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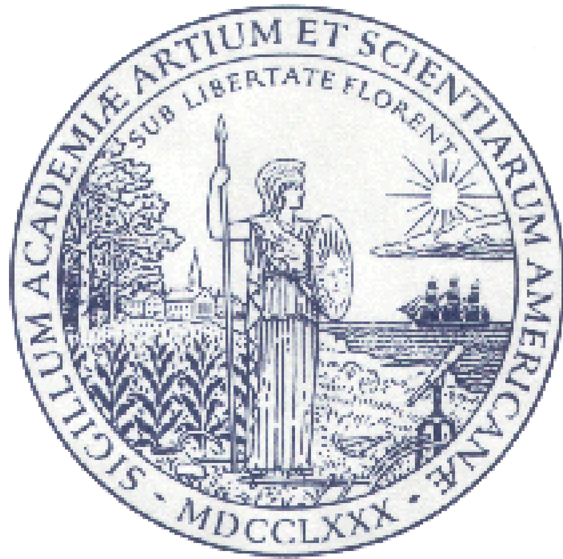

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Nomi Maya Stolzenberg

The Culture of Property

IN THE LONG, STRAINED RELATIONSHIP between liberalism and community, property occupies a curious place. Many people have viewed private property as an agent of cultural disintegration and atomization, and for good reason. Private property seems to epitomize individual rights. At the same time, it bespeaks a basic commitment to a capitalistic economy organized around the principles of the market, made up of contractual exchanges among property owners exercising the quintessentially individual rights of private ownership and freedom of contract. The oft-noted shift from *Gemeinschaft* to *Gesellschaft* has long been associated with the rise of the market economy.[1] Yet, in ways that have still to be fully appreciated, private-property rights have also played a significant role in fortifying small subcommunities, cementing their boundaries, and endowing them with effective forms of collective control over both resources and members. A few scholars have studied the role played by property rights in constituting, shaping, and preserving communities.[2] But for the most part, the subject has been ignored both by scholars of property and by scholars of communitarianism, as the concern with preserving communal bonds and cultural traditions has come to be called. Notwithstanding the centrality of private property to liberalism, property rights have largely escaped the attention of contemporary communitarian critics.

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This essay is part of a forthcoming volume, The Free Exercise of Culture, *edited by R. Shweder, M. Minow, and H. Markus.* *© Russell Sage Foundation. All rights reserved.*

My aim is to rectify that inattention by pointing out the broad range of effects on communal life and cultural relations that result from establishing a system of private property. I refer to these as the cultural effects of private property, to distinguish them from strictly economic effects, such as maximizing wealth, promoting competition, or entrenching monopolies and inequalities of wealth and class; and from political effects, such as generating the material preconditions for an effective democracy. Most property scholarship focuses on the economic functions of property law; a smaller body of scholarship addresses the important political functions of property law; still less attention is paid to its cultural functions.[3] But property law in fact has profound consequences for cultural relations. Property law affects the ability of cultural groups to survive, and even to be formed in the first place. It affects the boundary lines drawn between and within groups. It affects the shape of power relations within and among different subgroups, and the nature of groups' interactions with one another. On a larger scale, property law affects the extent to which society generally is characterized by the presence of relatively insular, segregated, and autonomous subcultures. It also affects the degree to which cultural differences are correlated with differences in wealth and class. Which is to say, more broadly, that property law plays a significant role in determining the extent to which matters of distributive justice are intertwined with cultural relations.

This is not to say that property law is the exclusive, or even the dominant, force in determining the pattern of cultural relations in society. Many factors play a role in determining which cultural groups form, which thrive and which decline, whether they are tight-knit and insular or permeable and open, what their beliefs and practices are and whether they change or remain static, and what their relations with the rest of the world are like. But access to property and territorial control, through the acquisition of real estate, is often of critical importance to all of these dimensions of cultural and communal life. The cultural consequences of the system of private property to which liberalism is dedicated must be investigated before con-

clusions about the impact of liberalism upon community can be drawn.

THE COMMUNITARIAN CRITIQUE OF LIBERALISM

Liberalism has long been viewed as the enemy of tradition and community. With its view of the individual as the fundamental unit of society, its dedication to individual rights, and its implicit commitment to a market-based economy, liberalism has seemed to pose three intertwined threats. First, *individualism,* by definition, seems to be opposed to the communitarian values of cultural autonomy and group rights. Second, the *market economy,* which fosters the mobility of property as well as social mobility, unleashes dynamics that seem almost guaranteed to erode the traditional elements of historically rooted communities, including social fixity, geographic proximity, territorial control, and ultimately the sense of attachment to a historic place. The third threat is posed by liberalism's elevation of *rights* over alternative conceptions of the good. Individual rights like freedom of choice can undermine traditional conceptions of social and religious duty, along with the familial and quasifamilial relationships of dependency, authority, and mutual obligation that rest on such conceptions. Consider, for example, how values of sexual autonomy and reproductive choice have challenged the traditional structure of authority within the family. Newfangled legal claims, such as a child's right to divorce her parents, represent the culmination of the ascendance of individual rights over communitarian conceptions of the good.

Many objections to rights-centered discourse emanated historically from conservatives, who oppose any form of political ordering that breaks down traditional structures of social and political authority. In their eyes, a system dedicated to protecting individual rights is objectionable precisely because, by elevating the individual over the social unit, it is calculated to undermine the patriarchal forms of authority that have traditionally undergirded family, communal, and political life.[4] A separate tradition of criticism focuses on liberalism's underlying individualism and the consequent devaluation of relation-

ships, experiences, forms of being, and ways of life that cannot be reduced to an aggregate of individual behaviors or choices. Well before political theorists and sociologists writing in the 1980s popularized communitarianism, concerns about the fate of community in a liberal order had been voiced by early proponents of a vision of cultural pluralism, as well as by representatives of particular groups that felt a growing threat to their own existence.[5] As the disintegration of medieval corporatism gave way to new patterns of political order, and as the individual replaced the group as the political subject of the modern nation-state, not a few such newly minted individual subjects looked back ruefully to their groups' recent experiences of insularity and ghettoization, which, they now realized had (ironically) cemented their culture, fortified their faith, and even bestowed upon them meaningful forms of collective political power.

Notwithstanding the differences between conservatism and communitarianism, criticisms of individualism, the critique of rights, and the defense of tradition, culture, and community have always been interwoven. Radical egalitarian critics of the market have often made the critique of rights the basis of their sweeping criticisms of capitalism.[6] Indeed, the common concern of conservatives and communitarians—that rights rob people of care and social protection while legitimating their oppression—has been articulated nowhere more forcefully than by radical critics of the market.

But, curiously, the relationship between the egalitarian critique of the market and the conservative and communitarian critiques of individualism and individual rights has tended to go only one way. While critics of the market often rely on the critiques of individualism and rights, neither conservative nor communitarian critics of liberalism have had much use for the egalitarian critique of the market. The point may be most obvious in the case of conservatism. Conservative critics of liberalism rarely focus their ire on the institutions of the market, saving their wrath for the folly of individual rights instead. Much less frequently noted, but at least as significant, is the neglect of the market by communitarians. Only scant attention is paid to the market economy as opposed to other types of

economic order in contemporary communitarian literature. Absent is sustained analysis of the consequences of a market-based economy for groups struggling to maintain their traditions, to create a distinctive community, or to establish a measure of cultural autonomy. Indeed, if one were just to read contemporary communitarian literature, one might well form the impression that cultural groups have no political economy—as if the pattern of cultural relations in society were somehow impervious to the distribution of economic power.

Only a moment's reflection suffices to suggest the implausibility of a complete disconnect between the distribution of wealth and the distribution of cultural power. We are all readily reminded that issues of concern to cultural pluralists and communitarians cannot plausibly be divorced from economics in the real world. But the fact remains that we lack an adequate understanding of *how* economic and cultural forces intersect. More basically, we lack a systematic way of *thinking* about how they interact.

Property—property rights and property law—may provide a way in. Property constitutes the access to material resources and territorial control that is essential to any real community. As soon as this material dimension of community is recognized, the long-standing idea that property and community are an antinomy starts to look implausible. The question remains whether *private* ownership of property is antithetical to communitarian and cultural pluralist aims. But even this version of the antinomy strains credulity, in light of the evident flourishing of small communities and parochial cultures in the midst of liberal societies. Across America, in the suburbs as well as the cities, immigrants and coreligionists are carving out communities in separate neighborhoods where they can establish their own communal institutions, social-service agencies, and financial institutions. And increasing numbers of communities have managed to secede from the established local-government jurisdictions to form their own local municipalities, composed of members of a single cultural or religious group.

Our question is whether these developments are enabled or thwarted by the liberal regime of private property. If private-property rights only inhibit the emergence of community, as

legend would have it, then we should just chalk these developments up to the tenacity of communities in the face of adversity. But if it turns out that private-property rights *enable* these developments to occur, then a revision of our understanding of the relationship of private property to community—as well as of our understanding of the relationship of liberalism to communitarianism—is in order.

THE CULTURAL EFFECTS OF PRIVATE PROPERTY

Three case studies may serve to illustrate the dramatic range of private property's cultural effects. Our first case, the historic community of the Mashpee Indians in Cape Cod, Massachusetts, bears out the standard communitarian story about liberalism, illustrating private property's atomizing effects. Mashpee provides a vivid example of a shift from communal to individual ownership of property, which directly resulted in the erosion of the community's traditional boundaries. At the same time, the Mashpee story challenges any facile equation between cultural *erosion* and the utter *dissolution* of a culture by forcing us to consider the possibility that dramatic cultural change, even pervasive assimilation, may result not so much in cultural annihilation as in *new* forms of cultural identity and community, which are themselves worthy of respect.

Our second case, a religious community in Oregon called Rajneeshpuram, is in some ways less and in other ways more typical of communal experiments in America. Widely regarded as a cult, the Rajneeshees neither fit into our standard categories of minorities nor follow a conventional religious faith. Yet the community successfully availed itself of legal forms of property ownership used in the past by other religious groups to establish separate communities. It was only when the community moved beyond its assertion of private ownership to try to establish its own city that it ran into serious legal trouble. The case thus illustrates the significant advantages of private property over more overtly public forms of power, while at the same time demonstrating some of the limits on the forms of communal ownership and self-rule available in a private-property regime.

The case of Rajneeshpuram also illustrates the folly of critics focusing exclusively on the relatively rare attempts of communities to establish explicitly public forms of power (e.g., local governments) while neglecting the much more ubiquitous use of private property and private contracts to establish mechanisms of external exclusion and internal communal control. Whether one comes to celebrate or to deplore the creation of effective group autonomy, it seems misguided to ignore the mechanisms of private government that depend on the coordinated exercise of individual property and contract rights, and that accomplish the tasks of excluding outsiders and controlling insiders most effectively.

These points are reinforced by our third case study, which involves the community, the town, and the possibly unconstitutional public school district of Kiryas Joel. Kiryas Joel—a village in the suburbs of New York City composed exclusively of Satmars, followers of an ultraorthodox Hasidic Jewish sect—came to notoriety when its inhabitants prevailed upon the state of New York to create a public school district within the village's boundaries, thereby enabling them to run a school in Yiddish, in conformity with their cultural preferences. The school district is avowedly not religious, but it was nonetheless immediately sued for violating the establishment clause of the Constitution, which prohibits the state support of religion. Although the state statutes passed to authorize the creation of the district have been held by federal courts to be unconstitutional, the ultimate legal fate of the public school district remains uncertain while the legislature keeps trying to craft an authorizing statute that will pass constitutional muster.[7]

Almost completely ignored in this controversy is the private community of Kiryas Joel, a highly insular, tight-knit, culturally distinctive community of coreligionists, organized around a charismatic, hereditary religious leader who dictates virtually every aspect of his followers' lives. Regardless of how the issue of the constitutionality of the school district is resolved, this community will continue to exist—which is to say that it will continue to exert its considerable powers of internal discipline vis-à-vis dissenting members of the community, as well as its formidable powers of exclusion whereby the homogeneity of

the community is maintained. Only the most formalistic (or legalistic) of observers would deny that these powers of internal collective control and external exclusion constitute forms of *political* power. Yet, as a formal, legal matter, these powers flow entirely from the exercise of private, individual rights of property and contract. They are therefore not subject to the constitutional restraints that limit the exercise of governmental power.

Like Rajneeshpuram, Kiryas Joel serves as a reminder of the role private rights can play in helping subcommunities to escape the strictures of democratic, constitutional principles placed upon official governments. In their *private* capacity, members of Kiryas Joel have been able to style various conflicts with the surrounding secular culture as assertions of private individual rights (for example, objections to female bus drivers and to the state's refusal to provide special education services on the site of private religious schools).[8]

But Kiryas Joel also illustrates a successful attempt by a private community to secede from the existing local government and establish a local government of its own. Unlike Rajneeshpuram's experience, Kiryas Joel's incorporation as a separate municipality went unchallenged, and the Village of Kiryas Joel, unlike the Kiryas Joel school district, appears to be legally secure. The success of Kiryas Joel's village incorporation once again illustrates the power of private property—in this case the power of property owners to convert their private rights of ownership into political, local governmental, power. Indeed, the courts' reasoning in the cases rejecting the constitutionality of the school district only underscores the ability of private-property owners to use their rights to create, and legitimate, communal governmental power—so long as they follow certain basic rules of political engagement with the larger community.

Together, Mashpee, Rajneeshpuram, and Kiryas Joel provide a broad picture of private property's complicated cultural effects.

Mashpee

The Mashpee are a group of Native Americans who do not fit standard definitions of a tribe. Brought together by a Christian missionary, the original members of Mashpee were survivors of a number of different Indian tribes that had been decimated by diseases spread by English settlers. The founder, who fashioned himself as their savior and benefactor, created a plantation in Cape Cod, Massachusetts, in the model of a trust, presided over by himself. This meant that the land was to be held in trust for the benefit of Mashpee members, in perpetuity. Eventually, management of the trust passed to the Mashpee themselves; but the land long remained subject to collective control and to a prohibition on transferring land to nonmembers. Even when land ownership formally devolved from the trusteeship to individual occupants, it remained subject to this members-only restriction on property acquisition until 1870.[9]

This group-based restriction on the transfer of property rights was linked to political power in two quite different ways. Internally, the members-only restriction solidified, and indeed helped to constitute, collective autonomy and control. Collective restraints prevented property from falling into the hands of outsiders, and kept the community together, both physically and culturally. They guaranteed that the Mashpee stayed together as a unit and provided them with a territorial base for self-rule. Externally, the collective restraints on property reflected the stigma attached to members of what was considered an inferior, backwards race. Native Americans were regarded as lacking the independence and mental capacity necessary to exercise the rights of private property responsibly—a notion that was thought to justify their exclusion from the franchise, as well as their inability to control the transfer of their own property.

In the mid-nineteenth century, the state finally agreed to extend the franchise to Mashpee men, but only in exchange for lifting the members-only restriction on property ownership. The members of Mashpee then voted on whether to accept this bargain, which made citizenship and the receipt of individual rights conditional upon the forfeiture of collective rights and

privileges. As James Clifford recounts the story, Mashpee members clearly recognized the trade-off, with modernists within the community arguing in favor of accepting the political rights of citizenship and dissolving the group-based restrictions on property transfers. According to the modernists, permitting the Mashpee to become full-fledged private-property owners would lead to their economic betterment by enabling them to buy and sell real estate, while reflecting their status as political equals in the larger society. But traditionalists in the community cautioned that economic enfranchisement would be ephemeral and would only lead individual property owners to sell off their patrimony, lured by the quick profits sure to be promised by unscrupulous land speculators. Ultimately, the traditionalists predicted, short-term economic gains would evaporate, leaving members of the community even worse off both individually and economically (inasmuch as their homes and land would be lost) and collectively and culturally (in that the community as a whole would now be deprived of its traditional material, territorial, economic, and political base).

The modernists nonetheless prevailed. The Mashpee-only restriction on owning property was dissolved, and eventually the traditionalists' fears were largely borne out—by the 1970s more than half of the land in Mashpee was owned by people with no Mashpee heritage, and control of local government had fallen out of the hands of the Mashpee as well.

The history of Mashpee illustrates the standard story about the corrosive effects of private-property rights on traditional cultures and communal bonds. But more recent events in Mashpee provide a caution against equating the values of cultural tradition and difference with a simple, preservationist strategy of insulating groups from the market and wider political realms. In a telling episode, more than a century after the Mashpee Indians decided to dissolve the collective restraints on property, their descendants attempted to win back the property they had lost by bringing a land reclamation lawsuit. For centuries, federal law had denied Native Americans the unilateral right to choose to sell or otherwise transfer their land, requiring that the consent of the federal government be obtained prior to any transfer. In the 1970s Native American legal advocates turned

the law to the advantage of Indians with the novel argument that land transferred without the federal government's consent rightfully still belonged to them.[10] But the Mashpee suit was nipped in the bud when the court held that the Mashpee did not constitute a tribe and were therefore not eligible to sue for the reclamation of land. Weighing in favor of the court's decision was the fact that Mashpee was originally created as a sort of ersatz tribe out of the remnants of various historic tribes, and the further fact that the Mashpee displayed a high rate of intermarriage and cultural assimilation—developments facilitated, of course, by the dissolution of the group-based restraints on property. By the time of the lawsuit, many individuals claiming descent from the original Mashpee (or what tribal activists refer to as the Wampanoag) tribe were culturally as well as physically estranged from their heritage; indeed the desire to *reverse* the process of cultural assimilation and *revive* a largely dormant culture seems to have accounted for much of the motivation behind the suit.

To the court, these facts simply negated the existence of an authentic Native American tribe. But commentators on the case widely agree that this judgment rests on a false equation of cultural tradition with cultural stasis.[11] (Indeed, the Wampanoags of Mashpee today are probably about to receive official recognition as a tribe, and its members bear witness to the development of a strong Wampanoag identity in the aftermath of the failed litigation.)[12]

Cultural anthropologists have long pointed out the ethnocentric fallacy of assuming that indigenous cultures are static and insulated from one another.[13] Every culture evolves in reaction to its surrounding environment, and in response to the presence of other cultures—a recognition that calls into question the logic of the court. But this recognition also calls into question the basis for criticizing liberalism's atomizing effects. After all, if every culture is dynamic and interacts with other cultures, if cultural boundaries are constantly shifting, and if assimilation does not *negate* cultural difference and identity, but merely redefines them, then what precisely is wrong with inducing change and assimilation? And if there is nothing inherently wrong with it, then what is wrong with enforcing the logic of

the liberal market, which calls for the dissolution of group-based restraints on the transfer of property and simultaneously fosters the mobility of culture and of land?

Rajneeshpuram

The case of Rajneeshpuram provides an illuminating counterpoint to Mashpee. Rajneeshpuram, a religious commune in Oregon, was formed by the leaders of a Hindu-mystical-inspired religious group.[14] Probably unwittingly, the leadership followed a legal model that was already established in the nineteenth century when religious settlements, utopian communities, and Bible camps were at their peak of popularity. Under this model, the religious group formally incorporates a nonprofit or charitable corporation under the laws of the state. As a corporate entity, the religious group is entitled to acquire property; as a nonprofit or charitable entity, it is exempt from strictures that ordinarily apply to property owners, including the traditional common-law requirement to refrain from imposing limits on the transfer of land.

Traditionally, Anglo-American property law regarded restraints on the free transfer of land as being inimical to the institution of private property. Courts customarily voided restraints on the acquisition of land, first because they were perceived to limit owners' freedom to choose whether and to whom to convey land; and, second, because they were viewed as impeding the circulation of property in the market. A free and open market in property was regarded as the key to a productive economy. It was also regarded as a democratic, leveling force: the free circulation of property in the market was seen as having the salutary effect of breaking down dynastic fortunes and eroding the concentrations of wealth that give rise to social castes. For all of these reasons, restraints on the free transfer of real estate—or what the law evocatively calls restraints on the *alienation* of property—were generally prohibited as a matter of common law.

Of course, exceptions to this general law were always carved out, for example, for women and for people regarded as members of a backwards and inferior race, as we saw in the early history of Mashpee. Another important exception to the com-

mon-law rule against restraints on alienation was drawn for charitable trusts and nonprofit corporations. Had such an exception not been drawn—and there were sharp critics of the policy decision to do so—it would have been extremely difficult for religious groups to set up the kinds of communities that they sought to establish.[15] Their desire was precisely to escape the licentiousness of the general society by creating controlled communities with behavioral restrictions on the use of property (for example, temperance pledges), as well as restrictions limiting occupancy of the property to members approved by the religious group. Applying the traditional common-law rules in favor of the free alienation of property would have prevented such strictures from being enforced, and severely interfered with the formation of such highly regulated communities. But the legal forms of the nonprofit corporation and the charitable trust, deemed to be exempt from legal rules against restraints on alienation, provided a way of circumventing the traditional rules.

Like some earlier religious groups, Rajneeshpuram adopted the legal form of a private nonprofit corporation, which made it exempt from the rules requiring individual control over the sale and transfer of land. This legal form is particularly well suited to a community like Rajneeshpuram, run as a commune and presided over by a strong religious leader. That individual residents lack the rights of private-property owners themselves is perfectly compatible with the commune format; that the corporate entity exercises all of the rights of a private-property owner comports with devotion to, and dependence on, a charismatic leader. From a legal standpoint, the nonprofit corporation that owns the land in Rajneeshpuram, run by the Rajneesh leader and his close associates, is a single legal actor. Like any individual property owner, it is essentially free to use its property, and to grant (or deny) entrance to others, as it likes. How the managers of the corporation choose to use the property is seen as no more the court's business than an individual private-property owner's decision about whom to invite for dinner.

It was only when the community attempted to assume the form of a public, municipal corporation (a city) in addition to the form of a private corporation that it ran into trouble.

Although the Rajneeshees followed the routine democratic procedures prescribed by state law for establishing a new municipality, the Oregon Supreme Court determined that permitting a local government to be established within the geographic confines of Rajneeshpuram would be tantamount to establishing a miniature theocracy, in contravention of the constitutional prohibition against state-established religion.[16] According to this logic, using the legal form of private corporate ownership to create a homogenous population, ruled by a charismatic leader and devoted to the same religious way of life, is fine; but drawing the boundaries of a political jurisdiction to be coterminous with such a population is constitutionally illegitimate.

Kiryas Joel

Kiryas Joel took the logic of this public-private distinction several steps further. The case of Rajneeshpuram demonstrated how collective power can be instituted through the legal form of a private corporation. But corporations, like trusts, lodge control over property exclusively in the managers, or leaders, of the community. Individual members, who may end up occupying property and establishing homes in the community for decades—even generations—are, from a legal point of view, more like guests than owners. They are not merely *restricted* with respect to the right to control the use and transfer of the property they occupy; they have no legal right to the property at all. Legal forms like nonprofit corporations and trusts are thus well-suited to groups like the Rajneeshees, or traditional Mennonites, or nineteenth-century utopian communities—all of which reject the very principles of private ownership and participation in the market economy in favor of a commune-like economic and social structure. But the inhabitants of Kiryas Joel do not reject either private property or the market economy. Despite their general stance of opposition to secular, modern life, Satmars show no reluctance to own private property or participate in market exchanges. And, notwithstanding the pervasive role of the rebbe, the religious leader who controls every aspect of Satmar life, a commune was never what the Satmars had in mind. For all their defiance of the dominant cultural conventions, the Satmars in Kiryas Joel are conven-

tional property holders. Like most Americans, they either own or rent their own family home. In Kiryas Joel there is no single corporate entity that owns and controls all the land in the community; instead, the ownership of real estate is dispersed among the many individuals and families making up the community.

This raises the question of how the real estate in Kiryas Joel remains safely, and exclusively, in the hands of Satmars. We have already seen in the case of Mashpee how freeing individual owners from any legal obligation to keep property within the hands of community members can easily lead to individual owners selling off their piece of the cultural patrimony. Why has this not happened in Kiryas Joel, where the population is reputed to be 100 percent Satmar—and what would keep it from happening in the future?

Roughly speaking, there are two basic ways to prevent property from being transferred to outsiders in the absence of either corporate control or publicly enforced restrictions. The first is to establish formal restraints on the alienation of private property. Formal restraints on the transfer of property to outsiders can be instituted in the form of mutual pledges or covenants that, in the quaint terminology of the common law, run with the land. What this means, in plain English, is that (subject to certain legal restrictions) private owners can enter into mutual agreements regarding the use or transfer of their property that bind not only them, but also successive owners of the property in question. Thus, the Satmars could have entered into a series of restrictive covenants, covering all of the property in the community, and embodying an obligation not to sell to non-Satmars, or not to sell without the community's consent. Such a network of restrictive covenants would effectively simulate the sort of collective control over property transfers afforded by the corporate/commune structure without eliminating the other prerogatives of private property ownership.

However, the legal validity of such covenants is questionable. On the one hand, restrictive covenants embodying restraints on the sale and rental of property are widely enforced in the context of planned communities and condominiums governed by homeowner associations. For example, consent re-

quirements, which require the approval of other members or of a homeowner association, are now a common and legally approved feature of the contemporary real-estate landscape.[17] On the other hand, racially restrictive covenants—once a common device used to prohibit the transfer of property to blacks, Jews, and other disfavored minorities—were declared unconstitutional by the United States Supreme Court more than five decades ago.[18] Interestingly, there has not been any authoritative ruling declaring whether religiously restrictive covenants, or ethnic or other nonracial, group-based restrictions, are similarly illegal. Such covenants might well be deemed to violate civil-rights laws prohibiting discrimination in the real-estate market; but it is also conceivable that they could be found to be legally valid expressions of the rights to freedom of association and choice. Further complicating matters is the possibility of using consent requirements, which do not overtly distinguish buyers or renters on grounds of religion or group membership, but which could easily be used to filter out nonmembers in ways that might escape legal monitoring.

The possibility of using consent requirements to exclude nonmembers of the Satmar community points to the more general practice of informal choice—the second basic way that exclusion is often achieved. It is commonly said, by way of explaining situations like Kiryas Joel, that people just like to live with their own kind. The implication is that the existence of a homogeneous population is a matter of *mutual* choice: Satmars don't want to mix with non-Satmars, and non-Satmars don't want to mix with Satmars. Buried in this commonplace are both a descriptive and a normative claim. Descriptively, the claim is that the *cause* of such segregation is not legal compulsion, but rather happily harmonious individual preferences. Normatively, the implication is that there is nothing wrong with such a situation if everyone is happy and no one is being coerced. This logic is readily applied to Kiryas Joel; the Satmars wanted to secede and form their own community, and their neighbors were relieved to have them do so. (Indeed, the non-Satmars insisted that the boundary line be drawn to ensure that not one of their properties fell within Kiryas Joel.) If there are no non-Satmars seeking entry into Kiryas Joel's real-estate market,

then the answer to the question of how homogeneity is maintained seems to be, simply, personal choice.

Ideally, choice is reciprocal—the prospective buyers (or renters) whom the homeowner would reject have as little interest in acquiring the property as the homeowner has in them. But homeowners have the freedom to reject a particular buyer or renter, or to choose not to sell or rent at all, even when the choice is not reciprocal. Even in the absence of formal covenants restricting the freedom to transfer property, individual property owners can easily exercise their right to choose in a way that expresses a communal consensus against transferring property to outsiders. Indeed, the stronger the extralegal bonds cementing the community are, the less the need to formalize those bonds in legal covenants. In a tight-knit community like Kiryas Joel, bound by a strong sense of mutual obligation and fealty to a religious leader, an agreement not to convey property to outsiders could easily be instituted as a social practice without being formalized as a legal covenant—and could thereby escape potential legal detection and invalidation.

There are two basic problems with the informal-preference model of group formation and preservation. First, even within a community as cohesive as Kiryas Joel, actual individual preferences are inevitably not quite as harmonious as the model suggests. As in Mashpee, there have been defectors from the community consensus in Kiryas Joel, some of whom have been subjected to harsh internal discipline. Such internal dissent challenges the descriptive accuracy of the choice model of group-based exclusion. The second problem stems from the lack of harmony between the preferences of outsiders and insiders. Perhaps no one is seeking entry now, but it is only a matter of time before a non-Satmar will want to settle in Kiryas Joel. At that point, exclusion can no longer be said to be a function purely of *mutual* choice, even if every Satmar remains opposed to the admission of non-Satmars.

To the extent that we are concerned about the justice of excluding people from property on the basis of their group affiliation, focusing on the constitutionality of a public entity with a homogeneous population seems a lot like having the tail wag the dog. After all, there have been countless school dis-

tricts and local governments in America with religiously homogeneous populations (usually members of the same Protestant denomination). According to the prevailing legal logic, these situations are unproblematic so long as the boundaries of these governmental jurisdictions were not deliberately drawn to accommodate a particular religious group, but rather "just happen" to contain homogeneous populations. But of course local populations never just happen to be homogeneous. Keeping outsiders out, and suppressing factionalism within, require effective mechanisms of social control. As we have seen, in a liberal society, where governmental restraints on who can live where are prohibited, private property rights—exercised in a coordinated fashion—can do the trick.

COMMUNITARIANISM FROM THE BOTTOM UP

Cases like Rajneeshpuram and Kiryas Joel refute the longstanding notion that a liberal regime of individual rights and private property is inimical to communal autonomy and the preservation of distinct cultural traditions. In lieu of the sort of top-down approaches to separating groups and endowing them with their own territory and jurisdiction found in nondemocratic societies (like the former Soviet Union or the Ottoman Empire) or in consociational democracies (like Switzerland), the coordinated exercise of the rights of private property can similarly serve to separate and endow subgroups from the bottom up. It is true, as the Mashpee case illustrates, that a liberal regime of property rights also creates certain threats to traditional ways of life that may be avoided in nonliberal regimes. But it would be a gross oversimplification to conclude that liberalism is simply antithetical to communitarian goals and forms of social and political organization. On the contrary, "groupness" flourishes in, and not despite, liberal regimes.

That said, the shape that "groupness" takes in liberal and nonliberal regimes is not exactly the same. To observe that communitarianism can be fostered from the bottom up as well as from the top down is not to say that the strategies afforded by private property give all groups the same opportunities, or that any group has precisely the same opportunities as found in

top-down regimes. Both liberal and nonliberal regimes enable *and* disable the formation and perpetuation of cultural subgroups, in different and distinctive ways.

Perhaps the most obvious way in which bottom-up and top-down regimes differ is in the role played by economic wealth. In theory, top-down regimes can endow groups with separate territories and independent political jurisdictions regardless of the economic resources possessed by the groups. By contrast, the ability of a group to amass private property in quantities sufficient to establish effective forms of community control necessarily depends upon access to economic resources. The founders of Kiryas Joel and Rajneeshpuram had to possess substantial amounts of capital in order to acquire large numbers of contiguous lots in suburban New York, and a large open tract of land in Oregon. The Mashpee could never have obtained such prime real estate without the intervention of their self-styled paternalistic founder. Without such benevolent interventions, many groups simply lack the economic means to establish comparable islands of territorial and cultural autonomy. In top-down regimes wealth might influence the readiness of political rulers to recognize a particular group and endow it with valuable resources, but in principle the link between economic and cultural power can be broken. By contrast, in bottom-up regimes the link between economic and cultural power is much tighter—indeed, cultural power appears in many respects to be a mere *effect*, or privilege, of economic power in a private-property-based regime.

This is not to deny that communities of poor people are found in liberal societies. On the contrary, the segregation of rich and poor—ghettoization—is positively fostered by the dynamics of the real-estate market. But this phenomenon itself reflects the tight correlation between the distribution of economic power and the distribution of cultural power, which distinguishes liberal from nonliberal regimes. Of course, the ghetto is hardly unknown to nonliberal societies, but precisely what distinguishes what we might call the liberal ghetto from the traditional one is the feature of class segregation. Ghettoized subcommunities in traditional nonliberal regimes—epitomized by the original Jewish Ghetto of sixteenth-century Venice—typically exhibit a

full complement of classes, often living side by side (or stacked on top of one another).[19] By contrast, subcommunities in market-based regimes tend to be economically homogeneous.

The salience of wealth in shaping cultural boundaries in a liberal regime raises questions about the justice of the distribution of cultural power in liberal regimes. Questions about the validity of group-based restrictions on private property should not be resolved without attending to the interaction between economic and cultural power in a private-property regime. Consider the recent controversy over community land trusts—nonprofit corporations established to extend the benefits of private property ownership to the poor.[20] Community land trusts sell homes, and rent the underlying real estate, to eligible applicants at prices set substantially below market value. They maintain the affordability of the properties by restricting the ability of the owner/renters to transfer their property, and hence to profit from appreciation in the real-estate market. Owner/renters must either sell their property back to the trust, or sell with the consent of the trust, at below-market prices. Either way, both the price limitation and the restraints on free transfer offend the traditional common-law rule against restraints on alienation. The question posed in lawsuits challenging the validity of these restraints is essentially the same as that posed in cases concerning religious communities, like the nineteenth-century utopian societies Bible and the twentieth-century spiritual commune: should communal trusts and nonprofit corporations be permitted to evade common-law rules that require property to be freely alienable? The religious cases posed a basic conflict between the value of communal autonomy on one hand, and the values of the free market on the other; the community land trust adds the question whether economic justice justifies overriding the mechanisms of the free market. Indeed, it is difficult to know what best serves the cause of economic justice in such a case—enforcing the restrictions in order to maintain the affordability of housing, or letting the first generation of beneficiaries capture the profits available to them in the open real-estate market? The community land trust thus poses a dilemma similar to that confronted by the traditionalists and modernists in Mashpee: opting out of the market

in order to insulate a community from corrosive market forces versus allowing individual members to partake of the economic opportunities in a free market, even if that entails the dissolution of the community.

Such dilemmas reflect the tightness of the link between the distribution of wealth and the pattern of cultural pluralism in a liberal, market society. Bottom-up communitarianism is further distinguished by the basic tension between the norms of an open market and open society, on the one hand, and group-based restrictions, on the other. The validity of group-based restrictions on private property is always open to challenge in a liberal regime on two basic legal grounds: laws against discrimination and laws against impeding the free circulation of property. As we have seen, such laws do not mean that all group-based restrictions on the transfer of property are invalid. Exceptions to antidiscrimination and pro-alienation laws have frequently been carved out for the sake of protecting other liberal values, such as freedom of religion and freedom of association. Nonetheless, antidiscrimination law and rules against restraints on the alienation of property together form a significant countervailing force. Although market forces give rise to concentrations of economic and cultural power—wealthy enclaves and poor ghettos—they also foster economic and social mobility, which tends to break down, or at least reshuffle, cultural groupings. This, of course, is what gives rise to the communitarian lament: alienable property permits forms of cultural integration (or dis-integration, from the communitarian point of view) unimaginable in more traditional, top-down societies, as the history of Mashpee bears out.

Whether the personal mobility promoted by the freedom to transfer property is seen as an engine of cultural integration or disintegration is complicated, as we have seen in the Mashpee case. It may well be that the more cultures are separated and insulated from one another, the better preserved they will be. But what does it mean to preserve a culture—to render it static or to permit it to develop? The tension between the goals of cultural preservation and the goals of cultural development is built into the very concept of a cultural tradition. Property law clearly has consequences for how this tension is resolved in any

particular case. Inasmuch as property law allows collective restraints on the transfer of property, cultural interactions may well be inhibited and cultures may become "pickled."[21] Conversely, if property law discourages collective restraints, exposure to other cultures will be promoted with potentially dynamic—or destructive—results. Depending upon how the rules of property are drawn, the law will favor either the freedom of group seclusion or the freedom of others to influence the secluded group.

Property law has consequences for all three of the dimensions of cultural life identified above: (1) the extent of cultural dynamism as opposed to stasis; (2) the extent of cultural integration as opposed to group seclusion; and (3) the extent to which access to wealth shapes the pattern of cultural relations. In comparison to top-down regimes, bottom-up communitarianism tends to promote inter-group integration and cultural innovation, even to the point of intra-group disintegration; but the dynamic of inter-group integration is significantly offset by the tendency of inequalities of wealth to become entrenched in the form of economic segregation, which in turn shapes, and limits the formation of, cultural groups. This, of course, is a vastly oversimplified picture of private property's cultural effects. But even an oversimplified picture represents an advance over property scholarship that pays little heed to the cultural dimension of property, and communitarian scholarship that neglects the property dimension of culture. The time has come for scholars of property and scholars of community and cultural pluralism to come together and help us to chart out the complex interrelationship between property and culture.

ENDNOTES

[1]Ferdinand Tonnies, *Community and Society*, trans. Charles P. Loomis (East Lansing, Mich.: Michigan State University Press, 1957).

[2]See Robert Ellickson, "Property in Land," *Yale Law Journal* 102 (1993): 1315; Gregory Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community," *Cornell Law Review* 75 (1989): 1. Also see Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon Books, 1980) for

an analysis of the role of contract rights in the formation of utopian communities.

[3]On the political functions of property law, see, e.g., Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago: University of Chicago Press, 1997); Frank Michelman, "Possession and Distribution in the Constitutional Idea of Property," *Iowa Law Review* 72 (1987): 1319.

[4]See Kirk F. Koerner, *Liberalism and its Critics* (London: Croon Helm, 1985), 6–9; Don Herzog, *Poisoning the Minds of the Lower Orders* (Princeton, N.J.: Princeton University Press, 1998).

[5]Influential communitarian texts of the 1980s include, inter alia, Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Duckworth: London, 1981); Robert Bellah, Richard Madsen, William M. Sullivan, Ann Swindler, and Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, Calif.: University of California Press, 1985). For an example of earlier cultural pluralism, see Horace Kallen, *Culture and Democracy in the United States* (New York: Boni and Liveright, 1924). On a particular group's reaction, see David N. Myers and William V. Rowe, eds., *From Ghetto to Emancipation: Historical and Contemporary Reconsiderations of the Jewish Community* (Scranton, Pa.: University of Scranton Press, 1997).

[6]For example, see Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, 2d ed., ed. Robert Tucker (New York: Norton, 1978).

[7]See *Board of Education of Kiryas Joel* v. *Grumet*, 114 US 2481 (1994); *Grumet* v. *Pataki*, 675 N.Y.S.2d 662 (1998).

[8]See *Board of Education of the Monroe-Woodbury Central School District* v. *Weider*, 531 N.Y.S.2d 889 (1988); *Bollenbach* v. *Monroe-Woodbury Central School District*, 659 F.Supp. 1450 (1987).

[9]This discussion of Mashpee is based on James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge, Mass.: Harvard University Press, 1988), 277–346.

[10]On the legal treatment of Native American property, and the development of the reclamation strategy, see Linda S. Parker, *Native American Estate: The Struggle Over Indian and Hawaiian Lands* (Honolulu: University of Hawaii Press, 1989); Robert N. Clinton and Margaret Tobey Hotopp, "Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims," *Maine Law Review* 31 (1979): 17.

[11]See Clifford, *The Predicament of Culture,* 277–346; Martha Minow, "Identities," *Yale Journal of Law and the Humanities* 3 (Winter 1991): 97.

[12]See William A. Davis, "Spirit of the Wampanoag: Tribal Leader Russell Peters Recalls Battles That Helped Forge Their Identity," *Boston Globe*, 21 March 2000, D1.

[13]See, e.g., James Clifford and George E. Marcus, *Writing Culture: The Poetics and Politics of Ethnography* (Berkeley: University of California Press, 1986);

George E. Marcus and Michael M. J. Fischer, *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences* (Chicago: University of Chicago Press, 1986).

[14]See Frances FitzGerald, *Cities on a Hill: A Journey Through Contemporary American Cultures* (New York: Simon & Schuster, 1986), 247.

[15]See Gregory Alexander, "The Dead Hand and the Law of Trusts in the Nineteenth Century," *Stanford Law Review* 37 (1985): 1189–1266. On the application of laws against restraints on alienation to religious corporations, see Weisbrod, *The Boundaries of Utopia,* 29–30.

[16]*Oregon* v. *City of Rajneeshpuram*, 598 F.Supp. 1217 (1984).

[17]The common law has been reformed to allow such covenants, which would have been void under the traditional rule against restraints on alienation. See Susan French, "Tradition and Innovation in the New Restatement of Servitudes: A Report from Midpoint," *Connecticut Law Review* 27 (1994): 119.

[18]*Shelley* v. *Kraemer*, 334 US 1 (1948).

[19]Michael Walzer, *On Toleration* (New Haven, Conn.: Yale University Press, 1997).

[20]See Christopher A. Seeger, "The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?" *Cardozo Law Review* 11 (1989): 471; David M. Abromowitz, "An Essay on Community Land Trusts: Towards Permanently Affordable Housing," *Mississippi Law Journal* 61 (1991): 663.

[21]The pickling formulation comes from Professor Wendy Gordon.