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What are the legal consequences of viewing cultural and religious identity—Jewish identity in particular—not in static terms, but as an evolving human artifact subject to the dynamic forces of history? What implications are to be drawn if we understand the supposed “essence” of religious and cultural identity as nothing but a projection of our current, fleeting self-perceptions? Animating these questions is the recent insight of cultural anthropologists that the self-definition of a community emerges out of a perpetual contest for cultural authority in which the terms of identity are constantly challenged and revised.¹ This insight breaks down the distinction between internal and external cultural forces, between an “essential” current, hermetically sealed off from the outside, and a set of well-defined extraneous forces whose movements can be recorded accurately. The impulse to erode this dichotomy stems from a dissatisfaction with, and lack of confidence in, the analytical tools for measuring the influence

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1. See generally JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* (1988); *THE INVENTION OF ETHNICITY* (Werner Sollors ed., 1989); GEORGE E. MARCUS & MICHAEL M.J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986); *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (James Clifford & George E. Marcus eds., 1986) [hereinafter *WRITING CULTURE*]. Some legal scholars have adopted this anti-essentialist perspective on cultural identity. See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 *UCLA L. REV.* 915, 933–63 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 608–17 (1990); Martha Minow, *Identities*, 3 *YALE J.L. & HUMAN.* 97, 98–99 (1991); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 *U. CHI. L. REV.* 671, 705–19 (1989).

of one cultural entity upon another. The idea that Jewishness, for example, has been defined and redefined by accommodations to "external," that is, non-Jewish, forces challenges the very existence of an immanent Jewish culture. Conversely, if one recognizes that Jewishness has been subject to competing "internal" definitions, then it becomes difficult to speak of a singularly authentic cultural essence.

The problems encountered by the traditional model of influence have led some to a new model of cultural "polyphony" in which external and internal influences are indistinguishable from one another.² This new polyphonic model is germane not only to the realm of historical interpretation, but to the normative-legal arena as well. In the absence of fixed cultural identities, separated by sharp boundary lines and transgressed by clear vectors of causation or cultural influence, the basis for challenging "cultural imperialism" or forced assimilation becomes unclear. By the same token, it becomes questionable which, if any, of the dynamic interactions that continually constitute and reconstitute a cultural group (or subgroup) should be singled out for defense. The anti-essentialist view of culture calls into question the very notion of cultural "influence." In so doing, it undermines the basis for condemning "interference" in the processes of forming cultural identity—even if that "interference" comes from the state.

Yet, while questioning the ability to identify interference in cultural formation, the anti-essentialist perspective also calls into question the neutrality of the principles of individualism and universalism upon which state activity usually is justified. Jewish history provides an example of an institution imbued with a sense of communal unity and cultural particularism, the *kehilah*, which could not survive the official implementation of an individualistic and universalistic principle of tolerance. This semiautonomous communal form emerged as the characteristic vehicle of Jewish self-expression and self-regulation in medieval and early modern Europe. Throughout this period, the *kehilah* reflected the political subordination by and dependence of the Jews, as a group, on their Gentile "hosts." Most importantly, it represented a holistic form of existence in which the boundaries

2. See, e.g., James Clifford, *Introduction to WRITING CULTURE*, *supra* note 1, at 1, 15-17.

between political regulation, religion, culture, and law were blurred, and the individual always was regarded, first and foremost, as a member of the group.³

The very "groupness" of the traditional Jewish way of life, in combination with the particularism of its culture and creed, made its survival impossible in the emerging modern world order without drastic reformulation. As the nature of political fealty was redefined in the postfeudal era of the nation-state, Jews were confronted with a seemingly Mephistophelian bargain. They could reject their traditional ways in exchange for the abstract, universal rights of the individual citizen, or they could be, as they often were, disenfranchised as a collectivity.

The withholding of citizenship rights generally and justifiably is regarded as the mark of an intolerant regime. Conversely, the extension of individual rights to Jews and others—the promise of emancipation—has been seen as the hallmark of a liberal and tolerant order. But the underlying quid pro quo of assimilation for rights suggests that the liberal promise of emancipation somehow excluded traditional Jewish identity and faith. Jewish life could continue under a regime of liberal tolerance, but only in the private realm. The resulting bifurcation of public and private selves was itself inconsistent with the holism of premodern Jewish existence, and thus it only served to accentuate the paradox of liberalism's "tolerant" embrace.

Over time, these normative issues inevitably have been translated into legal claims. Scholars increasingly pose the question of whether constitutional principles of tolerance and religious liberty should be interpreted to recognize "group rights."⁴ More specifically, they ponder the validity of a group

3. See *infra* text accompanying notes 6–27.

4. See, e.g., Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 12–14 (1983) (exhibiting tension between a so-called "paideic" law, characteristic of particularistic groups, and "imperial" law, which attempts to mediate among diverse groups on the basis of general principles of liberalism); Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1008–09 (1983) (constructing a philosophical argument for recognizing group, as distinguished from both social and individual, rights and applying the argument to the context of religion); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 299–305 (1988) (contrasting assimilationism, pluralism, and individualism); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 729–38 (1986) (arguing for the substitution of a more republican approach, one of mutual forbearance, for the prevailing liberal individualist approach to religion).

right against state-promoted assimilation.⁵ These propositions raise the question: what is the basis for a complaint against assimilation if every particular form of cultural identity is simply the manifestation of a temporary victory in the ongoing struggle for cultural definition?

This Article seeks not to answer these questions, but simply to pose them in a historical, as well as a legal-theoretical, context. Part I describes the historical development of the Jewish *kehillah*, its subsequent evolution, and eventual dissolution. Part II surveys recent trends in legal scholarship which reflect a growing consciousness of the tension between the demands of self-conscious cultural groups and liberal legal principles.

I. THE JEWISH *KEHILAH*

In its transition from an autonomous social, religious, and legal entity to a purely voluntary association without coercive power over its members, the Jewish communal organization, known by the Hebrew "*kehillah*," illuminates the tension between the ideal of tolerance within a liberal society and the claims of a subgroup within that society to self-expression and self-regulation.⁶ The roots of the *kehillah*'s transformation parallel—or,

5. See Post, *supra* note 4, at 299-305. Opposition to assimilation is a prominent theme in critical feminist legal scholarship. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 9 (1987); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1163-70 (1986); Alison M. Jagger, *Sexual Difference and Sexual Equality*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 239, 249-51 (Deborah L. Rhode ed., 1990); Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1393-99 (1986); Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825, 829-32 (1985); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 836-40 (1989); Iris M. Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535, 540-50 (1987). Similarly, it represents an important theme in critical race theory. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 9-10 (1991); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 490-508 (1988); Ankur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 416-18 (1988).

6. See David N. Myers, *Dual Loyalty in a Post-Zionist Era*, 38 JUDAISM 333, 334 (1989) (discussing this tension in the context of an analysis of the "national" status of contemporary Jews and presenting the historical denouement of the *kehillah*).

more accurately, reside in—a large structural change in the political order of Europe: the shift from medieval corporatism to the model of centralized nation-states, during which self-regulating subgroups (such as nobles, clerics, and guilds) began to be perceived as threatening to social and political stability.⁷ This significant change provoked in turn a tumultuous process of redefining Jewish communal identity—and created a stark and revealing juxtaposition between the autonomy and holism of the *kehilah* and the condition of alienation and displacement that characterizes “modernity” in Jewish historical experience.

In tracing this transformation and ultimately applying its lessons to contemporary American legal issues, we should be wary of the dangers of idealization. A wistful turn to the organic *kehilah*, which existed as a corporate entity within a corporatist sociopolitical order, leads all too hastily to the conclusion that the community was itself a paragon of democracy and tolerance.⁸ In reality, the degree of tolerance within a given community depended on the composition of its members, the composition and strength of its leadership, and its relations with the surrounding environment. Wide disparities in size and management existed among the *kehilot*, defying generalizations about their essential character. Common to all, however, was the central role of Jewish law (*Halakhah*) as legal, religious, and social arbiter.⁹

7. See R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 305–06 (5th ed. 1978). For a discussion of the general change in theories of law and governance in medieval Europe, see FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 176–80 (S.B. Chrimes trans., 1939). Important contributions to Jewish communal history include 1 SALO W. BARON, *THE JEWISH COMMUNITY* (1942); JACOB KATZ, *TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES* (1961); Salo W. Baron, *Ghetto and Emancipation*, 14 *MIENORAH* J. 515 (1928); Shmuel Ettinger, *The Modern Period*, in *A HISTORY OF THE JEWISH PEOPLE* 727 (H.H. Ben-Sasson ed., 1976).

8. For instance, Yitzhak Baer, in discussing the origins of the *kehilah*, suggests that a popular, even democratic, spirit found among Jews in the Second Temple period stimulated its birth. See Yitzhak Baer, *Ha-hathalot ve-ha-yesodot shel irgun ha-Kehilot ha-yehudiyot bi-yeme ha-beynayim* [*The Origins of Jewish Communal Organization in the Middle Ages*], 15 *ZION* 1 (1950), translated in BINAH: *STUDIES IN JEWISH HISTORY, THOUGHT, AND CULTURE* 59, 60 (Joseph Dan ed., 1989). According to Baer, the anti-rational, democratic tendencies of the early *kehilah* form found fulfillment in the insular medieval communities of Ashkenaz. His idealization of the democratic impulses of Ashkenazic *kehilot* stands in stark contrast to his depiction of Spanish Jewish communal life, beset by class strains and powerful assimilatory impulses. For a response to Baer's position on the Spanish Jewish community, see Shalom Albeck, *Yesodot mishtar ha-kehilot bi-Sefarad 'ad ha-Rama (1180–1244)*, 25 *ZION* 85 (1960).

9. See Menachem Elon, *Power and Authority: Halachic Stance of the Traditional Community and Its Contemporary Implications*, in *KINSHIP AND CONSENT: THE JEWISH POLITICAL TRADITION AND ITS CONTEMPORARY USES* 183, 185 (Daniel J. Elazar ed., 1981).

Also common to the varied communities was the erosion of the cohesive force of *Halakhah* with the onset of the modern era.

Throughout the Middle Ages, Jewish legal and legislative autonomy not only existed but also was encouraged by the corporate nature of feudal society.¹⁰ There were no centralized nation-states with individual subjects. Instead, there was a complex division of authority, obligations, and rights divided among discrete bodies or classes. Under this arrangement, local, regional, and imperial rulers—as well as representatives of the Church—granted “charters” or “privilegia” which dealt with Jewish subjects collectively.¹¹ When a particular sovereign tolerated Jews—often because of the economic benefit he expected them to bring¹²—he accorded physical protection and the right to safety and security to the whole community;¹³ conversely, when a sovereign expelled Jews from a certain region,¹⁴ the entire community was affected.

The phenomenon of Jews existing as a distinct collective entity within an alien religious and linguistic culture was the condition of the exile *par excellence* before modern times. Since the loss of national-territorial sovereignty in *Eretz Yisrael* (the land of Israel), Jews more or less had accepted the political rule of the

10. H.H. Ben-Sasson, *The Middle Ages, in A HISTORY OF THE JEWISH PEOPLE*, *supra* note 7, at 383, 501 [hereinafter Ben-Sasson, *The Middle Ages*]. While the inception of the *kehillah* has been traced to the Second Temple period, the crystallization of the medieval *kehillah* form has been identified around the time of Rabbenu Gershom (11th century). See LOUIS FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* 5-7, 21, 83 (1924); see also Baer, *supra* note 8, at 28. We should note that the Jews, as a function of their changing economic role, were increasingly found in urban, not rural, environments by this time. Ben-Sasson, *The Middle Ages, supra*, at 388. For a discussion of parallels between the *kehillah* form and the medieval city, see H.H. Ben-Sasson, *Mekoma shel ha-kehillah / ha-ir be-toldot Yisra'el*, reprinted in HA-KEHLA HA-YEHUDIT BI-YEME HA-BEYNAYIM 7 (H.H. Ben-Sasson ed., 1976).

11. For a collection of medieval privilegia and charters concerning Jews, see CHURCH, STATE, AND JEW IN THE MIDDLE AGES 55-93 (Robert Chazan ed., 1980) [hereinafter CHURCH, STATE, AND JEW].

12. *Id.* at 9. Exemplary of the enthusiasm which inspired a local ruler to invite Jews to reside in his area was the 11th-century charter of Rüdiger, bishop of the German village of Speyer, who “thought that the glory of our town would be augmented a thousandfold if I were to bring Jews.” *Id.* at 58. Another fascinating example of the attempt by a ruler to induce Jews to inhabit his region is that of the Polish Duke Boleslav from 1264. *Id.* at 88. Duke Boleslav’s Charter was intended to ensure the responsible protection of the Jews of Greater Poland; for example, the 35th clause of his charter ordered that Christians who did not respond to the cries of Jews, “compelled by dire necessity,” heard in the night, might be liable to pay a considerable fine. *Id.* at 93.

13. *Id.* at 10, 11.

14. The most comprehensive expulsions of Jews in the Middle Ages were from England (1290), France (1306), and the Iberian Peninsula (1492). Ben-Sasson, *The Middle Ages, supra* note 10, at 463, 465, 570.

host nations in whose midst they resided.¹⁵ Concomitantly, they developed the *kehilah* form, which permitted the preservation of Jewish faith and law in alien environs. Accompanying this development was the articulation of a political theory, known by the Aramaic *Dina di-Malkhuta Dina* ("the law of the kingdom is the law"), which rationalized and demarcated the extent of a king's or ruler's sovereignty over the Jewish community.¹⁶ This elastic theory, when invoked, enumerated certain functions (such as taxation) recognized as belonging to the host sovereign.¹⁷ By consequence, religious and ritual functions, and the authority to enforce adherence to its norms, accrued to the *kehilah*.¹⁸ This political theory of relations with the host society and, more significantly, the *kehilah* form itself were cultivated as mechanisms of communal self-preservation in response to the exigencies of exile.¹⁹

The *kehilah* served the intracommunal needs of Jews through institutions which instilled respect for Jewish ritual and law.²⁰ Courts of law and educational institutions were vital cogs in the medieval communal apparatus.²¹ Within that apparatus (excepting those matters ceded to the authority of the host sovereign), Jewish law reigned supreme—without distinguishing between the public life of the community and the private lives of its members.²² Violations of its clauses and of related social norms²³ were met

15. See KATZ, *supra* note 7, at 15–16 (stating that Jews did not question the right of the host nation to expel them).

16. See GIL GRAFF, SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW 1750–1848, at 8–29 (1985); Shmuel Shilo, *Dina de-Malkhuta Dina*, in 6 ENCYCLOPAEDIA JUDAICA 51, 51–55 (1971). See generally SHMUEL SHILO, DINA DE-MALKHUTA DINA (1974).

17. Shilo, *supra* note 16, at 53–55.

18. SHILO, *supra* note 16, at 53. A particularly salient form of insuring adherence to communal standards was the *herem*, or excommunication. See GRAFF, *supra* note 16, at 17, 19.

19. SHILO, *supra* note 16, at 51.

20. KATZ, *supra* note 7, at 79.

21. See ISRAEL ABRAHAMS, JEWISH LIFE IN THE MIDDLE AGES 49–52, 341 (Atheneum 1969) (1896); KATZ, *supra* note 7, at 94–95, 192.

22. See KATZ, *supra* note 7, at 80.

23. *Halakhah* is a dynamic legal system which spawns legal interpretations and reformulations in a variety of ways. See Benjamin DeVries & Louis Jacobs, *Halakhah*, in 7 ENCYCLOPAEDIA JUDAICA 1156, 1156–66 (1971) (describing the elements and differing interpretations of the *Halakhah*). Thus, in addition to the canonized Oral *Torah* and the venerated *Halakhic* sources which achieved universal approval in the Jewish world, individual communities or regions developed ordinances and regulations to ensure adherence to communal religious norms. See ABRAHAMS, *supra* note 21, at 58–61.

with punitive responses.²⁴ Hence, just as *Halakhah* served to regulate the public and private norms of the community, so the community—through its lay and rabbinic leadership—served to insure adherence to *Halakhah*.

Apart from its delineation of local communal borders, the *kehillah* also served as the repository of a unique extraterritorial identity which linked Jews regardless of their native land or language. While desirous of preserving economic well-being in their own towns and cities, leaders of a given Jewish community also were encouraged by rabbinic rulings to welcome visits and solicitations from Jewish individuals and communities in need.²⁵ The assistance of one community to another was stimulated by a sense of shared fate among Jews, as well as by the shared expectation of ultimate redemption and deliverance from exile, to be achieved through a return to Zion.²⁶

The medieval *kehillah* thus operated on several different levels. Intracommunally, the *kehillah* acted according to the norms of the self-contained community. Intercommunally, the *kehillah* operated in two distinct ways: first, in its relations with other Jewish communities and, second, in its relations with the host sovereign and society (as reflected in the doctrine of *Dina de-Malkhuta Dina*). But while observing that the *kehillah's* activity and authority extended to each of these three planes, we nonetheless must recall that the prevailing political order of medieval corporate society validated (or, in the case of expulsions, voided) the Jewish claim to legal and religious autonomy.²⁷

Consequently, when the medieval political order of Central and Western Europe began to disintegrate in the seventeenth

24. One of the most powerful modes of punishment exercised by concerned authorities was the *herem*, or writ of excommunication. See Ben-Sasson, *The Middle Ages*, *supra* note 10, at 428. The success of the community in enforcing the laws obviously depended on its own power of enforcement. The case of Jewish informers in medieval Spanish Jewish communities presents a fascinating example of the limits of that power. Despite the fact that the informers may well have informed on the Jewish community to the non-Jewish host authorities, Jewish communal authorities, lacking the actual power to impose capital punishment, "relaxed" (handed over) the informers to the Gentile authorities in order to carry out their punishment. See *id.* at 498.

25. *Id.* at 506.

26. With few exceptions, this remained a largely passive expectation; accordingly, human attempts to "hasten the end" were considered profane intrusions into a sacred realm. However, medieval Jewish history knows of more than a few examples of messianic activism in which the initiative to bring the Messiah was humanly inspired. See ABBA HILLEL SILVER, *A HISTORY OF MESSIANIC SPECULATION IN ISRAEL FROM THE FIRST THROUGH THE SEVENTEENTH CENTURIES* 55-56, 87-88, 143-50 (Peter Smith 1978) (1927).

27. Ben-Sasson, *The Middle Ages*, *supra* note 10, at 409, 412-13.

and eighteenth centuries²⁸ as “enlightened despots” consolidated disparate groups and territories into nation-states,²⁹ the structural support for Jewish communal identity seemingly disappeared. Corporate bodies organized on the basis of common religious, economic, or social interests now were perceived as threatening to the state.³⁰ The new breed of rulers encouraged a kind of allegiance—an individual bond with the state—which required the dissolution of communal affiliations.³¹ At the same time, this allegiance also required the conferral of rights and obligations to the private subject. In the new economy of political organization, the state bestowed upon Jews the same rights and privileges accorded to others as individuals—provided that they yield their communal autonomy. This, at least, was the hope of liberal thinkers such as John Locke and John Toland, who pushed for the application of principles of toleration to Jews on both altruistic and utilitarian grounds.³²

Although logic (and liberal theory) dictated it, Jewish equality was not quick or uniform in coming. France was the first country in which Jews (Sefardim in 1790 and the rest in 1791) were granted citizenship rights.³³ The sentiment among advocates of Jewish emancipation was pointedly summed up in the words of Count Clermont-Tonnerre, a delegate to the French National

28. See Ettinger, *supra* note 7, at 727; see also Selma Stern-Taubler, *The Jew in the Transition from Ghetto to Emancipation*, in 2 *HISTORIA JUDAICA* 102, 102–04 (1940) (discussing the effects of absolutism, mercantilism, and rationalism on Jews).

29. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM*, 14–15 (new ed. 1979) (1951); KATZ, *supra* note 7, at 247; see also HAJO HOLBORN, *A HISTORY OF MODERN GERMANY 1648–1840*, at 63–67 (1964) (describing the development of the agencies of absolute government in Germany).

30. See Ettinger, *supra* note 7, at 750.

31. See KATZ, *supra* note 7, at 247–50.

32. See JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 45–52 (Patrick Romanell ed. & William Popple trans., 1955) (1689) (arguing that because a man’s first duty is to his conscience, the state should exercise toleration unless a sect “challenge[s] any manner of authority over such as are not associated with them in their ecclesiastical communion”); JOHN TOLAND, *REASONS FOR NATURALIZING THE JEWS IN GREAT BRITAIN AND IRELAND* (1714) (calling for the naturalization of British Jews both as a matter of principle and as a matter of economic utility). As background to this development, Shmuel Ettinger points to the Protestant Reformation as laying the foundation for a spirit of toleration, and, consequently, a more beneficent attitude toward the Jews. S. Ettinger, *The Beginnings of the Change in the Attitude of European Society Towards the Jews*, in 7 *SCRIPTA HIEROSOLYMITANA* 193, 195–96 (Alexander Fuks & Israel Halpern eds., 1961). The challenge to Church authority and the new Hebraism, fostered by a desire to return to the Old Testament, *sola Scriptura*, together stimulated this new sensibility.

33. *THE JEW IN THE MODERN WORLD* 101–07 (Paul R. Mendes-Flohr & Jehuda Reinharz eds., 1980).

Assembly, who argued, "One must refuse everything to the Jews as a nation but one must give them everything as individuals."³⁴ According to these terms, emancipation seemed to mandate an end to Jewish communal autonomy.³⁵

In Germany, where the intellectual and cultural values of the Enlightenment (*Aufklärung*) most deeply influenced Jews, political emancipation proved far more elusive than in France. Prussian Jews did receive civil rights in 1812,³⁶ but new restrictions on Jewish integration were enacted in the wake of the conservative reaction which swept Europe following the defeat of Napoleon.³⁷ In fact, more than half a century passed before Jews finally received equal status in the various German-speaking territories.³⁸ What so tellingly characterized the life of Jews in these lands was the disparity between their intellectual and

34. ARTHUR HERTZBERG, *THE FRENCH ENLIGHTENMENT AND THE JEWS* 360 (1968).

35. PATRICK GIRARD, *LES JUIFS DE FRANCE DE 1789 À 1860*, at 173 (1976); see Elon, *supra* note 9, at 207. Interesting counter-texts to Clermont-Tonnerre's statement are found in the famous essay of the Christian *Aufklärer*, Christian von Dohm, *Über die bürgerliche Verbesserung der Juden*, as well as in the responses of the Comte de Mirabeau and Adolphe Thiéry to the 1785 Royal Metz Academy essay contest on how to improve the lot of the Jews. See CHRISTIAN K.W. VON DOHM, *ÜBER DIE BÜRGERLICHE VERBESSERUNG DER JUDEN* [CONCERNING THE AMELIORATION OF THE CIVIL STATUS OF THE JEWS] (1781), translated in part in *FROM EXPULSION TO EMANCIPATION: TEXT AND DOCUMENTS ON JEWISH RIGHTS 16TH-18TH CENTURIES* 141 (Yosef H. Yerushalmi ed.) [hereinafter *FROM EXPULSION TO EMANCIPATION*] (collection of xeroxed primary sources for use in courses at Columbia University); HONORÉ GABRIEL RIQUETTI, *COMTE DE MIRABEAU, SUR MOSES MENDELSSOHN, SUR LA REFORME POLITIQUE DES JUIFS* [ON MOSES MENDELSSOHN, AND ON THE POLITICAL REFORM OF THE JEWS] (1787), translated in part in *FROM EXPULSION TO EMANCIPATION*, *supra*, at 175; ADOLPHE THIÉRY, *DISSERTATION SUR CETTE QUESTION: EST-IL DES MOYENS DE RENDRE LES JUIFS PLUS HEUREUX ET PLUS UTILES EN FRANCE?* [A DISSERTATION ON THE FOLLOWING QUESTION: ARE THERE MEANS OF RENDERING THE JEWS HAPPIER AND MORE USEFUL IN FRANCE?] (1788), translated in part in *FROM EXPULSION TO EMANCIPATION*, *supra*, at 176. All three seem to have advocated some form of ongoing Jewish communal identity. Von Dohm and Mirabeau approved of the continued use of excommunication on religious grounds. See VON DOHM, *supra*, at 161; MIRABEAU, *supra*, at 175. Thiéry, too, urged that Jewish communities be left intact, at least for the short term. See THIÉRY, *supra*, at 175-77. Their views were adumbrated by the opinion of the renowned international legal scholar, Hugo Grotius, on the status of the Jews in Holland. In his *Remonstrantie*, Grotius advocated legal admission of the Jews to Holland. See HUGO GROTIUS, *REMONSTRANTIE NOPENDE DE ORDRE DJE IN DE LANDEN VAN HOLLANDT ENDE WESTVRIES LANDT DJENT GESTELT OP DE JODEN* [REMONSTRANCE, CONCERNING THE REORGANIZATION OF THE SITUATION OF THE JEWS IN HOLLAND AND WEST-FRISIA] (1615), translated in part in *FROM EXPULSION TO EMANCIPATION*, *supra*, at 13. He also endorsed the rabbinic right of excommunication, provided there be a parallel right of appeal to non-Jewish courts. *Id.* at 23.

36. Ettinger, *supra* note 7, at 788.

37. *Id.* at 807. The rights granted under the 1812 Emancipation Law were not extended to areas of the state annexed after 1812; thus, the laws affecting treatment of the Jews varied from place to place. *Id.*

38. See *id.* at 811-12. Emancipation in the Austro-Hungarian Empire, for example, came only in 1867, and in unified Germany, in 1869. *Id.* at 811.

cultural achievements, on one hand, and their political and social acceptance, on the other. For many, the alluring promise of liberation held out by *Aufklärung* and its Jewish cognate, *Haskalah*, never was realized. Even when legal emancipation was achieved, full social acceptance often did not follow, leading to frustration and despair, particularly among those Jews with the most to gain, the educated and the enlightened. The despair of one such enlightened Jew, the poet Heinrich Heine, led him to a path frequently followed by others—conversion—which he referred to as his “entrance ticket to European culture.”³⁹

Each in its own way, the French and German cases of the late-eighteenth and nineteenth centuries reveal an insidious equation in which the promise of full emancipation was offered in exchange for the diminution or outright denial of Jewish identity. The imperative to dissolve communal autonomy was communicated to Western European Jews as a necessary price to pay for liberation. This message was often internalized by Jews. Thus, Moses Mendelssohn, regarded by some as the first truly “modern” Jew, pleaded against the coercive force of religion in his famous *Jerusalem*⁴⁰—all the while remaining scrupulously observant of Jewish ritual.⁴¹ To his mind, religion was a matter of moral suasion.⁴² Vestiges of coercion, such as excommunication, violated the principles of “rational devotion” to which Mendelssohn subscribed.⁴³

An even balder example of internalization comes from a French Jew of Revolutionary times, who called upon co-religionists “to divest ourselves entirely of that narrow spirit, of Corporation and

39. Elizabeth Petuchowski, *Introduction to HEINRICH HEINE, JEWISH STORIES AND HEBREW MELODIES* 8 (1987). In cosmopolitan Berlin, capital of the German Enlightenment and the Prussian state, full social acceptance came only with conversion and even then was not guaranteed. See DEBORAH HERTZ, *JEWISH HIGH SOCIETY IN OLD REGIME BERLIN* 240, 249–50 (1988).

40. See Alexander Altmann, *Introduction to MOSES MENDELSSOHN, JERUSALEM, OR ON RELIGIOUS POWER AND JUDAISM* 3 (Allan Arkush trans., 1983) (1783) (“*Jerusalem* reaffirms . . . [Mendelssohn’s] strong conviction that neither religion nor the state is authorized to coerce the consciences of men, and seeks to show . . . that Judaism honors this principle.”).

41. See 5 HEINRICH GRAETZ, *HISTORY OF THE JEWS* 310 (1927) (“In the darkness of the Ghetto he was a strictly orthodox Jew, who, apparently unconcerned about the laws of beauty, joined in the observance of every pious custom.”).

42. See ALEXANDER ALTMANN, *MOSES MENDELSSOHN: A BIOGRAPHICAL STUDY* 551–52 (1973).

43. Interestingly, Mendelssohn dissented from the view of the non-Jewish advocate of Jewish toleration, Christian von Dohm, who supported continuation of Jewish juridical autonomy. Compare MENDELSSOHN, *supra* note 40, at 73–75 with VON DOHM, *supra* note 35, at 161.

Congregation, in all civil and political matters, not immediately connected with our spiritual laws."⁴⁴ This message anticipated the more systematic efforts of nineteenth-century German religious reformers to redefine Jewishness as a voluntary confession of faith. The German Reformers envisaged Judaism as a *Religionsgemeinschaft* (a community defined in religious terms alone), a vision that reflected their own acknowledgement of the contraction of Jewish identity.⁴⁵ In the expectation of becoming full and active participants in society, they were prepared to place severe limits on Jewish communal identity, indeed, to surrender the reign of *Halakhah* and to profess primary loyalty to the German nation.⁴⁶

German-Jewish Reformers envisaged a Judaism shorn of its juridical authority and consigned to the nonlegal private or domestic sphere. The well-known refrain of the Jewish Enlightenment movement memorialized this contraction; it ordained that one "be a man in the street and a Jew at home."⁴⁷ The adage mirrored what Karl Marx somewhat approvingly referred to as the "decomposition of man" into political and religious realms.⁴⁸ A later and more sympathetic Jewish observer,

44. Letter from M. Berr-Isaac-Berr to the Jews of France (1791), translated in FROM EXPULSION TO EMANCIPATION, *supra* note 35, at 249, 251.

45. The radical religious reformer Samuel Holdheim stated at the first Reform Rabbinical Conference at Brunswick, Germany in 1844: "What was once a commandment for the Israelite with regard to his fellow Israelite, must also oblige us with regard to our contemporary compatriots—to the Germans. The doctrine of Judaism is thus, first your compatriots [*Vaterlandsgenosse*] then your co-religionists [*Glaubensgenosse*]." THE JEW IN THE MODERN WORLD, *supra* note 33, at 157.

46. See *supra* note 45; see also W. GUNTHER PLAUT, THE RISE OF REFORM JUDAISM 133 (1963) ("Jews were eager to eschew all dual loyalties and to profess their respective patriotism."); MICHAEL A. MEYER, RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM 6 (1988) (stating that although the Reformers retained some aspects of *Halakhah*, in other ways they departed from Jewish legal tradition); DAVID J. SORKIN, THE TRANSFORMATION OF GERMAN JEWRY, 1780–1840, at 63–65 (1987) (discussing the effects of the intervention of the absolutist states and the dissolution of communal autonomy on Jews' views of political authority). Of particular interest regarding the effects of emancipation and the dissolution of communal autonomy on Jewish law is the inverted meaning to which the precept of *Dina di-Malkhuta Dina* was applied in the case of the Sanhedrin. The doctrine now came to justify government regulation of matters traditionally left to Jewish law. See GRAFF, *supra* note 16, at 149–50 n.71.

47. This refrain can be found in *Awake, My People*, a poem by the famous Russian-Jewish writer Y.L. Gordon. For the text of the poem and a novel interpretation of Gordon's meaning, see MICHAEL STANISLAWSKI, FOR WHOM DO I TOIL?: JUDAH LEIB GORDON AND THE CRISIS OF RUSSIAN JEWRY 49–52 (1988).

48. Marx wrote: "The decomposition of man into Jew and citizen, Protestant and citizen, religious man and citizen, is not a deception practised against the political system nor yet an evasion of political emancipation. It is political emancipation itself, the political mode of emancipation from religion." Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 24, 33–34 (Robert C. Tucker ed., 1972).

Gershom Scholem, spoke despondently of the same phenomenon, which he described as "the progressive atomization of the Jews as a *community* in a state of dissolution, from which in the best case only the *individuals* could be received."⁴⁹

The bifurcation of private-religious and public-political identities, observed by such diverse figures as Marx and Scholem, set the stage for the central drama of the modern Jewish experience in the West: the struggle to preserve a modicum of Jewish identity while absorbing modern cultural and intellectual values.⁵⁰ This struggle took shape in the aftermath of the demise of the medieval *kehilah* and of the holistic Jewish world view and legal order which enveloped it. In the fractured world that emerged, the age-old redemptive impulse to return to Zion was checked, and lingering feelings of Jewish national unity were significantly diluted. By the end of the nineteenth century, this development had triggered a number of repercussive Jewish responses, ranging from complete disaffection with Judaism to a resurgent sense of Jewish national identity. Perhaps the most important of these responses was Zionism, a movement explicitly dedicated to rejoining the private and public components of Jewish identity into an organic whole in Zion.⁵¹

One intriguing, albeit short-lived, attempt to repair the breach between private-religious and public-political identities was made not in Palestine, but rather in America. There, in the first decade of the twentieth century, a group of Jewish leaders in New York City sought to revive the communal impulses of their fellow Jews by establishing a city-wide organization known as the Kehillah.⁵² The outlandish claim of the New York City police commissioner that fifty percent of the criminals in the city were Jewish inspired their endeavors.⁵³ Although the statement was retracted, Rabbi

49. GERSHOM SCHOLEM, *Against the Myth of the German-Jewish Dialogue*, in *ON JEWS AND JUDAISM IN CRISIS* 61, 62 (Werner J. Dannhauser ed., 1976). For a view which challenges the dichotomy between traditional and modern societies, see Robert Liberles, *Emancipation and the Structure of the Jewish Community in the Nineteenth Century*, in *LEO BAECK INSTITUTE YEARBOOK* 1986, at 51, 66-67 (Arnold Paucker ed., 1986).

50. David Sorkin offers an important new perspective by arguing that assimilation was not the only logical result of the struggle for Jewish emancipation in Germany. He skillfully traces the emergence of a distinct Jewish "subculture" adjacent to, but not subsumed within, the broader German society. See SORKIN, *supra* note 46, at 4-5.

51. See Myers, *supra* note 6, at 337-39. We refer here explicitly to Western Zionism, that version first formulated by the assimilated Viennese journalist Theodor Herzl in the wake of the Dreyfus Affair. See MICHAEL A. MEYER, *JEWS AND JEWISH IDENTITY IN THE MODERN WORLD* 62-63 (1990).

52. ARTHUR A. GOREN, *NEW YORK JEWS AND THE QUEST FOR COMMUNITY: THE KEHILLAH EXPERIMENT 1908-1922*, at 43-56 (1970).

53. *Id.* at 25-30.

Judah L. Magnes, one of the moving forces behind the Kehillah, declared, "The one million of Jews of New York . . . should draw proper deductions from this incident. They need a permanent and representative organization that may speak in their behalf, that may defend their rights and liberties, and that may also cope with the problems of criminality . . ." ⁵⁴

This commitment to a permanent representative of Jewish rights undergirded the founding convention of the Kehillah. On February 27, 1909, the "Jewish Community of New York" was formally established with the mandate "to further the cause of Judaism . . . and to represent the Jews of this city."⁵⁵ As it developed organizationally over the course of its brief existence, the Kehillah was governed by two sources of authority: the Convention, open to delegates from all areas of New York Jewish society, excepting political organizations;⁵⁶ and the various administrative bureaus, staffed by professional employees.⁵⁷

With this new organization, Magnes and other Kehillah advocates sought to preserve, or, more accurately, to recapture, the integrity of Jewish communal life once embodied in the medieval *kehilah*, all the while remaining within the bounds of the American political tradition. In the wake of the founding convention of 1909, Magnes articulated a vision of how that tradition could accommodate such expressions of group identity as the Kehillah:

The symphony of America . . . must be written by the various nationalities which keep their individual and characteristic note, and which sound this note in harmony with their sister nationalities. Then it will be a symphony of color, of picturesqueness, of character, of distinction—not the harmony of the Melting Pot, but rather the harmony of sturdiness and loyalty and joyous struggle.⁵⁸

54. *Wrong About Jews, Bingham Admits*, N.Y. TIMES, Sept. 17, 1908, at 16.

55. GOREN, *supra* note 52, at 51 (quoting Minutes of the Constituent Convention of the Jewish Community of New York City (February 27–28, 1909) (on file in the Judah L. Magnes Archives (Jerusalem), F48-L135)).

56. J.L. Magnes, *What the Kehillah Has Given New York Jewry*, Statement Presented to the Eighth Annual Convention of the Kehillah of New York City 9 (Apr. 28–29, 1917).

57. *See id.* at 10–15. In his Statement to the Eighth Convention, Magnes recommended that the work of the Bureaus (Education, Industry, Social Morals, Religious Affairs, Philanthropic Research, and the School for Jewish Communal Work) be separated from that of the popular Convention so as to improve the provision of services to New York's Jews. *Id.* at 15.

58. GOREN, *supra* note 52, at 4 (quoting 3 JUDAH L. MAGNES, *THE EMANU-EL PULPIT* 10 (1909)).

To his chagrin, this vision of a harmonious symphony of nationalities never was realized. The Kehillah experiment lost momentum over the course of a decade and a half, ground down by the divergent expectations, interests, and politics of New York Jewry.⁵⁹ Over time, it became clear to Magnes that his erstwhile faith in the malleability of American pluralism perhaps was exaggerated. At one point, he recognized the tendency of democracy “to level all distinctions, to create the average type, almost to demand uniformity.”⁶⁰ In the last years of the experiment, Magnes also recognized the ineradicable difference between the *kehilot* of the Old World and the Kehillah of the New, between the medieval and modern incarnations of Jewish communal identity:

The European notion of a uniform, . . . all-controlling . . . kehillah cannot strike root in American soil . . . because it is not in consonance with the free and voluntary character of American religious, social, educational, and philanthropic enterprises The only power that the kehillah can exercise is moral and spiritual in its nature, the power of an enlightened public opinion, the power of a developed community sense.⁶¹

II. GROUPS IN THEORY

Though its life was brief and its impact on American Jewry minimal, the experiment of the New York Kehillah is worth recounting because it exposes the latent, and paradoxical, limits of the principles of pluralism and tolerance embodied in constitutional law. In imagining the revival of an organic Jewish community, Judah Magnes seized upon the nostalgic imagery of American ethnic interest groups—“color[ful]” and “picturesqu[e]”⁶²—even while he rejected the assimilationist metaphor of “the Melting Pot.” In observing the Kehillah’s ultimate failure to “strike root,” Magnes acknowledged the levelling

59. *See id.* at 247–52.

60. 2 JUDAH L. MAGNES, *THE EMANU-EL PULPIT* 7 (1909).

61. GOREN, *supra* note 52, at 252 (quoting Minutes of the Special Convention of the Kehillah (Jan. 13, 1918) (on file in the Judah L. Magnes Archives (Jerusalem), F18-L24)).

62. *See supra* text accompanying note 58.

force of voluntarism and interest-group pluralism in American society.⁶³ But his epitaph on the New York Kehillah was more ambivalent than bitter. While recognizing the failure to establish a "uniform, . . . all-controlling" community, Magnes also indicated an affirmation, reluctant though it was, of a voluntary (and inevitably diminished) Jewish identity, not unlike that represented by the German *Religionsgemeinschaft*.⁶⁴ What the failed efforts of Magnes and his colleagues revealed was precisely that the voluntariness of group membership in the modern liberal order had eviscerated the foundation of Jewish communal life.⁶⁵

Of course, many have perceived the limits of liberal pluralism, even without the benefit of the lessons of Jewish history.⁶⁶ Legal

63. See *supra* text accompanying note 61.

64. See *supra* notes 45–46 and accompanying text.

65. The demise of the Kehillah did not, however, signal the end of Magnes's career or aspirations for a renaissance of Jewish communal life. He emigrated to Palestine, where he became one of the founders and the first chancellor of the Hebrew University in Jerusalem. NORMAN BENTWICH, *JUDAH L. MAGNES: A BIOGRAPHY OF THE FIRST CHANCELLOR AND FIRST PRESIDENT OF THE HEBREW UNIVERSITY OF JERUSALEM 147–72* (1955).

66. See, e.g., Cover, *supra* note 4, at 7–9 (contrasting the normative order of particularistic subgroups and their requirements of the state with a universalist legal order); Garet, *supra* note 4, at 1002–04, 1006–29 (demonstrating the failure of a system based exclusively on individual rights and state interests to comprehend the unique claims of groups); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12, 17–22 (1987) [hereinafter Minow, *Justice Engendered*] (demonstrating how the recognition of group differences can have the effect of their deprecation, while ignoring them and treating all individuals the same likewise can have the effect of compounding group disadvantage); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 77, 77–79 (Mark Tushnet ed., 1990) (observing the paradox involved in tolerating intolerance); Resnik, *supra* note 1, at 727–34, 747–49 (describing how apparent tribal sovereignty granted to Indians under plenary law in fact involves domination and assimilation); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 746–66 (1987–88) [hereinafter Weisbrod, *Family, Church and State*] (describing the conflicts in a pluralist society between the legal orders of religious subgroups and that of the state, and various strategies undertaken by subgroups for overcoming or avoiding such conflicts).

Although these authors arrive at their critical insights independently of a close examination of Jewish history, that does not mean that the Jewish case always has been far from their minds. Cover's article, in particular, is steeped in Jewish sources. See Cover, *supra* note 4, at 11–23; see also Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 894–900 (1992) (discussing a Jewish senior center); *id.* at 937–38 (analyzing the Israeli declaration of independence); Minow, *Justice Engendered*, *supra*, at 19, 32 (1987) (discussing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), in which a Jewish congregation argued that federal law proscribing interference with property on racial grounds should be applied as a prohibition against the desecration of a synagogue; and asserting a difference between unstated white Christian norms implicit in law and the norms of minority groups, including Jews); Carol Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 B.Y.U. L. REV. 143, 191 (contrasting the Jewish law of marriage and divorce to state law in order to demonstrate how some "sub-groups . . . think about divorce in their own way"); Weisbrod, *Family*,

scholars have become increasingly sensitive to the burdens that fall on certain religious groups as a result of the state's commitment to the values of tolerance and neutrality among different religious and nonreligious views.⁶⁷ But the concrete details of the evolution of Jewish communal life under a liberal political order provide a foil to existing legal scholarship, alternately reinforcing its insights and challenging the adequacy of its conceptual apparatus.

The recognition of the burdens and costs of liberal toleration has stimulated numerous efforts to devise an alternative to the liberal conception of religion as a voluntary, essentially private association⁶⁸—an association which, by virtue of its private

Church and State, *supra*, at 744 n.6 (referring to the Ottoman Empire's "millet" system, under which non-Muslim minorities, including Jews, were accorded a measure of separate judicial authority); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 988 (1990) (stating that Jewish jurisprudence is different from feminist jurisprudence because it is concerned with the legal theory of a particular group); see also Frank T. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 5-17 (1985) (focusing on the general question of the relationship between culturally diverse subgroups and the state and on the particular case of *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which an orthodox Jewish member of the Air Force sought and was denied the right to wear a yarmulke while on duty); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 270 n.14 (1991) (observing a similarity between university regulations against racist speech and behavior and "efforts of the Inquisition in sixteenth-century Spain to discover and punish all external signs of inward backsliding on the part of Moors and Jews who had outwardly converted to Catholicism in order to avoid expulsion"); Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1427 n.20 (1989) (reviewing MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988)) (noting cases which "involve the role of a Jewish minority in a predominantly Christian country"). These passing references evince the authors' interest in the case of the Jewish community's relationship to a larger pluralist society, but do not constitute a sustained discussion of that subject.

67. See, e.g., Garet, *supra* note 4, at 1030-35; Michelman, *supra* note 66, at 4-17; Tushnet, *supra* note 4, at 703-06; David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 889-96 (1991). Needless to say, the paradox of tolerance—the intolerant effect of the pursuit of tolerance—was apparent to those who were affected by it long before it was discovered and named by students of the phenomenon.

68. The *locus classicus* for the liberal conception of religion would be John Locke's *A Letter Concerning Toleration*. Locke wrote:

I say it is a free and voluntary society. Nobody is born a member of any church; otherwise the religion of parents would descend unto children by the same right of inheritance as their temporal estates, and everyone would hold his faith by the same tenure he does his lands, than which nothing can be imagined more absurd. Thus, therefore, that matter stands. No man by nature is bound unto any particular church or sect, but everyone joins himself voluntary to that society in which he believes he has found that profession and worship which is truly acceptable to God.

character, overlaps minimally with civic obligations. These various theoretical efforts draw from and contribute to more general scholarly efforts to expose and to critique problematic aspects of such central liberal tenets as the exclusive sovereignty of the state and state law,⁶⁹ and the neutrality of official law.⁷⁰

The scholarship that contributes to the reconsideration of liberalism can be sorted in a variety of different ways. The scheme of classification we adopt here delineates three schools of thought: (1) civic republicanism, (2) legal pluralism, and (3) cultural pluralism. Civic republicanism refers broadly to an ancient and variegated tradition of political thought, centered on the ideals of active citizenship or civic virtue, of a politics dedicated to the common good, and on the notion of practical reason and collective debate serving as agents for the realignment of private will with the general good.⁷¹ The civic republicans we have in mind are contemporary American legal scholars—in the main, constitutional scholars—who propound an interpretation of American law based

LOCKE, *supra* note 32, at 20. For a typical contemporary scholarly expression of the Lockean-liberal conception of religion as a voluntary and private affair, see DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 105–21 (1986) (embracing a Lockean vision of freedom of religious conscience). For case law, see *United States v. Lee*, 455 U.S. 252 (1982) (rejecting an Amish claim for exemption from social security taxes where the law did not burden the choice of individuals to follow a particular religion); *Gillette v. United States*, 401 U.S. 437 (1971) (upholding a religious conscientious objector law); *Walz v. Tax Comm'n*, 397 U.S. 664 app. II at 719 (1970) (Douglas, J., dissenting) (“[W]e hold it for a fundamental and undeniable truth, ‘that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.’” (quoting *Everson v. Board of Educ.*, 330 U.S. 1 app. at 64 (1947) (Rutledge, J., dissenting) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901) (1785) (quoting THE VIRGINIA DECLARATION OF RIGHTS art. XVI (1776)))).

The liberal conception of religion as private and voluntary was absorbed into some strands of Jewish philosophical thought, beginning with Moses Mendelssohn’s *Jerusalem*. See MENDELSSOHN, *supra* note 40, at 45, 73.

69. See *infra* text accompanying notes 84–95.

70. The critique of legal neutrality is a *leitmotif* of critical legal scholarship. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731–37 (1976); Frances E. Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497, 1508–13 (1983); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804–24 (1983); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 655–60 (1983).

71. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 49–50 (1975) (discussing “a theory of knowledge which allows great latitude for public decisions upon public events”); *id.* at 56–57 (describing the ideal of active citizenship); *id.* at 74–76 (describing the notion of the common good); see also J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY* 39–43 (1985) (summarizing the elements of classical republicanism). For an insightful overview of the historiography of civic republicanism, see JOYCE APPELBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992).

on civic republican principles.⁷² Legal pluralism, informed by the disciplines of sociology and cultural anthropology, is a contemporary school of thought that challenges the reduction of all law to official state law, and asserts the multiplicity of legal systems. Cultural pluralism refers to scholarship marked by the effort to attend to cultural diversity and to avoid unnecessary impositions on cultural sub-groups.

This classification scheme is designed to accomplish two ends. First, it brings one body of thought, which has been marginalized—legal pluralism⁷³—into contact with the other two modes, which have gained wide attention in the conventional organs of legal academic scholarship⁷⁴ and which grapple with the same central question that animates legal pluralism, namely, the relationship between cultural sub-groups and the state.⁷⁵

The second feature of the classification scheme adopted here is that it highlights tensions within pluralist thought. Like any classification scheme, this one is to a certain extent artificial. Particular works or writers do not fall neatly under one label precisely because they tend to straddle the conceptual tensions that divide one school of thought from another. The classification offered here is based on the divergent responses to the inherent tensions of pluralism, tensions which are made palpable by the example of the Jewish *kehilah*. By advancing this scheme, we hope to clarify these tensions, paving the way for further systematic analysis.

Examination of the *kehilah* reveals some of the features of associational life that the conventional conception of extra state

72. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540–41 (1988).

73. The principal venue for legal pluralism, the *Journal of Legal Pluralism and Unofficial Law*, was published for its first 18 issues under the name *African Law Studies*. Its editorial advisory board is international and draws heavily on anthropologists, sociologists, ethnographers, comparative law specialists, and economists. Manuscripts are collected in the Netherlands.

74. *Yale Law Journal* devoted an entire issue to a symposium on civic republicanism. See Symposium, *The Republican Civil Tradition*, 97 YALE L.J. 1493 (1988). Frank Michelman's discussion of republicanism, *Traces of Self-Government*, appeared as a Foreword to the *Harvard Law Review's* widely read Supreme Court issue. See Michelman, *supra* note 66. *Harvard Law Review* has published other articles discussing civic republicanism. See, e.g., Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

75. See, e.g., Michelman, *supra* note 72, at 1506, 1526–31 (proposing a notion of republican citizenship not centered on the state, encompassing diversity and cultural plurality); Post, *supra* note 4, at 299–305 (outlining the cultural pluralist commitment to preserving the "diversity [that] inheres in the various perspectives of differing groups").

associations commonly fails to capture. Latter-day civic republicans, cultural pluralists, and legal pluralists all reject the model of religious and cultural subgroups as associations that are reducible to the private will of the individual.⁷⁶ But they also share a lack of clarity about precisely what it is that is missing from the conventional liberal account—and what they believe is imperiled by the institutionalization of liberal principles. Is it differing values? Beliefs? Traditions? Ways of life? Or cultural autonomy? Legal autonomy? Perhaps competing political sovereignties?

If the history of the demise of the *kehilah* does not provide an automatic answer to this set of questions, it does caution against leaping to simple conclusions or failing to differentiate among these claims. The *kehilah* historically combined religious, cultural, legal, and nationalist impulses.⁷⁷ In the course of its evolution, the organic unity of these forces fractured in various ways. Sometimes, as with Reform Judaism, religious beliefs were separated from coercive legal authority.⁷⁸ In this case, the political/national face of Judaism was suppressed in favor of a new affiliation as German or American citizens (of the Jewish faith). Although certain religious practices were preserved in the private realm, the holistic way of life of medieval Jewry, regulated by *Halakhah*, was rejected. In the case of secular Zionism, by contrast, the aspiration for political sovereignty became ascendant, while the meaning of Jewish religious autonomy and the relationship of

76. Michelman has described Jewish identity as “[w]hat Robert Cover called a ‘paideic’ community. Such a community is formed by strong interpersonal bonding through shared commitment to a specific moral tradition and its contemporary elucidation.” See Michelman, *supra* note 66, at 13 (citing Cover, *supra* note 4, at 12–13). Robert Cover made it clear that discourse in the paideic community, which Michelman seeks to absorb into the republican tradition, is less analytic and critical than “initiatory, celebratory, expressive, and performative.” Cover, *supra* note 4, at 13. The understanding that these religious and cultural affiliations are not chosen is displayed in Post’s analysis of the legal view of cultural pluralism and individualism. See Post, *supra* note 4, at 303–05. Similarly, the anthropological conception of cultural groups, underlying legal pluralism, implies attachments that are the product of acculturation rather than individual, rational choice.

77. See *supra* notes 6–25, 50–59 and accompanying text.

78. The idea of a de-nationalized, noncoercive Judaism was most effectively propagated among nineteenth-century German Jews by Abraham Geiger. A distinguished scholar and rabbi, Geiger was devoted to the principle that one should be a German of the Jewish faith. See ABRAHAM GEIGER AND LIBERAL JUDAISM: THE CHALLENGE OF THE NINETEENTH CENTURY 63 (Max Weiner ed. & Ernst J. Schlochauer trans., 1962). This formulation was later memorialized in the name of the important German-Jewish organization, *Centralverein deutscher Staatsbürger Jüdischen Glaubens* (Central Organization of German Citizens of the Jewish Faith).

Jewish state power to Jewish law were left unclear.⁷⁹ In the case of the New York Kehillah, Jews attempted—unsuccessfully—to merge a greater measure of communal self-government with the desire to participate in a liberal pluralist society.⁸⁰

All of these examples suggest the difficulty of detaching Jewish religion—and Jewish identity, more generally—from the domain of Jewish legal and political authority. At the same time, they indicate the difficulty of fusing an autonomous Jewish legal and political culture with citizenship in a non-Jewish state. The question then becomes, what remains as the object of preservation when Jewishness is divested of legal and political authority?

Pluralists have sought to address a similar question when contemplating the role—on a more basic level, the prospects for survival—of a separate, autonomous, legal-political sub-community within a state. Critics have taken pluralists to task for expressing “a nostalgia for a quasi-medieval system of autonomous jurisdictions.”⁸¹ The same charge could be pinned on the current revivalists of the civic republican tradition, insofar as they too seek protection for separate “jurisgenerative,”⁸² or lawmaking, communities.⁸³ This charge, and the general question of the desired, or possible, relations among normative subgroups, and between them and the state, have yet to be adequately addressed.

The apprehension that certain liberal legal institutions are biased in favor of the exclusive recognition of official state law has induced many theoretical reevaluations of intermediate associations and subgroups.⁸⁴ This observation is the very foundation of legal pluralism. Thus, legal pluralism has been

79. Theodor Herzl, the founder of political Zionism, believed that organized religion should have a carefully circumscribed and subsidiary role in a Jewish state. For Herzl, it was the national character of Jews, not the religious character of Judaism, which undergirded the Zionist movement for national revival. See THEODORE HERZL, *THE JEWISH STATE* 15–17, 71 (H. Pordes ed. & Sylvie D'Avigdor trans., 6th ed. 1972) (1896).

80. See *supra* notes 6–25, 50–59, 71 and accompanying text.

81. F.M. Barnard & R.A. Vernon, *Pluralism, Participation, and Politics: Reflections on the Intermediate Group*, 3 *POL. THEORY* 180, 193 (1975); cf. ROBERTO M. UNGER, *FALSE NECESSITY* 41–124 (1987) (criticizing polyarchy).

82. See Cover, *supra* note 4, at 11 (inventing the term “jurisgenesis,” the creation of legal meaning).

83. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1718 (1988) (criticizing current republican revivalists’ attempt to reconcile republicanism with group heterogeneity on the ground that “[a]ffirming ongoing differences among involuntary groups appears a fatal concession, undercutting the republican project of pursuing, even aspirationally, a unitary common good”).

84. See Cover, *supra* note 4; Resnick, *supra* note 1.

defined as the antithesis of "legal centralism,"⁸⁵ which itself is described as an ideology that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."⁸⁶

What legal pluralists refer to as legal centralism, then, is simply the conventional view that the law of the polity is qualitatively different from forms of normative ordering that are found in social units outside the nation-state and exclusively warrants the nomenclature of "law." According to the legal pluralists, this is false as a matter of description.⁸⁷ Instead, they contend that law, properly understood, "is the self-regulation of a 'semi-autonomous social field.'"⁸⁸ Furthermore, semiautonomous social fields are numerous and overlapping, and therefore law and legal institutions are not "subsumable within one 'system.'"⁸⁹ The legal pluralist definition of law is thus very broad—virtually as broad as the anthropological conception of a social field, which includes "both corporate groups and less formally bounded action-arenas."⁹⁰ It embraces not only religious law, like *Halakhah*, but also the self-regulation of such diverse organizations as trade associations, professional associations, particular industries (such as the garment industry with its own customs and rules), and even shopping centers, which appear in this analysis as arenas of autonomous law or "reglementation."⁹¹ Law, on this account, abounds in diverse social organizations.⁹²

85. John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 4–5 (1986).

86. *Id.* at 3; see also Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 17 (1981) (describing the perspective of legal centralism as "a picture in which state agencies . . . occupy the center of legal life and stand in a relation of hierarchic control to other, lesser normative orderings such as the family, the corporation, the business network" (citation omitted)).

87. See, e.g., Griffiths, *supra* note 85, at 3–4 ("[L]egal centralism has long been the major obstacle to the development of a descriptive theory of law. . . . [I]t has also been the major hindrance to accurate observation.").

88. *Id.* at 38 (emphasis omitted). Though the term "semiautonomous social fields" is adopted from Sally Falk Moore, she herself maintains the distinction between the self-regulation of the state, for which she reserves the term "law," and that of all other social fields, which she designates as "reglementary activity." See SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 8, 18, 57–58 (1978). She thus does not represent the legal pluralist school of thought.

89. Griffiths, *supra* note 85, at 38–39.

90. FALK MOORE, *supra* note 88, at 29; see also Weisbrod, *Family, Church and State*, *supra* note 66, at 743 (observing the breadth of the legal pluralist conception of law).

91. See FALK MOORE, *supra* note 88, at 18; see also Galanter, *supra* note 86, at 22 n.34 (referring to literature which describes self-regulation in these settings).

92. Note how this claim about the abundance of law parallels the claim that politics, rather than being a unique property of state government, is a feature of all or most "private" intermediate associations. Such a claim is made by proponents of the direct participation

Legal pluralists offer this much as a descriptive claim. Without their conception of law, they insist, our understanding of how official law works and what it does is hindered.⁹³ Not surprisingly, a normative claim is also implicit in this conception of law. By taking extra-state "law" seriously, legal pluralism reveals the harms that result from the incursion of official state law into autonomous legal realms—harms which would not be apparent were we blinded to the existence of extra-official law.

This is not to say that legal pluralists unwaveringly favor the protection of unofficial against official law.⁹⁴ It is not even clear that that is a coherent proposition. Could anyone coherently champion *all* unofficial law? Nonetheless, by positing the existence of extra-state normative orderings, the legal pluralist perspective uncovers effects, namely, the disruption of such normative orderings, which might support moral claims against the official regimes which produce them.

These moral implications are strengthened when the descriptive thesis (positing the existence of extra-state normative orderings) is attached to the additional claim that extra-state orderings are singularly responsible for constituting such human goods as personal values, beliefs, and even the very sense of one's self.⁹⁵ For example, if we understand the *kehilah* as an autonomous

school of democratic theory, which has roots in the civic republican tradition. See, e.g., CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 45–66 (1970) (proounding a theory of political participation in the workplace as well as the polis). For criticism of this participationist claim, linking participationist theory to the thought of Harold Laski and G.D.H. Cole (the English "pluralist" theorists who may also be seen as forerunners of today's legal pluralists), see Barnard & Vernon, *supra* note 81.

93. See, e.g., Galanter, *supra* note 86, at 27 ("[A]ny major advance in our understanding of how official legal regulation works in society depends on knowing more about indigenous law and about its interaction with official law."); Griffiths, *supra* note 85, at 4 ("Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion.")

94. Marc Galanter explained:

I am not trying to turn legal centralism upside down and place indigenous law in the position of primacy. . . . Nor do I mean to idealize indigenous law as either more virtuous or more efficient than official law. Although by definition indigenous law may have the virtues of being familiar, understandable and independent of professionals, it is not always the expression of harmonious egalitarianism. It often reflects narrow and parochial concerns; it is often based on relations of domination; its coerciveness may be harsh and indiscriminate; protections that are available in public forums may be absent.

Galanter, *supra* note 86, at 25.

95. This viewpoint is embraced by "communitarians." See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* 258 (2d ed. 1984); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982); CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 84–95 (1979).

political and juridical order—as the legal pluralists would—we can see the effects of the liberal redefinition of relations between the individual and the state: the diminution of Jewish identity, the contraction of the sphere of Jewish law, and the alteration of the traditional terms of communal existence. But unless we have reason a priori to value “Jewish identity,” defined in accordance with *Halakhah*, we may not necessarily see, or be moved by, the *harm* involved in the demise of the *kehillah*. Instead of a harm, we merely may see a change.

One can take a further step and regard the demise of the *kehillah* as a harm if one holds either of the two following viewpoints. The traditional Jew, who is personally invested in perpetuating (or resuscitating) the *kehillah* and *Halakhah*, naturally holds the view that a harm results from their demise. But also endorsing this view will be one who adopts the second viewpoint, which holds that the social relations which followed the disintegration of the corporatist order display some bad characteristics—for example, alienation and anomie—in the absence of the small-scale intermediate groups that (in this view) make life meaningful.

Only by adopting this kind of explicitly normative thesis—that human goods, such as meaningfulness and a sense of self, arise exclusively in legal fields outside the state—does the legal pluralist view gain prescriptive punch. If not for that thesis, there would be no particular reason to protect fields of law outside the state. There would be no reason to assume that human needs (for example, for meaningfulness or for a sense of self) were not satisfied adequately by informal forms of association like the *Religionsgemeinschaft*, based exclusively on a confession of faith, without political or juridical authority. Nor would there be any reason to suppose that those needs could not be met by that special (and specially reviled) form of association—the state.

Legal pluralists display some ambivalence about this prescriptive assertion of the superior moral worth of the subcommunity, as opposed to the state. Cultural pluralists, however, define themselves by the centrality of this normative claim.⁹⁶ In this

96. See, e.g., Galanter, *supra* note 86, at 25. This contrast between cultural pluralists and legal pluralists carries the danger of overstatement. It may suggest that cultural pluralists are identifiable individuals who clearly define their points of view in ways that distinguish them from legal pluralists, by rejecting the notion of multiple legal cultures that forms the basis of legal pluralism. In fact, however, we are not aware of any cultural pluralists who expressly dispute the existence or the value of separate legal cultures. Instead, exponents of cultural pluralism tend not to address the distinction between legal cultures and other forms of cultural life or the relation of their viewpoints to legal pluralism.

view, pluralism means that "the affirmative value of diversity is explicitly acknowledged *and celebrated*."⁹⁷ This position rests on two basic premises. One is the normative proposition that "diversity is to be safeguarded."⁹⁸ The second is the descriptive proposition that "diversity inheres in the various perspectives of differing groups,"⁹⁹ rather than in the perspectives of individuals.

In one respect, the cultural pluralists' descriptive position overlaps with that of the legal pluralists: the existence of normative orderings in associations outside of the state is the central assumption, and object of concern, of both schools of thought. But while cultural pluralism is generally preoccupied with differences in "values,"¹⁰⁰ legal pluralism focuses exclusively on those value systems that qualify as sovereign or "legal" systems.¹⁰¹

To the extent that legal pluralists adopt a broad definition of the attributes of a legal system, their objects of protection coincide with those of the cultural pluralists. But the cultural pluralist notion of "'manyness, variety, differentiation,' as opposed to . . . the dead uniformity of Americanization"¹⁰² encompasses cultural phenomena that are not part of an integrated legal system. In this respect, cultural pluralism extends beyond legal pluralism, which is concerned solely with forms of cultural life which contain the formal features of a legal system, for example, legal codes, tribunals, and sanctions.

The example of state laws interfering with the dress code of a subgroup illustrates the practical result of this difference. Legal

Nevertheless, our suggestion is that the cultural pluralists' faith in the possibility of a unitary, official "pluralist law," embracing the cultural heterogeneity of the nation, is implicitly a form of legal centralism. This viewpoint implies that the forms of cultural life protected by cultural pluralism do not include alternative political or legal sovereignties. See *infra* text accompanying notes 139-140. Because this conclusion is an *implication*, rather than an actually expressed statement of a cultural pluralist, references to "cultural pluralists" in this Article should be understood as references to a typology, rather than to any particular authors, such as Robert Post, upon whom we rely to illustrate aspects of the cultural pluralist point of view.

97. Post, *supra* note 4, at 301 (emphasis added).

98. *Id.* at 302-03.

99. *Id.* at 303.

100. See, e.g., *id.* at 299 (concentrating on the "distinctive values" of cultural groups).

101. See Weisbrod, *Family, Church and State*, *supra* note 66, at 743. According to Weisbrod, legal pluralism "asserts that it is arbitrary to confine the term 'sovereignty' to aspects of the state and . . . argues that 'sovereignty' can be located in groups other than the state." *Id.* Weisbrod observes further that this idea of legal pluralism "must be distinguished from the idea of 'cultural pluralism,' which assumes the fact or desirability of cultural or social diversity within a single sovereign state." *Id.*

102. Post, *supra* note 4, at 301 (quoting HORACE KALLEN, *CULTURE AND DEMOCRACY* 43 (1924)).

pluralists would be concerned with the overriding of a dress code *if* the code in question formed part of a corpus of regulations backed by sanctions—for example, the Jewish practice of wearing a head-cover. In fact, the Supreme Court addressed the constitutionality of official (in this case, military) regulations prohibiting this practice several years ago in *Goldman v. Weinberger*.¹⁰³ In *Goldman*, the Court denied an army doctor's claim that army regulations forbidding the wearing of nonuniform items, including head-coverings, violated his right to the free exercise of religion.¹⁰⁴ The narrow majority opinion upholding the military regulations ignited the protest of commentators who shared the pluralist commitment to protecting the autonomy of cultural and legal subgroups, like the community of orthodox Jews.¹⁰⁵ Legal pluralists presumably would not put the same weight on the violation of the dress code of, say, a skinhead, for whom the code expressed an anarchic, individual cultural lifestyle, rather than compliance with a code of commands.¹⁰⁶ Cultural pluralists, by contrast, could be expected to see in both the case of the religious Jew and the skinhead a similar harm—not the harm of the forced violation of a religious command, but the pressure to abandon a peculiar custom.

This distinction between legal pluralism and cultural pluralism turns on the distinction between culture and law. But, for several reasons, that boundary turns out to be difficult to trace. Customs tend to acquire the force of law; but at precisely what point is an inherently controversial question. The Jewish head-covering, or yarmulke, at stake in *Goldman v. Weinberger* is a good example. Despite the widespread practice and sense of its obligatoriness among Orthodox Jews, rabbis over the centuries have disagreed about whether wearing a yarmulke is *required*.¹⁰⁷ Hence, simply

103. 475 U.S. 503 (1986).

104. *See id.* at 509–10.

105. *See, e.g.,* Michelman, *supra* note 66, at 17–55 (associating the protection of the Jewish practice with the civic republican approach).

106. We are assuming, being fairly ignorant of skinhead culture ourselves, that skinheadism does not qualify as a legal system under the legal pluralist definition of law. If we are mistaken in this assumption, substitute a hypothetical manifestation of difference in dress that has emerged more or less spontaneously, as opposed to appearing in conformity with some prescribed norms.

107. No explicit Biblical precept commands a male Jew to cover his head (although it is now a common practice among Orthodox Jews). Meir Ydit, *Head, Covering of the*, in 8 ENCYCLOPAEDIA JUDAICA 1, 1 (1971). Moreover, the Talmud (Nedarim 30b) maintains that the practice of covering one's head is optional—a view to which many medieval and early modern rabbinic commentators lent support. However, in the past two centuries, the practice of head-covering has become symptomatic and, in part, a causal agent of the denominational divisions between the Orthodox, Conservative, and Reform Jewish movements. *See id.* at 5–6.

as a matter of phenomenology, the distinction between custom and law is difficult to discern. Other theoretical developments further complicate the distinction. The legal pluralists' definition of law relies on a cultural-anthropological perspective, which likens law to culture. The cultural pluralists aim to translate cultural differences into group rights, thus converting culture into law. Both of these intellectual moves make it difficult to state the difference between the "legal" systems of which legal pluralists are solicitous, and the more general "cultural" values that motivate cultural pluralists.

Perhaps the distinction lies in the concept of "political sovereignty." Sovereignty classically has been defined as "that absolute and perpetual power vested in a commonwealth"¹⁰⁸ over its citizens and subjects. The crucial feature, for purposes of distinguishing legal systems from cultural systems more generally, is the idea of governance and the corollary notion of being subject to governance. Governance is a necessary feature of the cultural system described by legal pluralists as "law." In the legal pluralists' own terms, legal rules make up a "body of authoritative learning,"¹⁰⁹ which is *applied* to the *subjects*, usually by specialized authoritative bodies (such as courts) through a variety of specialized "processing" techniques (such as "administrative processing, record-keeping, ceremonial changes of status, settlement negotiations, mediation, arbitration, and 'warfare' (the threatening, overpowering and disabling of opponents), as well as . . . adjudication"¹¹⁰).

By contrast, governance, or sovereignty, is not a *necessary* characteristic of the subgroups which cultural pluralists seek to protect. This distinction is especially evident in the different visions of the relationship between the state and the relevant subgroups endorsed by legal pluralism and cultural pluralism, respectively. For legal pluralists, relationships between legal subgroups and the state are inherently problematic *precisely because* they involve multiple sovereignties with potentially or actually incongruous systems of governance.¹¹¹ From this perspective,

108. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 25 (M.J. Tooley trans., 1955). For a discussion of the relationship between Bodin's conception of sovereignty and his views about religious toleration, see Stephen Holmes, *Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion*, in *RELIGION, MORALITY, AND THE LAW: NOMOS XXX* 5, 29-31 (J. Roland Pennock & John W. Chapman eds., 1988).

109. Galanter, *supra* note 86, at 1.

110. *Id.* at 3.

111. *See id.* at 17 (arguing against the "habitual perspective of 'legal centralism,' a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of hierarchic control to other, lesser normative orderings" (citation

conflicts between the state and the subgroup represent conflicts between official law and unofficial law, which are intractable unless one sovereignty capitulates to the other.

By contrast, cultural pluralists aspire to a single, unified (implicitly national) body of law that "attempts to create ground rules by which diverse and potentially competitive groups can retain their distinct identities and yet continue to coexist."¹¹² The very idea that coexistence is attainable suggests that cultural groups are not seen as posing the same sort of threat to the state as a rival sovereign. Conversely, under "ground rules" which include the recognition of group rights, cultural pluralists imagine that the activities of the state need not interfere unduly with the maintenance of cultural identity. Reconciling differences in cultural "perspectives" under the aegis of a unitary political and legal system somehow seems easier than uniting different sovereignties. Thus, cultural pluralists express less concern about the dissolution of alternative structures of legal and political authority and more about the subtle threats to group identity posed by assimilation and individualism.¹¹³

The question of multiple versus unitary sovereignty, which cultural pluralists do not address directly, is of paramount concern to contemporary civic republicanism. In its most recent incarnation in legal theory, "civic republicanism" has been invoked to challenge the legal tenet of neutrality and to redefine principles of equality in a fashion that renders adjudication more permeable to claims by minority groups, including religious groups.¹¹⁴ By contrast, the focus of both

omitted)); Weisbrod, *Family, Church and State*, *supra* note 66, at 745 ("The social world is described rather as English pluralists or legal pluralists describe it, as filled with competing sovereignties and sources of law."); *see also* Resnik, *supra* note 1, at 753-59 (suggesting an alternative to the hierarchical ordering of federal and tribal courts based on the meaningful ascription of "sovereignty" to the latter as well as to the former).

112. Post, *supra* note 4, at 302.

113. *See id.* at 299-305 (distinguishing pluralism from assimilationism and individualism); Resnik, *supra* note 1, at 727-29 (describing and criticizing assimilationist policies toward Indian tribes); *id.* at 747-49 (acknowledging the assimilationist pressure resulting from enforcing individual rights against a tribal definition of group membership).

114. *See* Michelman, *supra* note 66, at 15 ("Neutral' legal standards seem to absolve their promulgators—sometimes the very judges who apply them—of responsibility for their contributions to socially unequal or conflictual outcomes."); Michelman, *supra* note 72, at 1532-37 (crafting a republican constitutional argument for striking down the Georgia antisodomy law upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986)); Sunstein, *supra* note 72, at 1550 ("The requirement of deliberation is designed to insure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals." (emphasis added)); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 72-73 (1985) [hereinafter

schools of pluralism—legal and cultural pluralism—has been on identifying loci of collective self-government outside of the state.

Civic republicanism, even more strongly and unequivocally than cultural pluralism, is committed to a unitary sovereignty: the polity.¹¹⁵ As currently invoked by legal theorists, civic republicanism borrows from pluralist thought in two different ways. First, like both legal and cultural pluralism, contemporary republican thought relies on an essentially anthropological conception of the polity as a kind of cultural group. Thus, far from transcending the “social field” of cultural, value-laden norms, official state law is understood to be *properly* normative and culturally rooted.¹¹⁶

The second incorporation of pluralist thought into republicanism is expressed in the mandate that the official legal culture

Sunstein, *Interest Groups*] (arguing that republicanism countenances a judicial examination of “public value justifications to see whether such justifications [are] in fact rooted in, or [are] merely a disguise for, existing relations of power”); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 130–38 [hereinafter Sunstein, *Public Values*] (propounding a republican argument for more rigorous judicial scrutiny to flush out discriminatory stereotypes standing behind apparently rational state interests). *But see* Derrick Bell & Preeti Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1612–21 (1988) (arguing that Michelman’s and Sunstein’s republicanism cannot really be made to accommodate minority interests because of republicanism’s need for homogeneity); Sullivan, *supra* note 83, at 1716–18 (“Affirming ongoing differences among involuntary groups appears a fatal concession, undercutting the republican project of pursuing, even aspirationally, a unitary common good.”); Iris M. Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER 57, 66–67 (Seyla Benhabib & Drucilla Cornell eds., 1987) (“[T]he idea of the civic public as expressing the general interest, the impartial point of view of reason, itself results in exclusion.”); Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 251–54 (1989) [hereinafter Young, *Polity and Group Difference*] (arguing that the civic republican ideal of transcending private differences to achieve a common will is based on norms derived from masculine experience and therefore requires homogeneity and assimilation to male norms).

115. The assumption of a unitary state is usually so implicit that it is not even stated in republican writing. It is clearly evident, however, for example, in Rousseau’s republican vision of the homogeneous city-state. *See* JEAN-JACQUES ROUSSEAU, *A Discourse on the Origin of Inequality*, in THE SOCIAL CONTRACT AND DISCOURSES 27 (G.D.H. Cole trans., 1973) (1754). Other commentators have noticed the dependency of republicanism on this assumption. *See, e.g.,* Sullivan, *supra* note 83, at 1713; Young, *Polity and Group Difference*, *supra* note 114, at 251–55.

116. *See* Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 73 (1987) (noting that republicans view law as “normative” and “constitutive of culture”); *see also* Michelman, *supra* note 72, at 1495 (referring to the historical association of republican politics with majority sentiments about morality and arguing for a progressive version of republican politics which “involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members”).

not be “imperialist” in the sense of suppressing other cultures or perspectives.¹¹⁷ Like both legal and cultural pluralists, contemporary civic republicans recognize the existence of cultural groups outside the state and the importance of their role in the formation and maintenance of values, norms, and personal identity.¹¹⁸

Yet the civic republican attitude toward the relationship between law and culture is murky. On one hand, modern civic republicans see law as culturally constituted (a cultural form) and culturally constitutive (an ingredient in forming the culture).¹¹⁹ In this respect, civic republicans resemble legal pluralists, who see law as a cultural system. (Both thus differ from cultural pluralists, who are concerned less with the anthropological conception of law than with interpreting the *content* of official legal doctrine to reflect a recognition of group rights.) On the other hand, civic republicanism diverges from the legal pluralist vision of multiple sovereign legal cultures. Civic republicanism ultimately is committed to a unitary polity, a stance which, in order to reconcile cultural diversity with legal centralism, leads to a focus on the vestigial perspectives, values, and attenuated sense of a distinctive identity that persist after the formal legal and political apparatuses of a separate culture have atrophied.

Thus, civic republicanism, like cultural pluralism, has an ingrained tendency to focus on the stuff of cultural “values,” “traditions,” and “perspectives,” rather than on separate (and separatist) legal sovereignties whose demands for autonomy are more troublesome to mesh into one embracing system.¹²⁰ In this

117. For example, Michelman characterized Justice Stevens’s opinion in *Goldman v. Weinberger* as an “imperial” stance. See Michelman, *supra* note 66, at 14. Michelman’s use of the term “imperial” is drawn from Robert Cover’s *Nomos and Narrative*. Cover contrasts the “imperial” nature of the neutral, mediating principles of a liberal, heterogeneous state with the “paideic” nature of flourishing, particularistic subgroups contained within the state. See Cover, *supra* note 4, at 13–14; see also Michelman, *supra* note 72, at 1495, 1499–1505 (advancing a vision of republican politics that is dialogic, open to diversity, and inclusive).

118. See Michelman, *supra* note 72, at 1495; see also Sunstein, *supra* note 72, at 1539–41 (expressing concern about the practices of exclusion associated with republicanism and proposing to overcome them).

119. See sources cited *supra* note 116.

120. For example, contrast Resnik’s concern—exemplary of legal pluralism—with juridical control and tribal sovereignty with Michelman’s focus on the right of a Jew in the U.S. military to wear a yarmulke. See Resnik, *supra* note 1, at 727–42; Michelman, *supra* note 66, at 5–17. Or consider Weisbrod’s interest in religious “legal systems,” Weisbrod, *Family, Church and State*, *supra* note 66, at 746, particularly Weisbrod’s interest in religious juridical control over marriage and divorce, *id.* at 753–59. Compare

scheme, individualism and assimilationism—rather than the suppression of independent sovereignty—are seen as the chief wrongs wrought by an imperialistic official law.

The rejection of individualism in favor of the view that values are created and sustained in the context of a group has been a traditional axiom of civic republicanism.¹²¹ The renunciation of assimilationism, however, represents a tenuous innovation in civic republican thought.¹²² This development is in tension with the traditional civic republican commitment to the polity as *the* primary norm-enunciating group. Like the cultural pluralists, today's civic republicans suggest that this tension can be resolved simply by having the norms of the primary group *include* the perspectives of subgroups.¹²³ In this way, civic republicanism looks at first glance like the cultural pluralists' national political philosophy. However, the traditional civic republican emphasis on the culture of the unitary polity requires more homogeneity than the cultural pluralists (who abhor assimilation) would allow.

Notwithstanding this, a number of authors have suggested that a jurisprudence based on a republican political philosophy, rather than the prevailing liberal one, would be more receptive to the claims of intermediate groups.¹²⁴ In particular, Professor Tushnet has proposed that a "reconstituted law of religion . . . draw[ing] on . . . the republican tradition"¹²⁵ would be more accommodating of nonindividualist forms of religious life¹²⁶—like, for example, the Jewish *kehilah*. This argument begins with a critique of the liberal conception of religion and intermediate institutions.

this with Post's interest—characteristic of cultural pluralism—in "the various *perspectives* of differing groups" in a multiethnic society. Post, *supra* note 4, at 303 (emphasis added).

121. See, e.g., JEAN-JACQUES ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSES*, *supra* note 115, at 163, 172–75 (stating that the essence of the social compact is that "[e]ach of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole" (emphasis omitted)); see also ROUSSEAU, *supra* note 115, at 41–42 (criticizing individualist accounts of the state of nature).

122. See Michelman, *supra* note 72, at 1506.

123. See *id.* at 1507. Michelman emphasizes a "version" of republicanism that is "inclusory" and "plurality-protecting," while still contemplating citizenship in a unitary polity. *Id.* at 1505–07. Michelman acknowledges that the "extension of the circle of citizens to encompass genuine diversity greatly complicates republican thinking about the relation between rights (or law) and politics." *Id.* at 1506. In a similar vein, Sunstein marshals the civic republican tradition to support more searching review of legislative and administrative acts that may reflect discrimination against groups. See Sunstein, *Interest Groups*, *supra* note 114, at 68–75; Sunstein, *Public Values*, *supra* note 114, at 164–67.

124. See *supra* note 114.

125. Tushnet, *supra* note 4, at 702.

126. See *id.* at 735–38.

Liberalism, according to this republican critique, cannot generate a coherent law governing the relationship between religion and state.¹²⁷ Instead, “[t]he liberal tradition accommodate[s] religion by relegating it to the sphere of private life, a sphere whose connections to public life [are] of essentially no interest.”¹²⁸ The explanation of the nature of this “accommodation” precisely parallels the historical explanation of the demise of the *kehilah*.¹²⁹ Tushnet explains that as political philosophers “developed modern liberal theory, [they] saw a terrain in which attachment to a universal nation-state had substantially reduced attachment to local institutions and in which their [Protestant] theology allowed them to remain believers while eliminating the church as an intermediate institution.”¹³⁰

As described by republican critics of liberalism, the emergent order of nation-states depended on a direct relationship between the state and the individual,¹³¹ based on the extension of the benefits of membership by the state in return for the individual’s political allegiance and obedience to legal state authority. Intermediate associations representing alternative legal orders constituted a direct threat to state sovereignty that had to be neutralized.¹³² The task of neutralization was facilitated by the liberal redefinition of intermediate associations as being either arms of the state or quintessentially private, voluntaristic assemblies, lacking any regulative function.¹³³

The republican authors of this critique further suggest that the autonomous or semiautonomous regulative subcommunity, which is excluded (if not destroyed) by the liberal conception of intermediate associations, would be better protected by a civic republican jurisprudence.¹³⁴ However, the different ways that republicans have devised to situate subcommunities in the

127. *Id.* at 730–35.

128. *Id.* at 731–32.

129. *See supra* part I.

130. Tushnet, *supra* note 4, at 731.

131. *Id.* at 730.

132. *Id.* at 730–33.

133. *Id.* at 732. Tushnet describes three roles for the intermediate associations permitted in a liberal order: “provid[ing] the matrix within which private preferences are formed;” “serv[ing] as instruments of public policy;” and “being vehicles of alliance among like-minded people.” *Id.*; *see also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1070–73, 1151–52 (1980) (asserting that intermediate institutions are defined from a liberal standpoint either as departments of the state or as purely voluntary associations, and proposing an alternative conception of intermediate associations as semiautonomous regulative communities based on a mixture of civic republican and medieval corporatist ideals).

134. *See supra* text accompanying note 126.

modern state do not solve, but simply overlook the fundamental conflict between a unitary sovereignty and multiple normative communities. Some adopt the legal pluralist recognition of the legal and political dimensions of such communities and propose a devolution of regulative power to local authorities¹³⁵—an arrangement reminiscent of the medieval corporatist order. The preferred approach of civic republicans, however, has been (implicitly) to maintain the supremacy of the official law of the state, while elaborating doctrines, methods of interpretation, and, more broadly, judicial attitudes which are supposed to be more receptive to the claims of different cultures within the state.¹³⁶ This mode of civic republicanism resembles the cultural pluralist aspiration for a national “pluralist law,” which would entail “ground rules by which diverse and potentially competitive groups can retain their distinct identities and yet continue to coexist.”¹³⁷

By relying on such a concept, cultural pluralists and civic republicans imply the possibility of resolving the conflict between the order of the nation-state and a constellation of lesser corporate orders, or between the imperatives of national sovereignty and the survival of autonomous legal orders, like the *kehilah*. Current revivalists now propose to dedicate the republican tradition to the recognition of the regulative, norm-inculcating dimension of religious communities *and* to “fit” such communities into the national order, by treating them as the “location[s] for the inculcation” of the “civic responsibility and a concern for the public interest” which are the hallmarks of republican culture.¹³⁸

In dedicating subcommunities to serve as training grounds for participation in the national political community, however, contemporary civic republicans slip into the same sort of thinking for which they took liberals to task. After all, the idea of the community as civic training ground is just another version of the reconceptualization of the intermediate group as an arm of the state—in this case as an informal branch of public education.¹³⁹

135. See, e.g., Frug, *supra* note 133, at 1149–54.

136. See Michelman, *supra* note 72, at 1495; text accompanying notes 106–07.

137. Post, *supra* note 4, at 302.

138. Tushnet, *supra* note 4, at 735–36.

139. See Sullivan, *supra* note 83, at 1721 (asserting that “private voluntary groups are poor ground for republican boot camps”).

The trouble is that the mere fact that both the republican national culture and religious and ethnic subcultures are "legal" as well as normative "fields" does not imply that the content of their laws necessarily will correspond. Nor does it imply that participation in one naturally will extend to participation in the other.¹⁴⁰ Although the "law" of an intermediate association and the law of the polity do harmonize at times, this is likely a fortuity or, even more likely, the result of relationships of interdependence between the subgroup and the dominant culture that produce "assimilation." The process of cultural assimilation may or may not include overtly coercive interactions imposed by the dominant society, such as forced conversions or the discriminatory denial of benefits. But at the point where the norms of the larger society are internalized by the subcommunity so that the laws of both "harmonize," a process of assimilation undoubtedly has occurred.

This suggests that a basic conflict exists between the legal pluralist recognition of conflicting sovereignties and a republican vision of plural "cultures" glued together by assimilation. We cannot have it both ways. The choice creates a dilemma for the civic republicans and cultural pluralists who share the perception that cultural assimilation is a harm that should not be countenanced by pluralist law. Either they must forego the commitment to the primacy of a unitary official law and embrace legal pluralism and the feudalist consequences that it seems to entail; or they must uphold that commitment by limiting the principle of toleration to the vestigial "perspectives," "traditions," and other badges of a largely assimilated identity; or, with a bit of a legerdemain, they might embrace alternative legal cultures, but only ones that are so marginal that they do not pose a realistic threat to the sovereignty and essential homogeneity of the civic state.¹⁴¹

140. Barnard and Vernon also made this point:

The attribution of mediating properties to sectional groups rests either on a mistake or an illusion. The theory is mistaken if it relies on the similarity of the processes occurring at the sectional and general levels, for the resemblance of one level to another tells us nothing about their actual relationship. It rests on an illusion if . . . the mediation is demonstrated by reading into the groups beforehand those properties which are presented as their products.

Barnard & Vernon, *supra* note 81, at 195.

141. See Tushnet, *supra* note 4, at 723-29 (noting the marginality of a religion as an indicator of a successful Free Exercise claim).

The last is the approach followed in the few cases in which the courts have deviated from the dominant individualist conception of cultural and religious associations. In the areas of religion and public education, for example, the courts have shown *some* receptivity to the view that religious and national identity alike depend on the generation and transmission of norms and values by holistic communities.¹⁴² In adopting this position, courts implicitly endorse the civic republican view that the state is a cultural group and that official law is both constituted by and constitutive of the "civic" culture. At the same time, religious challenges to public education are the area in which the judiciary has come closest to the pluralist recognition of the existence and value of heterogeneous subgroups. In *Wisconsin v. Yoder*,¹⁴³ the Supreme Court went so far as to approximate the legal pluralist view by accepting the primacy of a holistic religious tradition, which "pervades and determines the entire mode of life of its adherents," over a compulsory state education law.¹⁴⁴ In *Yoder*, the court protected the "free exercise" of the Old Order Amish religion. But similar claims by religious groups less marginal and less isolated than the Amish have not prevailed similarly.¹⁴⁵

142. The strongest recognition that the survival of a religious community depends on the community's ability to inculcate its norms in its youth came in *Wisconsin v. Yoder*, in which the Supreme Court granted the Amish an exemption from Wisconsin's compulsory school law on the ground that it "interpose[d] a serious barrier to the integration of the Amish child into the Amish religious community." 406 U.S. 205, 211-12 (1972). The Court further observed that "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion." *Id.* at 217. The Supreme Court's recognition that the polity of the United States itself is a community of values whose transmission is required in order for it to survive is repeated in many cases. For example, in *Westside Board of Education v. Mergens*, Justice Marshall asserted that the mission of encouraging participation in student clubs—including religious clubs—"comports with the Court's acknowledgment 'that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.''" 496 U.S. 226, 265 (1990) (Marshall, J., concurring) (quoting *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))); see *Bethel School Dist. v. Fraser*, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."); *School Dist. v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring) ("It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function[:] the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.").

143. 406 U.S. 205 (1972).

144. *Id.* at 210.

145. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (holding that the requirement that public school students use textbooks chosen by school authorities does not create an unconstitutional burden under the Free Exercise

The courts also have recognized nominally the "sovereignty" of Indian tribes.¹⁴⁶ But this recognition must be qualified by the relationship of dependence and domination that nevertheless exists between the tribes and the federal government,¹⁴⁷ in the same way that the judicial recognition of Amish legal and religious autonomy must be qualified by its marginality. Subgroups which are neither marginal (as are the Amish) nor subordinated by an explicit hierarchical structure of jurisdiction (as in the case of Native Americans) have not been treated as sovereign legal cultures, despite the fact that their "values" and "customs" may receive occasional recognition.

CONCLUSION

Is cultural "preservation," without an ongoing commitment to separate juridical authority or sovereignty, the most that American constitutional law has to offer its subcommunities? Is the demise of the medieval *kehillah*, or more saliently, the failure of the New York Kehillah of this century, illustrative of the levelling effect of the liberal order?

This Article has described how the transformation from medieval corporatism to nation-state eviscerated the *kehillah* form. The promises and imperatives of a liberal order were incompatible with ongoing Jewish communal autonomy—as Judah Magnes observed in the last years of the New York experiment.¹⁴⁸ Jews themselves internalized some of the liberal promises (equal citizenship) and imperatives (loyalty to the state). At the same time, a combination of internal Jewish impulses and external forces (for example, anti-Semitism) served to sustain more than a vestige of an ongoing group affiliation—more indeed than the nineteenth-century conception of Judaism as a *Religionsgemeinschaft* allowed. Challenging the view of religion as a voluntary confession of faith and free association of individuals, a variety of modes of collective, secular Jewish

Clause), *cert. denied*, 484 U.S. 1066 (1988). For an extended analysis of *Mozert* in relation to the question of assimilation in a pluralist society, see Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out . . .": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. (forthcoming Jan. 1993).

146. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58, 63 (1978).

147. See Resnik, *supra* note 1, at 674.

148. See *supra* text accompanying notes 59–61.

expression have surfaced in this century: Zionist, Diaspora autonomist, and Yiddishist, to name only a few.

The persistence of Jewish communal expression should sensitize us to the limitations of American constitutional principles of tolerance, which are based on an unbroken boundary dividing the public (legal/political) from the private (religious) realm. Perhaps, as some have suggested, American constitutional law should be reconstituted to accord greater autonomy to religious and nonreligious legal-cultural "fields."¹⁴⁹ But despite the intellectual allure of eliminating "false distinctions" between public and private, religious and nonreligious realms, our comparison of legal pluralist and cultural pluralist views suggests that the protection of autonomous legal orders cannot be achieved fully *within* the framework of a unitary national system of law. Vestiges of such orders can survive and no doubt *will* survive in a liberal regime. But to maintain that multiple legal orders could be fully respected and protected is, as the legal pluralists would surely point out, a pipe dream. The full protection of an alternative legal culture only can be obtained at the price of dismantling central political order, except in cases, like that of the Amish, where the alternative order is extremely marginal and insular. By contrast, more than a million New York Jews in the 1920s hardly satisfy the criteria of marginality and insularity. Nor would a revived *kehilah* in the future.

This example suggests why a system more sympathetic to such communal forms not only is incompatible with our current system, but also is, in certain ways, undesirable. The very "harms" wrought by the ascendance of the liberal order—the disintegration of the *kehilah*, assimilation, alienation—have played a considerable role in reshaping modern Jewish identity. Jewish culture is not a static entity, defined independently of other cultures. It was not so even in the relatively insular medieval *kehilah* form, which, after all, reflected the conception of political and social order prevalent in the host society as much as any "internal" religious doctrine. Indeed, Jewish culture continually has been reconstituted by a mixture of influences and forces emanating from both within and without. Hence, assimilation, understood broadly as adaptation to the host society, cannot be regarded unambiguously as a harm, as the cultural pluralists

149. See *supra* text accompanying notes 87–92.

and the civic republicans suggest. To do so only enforces a group right to stasis—a stasis whose conditions, ironically, are defined by an ephemeral set of authorities in response to a momentary convergence of forces.