the ability of subsequent owners of her property to control its transfer. In the late nineteenth and the first part of the twentieth century, common law doctrine purported to prevent property owners from imposing restraints on the "alienation" of private property in no uncertain

30. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995); City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995).

31. 42 U.S.C.S. § 3607 (2001).

terms. The three-fold rationale proffered for this strict "rule against restraints on alienation" reflects the strenuously libertarian version of classical liberalism, and the companion doctrine of laissez-faire economics, which were then in their hey-day. Any restriction that prevented the individual property owner from disposing of his own property however and to whomever he wanted was seen as impermissibly curtailing his absolute liberty. Restrictions on the alienability of property were also thought to have the bad effect of keeping property from passing into the hands of the person or entity who attached the most value to it, and would put it to its best (i.e., most productive) use. Finally, restraints on alienation were regarded with suspicion as "feudal," "anti-democratic," "dynastic" devices, used to perpetuate the passage of property within a family and thereby consolidate wealth in the hands of a few. Conversely, the rule against restraints on alienation was thought to have the salutary effect of promoting a wide dispersal of property-ownership, thereby preventing the formation of hereditary economic castes. Underlying all of these rationales was an exalted vision of the free market, coupled with the belief that any restrictions placed on the autonomy of the individual property owner were antithetical to that vision. In this view, the free market, in which private property freely circulates thanks to the owner's unfettered control over its alienation, was at once the *embodiment of individual autonomy*; the *invisible hand* that brings property to those who will make of it the most productive use; and the *leveling force* which erodes economic dynasties by letting the indolent scions of family fortunes sell their assets off. The free market, in other words, was regarded as a dynamic, progressive, equalizing force even as it was also understood to require recognizing the rights of private property owners to be absolute.[32] From this point of view, it is not surprising that racially-restrictive covenants should eventually be condemned in the United States, not so much because they constitute a form of invidious discrimination, in violation of constitutional principles of racial equality, but because they erect barriers to the free circulation of property in the market and constitute a restraint on the individual power of alienation, in

32. *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 at 145-47, 288-97 (1997); *see also* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989).

violation of long-standing principles of common law.[33]

What is important to note for our purposes is that the routine application of the traditional rule against restraints on alienation involves no less of a curtailment of the liberty of private property owners than the controversial holding of *Shelley v. Kraemer*. When privately-imposed restrictions are found to violate the common law rule against restraints on alienation, they are unceremoniously voided by the courts. The effect of this on the owners who have tried to impose the restrictions is no different from the contraction of the owners' private liberty caused by *Shelley* and the civil rights statutes. The rule against restraints on alienation involves no less of an invasion of the private realm of property and individual liberty than the civil rights laws. Under both species of law, private property owners are subjected by the courts to public regulations that limit their autonomy specifically by limiting their ability to restrict the alienability of their property. In the case of the rule against restraints on alienation, these regulatory limits are routinely defended as necessary for maintaining the mobility of property, and protecting the autonomy of individual property owners from "dead-hand control."[34] The ultimate rationale is to preserve the free market. The common law doctrine thus reflects the recognition that privately-imposed barriers can interfere with the mobility of property—i.e., with the market – as much as publicly-imposed ones. From the point of view of a concern with maintaining the free circulation of property in the market, it makes no difference what the source of the impediment is. The effect is the same: to restrict the capacity of private property owners to control the alienation of their own property.

This understanding, which has long informed the common law—that private property owners can create restrictions that are, with regard to

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33. Indeed, the difference between liberal and illiberal regimes in this regard may lie in the former's greater commitment to free market values more than in a difference in attitude towards the treatment of minorities. *Accord* Ware, *Invisible Walls*, *supra* note 24 at 771 ("To some degree . . . ., the Supreme Court's decision in the restrictive covenants cases was inevitable. The redistribution of the black population from rural to urban areas, and the availability of jobs in a growing industrial economy, assured that the rapid growth of black populations could not be contained within the tiny districts to which they were confined by the covenants. The economics of real estate transactions played a role as well. The law of supply and demand was in operation to the extent that white homeowners found, in many cases, that they could sell their homes to a black family for a higher price than they would have received if they sold to a white family. The real estate brokers earned their usual fees and commissions, and as witnessed in the St. Louis transaction, tremendous profits could be made through 'straw' transactions.").

34. On dead hand control, see ALEXANDER, *supra* note 32, at 26; *see also* Gregory S. Alexander, *The Dead Hand the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

their effects, indistinguishable from public regulations—converges with the reverse critique. The difference is that the reverse critique reveals the private power unleashed by laissez-faire private property doctrines over the propertyless and the powerless in order to criticize those doctrines, whereas traditional common law doctrine exposes the power exercised by private property owners *over other property owners* the better to *maintain* the market system of private property. But the gist of each is the same. The logic of the common law doctrine regarding private restraints on the alienation of property is not unlike the logic underlying laws against private monopolies in this respect. In both cases, the law recognizes that the market, and the rights of private property and contract of which it is composed, can prove to be their own undoing when left entirely unregulated by the state.[35] Anti-trust law reflects the understanding that, unrestrained, the exercise of the right to accumulate private property results in monopoly, negating the competition which makes a market free. The rule against restraints on alienation reflects a similar recognition that the unrestrained exercise of the right to restrict one's property deprives future owners of the exclusive control over a resource that makes property private. Anti-trust law responds to the danger that the realm of economic freedom will be destroyed through the private *aggregation* of property; the rule against restraints on alienation responds to the parallel threat that the same will occur through the private *dis*-aggregation of property.[36] Both respond to the basic threat of private power—power over others—issuing from the exercise of individual rights.

It is here that the tension within property law is thrown into relief. Laws against restraints on competition and laws against restraints on alienation both respond to the threat of private power by placing public regulatory limits on the exercise of the rights of private property and contract. But they do so precisely in order to preserve the ability of private individuals to control their own property and participate in a free market in the future. What these regulatory schemes make clear is that the freedom of private property owners *from* privately-created monopolies and restrictions on land in the future cannot be obtained without placing limits on their freedom *to* create monopolies and

35. *See* ALEXANDER, *supra* note 32, at 185-210; JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP, 20-30, 35-37 (2000).

36. See Frank I. Michelman, *Ethics, Economics, And The Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3 (1982).

restrictions today. At bottom, the tension inheres in the very value of individual liberty, which either includes the freedom to limit freedom in the future (through the placement of permanent restrictions on the use and occupancy of property), or does not (and is therefore limited).[37] The existence of this tension explains why the law in a liberal state must always allow some latitude for like-minded individuals to group together and erect barriers to outsiders. It is simply not possible for the law to go all the way in denying individuals the right to group together and exclude without at the same time going farther in curtailing individual liberty than liberals can countenance. So long as private property law is committed to preserving a sphere of individual liberty (and private property), it must necessarily reflect the tension between the need to protect individuals from (privately- and publicly-imposed) restrictions on their autonomy and property and the need to protect individuals from restrictions on their ability to impose such restrictions on their own property. As is often said, the law must "strike a balance." But wherever the "balance" is "struck" (and it should come as no surprise that "the balance" is continually shifting), a liberal legal system must always provide *some* protection for group-based exclusion by private groups, lest it cease to be balancing the two aspects of private autonomy at all. The liberal justification for allowing individuals to exercise their rights in ways that produce power over others—the liberal justification for private regulation—is just the flip side of the critique of private regulation. Yes, the unrestrained exercise of individual rights gives rise to the exercise of power over others (in the form of monopolies and group discrimination); but those private structures of power are at the same time expressive of individual liberty and choice. So long as the law remains committed to protecting the rights of individual liberty and choice, laws prohibiting private discrimination and restraints on alienation must provide some escape valves. And so long as any escape valve is provided, groups (at least some groups) will be equipped with the means to exclude.

Hence the existence of private mechanisms of exclusion in a liberal state. The legal system provides private groups with such mechanisms in the form of property rights (and other private rights as well, as we shall see), not *to the exclusion of* laws that "atomize" private structures of regulation, discrimination, and coercion but alongside them. The law cannot fail to let private rights be exercised by groups in an exclusionary manner without extinguishing the sphere of freedom from public regulation altogether. And so, in keeping with the liberal commitment to

37. See sources cited in *supra* notes 35-36.

preserving such a sphere, the liberal state unfailingly leaves some room for groups to engage in exclusion and to establish other forms of collective regulation in the private realm.

Such private regulation may, but need not necessarily, take the specific form of legal covenants, such as those that were censured in *Shelley v. Kraemer*. Where the use of covenants is prohibited, alternative methods of private regulation and exclusion are available. In a setting like New Square, where the community is small, tightknit and organized around a single, charismatic religious leader, it may be quite possible to do without formalized agreements, and rely on informal private mechanisms instead. Taking their cue from their Rebbe, and from each other, members are very likely to abide by an informal understanding against transferring property to outsiders, an understanding which, if not entirely invisible from a legal standpoint, may look less like the sort of orchestrated scheme condemned in *Shelley* than a series of uncoerced and uncoordinated individualized choices, beyond the scope of legal censure. And even if *this* avenue were legally foreclosed—as perhaps it could be—still others would remain open. For example, community leaders could form a private non-profit corporation or a community land trust, in the manner of a commune or (since it need not be run on an egalitarian basis) a modern-day estate, which would hold title to all the property in New Square as a single legal entity, and then grant permission to members of the community to occupy it according to a collective scheme.[38] Whether such an arrangement, which departs from the prevailing norm of individual ownership, will be acceptable to a particular group, such as the Skverer Hasidim, will depend in part on its own norms and customs regarding property. But it possesses the considerable attraction of providing an alternative *and effective* way for a group to control access to land while, at the same time, circumventing the various laws that potentially regulate and limit property transfers. (Since the land is held collectively by a corporate entity, the need for transfers is obviated).

Even without officially adopting a corporate form, the possession of real estate concentrated in a certain area by members of a group in and of itself produces effects which simulate the effects of a corporate

38. Many groups in the past have used the corporate form in this manner. *See generally* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1056 (1998).

structure. In part, these effects are simply a function of the existing distribution of property, what economists call the "wealth effect."[39] In essence what this means is that economic forces favor those currently in possession of a resource over those who would like to acquire it (a sort of economic analogue to the legal maxim that "possession is nine tenths of the law."). The idea is that even if an outsider attaches greater value to a piece of property in the community than members of the community do—meaning that the outsider would, in certain circumstances, have been willing and able to pay a higher price for the property than community members—the outsider may nonetheless fail to meet a community member's asking price if that property is already in the community member's possession. But if the positions were reversed (if the property were originally occupied by the outsider, and the community member was the one trying to acquire the property), then the community member would fail to offer as much money to buy the property from the outsider as she would demand from a buyer if she were in the position of the owner/seller. The reason is simple: ownership of property is a valuable economic asset. Notwithstanding countervailing economic pressures, ownership endows the current owner with the ability to demand a higher price from potential buyers than she herself would have been willing or able to pay for the property were it not already in her possession. In the context of our particular example, this means that once the Skverer Hasidim were ensconced in New Square, they were in a position to ask for more in return for a transfer of their properties to outsiders than outsiders were likely to cough up. To put it otherwise, ownership endows community members with economic assets that help them to resist selling their property off.

Of course, this "wealth effect" doesn't explain how the Skverer Hasidim acquired the property in New Square the first place; it merely provides (part of) the explanation of how the occupancy of property solely by members of the community is perpetuated. Possession, one might say, is nine tenths of the market (or, more precisely, nine tenths of market *power*). Another market phenomenon described by economists helps to explain how the ownership of property in a particular area shifts from one group to another. Originally used to describe the transformation of racially-integrated neighborhoods into all-black ones brought about "white flight," "tipping" is the concept that may be of aid of here. Empirical studies suggest that it takes the acquisition of only a relatively small fraction of real estate in a neighborhood by members of

39. On the concept of the wealth effect, see Russell Korobkin, *Policymaking and the offer/asking price gap: Toward a Theory of Efficient Entitlement Allocation*, 49 STAN. L. REV. 663 (1994).

a minority group for a "tipping point" to be reached, triggering the flight from the neighborhood of members of the majority group.[40] When the number of minorities who live in the area stays below the tipping point, the demographics remain relatively stable; but once the tipping point is reached—usually well before the minority group reaches 50% of the local population—an orgy of selling occurs, as members of the majority group hasten to relocate to "safer" precincts. In the racial context, the selling frenzy is usually spurred by plummeting real estate values, accompanied by the specter of a declining local tax base and deteriorating public schools. A comparable decline in the value of real estate does not generally result from the influx of Orthodox and Hasidic Jews. (On the contrary, the demand for properties in close proximity to one another on the part of Orthodox and Hasidic Jews may have the effect of driving the price of real estate up). Nonetheless, the establishment of an Orthodox Jewish community is often resisted by prior residents, for a variety of other, non-economic reasons, including most saliently (besides anti-Semitism), disapproval of the kinds of land use favored by the Orthodox, a desire to avoid expressions of disapproval by Orthodox Jews of their secular lifestyle, and concerns about the impact of the Orthodox community on the local school system, since many Orthodox families do not send their children to public school. In the absence of decreasing property values, these concerns may be enough to trigger the equivalent of white flight, and simultaneously create momentum within the Orthodox community to buy up the properties being evacuated. The two phenomena—flight of the old, momentum of the new—naturally reinforce one another, and anecdotal evidence suggests that, as in the racial context, a small number of Orthodox newcomers may suffice to bring "tipping" about.[41] If so, it is not hard to understand how members of a group like the Skverer Hasidim managed to become a totality of the population in a locality, where they formerly had no presence at all.

One could describe the process of tipping as the expression of individual preferences and the right to individual choice. Certainly, no

40. See Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COL. L. REV. 1965 (2000); Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. LAW 89 (1998).

41. A description of this phenomenon can be found in SAMUEL G. FREEDMAN, JEW VS. JEW: THE STRUGGLE FOR THE SOUL OF AMERICAN JEWRY (New York, 2000) (in the chapter on *Beachwood, Ohio, 1997-1999.*)

law compels prior residents to sell their property and leave. In this vein, it is often said, by way of "explaining" phenomena like the existence in a liberal society of communities that are exclusively white or black or Hasidic or Protestant, that people "just want to live with their own kind." The implication is that outsiders no more want to live or buy property in a community like New Square than the Skverer Hasidim of New Square want to let them in—as if that disposes of liberal concerns about exclusion. What the theory of tipping reflects is the sense people have of being *caught up in forces beyond their control.* That is why first-person reports of the experience of an influx tend to be full of phrases like "being taken over," "feeling forced out," and so on.[42] Although the original residents of course have the legal right to, quite literally, stand their ground, that right cannot protect them from the economic forces, like tipping, which, from their point of view, are at least as real as legal ones. Moreover, the exercise by a few of the legal right to stay will not serve to preserve *the pre-existing community*, once the tipping point has been reached. At best, it will permit these few to live on in the area in the position of an increasingly isolated minority, aliens in a newly-strange world.

Market forces of the sort described above—"wealth effects" and "tipping points"—are among the many ways in which exclusion and segregation are achieved and perpetuated in the private realm, without the use of legislation. Along with private covenants, and the ability to form private corporations and joint trusts, they are among the many devices that a society committed to private property makes available to groups to seclude themselves and keep outsiders out.[43] This is not to say that these "devices" are employed by groups deliberately: sometimes they are, sometimes they are not. But that they have served to produce *and maintain* the stunning homogeneity observable in towns like New Square, as well as the more pervasive patterns of segregation to which we have become accustomed, cannot be doubted. Private property rights

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42. *See id.* at 313 (quoting a non-Orthodox Jew's reaction to the influx of Orthodox Jews: "'When the Orthodox began moving onto Taylor Road, the non-Orthodox felt they were being pushed out,' he explained. 'If you want to move in, move in. But if you bring all the baggage with you—two more synagogues, the *mikvah*, the school, the whole shtick—you're taking over.'").

43. Others include exclusionary zoning. On exclusionary zoning, *see, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COL. L. REV. 1 (1990); Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994); Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989); Linda Wintner, *An Argument for an Antitrust Attack on Exclusionary Zoning*, 50 BROOKLYN L. REV. 1035 (1984).

create highly effective (though not impregnable) barriers between groups.

Exclusion, however, is not the only function that illiberal communities need to be able to survive in a liberal state. If all that illiberal groups could do was to exclude others, they would be, culturally speaking, empty shells. Traditionalist groups, like the Skverer Hasidim, are defined by their distinctive internal functions—their ritual practices, their religious laws, their transmission of a particular religious tradition, ethos, and code of values—as much as by their ability to exclude that which is alien to their religious culture. Here, too, private property rights have an important role to play. Exclusion is not the only type of illiberal cultural function enabled by private property law. Private property rights also play a crucial, though largely invisible, role in the educative, disciplinary, and ritual functions of illiberal communities. Education and socialization, ritual observance and celebration, discipline and punishment—all have to take place *somewhere*. Private education, almost by definition, must take place on property that is privately-operated and privately-owned. The religious schools in which the children of New Square are educated (like all parochial schools in this country) are located on private property. So are the community's houses of worship—its synagogues as well as its informal congregations—as are its religious court, its ritual bathhouse, and of course its members' homes. These communal institutions are quite literally housed in private property. Private property is the ground where families dwell, where children are raised, and where the myriad rituals of daily life are observed, in accordance with religious law. It constitutes the space in which to be initiated, married, and buried, in accordance with religious law. Cemeteries, day care centers, businesses that certify and supply kosher services and goods, all are privately-operated and owned. Whether owned by individual members of the community, as in some cases, or by corporations formed by members of the community, as in others, private property provides the necessary physical base for a wide array of cultural practices.

But it is not only the physical foundation for cultural institutions that private property supplies. In some instances, the exercise of private property rights serves an important cultural function in and of itself. For example, exercising the right to exclude people from privately-owned institutions and resources can be an important (and sometimes the only practically available) means of social discipline or even punishment. The community, after all, does not have its own private jails. It lacks the

authority to imprison people for deviations from custom or infractions of its religious-legal code. Likewise, it lacks the authority to impose corporal punishments. How then can it enforce its legal code? Denied the coercive apparatus of punishment which, in a liberal political order, is the monopoly of the state, the community must rely instead on "informal" means, such as shunning or the refusal of valued social benefits, to punish and deter wrongdoing. Such modes of social control can be highly effective. Offenders may find themselves, or their family members, suddenly un-marriageable, a potent sanction in a community which adheres to the biblical injunction, "be fruitful and multiply," and is organized around a traditional patriarchal conception of the family. Another effective kind of punishment is the denial of access to important cultural sites, such as the cemetery.[44] This form of punishment makes use of a familiar mechanism, the exercise by private property owners of the right to exclude. The cemetery (or the synagogue, or whatever communal institution or resource is being withheld—even the marriage pool might be seen as a private resource in this respect) is privately owned; access is refused by an owner. From a legal standpoint, the owner is merely exercising the right to exclude possessed by individuals and private corporations. But from a sociological point of view, the owner is exercising that right on behalf of the larger community or its leaders. The point is that private property can be used in a situation like this as an effective mechanism for punishing wrongdoing, encouraging compliance with communal norms, and suppressing dissent within a community. What in another context serves as a mechanism for excluding outsiders, and thereby maintaining a condition of seclusion, serves here as a mechanism for controlling insiders, and thereby discouraging social deviance. In both contexts, the right of private property owners to exclude is productive of cultural homogeneity and uniformity. It thus forms an important element of the enveloping social structure that shapes people's "self"-identification with a particular community of belief. The control over valuable resources embodied in the rights of private property gives members a powerful inducement to conform their behavior and beliefs to the communal norms.

Of course, such inducements would not be effective—would not operate *as* inducements—unless the beliefs and feelings of the people subject to them were already shaped by the community to some degree. As an outsider, the threat of being denied access to the community cemetery or marriage pool is unlikely to make any difference to *your*

44. An example of the use of this sanction in the Hasidic village of Kiryas Joel was reported in Jeffrey Rosen, *Village People*, THE NEW REPUBLIC, Apr. 4, 1994, at 11.

behavior or beliefs. Clearly, the right to exclude by itself is not enough to produce the desired disciplinary effects. To put it another way, private property is a necessary, but not a sufficient, condition for the modes of social discipline which we have been discussing to work. It takes other liberal rights to complete the package, in particular, the various rights that have been bundled together and protected under the constitutional doctrine of "the right of privacy."[45] Chief among these is the right of parental authority.

The doctrine of constitutional privacy not only complements the rights of private property, it also reflects the same basic tension between individual freedom from outside control and communal control *over* individuals that is reflected in property law. As Anne Dailey has shown,[46] this tension results in the legal system according protection to the family "as an independent *institution*," "alongside the right of individual autonomy."[47] "Although the family finds no express protection in the Constitution," Dailey explains, the Supreme Court has nonetheless "interpreted the constitutional guarantee of 'liberty'" contained in the Due Process Clause of the Fourteenth Amendment as encompassing "a 'private realm of family life into which the state cannot enter.'"[48] This "right of family privacy" was first recognized in the early twentieth century in cases that established the right to private education as against unlimited state control over schooling.[49] These cases specifically protected the right of parents to engage instructors to teach subjects of which the state disapproved (i.e., German), and the right of the instructors to teach the disapproved subjects.[50] Rights of parental authority were thus entwined with control over the acculturation and schooling of children from the doctrine's inception. Since these early

45. This line of cases in which this doctrine has been developed begins with cases concerning private control over the education of children (Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925)), and continues with cases defining the contours of the right to reproductive control (*see* Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, and Moore v. City of East Cleveland, 431 U.S. 494 (1977). Casey v. Planned Parenthood, 505 U.S. 833 (1992). See Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TULANE L. REV. 955 (1993); David D. Meyer, *The Paradox of Family Privacy*, 53 VANDERBILT L. REV. 527, 532-48 (2000).

46. Dailey, *supra* note 45, at 964.

47. *Id.* at 960.

48. *Id.* at 968.

49. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

50. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

cases, the Court has repeatedly affirmed that a core element of the privacy right is "the power of parents to control the education of their own."[51]

As Dailey argues, this "rhetoric of family privacy does not conform to an individualist model."[52] The constitutional right of privacy doctrine has usually been regarded as a doctrine that protects individual liberty.[53] Indeed, it is conventionally seen, in keeping with the standard view of liberalism, as having "evolved from protecting the integrity of the family to protecting the autonomy of individuals in personal matters."[54] But, as Dailey contends, this is a highly inaccurate view of how the privacy doctrine is actually applied and what it actually means in practice. In fact, "[t]he interpreters of constitutional liberty have never withdrawn protection for the 'sanctity' of family life.... In case after case involving constitutional privacy, the Court has emphasized that the family unit and familial relationships define the core of this fundamental interest."[55] Moreover, this is not just a matter of two sub-doctrines—individual privacy and family privacy—co-existing in harmony. On the contrary, "the claim of individual privacy is inherently at odds" with the concept of family privacy.[56] "Defined in terms of parental authority, the doctrine of family privacy does not protect a sphere of individual freedom where all family members are free to pursue their own conception of the good family life. Instead, the sphere of family life is carefully defined by the traditional hierarchical structure of parent-child relations."[57] Put even more sharply, "[p]arental rights are not simply a modified version of the individual right of privacy. Indeed, parental rights are not concerned with individual sovereignty at all, but instead

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51. *Id.* at 401. *See* Dailey, *supra* note 45, at 971.

52. Dailey, *supra* note 45, at 981.

53. *Id.* at 962 ("There exists a widely shared perception that constitutional liberty extends protection to individual liberty. Conventional wisdom holds that privacy doctrine focuses predominantly, if not exclusively, on the protection of individual choice in matters of a highly personal nature.") The *locus classicus* for this view, as Dailey points out, is Justice Brennan's opinion in *Eisenstadt v. Baird*, one of the reproductive freedom cases. In Brennan's memorable lines, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything it is the right of the *individual*, whether married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 976-77.

54. *Id.* at 964.

55. *Id.* at 979.

56. *Id.* at 961.

57. *Id.* at 986.

pertain to the right of one individual to control another."[58]

So here we have another quintessentially liberal doctrine dedicated to protecting a sphere of private action from government intervention that in fact functions to confer authority on a group, to wit, the family. As Dailey concludes, contrary to the supposition that the "evolution of liberalism" would "undermine the vitality of all groups that held an intermediate position between what we now think of as the sphere of the individual and that of the state,"[59] "the family as an independent institution has not in fact withered out of constitutional existence, but is very much alive in privacy doctrine."[60] Just as the "individual" rights of private property accrue to groups, so too, the individual right of privacy accrues to the family, or more specifically, to the family's heads or head.

The prerogative of the head of the family protected by the privacy doctrine is, plainly, *the* primary influence on the formation of a child's identity. Privacy doctrine defines the family as the formative context in which the self (which will later become the agent of "self-identification") first takes shape. In the liberal state, the family functions as the principle vehicle of acculturation. There is a liberal aspect to this function. As Dailey describes it, the family "plays a vital role in maintaining the diverse moral values and traditions that comprise the pluralist foundation of our liberal political order, values and traditions that in turn serve to counter the threat that unmediated state power poses to moral diversity."[61] Simply put, the family is a buffer between the state and the individual; parental control over the upbringing and education of children is the obvious alternative to tyrannical state control. But clearly there is an illiberal aspect to this function as well. The parental rights protected under the doctrine of constitutional privacy *"pertain to the right of one individual to control another."*[62] They pertain to the ability of parents to mold the values of the young, to shape their identity, in part by controlling their environment, warding off "bad" influences, exposing them to certain cultural options, and foreclosing others.

The role of parents in this regard is well understood; the role of (liberal) law in endowing parents with this authority less so. As with property law, it is easy to mistake the legal regime operative here for no

58. *Id.* at 986. *See also* AMY GUTMANN, DEMOCRATIC EDUCATION (1987).
59. *Id.* at 976 (quoting Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L REV. 1057, 1088 (1980)).
60. *Id* at 964.
61. *Id.* at 958-59.
62. *Id.* at 986.

regime at all. Parental authority is figured as a privacy right precisely because it represents an alternative to the tyranny of the state. It is hard not to equate this alternative with freedom, since freedom of a kind is clearly involved. But, as the reverse critique makes clear, freedom for one is subordination for another. To put it another way, the freedom granted (to parents, in the first instance) under the constitutional doctrine of privacy is a species of power (over others). The right of privacy does not reflect a world in which every individual is free to choose his or her own beliefs and identity; rather, it reflects a world in which the powers of formal and informal education, which shape our identity and constrain our choices, are allocated to certain agents rather than others. Indeed, in this world, parents themselves are not so much autonomous authorities as conduits through which a larger culture flows. Parents, after all, were once children subject to the authority of their parents. They may be singled out by law as the agents of the "right of privacy," but they exercise that right as, as it were, deputies of the subculture (or subcultures) to which they belong. The doctrine of constitutional privacy lends authority to the cultural institutions which command the parent's allegiance as much as to the parent him or herself. Whether secular or religious, liberal or illiberal, it is the subculture that provides the schools and other social institutions from which a parent chooses. The subculture moreover shapes the range of options and the values which lead a parent to make one choice rather than another. In an inchoate way, the Supreme Court's early privacy decisions recognize as much insofar as they ascribe liberty interests to schools and instructors as well as to parents. From this point of view, the Court's later summarizing of these cases as establishing a liberty interest in the family looks like a truncation of the doctrine that was actually spawned. In practice, "the family" endowed with "the right of privacy" is a proxy for the group to which the family belongs.

Certainly, in a setting like New Square, the constitutional doctrine of privacy enables the *community* to establish the institutions, and engage in the practices, which foster the continuation of its distinctive way of life by transmitting it to the next generation. The doctrine allows the community to run its own schools. It lets not just the parents, but the community as a whole, inculcate in children the values and traditions *of the group*. It insulates the whole fabric of formal and informal education, composed of the rituals of daily life, of food and hygiene, of language and social comportment, of dress and decorum, festivities and mourning, courtships and friendships, gossip, intrigue, rivalries and romance. It thereby produces the sense of attachment and allegiance that makes even dissenters within the community susceptible to the informal

inducements and punishments that property law allows community leaders to mete out. Thus, the constitutional right of privacy complements the rights of private property, supplying the missing element, without which informal communal sanctions, like shunning and the denial of access to community resources, would have no effect.

Together, the rights of privacy and the rights of private property provide groups like the Skverer Hasidim with more than ample means to create communities, largely secluded from the outside world, replete with their own, relatively autonomous, political and legal institutions. Within these enclaves, members of the community are free to follow a highly prescribed way of life, to submit to the authority of religious leadership and law, and to transmit their practices, beliefs, and allegiances to their children. Of course, none of this constitutes an iron-clad defense against internal dissent and defection. Every community, including the most illiberal ones, will contain cleavages within it as well as more porous boundaries between itself and the "outside" world than its most conservative defenders would want to allow. It is possible that liberal states create more lures and escape routes from illiberal communities than illiberal states do. But escape routes imply escape *from* somewhere. It is one thing to say that the liberal state allows, or even encourages, people to escape illiberal communities, quite another thing to say that it destroys them, as the classic critique of liberalism maintains.

The classic critique fails to recognize that private rights can, and indeed *must*, give rise to social structures that regulate the individual, within the liberal state. That is the sum and substance of the reverse critique. The rights of private property and the rights of privacy flesh out that critique. They are the means whereby the various regulative functions and prescriptive practices that groups depend on are implemented. The reverse critique, which highlights how the rights of property and privacy can be employed in this way, provides the answer to the basic question of how illiberal groups can be sustained—how they can sustain themselves—in a liberal state. It shows that illiberal groups can dispense with illiberal laws. They do not need the state to legislate their seclusion or create an official political jurisdiction for them, like a millet; they can create what is for all intents and purposes a self-governing political jurisdiction, albeit a "private" one, through the exercise of the rights of privacy and property. Nor do they need to exercise municipal power themselves in order to articulate and implement their legal code, or to sustain their way of life; that too can be

accomplished in the private realm through the rights of privacy and property.

Why, then, create a municipal government, as in the case of New Square? If official public power is unnecessary for the creation and sustenance of illiberal groups, as I have maintained, if private rights suffice, why bother? The answer is not hard to find. The incorporation of a "Hasidic" town does not serve to *create* a Hasidic community, so much as to *defend* the community and its constitutive practices and institutions from attack. Liberalism may empower illiberal groups, but it does not make them invulnerable. It may enable them to seclude themselves by throwing up barriers to the outside world, but it does not completely insulate them from contact with others. No matter how strong the forces of exclusion unleashed by liberal law, there are always countervailing forces fostering social and economic integration. Inevitably, communities like the Skverer Hasidim find themselves amidst others. And what the others want from local government often conflicts with what the Hasidim want. Which uses of land should be permitted under the local zoning ordinances, and which proscribed, what days garbage should be collected, what days municipal services should be shut down, how parking should be regulated—these are just some of the mundane issues over which the Skverer Hasidim and their neighbors are likely to differ. Forming their own municipal government enables the Skverer Hasidim to pass zoning laws and other local ordinances to their liking without having to accommodate the conflicting preferences of others. The regulations that the municipality passes do not directly implement the religious laws of the community so much as provide them with an additional layer of protection against contrary regulatory policies favored by others.

From this point of view, it should be clear the sense in which New Square is, and is not, a "Hasidic town." The town is not "theocratic" in the usual sense of the word in that it does not use the official powers of government to further religious aims or enforce religious laws. The town itself is not religious in its functions or the character of its actions: its ordinances are secular in content, confined to the usual business of garbage collection, land use control, etc. Nor are the town's regulations particularistic in a non-religious, ethnic or racial, sense: exclusion, as we have seen, occurs in the realm of private, not public, action. Yet in another sense, New Square *is* theocratic and particularistic, and it is disingenuous to feign otherwise. The whole point of creating a separate local government is to be able to pass local regulations that support, rather than thwart, the religious community and its practices and institutions. Naturally, a population of voters that follows the authority

of a Rebbe is going to elect town officials who (usually) act in conformity with the Rebbe's expressed wishes. Local zoning ordinances are designed to permit the land uses favored by the Rebbe and the Skverer community at large. By the same token, these ordinances tend to exclude the land uses favored or required by others. They may thereby contribute to exclusion of outsiders even if they are not chiefly responsible for their exclusion, and sometimes that effect may not be unintended. Certainly, the effect is not unwelcome. The same may be said of other sorts of local ordinances as well.

Questions have been raised about the consistency of a local government that works this way with the basic norms of liberal democracy. Voters and political officials, it is submitted, should not be subject to "clerical control." Municipal ordinances should not further the aims of a particular religious groups. This is a democracy, not a theocracy, and citizens should no more be allowed to carve out their own local theocracies than they should be permitted to make of state or federal government theocracy writ large. But from the point of view of the reverse critique, the position just stated depends upon conceptual oppositions which are untenable. Characterizing religion as an external influence on politics, let alone an imposition, depends upon being able to separate the religious beliefs of voters from the content of public policy and governmental action. But the very notion of dividing politics from the private beliefs of constituents makes little sense from the standpoint of democracy. Democratic procedures—the right to vote, the right to hold office, etc.—are the conduit through which private beliefs, religious or otherwise, are *supposed* to influence politics. Clerical control, and religious influence on politics more generally, are not external impositions on local politics; they are the products of local democratic politics in action.

By design, the practice of local democracy breaks down the opposition between public and private realms. Indeed, in a setting like New Square, it breaks down the very opposition between democracy and theocracy. Critics of "Hasidic towns" like New Square have assumed that theocracy and democracy are mutually exclusive options. But the reverse critique suggests that, just as the individual rights of privacy can produce parental and communal control, and just as the individual rights of property can produce collective property, the exercise of the rights of democracy can in some cases produce a "theocracy," albeit one that is subject to constitutional limits.

III. THE UNMAKING OF A RADICAL COMMUNE AND OTHER FINAL THOUGHTS

If we turn our attention from Traditionalist to Radical illiberal groups, the most striking fact is that there is no obvious Radical counterpart to the Traditionalist Town. Dated jokes about the People's Republic of Berkeley (or Santa Monica) aside, it is hard to find an example of a town or a village or even a hamlet that could plausibly be called a miniature collectivist state. Even if we confine our attention strictly to the private realm, thriving communities or communes that answer to the description of the Radicals offered in the opening of this essay have been few and far between—though not, it should be noted, non-existent.

The reasons for this asymmetry are many. Certainly the lack of success on the part of many of socialist experiments—and more fundamentally, the paucity of attempts—is attributable to a great many factors, beyond the scope of this inquiry. But the same critique that explains the success of Traditionalist groups in establishing autonomous political entities in a liberal state, may also help to explain why Radical groups have largely failed to do the same. Although the resources made available by the liberal state to Traditionalist groups, which the reverse critique draws attention to, are theoretically available to Radical groups as well, there are a number of reasons why many Radical groups might not be in as strong a position to exploit those resources (or to develop at all). The example of the Radicals shows that the very features of a liberal political order which contribute to the making of some illiberal communities contribute to the unmaking of others. The rights of property, privacy, and local democracy throw up obstacles to the formation and continuation of illiberal groups even as they create openings for them.

The most basic obstacle that a system based on private property lays down is wealth, or more precisely, lack thereof. In a liberal state, as we have seen, illiberal communities are founded at bottom on property. The private ownership of property substitutes for the assignment of political jurisdictions by the state that takes place in illiberal systems, like the millet. But owning private property—both acquiring it in the first place and being able to hold on to it—requires access to economic capital. Some groups have it, others don't. From the vantage point of trying to found a community, if a group is not already in possession of a suitable tract of land, it needs the funds to acquire one. There is no reason in principle that adherents of Radical philosophies should lack the money (or the ability to borrow the money) to do so. And indeed, there are plenty of cases of land being purchased for experiments in Radical

living, including various Christian communist societies, nineteenth-century utopian societies, and in the twentieth-century, model kibbutzim, as well as the more well-known communes of the sixties and the seventies.[63] Sometimes members of these movements have been persons of means (or have had access to persons of means as patrons), and in any event, land has sometimes been available on the cheap. But it is important to note that adequate access to the capital is not always to be had, and in such cases it is nearly impossible to create the kind of thriving community found in New Square. In a liberal state, in a society where wealth is unevenly distributed, the opportunity to found an illiberal community on private property is simply not equally available to everyone. To some it is not available at all. Of course, Radicals are not uniquely disadvantaged in this respect. Any community, or would-be community, which lacks the economic resources to acquire substantial real estate holdings will be unable to get off (or rather, on) the ground. There will be cases where Traditionalist groups lack the necessary means, and other cases where Radical groups have them. But it should not be surprising if groups dedicated to overcoming economic inequality are found among those lacking in sufficient economic resources.

A more difficult obstacle for Radical groups lies not in the absence of "start-up" funds, but in the difficulty of sustaining a group that is opposed to capitalism in the midst of a larger, market-based society. In part, the problem is again one of not having, or making, enough money. If a community does not engage in economically productive activities, it cannot survive; if it does not generate sufficient wealth for its members, the economic pressure to sell its constituent pieces of property to outsiders may be too great to withstand. But this is not the real, or at least not the only, problem faced by Radical groups. Although there are exceptions, Radical groups have not, as a rule, shunned productive labor. To the contrary, the "dignity of labor" is typically enshrined as a motto in Radical communities.[64] Nor have Radical groups been fated to engage in particularly unremunerative lines of work. The real problem is, how to follow and maintain Radical principles of ownership, distribution, and production within the group, while being surrounded and enmeshed by a larger society based on radically different principles

63. See HENRY NEAR, THE KIBBUTZ MOVEMENT: A HISTORY (Vols. 1 & 2, 1992 & 1997).

64. *Id.*

of economic organization. In other words, the problem has been one of avoiding contamination by market society. The classic response to this problem was the radical ideal of economic self-sufficiency. If the community could rely exclusively upon itself for goods and labor, it was thought, it could avoid becoming implicated in the market-based relationships of the larger liberal society. This response was doomed to failure—perfect self-sufficiency, it appears in retrospect, is an impossible ideal. The question then became whether interactions with the larger economy could be brooked without the community losing its own internal compass. Could the draw-bridge be let down to allow, for example, hired labor to enter the community, or goods and services to be sold outside, without the community's principles of economic justice being fatally compromised? If so, could the *cultural* influences of a market-based society be kept at bay? Was there any way that limited economic contacts with the larger society could be kept strictly economic? Or would economic interactions inevitably bring cultural influences trailing along behind them? What about the kids? How're you going to keep them down on the farm? And so on.

Obviously, the answers to these questions are complex, and will vary according to the circumstances and the nature of the particular group involved. Unfortunately, little research has been done into the legal infrastructure of the various Radical groups that continually surface on the margins of American society. Such as yet undeveloped scholarship might help to explain what it is that enables some Radical groups to resist the economic and cultural pressures of a liberal society, while so many others succumb. The exception to this scholarly lacuna is Carol Weisbrod's *Boundaries of Utopia*, which analyzes the impact of private contract law on nineteenth-century utopian societies.[65] It can only be hoped that comparable legal-historical studies of other experiments in Radical community will be undertaken. Until then, we must make do with what little knowledge we have. What seems clear is that a legal regime which does not preclude illiberal communities, but which requires them to be built on the basis of the rights of private property and privacy; makes communities that are fundamentally opposed to private property (and in some cases to "privacy" as well) difficult, if not impossible, to sustain. Perhaps there are exceptions—certain monasteries, famous for their liqueurs, come to mind. But this seems to be a case where the exceptions prove the rule. (It is interesting to note in this regard the deep compatibility between many Traditionalist societies, like that of the Skverer Hasidim, with the "liberal" norms of private property

65. CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980).

ownership and a market economy, notwithstanding their professions of opposition to modern liberal society.)

It bears repeating that the forces of liberalism that favor illiberal groups and those that undermine them do not track a simple distinction between Radical and Traditionalist groups. As suggested above, a Traditionalist group could be undone by the various obstacles thrown up by a liberal society. Many a Traditionalist community has dissolved, as a result of the very forces of liberalism which are feared and opposed by Traditionalist critics of modern, liberal society. Conversely, it is conceivable that a Radical group could stake out some ground—both literally and figuratively—where Radical principles could be reconciled with interactions with the economy and culture of the surrounding liberal society. The distinction between the Radicals and the Traditionalists is itself after all an artificial one.[66] The dichotomy was intended merely to gesture at the great variety of illiberal groups found in the modern, liberal state, and, at the same time, to suggest how the same features of a liberal legal order that can be supportive of some illiberal groups can be destructive of others. That liberalism has this destructive effect is a matter that has been widely proclaimed, especially by proponents of the classic critique. In this regard, the proponents of the classic critique are right on the money. That liberalism could also have the contrary, group-supportive, effect is perhaps less well known.[67]

66. The Mennonite and Amish communities, for example, share features of both the "Radical" and the "Traditionalist" communities.

67. According to some theorists, self-government is an inherently individualistic concept. On this view, there simply is no such thing as group, as opposed to individual, autonomy. A powerful version of this argument was recently put forward by Frank Michelman in his book, BRENNAN AND DEMOCRACY, *supra* note 2. This argument deserves a more serious response than I can provide here.