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Dual Sovereignty in Traditional Judaism and Liberal Democracy

Cover Page Footnote

29-2

DUAL SOVEREIGNTY IN TRADITIONAL JUDAISM AND LIBERAL DEMOCRACY

*William A. Galston**

In the course of his lecture, Professor Levinson remarked: “[A]ll of us believe that there must be some limits to political authority, even if we might disagree on the source of such limitation.” This is the core principle of liberal government, and as Levinson well knows, many creeds—secular and religious—do not accept it.

One classic ground of limits is the direct rational or intuitive apprehension of moral laws. Levinson gestures toward this when he speaks of individuals subject to sovereign authority who believe that the sovereign is commanding “grotesque injustice.” As he notes, under the aegis of some theological positions, individual awareness of moral restraints can serve as limitations on divine as well as earthly sovereignty. As Abraham famously asks, “Shall not the Judge of all the earth do right?”¹ (I leave open the question, raised by David Novak, of whether there is a Jewish equivalent of natural law or right.)²

It is odd to describe reason as an alternative “sovereign”; not so when the source of governmental limits lies in principles that are divinely ordained and acts that are divinely commanded. God is sovereign—indeed, many believe, the ultimate sovereign. However, the challenge that revealed religion poses for civil government is anything but straightforward.

Speaking broadly and schematically, there are three possible relations between political and religious authority. First, political au-

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¹ *Genesis* 18:25.

² See generally DAVID NOVAK, *NATURAL LAW IN JUDAISM* (1998) (arguing that there is a Jewish equivalent of natural law or right).

thority may be comprehensively dominant over religion, which is seen as serving state power (and for this reason is often called “civil” religion). Second, and conversely, religious authority may coincide with, or comprehensively dominate, political authority, yielding some version of theocracy. Third, political and religious authority may coexist without either enjoying a comprehensive dominance. One version of this position seeks to divide social life into different spheres, dominated by either politics or faith. (Maxims such as “Render unto Caesar what is Caesar’s” provide the basis for such an understanding.) It is hard to come by such neat surgical divisions, however. More typically, the coexistence model implies overlapping and conflicting claims, generating the need for both theoretical clarification and case-specific judgment, which in constitutional democracies often takes the form of legal adjudication.³

Levinson discusses an instance of this—Justice Scalia’s reflections on the relation between his duties as a judge in a constitutional democracy and his duties to God as a Roman Catholic.⁴ If the United States Constitution were to compel him to participate actively in an act that Catholic doctrine bindingly declares to be immoral, he would have no choice but to resign his office. While the Justice insists that his duty to God takes priority, he does not assert the right to

³ See generally William A. Galston, *Religious Violence or Religious Pluralism: The Essential Choice*, in RELIGION, THE ENLIGHTENMENT, AND THE NEW GLOBAL ORDER 37, 38 (John M. Owen IV & J. Judd Owen eds., 2010). Editor’s Note: This paragraph and the following section is reprinted from the aforementioned source with additional commentary. See Matthew 22:21; see, e.g., Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1250-51 (1986) (“Though not sacral in itself, a civil religion draws on the various sacral religious traditions of a society. . . . A civil religion gathers and expresses the most deeply felt, abiding ideals and attitudes of a society’s political life. By drawing on the form and language of sacral religion it achieves a special resonance and power.”); *Engel v. Vitale*, 370 U.S. 421, 422-24 (1962) (finding that New York State’s policy of encouraging students to recite a religious prayer in school violated the Establishment Clause of the United States Constitution); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947) (discussing the use of New Jersey taxpayer funds to pay for public transportation of children to Catholic schools and reasoning that this practice does not violate the First Amendment because the amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them”).

⁴ Antonin Scalia, *God’s Justice and Ours*, Adapted from remarks made at the University of Chicago Divinity School during a conference sponsored by The Pew Forum on Religion & Public Life, available at <http://www.prodeathpenalty.com/scalia.htm> (“I am judicially and judiciously neutral) I do not find the death penalty immoral. I am happy to have reached that conclusion, because I like my job, and would rather not resign.”).

impose his understanding of God's laws on the rest of the country. On the contrary, reinterpreting the Constitution so as to eliminate the clash between divine and human law would violate his judicial oath.

This position is hardly theocratic, as some have charged. If it were, our only Catholic president would be guilty of theocracy. In his famous speech to the Protestant ministers, President John F. Kennedy did his best to minimize the tension between his presidential duties and the dictates of his faith.⁵ However, he concluded: "But if the time should ever come . . . when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same."⁶

The arguments espoused by both Scalia and Kennedy rest on an unstated premise: their faith commands them negatively—not to perpetrate evil directly—but not positively, to do whatever they can to promote the good as the Church understands it. Catholicism did not always make this distinction, which is one reason why relatively few Catholics were chosen to occupy high offices under our Constitution until quite recently.⁷

Dramatic as principled resignation always is, the clash between religious authority and high civil office does not raise the most vexing problems. While individuals in question pay a personal price, they can live freely as private citizens, and others can capably discharge the duties of the vacated offices. The cost can be higher when religious institutions are forced to choose between their mission and their convictions. In recent years, some Catholic adoption agencies have felt compelled to cease operation because they would not refer potential adoptees to gay or lesbian couples and a Catholic organization fighting international sex trafficking withdrew as a result of its refusal to refer the women it rescued to abortion providers.⁸

⁵ *Transcript: JFK's Speech on His Religion*, NAT'L PUB. RADIO (Dec. 5, 2007), <http://www.npr.org/templates/story/story.php?storyId=16920600>.

⁶ *Id.*

⁷ See *Faith on the Hill: The Religious Composition of the 112th Congress*, THE PEW F. ON RELIGION & PUB. LIFE, <http://www.pewforum.org/Government/Faith-on-the-Hill--The-Religious-Composition-of-the-112th-Congress.aspx> (last updated Feb. 28, 2011) (indicating that in 1961 Catholics made up 19% of Congress and in 2011 Catholics made up 29%); *The Religious Affiliations of U.S. Presidents*, THE PEW F. ON RELIGION & PUB. LIFE (Jan. 15, 2009), <http://www.pewforum.org/The-Religious-Affiliations-of-US-Presidents.aspx>.

⁸ See, e.g., *Catholic League for Religious & Civil Rights v. City and Cnty. of S.F.*, 567 F.3d 595, 597 (9th Cir. 2009) (involving the issue of "adoption . . . by same-sex couples and

The most fundamental clash implicates neither office-holders nor voluntary associations, but rather individual citizens. If the state orders the faithful to participate in what they regard as evil, they may have no choice but to refuse. Justice Scalia criticizes a certain understanding of democracy for suggesting that, “a democratic government, being nothing more than the composite will of its individual citizens, has no more moral power or authority than they do as individuals.”⁹ This stance, he says, fosters civil disobedience.¹⁰ And so it can. But unless one believes that civil authority and Catholic doctrine always coincide—which Scalia does not—or that in cases of conflict civil authority always takes precedence—which Scalia does not—then in principle, Catholic citizens may find themselves compelled to disregard the law.¹¹ Although the specific flash points differ, every account of dual sovereignty poses this difficulty. For instance: Few individual believers or faith communities can be satisfied with the civic republican approach, which embodies an ordering of values antithetical to most religious commitments. As the history of European nations with deep civic republican traditions shows, the effort to demote religion to purely civil status is bound to spark political conflict and, on occasion, actual violence.¹² Even when anti-clericalism abates, as it eventually did in France and throughout Europe, the systematic expulsion of all expressions of faith from the public square inevitably impinges on what most believers (and most Americans) would regard as the minimal conditions of free exercise.

The theocratic option fares no better. Whatever may be the case for homogeneous communities espousing a single faith (few of any size do so), the theocratic impulse creates grave difficulties for societies with multiple faith communities and individuals who reject religion as well. In circumstances of diversity, a serious religious establishment (as distinguished from, say, the increasingly symbolic

the Catholic Church["]); *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 476 (D. Mass. 2012) (involving the issue of abortion services referrals and the Catholic Church).

⁹ Scalia, *supra* note 4.

¹⁰ *Id.*

¹¹ See *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 891, 912 (2005) (Scalia, J., dissenting) (commenting on the tension between civil and religious law); see also Scalia, *supra* note 4 (explaining his personal views on the conflict of religion and civil law).

¹² See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 72-73 (1998) (discussing the political conflict between the secular and religious in Europe).

role of the Church of England) will inevitably use legal coercion to impose its views on faith communities that conscientiously reject them.¹³ Here again, political conflict will tend to spill over into episodes of violent resistance.

That leaves the coexistence model, a mode of plural sovereignty that rejects any comprehensive hierarchy between political and religious authority claims and that insists on horizontal relations among faith communities. By definition, this liberal option is bound to leave both theocrats and civic republicans dissatisfied, but it holds out the hope of maximizing the expressive opportunities for individuals and faith communities—and of reducing coercion to the minimum that civic order requires. As we have seen, it also requires institutions that can contain the consequences of the conflicts between religious and civil authority that will break out from time to time.

I. “CLAIMS OF POLITICS AND CLAIMS OF FAITH” IN TRADITIONAL JUDAISM¹⁴

Modern Catholicism presents a clear case of a formerly theocratic faith that has evolved theologically toward reconciliation with liberal constitutionalism. Jews who do not consider themselves bound by the *halakha* find liberal constitutionalism easy to embrace. Indeed, they have often been its most fervent defenders.

One might imagine, however, that traditional Judaism inevitably leans toward theocracy. It is easy enough to find examples of theocratic governance in Biblical texts. If traditional Judaism were unequivocally theocratic, this would create a deep gulf with liberal democratic politics. Fortunately for traditionalist American Jews, there is a long line of Biblical and Talmudic interpretation that leads to at least a qualified endorsement of government that is both secular

¹³ See, e.g., Erwin Chemerinsky, *The Need for a Wall Separating Church and State*, in RELIGION AS A PUBLIC GOOD: JEWS AND OTHER AMERICANS ON RELIGION IN THE PUBLIC SQUARE 91, 98 (Alan Mittleman ed., 2003) (discussing the need to separate government and religion).

¹⁴ See generally William A. Galston, *Traditional Judaism and American Citizenship*, in RELIGION AS A PUBLIC GOOD: JEWS AND OTHER AMERICANS ON RELIGION IN THE PUBLIC SQUARE, 127, 127-33 (Alan Mittleman ed., 2003) & William A. Galston, *Religious Violence or Religious Pluralism: The Essential Choice*, in RELIGION, THE ENLIGHTENMENT, AND THE NEW GLOBAL ORDER 37, 50-51 (John M. Owen IV & J. Judd Owen eds., 2010). Editor's Note: The following section is reprinted from the aforementioned source with additional commentary.

and limited.

Read literally, the authority established by the laws of Moses was theocratic and, if the Book of Judges is to be taken as history, was exercised theocratically for an extended period.¹⁵ Gideon famously refused the people's demand that he become king over Israel: "I will not rule over you myself; nor shall my son rule over you; the Lord alone shall rule over you."¹⁶

There was a problem, however—the Lord ruled, not directly, but through human intermediaries. What would happen when these theocratic authorities, the "judges," strayed from the true path? Samuel, the last of the judges, was a righteous man, but his sons were not: "they were bent on gain, they accepted bribes, and they subverted justice."¹⁷ The leaders of the people gathered to request that Samuel "appoint a king for us, to govern us like all the other nations."¹⁸ Samuel resisted their demands, to no avail. The elders insisted that the administration of justice and the conduct of war made kingship necessary: "We must have a king over us . . . [to] rule over us and go out at our head and fight our battles."¹⁹ In the end, the Lord said to Samuel, "Heed their demands and appoint a king for them."²⁰

Although the Lord also tells Samuel that the people's demand for a king means that "it is Me they have rejected as their king," the Bible does not characterize kingship as wrong in the same way that idolatry is wrong.²¹ Indeed, the period before kings is linked to stories of strife and disorder.²² Without a king, "everyone did as he pleased."²³ It seems that the establishment of non-theocratic authority was needed to prevent the Jewish people from swallowing one another alive. Rightly understood, kings can perform limited but critical nontheological functions: ensuring public order, administering

¹⁵ 3 THE CODE OF MAIMONIDES, BOOK FOURTEEN: THE BOOK OF JUDGES 5:1-5:31 (Julian Obermann, Louis Ginzberg & Harry A. Wolfson eds., Abraham M. Hershman trans., 1977).

¹⁶ *See Judges* 8:23.

¹⁷ *Nevi'im, I Samuel* 8.3.

¹⁸ *Id.* (internal quotation marks omitted).

¹⁹ *Id.* (internal quotation marks omitted).

²⁰ *Id.* (internal quotation marks omitted).

²¹ *Id.*

²² *See, e.g.,* 1 THE JEWISH POLITICAL TRADITION: AUTHORITY 116 (Michael Walzer, Me-nachem Lorberbaum & Noah J. Zohar eds., Yair Lorberbaum co-ed., 2000).

²³ *Nevi'im Judges* 21.11.

justice, and safeguarding the people against external danger.²⁴

As the discussion of this matter developed during the Talmudic and medieval periods, kingship became a metaphor for secular government in general.²⁵ Nissim Gerondi, a leader of the Barcelona Jewish community, argued explicitly for two “separate agenc[ies],” one to judge the people in accordance with Torah law, the other to uphold public order.²⁶ The precedent for this, he insisted, was established during the Biblical period: “[A]t a time when Israel had both Sanhedrin and king, the Sanhedrin’s role was to judge the people according to just [Torah] law only and not to order their affairs in any way beyond this, unless the king delegated his powers to them.”²⁷

Gerondi accepted that the secular authority would need to use coercion “to enhance political order . . . and in accordance with the needs of the hour, even if [the application of force] is undeserved according to truly just [Torah] law.”²⁸ He went so far as to acknowledge that “some of the laws and procedures of the [gentile] nations may be more effective in enhancing political order than some of the Torah’s laws.”²⁹ No matter, the king would correct these deficiencies, acting in the name of political order.³⁰ The secular authority, in short, has one sphere of authority, religious leaders another; and the former need not always give way to the latter in cases of conflict. The aims of Torah law may be more elevated, but the aims of secular law may be more urgent. Sometimes efforts to achieve a spiritually good life must yield to the necessity of preserving life itself.

Once the legitimacy of two authorities, one secular, the other religious, was accepted, a question necessarily arose concerning the relation between them. This question assumed particular urgency after the fall of the Jewish commonwealth and the dispersion of the Jews among the nations of the earth. Shmuel, an authority of the early Talmudic period, laid down a principle that became central to all subsequent discussion of this issue: “The law of the [secular] king-

²⁴ See THE JEWISH POLITICAL TRADITION, *supra* note 22, at 152 (outlining the civil responsibilities of a king).

²⁵ See *id.* at 115 (discussing how kings were seen in a civil context).

²⁶ *Id.* at 156-57.

²⁷ *Id.* at 159.

²⁸ *Id.* at 156.

²⁹ THE JEWISH POLITICAL TRADITION, *supra* note 22, at 158 (alteration in original).

³⁰ *Id.*

dom is law.”³¹

This might seem to give secular authority plenipotentiary power over the Jewish community subject to its jurisdiction. Over time, however, two important limitations emerged—one formal, the other substantive. In the *Mishneh Torah*, Maimonides articulated a version of the principle that we now call “equal protection,” which he used to distinguish between genuine laws and arbitrary decrees:

The general rule is: any law promulgated by the king to apply to everyone and not to one person alone is not deemed robbery. But whatever he takes from one particular person only, not in accordance with a law known to everyone but [rather] by doing violence to this person, is deemed robbery.³²

To be valid, law must comply with the requirements of formal justice. When secular authority disregards these formal requirements, it exceeds its just powers and may be criticized, even resisted, if circumstances permit. Alongside this formal restraint, there developed a substantive limitation on the content of secular law that Jews were required to obey. In the course of answering questions posed by Napoleon to the Jews of France, Ishmael of Modena observed that “[a]ll the [interpreters of Shmuel’s principle] have written that as long as the laws of the kingdom do not contradict Torah law, we must abide by them.”³³

But what does it mean to “contradict” the Torah? The maximalist interpretation would be that civil law contradicts the Torah if and to the extent it deviates from Torah law. To say this, however, would be to undermine virtually all civil law, contradicting the intention of the basic principle. The most widely accepted interpretation, historically and down to the present, is that civil law is valid when it “does not contravene an explicit statement of the Torah.”³⁴ Civil law loses its claim to be obeyed if it commands something that the Torah forbids, or forbids something that the Torah commands.

³¹ *Dina De-Malkhuta Dina*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsourc/judaica/ejud_0002_0005_0_05228.html (last visited Feb. 25, 2013).

³² 9 THE CODE OF MAIMONIDES, BOOK ELEVEN: THE BOOK OF TORTS 5:14 (Julian Obermann, ed., Hyman Klein trans., 1954).

³³ THE JEWISH POLITICAL TRADITION, *supra* note 22, at 451.

³⁴ Ovadyah Haddayah, *Does “Dina de-Malkhuta Dina” Apply to the State of Israel?*, in THE JEWISH POLITICAL TRADITION, *supra* note 22, at 477.

As Maimonides puts it:

Whoever disobeys a royal decree because he is engaged in the performance of a religious command [mitzvah], even if it be a light command, is not liable, because (when there is a conflict) between the edict of the Master (God) and the edict of the servant (the king), the former takes precedence of the latter.³⁵

And, he adds, “It goes without saying that if the king issues an order annulling a religious precept, no heed is paid to it.”³⁶

It does not follow, however, that traditional Jews are always required to disobey civil law when such conflicts arise. A few civil demands (such as mandatory idolatry) must be resisted, to the death if need be. In most cases, however, it is permissible to take into account the severity of the consequences of disobedience.

The legal structures of traditional (rabbinic) Judaism, in short, developed over a period of nearly two millennia during which Jews were a nearly powerless minority in the states they inhabited. The religious practices, such as the rituals of the Temple, that presupposed Jewish sovereignty in Israel fell into desuetude and were not revived—even after the reestablishment of a Jewish state in Israel in 1947.

During the founding period, to be sure, there were some traditionalists who urged the supremacy of religious over political authorities and who were bitterly disappointed when this failed to develop. Isaac Halevi Herzog, a prominent religious and legal authority who welcomed the establishment of the state and became its first chief rabbi, writes that he “aspired to create a powerful movement among us whose purpose would be to influence the future legislative council to include in the constitution a basic clause stipulating that the law of the state will be Torah law.”³⁷ For him, it was “inconceivable that the laws of the Torah should allow for two parallel authorities.”³⁸

But not only were modernizing Jews opposed to state imposition of Torah law; so were many traditionalist Jews who did not see how a system predicated on millennia of political powerlessness

³⁵ THE BOOK OF JUDGES, *supra* note 14, at 214 (first alteration in original).

³⁶ *Id.*

³⁷ THE JEWISH POLITICAL TRADITION, *supra* note 22, at 473.

³⁸ *Id.* at 475.

could possibly serve as the legal framework for a modern state. The result was a political order in which secular and religious authorities uneasily coexist. The rabbinate exercises total control over the “private” laws of marriage and divorce for Jews. The state exercises total control over civil functions such as economic regulation and national defense; Orthodox Jews use political power to bend civil authority toward, e.g., enforcing Torah-based laws of kashrut and the Sabbath and granting religious students exemption from military service. And then there are constant boundary disputes over questions such as “Who is a Jew?” the answer to which determines the scope of the famous Law of Return guaranteeing the rights of unimpeded immigration and instant citizenship to Jews everywhere. While it would be an exaggeration to say that Jewish traditionalism has fully made its peace with democratic pluralism, there is a rough *modus vivendi* on many points.

Many, but not all. Citing their interpretation of God’s promise to the Jewish people, some Orthodox leaders have incited religious soldiers in the Israel Defense Forces to resist the lawful commands of officials representing a democratic majority. Religious extremists have been willing to slaughter Muslims at prayer, and even to assassinate an Israeli prime minister. While the shock waves from these events restrained some of the most incendiary utterances, the problem remains.³⁹

II. THE POLITICS OF TRADITIONAL JUDAISM IN A LIBERAL DEMOCRACY⁴⁰

In most contemporary liberal democracies, these sharp, explicit conflicts are relatively rare. In the United States, especially, the “free exercise” clause of the First Amendment offers substantial protections to those seeking to live in accordance with the dictates of their faith.⁴¹ Traditional Jews therefore join many other communities of faith in urging an expansive reading of this constitutional language. In 1990, the Supreme Court handed down a decision that re-

³⁹ See Daniel J. Elazar, *Israel as a Jewish State*, JERUSALEM CENTER FOR PUB. AFF., <http://jcpa.org/dje/articles2/isrjewstate.htm> (last visited Jan. 31, 2013).

⁴⁰ See generally Galston, *supra* note 14, at 130-33 (discussing the difficulties in enforcing religious laws and man-made laws). Editor’s Note: The following section is reprinted from the aforementioned source with additional commentary.

⁴¹ See U.S. CONST. amend. I (ensuring separation of church and state).

duced protections for free exercise by lowering the standard that government must meet to justify legal interference with religious practices.⁴² Traditional Jews participated in a broad coalition to resist and reverse this decision by enacting the “Religious Freedom Restoration Act” (RFRA).⁴³ This proposal, adopted by the Congress and signed into law by President Clinton in late 1993, required government to show that its interference was made necessary by a “compelling” interest and that the proposed intervention represented the least intrusive means of promoting that interest.⁴⁴ The Supreme Court subsequently invalidated RFRA as applied to the states,⁴⁵ but upheld it as applied the federal government.⁴⁶

Liberal democracies can act in ways that either relax or exacerbate the conflict between civil and Torah law. A number of contemporary political philosophers resist the strategy of accommodation in favor of policies that emphasize the force of “civic” claims and that pursue aims thought to be broadly desirable, regardless of their impact on particular communities of faith.⁴⁷ Brian Barry, a leading representative of this tendency, published a book arguing that civil concerns nearly always take priority and that cultural and religious claims rarely constitute grounds for objection or accommodation.⁴⁸ So, for example, the public demand to prevent (alleged) cruelty to animals suffices to warrant the legal suppression of current kosher slaughtering practices. This is not even a deprivation of religious liberty, Barry asserted, for the simple reason that “nobody is

⁴² *Emp’t Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (finding that religious beliefs must still comply with civil law).

⁴³ 42 U.S.C. § 2000bb (2006).

⁴⁴ 42 U.S.C. § 2000bb-1(b) (2006).

⁴⁵ *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (stating that Congress overreached its congressional authority under § 5 of the Fourteenth Amendment).

⁴⁶ *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005) (reaffirming the feasibility of considering religious exemptions on a case-by-case basis as applied to generally applicable rules).

⁴⁷ *E.g.*, Bhikhu Parekh, *Contemporary Liberal Responses to Diversity*, in *DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 239, 246-47 (Derek Matravers & Jon Pike eds., 2003); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 219, 231 (Derek Matravers & Jon Pike eds., 2003); *see also* Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 *AVE MARIA L. REV.* 47, 65 (2010).

⁴⁸ BRIAN M. BARRY, *CULTURE AND EQUALITY* (First Harvard Univ. Press 2002).

bound to eat meat. (Some Orthodox Jews are vegetarians.)”⁴⁹ Clearly, traditional Jews must oppose all arguments of this form and urge instead that liberal democracy rightly understood embodies a presumption in favor of wide religious liberty that is overridden only in the event of a severe clash between religious practices and fundamental human interests that the state must defend. The state may prevent human sacrifice, and it may require Jehovah’s Witnesses to permit their children to receive life-saving blood transfusions.⁵⁰ But in enacting a general prohibition against the consumption of alcohol or other drugs, it must not prevent their sacramental use.

While debates over conflicts between the demands of civil law and the requirements of faith are noisy, such conflicts are relatively rare. Much more usual is the opposite case, when civil law permits what Torah law forbids. Under these circumstances, traditional Jews face a dual challenge: they must do their best to insulate their own communities against the temptations of a permissive cultural environment, and they may do what seems prudently possible to foster changes in civil law that narrow the gap with (at least the spirit of) Torah law.

I remarked earlier that living traditions contain multiple interpretive possibilities and that the challenge facing traditional Jews is to find defensible interpretations of both authoritative Jewish texts and the United States Constitution that to the greatest extent possible closes the gap between the demands of faith and the demands of citizenship. A strategy that addresses this challenge has now come into view. Following the Gerondian view, traditional Jews should acknowledge not just the instrumental utility, but also the legitimacy, of secular political institutions that parallel and complement religious authority. At the same time, traditional Jews should embrace an interpretation of American constitutionalism that is liberal rather than civic republican—a view that regards the legitimate scope of democratic political power as limited in a manner that leaves space for the exercise of practices commanded by faith, limited only by the requisites of public order and tranquility.

While I write as an American Jew, I cannot resist concluding that traditional Jews in Israel would be well advised to embrace this

⁴⁹ *Id.* at 45.

⁵⁰ *See In re McCauley*, 565 N.E.2d 411, 413 (Mass. 1991) (weighing individual interests in religion and state interests in health and well-being).

same formula. While it is legitimate to resist the incursion of state power into the sphere of religious law, it is not legitimate to co-opt state power to impose that law on others who may interpret it differently or reject its authority altogether. Nor is it legitimate to use private communal force to do so. Civil authority should do its best to accommodate traditionalists—for example, by refraining from activities that impede their full observance of Shabbat. But civil authority has no choice but to resist the imposition of religious law on public services. If observant communities wish to practice gender-separated seating in vehicles they communally own and operate, that is their business, but, they cannot rightly impose it on public vehicles whose routes cross their neighborhoods.

Because dual sovereignty does not neatly separate spheres of authority, the possibility of clashing civil and religious commands always remains. My point is that there are ways of remaining faithful to traditional Judaism while minimizing this zone of controversy. It is regrettable that many observant Jews in Israel have not seized the opportunity to mute this conflict but rather seem determined to exacerbate it. For when they do, the consequences can be disruptive, even fatal.