

SHARING SOVEREIGNTY: NON-STATE ASSOCIATIONS AND THE LIMITS OF STATE POWER^{*}

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INTRODUCTION

Much of the work on the groups we usually call “mediating” associations, including the subset we call “voluntary” associations, proceeds from a flawed premise. That premise is that voluntary associations—private groups that are neither State, nor family, nor economic enterprise—are different in some fundamental way from those other categories, particularly from the State and the business enterprise. The usual model postulates a bipolar world with the State at one end of the axis and the Individual at the other, with all the other associations in society distributed between them. This gives rise to the idea of “mediating” institutions, because in this model these associations “occup[y] a middle position” and are “interposed between the extremes;” they “interpose between parties in order to reconcile them or to interpret them to each other;” they “negotiate a compromise of hostile or incompatible viewpoints, demands, or attitudes;” and they “act as an intermediary agent in bringing, effecting, or communicating” the influences of the State and the Individual.¹

Under this view, analysis of such organizations is essentially instrumental and asks what beneficial ends mediating institutions serve in their interactions with the State and the Individual. For example, Robert Vischer emphasizes how voluntary associations are “valuable to modern American society” because they allow society to “chart a middle path between the alienating extremes of excessive individualism and collectivism,” both of which are undesirable.² In contrast, Richard Garnett focuses less on the middle ground and more on the important role of non-State associations in providing competition to the State in education and the formation of meaning,³ and acting as a counterweight—his vivid phrase is “a wrench in the works”⁴—to the State’s impulse to hegemony. Jason Mazzone’s taxonomy of voluntary associations explicitly values non-State associations to the degree that they foster participatory democracy in the State.⁵ The United States Supreme Court also emphasized the utility of

1. 2 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1402 (1981).

2. See Robert K. Vischer, *The Good, The Bad, and The Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 1019 (2004) (noting that the path between individualism and collectivism generates conflict between associations, the Individual, and the State).

3. See Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 783 (2001) [hereinafter *Quiet Faith*] (questioning whether it is possible for religion to be completely removed from the interests of the State); Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849-50 (2001) [hereinafter *Henry Adams’s Soul*] (focusing on whether the government’s regulation of non-state associations’ role in education is overly burdensome).

4. *Henry Adams’s Soul*, *supra* note 3, at 1853-54.

5. See Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 748-58 (2002)

such groups by stating that “the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”⁶ All of these writers share the idea that for purposes of civil society these voluntary associations are, in Vischer’s words, “important relationally.”⁷

This instrumental approach leads to two *practical* difficulties. First, the effort to foster the social goods that non-State associations create by justifying them as valuable instrumentally—by focusing on their effects on the State and Individuals—is unlikely to be successful. Vibrant organizations capable of resisting the State and forging alternative meanings that can compete with those officially sanctioned by the State cannot be kept as plants in a carefully tended garden, fertilized and pruned as the gardener sees fit. The State—even an inclusive, democratic one—is not, perhaps, the group best situated to decide which organizations are or are not socially useful.

The second practical difficulty with these theories is that an artificial distinction between different types of groups puts undue emphasis on some kinds of organizations and ignores others. The family, the State, the church, and the business enterprise have historically been the primary forces creating individual identity and our general culture. All other associations in society, while certainly important, pale next to these. It is not a coincidence that much of the legal history of the twentieth century has been the story of the State’s campaigns to bring the family and the business enterprise more firmly under its control⁸ and to marginalize and trivialize religious associations.⁹ Yet business enterprises are regularly excluded

(arguing that the Constitution safeguards and facilitates the ability of non-State associations to work together).

6. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

7. See Vischer, *supra* note 2, at 952 (stating that the import of the relationship between associations, the Individual, and the State provides associations the power to serve mediating roles).

8. Mary Anne Glendon has pointed out the interesting parallel developments of family law and employment law during the 1970s, in which the State began enacting no-fault divorce laws at the same time it began replacing the old employment-at-will doctrine with the modern concept of unjust dismissal. See MARY ANNE GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 3-7 (1981). On the surface this is paradoxical—the State is making it easier for any dissatisfied party to terminate a family relationship but harder for a dissatisfied party to terminate an employment relationship. But both developments resulted in strengthening the State at the expense of each institution. By permitting no-fault divorce, the traditional family unit was weakened, and the power of the State over family members (including child custody and disposition of family assets) greatly increased. By restricting employment at will, the State increased its power over businesses by subjecting more of their internal operations to State control.

9. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (Anchor Books

from discussions of mediating institutions,¹⁰ even though they have enormous impacts in shaping our culture, our political landscape, and even the personal identities of Individuals. To the extent we seek entities that can develop meanings that can conflict and compete with those of the State, or act as a “wrench in the works” of the State’s drive for hegemony, or even act as an intermediary that helps the Individual deal with the faceless world, business enterprises fit the bill even better than most voluntary associations.

The observation that all human organizations are important because of their relations with other organizations has some truth to it, but as a building block for a theory of non-State associations the observation is unsound. As a *theoretical* matter, it draws distinctions between entities that are unwarranted, according a theoretical primacy to the State that is undeserved and unnecessary. The bundle of overlapping, only partially coordinated, and frequently conflicting associations we usually reify as “the State” is not fundamentally different from other organized human groups, and its primacy in modern society is more a result of a particular level of technology and the ability of those who control State associations to systematically break down their rivals. Similarly, the associations we call “families” and those engaged in economic enterprises are not substantially different in their societal effects from the voluntary associations. In Frederic Maitland’s words, there is a “genus” of which

1994) (1993) (demonstrating how modern American political trends undermine the importance of religious beliefs).

10. See ROBERT A. NISBET, *COMMUNITY AND POWER* 98-107 (1962) (placing voluntary associations in opposition to the alliance of the State and capital); see also PETER BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 158-59 (Michael Novak ed., 2d ed. 1996) (combining the State and market enterprises into “megastructures” to which voluntary associations stand in opposition); cf. JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 130-33 (1992) (discussing the work of Talcott Parsons, whose concept of society viewed voluntary associations as a sphere of interaction between the State and the market); RICHARD A. COUTO & CATHERINE S. GUTHRIE, *MAKING DEMOCRACY WORK BETTER: MEDIATING STRUCTURES, SOCIAL CAPITAL, AND THE DEMOCRATIC PROSPECT* 38 (1999) (explaining how voluntary associations have protected liberty and community from government policies and market capitalism). See generally David E. Price, *Community, “Mediating Structures,” and Public Policy*, 62 *SOUNDINGS* 369, 391 (1979) (arguing that the State cannot be the “prime creator of community life,” and that policymakers must think responsibly about the ethical impacts of community organization); David L. Sills, *Voluntary Associations: Sociological Aspects*, in 16 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 362, 363-64 (David L. Sills ed., 1968) (excluding organizations that function in the market from consideration as voluntary associations); Leonard L. Silverstein, *The Third Sector: Commission on Private Philanthropy and Public Needs*, in *AMERICA’S VOLUNTARY SPIRIT: A BOOK OF READINGS* 299, 307-13 (Brian O’Connell ed., 1983) (distinguishing the role of the “third sector” from that of the State and market-oriented firms by arguing that voluntary associations both support and conflict with the State and business entities); David Horton Smith, *The Impact of the Volunteer Sector on Society*, in *AMERICA’S VOLUNTARY SPIRIT: A BOOK OF READINGS* 331, 338-41 (emphasizing the impact the voluntary sector has on sovereignty and accountability of dominant institutions of government and business).

economic and non-economic organizations, such as Microsoft Corporation, the Roman Catholic Church, the National Association for the Advancement of Colored People, and the Social Security Administration, are merely “species.”¹¹ Sociologist Robert MacIver calls such groups “great associations,” all of them part of the community but none of them coextensive with it.¹²

The goal in this Article is to sketch and defend a view of organizations that is fundamentally different from the instrumental. To do this, I will first need, in Part I of this Article, to reconsider widely held but wholly unsupported assumptions about the State and its relations with other organizations in society. Much of this analysis will rest on the idea of legal “pluralism.”¹³ In Part II, I will look closely at the idea of “sovereignty” as it applies to the State. I will argue that the idea that one particular group of organizations in society—the ones we consider “the State”—enjoy all of the sovereign powers in society is neither logically required nor supported by practical experience. With sovereignty decoupled from the State, Part III will then outline an approach to the relationship between State and non-State organizations that we might think of as “multilateral associational relations.” I will conclude by arguing that this multilateral approach not only better recognizes the inherent dignity of these other organizations, but also has the practical advantage of being the best way to foster the instrumental benefits we prize.

I. RECONSIDERING THE ROLE OF THE STATE AND OTHER ASSOCIATIONS IN DEFINING COMMUNITY

The first piece of my present argument depends on the claim that the State is neither a special institution that constitutes the national community nor is it the embodiment of popular sovereignty in society. In MacIver’s terms, the State is not *the* community but is an association *within* the community, and is not fundamentally different, except in purpose, from the

11. See Frederic William Maitland, *Translator’s Introduction* to OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE*, at vii, ix (Frederic William Maitland trans., Cambridge Univ. Press 1968) (1900) (noting that State and Corporate species “seem to be permanently organized groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we ourselves are not the slaves of a jurist’s theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species.”).

12. See R.M. MACIVER, *THE MODERN STATE* 165-82 (Oxford Univ. Press 1932) (1926) (describing how great associations such as the Church and the family have an inner-life that is autonomous of the State).

13. The “pluralist” view, that law is not created by the State, but rather arises out of many institutions within society, and that the State has no monopoly on legal meaning is discussed in Part IV.A, *infra*.

other great associations.¹⁴ MacIver's notion may strike some as wrong. After all, States are different—they possess military force, interact with other States, and unlike other associations, States enjoy “sovereignty” within their territories. Sovereignty implies not merely that the State is different from other associations but also that it is superior. A historical analysis of the idea of the sovereign state helps illustrate this point.

A. *The Idea of the State*

The modern idea of the sovereign State as a fundamental building block of the world is, in fact, a very recent artifact.¹⁵ As Daniel Philpott has shown, the sovereign State resulted from the Protestant need to establish legitimate authority for secular princes to resist the Catholic Church's own claims of overarching authority.¹⁶ This occurred at the same time as the rise of the idea of nationalism (roughly the 17th to the 19th centuries) and resulted in the modern nation-State.¹⁷ That State, with its claims to be the embodiment of the national community, is a concept so natural to most of us that we find it hard to believe that it would have been viewed as not merely strange, but entirely absurd just a few hundred years ago.¹⁸ The medieval world was not a world of States and Individuals but a web of overlapping sovereignties, each strictly circumscribed, with no one association capable of controlling the others.¹⁹

Consider the first modern superpower. The sixteenth century “Spanish Empire” of Charles V and Philip II does not remotely resemble a bipolar Individual/State world.²⁰ The empire was an expanse of unrelated lands

14. See *id.* at 480-86 (theorizing that the State is a common channel that operates to serve all facets of social life).

15. I have explored this point before in Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1635-43 (1999).

16. See DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* 28 (2001) (arguing that the authority of the Catholic empire was one of several key elements that shaped the development of global society).

17. See E. J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780* 18-19 (2d ed. 1992) (describing how the concept of the “nation” in the nineteenth-century had grown into a collective sovereignty that constituted a body of citizens and their representative political expressions).

18. See JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* 13, 30 (Cambridge Univ. Press 2d ed. 1914) (1896) (noting that the importance of the monarchy and the aristocracy in medieval times would have made it difficult for medieval scholars to conceptualize sovereign state power as it exists today).

19. See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 117-20 (1992) (describing how the rise of urbanization from the twelfth to fourteenth centuries led to the proliferation of scattered nation-states in western Europe); FIGGIS, *supra* note 18, at 38 (attributing the international struggles of the seventeenth century to earlier controversies between papal and monarchical authority).

20. See generally HENRY KAMEN, *EMPIRE: HOW SPAIN BECAME A WORLD POWER, 1492-1763* 49-56 (2003) (describing King Charles V's struggles to restructure the Spanish Government in order to better govern Spain's increasingly expansive territories).

with different languages, cultures, religions, and customs. These were linked together by a network of ancestral property titles, religious sanctions, personal loyalties, and private enterprise, in which merchant banks or the Church frequently paid private contractors to provide such rudimentary State services as military defense and foreign conquest.²¹ The churches, universities, merchant banks, companies of *condottieri*, great nobles, and native chiefs who made up the Empire were not “mediating institutions,” but rather they were, to a large extent, sovereign entities uncontrolled by the Crown.²² The very recency of our concept of the State suggests that we need to be careful in describing its primacy as natural.

In the medieval ages, people viewed the world as under the authority of Christ, with the human authorities exercising power in His name through the “two swords”: the “spiritual” and the “material” or “temporal.”²³ As it happens, the doctrine of the single temporal authority was, in the medieval world, almost entirely theoretical. For example, when Emperor Frederick I claimed the direct right to rule in God’s name without being subject to the Pope,²⁴ his claim was more aspirational than real. His Holy Roman Empire was a welter of thousands of entities, some temporal and some spiritual, without common language, laws, or culture, except that which the Church provided, each with aspects of their sovereignty that he was powerless to affect.²⁵ It was not until the turn of the sixteenth century—ironically the time that the unified “spiritual sword” of the Church began to crack—that European kings could begin to give life to the idea of a unified temporal sword. At that point, changes in technology and finance began to give kings a major military advantage over their rivals.²⁶ They found the old

21. *See id.* at 50, 54 (providing a historical analysis of how during the first century or two following Columbus’ arrival in America, the Spanish state was essentially a loose alliance of small polities, local oligarchies, and private enterprises).

22. *See id.* at 53 (noting that people in the Spanish territories in the sixteenth century resisted the idea of a universal monarchy).

23. *See* Pope Boniface VIII, *The Superiority of the Spiritual Authority*, in THE PORTABLE MEDIEVAL READER 233, 233-36 (James Bruce Ross & Mary Martin McLaughlin eds., 1949) (discussing how the spiritual sword, wielded by the priest, and the temporal sword wielded by knights and kings, are ultimately controlled by the power of God).

24. *See* Frederick Barbarossa, *The Independence of the Temporal Authority*, in PORTABLE MEDIEVAL READER 259, 261 (James Bruce Ross & Mary Martin McLaughlin eds., 1949) (proclaiming that “whoever shall say that we received the imperial crown as a benefice from the lord pope, contradicts the divine institutions and the teaching of Peter, and shall be guilty of a lie”).

25. Powerless in the legal sense, at least. Judicious use of subsidies, preferments, and brute force could sometimes accomplish change in specific circumstances.

26. In the twelfth or thirteenth centuries, a collection of barons could easily field an army as professional and well-equipped as the king—and they often did. By the turn of the sixteenth-century, this became impossible. This is due in part to the appearance of the cannon, which was first used by the Turks in the successful siege of Constantinople in 1453, and to the development of firearms, which over time made the armored horsemen and bowmen of the nobles much less valuable. *See* Richard Holmes, “Villainous Saltpetre”, in THE WORLD ATLAS OF WARFARE: MILITARY INNOVATIONS THAT CHANGED THE COURSE OF

idea of a unified temporal sword a useful propaganda device in their campaigns to crush the nobles and control their own merchants.

The “temporal sword” evolved into the “divine right of kings,” the claim that all sovereignty was in the person of the monarch.²⁷ Shorn of its religious aspects, it became the concept of “indivisible sovereignty” and the idea that there must be one person or group with ultimate unified sovereignty within any State.²⁸ The idea powerfully influenced English thought and much of the modern world²⁹ through the work of Thomas Hobbes.³⁰ Harold Laski characteristically described that world-view:

[W]e cannot avoid the temptation that bids us make our State a unity. It is to be all-absorptive. All groups within itself are to be but the ministrants to its life; their reality is the outcome of its sovereignty, since without it they could have no existence. Their goodness is gained only through the overshadowing power of its presence. It alone, so to speak, eternally is; while they exist but to the extent to which its being implies them. The All, America, includes, ‘implicates’ in James’ phrase, its constituent states. They are one with it and of it—one and indivisible. Each has its assigned place and function in the great Whole which gives

HISTORY 70, 70-72 (Richard Holmes ed., 1988) (discussing the increasing importance of firearms in warfare during the Reformation). Kings, who had larger financial resources than most of their nobles, could afford the new siege trains and musketeers that gave them a decisive advantage. Thus, from 1066 to 1485, for example, virtually every English monarch had to weather serious uprisings among the nobles, and many of them—Stephen, Henry II, John, Henry III, Edward II, Richard II, Henry VI, Edward IV, and Richard III—were at one point or another killed in battle, captured, defeated militarily, forced to flee the country, or compelled to make concessions by military force. But from ascension of Henry VII in 1485, English monarchs had few difficulties putting down rebellious subjects until control of the central government power passed to Parliament in the mid-seventeenth century. The same process was happening at the same time in other countries. In France, the power of the nobles was largely curbed over the reign of Louis XI, who died in 1483, by which point nearly all of France was under effective royal control, while in Spain the joining of the crowns of Castile and Aragon in 1479 under Ferdinand and Isabella led to the unification of Spain under central royal authority within little more than a decade. After this, the risk that a handful of disgruntled nobles could overthrow the king was small; the later wars that challenged royal authority were no longer baronial squabbles but great popular causes, like the English Civil War, the French Wars of Religion, and the Dutch War of Independence from Spain.

27. See FIGGIS, *supra* note 18, at 13-14 (analyzing the relationship between sovereignty and the supremacy of papal and monarchical authority during the middle ages).

28. See JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 80-83 (M. J. Tooley trans., The MacMillan Co. 1955) (1576) (introducing the phrase “indivisible sovereignty” and discussing the roles officers of state play in sovereign governmental bodies).

29. Edmund Sears Morgan presents an interesting, if rather cynical, take on this development of popular sovereignty. EDMUND SEARS MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13-15, 58-59 (1989) (arguing that the rise of popular sovereignty was effectively a fiction designed to cover continued elitist governance).

30. See D.B. Robertson, *Hobbes’s Theory of Associations in the Seventeenth-Century Milieu*, in *VOLUNTARY ASSOCIATIONS: A STUDY OF GROUPS IN FREE SOCIETIES* 109, 109 (D.B. Robertson ed., 1966) (stating that Hobbes considered the proliferation of voluntary groups in the seventeenth century dangerous to the sustenance of the monarchical state).

them life. This is essential; for otherwise we should have what Mr. Bradley calls 'a plurality of reals'; which is to destroy the predicated unity.³¹

But as Laski recognizes, his argument is still much more theological (one with roots in such thinkers as Dante, Aquinas, and Boniface VIII) than it is a description of the real world.³²

It is a common view that the State is the sole embodiment of a community. It has been in the interest of State officials to insist on such an idea. But we must question whether there is any real difference between, for example, the private British East India Company, which controlled most of a subcontinent,³³ and the present government of Somalia, which controls virtually nothing.³⁴ By insisting on such a distinction, we may be, to some degree, Maitland's "slaves of a jurist's theory"³⁵ or even slaves of the theologians.

There is a very old strand of thought that has, over the last 200 years or so, stood in opposition to the idea that the State is the embodiment of the community and the unified expression of its sovereignty. Some of that thought is present in the structure of the original United States Constitution, with its talk of powers "delegated to" the national government, or "reserved" to the States or, more obscurely "to the people."³⁶ It evinces a notion that the State and the civic polity are not identical.³⁷

This school of thought is usually called "pluralist," and it implies the

31. HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 1 (1917).

32. *See id.* at 3-4 (conceding that the monistic interests of citizens are subject to "the reality of the State's personality").

33. *See* PERCIVAL GRIFFITH, *THE BRITISH IMPACT ON INDIA* 143-53 (1952); 1 SIR WILLIAM WILSON HUNTER, *A HISTORY OF BRITISH INDIA* (1899) (describing the origins of the Company's control of the subcontinent); *see generally* JANICE E. THOMPSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1994) (discussing the relationship between "private" and "public" uses of force in European colonial expansion).

34. Currently, the "government" of Somalia is actually in Kenya because it controls no part of the country, which is "a patchwork of fiefs divided among armed militias representing the various clans." Marc Lacey, *Somalia Leader, in Kenya Exile, Asks U.N. to Help Disarm Militias*, N.Y. TIMES, Nov. 20, 2004, at A6; *see generally* ANNA SIMONS, *NETWORKS OF DISSOLUTION: SOMALIA UNDONE* (1994) (tracing the disintegration of Somalia).

35. Maitland is referring to the process whereby individuals tend to conform their observations of reality to their preexisting notions. If we start from the idea that there is some kind of unified, singular sovereignty, we will interpret institutions in that light. If we start by observing reality, however, we would be hard-put to derive any such idea from the conflicting and contradictory mechanisms that we see in the real world. Maitland, *supra* note 11, at ix.

36. U.S. CONST. amend. X.

37. Such a view is not a contemporary phenomenon; it can be seen in James Madison's view of the conflicting groups within the Republic. *See* THE FEDERALIST NO. 10, at 16-23 (James Madison) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1787) [hereinafter THE FEDERALIST NO. 10] (describing the role of the republic to prevent factions of citizens from imposing their views on those outside of the faction).

idea that the sovereignty of any community is not unitary but is exercised jointly by any number of associations within the society. It has never been a popular idea, but it has never quite died out, even in the face of the modern mega-State. In Europe and America, it remained alive in the works of such writers as Maitland, Laski, Otto von Gierke,³⁸ John Neville Figgis,³⁹ Mark DeWolfe Howe,⁴⁰ Robert MacIver,⁴¹ and Robert Cover,⁴² all of whom have, in the face of the monistic State, stubbornly held to a vision of associational pluralism.⁴³ Howe, perhaps, said it most plainly:

The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.⁴⁴

The key word here is "entitled." The issue is not one of granting "limited sovereignty" from the State to certain kinds of associations,⁴⁵ but rather it is one of recognizing that associations have a right to be left alone that is as fundamental as the similar rights enjoyed by the Individual.

Our modern minds have substituted one picture of the world for another (the sovereign State for the unified temporal sword), but this picture still does not reflect the reality.⁴⁶ Even in our modern society, the concept we call the State is not a unified entity at all. Rather, it is an aggregation of

38. See OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* 70-79 (Ernest Barker trans., Beacon Press 1960) (1868) (discussing the federalist interpretation of the role of associations in society as being equal to and independent of the State).

39. See FIGGIS, *supra* note 18, at 256-66 (concluding that the medieval belief that the monarch was divinely appointed was necessary to transition government away from the influence of the Church and towards a more pluristic political structure, of which the Church and the government were important components).

40. See Mark DeWolfe Howe, *The Supreme Court, 1952 Term-Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91-92 (1953) (claiming that despite distinguishing between the liberties afforded to associations and individuals, the mere fact that the Court recognized certain liberties due to organizations represented "a step towards pluralism").

41. See MACIVER, *supra* note 12, at 165-82 (discussing the relationship between the state and "great associations" and concluding that each are equally autonomous).

42. See Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 61-62, 67-68 (1983) (claiming that both government and other institutions impact the interpretation of the laws of the State).

43. I have previously outlined the connections among many of these writers, with a particular emphasis on Cover. See Snyder, *supra* note 15.

44. Howe, *infra* note 40, at 91.

45. Cf. Vischer, *supra* note 2, at 1020 (arguing that although associations have a degree of autonomy that allows them to "facilitate shared meaning among its members," such autonomy is not without bounds). Associations operate within the limits set forth by the State, particularly in areas where the State has a pressing interest. *Id.* They function as bridges between the State and the individual, and as such are accountable to both. *Id.* This notion is consistent with the idea of limited sovereignty. *Id.*

46. See generally C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE* (1964) (providing a useful comparison of the world-pictures of the medieval and modern worlds).

things tangible (people, land, goods) and intangible (history, ideals, culture) organized for particular purposes. It is an association of people and things—more accurately, a *group* of associations, “a loose coalition of more or less independent collectivities,”⁴⁷ which frequently overlap and not infrequently conflict with each other. We use the term “State” as a handy euphemism for this network of associations.

And these State associations are not easily distinguishable in their attributes from other associations. De Tocqueville famously observed that in 1830s America, voluntary associations played a much larger role than they did in Europe.⁴⁸ Faced with a problem, the French tended to turn to the government, the British to their aristocracy, while Americans formed associations to deal with the problem.⁴⁹ This may suggest something about a uniquely American role for these associations,⁵⁰ but it also reveals that the State and voluntary associations can interchangeably perform (and have performed) many of the same functions, including the maintenance of

47. Meir Dan-Cohen, *Between Selves and Collectivities*, 61 U. CHI. L. REV. 1213, 1215 (1994) (explaining that this view of the State stems from the enormous scope of government operations).

48. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 504-06 (Harvey C. Mansfield & Delba Winthrop eds., trans., Univ. of Chicago Press 2000) (1835) (exemplifying how Americans, unlike Europeans, turn to voluntary associations such as the Church to achieve their self-interests).

49. See *id.* at 250.

50. The heavy reliance on associations in America may be misleading. After all, there was no aristocracy in the young United States and the legal structure set up for the government was designed to be feeble, so anything requiring concerted action required action by organized non-State groups. Whether this marks some uniquely “American” attachment to non-State organizations, or simply reflects the particular structural constraints of America before the Civil War is unclear. Earlier generations in America had little difficulty in consigning large responsibilities to government. As Professor Christopher Wolfe has noted:

In early America, the legitimacy of morals legislation was widely accepted. Tocqueville, in *Democracy in America*, points out that colonial penal laws, derived largely from Scripture, were very rigorous (at least on paper): “The chief care of the legislators in this body of penal laws was the maintenance of orderly conduct and good morals in the community; thus they constantly invaded the domain of conscience, and there was scarcely a sin which was not subject to magisterial censure.” He goes on to mention laws regarding rape and adultery, fornication, idleness and drunkenness, (injurious) lying, and requirement of attendance at religious services (and prohibition of nonconforming religious services). He adds that “the zeal for regulation induces him [the legislator] to descend to the most frivolous particulars: thus a law is to be found in the same code which prohibits the use of tobacco.”

Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 69 (2000) (internal citations omitted). Thus, we may be attributing to those antebellum Americans a preference for voluntary action when what we actually see is a lack of resources for any other kind. Cf. Hernando De Soto, *What’s Wrong With Latin American Economies*, REASON, Oct. 1989, at 39-40 (noting that a sociologist visiting Peru might erroneously conclude that Peruvians “prefer” to work in smaller family-dominated firms rather than larger corporate entities, but in fact the predominance of family firms reflects nothing more than the lack of an efficient and honest legal system that would enforce promises among strangers).

public order and defense. Much of the change in voluntary associations over the last hundred years can be explained more by the fact that many of their functions—providing charity, education, or life insurance, offering public entertainments, building roads—have been taken over by more efficient providers, usually the State or a business enterprise. The increasing move to contract out services previously seen as public to private organizations further blurs the distinction.

The features that many commentators find in voluntary associations are also found in State associations. Vischer, for example, lists four characteristics of the mediating institutions he studies: identity, expression, purpose, and meaning.⁵¹ Yet State associations seem to embody each of these values at least as well as most of the groups that fit any of the standard definitions of voluntary associations.

The State certainly provides *identity* because it invites “individuals to join together to pursue or maintain a common identity.”⁵² Especially in the wake of the destruction of the World Trade Center and the 2003 war in Iraq, it is difficult to argue that membership in the American State is unimportant to Americans’ sense of their individual identity. With respect to *expression*, the State provides “a voice in the world” for its “members’ views and values”⁵³ in thousands of ways, from encouraging reading and discouraging abortions, to preserving the wilderness.⁵⁴ As to *purpose*, the State enables its members to “join together in pursuit of a common purpose,”⁵⁵ whether that purpose is waging war, caring for the poor, or preventing subdivision lots less than one-half acre in size. And as for *meaning*, which Vischer equates with autonomy, if it is true that “associations require as much autonomy as possible to pursue their members’ chosen priorities and values,”⁵⁶ and that this allows them to develop their own meanings, it is hard to find a more autonomous entity than the State.

Nor is the “mediating” function of non-State associations different from the role that the State itself plays. Certainly the family, the church, the business, and the voluntary organization all mediate between the State and the Individual. But these organizations all mediate with each other in every

51. See Vischer, *supra* note 2, at 960 (noting that these values are actually subcategories of the tension between associations, the Individual, and the State).

52. *Id.* at 965.

53. *Id.* at 978.

54. The State’s speech can have at least as powerful an effect on public discourse as that of any other organization. See, e.g., Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 993-96 (1984) (arguing to restrict the State’s power to communicate, particularly in areas where the State’s biases are not countered by alternative perspectives).

55. Vischer, *supra* note 2, at 986.

56. *Id.* at 1000.

conceivable combination—the family with the church, the church with the voluntary association, and the voluntary association with the business. The State also mediates with all of them. The voluntary association may step between the Individual and the State, but the State may step between the Individual and the voluntary association.⁵⁷ The true picture is not a pole, with the State on one end and the other associations in the middle, but a dense web, where all the various associations, State and non-State, interact with and influence each other, and in which variant meanings and value systems flourish like plants in a tropical garden.⁵⁸

Some might object that the State is different from other types of associations in that it is not voluntary. To live within the United States is to be subject to the American State, but that distinction is more a matter of degree than it is of kind. Certainly the State is an association that is more difficult to exit than, for example, the Sierra Club or a bowling league, but so is a family, a church, or the market economy. Most State associations are, in fact, voluntary, even for those who reside within the State. I have no obligation to join the Coast Guard or work for the State of California. If I do not like the Fort Worth City Council, I can move to Arlington. If I do not choose to be a Texan, I can move to New Jersey. If I decide I no longer want to be an American, I can go to France or, if I prefer someplace lacking any resemblance to a State, Somalia. True, unless I move to Somalia, I will have to live somewhere within *some* kind of State, but that does not make my choice of states involuntary. Biology forces all human beings to be part of a family, and circumstances force people and organizations to be part of an economy; membership is no more voluntary than is the membership of the State.⁵⁹ The voluntary nature of membership, thus, is not a ground on which we can distinguish States from other kinds of entities.

B. The Role of Business Enterprises

In our modern world business enterprises perform much the same functions as the state and voluntary associations. The exclusion of business enterprises from most discussions of voluntary associations is interesting,

57. Compare *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (compelling a private non-State association to admit women members), with *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (permitting a private non-State association to exclude homosexuals).

58. See Snyder, *supra* note 15, at 1708 (arguing that law is a product of the relationships between different groups and the procedures groups use to interact with each other).

59. See MACIVER, *supra* note 12, at 483-84 n.1 (noting similarities between the membership of the State, familial relations, and a connection to an economic system). MacIver adds: “If the [S]tate is unique in its own way, so are the other associations in their ways. And if the [S]tate is absolutely necessary to our social life, so are they also.” *Id.* at 484.

given that the Walt Disney Co., for example, is as much a voluntary association as Amnesty International—both organizations are aggregations of people and property working together to accomplish particular purposes. If we consider Vischer's factors again,⁶⁰ businesses and their products, are important in shaping the identities of Individuals. Working for Sullivan & Cromwell or General Electric or the *New York Times*, riding a Harley-Davidson motorcycle, wearing Nike shoes, or drinking Starbucks coffee all influence and shape the identity of the Individual.⁶¹ Business enterprises are also relentlessly engaged in expression—some of it designed to sell products, some of it designed to influence the political process, and some of it designed to do nothing more than promote a worthy cause. Business associations plainly permit their members to join together in a common purpose, and their purposes are furthered by granting them substantial autonomy.

The exclusion of business enterprises from the discussion is probably best understood not as a reflection of any analytical difference but rather as the political and aesthetic preferences of those who have written on voluntary associations. Many of these writers tend to work backwards. They see something that they find valuable, whether participatory democracy, religious belief, or small-town values. They note that these values are reflected or developed by certain associations, such as the NAACP, the Baptist church, or the suburban homeowners' association. Because they view these institutions instrumentally, as a means to achieve the desired value, they tend to develop theories that these groups (though not others) should be favored by (or at least protected from) the State.⁶²

Thus, Robert Nisbet and Richard Couto both see the alliance of capital and the State as a threat to workers and social justice,⁶³ so they presumably have little interest in an associational theory that would extend protection to

60. See *supra* notes 51-56 and accompanying text (discussing how identity, expression, purpose, and meaning are common to both State associations and voluntary associations).

61. See generally VIRGINIA POSTREL, *THE SUBSTANCE OF STYLE: HOW THE RISE OF AESTHETIC VALUE IS REMAKING COMMERCE, CULTURE, AND CONSCIOUSNESS* (2003) (describing the interactions between the personal preferences of Individuals and the businesses who seek to meet such preferences).

62. See NISBET, *supra* note 10, at 283-84 (concluding that for society to truly be free, the State must embrace associations outside of the State which give people a sense of identity and thus encourage "a pluralism of functions and loyalties in the lives of its people"); COUTO & GUTHRIE, *supra* note 10, at 65-66 (claiming that the fear of despotism held by the Founding Fathers led to the creation of a government with multiple checks and balances intended to enable Americans "to pursue life, liberty, and happiness *without* government, rather than through its actions").

63. See NISBET, *supra* note 10, at 204-11 (illustrating the dangers accompanying the assimilation of government and business through a discussion of totalitarianism, with a particular focus on Nazi Germany); COUTO & GUTHRIE, *supra* note 10, at 56-58 (claiming that limited government regulation of the free market system is necessary to ensure an adequate amount of public goods and to prevent excessive negative externalities, such as pollution from a factory).

business enterprises. From the other end of the political spectrum, Peter Berger and Richard John Neuhaus regard the facelessness and impersonality of modern life as the problem, so they tend to treat both the State and the large business enterprise as “megastructures.”⁶⁴ For both progressives on the left and traditionalists on the right, the business enterprise is somehow different in kind from the voluntary association.

Given the goals with which such writers start, this approach is perfectly reasonable. Nevertheless, it impoverishes our discussion of voluntary associations. Even if we value associations only instrumentally, we need to recognize that many of the same valuable functions in voluntary organizations also exist in business enterprises. For example, which of the following provides more social value: the community food bank that gives away a loaf of bread, or the businesses that raised the wheat, milled the flour, baked the loaves, and delivered them to the food bank?

Society may draw a moral distinction between volunteers and those who are paid for their efforts, but that goes to their souls, not to the effects of their labors. With respect to social reform, the profit-seeking businesses have not been notably less progressive than labor organizations.⁶⁵ The profit-seeking Brooklyn Dodgers were racially integrated before the United States Army,⁶⁶ and but for State passage of Jim Crow laws at the insistence of other groups, the trains that ran through the South would have been integrated generations before the Civil Rights Act.⁶⁷

64. See BERGER & NEUHAUS, *supra* note 10, at 158-59 (explaining that the term “megastructures” incorporates the State and large corporate institutions, and discussing the difficulties these megastructures face in efficiently mediating between the private and public divisions in the modern world).

65. See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 54 (2001) (noting the virulent racism in American railroad unions during the early twentieth century as illustrated by the exclusion of African Americans from the American Railway Union despite their significant presence in the workforce).

66. Jackie Robinson signed a contract to play baseball with the Brooklyn Dodgers in 1945. See *ENCYCLOPEDIA OF ETHNICITY AND SPORTS IN THE UNITED STATES* 12-14 (George B. Kirsch et al. eds., 2000) (suggesting that Dodger management may have been more interested in gaining access to an untapped source of talent than in altruistically promoting racial equality). Robinson played baseball for the Brooklyn Dodgers for several years before President Truman proposed integrating the nation’s military. See Exec. Order No. 9981, 13 *FED. REG.* 4313 (July 28, 1948) (calling for “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin”) (emphasis added).

67. See James Cobb, *Segregation: South’s Most Infamous Legacy Born in the North*, *ATLANTA J. CONST.*, May 23, 2004, at E1 (identifying the economic incentive of railroad companies to provide first-class accommodations to all passengers who could afford the higher price ticket, regardless of race, and discussing the legislative response to conflicts arising amongst the mixed race passengers); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *CONST. COMMENT.* 115, 132 (1994) (observing that prior to the passage of the first wave of Jim Crow laws, which mandated segregation of railroad passengers, there was a surprising amount of integration in the South).

If we assess the values that mediating institutions are said to provide, it seems plain that business enterprises also contribute mightily. Are we concerned about providing training in leadership and civic responsibility? Few organizations are better at this than businesses, as is obvious from the number of business people who regularly play important roles in civic life at all levels. Are we interested in groups who can ameliorate the facelessness and atomism of modern society? The Silicon Valley experience, with its close-knit culture,⁶⁸ is at the opposite extreme from the faceless bureaucratic juggernauts of 1950s fantasies like *The Man in the Gray Flannel Suit*⁶⁹ or *The Organization Man*.⁷⁰ The small entrepreneurial enterprises that characterize much of modern capitalism are far less faceless and more empowering than such entities as the Red Cross or the United Way. Are we looking for entities that help individuals shape their identities? For good or ill, businesses have always been in the forefront of those efforts.⁷¹ Do we seek those who are willing to advance meanings that challenge those of the State? We need look no farther than business enterprises, which regularly challenge state pronouncements and spend considerable amounts of money to get their meanings across to others.⁷² Finally, to the extent we are looking for Garnett's "wrench in the works,"⁷³ for the structural counterbalance to the State's claims to hegemony, we can find few groups that better fit the mold than large capitalist enterprises, which are perhaps the only entities within the State with the skill and resources to offer significant resistance to State overreaching.

Some may question this description of business enterprises since businesses have often allied themselves with the State. The melding of Big

68. See generally Paul Van Slambrouck, *Anthropologists Peer Into a Valley of Silicon*, CHRISTIAN SCI. MONITOR, Jan. 20, 1998 (discussing the unique environment in the Silicon Valley where employees share knowledge and create vast networks with colleagues, friends and family, resulting in a situation where the lines between home and work are often blurred), available at <http://csmonitor.com/cgi.com/durable/Redirect.pl?/durable/1998/01/20/us/us.2.html>.

69. SLOAN WILSON, *THE MAN IN THE GRAY FLANNEL SUIT* (Four Walls Eight Windows 2002) (1955).

70. WILLIAM H. WHYTE, *THE ORGANIZATION MAN* (Univ. of Pa. Press 2002) (1956).

71. See Andrea McArdle, *The Postwar Consumer as Feminized Legal Subject*, 27 LEGAL STUD. F. 221, 232-36 (2003) (describing advertising efforts in the postwar era to shape women's identities as mothers and consumers by perpetuating the stereotypical perception of the woman as a homemaker through the use of mass psychology); Stuart Elliott, *The Media Business: Advertising; Kellogg Hopes That Health-Conscious Women will Want to Have Breakfast with Cindy Crawford*, N.Y. TIMES, Jan. 5, 2000, at C5 (identifying the portrayal of an unrealistic body image as a common criticism of advertising and the media in general).

72. See, e.g., STUART EWEN, *PR!: A SOCIAL HISTORY OF SPIN* 357-59, 362-64 (1996) (describing the efforts of businesses to combat New Deal-era big government initiatives through public relations campaigns intended to restore faith in the private sector).

73. See *supra* notes 3-4 and accompanying text (defining the term "wrench in the works" as the way in which voluntary associations prevent those in power from imposing their views on the minority).

Capital and the State has been a popular theme,⁷⁴ and history is filled with examples in which forces of the State lined up with businesses to crush resistance from other groups.⁷⁵ However, history is also filled with examples in which the forces of the State lined up with churches or workers or other groups to do the same thing.⁷⁶ That one kind of non-State organization may succeed in allying itself with the State to crush its enemies does not necessarily mean that such organizations do not contribute to society. It merely illustrates that a powerful State, although necessary, can be a dangerous thing.

C. *The Problem of State Centered Analysis*

The point of the foregoing is to emphasize that the distinction drawn in most discussions between the State, the business enterprise, and the voluntary association is a convenient fiction. Convenient fictions accommodate theories advanced by many who write on the subject of voluntary associations, but they remain fictions at their core and fall apart if too much weight is placed on them. This is not to say that the associations themselves are fictional. As Laski notes, when we consider any group of people with a common life and a common purpose, “we seem to evolve from it a thing, a personality, that is beyond the personalities of its constituent parts.”⁷⁷ The State is certainly such an entity. Writing in 1917, Laski notes that one who looks at the battlefields of Europe “will assuredly not deny that certain personalities, England, France, Germany are real to the soldiers who die for them.”⁷⁸ He also applies this personification of the entity beyond the State, noting that Lloyds of London is, to ship owners, much more than “the mere sum of its individual underwriters.”⁷⁹ Such a group entity, he says, quoting Maitland, “is no fiction, no symbol, no piece of the State’s machinery, but a living organism and a real person, with body

74. See *supra* note 63 and accompanying text (describing the common concern that a close affiliation between industry and the State will be detrimental to the public good).

75. A typical example is the nineteenth century use of the National Guard as “industrial policemen” to crush labor unions. See JERRY COOPER, *THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865-1920*, 44-45, 58-63 (1997).

76. The most notorious Church-State alliance was the Spanish Inquisition. See Simon Lemieux, *The Spanish Inquisition*, *HISTORY REV.*, Dec. 12, 2002, at 44. The State has lined up with “workers” against businesses and landowners in places like Cuba, and with voluntary groups against powerful mercantile interests, as in the abolition of the slave trade and the temperance movement that led to Prohibition in the United States. See ANTONI KAPCIA, *CUBA: ISLAND OF DREAMS* 99-146 (describing the process of remaking Cuban society); see generally DAVID TURLEY, *THE CULTURE OF ENGLISH ANTISLAVERY, 1780-1860* (1991); John J. Rumbarger, *PROFITS, POWER, AND PROHIBITION: ALCOHOL REFORM AND THE INDUSTRIALIZING OF AMERICA, 1800-1930* (1989).

77. LASKI, *supra* note 31, at 4.

78. *Id.*

79. *Id.*

and members and will of its own.”⁸⁰ In this sense the Ford Motor Company is no less (and no more) “real” than the United States of America. The distinction between them is not something mystical and fundamental but merely relates to their membership and purposes.

When we approach the issue in this way, it seems apparent that the true flourishing of non-State associations cannot occur in a regime in which they are, in Hobbes’s colorful phrase, merely “lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man.”⁸¹ Descriptions of these associations as “mediating structures,”⁸² existing for the particular benefits they confer on the State or the Individual, are unlikely to provide a suitable theoretical basis, if only because the choice of which organizations should be fertilized and which pruned will depend on the political and social views of those who happen to control the machinery of the State.⁸³ The State has, over the centuries, shown a remarkably flexible aptitude for siding with religious believers against non-believers,⁸⁴ with non-believers against believers,⁸⁵ with big business against insular communities,⁸⁶ with insular communities against big business⁸⁷—all conflicts from which the State emerges more powerful. Justifying non-State associations solely on their role as mediators in State/Individual conflicts is unlikely to provide a durable foundation for a pluralistic society.

80. *Id.*

81. Vischer, *supra* note 2, at 958 n.38 (quoting THOMAS HOBBS, *LEVIATHAN* 218 (M. Oakeshott ed., Basil Blackwell 1946) (1651)).

82. See COUTO & GUTHRIE, *supra* note 10, at 3 (identifying “mediating structures” as synonymous with the following terms frequently used by other authors: “the nonprofit sector, intermediate associations, civic associations, or voluntary associations”).

83. The approaches of Garnett, who values associations as structural counterweights that generate competing meanings, and Mazzone, who values them insofar as they foster participatory democracy provide an interesting contrast. Compare *Henry Adams’s Soul*, *supra* note 3, at 1853-54, with Mazzone, *supra* note 5, at 711.

84. The paradigm example is always the Spanish Inquisition, but even in the United States the State has at times deliberately favored religious groups. Until the 1960s, for example, American public schools routinely engaged in Christian prayers and Bible-reading. See A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 145 (1985).

85. The attempted destruction of the Catholic Church in Republican Spain and Mexico and the avowedly atheist States that made up the old Communist bloc come to mind. See MARY VINCENT, *CATHOLICISM IN THE SECOND SPANISH REPUBLIC: RELIGION AND POLITICS IN SALAMANCA, 1930-1936* 250 (1996); MARTIN MCCAULEY, *THE SOVIET UNION SINCE 1917* 149 (1981).

86. The most vivid examples in American history are the use of State forces to crush labor unions and other opposition to the powerful mining interests, but examples are hardly difficult to find. See generally SAMUEL YELLEN, *AMERICAN LABOR STRUGGLES, 1877-1934* (1969) (detailing such events as the Railroad Uprisings, the Ludlow Massacre, and the Haymarket Bombing).

87. For example, the Jim Crow laws that forced national railroad enterprises to segregate their trains were necessary because the profit-seeking businesses were unwilling to do so voluntarily due to the fact that such a policy would reduce their profits. See *supra* note 67 and accompanying text (discussing the background to the segregation of railroad facilities).

We need an approach that allows non-State associations to flourish as ends in themselves, not as appendages of some larger body. And that will require us to detach the concept of sovereignty from that of the State.

II. DETACHING SOVEREIGNTY FROM THE STATE

This may seem a formidable task. After all, our modern idea of sovereignty is so intertwined with that of the State that lawyers, for example, hardly ever deal with it except in connection with the government. A legal dictionary calls it “the supreme, absolute, and uncontrollable power by which any independent state is governed.”⁸⁸ Since the Peace of Westphalia in 1648, the system of international relations has tied the notion of sovereignty directly to States.⁸⁹ But scholars are now coming to understand that this notion was hardly inevitable; it was the result of particular processes operating in particular systems at particular times.⁹⁰ Interestingly, the idea of detaching sovereignty from the State sounds more plausible today than a generation ago.

In the 1950s, for example, the world was becoming more concentrated. The common perception was that big institutions were inevitably going to get bigger and that bureaucracy was going to get ever more powerful. It was, in short, the world of Orwell’s *1984*.⁹¹ The globe was divided into two great blocs that seemed immutable. Pluralistic democracies faced in world communism a powerful, apparently unified totalitarian force that claimed that history was on its side—a claim with which many agreed. American capitalism had settled into something that hardly looked less State-like, dominated by giant corporations, such as AT&T, General Motors, United States Steel, IBM, Sears Roebuck, Esso and Penn Central—companies so large that they would inevitably dominate their industries and stifle all individual innovation. Under this global structure, our future choices would be determined either by the all-consuming State or the all-consuming corporation, which would not only decide what we would eat, wear, and drive, but would even mysteriously control our thoughts.⁹²

88. BLACK’S LAW DICTIONARY 1252 (5th ed. 1979).

89. See HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE 14-15 (2000).

90. See HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 153-80 (1995); PHILPOTT, *supra* note 16, at 97-122.

91. GEORGE ORWELL, 1984 (1949); see Mark Schorer, *1940’s; When Newspeak Was New*, N.Y. TIMES, Oct. 6, 1996, at Section 7-63 (describing the novel 1984 as an “enormously careful and complete account of life in the super-state” whose goal is “the total destruction of the individual identity”), available at <http://query.nytimes.com/gst/fullpage.html?res=9802E2DE153FF935A35753C1A960958260>.

92. See, e.g., VANCE PACKARD, THE HIDDEN PERSUADERS 3 (1957) (describing “large-scale efforts being made, often with impressive success, to channel our unthinking

In such a world the idea that States might *lose* power seemed as ridiculous as the idea that a Japanese motorbike manufacturer might significantly contribute to the Chrysler corporation's brush with bankruptcy, or that the dominant retailer of the future would be a Ben Franklin franchisee in Bentonville, Arkansas.⁹³ The metaphor of the "Iron Curtain" implied more than an ideological divide; it suggested that the modern State really did have the power to control everything within its borders and exclude everything without.

We now realize that very little of this was true. The fall of communism revealed that the totalitarian Soviet State was never as unified or as powerful (except militarily) as it seemed. We went through the conglomerate boom of the 1960s and dis-conglomeration boom of the 1980s. We watched the rise of Invincible Japan in the 1970s and its fall in the 1990s.

We are thus in a better position than we were a half-century ago to realize that this picture has never been particularly accurate, nor has it been a fundamental building block of political or social theory.⁹⁴ "Sovereignty" is a concept that has been constructed both internally and externally. Internally, as noted above,⁹⁵ it developed because particular people, seeking particular powers, discovered theological and philosophical ideas they found useful in particular conflicts.⁹⁶ Externally, it developed because those in power within States found it useful to find a framework in which

habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences," with the result that "many of us are being influenced and manipulated, far more than we realize, in the patterns of our everyday lives").

93. The fact that both of these "ridiculous" ideas actually occurred shows that public perception may not always be correct and that society may change in unpredictable ways. See TETSUO SAKIYA, *HONDA MOTOR: THE MEN, THE MANAGEMENT, THE MACHINES* 12-13, 134-35 (Kiyoshi Ikemi trans., Timothy Porter ed., 1982) (describing the expansion of Honda during the 1960s from a company dealing solely in motorbikes to a major player in the automotive field and the impact that the introduction of compact cars by Honda and other Japanese automakers had on the American automobile industry); SAM WALTON, *MADE IN AMERICA: MY STORY* 32-33 (1992) (describing the founder of Wal-Mart's humble beginnings running a variety store in the small, "sad-looking country town" of Bentonville, Arkansas); Michael Massing, *Detroit's Strange Bedfellows*, N.Y. TIMES, Feb. 7, 1988, Section 6, at 20 (identifying the increased competition from Japanese automakers, particularly with regard to the introduction of gas-saving, compact cars to the American market, as a factor in Chrysler's financial troubles during the late 1970s and early 1980s).

94. See JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* 237-48 (1995) (tracing the development of the doctrine of sovereignty and arguing that it is not a fundamental aspect of political theory, but rather the result of particular historical processes).

95. See *supra* Part I.A (discussing the development of sovereignty in medieval Europe).

96. The studies by Laski and Figgis are still the classic descriptions of this process. See FIGGIS, *supra* note 18, at 5-6, 13 (comparing monist theories concerning the sovereign state to the perception during medieval times that the monarch was bestowed the right to rule by God and thus had unlimited power); LASKI, *supra* note 31, at 3-6 (introducing the concept of monism, which views the overarching State as necessary to give meaning to the lives of its citizens).

to mediate with other States for particular advantages.⁹⁷ The practical uses of sovereignty in the international arena certainly have never matched the rhetoric. In practice, sovereignty has taken on a much more fluid and more pragmatic role.⁹⁸

The sovereign State is also under attack today in ways that it has not been in recent years, both internally and externally. Internally, many of those on the left who traditionally have allied with the State against reactionary groups in society, have begun to realize that unitary sovereignty is a mixed blessing. That concept, after all, has played a major role in the subjugation and destruction of various native societies within larger modern States; claims of Australian aborigines or Native Americans to some kind of sovereignty have largely been quashed.⁹⁹ And others on the left, wary of the power of the State with regard to marginalized groups, have also begun calling for a concept of sovereignty detached from the State.¹⁰⁰ More pragmatically, some commentators have observed the practical disaggregation of sovereignty accomplished by politicians faced with claims for autonomy by groups from Indonesia to Northern Ireland.¹⁰¹

97. See Thomas J. Biersteker & Cynthia Weber, *The Social Construction of State Sovereignty*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1-3 (Thomas J. Biersteker & Cynthia Weber eds., 1996) (arguing that sovereignty is a “fundamentally contested concept” that is “a product of the actions of powerful agents and the resistances to those actions by those located at the margins of power”). Thus, the European States used the concept to protect themselves from each other at the same time that they were free to exploit and dominate other native peoples (who did not qualify as “States”) and even their own restive minorities. *Id.* at 2.

98. See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 40-43 (1999) (arguing that states have never been as sovereign as theory claims and that the doctrine of State sovereignty is actually “organized hypocrisy”).

99. See VINE DELORIA & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 25-27 (Univ. of Tex. Press 1998) (1984) (examining the U.S. government’s reluctance throughout the nation’s history to extend sovereign rights to Native American tribes largely due to an inability to comprehend the non-Eurocentric governing philosophy of the tribes); HENRY REYNOLDS, ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE AND NATION 16-17, 41 (1996) (suggesting that early English cases examining claims of tribal sovereignty in Australia were unduly influenced by cultural biases and racist opinions, and therefore incorrectly determined that the native inhabitants of Australia “had no law and no sovereignty” prior to colonization by the British); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE viii (1997) (claiming that the U.S. government has historically limited the rights of Native Americans and that the law as interpreted by the Supreme Court “has actually contributed to the diminution of the sovereign status of tribes and has placed tribes and their citizens/members in a virtually destabilized state”).

100. See, e.g., Laura Brace & John Hoffman, *Introduction: Reclaiming Sovereignty*, in RECLAIMING SOVEREIGNTY 1-6, 2-3 (Laura Brace & John Hoffman eds., 1997) (introducing a collection of essays which seek to de-link sovereignty from the idea of statehood); JOHN HOFFMAN, SOVEREIGNTY 18-20 (1998) (arguing that a coherent account of sovereignty must detach it from the State); cf. Cover, *supra* note 42, at 61-62, 67-68 (arguing that the State has no privilege over other groups in the development and articulation of legal meanings).

101. See, e.g., Stephen D. Krasner, *Problematic Sovereignty*, in PROBLEMATIC SOVEREIGNTY 2 (Stephen D. Krasner ed., 2001) (recognizing that the concept of sovereignty is comprised of multiple components and finding solutions to common theoretical problems

Thus, while the idea that unitary sovereignty resides in the State is still powerful,¹⁰² the current contested status of the doctrine is perhaps illustrated best by the fact that there are no fewer than three recent books that all share the title *Beyond Sovereignty*.¹⁰³ Increases in demands for local autonomy by various groups have often resulted in creation of quasi-sovereign groups, and theory has thus been changing to accommodate the new realities.¹⁰⁴ Further, over the last half century the legitimacy of violence as a normal instrument of statecraft, both domestically and internationally, has declined among developed countries.¹⁰⁵ To the extent that the State's primary role is to control and channel organized violence, it becomes relatively less important as the threat of international violence decreases.

The sweeping technological and social changes that have made national borders more permeable are also impacting sovereignty. The old idea of sovereignty reflected a certain level of technology, when intrusion into a State required physical intrusion, and in which the State could, with relative ease, control its borders and those who acted within them. But modern technology and social structures have destabilized the old stasis.¹⁰⁶ Modern mass communications, the rise of multinational corporations and other international non-governmental organizations, and the growing

through the disaggregation of these individual components from the overarching concept of sovereignty).

102. See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* 32 (1995) (articulating the continued relevance of unitary sovereignty as a "guide to an entity's international status," a tool in the resolution of inter-State disputes, and a measure of the reach of a State's power).

103. E.g., DAVID J. ELKINS, *BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY* (1995); *BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS* (Tom Farer ed., 1996); *BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA* (Maryann Cusimano Love ed., 2d ed. 1998) [hereinafter *GLOBAL AGENDA*].

104. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 333-35 (rev. ed. 1996) (1990) (examining instances where a limited amount of autonomy has been given to groups within a sovereign State, usually in response "to geographic, political, ethnic, linguistic, or other differences within a single sovereignty"); Krasner, *supra* note 101, at 20-21 (illustrating the idea of quasi-sovereignty through the situation in Hong Kong, which, although a part of the sovereign state of China, has been allowed to maintain its own judicial system); see also KRASNER, *supra* note 98, at 71-72 (noting that institutions have become embedded into the foundation of the State and thus have a tremendous impact on State action).

105. See JOHN L. GADDIS, *THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947*, at 353-61 (rev. ed. 2000) (1972) (arguing that the decreasing legitimacy of violence in the international arena is one of the causes that led to the collapse of the Soviet Union).

106. See VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES* 193-94 (1999) (recognizing that recent technical innovations and social developments have caused boundaries to blur, but not disappear entirely, and have created global society dynamically on the verge "between formerly segregated economies, nations, and cultures; between home and work, male and female, East and West, children and adults").

globalization of trade have made the old territorial State less powerful and less able to control its own citizens. The global communications revolution makes it more difficult for States to keep alien ideas outside their borders.¹⁰⁷ Issues of crime and environmental degradation, once inherently local, are increasingly transnational problems that individual States cannot solve on their own.¹⁰⁸ No one knows how this will effect our future concept of sovereignty, but there is no shortage of guesses.¹⁰⁹

The point of all this is merely to show that the concept of detaching sovereignty from the State is not as far-fetched as it once seemed. The international arena, the place where States historically have been at their most State-like, is now a growing web of multinational institutions, both private and public, making it harder to draw sharp distinctions between private and public entities. Domestically, claims for sovereignty by marginalized groups, distrustful of central authority, are also challenging the notion that the State and the community are one.¹¹⁰ This changing environment means that an approach to voluntary associations that rejects the idea of the monistic State is theoretically and practically possible.

III. TOWARDS A MORE INCLUSIVE THEORY OF ASSOCIATIONS

If we abandon the theory of the monistic State, what would our theory of associations look like? The answer is far from clear, but the general outlines of that approach are not. It will need to be rooted in the pluralist vision that the State is not the sole originator and interpreter of law. It will have to recognize that all associations in society, from the federal government down to the smallest and most marginalized group, are formally equal and are entitled to dignity and consideration—to *sovereignty* in their own affairs. Formal equality does not mean *actual* equality; the State is likely to remain the most powerful association for the foreseeable future. But formal equality is important. The police officer and the criminal are not actually equal; the former has the lawful power to restrain the latter. But they are formally equal, which means that the officer may only use that power within lawful limits, infringing the other's autonomy only to the extent necessary to carry out her function.

107. See MONROE E. PRICE, MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER 3-29 (2002) (analyzing difficulties States face in a world of increasing global information transparency).

108. See generally GLOBAL AGENDA, *supra* note 103 (collecting essays on issues that transcend State borders and that require multilateral support, such as terrorism, the drug trade, and ecological dilemmas).

109. See, e.g., BEYOND NATIONALISM?: SOVEREIGNTY AND CITIZENSHIP (Fred R. Dallmayr & José M. Rosales eds., 2001) (collecting essays addressing the impact of the increasingly interconnected global community on sovereignty).

110. See *supra* note 100 (discussing the separation of sovereignty from the state).

A. *Pluralism*

The pluralist thesis is that the State is but one of a number of associations within society.¹¹¹ These associations *share* sovereignty over aspects of communal life. Each of these groups is organized for a purpose, and each is an end in itself, not merely a piece of the “State’s machinery.”¹¹² Some groups are organized for religious worship, some are organized for common defense and the maintenance of public order (the State), some are organized for the production of goods and services (the business enterprises), some for charitable or social or recreational purposes (the voluntary associations)—but all are sovereign.

This means that in an important sense all associations are equal, from the United States Supreme Court to the Ku Klux Klan, from Microsoft Corporation to Amnesty International, from the Catholic Church to a bowling league. They are *formally* equal in the sense that they are ends in themselves, with power over their own spheres of action. They are not, however, *factually* equal. Some are powerful, some weak; some are popular, others unpopular; some are influential, others marginalized, or even persecuted. But that formal equality, while sometimes derided as a “fiction,”¹¹³ is important. It is, after all, the basis of the rule of law.

When, for example, a group of people gather in a courtroom, the judge has power over the group. That power will be enforced, if necessary, by bloodshed.¹¹⁴ But in exercising that power the judge is not superior to the litigants. A judge is charged with making the decision that one party must go to jail, or pay damages to another. But our notions of formal equality require her to respect the autonomy and dignity of all the other participants. A judge may not, for example, base her decision on her own advantage. The judge’s relationship to the litigants is not that of the corporation to its subsidiaries; they do not exist for the judge’s benefit nor are they, in general, under the judge’s command. Obviously, some litigants will have more power than others—some because the judge shares their values rather than those of their opponents, others because they have the political or economic power to bend the judge to their wishes. If the litigants are valued primarily for the benefits they confer on the judge, these influences

111. See Howe, *supra* note 40, at 91 (noting that the center of the pluralist theory is that the State does not possess sovereignty exclusively).

112. See MAITLAND, *supra* note 11, at xxi (arguing that associations, here called corporations, are fictions of law controlled by the State, and that as “artificial persons” these associations have no natural rights and are instead “a wheel in the State’s machinery”).

113. See, e.g., Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1317 (1992) (arguing that our legal system is based on the idea of formal equality and free association but that reliance on these ideas often means overlooking particular harms that result from factual inequalities).

114. That bloodshed is rarely needed to enforce judicial decisions does not mean that its availability as an ultimate resort is not ever-present in the proceedings.

are perfectly legitimate. But if we view the litigants as equal, and as entitled to equal respect and equal treatment, these influences are illegitimate. The way we analyze the process is obviously important.

Some years ago the sociologist Robert MacIver distilled much of this thinking into his work on “the great associations.”¹¹⁵ By “great associations” MacIver meant the three large entities that have most shaped the world: the State, the church, and the business enterprise.¹¹⁶ According to MacIver, the State is frequently confused with the community, but in reality it is just one form of social organization within the community.¹¹⁷ The State itself is an association, a specific organization within the society, not different in kind from the other great associations.¹¹⁸

Another sociologist, the German Karl Hertz, subsequently explored MacIver’s thesis.¹¹⁹ Hertz’s articulation of what he calls “the MacIver doctrine” has strong parallels in the work of Maitland and Laski.¹²⁰ Agreeing with MacIver, Hertz states that the concept, “that state, church, corporation and so on are associations within the community, not identical with it, is a doctrine of limited sovereignty.”¹²¹ This does not mean merely that non-State associations exercise limited sovereignty within the State—as if the State’s power is delegated to them—but that the State itself is limited in its sovereignty.

Hertz somewhat overstates the originality of MacIver’s insight but he recognizes its theoretical importance:

By also identifying economic and religious associations as “great associations,” [MacIver] gives them places of equal importance and provides a theoretical framework for the discussion of the norms governing the relations among these “great associations.” . . . What he contends for is, first, a particular view of the nature of “the great associations;” what he demands, second, is that we see the rights and obligations of these “associations” in light of their constitutions and relationships.¹²²

MacIver’s emphasis on the “great associations” is too narrow. The claim

115. See MACIVER, *supra* note 12, at 165-82.

116. *Id.*

117. See MACIVER, *supra* note 12, at 183 (noting that the State is but one social agent and not the source of ultimate power within society); see also *supra* Part I.A (discussing the concept of the state and its role in defining a social community).

118. *Id.* at 165 (noting that other “great associations” are neither part of the State nor subject to it, but rather they “exist in their own right” as the State does).

119. See Karl Hertz, *The Nature of Voluntary Associations*, in VOLUNTARY ASSOCIATIONS: A STUDY OF GROUPS IN FREE SOCIETIES 17, 17 (D.B. Robertson ed., 1966) (arguing that MacIver created the modern theory of organizations within the social order).

120. These writers, along with Gierke, often use the terms of “fellowship” or “corporation”—the latter in its older sense of any organized group of people with legal status—to describe these groups.

121. See Hertz, *supra* note 119, at 18.

122. *Id.*

that church, business, and state are the sovereign entities suggests that there are no others. Thus, where these three “sovereignties” tend to agree (as, perhaps, in Franco’s Spain) or where the State has outlawed or co-opted religious and economic organizations (as in the Soviet Union), MacIver’s theory might suggest that there is little or no reason for other groups to complain. But that ignores the fact that powerful human aspirations and values are embodied in a host of private, secular, non-business entities, from small, marginalized groups like the proto-feminist reading groups that Mazzone studies,¹²³ to large influential groups such as the Sierra Club and the NAACP. While MacIver’s focus on the largest and most important organizations is understandable, the broader visions of Gierke, Maitland, and Laski, which recognize the same rights even in smaller secular entities, are more consistent with the pluralist vision.

The difficulty with the pluralist approach—and the reason it has never been popular—is that while it is normative, in the sense that it values pluralism and associational autonomy, it lacks a unifying political vision. It values human dignity, but it does not call for any particular result of the process, and that leaves it with few friends. The theory that associations should be permitted to decide things for themselves necessarily entails the possibility that they may decide things that others in the community find reprehensible. Thus, those who share the same ideological goals may find themselves at opposite ends of the argument when it comes to taking pluralism seriously.

Some have argued, for example, that decoupling sovereignty from the State and allowing pluralism to flourish would empower marginalized groups, like racial and sexual minorities.¹²⁴ But others have come to the opposite conclusion, arguing that pluralism will legitimize pervasive ideologies of racism and sexism.¹²⁵ Robert Cover, an anti-racist and incorrigible pluralist, tried to develop a framework for resolving a particular legal dispute among groups that involved a clash over substantive world-views—specifically, the battle over the tax exemption of

123. See Mazzone, *supra* note 5, at 642 (describing the growth of women’s reading clubs since the establishment of the Massachusetts Bay Colony). These reading groups were originally organized by the Puritan establishment in order to promote the reading of religious texts. *Id.* Over the next three hundred years, however, these clubs increased in importance and size. *Id.* Women, politically marginalized, used these clubs to discuss important social and economic changes, particularly by the time of the Civil War. *Id.*

124. See, e.g., *supra* note 100.

125. See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 752 (1992) (noting that Cover fails to take into account hierarchical structures within “law making” associations and groups); Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179, 179 (1996) (arguing that Cover’s vision of the State as “jurispathic” overlooks the important role the courts play in protecting vulnerable groups, such as women).

fundamentalist Bob Jones University¹²⁶—but his distaste for the university’s position led him ultimately to duck the question.¹²⁷

B. *Multilateral Associational Relations*

Accepting the pluralist vision, however, does not tell us how we ought to go about ordering the relationships among associations. But merely phrasing the question this way has taken us a great distance from the questions “how should the State go about regulating associations[?]” or “which associations ought to be protected from State interference[?]” If we recognize associations (including the State) as equals, and recognize that they each bear their own sovereignties in their own spheres, then we need a theory of how to mediate among them. We need, in Hertz’s phrase, a theory of “multilateral associational relations.”¹²⁸

Within any society, groups will be in conflict—civil rights activists and racists, abortion providers and abortion opponents, management and labor, believers and non-believers, gays and straights. In any society there are mechanisms to mediate the conflicts among these groups. In the most primitive societies, these mechanisms involve a range of factors from customs to religious mediation to armed violence. The same is true in modern societies, but in modern society we have put control of armed violence in the hands of State associations.¹²⁹ Yet, the ultimate power to mediate any dispute among groups resides in the State and often its courts.

This notion of the State as a final arbiter is problematic. In 1787, Madison stated that no one ought to be trusted to be the judge in her own case.¹³⁰ The temptations to bias or corruption are too powerful. And if one man cannot be trusted, there is even less reason to trust a group.¹³¹ The State is regularly in conflict with other associations in society, and in those conflicts it is both the party and the judge.

For example, when the State decides that a religious university must permit interracial dating to qualify for a tax exemption,¹³² or that a civic organization must admit women,¹³³ or that the Air Force may forbid

126. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

127. See Cover, *supra* note 42, at 66-67.

128. See Hertz, *supra* note 119, at 18.

129. See MACIVER, *supra* note 12, at 187 (noting that the state is perfectly situated to take on this role, and is able to do so more thoroughly or adequately than individuals or organizations).

130. See THE FEDERALIST NO. 10, *supra* note 37, at 44.

131. *Id.*

132. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (holding that schools that discriminate based on race cannot be deemed to be conferring a public benefit such as to qualify for charitable tax-exemption status).

133. See *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (holding that the Jaycees, a civil association organized for the advancement of young men, could not exclude women pursuant to the Minnesota Human Rights Act).

officers to wear yarmulkes,¹³⁴ the State's thumb is always on the scales, either directly or indirectly.¹³⁵ Those conflicting roles have the potential to warp its judgments and create the obvious problems of corruption.

The trouble is that now the only limits to that pressure are those that arise when (i) one State association tries to do something that is properly under the authority of another State association,¹³⁶ or (ii) where the State has infringed on the rights of the Individual. So long as it acts within its own jurisdiction *vis-à-vis* other State associations, and does not trample on the rights of Individuals, the State is free to privilege its own views and interests over those of other associations.

A theory of multilateral associational relationships would view the State's infringement on individual rights as illegitimate; unavoidable, perhaps, given the present state of human perfection, but something to be carefully watched and deliberately combated.¹³⁷ The norms articulated by the State, in the pluralist view, are not entitled to any privilege over those of other associations.¹³⁸ True, State norms may have to be imposed on other groups to accomplish the legitimate purposes that are within the State's charter. The reasonable needs of public order and national defense are legitimate concerns of the State, and contrary views of other associations may have to yield.¹³⁹ Similarly, its members may properly ask the State to accomplish other purposes, such as building infrastructure, alleviating poverty, or eradicating racism.¹⁴⁰ But in asserting its own rules over those of other associations the State inevitably infringes on their autonomy. It also lessens the ability of these associations to carry out their own missions. Thus, there is always harm to the fabric of associational relations even when the State's infringement is widely agreed to be just and fair.

To prevent unnecessary harm to other associations, the State must act in accord with law. But this is not merely the "law" as articulated by the

134. See *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (holding that the Air Force's regulation of military attire did not violate First Amendment rights to religious expression).

135. In *Goldman* it was the State's interest in managing its own operations, while in *Bob Jones University and Roberts* the issue was its intent to carry out social policies the State had adopted as being in the public interest.

136. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the individual states, rather than the federal government, had the power to proscribe guns in school zones).

137. See Hertz, *supra* note 119, at 33 (arguing that a pluralistic concept fights any unilateral control of one sphere of life by any one association).

138. *Id.*

139. See MACIVER, *supra* note 12, at 187.

140. Even in the international arena, States may reasonably choose to use military force to carry out policy objectives that are not, strictly speaking, related to their ordinary self-preservation. The Clinton administration's decision to invade Haiti to promote democracy and alleviate the suffering of the Haitian people is an example. See generally DAVID M. MALONE, *DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI, 1990-1997* (1998).

State. Traditional legal theory posits that the State and its various appendages are the manufacturers of law, either through the usual process of its legislatures and administrative organs or, in the case of disputes where such rules are not clear, its courts.¹⁴¹ The classic account is that of the English legal theorist H.L.A. Hart,¹⁴² but it is widely reflected in American jurisprudence in writers as diverse as Justice Cardozo,¹⁴³ Judge Posner,¹⁴⁴ and in the Supreme Court's constitutional interpretations.¹⁴⁵

But just as the State is not coextensive with the community, law is not coextensive with the State's articulation of it. The State is the association that enforces the law, and it has some role in articulating the law, but it does not make the law. Robert Cover explained that the law bubbles up from underneath, in the contested interpretations of right and wrong of the various groups meeting and interacting in society.¹⁴⁶ Cover was a radical anti-Statist, but he was not anti-law, and his approach is the antithesis of the Critical Legal Studies approach that equates law with brute politics.¹⁴⁷ Law is, rather, a natural outgrowth of human interactions, and groups in society generate competing legal meanings like a rain forest sprouts foliage.¹⁴⁸ The State enforces legal meanings, but it does not create them. When judges decide cases on behalf of the State, they simply pick from the competing meanings that others have already generated. This is important, because it means that the legal meanings advanced by any association are entitled to as much respect and consideration as those of a State association, even when that association is the United States Supreme Court.¹⁴⁹

Other associations therefore have no obligation to view the Supreme Court as infallible merely because it is, in some sense, final.¹⁵⁰ To the extent there ever were "final" words from the Supreme Court, that day is

141. H.L.A. HART, *THE CONCEPT OF LAW* 124-36, 272-76 (2d ed. 1994).

142. *Id.*

143. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20-21, 167 (1921).

144. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 197-203 (1990) (noting that there are an infinite number of legal questions to which judges do not have the answers).

145. There is a sophisticated variation of this basic civics concept which is much heard in law schools. This variation states that the Constitution says what five Justices say it says.

146. Cover, *supra* note 42, at 4.

147. See Snyder, *supra* note 15, at 1654-55 & n.151 (explaining that Cover's views do not fit into any of the established legal theory perspectives).

148. See Cover, *supra* note 42, at 7 (noting that our society is held together through the force of "interpretive commitments" that define what law should be).

149. *Id.* at 28 (arguing that the legal interpretations asserted by judges are not objectively superior and providing the example that the Mennonite understanding of the First Amendment has an equal or superior status to the understanding of the United States Supreme Court).

150. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, we are infallible only because we are final.").

passed. Other associations know that a change in Court membership may swing the State around to their side of a disputed issue. This instability is a fundamental problem. The availability of State power to coerce other associations is an invitation to associations to ally with it or co-opt it for their own purposes. Any given instance of this may be entirely benign—the State’s (belated) role in addressing racial discrimination is an example—but the result is increasing intellectual warfare, with attempts by all groups involved in a particular question to use State force to disable their opponents.

The State, then, must be bound by law. And the State has no monopoly on the meaning of law. It follows from this that the State’s power over other associations should be strongest in areas where the law is not fundamentally contested. Where there is general agreement among the associations in the community on the legitimacy of a law—and the vast majority of our public and private law is of this sort—the State is unlikely to infringe on the sovereignty of a group by applying those laws to it. But where the law is fundamentally contested, as where significant associations in society reject the legitimacy of the rule, the State must tread carefully. In such cases there may be a legitimate reason to impose a contested meaning by force, but such situations should be relatively rare.¹⁵¹

To illustrate this point, the Supreme Court held in *Roe v. Wade*¹⁵² that a woman has, to some extent, a constitutional right to choose an abortion.¹⁵³ The *Roe* decision, involves a fundamentally contested legal meaning. The opponents of *Roe* do not merely argue that the law is undesirable in the same way that a group of manufacturers might argue that an import tariff is too low or a given smokestack regulation is too costly. The opponents of *Roe* contend that it is not “law” at all.¹⁵⁴ They do not agree with the State’s articulation of the rule, and they are unwilling to defer to it. They agree that the governing law is the Constitution, but they vigorously dispute the Constitution’s meaning.¹⁵⁵ In a pluralist world, their meaning is as good as anybody’s, including the Court’s.

To the extent, then, that the State backs its own interpretation, it inevitably conflicts with the associations that take a contrary view. But that does not mean that it is powerless. The State does not infringe on the

151. The great desegregation battles in the 1950s and 1960s, for example, were fundamentally a struggle *among* State associations. The segregated schools and the Jim Crow laws were *State* creations. Abolishing the practices that did not intrude on the sovereignty of non-State associations.

152. 410 U.S. 113 (1973).

153. *Id.* at 153.

154. See Cover, *supra* note 42, at 8 (noting that opponents of *Roe v. Wade* believe the Supreme Court has sanctioned murder).

155. *Id.* at 19.

sovereignty of other associations if it removes its own criminal sanctions for abortion.¹⁵⁶ It does not implicate associational sovereignty if it chooses to fund abortions through its own medical programs. Or if it prosecutes those who destroy property or injure other persons or disrupt the operations of those who are engaged in the abortion process, at least if it is applying the same standards that it would apply to all other breaches of the peace. These are all legitimate exercises of the State's own authority.

But it is another thing entirely for the State to compel other associations to adopt its meaning. It infringes the sovereignty of other associations if, for example, it compels religious hospitals to perform abortions or requires employers to offer abortion coverage through health plans. This is not because *Roe* essentially implicates religious beliefs (though it obviously does) and religious beliefs have a special status under the First Amendment.¹⁵⁷ The issue here is the same whether the objection to abortion is religious or secular. Where the meaning is fundamentally contested, it is generally illegitimate for the State to impose its meaning on other associations and compel their acquiescence.¹⁵⁸ The origins of the objection, whether religious or secular, are unimportant.

Another example is the debate over race-based preferences in education. The Supreme Court has narrowly held that at least *some* affirmative action is appropriate for purposes of diversity in education.¹⁵⁹ The Court has also held that some sorts of race-based preferences are not permissible.¹⁶⁰ These are fragile holdings, however, and could conceivably be undone by a single change in the Supreme Court's membership. The idea of race-based preferences is fundamentally contested in our society. A great many private educational institutions believe that it is not only constitutional, but in a sense even required by our common notions of equality and opportunity. The point is that if the Supreme Court subsequently decides that race-based preferences are unconstitutional at State institutions, it is acting within the scope of its sovereign authority. But if it purports to

156. Just as it does not infringe on the sovereignty of any group if it, for example, requires its school teachers to refrain from classroom prayers or prohibits its police from prosecuting flag burners.

157. See generally Cover, *supra* note 100, at 19 (discussing Constitutional interpretation and the idea that different groups rely on different sources as the foundation for their interpretation, particularly in the area of religion and the First Amendment).

158. *Id.* at 68 (arguing that legal meaning is a restraint on power and that legal norms should not be circumscribed).

159. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that the interest in attaining diversity at the University of Michigan Law School was a compelling interest, and that its affirmative action policy was narrowly tailored to achieve this end). As such, the policy did not violate the Equal Protection Clause. *Id.* at 342.

160. See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (holding that the point system used by the University of Michigan's undergraduate program was not narrowly tailored). As such, this policy did violate the Equal Protection Clause. *Id.* at 342.

impose that understanding on, for example, Yale University, a private institution, and forbids Yale to take race into account in admissions decisions, it is impermissibly interfering with another association.¹⁶¹

There may be some objection to the formulation, that “general agreement among the associations in the community” is the relevant standard. A general agreement is not a perfect agreement; there will always be dissenters. This formulation leaves open the possibility that the meanings of some small and marginalized groups will not get the same protection offered to larger and more politically powerful groups. But for at least two reasons, “general agreement” is likely to be the most realistic option. First, unanimity within any community is impossible; the world is full of too many competing meanings to ensure that no one is ever burdened by a legal meaning he or she contests. The practicalities of ordinary life require that meanings too narrow or obscure will generally be ignored. Second, and more important, a pluralist view of associations is not going to make the situation of these groups worse. True, a small and powerless association may still be overborne by State power. Under a pluralist vision, the practitioners of a small and marginalized group who seek to engage in activities ordinarily banned by the State may still lose, but they were already losing.¹⁶²

CONCLUSION

If our goals are instrumental, we may be well-served by a theory of associations that make them “mediating” institutions, put here to influence, channel, or mask the power of the State. If our goal is not the rampant flourishing of a rain forest of associations, but rather the careful care and pruning of valuable plants in a well-tended garden, we may prefer the monist vision of the State and elect to argue over which associations should be privileged and which not. We must be careful, however. This will certainly be a political battle, and that means that the associations with the most political strength at the moment will likely be favored.

We are often tempted to channel the power of the State for good ends. The State, after all, has the power to desegregate the schools and eradicate discrimination in housing, or to protect a woman’s right to an abortion and

161. As it now stands, it is possible that if *Grutter* is overruled a private institution may be required to eliminate its race-based preferences under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2004), because the Supreme Court has held that any discrimination that would be unconstitutional for a State action is punishable if done by an organization that receives federal funds. See *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003); *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

162. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that practitioners of Native American religion had no constitutional right to use peyote in a religious ceremony).

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a same-sex couple's rights to create a family. The problem is that it can do exactly the opposite—and has. It can segregate as well as integrate, persecute as well as protect. The monist vision means that we trust the State over all other associations as the one true keeper of meaning.

But it need not be so. If we value the human dignity that allows people to work for common ends in organized groups, and if we value the things that non-State associations do in society, we are best served by a theory of associations that rejects the State's claims of superior authority. We are best served by the pluralist vision.