ABSTRACT

Political Pluralism and the Common Law Tradition

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The term "pluralism" has many meanings. In my project, I refer to the conception offered by a collection of British writers in the early nineteenth century. They understood pluralism as a response to the excesses of both individualism and state collectivism. They argued that individuals will always be found within a myriad of groups—families, churches, communities. Such groups are realities in their own right. They are not reducible to the individuals who make them up, nor are they legal fictions or mere concessions of the state. In fact, groups are constitutive of the state. The state owes its existence to groups, not the reverse. As a result, pluralists conceive the role of government to be the maintenance of a system of rules within which associations pursue their own ends.

Though pluralism thus understood came to full bloom among the English pluralists of early twentieth-century Britain, its origins read back to Germany—from Johannes Althusius in the early seventeenth century and Otto von Gierke in the late nineteenth. Each of these thinkers conceived of society as being built from the bottom up by an assortment of groups. My argument is that this organic view of society goes hand in hand with a parallel organic view of

law, which conceives law as a historically unfolding emanation from the people rather than as a simple command of the sovereign.

In the second half of this dissertation, I turn to America. I argue that in early American history, a strong organic conception of law and society was present. Changes in our understanding of law have brought about corresponding changes in our understanding of society. The intermediary institutions praised by Tocqueville in the 1830s are much weakened as a result. We are left with the individual versus the state. Political pluralism offers a powerful alternative. I offer the jurisprudence of Justice John Marshall Harlan as a model for the practice of pluralism.

Political Pluralism and the Common Law

by

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CHAPTER ONE

Political Pluralism and the Common Law

Statement of the Problem

When Tocqueville traveled through America in the early 1830s, he noted a paradox in our "national character"—namely that we are prone to both individualism and conformism.[1] Tocqueville provides a helpful explanation of how this is possible:

> In times of equality, because of their similarity, men have no faith in one another; but this same similarity gives them an almost unlimited trust in the judgment of the public; for it does not seem plausible to them that when all have the same enlightenment, truth is not found on the side of the greatest number.

When confronted with the mass of people, the individual "is immediately overwhelmed by his own insignificance and his weakness." Tocqueville concludes, "The same equality that makes him independent of each of his fellow citizens in particular leaves him isolated and without defense against the action of the greatest number." Thus, he could see the danger of a new type of despotism arising in democracies.[2]

However, Americans maintained two practices that mitigated the potential danger of its form of government. We decentralized administration and had developed the art of association. During Tocqueville's time, the remedies seemed to be effective. First, by decentralizing administration and protecting "[l]ocal freedoms," America "multipl[ied]

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[1] *See, e.g.,* Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Barbara Winthrop (Chicago: U. of Chicago Press, 2000); T. Scott Miyakawa, *Protestants and Pioneers: Individualism and Conformity on the American Frontier* (Chicago: University of Chicago Press, 1964); Max H. James, "The Polarity of Individualism and Conformity: A Dynamic Dream of Freedom, Examined in *Looking Backward*," *Christianity & Literature*, Vol. 35, No. 1 (Fall 1985), 17-59; Wilfred McClay, *The Masterless: Self and Society in Modern America* (Chapel Hill, NC: University of North Carolina Press, 1994).

[2] Tocqueville, *Democracy in America*, 409-10.

infinitely the occasions for citizens to act together and to make them feel every day that they depend on one another." Duty is united with interest, and necessity is united with choice. Second, the feelings of mutual dependence are strengthened through the art of association. Tocqueville describes associations of varying sizes and purposes. He disagrees with those who argue that as citizens become weaker individually in a democracy, government should be rendered "more active in order that society be able to execute what individuals can no longer do." He asks, "But what political power would ever be in a state to suffice for the innumerable multitude of small undertakings that American citizens execute every day with the aid of an association?" Tocqueville feared that if the state increasingly took the place of associations, men would lose the art of association, while simultaneously needing the art more and more.[3]

For the purposes of this dissertation, I am suggesting that Tocqueville observed the practice of political pluralism in America. The tradition of political pluralism is not well known today, even though it arguably had a profound impact in early American history and just may provide guidance for some of our most intractable political problems. The term "pluralism" is used frequently and with a variety of meanings. One could speak of the metaphysical pluralism of William James or the value pluralism of Isaiah Berlin. There is the interest group pluralism of Robert Dahl, the reasonable pluralism of John Rawls, and the legal pluralism of Brian Tamanaha. While the pluralism I describe bears some affinity to these, it is distinct.

The pluralism to which I refer stands as a response to the excesses of both individualism and state absolutism. Pluralists consider the autonomous individual a

[3] Ibid., 487-91.

myth. Individuals will always be found within a myriad of groups—families, churches, communities, etc. Such groups are realities in their own right. They are not reducible to the individuals who make them up, nor are they legal fictions or mere concessions of the state. In fact, groups are constitutive of the state. The state owes its existence to groups, not the reverse. As a result, pluralists conceive the role of government to be the maintenance of a system of rules within which associations pursue their own ends.

This conception of pluralism has been called English Pluralism, named for a collection of British writers who were active in the early twentieth century. Leaders in the group included F. W. Maitland, J. N. Figgis, G. D. H. Cole, and Harold Laski. Great diversity existed among these members, but they nevertheless represent a coherent movement.[4] This movement has deep roots in the work of two seminal thinkers, Otto von Gierke (1841-1921) and Johannes Althusius (1557-1638). What is known as English Pluralism thus stretches back to the birth of the modern nation-state and the first efforts to conceptualize modern sovereignty and law.

Thinkers within the pluralist tradition emphasized that pluralism is a more accurate reflection of the way society works than the dominant monistic alternatives. They taught that individuals are not the only unit of analysis. Society is composed by a vast "plurality" of overlapping associations, each with its own set of purposes. Society is best served when these associations are given the functional autonomy to perform their unique roles. No centralized power could effectively replace their work.

Not only does the functional autonomy of groups serve *society*, it also serves the *individuals* within society. Thus, those in the pluralist tradition also stress that human

[4] See, e.g., David Nicholls, *The Pluralist State: The Political Ideas of J. N. Figgis and His Contemporaries*. New York: St. Martin's Press, 1994.

flourishing is made possible in associative life. Individuals are far from sufficient on their own. Not only do our relationships with one another satisfy many of our most basic needs, our very identity is formed through the *plurality* of our attachments. We are members of communities, of trades, of physical and spiritual families. These various groups give our lives meaning. Furthermore, they also serve as effective intermediary bodies between individuals and the state, simultaneously preventing our disintegration into atomism and our absorption into state absolutism.

This dissertation will build on pluralist thought, contending that pluralism is true to societal realities and is vital both for individual development and the preservation of freedom. I will go further by pulling together a thread that runs throughout pluralist thought. I hope to highlight the close connection between a pluralist society and a particular conception of law. A close examination of the pluralist tradition reveals that an organic society is strengthened and maintained by organic law. In other words, the pluralists understood that law should be organically connected to the people it serves. The law is not "made" or "handed down" from on high but evolves through the practices of the people. Thus, the pluralists championed the common law over and above positivist theories that define law as commands of the sovereign.

Next, I argue that Tocqueville depicted an American practice of pluralism even though a developed theory of pluralism was lacking in America. Without such a theory, however, these quintessentially American practices were left in a vulnerable state. Indeed, America has, to a large degree, cast off the remedies that Tocqueville described. Power is increasingly centralized, and the national government continues to take on responsibilities that have traditionally been left to other bodies, both smaller units of

government and private associations. Unsurprisingly, we have also strayed from our traditional understanding of law. The common law was strong in early American history, but our understanding of the tradition has undergone significant revision in ways that pluralism would reject. We are now prone to view law more as a legislative enactment from a power above than as a gradual development emanating from the people below. Looking to the pluralist tradition may help Americans reclaim a powerful resource to help alleviate some our most pressing political ills.

This study will articulate the pluralist outlook by first examining the thought of Althusius and Gierke. I will then focus on the English Pluralists Maitland, Figgis, and Laski. I chose these individuals from among many possibilities for two reasons: they are most useful for drawing the connection between law and society, and they are useful for demonstrating how pluralism illuminates the American context, which is my ultimate focus. After establishing a baseline for social and legal thought in early American history, I turn to the dramatic changes to law that occurred during Reconstruction and the effects of these changes to American society throughout the twentieth century.

Review of Literature

English Pluralism

To what extent has the thought of the English pluralists been used to shed light on America's political tradition? Certainly, the English pluralists have received scholarly attention on their own. Because this work informs my study, a brief survey is worthwhile before turning to the question of America. Among the early book-length works are Kung

Chuan Hsiao's *Political Pluralism* and Henry Magid's *English Political Pluralism*.[5] More recent works include David Nicholls's *Three Varieties of Pluralism,* a book intended to be "an introduction to the literature rather than … an exhaustive treatise."[6] Nicholls argues that the principal cause of ambiguity in the way pluralism is understood today stems from the fact that the separate groups of thinkers rarely connected their use of the term "pluralism" to its other usages. Nicholls wanted to bring some clarity by distinguishing three primary uses. All three groups, he argues, are interested in "a series of connected problems, namely the degree of unity and the type of unity which actually exist in particular states, or which ought to exist." In other words, "They are … concerned with the relationship between unity and diversity in a state." In one brief chapter, Nicholls outlines the English pluralists. In the next chapter, he covers the American pluralist theories, which are concerned with explaining politics as it works in the United States. For these theories, Nicholls contends, "politics is an amoral struggle between contending groups, each acting in its own interest." Government acts as an umpire while the groups contend for the resources of the state. The final group is composed of social anthropologists and sociologists rather than political theorists. Nicholls designates this as "plural society," and describes it as a society that remains highly segmented due to the impact of colonialism and capitalism on traditional cultures.[7]

[5] Kung Chuan Hsaio, *Political Pluralism* (New York: Harcourt, Brace & Co, 1927); Henry Meyer Magid, *English Political Pluralism: The Problem of Freedom and Organization* (New York: Columbia University Press, 1941).

[6] David Nicholls, *Three Varieties of Pluralism* (New York: St. Martin's Press, 1974), Preface. Indeed, notes included, the book is only sixty-five pages long.

[7] Ibid., 1-4, 38.

Nicholls provides a much fuller treatment of the English pluralists with a second volume, *The Pluralist State*. While addressing the pluralists as a group, Nicholls pays special attention to the thought of J. N. Figgis, whom he argues "was perhaps the most original and interesting writer among the British political pluralists, and certainly the least known."[8] The work is divided thematically with discussions of topics like "the attack on sovereignty," "group personality," and "authority in the church." While Nicholls focuses on the content of English pluralists' thought and the contemporary intellectual climate that provoked their work, his project is not concerned with describing their intellectual influences. Maitland and Gierke only receive passing mention, and Althusius is not mentioned at all.

Cécile Laborde contributes to the literature on the British pluralists in his *Pluralist Thought and the State in Britain and France, 1900-25*. He identifies several strands of thought within the broader group. In particular, Laborde distinguishes the thought of Figgis from his mentor, Maitland, and from his younger, more radical followers, Laski and Cole. Thus, Laborde demonstrates that, despite their relation, no *simple* continuity connects the various thinkers encompassed in "English pluralism." Figgis, in particular, did not view all groups as equally valuable. He preferred groups of a particular type, a type Laborde connects with Tönnies's *Gemeinschaft*.[9]

[8] David Nicholls, *The Pluralist State*, xvii.

[9] Cécile Laborde, *Pluralist Thought and the State in Britain and France, 1900-25* (New York: St. Martin's Press, 2000); see also Ferdinand Tönnies, *Community and Civil Society*, Jose Harris, ed. (Cambridge: Cambridge University Press, 2001).

Other scholars probe more deeply into the German origins of English pluralism.[10] For instance, David Runciman's *Pluralism and the Personality of the State* intends to tell "the full history of the movement in early twentieth-century English political thought known as political pluralism."[11] In tracing the philosophical background of pluralism, Runciman devotes attention to seven figures. Hobbes stands prominently in the work as the principal architect of the ideas to which the pluralists were responding. Gierke is given attention as an immediate influence. Treated as pluralists themselves are Maitland, J. N. Figgis, Ernest Barker, G. D. H. Cole, and Harold Laski.

The above works are quite useful in informing my own, but mine differs in a few significant ways. First, I ground the pluralist narrative in Althusius, who reaches the English pluralists through Gierke. Framing pluralism in this way gives the tradition a slightly larger history than many contemporary accounts have provided. Althusius lay in relative obscurity for more than two centuries until Otto von Gierke rediscovered his work. Gierke published an entire volume on Althusius in 1880, remarking that he hoped "Althusius will not fall again into the undeserved oblivion in which he has been lost."[12] Gierke's thoughts on sovereignty, federalism, and "group personality" clearly owed much to Althusius. Gierke's theories attracted the attention of Maitland and Figgis, who worked together to translate a portion of his work into English.[13] The two, in their

[10] Michael Dreyer, "German Roots of the Theory of Pluralism," *Constitutional Political Economy*, Vol. 4, No. 1 (1993); David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).

[11] Runciman, *Pluralism and the Personality of the State*, book cover.

[12] Otto von Gierke, *The Development of Political Theory*, trans. by Bernard Freyd (New York: W. W. Norton & Co., 1939), 11.

[13] Otto von Gierke, *Political Theories of the Middle Age*, translated by Frederic William Maitland (Cambridge: University of Cambridge Press, 1900).

individual ways, furthered Gierke's ideas of group personality and the substantial autonomy groups should have from the state. Moreover, both Maitland and Figgis were very much familiar with Althusius. In fact, Figgis is credited with being among the first to introduce Althusius to the English speaking world.[14]

More importantly, by beginning with Althusius and then selectively examining pluralists through Figgis and Laski, I am able to build a pluralist narrative that sheds considerable light on the American context. Other than perhaps distinguishing the English pluralists from the American school that goes by the same name, the above scholars are not concerned with American politics.

Pluralism in the American Context

Many theorists have employed the *language* of pluralism in an American context. Beginning in the 1950s, sociologist Robert Nisbet began to resurrect Tocquevillian notions of intermediary institutions standing between the atomized individual and the absolutist state. He explains that within the Western tradition, there are exceptions to the "monistic spirit of Plato [that] has been overwhelmingly dominant"—exceptions that he calls "pluralism." Surveying both conservative and liberal varieties, Nisbet identifies several elements of pluralism: a plurality of communities, functional autonomy for each community, decentralization of authority, hierarchy of function and responsibility, tradition, and localism (which is a "sense of place" with an "emphasis on the family,

[14] See James W. Skillen & Rockne M. McCarthy, eds., *Political Order and the Plural Structure of Society* (Atlanta: Scholars Press, 1991), 99.

neighborhood, small community, and local association").[15] Through his many works, he anticipated much of what later communitarians and civil society theorists would teach.[16]

Avigail Eisenberg explains that, for all their differences, communitarians like Michael Sandel, Alasdair MacIntyre, and Charles Taylor are united by a "broad diagnosis of the malaise suffered by contemporary liberal society." Like pluralists, they are concerned "by the excessive individualism which pervades liberal philosophy and political practice."[17] For instance, Taylor says that liberalism is built on the doctrine of atomism, which asserts the self-sufficiency of the individual and the primacy of individual rights.[18] Communitarians argue that this unrealistic conception of the individual is a hazardous foundation on which to build a just society. To paraphrase Eisenberg, liberalism's primacy of rights seeks to protect individual capacities at the expense of the communities by which those capacities are developed.[19]

Communitarians have been criticized for failing to recognize 1) the extent to which communities may become as oppressive as the state, and 2) that individuals require

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[15] See Robert Nisbet, *The Social Philosophers: Community and Conflict in Western Thought*, (New York: Thomas Y. Crowell Co., 1973), 385-90; Nisbet offers similar ideas in other works, including *Conservatism: Dream and Reality* (New Brunswick, NJ: Transaction Publishers, 2002); *The Quest for Community* (New York: Oxford University Press, 1986); *Prejudices: A Philosophical Dictionary* (Cambridge, MA: Harvard University Press, 1982).

[16] Such is the judgment of Nisbet's biographer, Brad Lowell Stone in *Robert Nisbet: Communitarian Traditionalist* (Wilmington, DE: ISI Books, 2000).

[17] Avigail Eisenberg, *Reconstructing Political Pluralism* (Albany, NY: State University of New York Press, 1995), 3-16. For an overview of this debate, see Amy Gutman, "Communitarian Critics of Liberalism," *Philosophy and Public Affairs* 14 (1985), 308-21; Charles Taylor, "Cross Purposes: The Liberal-Communitarian Debate," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, MA: Harvard University Press, 1989); Michael Walzer, "The Communitarian Critique of Liberalism," *Political Theory* 18:1 (1990).

[18] Charles Taylor, "Atomism," in *Philosophical Papers: Vol. 2, Philosophy and the Human Science* (New York: Cambridge University Press, 1985), 187ff.

[19] See Eisenberg, *Reconstructing Political Pluralism*, 14.

a plurality of attachments. Eisenberg sees pluralism as providing a corrective on both counts. Pluralism harbors no romantic notions about the nature of communities but instead mitigates potential harm through a plurality of attachments.[20]

Eisenberg belongs to a wave of civil society theorists that has been strong since the 1980s. Individuals writing in this vein come from both the Left and Right.[21] Like the communitarians, they are proposing remedies for what they consider the shortcomings of liberal democratic societies. Many use the language of pluralism and view themselves as a part of the pluralist tradition. For instance, Eisenberg writes that contemporary "discourse of pluralism has been poisoned by being typecast as a theory merely about interest-group competition." Thus, her purpose "is to resurrect theories of pluralism and reconstruct the tradition on the basis of a broader historical view."[22]

Eisenberg admits that her proposed definition of pluralism is "quite broad," largely because her project consists of drawing together many strands of pluralist thought.[23] Thus, she speaks of "three episodes" of political pluralism. The first includes

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[20] Eisenberg, 3-16.

[21] See, for example, Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); Robert D. Putnam, et al., *Better Together: Restoring the American Community* (New York: Simon & Schuster, 2004); Jean Bethke Elshtain, *Democracy on Trial* (New York: Basic Books, 1995); Elshtain, "A Call to Civil Society," *Society*, Vol. 36, No. 5 (July/August 1999), 11-19; Adam B. Seligman, *The Idea of Civil Society* (Princeton: Princeton University Press, 1992); Michael Edwards, ed., *The Oxford Handbook on Civil Society* (Oxford: Oxford University Press, 2011); Michael Edwards, *Civil Society*, 3d Ed. (Cambridge: Polity Press, 2014); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman, OK: University of Oklahoma Press, 2003).

[22] Eisenberg, *Reconstructing Political Pluralism*, 8.

[23] Ibid., 1-26. Regarding elements of both her themes and her historical project, Eisenberg finds correlation in theorists such as Michael Walzer, Paul Hirst, Kirstie McClure, and Nancy Rosenblum. See Walzer, *Spheres of Justice* (New York: Basic Books, 1983); Walzer, "The Civil Society Argument," in *Dimensions of Radical Democracy: Pluralism, Citizenship, and Democracy*, edited by Chantal Mouffe (London: Verso, 1992); Hirst, "Associational Democracy," in *Prospects for Democracy: North, South, East, West*, edited by David Held (Cambridge: Polity Press, 1993); Hirst, "Retrieving Pluralism," in *Social Theory and Social Criticism*, edited by W Outhwaite and M. Mulkay (Oxford: Basil Blackwell, 1987);

the work John Dewey and William James. For the second, Eisenberg includes the work of J. N. Figgis, G. D. H. Cole, Harold J. Laski, and Mary Parker Follett. The third episode, which is the dominant strand in America today, is captured best in the work of Robert Dahl. By pulling together these strands and taking a critical perspective, Eisenberg considers her work as contributing to the "project of liberal renewal" because, as she defines it, "pluralism is one of the key resources of liberalism."[24]

My project differs in that I am neither attempting to gather the diverse strands of pluralist thought nor trying to promote liberal renewal. Instead, I want to isolate and develop one thread, which I believe informed our founding and stands as an alternative to contemporary liberalism. A central premise of my work is that any possible reinvigoration of pluralism will be frustrated by our liberal commitments. A second way to distinguish my work from the above is through its focus on the implications that pluralism has for law. By denying traditional theories of sovereignty, pluralism has always favored "tradition in contrast to law" when the latter is defined as "formal, calculated, and prescriptive regulations."[25]

McClure, "On the Subject of Rights: Pluralism, Plurality, and Political Identity," in *Dimensions of Radical Democracy: Pluralism, Citizenship, and Democracy*, edited by Chantal Mouffe (London: Verso, 1992); Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* (Cambridge, MA: Harvard University Press, 1987); "Pluralism and Self-Defense," in *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989).

[24] Eisenberg, *Reconstructing Political Pluralism*, 1-26. Another work in this vein is Richard E. Flathman, *Pluralism & Liberal Democracy* (Baltimore: John Hopkins University Press, 2005). Flathman addresses four thinkers: William James, Hannah Arendt, Stuart Hampshire, and Michael Oakeshott. His goal is to "augment" the theories of thinkers like David Truman, Grant McConnell, Robert Dahl, and Theodore Lowi in order to develop and defend a particular kind of liberalism.

[25] Nisbet, *The Social Philosophers*, 389.

Dissertation Outline

Section One: Developing the Theory of Pluralism

Chapter Two begins the exploration of pluralist thought by looking to Johannes Althusius, a German theologian and jurist who wrote at the beginning of the seventeenth century. When Althusius wrote his *Politica,* he was responding to a number of events that shaped European history. First was the St. Bartholomew's Day Massacre, in which Catholics killed a number of Huguenots and sparked widespread calls for resistance to monarchy. Second was a specific instance of resistance, the Dutch Revolt against Catholic Spain, which was both a fight for religious freedom and a fight against creeping tyranny. Finally, Althusius was also responding to Jean Bodin's famous work *Les Six livres de la République,* which set out Bodin's classic definition of sovereignty. In opposing both the trend toward centralization and Bodin's notion of sovereignty, Althusius developed a coherent vision of a pluralist society. Rather than attributing sovereignty to the ruler, Althusius placed sovereignty in the organized body of the commonwealth.[26] The prince is merely the "steward" or "administrator." This does not suggest some notion of popular sovereignty as it is understood today. Neither was Althusius contending for an unlimited power in temporary majorities. Instead, he argued that power should reflect consensus and that this consensus should be built from the bottom up.

Althusius defines politics as "the art of associating men for the purpose of establishing, cultivating, and conserving social life among them." Politics is about the art of "association, in which the symbiotes pledge themselves each to the other … to mutual

[26] See Althusius, *Politica,* xx-xxi.

communication of whatever is useful and necessary for the harmonious exercise of social life."[27] Private associations, rather than individuals, are the constituent parts of the city, which is itself a public association. Althusius thus develops the building blocks for future pluralist thought—"federalism [as] a means of governmental decentralization based upon natural or traditional communities."[28]

Chapter Three turns to Otto von Gierke, a German jurist who wrote during the late nineteenth century. Gierke built on the work of Althusius by demonstrating that a pluralist society requires reinforcement by a particular kind of law. To explain his contribution to pluralist thought, it is first necessary to explore the context of his writings. He lived during a period of legal upheaval. Centuries before, traditional German law had gradually mixed with Roman legal principles in a process known as "The Reception." This unsettled amalgam of law was further disturbed by the French Revolution and the subsequent imposition of the Napoleonic Code in certain areas of the German empire. During this period, Thibaut of Göttingen proposed that Germany embark on a codification effort of its own. Friedrich von Savigny, among others, initiated the German Historical School of Law to oppose this project. He argued that law cannot fully be deduced from nature, nor can it effectively be laid down by a sovereign. Law precedes the state; it does not emanate from it. The law-making power does not create law but declares, in the words of Paul Vinogradoff, "an existing State of legal consciousness," which itself is the product of organically developing customs of the people.

[27] Ibid., 17.

[28] Nisbet, *The Social Philosophers*, 401.

Within the Historical School, a division occurred between Romanist and Germanist elements. The former, led by Savigny, saw the reception of the Corpus Juris of Rome as the source of popular consciousness, or *Volksgeist*. Gierke represented the latter, finding the German *Volksgeist* more properly springing from German medieval law. Critical for Gierke's argument was the insufficiency of Roman law to describe German associations. Contrary to the teaching of Roman law, Gierke contended that associations were not merely legal fictions or concessions of the state. They were independent realities. [29]

Gierke's appreciation of and debt to Althusius is plain as he develops his ideas about sovereignty, federalism, and "group personality." Gierke published an entire volume on Althusius in 1880, remarking that he hoped "Althusius will not fall again into the undeserved oblivion in which he has been lost."[30] Gierke expanded his ideas in a massive four-volume work on *The Law of German Associations*, portions of which were translated into English and utilized by the English pluralists.[31]

This dissertation turns to these English thinkers in Chapter Four. In particular, I look to F. W. Maitland, an English legal historian who did much to translate pluralist ideals into an English context, which is important to this project given America's English heritage. English pluralism received further important contributions from John Neville Figgis and Harold Laski. The English pluralists were responding to the excesses of

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[29] Paul Vinogradoff, *Introduction to Historical Jurisprudence* (Kitchener, Ontario: Batoche Books, 2002 [1920]), 106-12.

[30] Gierke, *The Development of Political Theory*, 11.

[31] Gierke, *Political Theories of the Middle Age*, F. W. Maitland, trans. (Cambridge: Cambridge University Press, 1900); *Natural Law and the theory of Society*, Ernest Barker, trans. (Cambridge: Cambridge University Press, 1934); *Community in Historical Perspective*, Anthony Black, trans. (Cambridge: Cambridge University Press, 1990).

Utilitarian individualism, on the one hand, and Idealist collectivism on the other. My focus, however, lies in the way these three pluralists responded to the ideas of sovereignty and law put forward by other, more famous Englishmen, namely Thomas Hobbes and Jeremey Bentham.

Hobbes announced that "justice" and "injustice" have no place until a coercive power is erected that can compel performance of covenants by the terror of punishment. This is the "Leviathan," the "Mortall God" in whom "consisteth the Essence of the Commonwealth." Because this sovereign power is the product of the original compact rather than a party to it, it cannot breach the covenant. Similarly, the sovereign cannot be subject to the civil laws, which are its own creation. Connected to Hobbes's notion of sovereignty is a particular antipathy toward corporations, which he regarded as "many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man."[32]

These ideas of sovereignty and law were furthered by Bentham, who shared Hobbes's contempt for the common law.[33] Some twenty years later, John Austin would provide legal sophistication for theories of positivism with his *The Province of Jurisprudence Determined*. Maitland opposed such rationalist critiques. He found in Gierke an ally, prompting him to translate a portion of Gierke's work into English. In his celebrated introduction to this translation, Maitland described how Roman jurisprudence began "with a strict severance of *ius publicum* from *ius privatum*" [public law from

[32] Hobbes, *Leviathan*, 100-01; 120-22; 224; 230.

[33] Cf. Hobbes, *Dialogue*; Jeremy Bentham, "Letter to the President of the United States," in *The Works of Jeremy Bentham, 11 Vols*., Vol. 4, edited by John Bowring (Edinburgh: William Tait, 1838-1843).

private law], which resulted "in an absolutistic public law and an individualistic private law." From Roman law came the idea that corporate bodies were mere fictions and creatures of the state, not living associations with real personalities. Like Gierke, Maitland saw in these abstractions an ill fit with reality.[34] He would confine himself to a juristic explanation of the phenomenon, saying, "As for philosophy, that is no affair of mine." For a "mere lawyer," it should be enough to say that no matter how "disinclined … [one] may be to allow the group a real will of its own, just as really real as the will of a man, still he has to admit that if *n* men unite themselves in an organized body, jurisprudence, unless it wishes to pulverize the group, must see *n* + 1 persons."[35]

Where Maitland would confine himself to legal history and theory, Figgis, his younger colleague, would feel comfortable venturing farther afield. Figgis said his early work had "the defect of being written beneath the shadow of the Austinian idol." His thinking underwent a great change when he was exposed to "the wisdom of great masters like Acton and Maitland" and "read the great work of Gierke."[36] Like them, Figgis argued that groups possessed real personalities and were entitled substantial autonomy. He recognized that groups may oppress the individuals within them, and they "may come into collision with the State." But the answer, he argued, is not to ignore "the facts of life as it is lived," for "you will not escape the possibility by ignoring the facts." "What do we find as a fact?" Figgis asked. "Not, surely, a sand-heap of individuals, all equal and

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[34] Frederic William Maitland, "Introduction," in *Political Theories of the Middle Age*, F.W. Maitland, ed. (Cambridge: University of Cambridge Press, 1900).

[35] Frederic William Maitland, *State, Trust and Corporation*, edited by David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 69-71.

[36] John Neville Figgis, *The Divine Right of Kings*, 2d Ed. (Cambridge: Cambridge University Press, 1914), vii-ix.

undifferentiated, unrelated except to the State, but an ascending hierarchy of groups, family, school, town, county, union, Church, etc." He did not "deny the distinctness of individual life" but argued that the individual "can only function in a society." The isolated individual is a myth. To build society on such a fiction was as foolish as it was dangerous, for such atomism paved the way for state absolutism.[37]

Finally, I examine the way that Harold Laski developed certain pluralist ideals early in his career. Like Maitland, Laski attacked philosophy broadly, and legal theory specifically, for being ill-attuned to the concrete facts of political life. Only when dealing in abstraction, Laski argued, can the legal notion of sovereignty be defended. He contended that the theory of sovereignty was "administratively incomplete and ethically inadequate."[38] Thus, like Figgis, Laski found pluralism to be truer to political life in a descriptive sense *and* superior to monism in a normative sense.

Section Two: Turning to America

Chapter Five begins the second section of my project where I turn attention to the American context. This chapter examines antebellum America in order to establish a baseline both for our early practice of political pluralism as well as our adherence to the common law tradition. I begin by distinguishing the interest group theories, often described as "pluralism," from the political pluralism that is the subject of this dissertation. These interest group theories were introduced by James Madison in the *Federalist Papers* and have had many proponents in the last century.

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[37] John Neville Figgis, *Churches in the Modern State* (New York: Longman's, Green, and Co., 1913), 86-93.

[38] Ibid., 568.

While such theories have long existed in America, we also had a practice of political pluralism from the very beginning. Pluralism is rooted in our fundamental law in the original text of the Constitution and with reinforcement in the Bill of Rights. Despite the fact that the delegates at the Constitutional Convention leaned more heavily toward nationalism than the general population, there were many strong defenders of states. A number of delegates recognized states to be more than convenient administrative units; states were political societies themselves. As such, not only were *individual* interests represented in the proposed government, *state* interests were represented as well.

A number of other important provisions were made to secure federalism in the proposed Constitution. Even so, a strong contingent of individuals thought too much power was bestowed on the central government. Known as the Anti-Federalists, this group insisted on the addition of a Bill of Rights, which would further clarify limitations on federal power. The Bill of Rights confirmed the fact that the federal government was intended to have a limited sphere of action. States were to continue being regarded as separate societies with unique identities.

The pluralist structures of early America were not only present in the constitutional division of power between the federal and state governments, but pluralism also abounded in all levels of society in both political and civil associations. Alexis de Tocqueville famously attested to this fact in his *Democracy in America*, a book written to describe his long-term visit to and travels in the United States. Tocqueville depicted a sort of "societal federalism," to use the phrase that Hueglin applied to Althusius' system. He frequently addressed the American practices of "township freedom" and

"administrative decentralization." Tocqueville argued that localities are better judges of their particular needs than a centralized power. More importantly, local freedoms allowed citizens to participate in self-government, a practice that reinforces mutual dependence and serves as a barrier to centralized tyranny.

Not only did America have an early practice of political pluralism, we also found support for this system in our early adherence to the common law tradition. Of course, there were many competing strands of thought at the time of the Founding,[39] but the common law tradition was by no means insignificant. As James Stoner writes, "[C]ommon law is said to exist wherever precedents have the force of law, although traditionally precedents are seen to indicate common law, not create it." In the common law order, "law need not begin with a statute, which in turn began with a sovereign authority."[40] Instead, law develops organically, emphasizing "assent rather than domination, the community rather than the state, moral authority rather than physical power."[41] The common law traditionally affords strong protection to groups like the family, church, and business.[42]

The long-established understanding of the common law came under attack in the late 1800s. Now, the idea of common law judges "discovering" rather than "inventing" law seems quaint, primarily due to the influence of Oliver Wendell Holmes, Jr. This

[39] See, e.g., Michael Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame: University of Notre Dame Press, 1996), introduction to Part II.

[40] James R. Stoner, Jr., *Common Law & Liberal Theory: Coke, Hobbes & the Origins of American Constitutionalism* (Lawrence, KS: University of Kansas Press, 1992), 6-7.

[41] James R. Stoner, *Common Law Liberty: Rethinking American Constitutionalism* (Lawrence, KS: University of Kansas Press, 2003), 5.

[42] See generally Stoner, *Common Law Liberty*.

places the role of the common law in question in our democracy. As Stoner argues, "to claim … that the common law is a key to understanding the fundamental principles of our Constitution and a guide for deciding contemporary constitutional crises is to find oneself … in a breach between two parties deeply at odds." On the Right are those who oppose notions of a "living Constitution," who believe the Constitution should only change by following the procedures outlined in Article V. They claim to be champions of judicial restraint in their narrow focus on the text and original understandings; indeed, they consider the common-law frame of mind the cause of excesses of judicial activism.[43] Stoner argues that the Left is "if anything, more hostile to the common law, at least if it is understood historically."[44] However, the Left does not hold to historic understandings. Many have recently written in praise of the common law,[45] yet their work reveals an appreciation of "the development of law from precedent to precedent in the name of reason" rather than "the anchoring of law in custom and tradition freely attested and consented to."[46]

Both the misunderstanding of and the hostility to the common law, traditionally understood, have served to reinforce the idea that law emanates from the sovereign, whether this sovereign be understood as the "Framers," "We the people" at the time of

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[43] Ibid., 1-3.

[44] Ibid., 3; see also, for example Steven G. Calabresi, "Text vs. Precedent in Constitutional Law," 31 Harv. J. L. & Pub. Pol'y 947 (2008); Antonin Scalia, *A Matter of Interpretation; Federal Courts and the Law* (Princeton: Princeton University Press, 1997); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999).

[45] See, e.g., David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010); David A. Strauss, "Common Law Constitutionalism," 63 U. Chi. L. Rev. 877 (1996); David A. Strauss, "The Common Law Genius of the Warren Court," 49 Wm. & Mary L. Rev. 845 (2007); Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: U of Chicago Press, 2002).

[46] Stoner, *Common Law Liberty*, 76.

ratification, or "We the people" as the current majority. This positivistic view of law was a great concern to the pluralists covered in section one. It turns law from consent to power, from the people to a central lawmaking authority.

Chapter Six examines a watershed moment in the history of American political pluralism. If one were to focus only on greater federal power and centralization, we might look to LBJ's "Great Society" or FDR's "New Deal." We might look to Wilson's tremendous arrogation of power during WWI or to the progressive era more generally. However, if we expand our consideration to include America's changing conception of law, then Reconstruction emerges as a critical event.

In particular, I focus on the ratification of the Fourteenth Amendment. The procedures for amending the Constitution are provided in Article V. Proposed amendments may originate from two thirds of both houses of Congress or from a convention called by the application of two thirds of the states. Proposals via either method are ratified when accepted by three fourths of the states acting either through their legislatures or state conventions, an option decided by Congress.[47] With the Fourteenth Amendment, however, the country departed from the constitutional mode of ratification.

The Thirteenth Amendment received the necessary votes to be added to the Constitution upon Georgia's ratification on December 6, 1865.[48] By this time, President Lincoln had been assassinated. The new president, Andrew Johnson, desired to continue Lincoln's generous policy of reconciliation. With the Civil War over and the

[47] See U.S. Const., Art. V.

[48] See *The Constitution: Analysis and Interpretation*, FN5, 30.

Confederacy disbanded, Johnson considered the South's participation in the sacred act of amending the Constitution to be sufficient evidence to justify the South's return to Congress.[49]

The Radical Republicans disagreed. They refused to seat legislators from Southern states. Thus, with eleven of thirty-six states excluded from representation, Congress approved of the Fourteenth Amendment and called President Johnson to transmit it to state legislatures for consideration.[50] Of the eleven states in the Confederacy, only Tennessee initially ratified the amendment, and it did so only under very suspicious circumstances.[51] Congress immediately voted to admit Tennessee.[52]

When the other ten states rejected the Fourteenth Amendment, Congress passed the Reconstruction Act of 1867. Among other things, this placed the South under military occupation. It required the states to pass new state constitutions that would be subject to congressional approval. Furthermore, the Act required the states to ratify the Fourteenth Amendment in order to be readmitted to Congress.[53] As was often the case during his troubled presidency, Johnson vetoed the measure but was overridden by the Radical Congress.[54]

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[49] See Johnson, "First Annual Message."

[50] See Cong. Globe, 39th Cong., 1st sess., 3237 (June 18, 1866).

[51] See *The Constitution: Analysis and Interpretation*, 31 FN6; see also Joseph B. James, *The Ratification of the Fourteenth Amendment* (Macon, GA: Mercer University Press, 1984), 19-23.

[52] See Cong. Globe, 39th Cong., 1st sess., 3980 (July 20, 1866) (House); see also Cong. Globe, 39th Cong., 1st sess., 4007 (July 21, 1866) (Senate).

[53] See "Reconstruction Act of 1867," 14 Stat. 428-29 (March 2, 1867).

[54] See Cong. Globe, 39th Cong., 2d sess., 1976 (March 2, 1867).

Though Southern resistance began to wane and Southern legislatures began to ratify the Fourteenth Amendment, three Northern states objected to the coercive methods employed by Congress. They withdrew their prior consent to the amendment. However, while Secretary of State William Seward allowed the South to change its votes to affirmative, he refused to allow Northern states to change their votes to negative. As a result, he certified the Fourteenth Amendment on July 20, 1868.[55]

As I argue in the chapter, I do not deny the existence and legitimacy of the Fourteenth Amendment. My intent is not to revive old fights against the amendment in order to justify state acts of racial discrimination. While I sympathize with the noble goals of at least some of the Radical Republicans, I object to their methods. I oppose the impatience for reform that leads those in power to resort to force and fraud. I contest the idea that law—particularly our fundamental law—is whatever *power* claims it to be. Yet that was precisely the case with the Fourteenth Amendment.

The amendment fundamentally altered both the pluralist structures within America *and* the concept of law that undergirded them. This change only began with the ratification procedures. Chapter Seven discusses how the amendment continued to be used to undermine political pluralism through the twentieth century. Two lines of cases are particularly useful for demonstrating this change—incorporation and re-apportionment. Moreover, the topics also permit an examination of Justice John Marshall Harlan II, whose opinions reveal his commitment, not only to pluralism, but also to a conception of law that makes pluralism possible.

[55] See *The Constitution: Analysis and Interpretation*, 31 FN6.

Incorporation is the process of applying not just the Bill of Rights but also the accompanying federal case law to the states. Justice Harlan argued that incorporation may satisfy those who "see in the Fourteenth Amendment a set of easily applied 'absolutes' which can afford a haven from unsettling doubt"[56]; however, "our federalism not only tolerates, but encourages, differences between federal and state protection of individual rights."[57] For this reason, Harlan argued that incorporation produced a "compelled uniformity"[58] and was a "creeping paralysis … [that is] infecting the operation of the federal system."[59] The Fourteenth Amendment has been used to impose a one-size-fits-all standard across the country.

The congruity of pluralism and Justice Harlan's jurisprudence is further seen in his opinions in the apportionment cases. Apportionment refers to the process by which representation in a legislative body is distributed. For a long period, the Court rejected invitations to insert itself in the "political thicket" of apportionment decisions.[60] The Court made a sudden "break with the past" in *Baker v. Carr* by determining that apportionment claims were justiciable.[61] Shortly thereafter, the Court determined that Article I demanded "that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[62] Thus, the "one man, one vote" rule was

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[56] *Malloy v. Hogan*, 378 U.S 1, 28 (1964) (Harlan, J., dissenting).

[57] Harlan, "Bill of Rights," 50 A.B.A. J. 918, 920 (October 1964).

[58] *Malloy v. Hogan*, 378 U.S 1, 16.

[59] *Griffin v. California*, 380 U.S. 609, 616 (1965) (Harlan, J., concurring).

[60] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

[61] *Baker v. Carr*, 369 U.S. 186, 339-40 (1962) (Harlan, J., dissenting; joined by J. Frankfurter).

[62] *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); see also ibid. at 27 (Harlan, J. dissenting) (Harlan countered Black's point, saying, "Although many, perhaps most, of them also believed generally—but

announced, here in reference to congressional districts. The Court later determined that "one man, one vote" was also required under the Equal Protection Clause, so they extended the requirement to state legislatures[63] and even to all the subdivisions of local government.[64]

Justice Harlan dissented in each of these cases, arguing that the Court's assumption of power "saps the political process" because "[t]he promise of judicial intervention . . . cannot but encourage popular inertia in efforts for political reform through the political process."[65] He demonstrated along the way that the majority's decisions were not justified by theories of textualism, originalism, or precedent. The decisions were only justified by liberal theory—the idea that the individual is the basis of society, that individuals are interchangeable "ciphers,"[66] and that abstract theory is preferred over experience. Not only do the decisions give effect to the atomistic individualism so abhorred by pluralists, they are animated by a conception of law as the command of the sovereign, not the pluralists' view of law as an organic development that springs from the people themselves.

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assuredly not in the precise, formalistic way of the majority of the Court—that, within the States, representation should be based on population, they did not surreptitiously slip their belief into the Constitution in the phrase "by the People," to be discovered 175 years later like a Shakespearian anagram.").

[63] See *Reynolds v. Sims*, 377 U.S. 533 (1964).

[64] See *Avery v. Midland County*, 390 U.S. 474, 484 (1968); the Court cited a "preliminary calculation by the Bureau of the Census for 1967" that estimated there were "81,304 units of government in the United States."

[65] *Wesberry v. Sanders*, 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

[66] *Reynolds v. Sims*, 377 U.S. 533, 623-24 (1964) (Harlan, J., dissenting).

Conclusion

I do not argue that we should attempt to roll back time in some effort to restore the America of 1800. However, in a time of profound dissatisfaction with government, pluralism offers powerful lessons. Groups such as the family, church, and local community have important functions to play in a thriving society. Permitting their functional autonomy not only removes a large burden from the central government, it also helps prevent individuals from getting lost in the vastness of the state system. Government can be brought closer to citizens, giving them a sense of empowerment as they share in the tasks of self-government. This type of society is facilitated by a conception of law as a historically unfolding emanation from the people rather than as a simple command of the sovereign. An organic law is suitable for an organic society.

CHAPTER TWO

Althusius and the Foundations of Pluralism

Thomas O. Hueglin has dedicated much of his academic career to substantiating his claim that "Althusius' political theory … constitutes a rather important, if still largely neglected, contribution to the history of political thought." He argues that Althusius mediated two worlds. On one side stood the "overlapping circles of rule under the banner of Christian universalism"[1] where numerous associations (like the church, family, guild, etc.) "made parallel and often competing claims to the same area."[2] On the other side stood "the new world of sovereign territorial states, which would find its first formalized expression in the 1648 Treaty of Westphalia." In this new system, sovereignty not only described a state's *external* relations with other states; sovereignty also described a state's *internal* power, unitary and increasingly absolute. Hueglin concludes:

> The significance of Althusius' theoretical contribution lies in the fact that he accepted the new system of territorialized politics in its external dimension, but sought to preserve the internal plurality of rule, constitutionally stabilizing it into an organized process of power sharing and conflict management (rather than resolution) based on consent and solidarity.[3]

This chapter will focus on this second element—internal plurality of rule—arguing that Althusius is critical in laying a foundation for subsequent pluralist thought. After briefly reviewing Althusius' biography, I examine the consolidating forces to which Althusius

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[1] Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Federalism and Community* (Waterloo, Ontario: Wildred Laurier University Press, 1999), 5.

[2] Ibid., quoting Paul Hirst and Grahame Thompson, *Globalization in Question* (Cambridge: Polity Press, 1996), 171.

[3] Ibid.

responded in his *Politica*. The first of these came from territorial overlords who threated local autonomies. Second was the 1576 publication of Jean Bodin's *Les six Livres de la République*, with its revolutionary definition of sovereignty. My purpose is neither to provide an exhaustive account of Althusius' time nor to give an authoritative interpretation of Bodin's theory. Instead, I wish to provide a sketch that is useful for context. With this done, I examine *Politica* itself, emphasizing the pluralist society depicted therein. Finally, I conclude with a look at contemporary assessments of Althusius' thought. His great contribution to pluralism comes in his vision of a society built from the bottom-up, where the basic unit was the family rather than the isolated individual.

Althusius' Biography

Althusius was born in 1557,[4] just two years after the Peace of Augsburg, a treaty which ended a religious struggle by affirming the right of princes in the Holy Roman Empire to choose the religion of the territory they controlled.[5] He was born in Diedenhausen, located in a Calvinist county in what is now the state of North Rhine Westphalia, Germany. Calvinism would substantially shape Althusius' thought. Little is known of his parents or early life. He earned a doctorate of both ecclesiastical and civil law from Basel in 1586. In the same year, he published *Jurisprudentia Romana*, a systematic treatise of Roman law, and accepted an offer to join the new Faculty of Law at

[4] Carl Joachim Friedrich, "Introduction," in Johannes Althusius, *Politica Methodice Digesta* (Cambridge, MA: Harvard University Press, 1932), xxiii.

[5] Thomas Brady, Euan Cameron, and Henry Cohn, "The Polity of Religion: The Peace of Augsburg 1555," *German History*, 24:1 (2006), 85.

Herborn.[6] While there, he also worked as a lawyer. As John Witte, Jr., notes, Althusius "was called more than once to defend the Academy's rights against the encroachments of local nobles and officials." Witte credits this experience with helping to shape Althusius' "life-long interest in defining and defending the rights of private associations." [7]

By 1603, when the first edition of *Politica* was published, Althusius was rector of the college. Perhaps on the basis of this work, he was invited to become the syndic of Emden, a seaport city in Eastern Frisia that neighbored the Netherlands. He accepted the role in 1604 and continued in service until his death in 1638.[8]

Life in the city of Emden would shape the further development of Althusius' thought. By the late 1500s, Emden had grown to become one of Europe's busiest ports. Much of the city's population adopted Calvinism, though the counts of Eastern Frisia were Lutheran. To compound this religious conflict, the counts also faced resistance to their attempts to raise taxes in the province. In the midst of this turmoil, the city forcibly removed the count's magistrate in 1595 and established a city council and the office of syndic.[9] The syndic served as the city's lawyer. He represented the city in court, assisted in diplomatic negotiations, and advised the city council on a variety of issues. Friedrich concludes, upon exhaustive review of documentary material, that in his role as syndic, "Althusius became the most influential man in the councils of the city."[10] His experience

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[6] See Friedrich, "Introduction," xxiii-xxvi; see also Otto von Gierke, *The Development of Political Theory*, translated by Bernard Freyd (New York: W. W. Norton & Co., 1939), 19.

[7] John Witte, Jr., "Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic," 87 U. Det. Mercy L. Rev. 565 (2009-2010), 574.

[8] See Friedrich, "Introduction," xxix-xxxiv.

[9] See Hueglin, *Early Modern Concepts*, 34-35.

[10] Friedrich, "Introduction," xxiv-xxxv.

in practical affairs prompted him to return to *Politica*, providing a substantial expansion for a second edition which was published in 1610. Further supplements and citations were added to the third edition, which was published in Herborn in 1614. Five reprintings were ordered over the next forty years.[11]

Forces of Consolidation

Hueglin argues that the two most important events during Althusius' life, "particularly so for a devout defender of the Reformed faith, were the St. Bartholomew's Day Massacre of 1572 and the Dutch Revolt against Catholic Spain."[12] The former took place when Huguenots gathered in Paris for the wedding of the Huguenot Henry of Navarre to the Catholic Marguerite de Valois. Scholars disagree as to how and why the massacre began. However, there is a general consensus that royal troops were dispatched to execute Huguenot leaders. The situation quickly escalated with the Catholics of Paris joining in the killing of all suspected Huguenots. Estimates of the time suggested the dead from the massacre numbered from 2,000 to as high as 100,000.[13] Catholic leaders from across Europe sent their congratulations to Catherine de Medici, the queen mother of King Charles IX.[14] When the news reached Rome, cannons sounded, bells rang, and

[11] See Gierke, *Development*, 21; see also Friedrich, "Introduction," xl. Friedrich says that the second edition doubled the length of the first.

[12] Hueglin, *Early Modern Concepts*, 29.

[13] James R. Smither, "The St. Bartholomew's Day Massacre and Images of Kingship in France: 1572-1574," *The Sixteenth Century Journal*, 22:1 (Spring, 1991), 29.

[14] See Hueglin, *Early Modern Concepts*, 31.

bonfires were lit in celebration. Pope Gregory XIII had a medal struck to commemorate the event, and he commissioned three frescoes to immortalize the massacre.[15]

The massacre of so many Protestants had a significant effect on the course of European political thought. Calls for resistance to monarchy and in favor of popular sovereignty had existed prior to 1572, yet they grew in number, detail, and influence.[16] Most popular was *Vindiciae contra Tyrannos: A Defence of Liberty Against Tyrants*, a treatise written anonymously under the pseudonym Junius Brutus. In his introduction to a reprint of the treatise, Harold Laski asks, "If Kingship existed for the protection of subjects, what were their rights when the very basis of its meaning was taken away?"[17] He concludes, "The issue, for the Huguenots, had become a simple choice between their religious faith and their political loyalty. It was fortunate for European liberty that they did not hesitate in their decision."[18] Faith came first.

The decision to defend religious freedom was at once a fight against state absolutism and despotic centralization. As Laski demonstrates, this fact leads directly to the second event Hueglin identifies as crucial in Althusius' life—the Dutch Revolt against Catholic Spain. In 1555, when Philip II became king of Spain, he inherited the seventeen loosely joined provinces of the Netherlands. Philip II pursued a policy of centralization, disregarding the traditional limits of customs and privileges enjoyed

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[15] See Henry White, *The Massacre of St. Bartholomew Preceded by a History of the Religious Wars in the Reign of Charles* IX, (New York: Harper Brothers, 1868), 465-66.

[16] See Mack P. Holt, *The French Wars of Religion: 1562-1629*, 2d ed. (New York: Cambridge University Press, 2005), 96.

[17] Harold J. Laski, "Historical Introduction," in *A Defense of Liberty Against Tyrants: A Translation of the Vindiciae contra Tyrannos by Junius Brutus*, edited by H. J. Languet (New York: Lenox Hill, 1972), 22.

[18] Ibid., 23.

within the provinces. He marginalized the counsel of the Dutch high nobles in favor of his own civil servants. Finally, he was responsible for severe persecution of Dutch Protestants, also in violation of long-established privileges, which were considered to be something of a contract between the king and his subjects.[19] Dutch resistance was not grounded on "theoretical abstract notions." As Martin van Gelderen argues, "There was no need for them to talk much about the state of nature, the natural liberty of the people and suchlike notions…. [Their] theory was well-grounded on its own traditional privileges."[20] Gelderen concludes, saying that the Dutch theory of resistance "was not developed behind a philosopher's desk but in political practice."[21]

The aftermath of both the St. Bartholomew's Day massacre and the Dutch Revolt would have a profound impact on Althusius' life and thought. Throughout *Politica,* he frequently cites with approbation Brutus' *Vindiciae contra Tyrannos* and the works of other "monarchomachs."[22] The term "monarchomach," Friedrich explains, is a misleading epithet for the "group of writers who rather emphatically asserted the right of the community to defend itself, even by violence, against a man who abused his princely

[19] See Martin van Gelderen, "A Political Theory of the Dutch Revolt and the *Vindiciae contra Tyrannos*," *Il Pensiero Politic*o, 19:2 (May 1, 1986), 165-70.

[20] Ibid., 180; see also "Dutch Act of Abjuration (1581)" in *The Low Countries in Early Modern Times: A Documentary History*, Herbert H. Rowen, ed. (New York: Walker & Co., 1972), 102. "[I]n accordance with the law of nature and in order to preserve and defend ourselves and our fellow-countrymen, our rights, the privileges and ancient customs and the freedom of our fatherland, and the life and honor of our wives, children, and posterity, so that we may not become the Spaniard's slaves, and forsaking the King of Spain with good right, we have been compelled to devise and practice other means which seem to provide better for the greater safety and preservation of our aforesaid rights, privileges, and liberties."

[21] Ibid., 181.

[22] See Frederick S. Carney, "Translator's Introduction," included in *Politica,* edited and translated by Frederick S. Carney (Indianapolis: Liberty Fund, 1995), xxiv-xxix; see also Friedrich , "Introduction," xlvii.

office." Rather than seeking to fight monarchy itself, the group was dedicated to fighting tyranny. Friedrich contends that Althusius may be called "the philosopher of this group."[23] Carney agrees, saying that "Althusius may be considered the culminating theorist of this group, for he provided their ideas on limiting the power of a ruler with a politically systematic basis they had previously lacked."[24]

With regard to the second event Hueglin mentions, the Dutch Revolt against Spain, the impact on Althusius was even more direct. James Rogers holds the revolt to be "the beginning of modern political science and of modern civilization." Having repudiated the divine right of kings and the divine authority of the Catholic Church, Rogers says that "[t]o the true lover of liberty, Holland … should be held sacred."[25] Laski argues that in the Netherlands,

> [the] rebellion is not merely successful, but leads to the formation of a republic of which the prosperity was based on toleration. … Had there not been that protest, the general condition of Europe would have been similar to that of France under Louis XIV — an inert people crushed into uniform subjection by a centralised and unprogressive despotism.[26]

Thus, the Dutch provided a model for future people to follow.

That is precisely what occurred n Althusius' city of Emden, where the same narrative played out on a smaller scale, with the city resisting "violations of its vital and fundamental rights."[27] In the Dutch Revolt, the tension was between provinces and the broader Spanish Empire. With Emden, the fight was between a city and the broader

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[23] Friedrich, "Introduction," lvi-lvii.

[24] Carney, "Translator's Introduction," xxv.

[25] James E. Thorold Rogers, *The Story of Holland* (New York: G. P. Putnam's Sons, 1889), ix-x.

[26] Ibid., 27.

[27] Ibid., 34.

province of Eastern Frisia. As Friedrich explains, Count Enno III was legally the overlord of the province, but he was considered a political enemy. He was Lutheran rather than Calvinist, like the majority of the population. Enno repeatedly attempted to raise taxes, and he was suspected of conspiring with the city magistrate to interfere with the administration of the city. Proximity and a common faith led to a strong relationship between Emden and the neighboring Dutch. Not only did the Dutch serve as arbitrators between the city and Count Enno, they also garrisoned troops in the city to defend it from harm during the Thirty Years War. Emden's leading man during this period was Althusius, whose chief aim was to defend local autonomies against creeping absolutism.[28] This desire courses through the pages of *Politica.*

Jean Bodin and Sovereignty

Althusius' *Politica* is replete with citations to a wide variety of sources. These give some sense of Althusius' erudition and the project he pursues. Carney notes that there are over 150 books referenced in the abridged English translation.[29] Friedrich provides a complete Latin index of sources in his 1932 edition of *Politica*. Of the references, biblical citations are most frequent, with a number in the thousands. Friedrich argues that the references were not added as "mere ornament" but "form a very essential and inseparable part of the text."[30] He continues, "Other works to which very frequent

[28] See ibid., 34-41; see also Friedrich, "Introduction," xxxii-xli.

[29] See Carney, "Translator's Introduction," xxiv.

[30] Friedrich, "Introduction," xlv; see also Alain de Benoist, "The First Federalist: Johannes Althusius," trans. by Julia Kostova, *Telos,* 200:118 (Winter 2000), 47-48. Benoist mistakenly attributes to Friedrich an idea that the latter was citing, only to disagree. Friedrich expresses surprise that a contemporary theologian, General Superintendent P. G. Bartels, could claim that Althusius' theology was nothing but a "superficial ornament" (xviii).

reference is made are the Justinian Law Books, Aristotle, Cicero, Bodinus, Gregorius Tolosanus, and the group of writers commonly called the monarchomachs." For present purposes, Ioannes Bodinus, or Jean Bodin, is of particular importance. Althusius referred to him nearly two hundred times. Indeed, as Friedrich concludes, Bodin "is in a sense the great opponent against whom the *Politica* is directed."[31]

The controversy between the two thinkers centered on the source and nature of sovereignty. Dieter Grimm contends, "Sovereignty is linked, like no other principle of politics or law, with the name of one author: Jean Bodin."[32] If sovereignty describes "the highest, final decision-making authority," then in the Middle Ages, "sovereignty could be linked only with individual powers."[33] The concept was necessarily pluralistic given that many "sovereigns" could coexist in the same territory. As Grimm demonstrates, this conception of sovereignty was related to a particular conception of law:

> Functionally, sovereignty did not include the right to autonomous lawmaking. … Lawmaking was limited to making existing law more concrete, or at least it had to claim to be doing this. Ascertaining the law was most important. The function of finding the law antedated the function of making law. Thus, the expression *sovereign* referred with particular frequency to the power of dispensing justice.[34]

With the medieval order collapsing, Bodin described the consequences for sovereignty.

Bodin was born in Angers, France in 1529 or 1530. He became known to the royal court by the end of the 1560s and was associated with King Charles IX, Henry III, and Francis, duke of Alençon. Bodin published his *Les six Livres de la République* in

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[31] Ibid., lix.

[32] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, trans. by Belinda Cooper (New York: Columbia University Press, 2015), 13.

[33] Ibid., 14.

[34] Ibid., 17.

1576, developing in great detail an absolutist theory of sovereignty. His account was welcomed by political elites in France.[35]

Spurred by years of religious strife, including the St. Bartholomew's Day Massacre of 1572, Bodin believed that peace required a superior power. Sovereignty must be united in a ruler; the state could not suffer a continued sharing of power.[36] According to Bodin, the sovereign could recognize none but God as greater than himself.[37] His power could not be limited in function or time. If a magistrate attempts to prolong his power by force, he is a tyrant but remains a sovereign. If he attempts to prolong his power by the consent of the people, he is not sovereign for his power is only by sufferance.[38] He may choose to limit his power by granting rights, liberties, and privileges to lesser associations (like guilds and corporations). Any authority exercised by such bodies was derived from the sovereign and continued insofar as he permitted. Further, such grants of authority could only extend for the lifetime of the prince. Longer terms would deprive a prince's successor of true sovereignty.[39]

Moreover, as described by Bodin, sovereignty stands above law. He says that sovereignty that is "subject to obligations and conditions is properly not sovereignty or absolute power."[40] Such conditions may be politically prudent, but they are not required

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[35] See Julian H. Franklin, "Introduction," in *Bodin: On Sovereignty*, edited and translated by Julian H. Franklin (Cambridge: Cambridge University Press, 1992), ix-x.

[36] See ibid., xii-xiii; see also Grimm, *Sovereignty*, 18-20.

[37] See Bodin, *On Sovereignty*, 4.

[38] See ibid., 6.

[39] See ibid., 12; see also ibid., 65-66; Bodin explains that "magistrates, or guilds and corporations, may have the power to choose and name high magistrates," but the results of any such election is always subject to confirmation by the king.

[40] Ibid., 8.

of the sovereign. Bodin goes further, saying that "the prince is not subject to the law; and in fact the very word 'law' in Latin implies the command of him who has the sovereignty."[41] Again, he says that "law is nothing but the command of a sovereign making use of his power."[42] Indeed, "the main point of sovereign majesty and absolute power consist of giving the law to subjects in general without their consent."[43] Thus, law is contrasted with custom. The latter, Bodin says, "acquires its force little by little and by the common consent of all, or most, over many years, while law appears suddenly, and gets its strength from one person who has the power of commanding all." He concludes, "[C]ustom has no force but by sufferance, and only in so far as it pleases the sovereign prince. … Hence the entire force of civil law and custom lies in the power of the sovereign prince."[44] Thus, custom has no independent authority; law is the command of the sovereign.

Grimm says, "The effects of [Bodin's] theory cannot be overstated."[45] Nine editions were published in France within five years. By 1606, editions had been published in French, Latin, Italian, Spanish, German, and English. Many European princes adopted his theory as a model for rule.[46]

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[41] Ibid., 11.

[42] Ibid., 38.

[43] Ibid., 23.

[44] Ibid., 57-58.

[45] Grimm, *Sovereignty*, 23.

[46] See ibid., 23-24.

Althusius' Response

It is against this backdrop that Althusius wrote *Politica*. Imperial Spain was attempting to consolidate its power over its territories. Eastern Frisia was attempting to do the same over the cities within the province. Bodin's absolutist theory was gaining a foothold across Europe. Althusius responds with *Politica*, a work that envisions society built from the bottom-up, with families serving as the foundational unit.

In the preface to the first edition of his work, Althusius announces that his goal is "to find out whether a methodical plan of instruction" could be set forth for students of politics.[47] To do so, he must first answer the question, "What is politics?" His first chapter is dedicated to this subject. He begins, "Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them." In fact, he says that politics is called "symbiotics" and its "subject matter … is therefore association (*consociato*), in which the symbiotes [those who live together] pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life."[48]

Hueglin says that "the first chapter of Althusius' *Politica* … can almost be read as a synopsis of Aristotle."[49] Althusius builds on Aristotle's assertion that "man is by nature

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[47] Johannes Althusius, *Politica,* edited and translated by Frederick S. Carney (Indianapolis: Liberty Fund, 1995), 3.

[48] Ibid., 17; see also Hueglin, *Early Modern Concepts*, 16 FN4. Hueglin explains that the Latin is *consociatio*, which Carney translates as "association." Hueglin expresses some concern that this term might be "somewhat misleading because of its modern liberal connotations." As he goes on to say, Carney translated *Politica* before Arend Lijphart popularized the term "consociational democracy." For his part, Lijphart was building on the ideas put forward by Althusius. See Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968); see also Arend Lijphart, *Democracy of Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977).

[49] Hueglin, *Early Modern Concepts*, 60.

a political animal."[50] One does not find humans alone; everywhere they are in associations with others because "no man is self-sufficient, or adequately endowed by nature."[51] "As an aid and remedy for this state of affairs," Althusius says that humans are offered "symbiotic life." An individual is compelled toward this life "if he wants to live comfortably and well, even if he merely wants to live."[52] By God's design, humans are not meant to be alone:

> The entire second Decalogue pertains to this: "you shall love your neighbor as yourself"; "whatever you wish to be done to you do also to other," and conversely, "whatever you do not wish to be done to you do not do to others." … Of what use to anyone is a hidden treasure, or a wise man who denies his services to the commonwealth?[53]

Based upon these facts, Althusius concludes in no uncertain terms that the "practical and political life" surpasses the "theoretical and philosophical life."[54] He asks how "misanthropic and stateless hermits" can "promote the advantage of their neighbor unless they find their way into human society?"[55]

After determining that men are drawn into association by divine intent, Althusius then outlines a number of these associations. One grouping includes "simple and private association," which can be either natural or civil. The natural, private association is the family, which "is rightly called the most intense society, friendship, relationship, and

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[50] Aristotle, *The Politics*, translated by Carnes Lord (Chicago: University of Chicago, 1984), 1253a1.

[51] Althusius, *Politica*, 17.

[52] Ibid., 18.

[53] Ibid., 22.

[54] Ibid.

[55] Ibid., 22-23. It is interesting to compare Althusius' conclusions with Aristotle's. See Aristotle's *Ethics*, particularly Book X.

union, the seedbed of every other symbiotic relationship."[56] For this reason, an understanding of the family association is necessary to have an accurate understanding of all other relationships. Thus, Althusius disagrees with those political writers who would consign the study of the family association to economics rather than politics. He concedes "that the skill of attending to household goods … is entirely economic." "[A]ltogether different," he continues, is the family association, "which is entirely political and general, and which communicates things, services, rights, and aid for living the domestic and economic life piously, justly, and beneficially."[57] Althusius concludes his study of the family by again pointing out that, whether the association is public or private, "all symbiotic association and life is … political."[58]

Althusius then moves to a discussion of civil associations, which, unlike families, are generally voluntary societies and are not necessarily permanent.[59] Such associations are formed by three or more individuals who unite for some particular purpose. The members may elect one to have administrative power who would have coercive power

[56] Ibid., 28. See also ibid., 29-31. Althusius includes two kinds of association under the family heading: one is conjugal (*conjugalis*) and the other is kinship (*propinqua*). Within the family association, the "advantages and responsibilities are intensified as the degree of relationship among the kinsmen increases."

[57] Ibid., 31.

[58] Ibid., 32; but cf. Witte, "Natural Rights, Popular Sovereignty," 608. Witte seems to conflate public with political, writing, "In the development of civilizations, Althusius argued, groups of private (natural or voluntary) associations covenant together to form public (political) associations."

[59] See ibid., 33; see also Benoist, "The First Federalist," 34; Benoist correctly points Althusius "emphasizes that there is always an element of will in natural associations, of which marriage—the conjugal community—is the prototype, and that there is also an element of necessity in voluntary associations. Marriage requires the lasting consent of spouses, while in general voluntary associations do not dissolve until other structures evolve that appear to be better suited to their needs. This equilibrium between will and need is one of the key features of Althusius' associative theory."

over individuals within the group but not the group itself. [60] The association may establish rules for itself, but it "must not infringe on the public jurisdiction."[61]

Public associations are created "when many private associations are linked together for the purpose of establishing an inclusive political order."[62] It is thus an association of associations or community of communities.[63] Althusius calls this a "representational person" that "represents men collectively, not individually." Indeed, the members of the community are associations rather than the individuals who make up private associations. Leadership of this community may be held by one or more persons. Leaders are appointed and govern by the consent of the community, which may revoke its appointment. Leaders are bound by "[a]n oath of fidelity to certain articles in which the functions of this office are contained."[64] Citizens, in turn, are bound to obey.

In addition to the administrator of the city, the people are also represented by a "senatorial collegium." For particularly grave matters, the Senate may call for the votes of the individual collegia, or groups, of the city.[65] Althusius then says that the "common business of a city is conducted and managed in almost the same manner as that of a realm

[60] See ibid., 33-34. Civil associations of this type go by a number of different names: collegium, guild, corporations, gathering, society, federation, etc. Members of these voluntary associations may be called colleagues, associates, brothers, etc.

[61] Ibid., 36.

[62] Ibid., 39.

[63] See ibid., 39-40. Carney explains in the first two footnotes that Althusius uses "community" in different ways. It can be used generically as above to include the commonwealth, province, and city. More often, however, Althusius uses "community" (*universitas*) to distinguish the city from a province (a larger particular public association) and a commonwealth (the universal public association).

[64] Ibid. 40-41.

[65] See ibid., 42-44.

or province."[66] Cities have a large degree of autonomy, but they must take care not to exercise jurisdiction beyond their territory or in ways contrary to fixed covenants with their superior.[67]

Aristotle says that "it is clear that everyone would praise the territory that is most sufficient."[68] Althusius would certainly agree. As Hueglin notes, "Althusius recognized the challenge and existential threat to the self-sufficiency and autonomy of small city-communities that stemmed from the formation of large territorial empires."[69] However, he also recognized a need for organization beyond the local city. Therefore, he engages in an extended discussion of provincial government, which is formed by an association of cities.[70] Althusius says that the province is composed by its orders and estates, not by individuals. Citing the advice of Jethro, the father-in-law of Moses, Althusius contends that "no one can be sufficient and equal to the task of administering such various, diverse, and extensive public business of a province unless in part of the burden he avails himself of skilled, wise, and brave persons from each class of men."[71] This arrangement preserves liberty for the members of the province, as each group knows that its interests will be represented. The orders work to assist and check the provincial head, whose task

[66] Ibid., 46.

[67] See ibid., 48.

[68] Aristotle, *The Politics*, 1326b25-30.

[69] Hueglin, *Early Modern Concepts*, 61.

[70] See Althusius, *Politica*, 51. As Carney notes in FN1, Althusius did not include provinces as a distinct type of association in the first edition of his work. He treated them more as administrative units of the larger commonwealth. By 1610, however, after years of working as the syndic of Emden, Althusius revised his position for the second edition.

[71] Ibid., 54.

is to administer government with efficiency.[72] If the provincial head fails in his work, the people may seek another who will carry out the work more effectively.[73]

Beyond the province, Althusius turns to what he calls "a universal association." It is not universal in the sense of encompassing the globe but in the sense of representing the entire realm or commonwealth. It is composed of many symbiotic associations, both public and private. Importantly, Althusius writes, "For families, cities, and provinces existed by nature prior to realms, and gave birth to them."[74] Cities and provinces may confederate fully or partially with one another.[75] The confederation facilitates commerce and improves defense.[76]

Thus, Althusius begins with the natural association of the family. He describes other civil associations. These combine to form public associations of varying sizes and functions. All associations, both private and public, are a part of the commonwealth. All participate in what Althusius describes as a symbiotic relationship and are, therefore, political. Hueglin is correct to note that Althusius' construction should not be considered "as a hierarchy … but as a federal building, which gives existential priority to the private associations as its fundaments, without which the encompassing universal association at the top could not exist."[77]

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[72] See ibid., 55 and 62.

[73] See ibid., 65.

[74] Ibid., 66.

[75] See ibid., 89-90.

[76] See ibid., 68.

[77] Thomas O. Hueglin, "Johannes Althusius: Medieval Constitutionalist or Modern Federalist?" *Publius*, Col. 9, No. 4 (October 1979), 20.

After reviewing the various associations, Althusius returns to the subject he first raised in his preface—the subject of sovereignty.[78] In the preface, he announces that a study of the rights and sources of sovereignty belong within the study of politics. He wastes no time stepping into controversial waters, disagreeing with "common opinion," which holds that the rights of sovereignty belong to the prince or supreme magistrate.[79] Althusius, on the contrary, says that the prince is the mere steward of these rights. "[T]heir ownership and usufruct," he contends, "belong to the total realm or the people." Indeed, "these rights of sovereignty … are proper to the realm to such a degree that they belong to it alone, and … they are the vital spirit, soul, heart, and life by which … the commonwealth lives." Althusius is confident in this judgment, saying, "I am not troubled by the clamors of Bodin, nor the voices of others who disagree with me."[80]

The difference between Bodin and Althusius, Hueglin argues, is primarily one of method:

> Bodin first determines the most general principle of politics—sovereignty—and then deduces from it the nature of organized social life, whereas Althusius first examines the nature of organized social life and *then* determines sovereignty as its most general principle—by means of induction rather than deduction.

Hueglin continues by illuminating the implications of this disagreement. First, the two men belong to traditions that define politics very differently. Bodin's camp views politics "as a hierarchical system of organized public power" where "[a]ll social rights and obligations stem from one universal source of legal authority." Althusius defines politics more broadly, in such a way that does not require a conceptual separation of state

[78] See Althusius, *Politica*, 70-74.

[79] Ibid., 6.

[80] Ibid., 7.

and society. His tradition views politics as "primarily a horizontal process of communication among a plurality of groups that all possess their own rights and obligations."[81] As has already been noted, Althusius distinguishes between public and private, but he includes both in his conception of politics.[82] However, as Hueglin reminds us, "The 'political' here … still is not primarily the establishment and exercise of hierarchical public authority."[83] "Political" refers to any association existing "for the purpose of establishing, cultivating, and conserving social life" among men.[84] This art of living together, for Althusius, requires that the rights of sovereignty belong to the people.

By placing sovereignty in the hands of the people, Althusius has been considered an important precursor to modern notions of popular sovereignty.[85] However, it is important to keep his meaning distinct from contemporary understandings, which are often intensely individualistic and present-oriented. For instance, when American legal scholar Akhil Amar writes of popular sovereignty, he seems to have in mind the people as an undifferentiated mass. Thus, as Amar tells the story of the American Founding, it comes as no surprise that he would privilege the views of Gouvernour Morris, a Founder who considered state equality in the Senate a policy of "selfishness" that ignored "the

[81] Hueglin, *Early Modern Concepts*, 76.

[82] See Althusius, *Politica*, 32.

[83] Hueglin, *Early Modern Concepts*, 77.

[84] Althusius, *Politica*, 17.

[85] See, e.g., William A. Dunning, "The Monarchomachs: Theories of Popular Sovereignty in the Sixteenth Century," *Political Science Quarterly*, 19:2 (June 1904), 289-94; Nicholas Wolterstorff and Terence Cuneo, "The Right of the People to a Democratic State: Reflections on a Passage in Althusius," in *Understanding Liberal Democracy: Essays in Political Philosophy* (Oxford: University of Oxford Press, 2012), 227-44; Patrick Overeem, "Johannes Althusius on Public Administration," *Administrative Theory & Praxis*, 36:1 (March 2014), 31-32;

true interest of man."[86] Amar agrees, arguing that delegates who favored proportionality have "the better argument from democratic principle" than those supporting the "nonegalitarian" system we ultimately chose.[87] He appears to have no objection to Americans asserting their "national popular-sovereignty right" by acting outside the amendment procedures of Article V and instead ratifying amendments through a national convention.[88] To give states any role in the process would violate his individualistic understanding of popular sovereignty.

Amar's colleague, Sanford Levinson, makes similar arguments. In *Our Undemocratic Constitution*, Levinson provides a list of "where the U.S. Constitution goes wrong."[89] How can a state as small as Wyoming receive the same representation in the Senate as the far more populous California? Why must three-fourths of the states agree to a constitutional amendment for it to be ratified? Why do we have an Electoral College, a mechanism that may prevent the seating of a presidential candidate who wins the majority of the popular vote? Why does the president have the authority to veto the will of the people as represented by majorities in Congress?[90] Levinson considers this final point far more important than the so-called "counter-majoritarian difficulty," where courts have the ability to strike down democratically enacted legislation that they, as

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[86] Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 294-95; citing *The Records of the Federal Convention of 1787*, Max Ferrand, ed., 1:531.

[87] Ibid., 295-96.

[88] Ibid., 297-99.

[89] Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Change It)* (Oxford, Oxford University Press, 2006). Another classic example in this line is Bruce Ackerman's *We The People: Transformations* (Cambridge, MA: Belknap Press, 1998). Ackerman speaks of "constitutional moments," where sustained majorities produce major changes to constitutional law without following the formal Article V amendment process.

[90] See ibid.

unelected judges, find unconstitutional. In writing his book, Levinson says that he discovered he was "much more Jeffersonian" that he had previously thought.[91] Wishing to take "reason for our guide, instead of English precedent," Jefferson notoriously suggested that all laws and constitutions expire every nineteen years, the length of time he calculated to be an average generation.[92] Levinson jokes that he is "not quite willing to sign on to" Jefferson's recommendation for frequent revolutions, but he does favor the frequent examination of our institutions by contemporary majorities.[93] Popular sovereignty is about what the people want *now*; what has come before is nothing but the "dead hand of the past."

Interestingly, Jefferson uses a word in this letter that also appears in a passage from Althusius quoted above, the word *usufruct*. Jefferson writes, "I set out on this ground, which I suppose to be self evident, '*that the earth belongs in usufruct to the living':* that the dead have neither powers nor rights over it."[94] A usufruct is "a right to use and enjoy the fruits of another's property for a period without damaging or diminishing it."[95] Jefferson's contention is that no "generation of men has a right to bind

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[91] Sanford Levinson, "Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Change It)," *Bulletin of the American Academy* (Winter 2007), 32.

[92] Thomas Jefferson to James Madison (Sept. 6, 1789), in *The Founder's Constitution*, Philip Kurland and Ralph Lerner, eds., available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>.

[93] Sanford Levinson, "Our Undemocratic Constitution," 32; see also Thomas Jefferson to William Stephens Smith (Nov. 13, 1787) in *The Works of Thomas Jefferson*, Federal Edition (New York and London: G.P. Putnam's Sons, 1904-05), Vol. 5 of 12. <http://oll.libertyfund.org/ titles/802>. In this letter, Jefferson makes his famous statement: "The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's [sic] natural manure."

[94] Ibid. (emphasis in original).

[95] *Black's Law Dictionary*, 8th ed., s. v. "usufruct."

another."[96] He connects the idea of contemporary majorities with the idea of egalitarian representation.[97] The individual is Jefferson's unit of analysis: "the rights of the whole can be no more than the sum of the rights of the individuals."[98]

Althusius means something far different when he places sovereignty in the hands of the people. Perhaps most importantly, he does not begin with the isolated individual. A man who cuts himself off from society out of desire or because he can supply all his own needs "is not a part of the commonwealth"; instead, he is "either a beast or a god, as Aristotle asserts."[99] Althusius believes "that man is a civil animal who strives eagerly for association."[100] Thus, he begins with the family, to which man is drawn both by "natural affection and necessity."[101] From this most basic and natural association, Althusius turns to private civil associations and finally to public associations. He argues that "human society develops from private to public association by the definite steps and progressions of small societies."[102] Repeatedly, he emphasizes that the constituent members of the public associations are smaller associations, not individuals within them.

As a result, Althusian popular sovereignty is not egalitarian in the way many contemporary scholars view popular sovereignty. An individual might find

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[96] Jefferson to Madison (Sept. 6, 1789), supra note 92.

[97] See Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *The Works of Thomas Jefferson*, Federal Edition (New York and London: G.P. Putnam's Sons, 1904-05), Vol. 12 of 12, http://oll.liberty fund.org/ titles/808.

[98] Jefferson to Madison (Sept. 6, 1789), supra note 92.

[99] Althusius, *Politica*, 25; see also Aristotle, *The Politics*, 1253a31.

[100] Ibid.

[101] Ibid., 28.

[102] Ibid., 39.

representation of his interests through his family, guild, church, etc. An individual's degree of influence will vary according to the network of associations he belongs to. Associations receive delegates for the provincial collegium, which is grouped into orders. Althusius mentions four possible orders: an ecclesiastical order and secular orders for the nobility, the burghers, and the agrarians. He concedes that the recognized orders are not uniform across the German and Belgian provinces. Some provinces do not recognize an agrarian order and others do not have an ecclesiastical order. However, due to the "diversity of affairs" to be discussed, Althusius recommends an inclusive policy, granting representation as widely as possible. Each order is entitled to deliberate in separate chambers and then cast one vote. The provincial head is not to interfere with free decisions.[103]

On many subjects, a matter is decided by a majority vote of the orders. However, unlike many modern proponents of popular sovereignty, Althusius does not equate popular sovereignty with simple majoritarianism.[104] A majority is only competent to decide for the whole on issues common to all the orders together. On issues that concern the orders separately, they cannot be bound by majority vote.[105] Althusius applies this

[103] See ibid., 60-65.

[104] See ibid; compare with *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Sanford Levinson, ed. (Princeton: Princeton University Press, 1995). In his editor's introduction, Levinson contrasts the views on popular sovereignty of Amar and Ackerman (discussed above) with those of David R. Dow ("Introduction," 9). In his essay, the latter is explicit, "In any event, the idea of popular sovereignty does *not* entail rule by majority will. Although popular sovereignty *can* be understood as 50 percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers…. Majority rule is a practical (and normative) rule of who wins. Popular sovereignty is a theoretical view of who does, or who ought to, have power. Neither notion entails the other" ("Popular Sovereignty and Constitutional Amendment," 120; emphasis in original).

[105] See ibid. 64-65.

principle to the collegium, city, province, and realm.[106] When speaking of deliberations in a collegium, Althusius explains the rule:

> The reason is that what is common to everyone is not my private concern alone. … However, in matters common to all one by one, or pertaining to colleagues as individuals, a majority does not prevail. In this case, 'what touches all ought also to be approved by all.' Even one person is able to object.[107]

Thus, for Althusius, popular sovereignty is not about egalitarian representation of individuals where simple majorities always prevail. His vision of popular sovereignty is a more general idea of authority stemming from ascending communities of consent.

Reception of Althusius

Though his work was popular in the generation of its publication, the teachings of Althusius soon slipped into relative obscurity.[108] As Daniel Elazar puts it:

> [T]he Althusian view, which called for the building of states on federal principles—as compound political associations—lost out to the view of Jean Bodin and the statists who called for the establishment of reified centralized states where all powers were lodged in a divinely ordained kind at the top of the pyramid or in a sovereign center.[109]

Althusius would not again receive systematic attention until Otto von Gierke, the subject of the next chapter, recovered him in a volume published in 1880.[110] Elazar says that Althusius' ideas "remained peripheral even to students of modern federalism since

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[106] See ibid; Althusius applies the same principle to deliberation within a collegium (see Chapter IV), a city (see Chapter V), and in councils of the realm (see Chapter XXXIII).

[107] Ibid., 37.

[108] See, e.g., Gierke, *Development*, 21; see also Friedrich, "Introduction," xl.

[109] Daniel Elazar, "Althusius' Grand Design for a Federal Commonwealth," included in *Politica,* edited and translated by Frederick S. Carney (Indianapolis: Liberty Fund, 1995), xxxviii.

[110] See ibid., xxxviv; see also Otto von Gierke, *The Development of Political Theory*, trans. by Bernard Freyd (New York: W. W. Norton & Co., 1939).

modern federalism was so strongly connected with the principle of individualism" and Althusian federalism is not.[111]

Carl Friedrich revived academic interest in Althusius with his Latin translation of *Politica* in 1932. Friedrich provided an extensive interpretive introduction, an index of the authors Althusius cited, and an appendix of letters written by Althusius.[112] The first English translation was provided by Frederick S. Carney in 1964, with a reprint published by Liberty Fund in 1995. Few scholars in the English-speaking world have explored Althusius with any level of detail.[113]

Among those who have, a number of different interpretations have emerged. For instance, Daniel Elazar focuses on Althusius' relationship to federalism. Elazar delineates three different kinds of federalism. "Premodern federalism" defined individuals by their membership in "permanent, multi-generational groups" where "rights and obligations derived entirely or principally from group membership." "Modern federalism" emphasized "polities built strictly or principally on the basis of individuals and their rights, allowing little or no space for recognition or legitimation of

[111] Elazar, "Althusius' Grand Design," xxxix.

[112] See ibid; see also Johannes Althusius, *Politica Methodice Digesta*, translated by Carl Joachim Friedrich (Cambridge, MA: Harvard University Press, 1932).

[113] I have already mentioned Friedrich's work in his Latin translation of Politica. In the English translation, Carney provides a helpful introduction and Elazar wrote a substantive foreword. Thomas O. Hueglin has done excellent work in a number of articles, chapters, and books. For other authors, see, e.g. M. R. R. Ossewarde, "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *The Monist*, Vol. 90, No. 1, Sovereignty (January 2007), 106-25; Alain de Benoist, "The First Federalist: Johannes Althusius," trans. by Julia Kostova, *Telos*, 200:118 (Winter 2000), 25-58; Patrick Riley, "Three 17th Century German Theorists of Federalism: Althusius, Hugo, and Leibniz," *Publius*, Vol. 6, No. 3 (Summer 1976), 7-41; James Skillen, "The Political Theory of Johannes Althusius," *Philosopha Reformata*, Vol. 39 (1964), 170-90; John Witte, Jr., "Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic," 87 U. Det. Mercy L. Rev. 565 (2009-2010), 565-627; John Witte, Jr., "A Demonstrative Theory of Natural Law: Johannes Althusius and the Rise of Calvinist Jurisprudence," *Ecclesiastical Law Journal* 11 (2009): 248-265.

intergenerational groups." Finally, there is "postmodern federalism," which accepts the need to secure individual rights while also recognizing groups "as real, legitimate, and requiring appropriate status." Elazar argues that "Althusius is the first, and one of the few political philosophers who has attempted to provide for this synthesis."[114] Unfortunately, Elazar does not provide additional context by identifying other proponents of his various categories of federalism.

Other scholars, such as Thomas O. Hueglin and Alain de Benoist, also use the language of federalism to describe Althusius, but they additionally discuss the concept of subsidiarity. Benoist calls Althusius "the first federalist" in the title of his article, and he refers back to Bernard Voyenne who held Althusius to be "the first federalist theoretician." Voyenne would go on to say that Althusius' federalism "in many respects is already integral federalism."[115] His claim has merit. Hueglin and Alan Fenna explain that "integral federalism" is connected to Alexandre Marc, a Russian socialist and follower of Proudhon. In the 1930s, the integral federalists sought a European federalism that integrated both politics and economics. Like Althusius, they argued that human nature is "embedded in plural relationships and therefore at odds with radical individual liberalism." Further, they would limit the role of the state to serving this network of self-governing communities.[116]

Thus, Benoist recognizes Althusius as a federalist, but he also devotes attention to the elements of subsidiarity in Althusius' thought. In fact, he contends that "Althusius

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[114] Elazar, "Althusius' Grand Design," xl.

[115] See Benoist, "The First Federalist," 54; see also Bernard Voyenne, *Histoire de l'idée fédéraliste*, Vol. 1: *Les Sources* (Nice: Presses d'Europe, 1976), 93-111.

[116] Thomas O. Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Peterborough, Ontario: Broadview Press, 2006), 108.

established himself as the first post-medieval defender of the principle of subsidiary authority."[117] For Althusius, freedom emanates from the autonomy of lower association. This freedom is guaranteed through subsidiarity, whereby each successive level performs only what its constituent parts cannot. At each level of association that Althusius depicts, the leader is superior to the members individually but remains subject to the collective organization. Benoist calls this point "essential [for] it encapsulates Althusius' entire theory on the subsidiarity of authority and sovereignty."[118]

Similarly, Hueglin connects the ideas of federalism and subsidiarity. He contrasts "the top-down governmental federalism of Madison and the American Federalists" with the bottom-up "societal federalism" of Althusius.[119] Althusius' federalism is "bottom-up" in that it begins with the "smallest fellowship" and moves to "the universal commonwealth," with every community "created by consent among its constituent members … [and] interconnected by universal principles of association representation, and sovereignty."[120] It is "societal" in that Althusius' inclusive definition of politics includes any association contributing to the common good, whether it be public or private.[121]

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[117] Benoist, "The First Federalist," 55.

[118] Ibid., 35.

[119] Hueglin, *Early Modern Concepts*, 11. This definition also allows Hueglin to escape the attacks of those like Peter Haworth, who draw sharp distinctions between federalism and subsidiarity. See Peter Haworth, "The Prudent Case for Robust Federalism and Limited Subsidiarity," *Nomocracy in Politics* (October 31, 2013), http://nomocracyinpolitics.com/2013/10/31/the-prudent-case-for-robust-federalism-and-limited-subsidiarity/.

[120] Ibid., 65.

[121] See ibid., 68-69. "On the one hand, [Althusius] clearly distinguished between the narrower private goals of families and guilds, and the wider public goals of provinces and realms. On the other hand, he defined both as "political"—i.e., contributing to the common good—and therefore incorporated them

By distinguishing between "federalism as a general form of social organization and modern federalism … as a specific type of government," Hueglin is able to then discuss subsidiarity in Althusius' thought.[122] He credits his friend Ken Endo with making the connection between Althusius and the subsidiarity embedded in the Maastricht Treaty, also known as the Treaty on European Union.[123] Article 3b of the treaty specifies:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.[124]

Hueglin agrees with Endo's assessment and has come under fire for asserting that subsidiarity has roots in Calvinist theology and Althusius' philosophy that predate Catholic social doctrine.[125]

Hueglin reminds us of Althusius' understanding of federalism: a "pluralization of governance among the members of a commonwealth wherein all higher levels of authority are as a matter of principle constituted on the basis of consent and solidarity from below." Subsidiarity, then, is "a principle of power allocation" within this pluralized system of governance. The key, Hueglin says, is the "tension between

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into a political system of "societal federalism" organized in ascending level of organized interests and their representation in each next higher level."

[122] Ibid., 109.

[123] See ibid., 152; see also Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors," *The Hokkaido Law Review* 44:6 (1994), 553-652.

[124] The Maastricht Treaty, Article 3b (Feb. 7, 1992).

[125] See Hueglin, *Early Modern Concepts*, 152; see also Hueglin, "Bottom-up Federalism: The Early Modern Contribution to Local Governance in a Globalizing World," working paper IV-09, The Globalization & Governance Project, Hokkaido University (Dec. 7-8, 2001), 1.

autonomy *and* solidarity" that Althusius' system keeps alive. There is no static enumeration of divided powers but a guiding principle that encourages active participation in self-government. When defined in this way, Hueglin considers the relationship between federalism and subsidiarity to be part of "and old and important European (counter)tradition of politics as discourse."[126]

On the other hand, M. R. R. Ossewarde argues that the "federalist interpretation of subsidiarity is a very common error in political thought."[127] He says further, "Neither is Althusius a subsidiarity thinker, nor has subsidiarity a relationship with federalism or distribution of state powers."[128] Rather than grounding his thought in the Aristotelian metaphysics from which the principle of subsidiarity springs, Althusius grounds his thought in "Calvinist metaphysics [wherein] each association must fulfill the given responsibilities assigned to it according to its calling," a concept that has come to be known as sphere sovereignty.[129] With this interpretation, Ossewaarde belongs to a line of Dutch thinkers that includes Guillaume Groen van Prinsterer (1801-76), Abraham Kuyper (1837-1920), and Herman Dooyeweerd (1894-1977).[130]

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[126] See ibid., 157.

[127] M. R. R. Ossewaarde, "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *The Monist*, Vol. 90, No. 1, Sovereignty (January 2007), 106.

[128] Ibid., 107.

[129] Ibid., 107-108.

[130] See, e.g., Guillaume Groen van Prinsterer, *Unbelief and Revolution: A Series of Lectures in History*. Amsterdam: Groen van Prinsterer Fund, 1973); Abraham Kuyper, *Lectures on Calvinism* (Peabody, MA: Hendrickson, 2008); Abraham Kuyper, *Guidance for Christian Engagement in Government: A Translation of Abraham Kuyper's* Our Program, translated and edited by Harry Van Dyke(Grand Rapids, MI: Christian's Library Press, 2013); Herman Dooyeweerd, *Roots of Western Culture: Pagan, Secular, and Christian Options*, translated by John Kraay (Grand Rapids, MI: Paideia Press, 2012); Herman Dooyeweerd, *In the Twilight of Western Thought* (Grand Rapids, MI: Paideia Press, 2012). For a helpful summary of these thinkers, see James W. Skillen, "From Covenant of Grace to Tolerant Public Pluralism: The Dutch Calvinist Contribution," in *The Covenant Connection: From Federal Theology to*

Ossewaarde continues, "Althusius argues that symbiotic associations in human societies … are *sovereign wholes in themselves*."[131] The role of politics is "maintaining the sovereignty of symbiotic associations." It is unjust to permit any association, governmental or otherwise, to usurp the symbiotic rights of another association.[132] Thus, Ossewaarde contends, "The concept of sphere sovereignty is antithetical to the scholastic concept of subsidiarity." The latter "conceives of all aspects of human reality in terms of part-whole relationships, in which all parts—families, schools, neighbourhoods—are subordinate to the political and religious wholes of State and Church." It simply "cannot recognize the existence of spheres [or] their sovereignty."[133] The symbiotic associations of Althusius are horizontal relationships rather than hierarchical. One symbiote is not above another; each needs the other to flourish.[134]

Ossewaarde makes the important point that if "the State is defined as the executioner of the sovereign will, it can no longer be held back by the laws, vested rights, or historical liberties, but works with revolutionary omnipotence as the crowned deput[y] of the sovereign[]." It may then seek to restrict or abolish those associations beneath it that are deemed injurious to its power.[135] The State, however, is a sphere unto itself, and it possesses the responsibility of administration. Within the sphere, administrative

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Modern Federalism, edited by Daniel Elazar and John Kinkaid (Lanham, MD: Lexington Books, 2000), 71-100.

[131] Ossewaarde, "Three Rival Versions," 113.

[132] Ibid., 114; see also Althusius, *Politica*, 19. Althusius explains that "symbiotic right" is also called "the law of association and symbiosis."

[133] Ibid., 116.

[134] Ibid., 117.

[135] Ibid., 119.

responsibilities may be distinguished among different levels like cities, provinces, and commonwealths. The State's jurisdiction is limited to the space "between the spheres" but "does not penetrate within the spheres."[136] Its identity is not constructed as an act of will but is revealed through the historically differentiated associations that make it up.[137] The people that compose the State are not a "'community of individuals' who are filled with autonomous reason and hold individual rights"; instead, as Althusius says, the people are "the universal symbiotic association of all spheres."[138]

Ossewaarde seems to exaggerate the disparity between Aristotelian metaphysics and Althusius' Calvinist metaphysics. The first chapter of *Politica* is Althusius' gloss on Aristotle. He provides an extended discussion of the search for self-sufficiency. Where Aristotle concluded with the polis, Althusius continued on to include both provinces and the commonwealth. Contemporary concerns in the realm of economics and defense made such an expansion necessary. However, Ossewaarde is correct to note the absence of some common enterprise that unites and directs the actions of every lesser association. The state, rather than pursuing its own good, establishes and enforces a system of rules to enable each association to pursue its own purpose. Associations retain the autonomy to do so long as they do not intrude upon other associations, thereby undermining the general commitment to mutual solidarity.[139]

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[136] Ibid., 120-21. Thus, Ossewaarde argues, the State should punish violence and acts of crime. It should not assume responsibility over poverty or education because those are tasks for other spheres.

[137] See ibid., 122.

[138] Ibid., 123.

[139] See, e.g., Hueglin, *Early Modern Concepts*, 157; see also Antony Black, *Guild And State: European Political Thought from the Twelfth Century to the Present* (New Brunswick, NJ: Transaction Publishers, 2003), 134. Black writes, "At each level of association, mutual need gives rise to mutual aid; solidarity is based on exchange."

For present purposes, it is not particularly relevant whether one identifies the Althusian system as federalism, subsidiarity, or sphere sovereignty. What is critical is Hueglin's recognition that Althusius belongs to a "tradition that has intellectual roots in the early-modern rediscovery of political complexity."[140] Althusius is aware that political life contains more than the individual and the State. It is built by a multitude of human associations, which are ontologically prior to the State. Such associations accommodate the natural diversity of human life. Each association possesses its own internal order and "end," independent of other associations, including the State. The centralizing, standardizing powers of the State are held in check by a proper respect for the function and authority of other associations.

[140] Thomas O. Hueglin, "Althusian Federalism for a Post-Westphalian World, in *The Challenge of Cultural Pluralism,* edited by Stephen Brooks (Westport, CT: Praeger Publishers, 2002), 114.

CHAPTER THREE

Gierke, the Historical School, and *Genossenschaft*-theory

Friedrich names Althusius as "the most profound thinker between Bodin and Hobbes" and considers him one of "the five great precursors of modern political science" from 1550-1650.[1] Nonetheless, by the time Friedrich published his Latin translation of *Politica* in 1932, he could say that the work was "so rare that the individual scholar and the newer libraries cannot acquire it." All the attention Althusius did receive was "based upon and start[ed] from Otto von Gierke's great monograph about him," an "extraordinary book, first published in 1880."[2] Althusius wrote as the modern state was emerging. Gierke's work, coming nearly three-hundred years later, built upon Althusius and reflected upon the significance of the changes wrought in the intervening years.

Gierke's rediscovery of and appreciation for Althusius is enough to merit him some attention. However, for present purposes, Gierke is even more noteworthy for the way that he draws out the legal implications of Althusius' theories of sovereignty and group life. Gierke was a nineteenth century German jurist and historian. In some 10,000 pages of published work, one theme sounded again and again—the idea of group personality.[3] Gierke argues that law should recognize the *real* character of human

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[1] Carl Joachim Friedrich, "Introduction," in Johannes Althusius, *Politica Methodice Digesta* (Cambridge, MA: Harvard University Press, 1932), xv. Besides Althusius, Friedrich includes Machiavelli, Bodin, Grotius, and Hobbes.

[2] Ibid., xvi.

[3] See H.D.H., Review of Otto Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker, *The Cambridge Law Journal*, 5:3 (1935), 414; see also Barker, "Translator's Introduction," lvii. Barker writes, "Gierke … speaks of all his researches, in all the four volumes of his *Genossenschaftsrecht*, as illuminated by 'the central idea of real group-personality.'"

associations. Such associations are not mere aggregations of individuals, for they possess personalities of their own. Likewise, they are not creatures of the State whose personality is simply a legal fiction. Associations exist independently of and prior to the State. Related to Gierke's theory of group personality was his perspective on law, that law cannot be imposed top-down by a sovereign prince or assembly. Law has an historical element that develops organically with the spirit of the people, or *volksgeist*.

In this chapter, I first provide a brief biography of Gierke. I then turn to a discussion of the context in which Gierke wrote. My account begins with the gradual and partial reception of Roman law in Germany. The unwritten customary and local laws of Germany stood precariously against the more sophisticated law coming from Italian legists. The two combined in various ways across the fragmented Holy Roman Empire. When Napoleon pulled together a number of German states into the Confederation of the Rhine, he introduced a new legal influence—his Napoleonic Code. The Confederation collapsed upon Napoleon's failure against the Russian Empire, yet the desire for a unified national code remained. Against this effort arose the German Historical School, with Friedrich von Savigny as its head. Opponents of codification argued that the State should not create law *ex nihilo* but should reflect the common consciousness of the people as it develops through time. Savigny led a wing of the Historical School to emphasize the Roman legal heritage in Germany, leading to what has been identified as a "Second Reception."[4] Gierke was indebted to another wing that emphasized German medieval law, which he understood to better describe German associations.

[4] See, e.g., Susan Gaylord Gale, "A Very German Legal Science: Savigny and the Historical School, 18 Sta. J. Int'l L. 123 (1982), 123.

Gierke's Biography

Gierke was born on January 11, 1841, in Stettin, Prussia (which is in modern-day Poland). His father was a Prussian official who was named Minister of Agriculture in 1848 and then President of the Court of Appeals of Bromberg in 1850. In 1855, Gierke's father and mother died of cholera. He was then cared for by an uncle who was also a Prussian judicial officer.[5] John D. Lewis writes that Gierke grew up in an atmosphere that was "highly respectable, sincerely patriotic, and intensely Prussian."[6] In 1857, Gierke began studies at the University of Berlin. He took a doctorate in 1861, having studied under Georg Beseler, to whom he dedicated the first volume of his *Das deutsche Genossenschaftsrecht* (The German Law of Fellowship [or Association]). Gierke was involved in military service first as a lieutenant of artillery in the battle of Königgrätz in 1866 and then again in the Franco-German War of 1870-71. He was awarded the Iron Cross for his efforts. He served as a lecturer at Breslau and Heidelberg through the 1870s and 80s and then succeeded to Beseler's chair at the University of Berlin, where he remained until his death in 1921.[7]

Gierke was, according to Lewis, a "determined, fighting Germanist." "To drive out the Roman invader," Lewis claims, "became a mission which inspired his best work."[8] His aim was to study legal history to identify the principles that were truly

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[55] See John D. Lewis, *The Genossenschaft-Theory of Otto von Gierke: A Study in Political Thought*, University of Wisconsin Studies in Social Sciences, 25 (Madison, WI: University of Wisconsin Press, 1935), 22-23; see also Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from* Das deutsche Genossenschaftsrecht, translated by Mary Fischer and edited by Antony Black (Cambridge: Cambridge University Press, 1990), ix.

[6] Ibid., 23.

[7] See ibid., 17-23; see also Gierke, *Community in Historical Perspective*, ix.

[8] Ibid., 17.

German and then insist on their recognition in practice. In so doing, Gierke was furthering the work of his mentor, Georg Beseler, who had begun the task of examining the historical development of German associations.[9] Gierke's primary contribution was in his monumental four-volume work *Das deutsche Genossenschaftsrecht* [*DG*]. The first volume was published in 1868, the second in 1873, and the third in 1881. Gierke took a prolonged hiatus before publishing the final volume in 1913.[10] Antony Black says that Gierke was "scandalized … by the anti-corporate bias" of the new German civil code of 1888. The code prompted him to turn his attention to a second immense effort, his three-volume *Handbuch des deutschen Privatrechts* (Handbook of German Private Law), which was published between 1895 and 1917.[11]

Selections from volume one of *DG* are translated in Lewis's *The Genossenschaft-Theory* and a more significant portion in Fischer and Black's *Community in Historical Perspective*. F. W. Maitland translated portions of volume three of *DG* in 1900 as *Political Theories of the Middle Age*.[12] George Heiman added another 120 pages of translation from volume three in 1977, published as *Associations and the Law: the*

[9] See ibid., 17-18; see also Georg Beseler, *System des gemeinen deutschen Privatrechts*, 4 vols. (Leipzig-Berlin, 1847-55); Georg Beseler, *Volksrecht und Juristenrecht* (Leipzig, 1843).

[10] See Gierke, *Community in Historical Perspective*, xii-xiii; Volume I: *The Legal and Moral History of the German Fellowship*; Volume II: *The History of the German Concept of Corporation*; Volume III: *The Ancient and Medieval Doctrine of the State and of Corporations and its Reception in Germany*; and Volume IV: *The Theory of the State and of Corporations in Modern Times, Completed up to the Mid-Seventeenth Century, and or Natural Law up to the Beginning of the Nineteenth Century*.

[11] Black, "Editor's Introduction," in Otto von Gierke, *Community in Historical Perspective*, (Cambridge: Cambridge University Press, 1990), xvi.

[12] Otto von Gierke, *Political Theories of the Middle Age*, translated by Frederic William Maitland (Cambridge: University of Cambridge Press, 1900).

Classical and Early Christian Stages.[13] In 1934, Ernest Barker translated a significant portion of volume four of *DG*, which was published as *Natural Law and the Theory of Society: 1500-1800*.[14] Gierke also published a volume on Johannes Althusius in 1878. This was translated by Bernard Freyd as *The Development of Political Theory* in 1939.[15]

Black contends that the often ignored volume one of *DG* contains the clearest and most vigorous statement of Gierke's contribution to pluralism. Just two years after the publication of this volume, on July 15, 1870, the Franco-German war began. Black marks this as the beginning of Gierke's "mystical nationalism" and the "flaccid evolution of Gierke's mind." Compared to the first volume, Black says the rest of Gierke's work "is pale and sickly," "tortuous abstraction and vapid prose."[16] While it is certainly true that Gierke became infected with a nationalistic fervor, Black overstates the decline of Gierke's scholarship, particularly with reference to pluralism. After all, his volume on Althusius came in 1878, and the third volume of *DG*, which inspired the English pluralists through Maitland, was not published until 1881.

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[13] Otto von Gierke, *Associations and the Law: the Classical and Early Christian Stages*, translated by G. Heiman (Toronto: University of Toronto Press, 1977).

[14] Otto von Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker (Cambridge: Cambridge University Press, 1934).

[15] Otto von Gierke, *The Development of Political Theory*, translated by Bernard Freyd (New York: W. W. Norton & Co., 1939).

[16] Black, "Editor's Introduction," xxii-xxiii. Though Gierke supported Germany in WWI and joined the German National Party in 1920, Black argues that it would be naïve to suppose that the ideology of the later National-Socialist party "was implicit in Gierke's way of thinking or indeed … in the national political culture and social philosophy upon which Gierke drew." "The National Socialists," Black continues, "rather, hi-jacked such notions and used them in a deeply perverted form."

Legal Background Preceding Gierke

The Reception

By "Reception" I refer to the diffusion of Roman legal principles and institutions into the practices of Europe. Interest in Roman law had revived upon the discovery of the *Corpus Juris Civilis* in the eleventh and twelfth centuries. A law produced by a centralized state was readily adopted by rulers across Europe who found in the law support for their claims of sovereignty. In Germany, as elsewhere, the process was an incomplete and "gradual infiltration" as Roman law mixed with territorial and feudal law.[17] F. W. Maitland contends that the "Renaissance, Reformation, and Reception … [are] three intimately connected and almost equally important movements which sever modern from medieval history." He continues, "Modern Germany has attained such a pre-eminence in the study of Roman law that we in England may be pardoned for forgetting that of Roman law medieval Germany was innocent and ignorant, decadently more innocent and more ignorant than was the England of the thirteenth century." English universities taught Roman law before Germany *had* universities. By the fourteenth century, Wyclif could urge "that if law was to be taught in English universities, it ought to be English law … [which] was as just, as reasonable, as subtle, as was Roman jurisprudence." "Thus," Maitland concludes, "when the perilous time came, when the New Learning was in the air and the Modern State was emerging in the shape of the Tudor Monarchy, English law was and had long been lawyers' law, learned law,

[17] Hans Julius Wolff, *Roman Law: An Historical Introduction* (Norman, OK: University of Oklahoma Press, 1951), 193.

taught law, *Juristenrecht*."[18] English law had developed to a stage where it could withstand the invasion of Roman law.

Such was not the case in Germany. Though "the theoretical continuity of the Empire was providing a base for the argument that the law of Justinian's books was or ought to be the law of the land," Maitland says that "the practical law of Germany was as German as it well could be." However, this law was largely unwritten and untaught. Native law could therefore not resist Roman law, "the subtle and polished invader" that "swept like a deluge over Germany."[19]

The advance of Roman law manifested itself in a variety of ways. German universities began to be established toward the end of the thirteenth century. Charles Sumner Lobingier says that the schools offered foreign law from the beginning, initially placing an emphasis on Canon law.[20] However, chairs were established for Roman law soon thereafter, with the University of Heidelberg leading the way in 1387, just a year after its founding. Though some of these positions were filled with professors from Spain and France, most were Italian. When German professors eventually were hired, it was often required that they had earned their degree in Italy.[21] The Reception was further aided with the fourteenth century publication of an influential law book that popularized

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[18] Frederic William Maitland, "Translator's Introduction," in Otto von Gierke, *Political Theories of the Middle Age*, translated by Frederic William Maitland (Cambridge: University of Cambridge Press, 1900), xii-xiii.

[19] Ibid., xii-xiv.

[20] See Charles Sumner Lobingier, "The Reception of the Roman Law in Germany," *Michigan Law Review*, 14:7 (May 1916), 562.

[21] See ibid.; see also Charles Phineas Sherman, *Roman Law in the Modern World, Vol. 1* (Boston: Boston Book Co., 1917), 308; William Alexander Hunter, *A Systematic and Historical Exposition of Roman Law in the Order of a Code*, 2d Ed. (London: William Maxwell & Son, 1885), 104-106.

Roman legal principles among the lay public. Another decisive event occurred in 1495 when Emperor Maximilian I organized the Imperial Chamber of Justice (*Reichskammergericht*), an appellate tribunal that served to extend Roman law as part of the "common laws of the empire."[22] Finally, the Reception was also facilitated by commentators, who helped "accommodate Roman law to medieval life," who ensured Roman law would go "half-way to meet the facts that it was to govern."[23] Thus, Roman law was in some measure adapted to present conditions, making its reception more palatable for those whom the law affected.

Ernest Barker compares the dual basis of law in Germany (Teutonic and Roman) to the dual basis of language in England (Latin and Teutonic). However, where English vocabulary has settled into a happy amalgam, such was not the case with German law. One of the greatest points of division came in the differing conceptions of groups or associations.[24]

However, before pursuing this line further, I must first introduce a major complication. The French Revolution and subsequent Napoleonic Wars provoked immense changes across Europe. In Germany, Napoleon left behind his Code, which caused legal questions in the country to reach a critical stage. This opened the way for Savigny's teaching on the historical character of the law and Gierke's research on the nature of group personality.

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[22] Ibid., 563-64; see also Sherman, *Roman Law in the Modern World*, 309.

[23] Maitland, "Translator's Introduction," xv.

[24] Ernest Barker, "Translator's Introduction," in Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker (Cambridge: Cambridge University Press, 1934), lvii.

The French Revolution and the Napoleonic Code

The legal landscape in Germany was further shaken by the aftermath of the French Revolution. Robert Darnton raises the question, "What was revolutionary about the French Revolution?" He considers the scope of the upheaval. The entire social order collapsed, leaving the French to view "reality as something that could be destroyed and reconstructed." Darnton says that "everyone was touched by the revolution because the Revolution reached into everything."[25] The revolutionaries attempted to make a sharp break with the past across the spheres of life. Reason would be the new lodestar. Indeed, though "*liberté, égalité, fraternité*" is the motto that has survived to the present, *raison* could just as easily been included in the ternary formula.[26] No tradition or custom was left untouched. As Darnton puts it, the Revolution even "recreated time and space," for under the revolutionary calendar, "time began when the old monarchy ended."[27] Time was divided into units the revolutionaries deemed rational. There were ten days in a week, three weeks in a month, and twelve months in a year. New names were given to the days of the week and the months of the year. Christian holidays were displaced. New units of weight and measurement were adopted. Some 1,400 streets in Paris were renamed due to prior references to royalty or religion. Similarly, 6,000 towns took new names. Even the revolutionaries themselves sought to cut ties with the past by changing

[25] Robert Darnton, *What Was Revolutionary about the French Revolution?* (Waco, TX: Baylor University Press, 1990), 5-6.

[26] See Mona Ozouf, *Realms of Memory: The Construction of the French Past, Vol. 3*, translated by Arthur Goldhammer, edited by Pierre Nora and Lawrence D. Kritzman (New York: Columbia University Press, 1998), 80.

[27] Darnton, *What Was Revolutionary?*, 7.

their names. The map of France was redrawn into symmetrical administrative departments in place of the previous provinces.[28]

The revolutionaries also sought a new organization for society itself, one designed to centralize power. As William Safran explains, "According to Jacobin ideology … the state represents the people's will, and the existence of plural institutions and social forces only fragments that will."[29] The intermediary institutions—family, church, trade guild, etc.—standing between the individual and the state were the target of revolutionary legislation. Divorce laws were loosened, and by 1794, the number of divorces exceeded the number of marriages. Paternal power was strictly limited and was cut off altogether when children reached the age of majority. Estate laws required equal division of property among children. As Nisbet says, "The family was considered a small republic (*une petite republique*)," wherein "the ideals of equality and individual rights must prevail."[30] Church property was confiscated. Traditional roles of the church, education and charity, were transferred to the state. Leaders within the church were required to be elected like political officials and swear oaths of fidelity to the state.[31] Guilds and trade associations were abolished and forbidden from reorganizing. In an address before the National Constituent Assembly, Jacques Guillaume Thouret justified these moves with natural-law arguments: "Individuals exist before the law, and they hold rights drawn from

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[28] See ibid., 6-9.

[29] William Safran, "Pluralism and Multiculturalism in France: Post-Jacobin Transformations," *Political Science Quarterly*, 118:3 (Fall 2003), 439.

[30] Robert Nisbet, *The Sociological Tradition* (New Brunswick,NJ: Transaction Publishers, 1993), 37-38.

[31] See George Lefebvre, *The French Revolution: From its Origins to 1793, Vol. I*, translated by Elizabeth Moss Evanston (New York: Columbia University Press, 1962), 160-66.

nature …; all corporations, on the other hand, only exist by law, and their rights are dependent on the law. … The destruction of a corporate body is not a homicide."[32] Another member of the Assembly, Isaac René Guy Le Chapelier, would speak similarly: "There is no longer any corporation within the state: henceforth there is only the particular interest of the individual and the general interest. No person is permitted to inspire any intermediate interest in citizens or to alienate them from the public good by inspiring a corporatist spirit."[33] As Nisbet concludes, "Rousseau's dislike of 'partial associations' within the state was now converted into legislative action."[34]

In 1799, following a decade of turmoil after the adoption of the Declaration of the Rights of Man and Citizen, Napoleon Bonaparte seized power. The legal historian Harold Berman notes that Napoleon was a popular young military commander who "presented himself as the fulfillment of the spirit of 1789."[35] Similarly, Nisbet stresses that Napoleon's edicts "were but extensions and reinforcements of what the Revolution, in its democratic-liberal phase, had already begun, a fact sometimes overlooked by historians who stress Napoleon's 'reactionary' relation to the Revolution."[36] To assist in achieving his objectives, Napoleon participated in the drafting of the *Code Civil* of 1804 (renamed the *Code Napoléon* in 1807). The code unified French law by subordinating

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[32] Nisbet, *The Sociological Tradition*, 36-39.

[33] As quoted in Pierre Rosanvallon, *The Demands of Liberty: Civil Society in France since the Revolution*, translated by Arthur Goldhammer (Cambridge: University of Harvard Press, 2007), 4.

[34] Nisbet, *The Sociological Tradition*, 36; see also Jean-Jacques Rousseau, *On the Social Contract*, Book II, chapter iii.

[35] Harold J. Berman, "Law and Belief in Three Revolutions," 18 Val. U. L. Rev 569 (1983-84), 615.

[36] Nisbet, *The Sociological Tradition*, 36.

customary law, which varied across the nation. Though the code was not originally intended for export, it soon "transcended national boundaries … via military conquests and through the Emperor's hegemonic ambitions." Thus, under "the force of arms," the Napoleonic Code spread across the Napoleonic Empire, including in many parts of Germany.[37]

In promoting this development, the French disregarded the advice of their own Montesquieu, who encouraged diversity in law and therefore discouraged attempts to transplant the law of one people to another. He taught that laws "should be adapted … to the people for whom they are framed," and "that it is a great chance ("*un tres grand hazard*") if those of one nation suit another." Laws should conform to a number of different factors—political, social, environmental, religious, etc.—that together constitute what Montesquieu calls "the spirit of the laws."[38] Naturally, this "spirit" would vary from one province to the next. For Montesquieu, a simple uniformity in the law is a mark of despotic government. He writes:

> The monarch, who knows each of his provinces, may establish different laws, or tolerate different customs. But, as the despotic prince knows nothing, and can attend to nothing, he must take general measures, and govern by a rigid and inflexible will, which, throughout his whole dominions, produces the same effect: in short, every thing bends under his feet.[39]

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[37] Guy Canivet, "French Civil Law Between Past and Revival," 20 Conn. J. Int'l L. 111 (2004-05), 111-12; see also Paul-Ludwig Weinacht, "The Sovereign German State and the *Code Napoléon*: What Spoke for its Adoption in the Rhine Confederation?" *European Journal of Law and Economics*,14:3 (Nov. 2002), 205-213.

[38] Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu*, 4 vols., Vol. 1 (London: T. Evans, 1777), Book I, ch. 3, 8-9.

[39] Ibid., Book VI, ch. 1, 93.

Napoleon was just such a despot. He used his code, in the words of Savigny, "as a bond the more to fetter nations."[40]

The Codification Controversy

When Napoleon was overthrown in 1814, his Code was in force across many provinces of Germany. Abraham Hayward explains that some provinces retained the law, but in most provinces "it was almost instantly thrown off, as a badge of political degradation."[41] The question, then, was what law should take its place. Anton Friedrich Justus Thibaut, a professor of law at Heidelberg, published the pamphlet *On the Necessity of a General Code for Germany*, in which he argued that while Napoleon's code should be discarded, Germans should not simply toss aside the idea of a codified law based on reason. Instead, they must use this chance to create a code of their own. He said, "[T]his splendid moment should be used for the purpose of destroying at last ancient abuses, and by means of new, wise civic arrangements, of securely establishing the prosperity of the individual." To this end, Thibaut thought that the civil law needed "a complete revision," which would then be issued for the whole nation.[42] In forming their new code, Germans could not rely on Canon law, which "is a mass of vague, fragmentary, incomplete regulations, in part occasioned by the defective views of the old interpreters of the Roman law, and so despotic in respect to the clerical power in world-affairs that no wise

[40] Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, translated by Abraham Hayward, 2d ed. (London: Littlewood & Co., 1831), 73.

[41] Abraham Hayward, "Translator's Preface," in Savigny, *Of the Vocation of Our Age*, translated by Abraham Hayward, 2d ed. (London: Littlewood & Co., 1831), iv.

[42] Anton Friedrich Justus Thibaut, *On the Necessity of a General Code for Germany [1814]*, translated by Albion W. Small in "Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience," *American Journal of Sociology*, 28:6 (1923), 717.

ruler can submit to the same." Likewise, Germans could not look to Roman law books, which come from a nation very different from Germany and, moreover, from the period of Rome's decline.[43] The new German code should be both simple and comprehensive, the work of Germans for Germans. Thibaut contended, "The prosperity of the citizen does not call for a learned advocate"; instead, a simple national code would "be accessible in all its parts to even the mediocre mind."[44]

Thibaut's proposal prompted Friedrich von Savigny to respond with a tract of his own: *Of the Vocation of Our Age for Jurisprudence and Legislation*,[45] a work that sparked the formation of the German Historical School.[46] Gierke, not Savigny, is remembered as a precursor to English pluralism. Gierke was a part of the Germanist wing of the Historical School, which stood in opposition to the Romanist wing, of which Savigny was a member. Nonetheless, both Gierke and Savigny shared the "historical sense," which provided safeguards against the self-delusions of Enlightenment rationalism.[47] For this reason, an exploration of Savigny's work is warranted.

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[43] Ibid., 718.

[44] Ibid., 718-19.

[45] See Paulo Becchi, "German Legal Science," 192-208. Becchi provides a good overview of the Thibaut-Savigny Controversy. On p. 193, he mentions many other contemporary works on the subject of codification "to point out a fact that seems often unremarked, which is that the polemic on codification did not just pass between Thibaut and Savigny but called into action a whole array of forces, some of which may even not be traceable to either Thibaut or Savigny."

[46] There is some disagreement about the formation of the historical school. Reimann and Stein place the beginning with Savigny's publication of the tract. See Mathias Reimann, "Nineteenth Century German Legal Science," 31 B.C. L. Rev. 837 (1989-90), 851; see also Peter Stein, *Roman Law in European History* (Cambridge, Cambridge University Press, 1999), 116. Beiser says it began in 1815 with the first volume of *Zeitschrift für geschichtliche Rechtswissenschaft*, the Journal of Historical Jurisprudence. Savigny founded the journal with Karl Friedrich Eichorn and Johann Friedrich Gößchen, both members of the historical school. See Frederick C. Beiser, *The German Historicist Tradition* (Oxford: Oxford University Press, 2011), 214. However, Sherman argues that Gustav Hugo founded the school well before Savigny. See Sherman, *Roman Law in the Modern World*, 320.

[47] Savigny, *Of the Vocation of Our Age*, 135.

Savigny claims that Napoleon's "code broke into Germany, and ate in, further and further, like a cancer."[48] It became clear that "when the designs of the oppressor came to be fully developed, our destiny must end in the annihilation of our nationality."[49] Yet now the foreign yoke was broken. Affirming the pluralists' appreciation of diversity, he rejoices:

> That once again a diversity of opinions may exist; that once again the decision can be a subject of dispute, is one of the blessings which God has vouchsafed to us; for only from this diversity can a living and firm unity proceed—the unity of conviction, for which our nature compels us to struggle in all matters of mind.[50]

Savigny outlines the two primary opinions as to what should be done now that the Napoleonic Code was displaced: a restoration of the prior system or the adoption of a new general code. He reminds his readers that the latter option has a history extending farther back in time than Napoleon's Code. Since the middle of the eighteenth century, "the whole of Europe was actuated by a blind rage for improvement." He continues:

> All sense and feeling of the greatness by which other times were characterized, as also of the natural development of communities and institutions, all, consequently, that is wholesome and profitable in history, was lost; its place was supplied by the most extravagant anticipations of the present age, which was believed to be destined to nothing less than to the being a picture of absolute perfection.[51]

The desire for a new legal code was part of this impulse. Men thought they could devise a complete code that would "insure a mechanically precise administration of justice," freeing a judge "from the exercise of private opinion" and confining him "to the mere literal application" of the text. Further, if the legal codes were "divested of all historical

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[48] Ibid., 18.

[49] Ibid., 9.

[50] Ibid., 19.

[51] Ibid., 20.

associations," they could, "in pure abstraction, be equally adapted to all nations and all times." Savigny contends that this impulse was not assignable to just a few "false teachers" but was, for the most part, "the opinion of nations." With such force behind the movement, a government could not stop it but could work to temper and direct it.[52]

Fortunately, however, Savigny argues, a "historical spirit has been everywhere awakened," a spirit that "leaves no room for the shallow self-sufficiency above alluded to." "Free from those extravagant pretensions," Savigny says that his time can now learn from their experience.[53] With that goal in mind, he reviews the three codes developed during that period: the French *Code Napoléon,* the *Prussian Landrecht*, and the *Austrian Gesetzbuch*.[54] Each code is connected to the view that "all law, in its concrete form, is founded upon the express enactments of the supreme power." In other words, jurisprudence and legislation are coextensive. What is law today may just as easily be reversed tomorrow by the lawmaking power. Underlying this view is often the "conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances, which we have only to discover to bring positive law to permanent perfection."[55]

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[52] Ibid., 20-22.

[53] Ibid., 22.

[54] See ibid. Savigny begins treating the *Code Napoléon* on page 70, the *Prussian Landrecht* on page 99, and the *Austrian Gesetzbuch* on page 114. See also Sherman, *Roman Law in the Modern World*, 315. Sherman explains that in the 18th century, Leibniz "did more than any other man to inaugurate the activity of … reform and codification of German law." The movement was also "vigorously advance by German jurists of the Natural Law school."

[55] Ibid., 23.

Against this point of view, Savigny argues that law has a quality that is "peculiar to the people" it governs.[56] He contends:

> But this organic connection of law with the being and character of the people is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.[57]

As the law matures, it develops a "twofold life." First, the law continues as "the aggregate existence of the community," which Savigny calls its "political element." Second, the law develops "as a distinct branch of knowledge in the hands of the jurists," which he calls the "technical element."[58] He sums up this theory by saying that all law "is first developed by custom and popular faith, next by jurisprudence." In other words, law originates in the people and "not by the arbitrary will of a lawgiver."[59]

Savigny then turns to the source materials for the proposed code. He acknowledges that many suppose "that these are to be supplied by the universal law of nature, without reference to anything existing." However, "those who had to do with the execution of such plans, or were otherwise acquainted with practical law, have laid no stress upon this extravagant and wholly groundless theory." Instead, they agree that the code is to lay down the existing law, rather than a universal law of nature, with such alterations and improvements as are thought necessary. The code would then supplant all

[56] Ibid., 24.

[57] Ibid., 27.

[58] Ibid., 28-29.

[59] Ibid., 30.

existing law "with exclusive validity conferred by the state itself." This point is essential for Savigny. He says that "in times so fruitful in writing … no particular book can preserve a predominant and lasting influence otherwise than through the authority of the state."[60]

The next concern is whether the code might "contain, by anticipation, a decision for every case that may arise." Once again, abstract theory falls to practice. Savigny writes:

> [W]hoever has considered law-cases attentively, will see at a glance that this undertaking must fail, because there are positively no limits to the varieties of actual combinations of circumstances. In all the new codes, indeed, all appearance of an attempt to obtain this material perfection has been given up, without, however, establishing anything in its stead.

The law codes do not provide adequate instruction concerning where jurists should go to fill in the inevitable gaps found in the code. He continues, "The administration of justice is ostensibly regulated by the code, but really by something else, external to the code, acting as the true dominant-authority." What is this external authority? How will it thrive when the "moral energies of the nation" are diverted to the novelty of the code?[61] Such unanswerable questions cause Savigny great unease.

Savigny then applies the discussion to both the Roman and German law.[62] He begins his discussion of the former by saying, "The advocates of the Roman law have not unfrequently placed its principal value in its containing the eternal rules of justice in

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[60] Ibid., 34-35

[61] Ibid., 38-39.

[62] While Savigny is known for being a part of the Romanist wing of the German Historical School, at the time *On the Vocation of Our Age* was published, the split had not yet occurred. I will cover the division in greater detail later in this chapter. For now, however, I wish to explore Savigny's thoughts on both Roman and German law.

peculiar purity, and thus being entitled to be itself considered a law of nature sanctioned as positive law." Savigny is not so impressed. He says that closer investigation reveals most of the content of Roman law "to be little better than narrowness and subtlety, and our admiration is almost entirely confined to its theory of contracts." Outside the field of contract, the excellence of the Roman law "is of so general a nature that it might have been discovered by plain good sense, without any juridical cultivation."[63]

Moreover, the form of Roman law most influential in modern Europe is Justinian's *Institutes*, which Savigny, like his adversary Thibaut, considers the product of Rome in decline.[64] The classical age that Savigny admires came before, during the time of Papinian and Ulpian. More than the content of their jurisprudence, it is the method of these jurists that Savigny finds so praiseworthy. The jurists had "possession of the leading principles," the "axioms of their science." From these, they proceeded with mathematical precision. Individual jurists cooperated "in one and the same great work." Savigny writes:

> [T]heir theory and practice are the same; their theory is framed for immediate application, and their practice is uniformly ennobled by scientific treatment. They see in every principle a case of application, in every case the rule by which it is to be decided; and in 'the ease with which they pass from generals to particulars, and back again from particulars to generals, their mastery is undeniable.[65]

This method connected one generation with the next. Both the materials of the science and the method itself, Savigny says, had roots during the days of the free Republic. He continues, "What, indeed, made Rome great, was the quick, lively, political spirit, which

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[63] Ibid., 43-44.

[64] See ibid. 44; cf. Thibaut, *On the Necessity of a General Code for Germany*, 718.

[65] Ibid., 47.

made her ever ready so to renovate the forms of her constitution, that the new merely ministered to the development of the old, a judicious mixture of the adhesive and progressive principles." Savigny concludes, "[T]he history of the Roman law, down to the classical age, exhibits everywhere a gradual, wholly organic development."[66]

What does all of this have to do with the question of codification? Savigny explains that history shows how little legislation affected Roman law while "it continued in a living state." While the law "formed itself almost entirely from within," no code was thought necessary. During the classical age, the jurists would have had no trouble forming an excellent code, yet, as Savigny says, "we find no trace of such an experiment." When did the idea for a code arise? It was earlier, when "Caesar, in the consciousness of his power and of the corruption of the age, resolved on being absolute in Rome." It arose again "when, in the sixth century, all intellectual life was dead, [and] the wrecks of better times were collected to supply the demand of the moment."[67]

Savigny explains that Roman law is important to Germany due to its relation to the common law, which had until very recently been a uniform system of law across Germany.[68] This, however, did not mean that law itself was uniform across Germany because the common law was modified in various ways by provincial law. Proponents of codification complain about "the great diversity of provincial laws," thinking "[t]hat the administration of justice is impaired and intercourse impeded by this diversity." Savigny

[66] Ibid., 45-49.

[67] Ibid., 50-51.

[68] See ibid., 53, 55.

disagrees, saying that "experience is silent upon the point." In fact, he argues, justice is more impaired by the uniformity that the would-be codifiers seek to impose.[69]

Savigny maintains an organic conception of the state. Like all organic beings, the state's "well-being … depends on the maintenance of an equipoise between the whole and its parts—on each having its due." He continues, in words reminiscent of Edmund Burke: "[A] lively affection for the whole can only proceed from the thorough participation in all particular relations; and he only who takes good care of his family, will be a truly good citizen."[70] The diversity of provincial law is then a strength, for its closeness to the people it rules makes the law more likely to be adapted to their "feelings and consciousness." A uniform law imposed on the people, however, will seem "like an uncongenial and arbitrary thing, [since] it leaves the people without participation." This was the very strength of the former system of law in Germany: "great variety and individuality in particulars, but with the common law for the general foundation, constantly reminding all the Germanic nations of their indissoluble unity."[71]

Savigny evaluates the three recent codes to show how they confirm his argument. He then devotes two chapters to the question, "What is to be done?" He distinguishes between the German countries where common law and provincial law were only briefly interrupted by the Napoleonic Code and those countries where domestic codes were already in force. Regarding the former, Savigny recognizes that a tangled mass of

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[69] Ibid., 57.

[70] Ibid., 58; see also Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999), 46-47. Burke writes, "To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country and to mankind."

[71] Ibid., 59.

"juridical notions and theories" exist. The nation does not master this material but is controlled by it. Indeed, this condition is the impetus for calls to institute a new code. Savigny says that some "might think to annihilate [existing law] by severing all historical associations and beginning an entirely new life." He rejects this notion as being "built on a delusion," for it fails to recognize the "indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning is conceivable."[72] Thus, Savigny concludes, the existing law will continue to have an influence on us. This influence will be injurious if Germans continue ignorantly to submit to it, but it will be beneficial if they might "obtain the mastery over it by a thorough grounding in history and thus appropriate … the whole intellectual wealth of preceding generations."[73]

Savigny calls for prudence, saying that Germany should "hesitate upon the application of the dissecting knife to our present system." Germans need "zealous study," by which they might sharpen their "historical and political sense." Without this historical spirit, Germany might fall prey to a "species of self-delusion … namely, the holding [of] that which is peculiar to ourselves to be common to human nature in general." We now look with pity, he says, at the process whereby some in times past fashioned a natural law out of the Institutes and looked upon it as "the immediate emanation of reason." Nonetheless, individuals continue to make the same mistake,

[72] Ibid., 131-32. Here again, Savigny's language brings to mind the words of Burke. In a famous passage, Burke begins by saying, "Society is indeed a contract." However, it is not a typical partnership. Burke continues, "As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born." Burke, *Reflections,* 96.

[73] Ibid., 132-33.

"hold[ing] their juridical notions and opinions to be the offspring of pure reason, for no earthly reason but because they are ignorant of their origin."[74]

Savigny ultimately recommends the same course of historical study for those parts of Germany where codes already existed.[75] He explains that the study should neither consist in "an exclusive admiration of Roman law, nor in desiring the unqualified preservation of any one established system." Each established system should be traced to its roots in order to "discover an organic principle whereby that which still has life may be separated from that which is lifeless and only belongs to history."[76]

The Historical School Splits

As David Rabban points out, "Savigny connected the abstract and unhistorical rationalism of the Enlightenment with arguments for codification."[77] Against this attitude, Savigny recommended "[a] two-fold spirit [which] is indispensable to the jurist; the historical, to seize with readiness the peculiarities of every age and every form of law; and the systematic, to view every notion and every rule in lively connection and cooperation with the whole, that is, in the only true and natural relation."[78] Matthew Reimann explains that, following Savigny, legal scholarship in Germany divided along lines of both method and material. Scholars often emphasized either systematic or

[74] Ibid., 134-35.

[75] See ibid., 172.

[76] Ibid., 137.

[77] David Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (New York: Cambridge University Press, 2013), 97.

[78] Savigny, *Of the Vocation of Our Age*, 64-65.

historical scholarship. They also typically accentuated one source of law over another: Roman or German.

For his part, Savigny did little more than pay lip-service to the study of German law. He focused entirely on Roman sources. Reimann says that his "most immediate legacy was the perfection of the systematic treatment of Roman law." Furthermore, Savigny fixated on private law rather than public law. He did this from "a narrow, formalist view of the function of law," thinking that law's function was "only to limit private spheres of freedom in such a way that these spheres could coexist in a society." Thus, law's function was "not to find the true idea of justice."[79] Reimann connects these "limitations," saying:

> The writings of the classical Roman jurists presented a law that was predominantly private, essentially individualist, and rationally formal. It would be hard to determine whether Savigny focused on the Roman sources because they matched his preconceived view of the function of law, or whether instead his view was a result of dealing with the Roman material. However this may be, Savigny's ideas and the Roman jurists' approach were highly congenial.[80]

Savigny's disciples followed in this path. His most influential devotee, Georg Friedrich Puchta, succeeded Savigny as chair of Roman law at the University of Berlin. Reimann says that Puchta "neglected historical studies while he drove the systematic method to new extremes."[81]

This increasing focus on systematization over history widened the split between Romanists and Germanists. At the beginning of the movement, the two branches of the

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[79] Mathias Reimann, "Nineteenth Century German Legal Science," 31 B.C. L. Rev. 837 (1989-90), 857.

[80] Ibid., 858.

[81] Ibid., 860.

Historical School worked harmoniously. In fact, in the year following his publication of *Vocation,* Savigny co-founded the *Journal for Historical Legal Science* with Karl Friedrich Eichhorn, one of the leading early Germanists. Savigny also maintained a very close friendship with Jakob Grimm (of the Brothers Grimm, known for their collection of folk tales), who was another leading Germanist.[82] However, despite cooperative beginnings, tension soon entered. The competing sides understood "law as custom" in different senses. Germanists considered the spirit of the German people to be one source of law, and they often entertained notions of popular administration of justice. Reimann explains that the Romanists understood the Volksgeist "in their own peculiar, elitist way," believing that justice lay "in the rulership of academically trained, scientific jurists."[83]

Georg Beseler, a leading critic of the Romanists, argued along these lines, contending that they elevated "jurists' law" over the "people's law." For him, and a number of Germanists, the reception of Roman law had been a "national disaster" for Germany.[84] As Maitland so descriptively puts it, "The people that defied the tyranny of living popes had fallen under the tyranny of dead emperors, unworthily reincarnate in petty princelings."[85] The Germanists viewed "Justinian's law as the regime of a despotic ruler" and contended that it was brought to Germany by princes during the rise of

[82] Ibid. 868; see also Rabban, *Law's History*, 102.

[83] Ibid., 868-69.

[84] Rabban, *Law's History*, 102; see also Reimann, "Nineteenth Century German Legal Science," 869, citing Beseler's *Volksrecht und Juristenrecht* (1843).

[85] Maitland, "Translator's Introduction," xvi.

absolutism. The princes then used the class of learned jurists as administrators of their system.[86]

The Germanists held no illusions about rooting out all traces of Roman law. Jakob Grimm contended that this would be as impossible as banishing Romance words from the English language. Maitland says, "The technical merits of Roman law were admitted, admired, and emulated." The desire was to nurse the old German law "into bearing the fruit of sound doctrine and reformed practice."[87] Nonetheless, they maintained that not only did Roman law pollute the stream of German law, it introduced foreign concepts that bore significant political consequences. Critical for Beseler was the theory of corporations. He introduced the concept of *genossenschaft*, which might best be translated as "fellowship." At the heart of the dispute between Roman and German law was whether fellowships were realities in their own right (as indicated in ancient Germanic conceptions) or if they were fictional persons, who owed their existence to the concession of the state (as indicated in Roman law and advocated by Savigny and the Romanists).[88] Maitland paraphrases Beseler's contention: "You will never … force our German fellowships, our German *Genossenschaften*, into the Roman scheme: we Germans have had and still have other thoughts than yours."[89] Beseler inspired his young

[86] Reimann, "Nineteenth Century German Legal Science," 869.

[87] Maitland, "Translator's Introduction," xvii.

[88] See, e.g., Ron Harris, "The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Pluralism and American Big Business," 63 Wash. & Lee L. Rev. 1421 (2006) 1427-28; see also George F. Deiser, "The Juristic Person," 57 U. Penn. L. Rev. 131 (1908), 136-38.

[89] Maitland, "Translator's Introduction," xviii.

protégé, Gierke, who would ultimately make him the namesake for the first volume of *DG*.

Gierke's Genossenschaft-*Theory*

The concept of association drove Gierke's work throughout a long, productive academic career. In his introduction to a translated section of *DG*, Ernest Barker says that Gierke was "[a]lways concerned with the conception of the Group, and especially with that form of Group which he calls the Fellowship (*Genossenschaft*), and always anxious to discover the essence of group-life, the source and nature of group authority, and the significance of group personality."[90] Though Gierke treated a vast array of subjects in some 10,000 pages of published work, the above theme underlies most of his pursuits.[91] In this section, I examine three routes Gierke took to establish the real personality of groups. First, I examine Gierke's depiction of the dialectical relationship between two conceptions of group unity—*Genossenschaft* and *Herrschaft*—in German history. Next, I turn to Gierke's exploration of intellectual history more broadly, particularly the contest between ideas Gierke identifies as "Properly Medieval" and those he calls "Antique-Modern." I conclude with Gierke's description of the achievement of the Historical School of Law, namely, how it transcends the traditional dichotomy of Positive Law and Natural Law. Through his study, Gierke remained convinced that

[90] Barker, "Translator's Introduction," xii.

[91] See H.D.H., Review of Otto Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker, *The Cambridge Law Journal*, 5:3 (1935), 414; see also Barker, "Translator's Introduction," lvii. Barker writes, "Gierke … speaks of all his researches, in all the four volumes of his *Genossenschaftsrecht*, as illuminated by 'the central idea of real group-personality.'"

society *is* organic and that it *should be* conceived of in that way. Essential to that end is the parallel awareness that law, too, is organic and should be so conceived.

Genossenschaft through German History

The esteemed English jurist Frederick Pollock opened a chapter titled "Persons" by saying, "Law necessarily deals with duties and rights of persons."[92] The term "person" comes from the Latin *persona,* which originally denoted the mask worn by an actor on the stage. As George Heiman explains, an individual wears a mask when he confronts the law. He acts out some legal role—litigant, testator, defendant, etc. German law, too, has a subjective aspect, which refers to the rights and duties of persons.[93] This subjectivity, as Heiman says, "denotes not only that a person is subject to law but also that he is a legally enabled (*rechtfähig*) entity prepared to hold, wield, and manipulate rights."[94] Thus, the question arises: "What is a person? Who are the proper subjects of rights and duties?" Pollock points out that "personhood," in a legal sense, is not coterminous with human beings. Individuals may have limited personhood due to minority status or mental incapacity. Moreover, when individuals act collectively and "behave as individuals … [t]here arise collective capacities and responsibilities which the

[92] Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law,* 2d ed. (New York: The Macmillan Company, 1904), 108.

[93] See George Heiman, "Interpretative Introduction," in Otto Gierke, *Associations and Law: The Classical and Early Christian Stages,* edited and translated by George Heiman (Toronto: University of Toronto Press, 1977), 25-26.

[94] Ibid., 27; see also Maitland, "Translator's Introduction," xx FN1. Maitland says, "Germans distinguish between the Subject and the Object of a right. If Styles owns a horse, Styles is the Subject and the horse the Object of the right. Then if we ascribe the ownership of the horse to the Crown, we make the Crown a Subject; and then we can speak of the Crown's Subjectivity."

law personifies for convenience."[95] What is the nature of this personification? How should the law conceive of group unity?

On one side of the debate are proponents of the *persona ficta* theory that descends from Roman law. The phrase *persona ficta* did not actually appear until the thirteenth century in the writings of an Italian jurist, Sinibald Fieschi, who would go on to become Pope Innocent IV. Fieschi gleaned from the Roman legal texts a theory of the corporation. As Maitland says, this father of the Fiction Theory "really understood the texts; the head of an absolute monarchy, such as the Catholic Church was tending to become, was the very man to understand them."[96] His interpretation permitted the centralization of power in his hands. As a fictional person, a group has no real personality of its own. Any rights it possesses are either derivative of the rights of its members or are concessions of the state. A group's very existence originates with an act of the state, and it continues by the state's sufferance.[97]

On the other side is Gierke's *genossenschaft*. This German fellowship "is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a *living organism* and a *real person*, with body and members and a will of its own." Maitland concludes, "It is not a fictitious person; it is a *Gesammtperson* [group-person], and its will is a *Gesammtwille* [group-will]."[98] Unlike Hobbes, Gierke's terminology is not so much "natural vs. artificial" but "real vs. fictitious." Gierke talks about the "real" personality of groups. David Runciman helpfully explains in a footnote that "'[r]eal'

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[95] Pollock, *A First Book of Jurisprudence*, 110-12.

[96] Maitland, "Translator's Introduction," xix.

[97] See ibid., xx.

[98] Ibid., xxvi (emphasis added).

stands in opposition to 'fictitious' as 'natural' stands in opposition to 'artificial' (an artificial lake may not be 'natural' but it is still 'real' in a way that a fictitious lake is not)."[99] By claiming that groups possess a real personality, Gierke continued the work of his mentor, Georg Beseler.

By tracing their historical antecedents in the ancient Germanic concept of fellowship, Gierke developed a theory of corporations.[100] For the sake of convenience, Gierke divided German history into four periods. The first period extended to the year 800, when Charlemagne took the throne as the first Holy Roman Emperor. Gierke characterizes this period as one of struggle between two forms of union: associational (*genossenschaft*) and lordly (*herrschaft*). In the former, unity is internal and springs from the "natural coherence" of the group. However, the Germans did not yet postulate the existence "a unit distinct from the sum of all the associates."[101] In the latter, unity is external and imposed by a lord or other authoritarian figure.[102]

The second period stretched from 800 to 1200, and is the period where *Herrschaft* was the dominant form of organization. The concept of *king* transformed from the folk-king whose source of power was folk-law into a king who was lord and master of the people.[103] In the third period (1200-1525), a new principle of association developed,

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[99] David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 37 FN4.

[100] See, e.g., Joel Edan Friedlander, Corporations and *Kulturkampf*: Time Culture as Illegal Fiction, 31 Conn. L. Rev. 31 (1996), 79.

[101] Gierke, *DG*, Vol. I, 45, as translated by Lewis in *The Genossenschaft-Theory*, 28.

[102] See Lewis, *The Genossenschaft-Theory*, 28-31.

[103] See ibid, 30.

which Gierke identifies as "free union" (*der freie Vereinigung*).[104] This resembled the old association but recognized "that an association does not, or at least not entirely, owe its existence to natural coherence … but finds the final basis of its solidarity in the free will of its associates."[105] Though Gierke says that the medieval guild was the purest form of this organization, it also included much larger associations. He approvingly cites as examples the federally organized city confederations, like the Hanseatic League. With a common low-German origin, cities within the League also shared legal, political, and economic bases. They engaged in a free union for limited purposes.[106]

Toward the end of this period, Gierke observes a change in the spirit of the associational movement. He says that "[t]he ideal of free union from below" once gave promise to a reconstruction of the Empire along federalist lines. However, such unity was not bound to succeed so long as the large class of peasants was left out of the associational movement.[107] The problem was that associations increasingly sharpened distinctions among classes and began to emphasize particularity of function over generality.[108] Gierke writes:

> A system of private corporations extending into the whole nation, transforming the living members of a great national organism into purely individual organisms, threatened public life with pettiness, disruption, and destruction, until finally consideration of the commonweal could only be brought to the front through territorial authority developed into princely absolutism, and through ruthless demolition of associations standing between the individual and the state.[109]

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[104] See ibid., 31.

[105] Gierke, *DG*, Vol. II, p. 221, as translated by Lewis in *The Genossenschaft-Theory*, 31.

[106] See Lewis, *The Genossenschaft-Theory*, 31-33; see also Gierke, *DG*, Vol. I, 472.

[107] Gierke, *DG*, Vol. I, 514 as translated by Lewis in *The Genossenschaft-Theory*, 33.

[108] See Lewis, *The Genossenschaft-Theory*, 34.

[109] Gierke, *DG*, Vol. I, 583 as translated by Lewis in *The Genossenschaft-Theory*, 34.

Though his sentence is long and complicated, several important points emerge. Although associations do not owe their existence to the state, Gierke claims, they are not entirely independent of it. He argues that their disregard of the commonweal only encouraged the emergence of an absolutist state that ultimately undermined their claim to independent rights.

This, then, is the fourth period (1525-1806), during which "the people has become a sum of individuals, [and] even the idea of community has been almost lost to them."[110] The older *Herrschaft* principle is intensified, and power is not concentrated in a lord but in an abstract "state." As the exclusive representative of the public interest, the state can brook "no rival centers of authority." By absorbing the privileged corporations, the state cleared the way for modern free association. As wholes in themselves, such associations also recognized themselves as parts of a greater whole.[111]

The character of this association is critical in Gierke's teaching. He insists that an association is a real personality. Barker contends, "It is one thing to plead the cause of liberty of associations: it is another thing … to plead that associations are beings or minds or real persons." He asks whether it is "possible to find a theoretical basis for liberty of association, without recourse to a doctrine of the real personality of groups." Contrary to Gierke, Barker answers in the affirmative. He says that the modern state is built upon "the consent of the governed and respects the liberty of individuals." Therefore, we can expect the state "to acknowledge the liberty of individuals to associate with one another" and to reflect this acknowledgement in its law. Where the law of associations is

[110] Ibid., 641 at Lewis, 34.

[111] Lewis, *The Genossenschaft-Theory*, 35.

disjointed (with parts in the law of agency and others in the law of trusts, contracts, corporations, etc.), the state might unify the rules "in view of its own developed character as a free association of free individuals."[112] Thus, for Barker, an association is merely an assembly of individuals, not a real personality in itself.

Barker is aware of Gierke's objection, but seems to dismiss his concern as overblown. Gierke would argue that Barker's approach is "individualistic liberalism." It reduces the essence of an association to the freedom of the individuals within it. The association is not considered an entity in itself, leaving the associations "without either body or animating soul; it is to dissolve their life into a lifeless nexus of contractual relations between the associated members." Conceiving groups as having a mind and personality is all the more important when the State itself is so conceived. For Gierke, a proper understanding of groups is essential if they are to be effective in standing between the extremes of individualism and state absolutism.[113]

Properly Medieval vs. Antique-Modern

Gierke furthers the conversation about the real personality of groups when he speaks of a contest within the history of ideas between ideas that he calls "Properly Medieval" and ideas that are "Antique-Modern."[114] The latter are ideas that originate in antiquity but become modern after combining with elements from the Middle Ages.[115] With its antique ideas of state and law, the Ancient World brought "seeds of dissolution"

[112] Barker, "Translator's Introduction," lx-lxi; see also W. M. Geldart, "Inaugural Lecture on Legal Personality," All Souls College, Nov. 5, 1910, (Oxford: Oxford University Press, 1923), 5.

[113] Ibid., lxi-lxii.

[114] Gierke, *Political Theories of the Middle Age*, 3.

[115] Maitland, "Translator's Introduction," xliv.

that would work "destruction upon the medieval mode of thought." Gierke describes the process, saying that ancient-modern ideas were the kernel within a medieval husk. The kernel drew nutrients from its outer shell until it grew large enough to break through.[116]

For Gierke, this development was tragic, even though it brought some good. Genuinely medieval thought, he says, holds out one hand to antiquity by setting "the Whole before the Parts." It holds out the other hand to modernity "when it proclaims the intrinsic and aboriginal rights of the Individual." What sets medieval thought apart from both, however, is the way in which "it sees the Universe as one articulated Whole." Within this whole, "every Being—whether a Joint-Being (Community) or Single-Being—[is] both a Part and a Whole: a Part determined by the final cause of the Universe and a Whole with a final cause of its own."[117] For this reason, Gierke says, "Unity was neither absolute nor exclusive." Unity extends only so far as common purposes require. He continues, "Between the highest Universality of 'All-Community' and the absolute Unity of the individual man, we find a series of intermediating units, in each of which the lesser and lower units are comprised and combined."[118] Medieval thought recognized the interconnectedness of these various groups, seeing them as tied together in a "divinely instituted Harmony which pervades the Universal Whole."[119] Human society was viewed as organic rather than mechanical and atomistic.[120]

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[116] Gierke, *Political Theories of the Middle Age*, 4.

[117] Ibid., 7.

[118] Ibid., 20-21.

[119] Ibid., 8.

[120] See ibid., 22.

The federalistic structure of medieval thought was increasingly "exposed to attacks which proceeded from a centralizing tendency."[121] Gierke saw clear analogues between the "Germanic organic concept of organization" and the initial organization and theory of the Church. The Church is described in the Bible as the body of Christ, "a body with many members, each of which in its own place serve the whole in a special manner, and the last of which is of value to the whole."[122] However, the spirit that came to dominate the Church was not the medieval *genossenschaft* but the classical and authoritarian state.[123] As Gierke explains, "It was in the Church that the idea of Monarchical Omnicompetence first began to appear … in the shape of a *plenitude potestatis* attributed to the Pope."[124] The Church centralized its organization and "deprived its parts of all independent life."[125] This idea quickly spread into the temporal sphere.

Thus arose "[t]he 'antique-modern' concept of the State-Unit as an absolute and exclusive concentration of all group-life."[126] While these Romanist and Canonists' principles were attacking intermediary associations from above, the developing theories of Natural Law and the social contract were attacking them from below. During the time of Althusius, state authority did not appeal directly to the individual for its basis.

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[121] Ibid., 21.

[122] Gierke, *DG*, Vol. I, 285 as translated by Lewis in *The Genossenschaft-Theory*, 48.

[123] See Lewis, *The Genossenschaft-Theory*, 49.

[124] Gierke, *Political Theories of the Middle Age*, 36.

[125] Gierke, *The Development of Political Theory*, 258.

[126] Gierke, *Political Theories of the Middle Age*, 21.

However, as time progressed, this began to change.[127] The State considered any association intruding between itself and the individual as suspect. In the transition away from medieval thought, Gierke identifies a drift toward the "theoretical concentration of right and power in the highest and widest group on the one hand and the individual man on the other, at the cost all intermediate groups." He explains, The Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy."[128] Gierke puts the same idea in different words in his work on Althusius:

> More and more there appeared as Natural Rights merely human right on the one hand and the sovereignty of the civil community on the other; more and more those great struggling principles were fused together in the war of extermination against the independent intermediary members, in which the state discerned an unbearable limitation upon its sovereignty and the individual an annoying chain upon his freedom and equality.[129]

As described in the previous section, Gierke could trace a minority position of the Germanic concept of *genossenschaft* through history. It had notable supporters like Althusius. However, Gierke recognized in the Romanists' attempt to "purify" German law of its Germanic elements a threat to the rebirth of German *genossenschaft*.[130]

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[127] See Lewis, *The Genossenschaft-Theory*, 50-51.

[128] Gierke, *Political Theories of the Middle Age*, 87.

[129] Gierke, *Johannes Althusius*, 257-58, as translated by Lewis in *The Genossenschaft-Theory*, 52.

[130] See Lewis, *The Genossenschaft-Theory*, 52.

Gierke and a Historical Conception of Law

Gierke asks the question, "But how was it possible to think that on the one hand the Law should exist by, for, and under the State, and that on the other hand the State should exist by, for, and under the Law?" Because medieval thought had not yet arrived at the idea "that State and Law exist by, for, and under each other," it had to find another solution. Gierke says that this antithesis was solved by means of a distinction coming from antiquity—the division between Positive Law and Natural Law. The former came to mean "the freely created product of the power of a human community, an instrument changeable according to estimates of utility, a set of rules without independent force." Positive law depended on the will of the Sovereign. The principle developed that the sovereign ruler was not bound by the law he created. Such a principle had ancient support in Roman texts with maxims like "*Princeps legibus solutus est*" ("The Prince is loosed from the law."). Even many who advocated the "People's Sovereignty" over the "Ruler's Sovereignty" considered their sovereign to have the same superior relation to law. In fact, as Gierke points out, the exemption from statute law became regarded "as the decisive criterion of sovereignty."[131] For Bodin and his followers, a true sovereign could neither be subject to "*leges civiles*" nor "*leges fundamentales*" (ordinary civil laws and laws of the constitution).[132]

As a result, rights acquired under positive law were held on a tenuous foundation. Gierke says that rights would only be held inviolable if they "could be based on some ground of Natural Law independent of positive law."[133] Regardless of whether Natural

[131] Gierke, *The Development of Political Theory*, 300-01.

[132] See ibid., 311.

Law was thought to be grounded in divine will or human reason, the middle ages viewed Natural Law as true and binding law that transcended the State.[134] Neither the ruler nor the people could act so as to bind anyone contrary to Natural Law. Thus, obedience to the commands of the sovereign was conditioned by the rightfulness of the command.[135]

However, this theory was radically shaken in the sixteenth century with the work of Machiavelli. Gierke says that when Machiavelli taught of a Prince's "freedom from restraint, it seemed to the men of his day an unheard-of innovation, a monstrous crime." General thought after Machiavelli maintained the previous distinction of Natural Law and Positive Law, but the two developed in new ways. Gierke explains that positive law was increasingly "reduced … to the concept of a statute, to which customary law must adjust itself as a tacit statute." An additional dispute developed over the nature of such statutes. One side, which Gierke identifies as "the absolutist school," emphasized the creative aspect of law. The binding effect of legislation hinged on the lawmaker's will; the binding effect of custom depended on his tacit consent.[136] The other side strove for what Gierke calls a "Right-State." Maitland translates the phrase as "reign of law."[137] This side viewed legislation as "a development of Natural Law with adaptation

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[133] Ibid., 303. Later, on page 316, Gierke explains that there were two great categories of rights derived from Natural Law. One was contracts with the State. The other was basic property rights, which were rooted in the "*jus gentium*," which, in turn, was rooted in Natural Law.

[134] Ibid., 303-04. On page 320, Gierke explains three possibilities. One says that Natural Law is a "derivation from the Will of God." A second derives Natural Law as "the principle of justice as contained in the nature of God." Finally, he says that there is "the thought, destined to triumph in the end, of an absolute Law of Reason binging on all rational beings by virtue of its rationality."

[135] Ibid., 303-05.

[136] Ibid., 307-08.

[137] See, e.g., Gierke, *Political Theories of the Middle Ages*, translated by Frederic William Maitland, 73.

to times and places." To put the matter differently, Gierke says that the former group emphasized the "imperative sanction" of a statute, while the latter emphasized its content.[138]

Natural-law ideas regarding the relationship between the State and Law, according to Gierke, culminated in the late 1700s. Then the entire natural law system began a process of disintegration before being supplanted by ideas introduced by the Historical School. He argues that the School's achievement consisted in "transcend[ing], at last, the old dichotomy of Law into Natural and Positive." Gierke states that the Historical School faced opposition from partisans of both sides, who, though "opposed to one another, were united in their opposition to the historic-organic idea of Law."[139]

On one hand are those that press an abstract Law of Nature so as to undermine the idea of the State.[140] The Natural Law that Gierke confronted was the secularized form that had long reigned in Europe. Though some Catholic thinkers of the period from 1500 to 1800 continued to think of Natural Law in terms of divine dispensation, "the general view of the thinkers of the School of Natural Law refers that law, and all that depends upon it, to the play of the natural life of human reason." Barker concludes, "The School is thus a rationalistic school, emancipated from the Church."[141]

In approaching history, Gierke was searching for elements of truth that, according to Barker, "accorded with the long historic trend of German life and thought and could be

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[138] Gierke, *The Development of Political Theory*, 308.

[139] Gierke, *Johannes Althusius*, which appears as Appendix II in Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker (Cambridge: Cambridge University Press, 1934), 223.

[140] See ibid.

[141] Barker, "Translator's Introduction," xli.

incorporated into the German present." He simultaneously was seeking to eliminate the elements of error.[142] Regarding Natural Law, Gierke clearly found some elements of truth. Far from seeking to resurrect the dead body of Natural Law theory, he acknowledged that "the undying spirit of that Law can never be extinguished" for "the living force of Law is derived from idea of Right which is innate in humanity."[143] However, as Barker notes, Gierke also found "something of error" in the Natural Law, particularly its individualistic and rationalistic bases.[144] Natural Law "moved more in the world of thought than in the world of action," an aspect that surely weakened its power in Gierke's estimation.[145] Though he was an academic, Gierke was never content to isolate himself in the ivory tower, detached from the practical concerns of his day.

Thus, Gierke was no devotee of the secularized Natural Law taught in the years before the Historical School. However, he found the opposing idea—Positive Law—all the more menacing because it was gaining intensity within Germany. Gierke says that this idea recurs to old understandings of Positive Law but without the complement of Natural Law. As a result, it is driven by the idea of utility. Its power rests in the state's force. This idea, he contends, "threatens to undermine all the foundations of Law."[146]

Opposing both perspectives, the Historical School viewed law as a unified whole and "refused to content themselves with merely continuing to emphasize one or the other side of the old antithesis." To use Gierke's previous language, the School argued "that

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[142] Ibid., xviii.

[143] Gierke, *Johannes Althusius*, 226.

[144] Barker, "Translator's Introduction," xviii.

[145] Ibid., xliii.

[146] Gierke, *Johannes Althusius*, 223.

State and Law exist by, for, and under each other." They are intertwined and dependent on one another. They are both to be regarded "as inherent functions of the common life which is inseparable from the idea of man"; they are "primordial facts."[147]

Gierke explains, "Law is not a common will that a thing shall be, but a common conviction that it is. Law is the conviction of a human community, either manifested directly by usage or declared by a common organ appointed for that purpose, that there exist in that community external standards of will—in other words, limitations of liberty which are externally obligatory, and therefore, by their very nature, enforceable." Obviously, the State plays an important role in the process—both in issuing commands and using the tools of compulsion. However, Gierke is quick to point out that "commanding obedience to what *is* Law is not an action which *creates* Law: it is only an action which sanctions Law."[148] Thus, for Gierke, there is an element of law that transcends time and place, but for this element to have effect, it must be forever connected to each particular community's present sense of justice. The law develops as the people develop.

Conclusion

Gierke has been called "a sort of patron saint of political pluralists."[149] His work was taken up enthusiastically by the English Pluralists who will be the subject of the next chapter.[150] Gierke's great contribution to pluralist thought comes in his recognition that

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[147] Ibid., 223-24.

[148] Ibid., 225.

[149] Morris R. Cohen, "Communal Ghosts and Other Perils in Social Philosophy," *The Journal of Philosophy, Psychology, and Scientific Methods*, 16:25 (Dec. 4, 1919), 683.

[150] See ibid., 679.

both law and society are organic rather than mechanical. He opened the first volume of *DG* by saying: "What man is, he owes to the association of man with man."[151] Man is born into some associations—family, community, etc. He joins others voluntarily for an array of purposes, both specific and general. Society itself is made of a complex web of associations, which are expressions of man's nature.

Given this critical function, associations should be protected in this best way possible. For Gierke, this meant that associations should be looked upon as having dignity, as having an existence independent of the State. This theory of association goes hand in hand with Gierke's conception of law. On one hand, the individualistic, rationalistic Natural Law ultimately rests on the sovereignty of the individual. Associations are reduced to mere mechanistic aggregations of individuals. On the other hand, the positivistic conception of law reduces associations to concessions of the sovereign rather than naturally-occurring and ontologically-prior entities. Both of these ideas rely on a too optimistic view of an individual's capacity for reason and have a tendency toward despotism. Gierke believes the associative spirit will be much better protected when law is seen as collective wisdom unfolding through time, as a nation's people grope toward a more complete understanding of justice.

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[151] Gierke, *DG*, Vol. 1, 1 as translated by Lewis in *The Genossenschaft-Theory*, 113.

CHAPTER FOUR

Law and the English Pluralists

> *The general character and disposition of the Rationalist are, I think, not difficult to identify. At bottom he stands (he always* stands*) for independence of mind on all occasions, for thought free from obligation save the authority of 'reason.' His circumstances in the modern world have made him contentious: he is the* enemy *of authority, of prejudice, of the merely tradition, customary, or habitual. His mental attitude is at once skeptical and optimistic: skeptical because there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason'; optimistic because the rationalist never doubts the power of his 'reason' (when properly applied) to determine the worth of a thing, the truth of an opinion, or the propriety of an action.*
>
> —Michael Oakeshott, "Rationalism in Politics"

Many of the most well-known political theorists in Great Britain fall under Oakeshott's description of the Rationalist. In this chapter, I begin by examining two of these thinkers—Thomas Hobbes (1588-1679) and Jeremy Bentham (1748-1832).[1] Though separated in time, the two were leading targets of the English pluralists who came after them. Both men were rationalists who opposed the common law tradition of their country. To continue with the language of Oakeshott, both substituted "the politics of destruction and creation … for the politics of repair, the consciously planned and deliberately executed being considered (for that reason) better than what has grown up and established itself unselfconsciously over a period of time."[2] The rationalized system

[1] Interestingly, Oakeshott looks favorably upon Hobbes, despite the fact that the "pluralist thinkers whom Oakeshott had admired in the 1920s had been unsympathetic to Hobbes's political philosophy." See Luke O'Sullivan, *Oakeshott on History* (Exeter, UK: Imprint Academic, 2003), 124. For a fuller picture of his unique interpretation, see also Oakeshott's "Introduction to *Leviathan*," reprinted in *Rationalism in Politics*, 221-94.

of law that both men favored was connected with an antipathy toward associative life, as associations pose a threat to the authority of the sovereign power.

I begin by briefly describing the common law tradition that Hobbes and Bentham, each in his own way, reacted against. I then work through their respective teachings on law and associations. Following this, I turn to an alternative understanding of both law and association, one powerfully depicted by the English legal historian Frederic William Maitland. Rather than dedicating himself to the recreation of English law, Maitland was driven by an "interest in what made English law and English legal institutions work." He sought to convince others that "questions of public law are also questions of political theory." Of particular importance to Maitland was establishing the connection between "the legal activities of groups and the philosophical doctrines of politics." He found Gierke's work to be indispensable to this effort, so Maitland translated a portion into English. This text, along with Maitland's introduction, was pivotal in the beginnings of the pluralist movement, which I describe at the close of the chapter.[3] Opposing the rationalist schemes of men like Hobbes and Bentham, the pluralists cherished an organic society and saw that this would be best preserved by an organic law.

England's Common Law Tradition

Legal development in England followed a different course from in Germany and the rest of the Continent. Roman law was known, and it was even taught at Oxford and Cambridge, yet as Barker says, it "had little bearing on English life." Instead, England

[2] Oakeshott, "Rationalism in Politics," in *Rationalism in Politics* (Indianapolis: Liberty Fund, 1991), 26.

[3] David Runciman and Magnus Ryan, "Editors' Introduction," in F. W. Maitland, *State, Trust, and Corporation* (Cambridge: Cambridge University Press, 2003), x-xii.

followed the common law tradition. Her law developed more from the work of practicing jurists than from legal professors as in Germany and other Civil Law countries.[4] Key within the common law tradition is the use of precedent. Gerald Postema points out that there are competing conceptions of precedent. These conceptions are, in part, a reflection of legal practice, but the conceptions also influence legal practice. He details some of the leading ways that legal precedents are conceived. First is what he calls the "positivist conception." In keeping with positivism, this view considers all law as the command of the sovereign; however, here the sovereign delegates some authority to courts. When there are gaps in the law, areas where the sovereign has not expressly declared his will in a statute, a court has the authority to speak for the sovereign while adjudicating from case to case. Judicial declarations of this type have the force of law, at least until the sovereign declares otherwise.[5]

While this may be very close to our contemporary understanding of precedent, Postema says that it is at odds with what he calls "classical common law theory" or the "traditionary conception of precedent." Postema rightly regards Sir Matthew Hale as "perhaps the most sophisticated defender of common law theory" during the time of Hobbes.[6] For this reason, I will use Hale to describe the traditional conception of legal precedent. Hale says that the parts of the law that are unwritten have "grown into use and have acquired their binding power and the force of laws by a long and immemorial usage and by the strength of custom and reception in this kingdom." Hale acknowledges that

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[4] Ernest Barker, "Translator's Introduction," in Gierke, *Natural Law and the Theory of Society*, translated by Ernest Barker (Cambridge: Cambridge University Press, 1934), xiv.

[5] See Gerald J. Postema, "Some Roots of Our Notion of Precedent," in *Precedent in Law*, edited by Laurence Goldstein (New York: Oxford University Press, 1987), 11-15.

[6] Ibid., 16.

much of the substance of the common law is recorded in law reports and other writings. Nonetheless, it is not the writing that gives the law "formal and obliging force and power"; this comes only "by long custom and use."[7]

Particular towns and cities may have their own customs as relating to their particular place. These diverse local customs form a part of the common law.[8] The canons, laws, and decrees of foreign powers, such as popes and Roman emperors, have no intrinsic force. They are authoritative parts of the common law only to the extent that they have been admitted and received by the English people.[9] Hale says that the common law "is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government and to the disposition of the English nation." This is possible because, "by a long experience and use," the law has been "incorporated into their very temperament and in a manner become the complexion and constitution of the English commonwealth." The people both shape and are shaped by the law. The same cannot be said of law that emanates top-down from a legal sovereign.

Hale appears to believe that there is some transcendent standard of justice but that full understanding of this standard is beyond the reason of individuals. Like Hobbes, he is anxious "to avoid that great uncertainty in the application of reason by particular persons to particular instances."[10] Law is needed to provide justice and set bounds, but it

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[7] Sir Matthew Hale, *The History of the Common Law of England*, 6th ed., Charles Runnington (London: Henry Butterworth, 1820), 21-22.

[8] See ibid., 23.

[9] See ibid., 24-25.

[10] Sir Matthew Hale, "Reflections by the Lrd. Chiefe Justice Hale on Mr Hobbes His Dialogue of the Law." In Sir William Holdsworth, *A History of English Law*, vol. V, (London: Methuen & Co., 1924), 505.

is not the law of a sovereign announcing his will at a particular moment in time. Instead, the law is the product "of the wisdom, counsel, experience, and observation of many ages."[11] It develops through "long and iterated experience … [which] is the wisest expedient among mankind." In this process, the common law "discovers those defects … which no wit of man could either at once foresee or aptly remedy."[12] It is like the human body, which, by degrees, works out of itself "those accidental diseases which sometimes happen."[13] Thus, in its pursuit of that transcendent standard of justice, the common law is ever-changing, maintaining continuity with the past while adjusting for present circumstances.[14] Such was the understanding of the common law that dominated England in the seventeenth century.

The Positivist Tradition in England

Thomas Hobbes

The common law tradition defended by Hale was not without its detractors, Thomas Hobbes chief among them. Hobbes is best known for *Leviathan*, a work often considered to be the greatest piece of political philosophy in the English language.[15] In *Leviathan*, Hobbes lays out the logic of sovereignty. Important for my purposes are 1)

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[11] Sir Matthew Hale, "Preface to Rolle's Abridgment" [1668], reprinted in *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England*, vol. I (London: E. and R. Brooke, 1791), 266.

[12] Hale, "Reflections," 503.

[13] Hale, *The History of the Common Law*, 47.

[14] See, e.g., Ayelet Ben-Yishai, *Common Precedents: The Presentness of the Past in Victorian Law and Fiction* (Oxford: Oxford University Press, 2013), 3.

[15] See, e.g., Richard Tuck, "Introduction," in Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press, 1997), ix (spelling and grammar are standardized throughout this chapter); see also Michael Oakeshott, *Hobbes on Civil Association*, (Indianapolis: Liberty Fund, 1975), 3.

the relationship between sovereignty and law, and 2) the relationship between law and associative life. As mentioned above, I am placing Hobbes within the legal positivist tradition. This argument, along with the very meaning of positivism, is a matter of great debate. A brief word on this subject is appropriate before turning more directly to Hobbes's work.

James Boyle argues that positivism is an "invented tradition." By this he means that legal scholars typically compile a series of texts to construct a lineage of positivism. The scholars fail to appreciate, however, the different political, epistemological, and rhetorical purposes that inspired the authors of these texts. The authors' purposes affect the "definitional actions" they take with regard to law. Boyle gives the example of Hobbes, who "was shoring up the power of a centralized state by appearing to deduce, from the very definition of law, the need to subordinate all forms of normative authority to the power of the sovereign." He contends that Hobbes's account should be read in light of this purpose, and the same should be done for other authors.[16]

Boyle then asks, "So what is positivism?" His answer is that positivists are those who deny or minimize "the role of morality or religion in the 'concept of law' and who have correspondingly stressed the role of the state and its authorized organs."[17] Like Sean Coyle, I contend that these two elements are not necessarily entwined. He asserts

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[16] James Boyle, "Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism," *University of Pennsylvania Law Review,* 135:2 (Jan., 1987), 384-87.

[17] Ibid., 385; see also Mark C. Murphy, "Was Hobbes a Legal Positivist?" *Ethics*, 104:4 (July 1995), 847. Murphy helpfully notes many of the authors who assert Hobbes is a positivist in FN4. In FN7, he notes the authors who adhere to the "separability thesis," that is, that positivism necessarily entails a "conceptual separation between law and morality such that the legal validity of an enactment does not depend on its moral content." For more on this subject, see generally, David Dyzenhaus & Thomas Poole, ed., *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012), especially Ch. 4, "Thomas Hobbes and the Common Law" by Michael Lobban.

that "the concern with 'conceptual connections' between law and morality is, by and large, an unwelcome distraction from the important issues which have traditionally defined the core of the positivists' thinking." What is this traditional core of positivists' thinking? Coyle argues that it can be summed up in the proposition that "law must consist in ascertainable standards in the form of authoritative, expressly laid-down (posited) rules if law is to make any contribution to social order in a world of moral doubt." Hobbes may not have held notions deemed essential to the modern conception of positivism. Nonetheless, if Coyle is correct in asserting that the above proposition constitutes the "essence" of positivist thinking, then Hobbes clearly belongs to the tradition.[18]

Hobbes on law. What does Hobbes have to say regarding sovereignty and the law? He famously builds from his vision of the state of nature, a time before individuals contracted with one another to form a civil authority. In this state, Hobbes says:

> The desires and other passions of man are in themselves no sin. No more are the actions that proceed from those passions, till they know a law that forbids them, which till laws be made they cannot know, nor can any law be made till they have agreed upon the person that shall make it.

The state of nature consists of a "war of every man against every man," where "nothing can be unjust." In fact, Hobbes continues, "The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law; where no law, no injustice." Man leaves this dreadful condition through a combination of his passions and reason. The passions propelling men toward peace include their "fear of

[18] Sean Coyle, "Thomas Hobbes and the Intellectual Origins of Legal Positivism," 16 Can. J. L. & Jurisprudence 243 (2003), FN 2. In his first footnote, Coyle points out that Hobbes is not really the *first* legal positivist because John Selden had earlier begun to "systematically … explore and develop characteristically positivist ideas."

death, desire of such things as are necessary to commodious living, and a hope by their industry to obtain them." "Reason," Hobbes says, "suggests articles of peace, upon which men may be drawn to agreement." These articles are also called Laws of Nature.[19]

Hobbes devotes chapters fourteen and fifteen or Part I to a discussion of these Laws of Nature. He explains that they are "found out by reason"[20] and "are immutable and eternal."[21] However, these "laws" have no intrinsic legal force. Hobbes explains that the Laws of Nature "oblige *in foro interno*"; that is, one should "desire they should take place." By "desire," Hobbes means "an unfeigned and constant endeavor" to carry them out. However, the laws do not always bind "*in foro externo*"; that is, one is not always bound to put them into action. An individual is free from obligation when self-preservation is threatened.[22] Arguably, this is the perpetual condition in the state of nature, which Hobbes describes as a "condition of war" where "every man has a right to everything, even to one another's body."[23]

Thus, are the Laws of Nature really laws? No. Hobbes says, "These dictates of reason men use to call by the name of Laws, but improperly; for they are but conclusions or theorems concerning what conduces to the conservation and defense of themselves; whereas Law, properly, is the word of him that by right has command over others."

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[19] Hobbes, *Leviathan*, Pt. I, Ch. 13, para. 62-63, 89-90.

[20] Ibid., Ch. 14, para. 64, 91.

[21] Ibid., Ch. 15, para. 79, 110.

[22] Ibid., Ch. 14, para. 64, 91.

[23] Ibid., Ch. 15, para. 79, 110; see also p. 91. Hobbes says that to preserve himself, a man has the right to do "anything, which in his own judgment and reason, he shall conceive to be the aptest means thereunto."

Hobbes concludes chapter 15 with a strange aside, saying that if we consider the same theorems as delivered by God in His Word, then they would properly be called Laws.[24] In chapter 26, Hobbes explicitly refers back to chapter 15's contention that "the Laws of Nature … are not properly Laws but qualities that dispose men to peace and to obedience." This time, however, Hobbes does not reference God who could, by commanding such rules, transform them into proper Law. Instead, he says that the rules become law "[w]hen a commonwealth is once settled … and not before."[25] Hobbes cast further doubt on the authority of divine law. Unless immediately given to an individual by God himself, the law must be transmitted by one authorized by God. Hobbes asks, "How can a man without supernatural Revelation be assured of the Revelation received by the declarer, and how can he be bound to obey them?"[26] Even the teaching of Christ and His Apostles did not contain "obligatory Canons, that is, Laws, but only good and safe advice for the direction of sinners in the way to salvation." They are "not Commands, but Invitations." Divine "law" is only properly law once the commonwealth is established and the Sovereign power has made it so.[27]

How, then, is the commonwealth established? Hobbes explains, "A Commonwealth is said to be instituted when a multitude of men do agree and covenant, everyone with everyone" to give one "man or assembly of men" the right of representation. Upon this representative, "the Sovereign Power is conferred by the

[24] Ibid., Ch. 15, para. 80, 111.

[25] Ibid., Pt. II, Ch. 26, para. 138, 185.

[26] Ibid., para. 148-49, 197-98.

[27] Ibid., Pt. III, Ch. 42, para. 285-86.

consent of the People assembled."[28] Individuals "may reduce all their wills … unto one will." "This," Hobbes concludes, "is the generation of that great Leviathan, or rather (to speak more reverently) of that Mortal God."[29]

Because the Sovereign is the product of the covenant, not a party to it, he cannot breach the covenant. Therefore, subjects cannot escape their subjection "by any pretense of forfeiture" on the part of the Sovereign.[30] Hobbes provides more detail of the Sovereign's power in a chapter titled "Of Civil Laws." "By Civil Laws," he explains, "I understand the laws that men are therefore bound to observe because they are member, not of this or that commonwealth in particular, but of a commonwealth." He acknowledges that the ancient law of Rome went by the name "Civil Law," but he repeats that his "design is not to show what is Law here and there, but what is Law." He is speaking of law in general, knowledge of which belongs "to any man" rather than being the preserve of legal scholars only.[31]

Hobbes's definition is straightforward: "Law in general is not counsel, but command; not a command of any man to any man; but only of him whose command is addressed to one formerly obliged to obey him." He adds, "Civil law is to every subject those rules which the commonwealth hath commanded him by word, writing, or other sufficient sign of will."[32] Thus, Hobbes gives what is now considered a fairly standard positivist account: law is a command of the sovereign, which is "posited," or

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[28] Ibid., Ch. 18, para. 88, 121.

[29] Ibid., Ch. 17, para. 87, 120.

[30] Ibid., Ch. 18, para. 89, 122.

[31] Ibid., Ch. 26, para. 137, 183.

[32] Ibid.

communicated to subjects through some sufficient sign of the sovereign's will. This positing of the law by an authoritative source is necessary, Hobbes says, because there is "nothing simply and absolutely" good or evil, no rules "to be taken from the nature of the objects themselves." *Good* and *evil* are just words "used with relation to the person that uses them." Moreover, each person will not have a constant usage for "a man's body is in continual mutation," which leads to persistent reassessment of one's appetites and aversions.[33] The Sovereign power cuts through the chaos. His pronouncements are authoritative and binding because of their *source*, without regard to their *content*. Hobbes does argue that "Law can never be against Reason," but by Reason, he does not mean private reason. Reason belongs to "our Artificial Man the Commonwealth," which represents the people as one person.[34] As Hobbes says, the people "submit their wills, everyone to his will, and their judgments, to his judgment."[35]

With this definition of law in place, Hobbes deduces the consequences that necessarily follow. The Sovereign is the Legislator who makes the Law. As the maker of Law, the Sovereign is not subject to law. He is able, at will, to "free himself of that subjection by repealing those Laws that trouble him and making new [Laws]." Custom gains no prescriptive value by the duration of its practice; authority only comes from "the Will of the Sovereign signified by his silence." A custom's long continuance "shall bring no prejudice to his Right" to abrogate.[36]

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[33] Ibid., Pt. I, Ch. 6, para. 24, 39.

[34] Ibid., Pt. II, Ch. 26, para. 139-40, 186-87.

[35] Ibid., Ch. 17, para. 87, 120.

[36] Ibid., Ch. 26, para. 137-38, 183-85.

Unlike some other positivists, Hobbes is under no illusion that the process of reducing law to writing will be easy. He admits, "All Laws … have need of Interpretation." Whether written laws are long or short, there remains the likelihood of misinterpretation, which can only be avoided by "a perfect understanding of the final causes for which the law was made, the knowledge of which … is in the Legislator." An author of legal commentaries or works of moral philosophy may express opinions on legal interpretation, but his opinions carry no authority unless he is "an Interpreter authorized by the Sovereign."[37]

Hobbes speaks with particular scorn against the class of lawyers who supposed they were interpreters of the law. He notes that from one country to the next, "manners," "those qualities of mankind that concern their living together in peace and unity," differed.[38] One source of such differences, Hobbes asserts, is a "[w]ant of science, that is, ignorance of causes, [which] disposes … a man to rely on the advice and authority of others." When it comes to right and wrong, "ignorance of the causes" is ignorance of the "original constitution of right, equity, law, and justice." Because man does not know what is right by nature, he is "dispose[d] … to make custom and example the rule of his actions." With great derision, Hobbes speaks of the lawyers who call "this false measure of justice … a precedent." He compares them to "little children that have no other rule of good and evil manners but the correction they receive from their parents." Worse than children, however, lawyers are not consistent in the application of their rules. They appeal to reason or custom, Hobbes insists, as the interests of the moment demand.[39]

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[37] Ibid., para. 143-45, 191-93.

[38] Ibid., Pt. I, Ch. 11, para. 47, 73.

Hobbes extends his argument against the common law in *A Dialogue Between a Philosopher and a Student of the Common Laws of England.* As the title suggests, the book involves a conversation between a philosopher and a devotee of the common law (called a "Student" in the title but "Lawyer" through the text).[40] Cropsey says that the "*Dialogue* is to some extent a polemic against Coke," who represents the common law tradition.[41] He summarizes the argument of the text:

> [I]f law is reason and reason alone generates law, then law gains greatly in dignity but loses its own nature; for it is of the nature of law to command, and it is of the nature of command that it comports with obedience, but a command whose authoritativeness begins and ends with the reasonableness of the command will not, but its nature, procure obedience, for it is of the nature of reason to be always open to question.[42]

Moreover, the nature of law is also to be just, which seems to conflict with its nature as a command. Hobbes responds to this challenge by denying that "reason as such … or reason as informed by a divinity is sufficient for declaring law." These "are the private possessions of individual human beings." Instead, Hobbes says, "[A]uthority is competent to declare law"; it "is the possession and sign of what is quintessentially public or politic."[43] In other words, law must be the command of the sovereign because

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[39] Ibid., para. 50.

[40] See Joseph Cropsey, "Introduction," in Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, edited by Joseph Cropsey (Chicago: University of Chicago Press, 1971), 2-8. Cropsey contends that the book could not have been completed—if it was completed at all—before 1662, which is likely the latest specific event mentioned in the text (a legislative enactment in the thirteenth year of Charles II). Cropsey goes on to detail an ongoing debate about whether Hobbes ever completed *A Dialogue*. He concludes, "Biographical and bibliographical consideration seem to justify leaving this question open."

[41] Ibid., 10-11.

[42] Ibid., 15.

[43] Ibid., 16-17.

submitting the law to individual judgments of reasonableness or justice would create chaos.

Hobbes goes on to reiterate some of the points made in *Leviathan*. There is no justice without law and no law without the command of the sovereign. The sovereign is the true legislator and judge. Divine commands are only law in the commonwealth if the sovereign makes them so.[44] The "essence of a law" includes that it "be publicly and plainly declared to the people." The Philosopher goes so far as to ask, "[W]hat reason can you give me why there should not be as many copies abroad of the statutes as there be of the Bible?"[45] That a law be "posited" is essential.

Throughout both *Leviathan* and *A Dialogue*, Hobbes's hostility toward the common law tradition abounds. As David Lobban notes, contrary to the common law, Hobbes dismissed both the use of custom as a source of law and the ability of judicial precedent to bind in subsequent cases.[46] Hobbes said that common lawyers were beholden to "reason," that "the more general and noble science, and law of all the world is true philosophy, of which the common law of England is a very little part."[47]

Hobbes on associations. Hobbes's teaching on law is integral to his broader theory of sovereignty. As sovereign, the King stands above the law. He is free to make, break, abridge, or abolish the law at will. Hobbes asks, "[W]hat is there that the King

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[44] See Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, edited by Joseph Cropsey (Chicago: University of Chicago Press, 1971), 67-71.

[45] Ibid., 71-72.

[46] See Michael Lobban, "Thomas Hobbes and the Common Law," in *Hobbes and the Law*, edited by David Dyzenhaus & Thomas Poole (Cambridge: Cambridge University Press, 2012), 58.

[47] Hobbes, *A Dialogue*, 58.

cannot do, excepting sin against the Law of God?" Even in this, however, "[n]o man may presume to dispute [what the King] does, much less to resist him."[48] The sovereign is the beginning and end of law.

Similarly, Hobbes's theory of sovereignty is also bound up in his thoughts on human association, though he devotes far less attention to this subject than he does to law. In a chapter on the things that weaken a commonwealth, he decries "the great number of corporations," which he likens to "many lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man."[49] Hobbes is suspicious when towns grow to a large size, especially if they can provide for their own defense.[50] In fact, he is suspicious of any large association. He says that the "[c]oncourse of people" is lawful "[i]f the occasion be lawful and manifest." However, if the number of individuals present is unusually large or the purpose of the assembly is not evident, the association is automatically suspect. Any time men meet but do not make their purposes known publicly, Hobbes considers their association "dangerous to the public and unjustly concealed." These he calls "factions or conspiracies."[51]

Further, Hobbes viewed any center of authority standing between the individual and the state to be suspect. Regarding the family, Hobbes says, "[A] great family, *if it be not part of some commonwealth,* is of itself, as to the rights of sovereignty, a little monarchy." Thus, Hobbes distorts the family by forcing it into his mold and analyzing it through the lens of sovereignty. Though he sees the family as a "little monarchy,"

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[48] Ibid., 74.

[49] Hobbes, *Leviathan*, Pt. II, Ch. 29, para. 174, 230.

[50] Ibid., Pt. II, Ch. 29, para. 174, 230.

[51] Ibid., Ch. 22, para. 121-123, 163-65.

Hobbes says that a family is not properly a commonwealth unless it is strong enough to defend itself from foreign aggression. Without such strength, each individual is free to "use his own reason in time of danger to save his own life … as he shall think best."[52] Thus, the family, which is the first dominion by nature,[53] is absorbed into the commonwealth.[54] The commonwealth has "absolute power" over the family; indeed, Hobbes says that this is God's intent. Speaking through the prophet Samuel, God said that a king shall have the right "to reign over you; … you shall be his servants." Hobbes interprets this to mean that families are to live in "simple obedience" to the sovereign, possessing no sphere of natural autonomy.[55]

Other power centers are similarly circumscribed. Hobbes defines a church as "[a] company of men professing Christian Religion, united in the person of one Sovereign, at whose command they ought to assemble and without whose authority they ought not to assemble." In fact, any assembly "which is without warrant from the Civil Sovereign is unlawful." Hobbes denies the separation of spiritual and temporal governments, arguing that there must be one "Governor" of them both to avoid "faction and civil war in the

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[52] Ibid., Ch. 20, para. 105, 142 (emphasis mine).

[53] Hobbes, *A Dialogue*, 159. Several more recent commentators have challenged the traditional view that Hobbes's state of nature was highly individualistic. See, e.g., Gordon J. Schochet, "Thomas Hobbes on the Family and the State of Nature," *Political Science Quarterly*, 82:3 (Sep., 1967): 427-445; Richard Allen Chapman, "*Leviathan Writ Small: Thomas Hobbes on the Family*," *American Political Science Review*, 69:1 (Mar., 1975): 76-90; Philip Abbot, "The Three Families of Thomas Hobbes," *The Review of Politics*, 43:2 (Ar., 1981): 242-58.

[54] See Hobbes, *Leviathan*, Pt. II, Ch. XX.

[55] Ibid., Ch. 20, para. 105-06, 143. Hobbes quotes I Samuel 8:11-12. See also ibid., Ch. 22, para. 121, 162-63.

commonwealth." That governor is the "chief pastor," the Civil Sovereign.[56] He has authority over church doctrine and the appointment of its ministers.[57]

Likewise, local magistrates, judges, and military leaders have no independent authority that is not derived from the Civil Sovereign who is "the magistrate of the whole commonwealth, judge of all causes, and commander of the whole militia." Even the selection of local mayors is subject to the Sovereign's consent.[58] Universities also come under the sovereign's control. Hobbes considers universities to have an important "office in a commonwealth."[59] He says, "[T]he instruction of the people depends wholly on the right teaching of youth in the universities." He then raises two questions: "are not … the Universities of England learned enough already to do that? or is it you will undertake to teach the Universities?" To the first, Hobbes says that it is through the universities that "so many opinions, contrary to the peace of mankind," have been deeply rooted in the people. He acknowledges that "the Universities were not authors of those false doctrines"; that is a distinction assigned primarily to Aristotle and the Church. Nonetheless, the universities "knew not how to plant the true [doctrines]." This said, Hobbes turns to the second question—whether he will undertake to teach the universities—and states, "[I]t is not fit, nor needful for me to say either aye or nay: for any man that sees what I am doing, may easily perceive what I think."[60] Indeed; for the peace of the commonwealth, the Sovereign should have dominion over the university as

[56] Ibid., Pt. III, Ch. 39, para. 247-48, 321-22.

[57] Ibid., Ch. 42, para. 295, 372-73.

[58] Ibid., Ch. 42, para. 295, 373.

[59] Ibid., Pt. I, Ch. 1, para. 4, 14.

[60] Ibid., Pt. II, Ch. 30, para. 179-80, 236-37.

over all associations. For the sake of securing peace, Hobbes wishes to put control of both law and associations in the hands of the sovereign.

Jeremy Bentham

Bentham on associations. Like Hobbes, Bentham was a rationalist whose views on both law and association were determined by a single over-arching idea. For Hobbes, the idea was sovereignty. For Bentham, the idea was utilitarianism. Bentham opens *Principles of Morals and Legislation* with the famous statement, "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure." He goes on to say:

> The *principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.[61]

This principle underlies Bentham's work. He develops what has come to be known as the "felicific calculus."[62] This is a complex calculation that is used to judge every action and its tendency "to augment or diminish the happiness of the party whose interest is in question."[63] Bentham provides a list of factors to be used in estimating the value of any pain or pleasure: intensity, duration, certainty, propinquity, fecundity, and purity. He suggests that an individual sum the pleasures on one side and deduct the pains on the other. The resulting balance will show whether any act possesses a good or bad

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[61] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *The Works of Jeremy Bentham* (TWJB), published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843), 11 vols., Vol. I, 1.

[62] See Wesley C. Mitchell, "Bentham's Felicific Calculus," *Political Science Quarterly*, 33:2 (Jun., 1918): 161-183.

[63] Bentham, *An Introduction to the Principles*, Vol. I, 1.

tendency.[64] Only when judged according to the principle of utility can an action be called *right* or *wrong*; otherwise, Bentham says, such words have no meaning.[65]

Bentham's principle of utility can be applied, not only to the interest of individuals, but also to the "interest of the community." He says that this phrase is "one of the most general expressions that can occur in the phraseology of morals." To clarify its meaning, Bentham gives the following formulation: "The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?—the sum of the interests of the several members who compose it."[66] Thus, we get a definition reminiscent of the Roman idea of association, against which Gierke labored. The group, or community, is no real body independent of the individuals of which it is composed. It is a fiction. Its interest is nothing more than an aggregation of individual interests.

Bentham says actions of government are to be judged by their accordance with the principle of utility, whether their tendency is to augment or diminish the happiness of the community. To measure the value of any pain or pleasure with reference to a community, the same process is followed as for individuals. However, in addition to the former six factors, a seventh is added—extent, or the number of people affected. The pleasures and pains are summed for each person. The resulting balance of the two figures will tell the good or evil tendency of the proposed act with respect for the entire

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[64] Ibid., 16.

[65] Ibid., 2; cf. Hobbes, *Leviathan*, Pt. I, Ch. 13, para. 62-63, 89-90; Hobbes argues that "[t]he notions of right and wrong, justice and injustice" have no place in the state of nature. It is only once a sovereign is instituted that the words have meaning.

[66] Ibid., 2.

community.[67] In Bentham's scheme, no role is assigned to intermediary institutions. He puts the matter bluntly: "Individual interests are the only real interests." Any association, including society as a whole, can have no interest apart from the individuals within it.[68]

Bentham on law. Not only does Bentham's utilitarianism dictate his view of the nature of associative life, it also directs his views on law. He frequently takes aim at the common law system as it existed in Great Britain. His arguments against the method are many. For one, he regards the common law method as a "barbarous mode of *ex-post-facto* judge-made law."[69] He says that judges make the common law in the same way a man makes laws for a dog: "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it."[70] Moreover, the law is too voluminous and complex. It is divided between statute law and common law. The former fills more books than a man could hope to lift. A non-lawyer would have no hope of successfully navigating the books on his own. The common law is even worse; it would fill more books than a man could hope to contain in his house.[71] How can the law govern efficiently if it is so hard to master?

Bentham contends that the *common law* would more properly be called *judiciary law.* He finds it to be a "fictitious composition which has no known person for its author,

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[67] Ibid., 16.

[68] See Bentham, "Principles of the Civil Code," in TWJB, Vol. I, 321. Bentham makes this point again, criticizing those who claim that the interest of individuals ought to give way to the public interest. He asks, "But what does this mean? Is not one individual as much a part of the public as another? This public interest which you personify, is only an abstract term: it represents only the mass of the interests of individuals."

[69] Bentham, "Petition for Justice," in TWJB, Vol. V, 486.

[70] Bentham, "Truth versus Ashhurst," in TWJB, Vol. V, 235.

[71] Bentham, "Petition for Codification," in TWJB, Vol. V, 546.

no known assemblage of words for its substance, forms everywhere the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe."[72] Supporters of the common law, Bentham says, turn the old adage—experience is the mother of wisdom—on its head. Men elevate the "times called old," which represent not "the wisdom of gray hairs … [but] the wisdom of the cradle," of "untaught, inexperienced generations." By a silly superstition, opponents of codification would "sacrifice the real interests of the living to the imaginary interests of the dead." England would do better than "to rely on the wisdom of our ancestors [… or] to vaunt their probity: they were as much inferior to us in that point as in all others." Instead of looking to the worthless opinions of their ancestors, Bentham counsels his countrymen to learn from the folly of their practice, which is far more useful.[73]

Bentham claims that if one wants a complete body of law, then he must make it. He argues that the existing judiciary lacks the aptitude to carry out "its alleged and supposed ends"; only codification would serve to carry out the needed reform.[74] Bentham volunteers himself for this task. He contends, "That which is called unwritten law is nothing more than 'mere rules.'" To transform these into "real laws," he continues, "has been one of the great objects of my plan; and the facility of promulgation has been one of the principal objects which I have had in view."[75] He knows that his project faces opponents, whom he calls "anti-codificationists,"[76] "corruptionists," or a

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[72] Bentham, *An Introduction to the Principles of Morals and Legislation*, in TWJB, Vol. I, iv-v.

[73] Bentham, *The Book of Fallacies*, in TWJB, Vol. II, 399-401.

[74] Bentham, "Justice and Codification Petitions: Advertisement," in TWJB, Vol. V, 438-39.

[75] Bentham, "Essay on the Promulgation of Law," in TWJB, Vol. I, 156.

[76] Bentham, "Principles of Judicial Procedure," in TWJB, Vol. II, 7.

"correspondent set of dupes."[77] Among these are lawyers whose "sinister interest" taints their opinions on questions of legislation. While it is in the interest of the public to remove all "uncertainty in the law," the lawyer benefits from the dependence created by uncertainty. Thus, he opposes every effort for "efficient promulgation" and "authoritative expression in words."[78] Others resist codification out of fear; they "would deprive the public of the receipt and enjoyment of [an] all-comprehensive instrument of felicity … all for a fear of innovation."[79] Bentham has no such fear, however; he is confident of his ability to produce a code that remedies the failures of the existing system.

Bentham says that an effective legal system will speak both to the "logic of the *will* as well as of the *understanding*." To accomplish this, he recommends that in addition to a body of legislative provisions, there also be a running commentary of political reasons.[80] Bentham argues that the only thing necessary to establish laws is power. Establishing *good* laws is a more complicated matter. Good laws require good reasons, which are well-explained. Moreover, good laws need a "common base … one unique and clear principle."[81] This principle, of course, is utility. Bentham declares, "To give a reason for a law is to show that it is conformable to the principle of utility."[82] Thus, Bentham proposes an entirely new code and commentary be drafted, all dedicated to his utilitarian standard.

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[77] Bentham, "Codification Proposal," in TWJB, Vol. IV, 537.

[78] Bentham, *The Book of Fallacies*, in TWJB, Vol. II, 395.

[79] Bentham, "Principles of Judicial Procedure," in TWJB, Vol. II, 7.

[80] Bentham, *An Introduction to the Principles of Morals and Legislation*, in TWJB, Vol. I, iv-v.

[81] Bentham, "Essay on the Promulgation of Law," in TWJB, Vol. I, 159.

[82] See ibid., 162-63.

To maintain unity throughout the code, Bentham argues that a single person should be responsible for the original draft. He even argues that a foreign hand is to be preferred to avoid local prejudices. To maintain symmetry and harmony within the code after enactment, he suggests a functionary with a title such as "Conservator of the laws," whose task would be to adjust the substance of legislative proposals to the proper form of the code. Naturally, Bentham believes the best choice would be the original drafter, a position that he so clearly desires for himself.[83] Besides a general codification proposal addressed to all "liberal nations," Bentham advertises his services through letters to specific nations scattered across the globe and even to individual states within the United States.[84]

Once enacted, Bentham would have the new code become the "chief book" and "one of the first objects of instruction in all schools." Children could be expected to transcribe an exact copy in their own hand, commit important sections to memory, translate them into other languages, and even turn the law into verse. Churches could be expected to read the code publicly throughout the year. The law that relates to particular places should be posted publicly in that place.[85]

Bentham is optimistic that his rationalized system of laws built on the principle of utility "will prepare for itself a universal dominion." When contemplating its spread across the globe, he asks, "What is the influence of the circumstances of place and time in matters of legislation?" Since human nature is "everywhere the same," we could not

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[83] See Bentham, "Codification Proposal," in TWJB, Vol. IV, 545-47.

[84] See generally, Bentham, "Papers Relative to Codification and Public Instruction," in TWJB, Vol. IV.

[85] Ibid., 158.

expect "different countries [to have] different catalogues of pleasures and of pains." Differences from one nation to another, then, are best explained by different causes of pain and pleasure. Thus, to transplant his code in another land, "the great task of invention has been performed; what remains is little more than manual labor." This labor consists of creating a catalog of the "circumstances influencing sensibility" in each nation.[86] Bentham writes:

> Legislators who, having freed themselves from the shackles of authority, have learnt to soar above the mists of prejudice, know as well how to make laws for one country as for another: all they need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require: possessed of these data, all places are alike.[87]

Thus, with this information in hand, a drafter may adjust the standard law to each particular nation.

Bentham's confidence in codification based on the principle of utility knows no bounds. The common law, built on the collective wisdom of the ages, is to be dismissed. It is archaic and too complicated. In its place is to be enacted a simple, rationalized code drafted by a single individual. Armed with tables of data from the nations of the world, he believes he can create such a code, one that will be readily adopted everywhere.

Like Hobbes, Bentham gets carried away in the pursuit of a single idea. His rationalism blinds him to both the organic nature of law and associations. Everything must be submitted to his utilitarian standard.

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[86] Ibid., 171-73.

[87] Ibid., 182-82.

The English Pluralists

As David Nicholls argues, liberalism began to shift following Bentham. Bentham's was a negative liberalism, what Nicholls calls "the ideology of a developing capitalism." Once capitalism was established, a new ideology emerged—the positive liberalism of individuals like T. H. Green and L. T. Hobhouse. State action was initially thought to obstruct the growth of industrial capitalism. However, as power passed from landed interests to industrial elites, a new role for the state was envisioned. The state could play a positive role in mitigating the effects of capitalism while also preserving the structures that brought the new power-holders to control. The understanding of "liberty" as the absence of governmental restraint was transformed into an understanding of "liberty" as the power to do what one chooses to do. Government had an active role in increasing an individual's power through paternalist regulations, welfare, and the liberation of individuals from the groups that oppressed them. Thus, as Nicholls notes, "Functions previously performed by families, trade guilds, friendly societies, local voluntary groups or civic associations increasingly were taken over by central government."[88] This state of affairs provoked a response from a group of individuals who came to be known as pluralists. They decried both the individualism of the former vision of liberty and the statism of the contemporary vision.

Frederick William Maitland

Leading the way for the pluralists was English legal historian Frederic William Maitland. Though his work often descended into particulars of law and history that many

[88] David Nicholls, *The Pluralist State: The Political Ideas of J. N. Figgis and His Contemporaries* (New York: St. Martin's Press, 1994), 5-7.

might find painfully tedious, Maitland did so because he saw in those particulars a connection to one of the enduring questions of political thought, namely, "What is it that governments ought to do?"[89] One of his essays, titled "Trust and Corporation," was originally published in German and was never intended to be printed for an English audience.[90] Nonetheless, an English translation appeared in 1911, and the substance is most helpful in connecting Maitland's conceptions of law and society.[91] Maitland begins the essay by expressing gratitude to the "foreign explorers" who have studied England as outsiders, giving the scholars a unique ability to teach the English something about themselves. Maitland acknowledges that interest in English law "is not merely for the sake of England." Instead, he argues:

> Is it not true that England has played a conspicuous, if a passive part in that development of historical jurisprudence which was one of the most remarkable scientific achievements of the nineteenth century? Over and over it has happened that our island has been able to supply just that piece of evidence, just that link in the chain of proof, which the Germanist wanted but could not find at home.

Maitland goes on to say that for students of legal history, particularly those interested in Germanic law, nothing in English law is more instructive than the legal institution known as the trust.[92]

What is remarkable is the extent to which the English trust accomplishes in England what Gierke wanted the *genossenschaft* to accomplish in Germany. To

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[89] F. W. Maitland, *Collected Papers*, Vol. I, edited by H. A. L. Fisher (Cambridge: Cambridge University Press, 1911), 161.

[90] Runciman and Ryan, "Editors' Introduction," xxxv. The editors cite a letter from Maitland to translator Josef Redlich of April 30, 1904, in *Letters of F.W. Maitland*, vol. II, 281.

[91] Ibid.

[92] F. W. Maitland, "Trust and Corporation," in F. W. Maitland, *State, Trust, and Corporation*, edited by David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 75.

understand the role of the trust, something must first be said about corporations. As in Germany, England was familiar with the "orthodox" position of Roman law—that corporations were legal fictions, concessions of the State. After all, Maitland says, in England one finds "a doctrine which in Charles II's day condemns all—yes, all—of the citizens of London to prison for 'presuming to act as a corporation.'" One finds Hobbes arguing that corporations are troublesome parasites.[93] One even finds a luminary such as Blackstone upholding this fiction theory.[94]

However, the fiction theory was not without detractors in England. In his Sidgwick lecture of 1904, Maitland praised the words of A. V. Dicey, who had delivered the lecture the previous year.[95] Dicey inverts the Roman teaching about corporations, saying, "When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, *by no fiction of law but from the very nature of things*, differs from the individuals of whom it is constituted." He sees this right to associate, not just as an individual liberty (which is the dominant view), but as a limitation of individual liberty. Groups, to some degree, limit the individual liberty both of members and those on the outside.[96]

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[93] F. W. Maitland "Moral Personality and Legal Personality," in . W. Maitland, *State, Trust, and Corporation*, edited by David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 66.

[94] Ibid., 63.

[95] Ibid.

[96] A.V. Dicey, "Combination Laws as Illustrating the relation between Law and Opinion in England during the Nineteenth Century," 17 Harv. L. Rev. 511, 513 (1903-04).

Maitland says of these comments, "I have been waiting a long while for an English lawyer of Professor Dicey's eminence to say what he said."[97] The subject of associations in law was of great interest to Maitland, the legal historian. He argues that the Roman law served as "the main agent of transmutation" of the medieval understanding of groups. The Roman treatment of groups as "legal fictions" furthered "a dogma that works like leaven in the transformation of medieval society." Legal personality became, not natural, but a gift of the prince. Maitland says that this understanding of Roman doctrine served as "an apt lever for those forces which were transforming the medieval nation into the modern State." He continues:

> The federalistic structure of medieval society is threatened. No longer can we see the body politic as *communitas communitatum* ('a community of communities'), a system of groups, each of which in its turn is a system of groups. All that stands between the State and the individual has but a derivative and precarious existence.

Maitland regards the destabilization and even destruction of intermediary bodies as one of the hallmarks of modern absolutism.[98]

Maitland used France as the warning beacon for other nations. Here, he says, "we may see the pulverizing, macadamising tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between Man and State." He points to the revolutionary decree of August 18, 1792, which held: "A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country."[99] As an example

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[97] F. W. Maitland "Moral Personality and Legal Personality," 63.

[98] Ibid., 65-66.

[99] Ibid., 66. The French is "considérant qu'un Etat vraiment libre ne doit souffrir dans son sein aucune corporation, pas même celles qui, vouées à l'enseignement public, ont bien mérité de la patrie."

of this principle carried into action, Maitland points to the controversies in France concerning ecclesiastical property. He asks who owns the land once fictions have been pushed aside. "To the nation," he answers, "which has stepped into the shoes of the prince." Property is insecure if groups are not seen as rights-bearing entities. Maitland argues that the treatment of churches could easily extend to other associations including universities, trade guilds, and towns and villages. If such associations lack legal personality, he concludes, then "[v]illage property … [is] exposed to the dilemma: it belongs to the State, or else it belongs to the now existing villagers." In this challenging environment for group life, Maitland notes the curious fact that France provided safe space for certain groups "provided … that the group's one and only object was the making of pecuniary gain." He continues:

> Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view.

Thus, while associations for business were largely spared, most other associations were targeted. Even as late as the early 1900s, it remained illegal to belong to any group having more than twenty members. A group might become licit with a license from a local prefect, but civil personality "was only to be acquired with difficulty as the gift of the central government."[100] This left groups at the mercy of the State.

Maitland argues that France's treatment of various organizations, particularly religious groups, shows that this is not a meaningless discussion of abstract legal theory: "the question whether the group is to be, as we say, 'a person in the eye of the law' is the question whether the group as group can enjoy more than an uncomfortable and

[100] Ibid., 66-67.

precarious existence." A group lived in danger, not only from State attacks, but also from attacks by private persons, whose lawsuits could "dissolve it into its constituent atoms."[101]

Maitland concludes that as much as French lawyers may wish to resist the fact, it is true "that if *n* men unite themselves in an organized body, jurisprudence, unless it wishes to pulverize this group, must see *n* + 1 persons." In other words, the group is more than the sum of its parts. In its history, England did not have the same concern for this issue as on the Continent. Maitland says that English law avoids many of the troubles of the fiction theory by what he calls "the most specifically English of all our legal institutes." By this, he refers to the trust.

Maitland explains that the trust originated because the English could not leave their land by will. This power had been "ruthlessly stamped out in the twelfth century." Nonetheless, the English wanted this power, so they created a clever way around existing law. A landowner could convey his property to some trusted individuals, who would hold the property for the use of the landowner's heirs. The property would be held in *trust* with the individuals holding it serving as *trustees*. The trustees would form a wall to protect the underlying property. Because there were multiple trustees, the wall would remain intact if one were to die. There is nothing of this device in Roman law books; it was the creation of the English. As Maitland points out, the practice, dealing as it did with real property, began "in the highest and noblest circles of society." He cites as an early example the case of John of Gaunt, the son of an English king, who created a trust

[101] Ibid., 67-68.

that profited his own son, who would go on to be King Henry IV.[102] However, the use of the trust quickly spread, not only to other classes but also for other purposes.[103]

The trust is useful in demonstrating two points about the English common law tradition in contrast to the rationalistic codes proposed by Bentham in England and actually put into practice across the Continent. The first point concerns the way the common law develops. The second concerns the common law's conduciveness for flourishing associative life. Regarding the first, legal development, Maitland makes the point that the trust grew out of widespread "social experimentation." Changes in statute law that may at first appear revolutionary were "no leap in the dark," for they were "preceded by a long course of experimentation."[104] After much testing and "a great deal of pains," English law arrives at convenient solutions. Maitland concludes, "I am far from saying that all our devices are elegant. On juristic elegance we do not pride ourselves, but we know how to keep the roof weather-tight."[105] When one branch of law ossifies, another springs to life to satisfy the community's needs.[106] While English legal solutions may appear haphazard to an outsider, they tend to work.[107]

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[102] Maitland, "Trust and Corporation," 84-87

[103] Ibid., 87; see also ibid., 96-103. Maitland says that the trust was first used to get around the lack of testamentary power. However, by the time a statute granted this power, the trust had "found other work to do and [did] not die." This other work included improving the law regarding spousal property, protecting the property of associations that may loosely be called charities, and ensuring wider religious toleration.

[104] Ibid., 97.

[105] Ibid., 101.

[106] See, e.g., Maitland, "Trust and Corporation," 97.

[107] See ibid., 110.

Rationalistic codes tend to be imposed *in toto* by the sovereign from above, and as a code, the law is less dynamic than the common law. The latter's effectiveness is, in part, due to the law's gradual development from precedent to precedent. The common law is also effective due to the high community buy-in, as the law is inextricably tied to the community's sense of justice. This, of course, is seen in the use of juries in criminal trials, where the accused is only convicted when a jury of his peers finds the evidence is "beyond a reasonable doubt." However, it goes much further. The standard for culpability with trusts is the same as in many other areas of law. If a buyer purchases property that is the subject of a trust, the beneficiary of the trust has an action against both the buyer and the trustees. The beneficiary will win against the buyer if he can establish that the buyer knew or *should have known* that the land was held in trust. Outright fraud is coupled with negligence, "actual notice" with "constructive notice." How do we determine what the buyer *should have known*? The standard is the "reasonable man." When applied by the courts (rather than lay juries), this standard may become too exacting. This produces a public reaction, which halts or even reverses the raising of the standard still further. This is the method of the common law; the law "move[s] slowly forward from precedent to precedent," never entirely insulated from the community's understanding of what justice demands.[108]

Secondly, the trust demonstrates how the common law better accommodates associative life than the rationalistic codes. Though the fiction theory of corporations existed in England, "and it was of a very orthodox pattern … it did not crush the spirit of association."[109] The trust developed to satisfy the desire to safeguard the autonomy of

[108] Ibid., 90-93.

associations. Maitland considers "the chief merit of the Trust" to be the fact that "[i]t has served to protect the unincorporated *Genossenschaft* against the attacks of inadequate and individualistic theories." Despite being members of a "litigious race," Maitland says that disputants within the English association "will be very unwilling to call in the policeman." Why? He suggests that idea of a group's "jurisdiction" runs deep; members, though they may feel wronged, accept this jurisdiction and will think twice before appealing the group's decision to a regular court of law.[110] Members desire to protect the autonomy of their small societies, which do all the things done by a corporation while unburdened by any notion that their freedoms are enjoyed as mere concessions of the state.[111]

Maitland goes on to argue that the use and value of trusts is demonstrated in the area of religious liberty. In a land where religion was seen as a matter of state concern, incorporation of minority sects was unlikely as "incorporation meant privilege and exceptional favour." Even if incorporation were possible, many religious groups would resist the notion that their liberty came as a concession of the State and remained subject to State control. However, Maitland continues, if the State would just repeal certain persecuting laws (e.g., requiring punishment for failing to attend meetings of the parish church), then trusts could do the rest. The State could recognize and enforce the "charitable trusts" of nonconformist religious groups, and a great diversity of such groups could operate without the State appearing to engage in "any active participation in heresy

[109] Ibid., 110.

[110] Ibid., 105-06.

[111] See ibid., 107-09.

and schism." Maitland again notes that this solution may appear "grotesque" to outsiders, yet as with other English solutions, it has worked tolerably well, especially when compared to the history of religious strife across other European nations.[112]

Maitland's introduction of Gierke to an English-speaking audience and his career-long interest in associative life opened the door for subsequent scholars to build on his themes.

John Neville Figgis

One such scholar was Maitland's student, John Neville Figgis, who was an Anglican priest. Figgis, in particular, was concerned with the subject of religious liberty. In the preface to his work *Churches in the Modern State*, which consists primarily of a series of four lectures, Figgis says that his main purpose is to convince readers of a problem that goes beyond "ecclesiastical pretensions" to "the nature of human life in society." He contends that the State cannot accomplish the good expected of it "if its founders ignore the fundamental facts of the reality of small societies." Figgis explains that he came to this conclusion, "not by the desire to defend Church rights," but by realizations "forced on him at last through Maitland and Gierke." He admits that he had "long brood[ed]" over John Austin's teachings on sovereignty and legal positivism, yet he came to understand that Austin's doctrine "is either fallacious or so profoundly inadequate as to have no more than a verbal justification." The further Figgis studied, the more he realized that Austin's theories were abstractions unconnected with reality.[113]

[112] Ibid., 102-03.

[113] John Neville Figgis, *Churches in the Modern State* (London: Longmans, Green, and Co., 1913), ix-x.

With regard to the Church, Figgis's claims depended "on its recognition as a social union with an inherent original power of self-development, acting as a person with a mind and will of its own." This idea opposes a long tradition resting on a "false conception of the State as the only true political entity apart from the individual." Figgis argues that this tradition had roots in Greek political thought and was developed and enlarged by Imperial Rome. It hampered, not only the freedom of the church, but was also "at variance … with the freedom of all other communal life, and ultimately with that of the individual," who requires such overlapping communities for personal development. Figgis shows great appreciation for historical jurists like Gierke and Maitland, whose efforts have contributed to a more accurate view of the State.[114] For law to be effective, it must be true to the facts of life. These facts reveal "a vast hierarchy of interrelated societies, each alive, each personal, owing loyalty to the State, and by it checked or assisted in their action no less than are individuals, but no more deriving their existence from Government concession than does the individual or family."[115] When law ignores or obscures this reality, then "political philosophy which is always largely dependent on law, oscillates between an unreal individualism and a wildly socialistic ideal." Figgis concludes, "[I]njury, both practical and theoretical, is always done by trying to ignore the facts."[116]

Importantly, Figgis did not assert the right of the Church or any other association to do as they liked without limits. He admits that "the State exists not indeed to found, as

[114] Ibid., 99-100.

[115] Ibid., 176.

[116] Ibid., 225-26.

in the old theory, but to control and limit within the bounds of justice, the activities of all minor association." The point, then, "is not whether Churches can do anything they choose, but whether human law is to regard them as having inherent powers, rights, and wills of their own—in a word a personality."[117] For Figgis, this was not just about law permitting liberty and conforming to social facts; it was about law conforming to moral truths.

Harold Laski

Harold Laski is also useful in depicting the relationship between law and thriving associations. Though his thought took on a more individualistic cast than either Maitland or Figgis, he further developed certain pluralist ideals early in his career.[118] Laski begins his essay "The Pluralistic State" by criticizing philosophy, which "seems, in politics at least, to take too little thought for the categories of space and time." Political philosophy, including the subfield of legal thought, has suffered because it has "withdrawn itself from the arena of hard facts to those remoter heights." Laski blames legal thinkers in particular for "our modern trouble … the monistic theory of the state [which] goes back to Jean Bodin" and through him to Hobbes, Bentham, and Austin. He points out that each thinker revivified the monistic theory during some societal upheaval that signaled changes in the distribution of political power. Despite apparent differences in the

[117] Ibid., 251.

[118] See, e.g., Nicholls, *The Pluralist State*, 3; see also Magid, *English Political Pluralism*, especially Ch. 4, "Laski: Individualistic Pluralism." Laski began to break with his earlier pluralism in the 1920s. As Nicholls notes, he became heavily influenced by Marxism and was a controversial public figure as the chairman of the Labour Party for a number of years.

character and motives of each thinker, their assertions share a common political background, and each proclaims the supremacy of the state against other institutions.[119]

Laski goes on to describe the shape the state's supremacy has taken in contemporary life. He says that it "is today the one compulsory form of association." We are taught that among associations, it alone deals with that "universal interest" or "what Rousseau called the common good." The state is thus "an absorptive animal" whose triumphs over competing groups fill the pages of history. At the very least, the state dictates the terms by which other associations function. Laski concludes, "The area of its enterprise has consistently grown until today there is no field of human activity over which, in some degree, its pervading influence may not be detected." He makes explicit that the legal notion of sovereignty is intimately bound up in a monistic theory of association. Sovereignty rests on the fiction that the state sits above all other associations and that its pronouncements are law by virtue of its authority. Power is hierarchically arranged and collected in a single center, which is the state.[120]

Laski says that pluralists find this theory to be "administratively incomplete and ethically inadequate."[121] Political pluralism recognizes that more is required for law than a simple command of the legal sovereign. This definition of law may suffice in a formal juristic sense, yet it fails to account for "the day-to-day stresses and strains which states have to encounter … [like] public opinion, the wills of other states, the impact upon itself of internal and competing powers, ethical right, or political wisdom."[122] A law is not

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[119] Harold J. Laski, "The Pluralistic State," *The Philosophical Review*, 28:6 (Nov., 1919), 562-63.

[120] Ibid., 564-65.

[121] Ibid., 568.

[122] Harold J. Laski, "Law and the State,"*Economica*, No. 27 (Nov., 1929), 268.

validated merely by "the source from which it emanates" but by "the acceptance which it secures." Government should be organized so as to maximize consent,[123] to produce citizens who are fit to rule and be ruled in turn.[124]

To secure this end, pluralists desire a state structure that is not so much hierarchical as it is coordinate. In other words, sovereignty is never absolute but "is partitioned upon some basis of function," what some might term "sphere sovereignty." He goes on to describe it in terms reminiscent of Althusius—as a type of federalism that applies not just to territories but also to functions. This system makes it more difficult for an individual to get lost in the vastness of the state system. Government is brought closer to the individual's grasp, giving each the opportunity to exercise political power. An individual's loyalty to associations other than the state is respected and understood as natural.[125] Laski calls humans "bundles of hyphens," for while they are a part of the state, they also "belong to other groups, and a competition for allegiance is continuously possible.[126] Humans do "not recognize an *a priori* hierarchy of claims, which receive their ultimate expression in the state."[127] The needs and interests of the various groups that make competing claims on individuals are better accommodated by avoiding any

[123] Ibid., 275.

[124] Laski, "The Pluralistic State," 569; citing Aristotle, *Politics*, Bk. III, Ch. 1, 1275a.

[125] Ibid., 564-71; see also Harold J. Laski, "The Personality of Associations," *Harvard Law Review*, 29:4 (Feb., 1916), 404. Laski writes, "For man is so essentially an associative animal that his nature is largely determined by the relationships thus formed." The state is far from the extent of man's group life.

[126] Laski, "The Personality of Associations," 425.

[127] Laski, "Law and the State," 276.

unwise assumption that the state might transcend all differences and achieve some "Hegelian harmonization" through lawmaking.[128]

Laski contends, "The very ideal of a *Rechsstaat* [Rule of Law] … is an insistence that [the legal sovereign] is justified in willing only what satisfies the demands of those over whom it rules."[129] However, there is the important caveat: pluralists repudiate any solution that merely seeks to aggregate the demands of isolated individuals, as this would deny any meaningful role for the associations that are constitutive of the state. Instead, pluralists advocate political decentralization and group autonomy as the best means for securing the allegiance necessary for effective law.

Conclusion

Maitland certainly pointed to the virtues of English law, yet he was cognizant of particular defects as well. One of these is the fact that, in certain points, English law was under-theorized. By the late sixteenth century, English courts "had long been dealing with English group-units." However, when the *persona ficta* theory of Roman law swept into England, the local courts "had no home-made theory to oppose to the subtle and polished invader." As a result, the courts were in a vulnerable position, and "a certain amount of foreign theory was received."[130] Making use of Gierke, Maitland and the pluralists after him began to furnish a theory to defend the autonomy of associations.

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[128] Harold J. Laski, "Sovereignty and Centralization," *The New Republic* (Dec. 16, 1916), 176.

[129] Laski, "Law and the State," 277.

[130] Maitland, "Translator's Introduction," in Otto von Gierke, *Political Theories of the Middle Age*, translated by Frederic William Maitland (Cambridge: University of Cambridge Press, 1900), xiv.

The same has been the purpose of the first section of this dissertation. As will be demonstrated in the next chapter, the practice of pluralism was strong in early American history. However, a corresponding theory was weak. The Americans had the small republic theory of Montesquieu and the associational freedom of the First Amendment, yet there was no broader theory of pluralism that united organic society with organic law. This theoretical weakness made vulnerable the American practice of pluralism. America has strayed from the organic conceptions of law and society she once possessed. Confronted with the developed theory of pluralism provided from Althusius through the English pluralists, America might be able to reclaim some of the practice.

CHAPTER FIVE

Political Pluralism and the Common Law in Early American History

Several scholars have put forward ideas about the strands of thought that combined in the late 1700s to create the American system of government. In his popular work *The Ideological Origins of the American Revolution*, Bernard Bailyn notes five in particular: classical antiquity, Enlightenment rationalism, the English common law, New England Puritanism, and radical Whiggism.[1] He gives special emphasis to the last of these, saying that the writers of the radical Whig tradition "brought these disparate strands of thought together [and] dominated the colonists' miscellaneous learning and shaped it into a coherent whole."[2] Michael Zuckert provides a similar narrative in *The Natural Rights Republic*. He tells of four threads: an English heritage (which he calls, "in honor of its Burkean echoes, the Old Whig view"), Puritanism, classical republicanism, and natural rights philosophy.[3] Zuckert favors this last element, saying that "the natural rights philosophy remains America's deepest and so far most abiding commitment, and the others could enter the amalgam only so far as they were compatible or could be made so, with natural right."[4]

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[1] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1992), especially Ch. 2, "Sources and Traditions."

[2] Ibid., 34.

[3] Michael Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame: University of Notre Dame Press, 1996), especially the introduction to Part II.

[4] Ibid., 95.

I do not dispute the various strands of thought enumerated by Bailyn and Zuckert, nor do I wish to demonstrate that some other was more dominant in the minds of the American Founders. Instead I wish to accentuate two other features of the early American republic—pluralism and the common law tradition. The early American practice of pluralism extended beyond the federalism embedded in our fundamental law, the Constitution. It was a sort of "societal federalism" of the type described by Althusius. It included the "township freedoms" and vast array of "intermediary institutions" so vividly described by Alexis de Tocqueville.

The practice of pluralism existed alongside a certain understanding of law and politics, which James Stoner has masterfully described as a "common law way of thinking."[5] I will describe this way of thinking, showing how the classic understanding of the common law was not the positivistic judge-made law of today. Instead, early Americans understood judicial decisions to be evidence of what the law truly was. The common law developed gradually and aspired to social consensus. This organic view of law strengthened and maintained the organic society, which I refer to as political pluralism.

Early Practices of Political Pluralism

When talking about the practice of pluralism embedded in the American Founding, I am referring to the pluralism depicted in the previous chapters of this work. I am not referring to the type of pluralism described by James Madison in the *Federalist Papers* and resurrected in the more recent iterations of pluralism described in American

[5] James R. Stoner, Jr., *Common Law & Liberal Theory: Coke, Hobbes & the Origins of American Constitutionalism* (Lawrence, KS: University of Kansas Press, 1992), 177.

political scholarship by thinkers such as Robert Dahl or Seymour Martin Lipset who focus on the competition of interest groups in the policy-making process.

In Federalist 10, Madison presents a precursor to the contemporary interest-group theories of pluralism. He talks about the Constitution's "tendency to break and control the violence of faction." By "factions," Madison is referring to groups who are united by some common interest that may be either "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." He famously explains that it is not practicable to remove the causes of faction, so government must settle for controlling its effects. He explains that "the republican principle" will furnish the solution whenever "a faction consists of less than a majority." The difficulty is when the faction makes up a majority. How can government "secure the public good and private rights against the danger of such a faction," while also maintaining the commitment to popular government? Madison answers, "Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression." It is here that Madison inverts the traditional argument in favor of small republics. Larger electoral districts provide greater choice for a fit candidate, and they diminish a candidate's ability to win an election through the "vicious arts." More importantly, a larger territory will "take in a greater variety of parties and interests," which will "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." Madison thus

concludes that the proposed Constitution offers "a republican remedy for the diseases most incident to republican government."[6]

During the Progressive era, many theorists continued to view groups as factions in need of control. They wanted factions to be reconciled in a higher unity, which could be found in the state. Some scholars, like Arthur F. Bentley and David Truman after him, argued that American politics is best understood as the interaction of groups seeking their respective interests.[7] Others, like Pendelton Herring, went beyond this descriptive account, going so far as to suggest that groups provide an infrastructure that makes "a representative system of government meaningful" by allowing individuals to combine for greater power.[8] Andrew McFarland traces the development of "interest group theories" through four successive stages, the details of which are unimportant here.[9] What is important, however, is distinguishing the pluralism I describe from these theories that

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[6] James Madison, "Federalist 10," in *The Federalist Papers*, ed. Clinton Rossiter, (New York: Penguin, 2003), 71-79.

[7] See Andrew McFarland, "Interest Group Theory," in *The Oxford Handbook of American Political Parties and Interest Groups*, edited by L. Sandy Maisel, Jeffrey M. Berry, and George C. Edwards III (Oxford: University of Oxford Press, 2010), 38; see also Arthur F. Bentley, *The Process of Government* (Chicago: University of Chicago Press, 1908); and David Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: Alfred A. Knopf, 1951).

[8] Pendelton Herring, *Group Representation Before Congress* (New York: Russel and Russel, 1967 [1929]), xi. John G. Gunnell provides a very helpful overview of this development in his "The Genealogy of American Pluralism: From Madison to Behavioralism," *International Political Science Review*, 17:3 (Jul., 1996), 253-65.

[9] See McFarland, "Interest Group Theory," 37-44. Step two consisted of Robert A. Dahl's pluralist response to C. Wright Mill's power elite theory (McFarland does not mention Seymour Martin Lipset here). Step three built on Dahl in what McFarland calls "multiple-elitism," including such thinkers as Theodore Lowi and E. E. Schattshneider. The fourth step, neo-pluralism, includes theorists such as William Connolly and Charles E. Lindblom. For an overview of their respective theories, see Robert A Dahl, *Who Governs?* (New Haven: Yale University Press, 1961); C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956); Seymour Martin Lipset, *Political Man* (Garden City, NY: Doubleday, 1963); Theodore Lowi, *The End of Liberalism* (New York: W. W. Norton, 1969); E. E. Schattschneider, *The Semisovereign People* (New York: Holt, Rinehart, Winston, 1960); Charles E. Lindblom, *The Intelligence of Democracy* (New York: Free Press, 1965); and William E. Connolly, *Pluralism* (Durham, NC: Duke University Press, 2005).

often use similar terminology. These thinkers use "pluralism" to describe a system where individuals join groups to gain great political power—power that is most often used to influence policy and achieve one's particular interests. Their theories do not describe groups as naturally occurring bodies with many purposes quite independent of government.

Pluralism in Early-American Law

The practice of American pluralism is rooted in our fundamental law, both in the original text of the Constitution and further strengthened in the Bill of Rights. This is true despite the fact that the Constitution was drafted by a group of men that, on the whole, leaned toward strengthening the national government. Clinton Rossiter has noted that the Constitutional "Convention [was] less perfectly representative than it might have been." This was, in part, due to the "legal disenfranchisement of the desperately poor, the effective disenfranchisement of the totally isolated, and the malapportionment of most state legislatures." Yet as Rossiter argues, the more significant factor determining the composition of the Convention was a matter of choice. Most "of those who were there … wanted to be there to give a boost to the nation." Some the detractors of the project, men such as Patrick Henry, chose to stay home despite being selected to attend as a delegate. As Rossiter concludes, had such men been present, the Convention "would have been much more perfectly representative of the active citizenry of 1787," and the finished product (if ever there was one) would have surely looked different.[10] Arguably, the proposed Constitution would have been even more in accord with political pluralism.

[10] Clinton Rossiter, *1787: The Grand Convention* (New York: W. W. Norton & Company, 1987), 141.

Nonetheless, the Constitution *does* maintain a number of features conducive to pluralism. It did not always appear that this would be the case. The Convention began with the presentation of the very nationalistic Virginia Plan. It called for a "National Legislature," which was empowered "to legislate in all cases to which the separate States are incompetent" and "to negative [veto] all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." The Plan likewise called for a "National Executive" and "National Judiciary." No real agency was granted to the existing states either in ratification or in the operation of the proposed government.[11] Gouverneur Morris (PA) summarized the fifteen articles of the Virginia Plan, saying "that a Union of the States merely federal" was insufficient; instead, "a *national* Government ought to be established consisting of a *supreme* Legislative, Executive, and Judiciary."[12]

Put this way, the Virginia Plan raised some alarm from the less nationalistic delegates. Charles Pinckney (SC) inquired of John Randolph (VA), who had initially presented the Plan, if it was his intention "to abolish the State Governments altogether."[13] This question would recur throughout the Convention.

One particular impasse regarding the role of states involved the matter of representation in Congress—what Madison called "[t]he great difficulty." Madison was confident that if this one matter could be resolved, many of the other issues could be

[11] "The Virginia Plan," (May 29, 1787), included in James Madison, ed., *Notes of Debates in the Federal Convention of 1787*, Bicentennial Edition (New York: Norton, 1987), 30-33.

[12] Comment by Morris (May 30, 1787), included in Madison, *Notes*, 34 (emphasis in original).

[13] Comment by Charles Pinckney (May 30, 1787), included in Madison, *Notes*, 34.

settled as well.[14] Very early, the Convention decided that the lower house should be elected by the people,[15] but the mode of electing the Senate proved far more complicated. The Virginia Plan recommended selection of senators by the House. Richard Spaight (NC) recommended selection by state legislatures.[16] James Wilson (PA), one of the most ardent nationalists, wanted to remove as much "interference" between local governments and the national government as possible; thus, he preferred selection of both houses by "the people," where each individual could vote directly for the politician of his choice.[17]

Initially, a majority could not settle the question of representation in Congress, so it was tabled for later discussion.[18] Nonetheless, the underlying issue of the role of states continued to be hinted at in a variety of contexts. During a discussion on executive removal, John Dickinson (DE) noted that the division of the country into states was one of the great sources of stability. He wish the division "to be maintained and considerable powers to be left with the states." One mechanism he recommended toward this end was "that each state would retain an equal voice at least in one branch of the national legislature."[19] Dickinson later combined this idea with the proposal that one branch be drawn from the people and the other selected by state legislatures. He argued, "This combination of the state governments with the national government was as politic as it

[14] Comment by Madison (June 19, 1787), included in Madison, *Notes*, 147.

[15] See Vote (May 31, 1787), in Madison, *Notes*, 41.

[16] See Comment by Spaight (May 31, 1787), in Madison, *Notes*, 41.

[17] See Comments by Wilson (May 31, 1787), in Madison, *Notes*, 40 & 42. Wilson also preferred a popularly elected president. See his comments on June 1, 1787 in Madison, *Notes*, 48-49.

[18] See Vote (May 31, 1787), in Madison, *Notes*, 43.

[19] Comment by Dickinson (June 2, 1787), in Madison, *Notes*, 56-57.

was unavoidable."[20] In other words, Dickinson found a pluralist arrangement not only required by political realities but desirable in its own right. Thus, as early as June 6, Dickinson had offered both components of what would become the Great Compromise. Sometimes known as the Connecticut Compromise, so named for the delegates who ultimately received credit for the idea, the plan involved allowing "the people" to elect representatives and the states to select senators.[21] William Pierce (GA), approved of the plan. Using the language of pluralism, he argued that such a system would mean "the citizens of the states would be represented both individually and collectively."[22]

Nonetheless, the states still had detractors. Dickinson's fellow delegate from Delaware, George Read, contended, "Too much attachment is betrayed to the state governments. We must look beyond their continuance."[23] He later said the only cure was "in doing away [with] States altogether and uniting them all into one great Society."[24] The only other delegate who seemed willing to go so far was ultra-nationalist Alexander Hamilton (NY), who presented his own plan on June 15. He argued, "The general power, whatever be its form, if it preserves itself, must swallow up the state powers." Rather than the language of pluralism, Hamilton spoke of sovereignty: "Two Sovereignties cannot coexist within the same limits." He could think of no reason not to "extinguish" the states except to avoid the "shock [to] public opinion by proposing such a

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[20] Comment by Dickinson (June 6, 1787), in Madison, *Notes*, 77.

[21] See Joseph C. Morton, *Shapers of the Great Debate at the Constitutional Convention of 1787* (Westport, CT: Greenwood Press, 2006), 78.

[22] Comment by Pierce (June 6, 1787), in Madison, *Notes*, 78.

[23] Comment by Read (June 6, 1787), in Madison, *Notes*, 78.

[24] Comment by Read (June 11, 1787), in Madison, *Notes*, 104. Surely it is a coincidence that LBJ's catchphrase for his centralizing agenda was "Great Society."

measure."[25] Hamilton even turned to the language of associations as "artificial beings" whose rights ought not to be respected on par with "the rights of the people composing them."[26]

Other nationalists, like Wilson, were unwilling to abolish states entirely. Though he thought "[a]new partition of the States desirable," he considered such a plan to be "evidently and totally impracticable."[27] He was willing to concede that states "must still be suffered to act for subordinate purposes for which their existence is made essential by the great extent of our Country."[28] However, he argued that they must not be allowed to act on equal terms: "The General Government is not an assemblage of States but of individuals for certain political purposes; it is not meant for the States but for the individuals composing them; the *individuals* therefore, not the *States*, ought to be represented in it."[29] Madison agreed, contending that any such departure from proportional representation was "evidently unjust."[30]

With neither side willing to budge, the Convention appeared to be headed toward embarrassment. Fortunately, the delegates from Connecticut began to intervene in favor of a compromise. Roger Sherman repeated his willingness to have proportional representation in one branch if the states were equally represented in the other.[31] William

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[25] Comment by Hamilton (June 18, 1787), in Madison, *Notes*, 133-34.

[26] Comment by Hamilton (June 29, 1787), Madison, *Notes*, 215.

[27] Comment by Wilson (June 9, 1787), in Madison, *Notes*, 98.

[28] Comment by Wilson (June 7, 1787), in Madison, *Notes*, 85.

[29] Comment by Wilson (June 25, 1787), in Madison, *Notes*, 189.

[30] Comment by Madison (June 7, 1787), in Madison, *Notes*, 83.

[31] See comment by Sherman (June 20, 1787), in Madison, *Notes*, 161. Sherman had earlier made this point on June 11. See ibid., 98.

Johnson pointed out that the delegates were arguing from different premises. Some delegates considered states to be no more than districts of individuals brought together into political society; other delegates considered the states "as so many political societies." In other words, some delegates understood states in pluralist terms—states are entities themselves and not reducible to the individuals who make them up. Johnson belonged to this group:

> The fact is, that the States do exist as political societies, and a government is to be formed for them in their political capacity, as well as for the individuals composing them. … [I]n some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; the in *one* branch the *people* ought to be represented; in the *other* the *States*.[32]

The third delegate from Connecticut, Oliver Ellsworth, repeated Johnson's desire for compromise later the same day, making the famous comment, "We were partly national; partly federal." The compromise would secure both principles. Ellsworth concluded, "Let a strong executive, a judiciary, and legislative power be created, but let not too much be attempted by which all may be lost."[33] The proposed compromise was ultimately recommended by a committee that met over the July 4 recess.[34] The Convention approved the measure on July 16.[35]

Hamilton cynically commented that the dispute over representation was "a contest for power, not for liberty."[36] Similarly, Pinckney observed that New Jersey would

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[32] Comment by Johnson (June 29, 1787), in Madison, *Notes*, 211.

[33] Comment by Ellsworth (June 29, 1787), Madison, *Notes*, 218-19.

[34] See Committee Report (July 5, 1787), in Madison, *Notes*, 237-38.

[35] See Vote (July 16m 1787), in Madison, *Notes*, 297.

[36] Comment by Hamilton (June 29, 1787), Madison, *Notes*, 215.

consent to a national system and quickly "dismiss her scruples"[37] if granted an equal vote. Rossiter disagreed, saying, "It would be a mistake to interpret this contest of will and nerve between the large-staters … and the small-staters … as nothing more than a naked struggle for power." He continued:

> It was such a struggle, to be sure, and all of the delegates must have realized that control of the proposed new government was at stake in the fierce in-fighting of Madison and Paterson. Yet it was other things as well: for Madison and his supporters a last opportunity, which they pushed to the brink of disaster, to "take out the teeth of the serpents," to do away with those petty "state attachments" that had been "the bane of the country"; for Paterson and his supporters a fight for the very lives of the communities that had sent them to Philadelphia.

Regarding the Great Compromise, Rossiter concludes that it "was a confirmation of the states as states" and "of the Union as union." States were confirmed as "discrete, self-conscious, indestructible units of political and social organization" while the nation was simultaneously confirmed as more than a "tight confederacy of sovereignties … yet less than a consolidation of malleable components."[38]

As Rossiter noted, while the agreements regarding representation in Congress "are not the only federal arrangements in the Constitution, they are, surely, the most essential." Other important "federal arrangements" include the requirement that each state have at least one Representative in the House, regardless of population.[39] The enumeration of congressional powers, by implication, leaves a great deal of responsibility with the states.[40] The Electoral College extends the Great Compromise into the method

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[37] See comment by Pinckney (June 16, 1787), in Madison, *Notes*, 127.

[38] Rossiter, *1787*, 192-93.

[39] See U.S. Const., Art. I, sec. 2.

[40] See U.S. Const., Art. I, especially sec. 8.

of choosing the executive.[41] The requirement that the executive seek the "Advice and Consent of the Senate" for treaties and appointments gives further protection for state interests.[42] The limitation of federal jurisdiction reserves many responsibilities for existing state courts.[43] Ratification of constitutional amendments requires the votes of states rather than individuals.[44] Finally, though the delegates ultimately determined that ratification should come from "the supreme authority of the people themselves" rather than assent from Congress and state legislatures, the Convention did not dismiss the role of states altogether.[45] The "people" gave their assent by acting in state conventions. Nine states were needed to put the Constitution into effect, and even then, it would only apply to the states that ratified.[46]

Following the Convention, the Constitution was released for debate among a public markedly less inclined toward nationalism than the delegates who drafted it. An opposition party arose that came to be known, somewhat unfairly, as the Anti-Federalists.[47] They were a very loose group who put forward many arguments against the adoption of the Constitution. Though there were inconsistencies within the various arguments put forward, there was, as Anti-Federalist Melancton Smith wrote, "a

[41] See U.S. Const., Art. II, sec. 1.

[42] See U.S. Const., Art. II, sec. 2.

[43] See U.S. Const., Art. III, sec. 2.

[44] See U.S. Const., Art. V.

[45] Comment by Madison (June 5, 1787), included in Madison, *Notes,* 70.

[46] See U.S. Const., Art. VII.

[47] See, e.g. W. B. Allen and Gordon Lloyd, "Interpretive Essay," in *The Essential Antifederalist* (Lanham, MD: Rowman & Littlefield, 2002).

remarkable uniformity in the objections … on the most important points."[48] They were a group quite sympathetic to the central ideals of pluralism. Thus, one of their most significant objections was that the Constitution created a centralized government that was too large and too powerful. While many Anti-Federalists were willing to admit that the Articles of Confederation were imperfect, they agreed that the proposed Constitution went too far. They repeatedly expressed fear that the expansive powers granted under the Commerce Clause and the Taxing and Spending Clause would lead to ever-greater consolidation. This threatened their understanding of republican liberty, which was best preserved in small settings where the people played a more active and direct role in self-government.[49]

To mitigate this danger, the Anti-Federalists insisted on a reservation of power for both states and individuals in the form of a Bill of Rights. Following the ratification of the Constitution, none other than James Madison worked to secure adoption of the Bill of Rights in the First Congress. Most notably, the Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[50] The Constitution expressly recognizes the existence of rights that are not expressly identified in the text. Additionally, the Tenth Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the

[48] Melancton Smith, "Address by a Plebian" (New York, 1788), in *The Essential Antifederalist* (Lanham, MD: Rowman & Littlefield, 2002), 70.

[49] See generally, Allen and Lloyd, "Interpretive Essay," xx-xxvii.

[50] U.S. Const. amend. IX.

people."[51] Importantly, the limitations enumerated in the Bill of Rights applied only to the federal government, not to state governments, which were governed by their own constitutions. It was not until 1833 that any suggestion otherwise even came before the Supreme Court. In the case *Barron v. Baltimore*, the Court addressed whether or not the Fifth Amendment's Takings Clause limited state action. Writing for the Court, Chief Justice John Marshall said:

> The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.[52]

As *Barron* makes clear, the addition of the Bill of Rights only affirmed what was already present to a degree in the body of the Constitution. The federal government was intended to have a limited sphere of action. States were to continue being regarded as separate societies with unique identities.

Pluralism in Early-American Society

The pluralist structures of early America are not only seen in the constitutional division of power between the federal and state governments; pluralism abounded in all levels of society in both political and civil associations. Alexis de Tocqueville famously attested to this fact in his *Democracy in America*, a book written to describe his long-term visit and travels in the United States. Tocqueville depicts a sort of "societal federalism," to use the phrase that Hueglin applied to Althusius' system.[53]

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[51] U.S. Const. amend. X.

[52] *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833).

[53] See, e.g., Hueglin, *Early Modern Concepts*, 11.

Tocqueville describes America as possessing "a complex constitution" where there are "two distinct societies enmeshed and … fitted into one another." Each society has its own government that is "completely separated and almost independent: one, habitual and undefined, that responds to the daily needs of society, the other exceptional and circumscribed, that applies only to certain general interests." Contrary to the intention of the most nationalist Founders and to the state of things today, Tocqueville witnessed what were effectively "twenty-four sovereign nations, the sum of which forms the great body of the Union." As a result, he found it necessary to study states before the Union, as they are constitutive of it. Similarly, before studying states, he must examine their components, the township and the county.[54]

Tocqueville comments that "the principle and the life of American freedom" stems from "township independence." Instead of "political existence" being communicated from the top down as in most European nations, in America, "the township [was] organized before the county, the county before the state, the state before the Union." Tocqueville continues, "Interests, passions, duties, and rights came to be grouped around the township's individuality and strongly attached to it." Thus, the township became a center for active political life. Tocqueville remarks that he "is struck by the intelligence about government" displayed in the early American republics. Compared to many European legislators, he finds the legislators in townships to have a fuller understanding "of the duties of society toward its members." From the beginning,

[54] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: U. of Chicago Press, 2000), 56.

he explains, townships made provisions to "satisfy a host of social needs," including supporting the poor, maintaining highways, and offering public education.[55]

Tocqueville considers townships a natural human occurrence,[56] and he finds township freedom to be most praiseworthy. Nonetheless, Tocqueville notes that townships freedom is both "rare and fragile." He explains, "A very civilized society tolerates only with difficulty the trials of freedom in a township." He concludes:

> It is nonetheless in the township that the force of free peoples resides. The institutions of a township are to freedom what primary schools are to science; they put it within reach of the people; they make them taste its peaceful employ and habituate them to making use of it.[57]

Townships retain a large measure of independence, "generally submit[ting] to the state only when it is a question of an interest … which they share with others." Citizens recognize in neither the state nor the federal government "the right to intervene in the direction of interests that are purely the townships."[58] Thus, Tocqueville finds a high degree of local autonomy in America. This he finds highly commendable, for it is in townships that power is brought within reach of the people, and they develop the habits of freedom.

Elsewhere, Tocqueville calls local autonomy "administrative decentralization." This he contrasts with "governmental centralization," which occurs when power is concentrated in one place over "interests [that] are common to all parts of the nation, such

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[55] Ibid., 40-41.

[56] See ibid., 57. Tocqueville says, "The township is the sole association that is so much in nature that everywhere men are gathered, a township forms itself. Township society therefore exists among all peoples, whatever their usages and their laws may be; it is man who makes kingdoms and creates republics; the township appears to issue directly from the hands of God."

[57] Ibid.

[58] Ibid., 62.

as the formation of general laws and the relations of the people with foreigners." Tocqueville is certain that governmental centralization is necessary for a nation to survive and prosper; without it, chaos would reign. At the same time, however, he argues that "administrative centralization is fit only to enervate the people who submit to it because it constantly tends to diminish the spirit of the city in them." While administrative centralization permits a higher level of efficiency in the short term, over time, it weakens a people.[59] Localities increasingly lose their capacity for self-administration as a centralized power inserts itself into local administration. Tocqueville concludes that the centralized power is an ineffective substitute: "A central power, however enlightened, however learned one imagines it, cannot gather to itself alone all the details of the life of a great people. It cannot do it because such a work exceeds human strength."[60] The central power works through legislation, which, by its uniform nature, "does not comport with the diversity of places and mores." Tocqueville says that this "is a great cause of troubles and miseries."[61]

Administrative decentralization is justified, not only because localities are better at judging their particular needs, but also because the political effects are incalculable. Citizens' interests are directly joined to their community; they love it because it is their own, and they play some role in directing it.[62] Edmund Burke had noted, "To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we

[59] Ibid., 82-83.

[60] Ibid., 85-86.

[61] Ibid., 152.

[62] See ibid., 65.

proceed towards a love to our country, and to mankind."[63] Tocqueville describes a similar process taking place in America.[64]

Furthermore, as Tocqueville surveys America, he observes the spread of equality. As distinctions among people and classes begin to fade, individuals become more independent, which is a source of pride. However, Tocqueville notes, that "same equality … leaves him isolated and without defense against the action of the greatest number." If everyone has relatively equal enlightenment, then it is easy to suppose that truth is on the side of the majority. Equality can thus make possible a new form of despotism, the tyranny of the majority.[65]

However, Tocqueville sees in America a remedy to combat the individualism that develops under conditions of equality. This remedy is, in part, the township freedom discussed above. By dispersing political authority, the United States has "multipl[ied] infinitely the occasions for citizens to act together." Sharing in public affairs, the citizens "are necessarily drawn from the midst of their individual interests" and are made to realize "that they depend on one another."[66] This is a critical component of pluralism. Individualism can be just as much an enemy of freedom as state absolutism. Township freedom reinforces the sense of mutual dependence.

However, it is not just towns, cities, and counties that provide these benefits. Tocqueville addresses a host of other associations, both political and civil, that provide a

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[63] Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford U Press, 1993), 46-47.

[64] See, e.g., Tocqueville, *Democracy in America*, 90 and 153.

[65] Ibid., 409-10.

[66] Ibid., 486-87.

similar function in a pluralist society. Through political associations, like political parties, citizens come together to "regulate the state," making decisions of how they wish to be governed.[67] It is in groups of this type that they "learn the general theory of association." Thus, Tocqueville concludes, "[P]olitical association singularly develops and perfects civil association."[68] The latter are particularly necessary in a democracy because, individually, citizens are very weak.

Tocqueville says that some of his contemporaries view the weakness of individuals in a democracy as evidence that the government should become "more active in order that society be able to execute what individuals can no longer do." He disagrees, however, asking, "But what political power would ever be in a state to suffice for the innumerable multitude of small undertakings that American citizens execute every day with the aid of an association?" He expresses amazement at just how proficient Americans had become in the art of association:

> Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial association in which all take part, but they also have a thousand other kinds: religious moral, grave, futile, very general and very particular, immense and very small; Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes; in this manner they create hospitals, prisons, schools.

He notes that Americans are even more "constant" and "skilled" in their use of associations than their English ancestors.[69] However, he warns that if the government

[67] Ibid., 499.

[68] Ibid., 496.

[69] Ibid., 489.

"puts itself in place of associations," citizens will lose the art of association just as they need it the most.[70]

If citizens were to "abandon the care of [public affairs] to the sole visible and permanent representative of collective interests, which is the state," the loss would be incalculable.[71] The central government would draw power to itself and encourage uniformity in law and habits, which "spares it the examination of an infinity of details with which it would have to occupy itself" if natural diversity were permitted to continue.[72] This situation leads to Tocqueville's famous comments regarding the "kind of despotism democratic nations have to fear."[73] The section is worth quoting at length, not only because of his eloquence but also because of his accurate prediction of society's direction.

Tocqueville says that conditions of equality will render despotism "more extensive and milder"; instead of "tyrants," we will find "schoolmasters." Citizens separate themselves from one another, existing only in themselves and for themselves.

> Above these an immense tutelary power is elevated, which alone takes charge of assuring their enjoyments and watching over their fate. It is absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that, it had for its object to prepare men for manhood; but on the contrary, it seeks only to keep them irrevocably in childhood; it likes citizens to enjoy themselves provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that; it provides for their security, foresees and secures their need, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?

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[70] Ibid., 491.

[71] Ibid., 643.

[72] Ibid., 645.

[73] See ibid., Vol. II, Part 4, Ch. 6.

> So it is that every day it renders the employment of free will less useful and more rare; it confines the action of the will in a smaller space and little by little steals the very use of it from each citizen. …
>
> Thus, after taking each individual by turns in its powerful hands and kneading him as it likes, the sovereign extends its arms over society as a whole; it covers its surface with a network of small, complicated, painstaking, uniform rules through which the most original minds and the most vigorous souls cannot clear a way to surpass the crowds; it does not break wills, but it softens them, bends them, and directs them; it rarely forces one to act, but it constantly opposes itself to one's acting; it does not destroy, it prevents things from being born; it does not tyrannize, it hinders, compromises, enervates, extinguishes, dazes, and finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd.[74]

Thus, Tocqueville foreshadows many of the concerns expressed by the English pluralists. Where others might consider individualism and state absolutism to be opposing forces, Tocqueville and the pluralists find them to be intimately tied together. Tocqueville contends that individualism "threatens to develop" as conditions become equal.[75] Individuals find only equals around them, which diminishes their faith in any "certain man or class" but dramatically expands their "disposition to believe the mass." Tocqueville explains that the citizens' "similarity gives them an almost unlimited trust in the judgment of the public; for it does not seems plausible to them that when all have the same enlightenment, truth is not found on the side of the greatest number."[76] This majoritarianism encourages the centralization of power with the attendant evils that Tocqueville so vividly described above. Yet, he found within America the remedy to this tendency: administrative decentralization and a flourishing network of civil associations. Decentralization allowed Americans to better participate in the act of self-government,

[74] Ibid., 663.

[75] Ibid., 483.

[76] Ibid., 409.

and civil associations served as important intermediaries between individuals and the state. America had a vibrant practice of pluralism even if it lacked a developed theory, and that pluralism was, according to Tocqueville, the heart of American greatness.

Early Understandings of the Common Law

The early American practice of political pluralism existed in conjunction with the common law tradition. James Stoner describes the "common law way of thinking" in two of his books.[77] When he discusses "the common law," he is not using the term in a narrow, legal sense, referring to collections of judicial decisions recorded in law reports. Rather, he talks about an *approach* to the law, one that "involves … viewing each controversy as a matter, not for free invention or fresh deduction from first principles, but for judicious choice, with attention to precedent always in order but authoritative solution always elusive." Stoner explains that the common law is related to reason, but it is a "reason that collects and judges particulars" rather than "reason in the modern, Enlightenment, analytical sense—the reason that breaks apart and reassembles." The common law emphasizes continuity over novelty. Though custom is important, it is not always dispositive; if a custom becomes unreasonable, it has no legal force.[78] The common law aspires to social consensus—the law that is *common* to the people.[79]

This classic understanding of the common law tradition is very different from modern understandings. Most lawyers and judges in America conceive of the common

[77] Stoner, *Common Law & Liberal Theory*, 177; see also James R. Stoner, Jr., *Common-Law Liberty: Rethinking American Constitutionalism* (Lawrence, KS: University of Kansas Press, 2003).

[78] See ibid.

[79] See Stoner, Jr., *Common-Law Liberty*, 5.

law as "judge-made law," but this understanding was not always so common. Stoner acknowledges that this view "was not entirely unknown to the Founders, but it was the cynic's perspective to which no self-respecting lawyer or judge, much less republican citizen, could admit."[80] The idea that the common law is judge-made law falls under a positivist understanding of law, only it is the judiciary making law rather than the king or a traditional legislative body. Oliver Wendell Holmes, Jr., who would go on to serve on the United States Supreme Court, did much to popularize this perspective. In his essay "The Path of the Law," Holmes asks, "What constitutes the law?" He recognizes that some would say "that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or whatnot." He, instead, holds that the law is nothing more than what the courts actually decide.[81]

Common Law as Judge-Made Law

Some judges, like Holmes, relish the opportunities afforded to judges to make law. Holmes suggests that, rather than relying on syllogistic reasoning from previous cases, judges make decisions based upon "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."[82] No source of inspiration should be foreclosed. Judges should appreciate "their duty of weighing considerations of social advantage."[83] In their practice, judges should be forward-looking social engineers.

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[80] Ibid., 11.

[81] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review,* 110:5 (Mar., 1997), 994. The essay was published at the 100-year anniversary of Holmes's address.

[82] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, and Co., 1881), 1.

[83] Holmes, "The Path of the Law," 999.

History will continue to be a part of the study of law, but it is only "the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of [existing] rules." Holmes continues:

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

He complains that the social ends desired by law are "obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view."[84] This is certainly not the view of a traditional common law judge, who find the common law's "gradual historical development" to be a strength rather than a weakness.

Nonetheless, this redefinition of the common law is used by many contemporary judges and legal scholars. For instance, Daniel A. Farber and Suzanna Sherry have written to critique scholars who "reject pragmatism as an approach to legal decision-making,"[85] seeking instead the certainty of some "universal method of interpretation," or what they call "grand theory."[86] The authors equate the common law method with their preferred mode of judicial reasoning—pragmatism. Another contemporary admirer of Holmes, Judge Richard Posner, is also committed to pragmatism. He contends that judges should consider consequences, both immediate and systemic, in all their

[84] Ibid., 1001.

[85] Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: University of Chicago Press, 2002), x.

[86] Ibid., 140-41.

decisions.[87] Posner believes that pragmatism is a method of adjudication for every case; it "is not merely a supplement, a tie-breaker for cases in which the conventional materials of adjudication . . . run out." Moreover, such materials "have no absolute priority over other sources," by which he means the traditional sources for decision-making such as "constitutional and statutory text, the text of a contract, [and] case law."[88]

Stoner is correct to note that the work of the above scholars reveals an appreciation of "the development of law from precedent to precedent in the name of reason" rather than "the anchoring of law in custom and tradition freely attested and consented to."[89] For Holmes and his intellectual disciples, reason is bound up with science. Holmes wants a judge to be a "man of statistics and the master of economics."[90] Posner explicitly announces his goal "is to nudge the judicial game a little closer to the science game."[91] Farber and Sherry conclude their work saying that there remains a "pressing need … for the application of social science findings to issues in constitutional law."[92] Judges in this system take on the role of the sovereign lawmaker. It is fascinating that scholars have taken the common law method, which has traditionally been intimately connected with custom, and have turned it into an ahistorical pragmatism.

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[87] Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003), 13.

[88] Ibid., 82.

[89] Stoner, *Common Law Liberty*, 76.

[90] Holmes, "The Path of the Law," 1001.

[91] Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995), 8.

[92] Farber and Sherry, *Desperately Seeking Certainty*, 166.

Where some who hold the view that the common law is judge-made law celebrate the power this gives judges to chart policy, others share the perspective on the common law but decry its implications. Justice Antonin Scalia is a good example. He opens his *A Matter of Interpretation* saying:

> American lawyers cut their teeth upon the common law. To understand what an effect that must have, you must appreciate that the common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not "customary law," or a reflection of the people's practices, but is rather law developed by judges.

Scalia goes on to say that students learn the law, "not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it."[93] He finds the first year of law school to be "exhilarating because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."[94] Scalia says that students form the idea that a great judge is one who devises the best rule of law for a particular case and *then* goes through prior cases to justify the result, selectively using the cases in support and distinguishing from the cases in opposition. The student carries this idea on into legal practice, including judicial appointments, "and thus the common-law tradition is passed on."[95]

Scalia takes issue with this approach, saying that it has an uncomfortable relationship with democracy, especially when dealing with constitutional issues.[96] While

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[93] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), 4.

[94] Ibid., 7.

[95] Ibid., 9.

[96] Ibid., 10, 38.

Scalia's concern has some merit, he is working within a Holmesian understanding of the common law. Moreover, his own approach suffers from similar problems. Scalia's antipathy toward the common law manifests itself in a number of ways: sympathy toward the rationalistic nineteenth-century codification efforts,[97] a static understanding of constitutional rights,[98] and his skepticism regarding common law rules of construction (such as the "rule of lenity" and the rule "that statutes in derogation of the common law are to be narrowly construed").[99] Instead, Scalia adopts a method of interpretation known as textualism. He says, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably."[100] Textualists are not interested in "the drafter's intent as the criterion for interpretation of the Constitution." Drafters and others of the age may be consulted for the purpose of learning "the original meaning of the text, not what the original draftsmen intended."[101] Thus, textualism is slightly more sophisticated that the earlier versions of originalism.

Nonetheless, as Scalia acknowledges, the major dispute is not between original intent and original meaning; the dispute is whether or not the original meaning is static. Is the Constitution a body of law that "grows and changes from age to age" in the manner of the common law, under either the traditional or Holmesian understanding? Should the Constitution as a whole, like Eighth Amendment cruel and unusual punishment

[97] See ibid., 10-11.

[98] See ibid., 13.

[99] See ibid., 27-29.

[100] Ibid., 23.

[101] Ibid., 38.

jurisprudence, reflect "the evolving standards of decency" present within the nation?[102] Scalia, of course, rejects these ideas, arguing that a constitution's "whole purpose is to prevent change."[103] After all, he argues, "Words have meaning. And their meaning doesn't change."[104] This, of course, is not true. Both Gierke and Maitland compared the organic development of law and society to the development of language, which never ceases to change so long as it is alive.

At one time, Scalia confessed that he was something of a "faint-hearted originalist." By this, he meant that he could not imagine, for instance, "upholding a statute that imposes the punishment of flogging" even though this would have been encompassed by the original meaning of the Constitution's text.[105] Scalia has since repudiated this view, saying, "I try to be an honest originalist! I will take the bitter with the sweet!"[106]

In summary, the Holmesian understanding of the common law dominates contemporary debate. The two leading sides both view the common law as consisting of judge-made law; in this sense, it is a positivistic conception of law as the command of the

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[102] Ibid., 40; quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

[103] Ibid.

[104] Jennifer Senior, "In Conversation: Antonin Scalia," *New York* (Oct. 6, 2013).

[105] Antonin Scalia, "Originalism: The Lesser Evil," 57 U. Cinn. L. Rev. 849, 864 (1988-89). Before repudiating his "faint-hearted originalism," Scalia had mentioned *stare decisis* as a way to distinguish his jurisprudence from that of Justice Clarence Thomas. In an interview with Thomas's biographer, Scalia said that Thomas "is the most willing of all of his colleagues to overrule precedent, what is known in legal jargon as stare decisis, or 'let the decision stand.' He does not believe in stare decisis, period. If a constitutional line of authority is wrong, he would say, let's get it right. I wouldn't do that." Ken Foskett, *Judging Thomas: The Life and Times of Clarence Thomas* (New York: William Morrow, 2004), 281-82.

[106] Senior, "In Conversation: Antonin Scalia." Scalia had been criticized for his inconsistency by Randy E. Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism," 75 U. Cinn. L. Rev. 7 (2006).

sovereign. The originalist judge claims to eschew any lawmaking role for himself. Nonetheless, his conception of law is still positivistic and static. He is willing to overthrow one hundred years of precedent to correct a perceived error because the *correct* interpretation of the law cannot change. The pragmatic activist gladly takes on the mantle of sovereign lawmaker. He is willing to overthrow one hundred years of precedent to enact his own version of social engineering. One adjudicates based on his understanding of what the Constitution originally meant; the other adjudicates based on his understanding of what the Constitution ought to mean. Both are individualistic acts of arrogance and are inappropriate from judges in the American legal tradition. Neither side has much right to criticize the other, as each lacks a proper respect for precedent and the organic development of law.

The Common Law in Early America

With the contemporary understanding of the common law explained, I now return to the way it was perceived in early American history. The common law possessed practical authority as it was grounded in the consensus of custom.[107] As with custom, the common law was alive, gradually accommodating itself to changes within the people it governed. Stoner recounts the many ways this understanding of the common law undergirded the foundation of the American system of government.[108] In their "Declaration and Resolves," the First Continental Congress held "That the respective colonies are entitled to the common law of England" and gave special emphasis to the

[107] See Stoner, *Common-Law Liberty*, 10.

[108] See ibid., 13-25.

common law right to be tried by a jury of peers from the vicinage.[109] Two years later, members of the Second Continental Congress put their names to the Declaration of Independence. The more famous opening of the document appeals to the abstract "Laws of Nature and of Nature's God." However, the body of the document, which catalogs "the long train of abuses and usurpations" of the English king and Parliament, is in the language of the common law. The Declaration speaks of "our constitution," which is a reference to the unwritten English constitution. The rights the king had allegedly trampled were the traditional rights of Englishmen, not abstract notions of natural rights.[110]

The nation's early commitment to the common law is seen not only in legal enactments but also in the views of leading statesmen. Sometimes called "the Father of the Constitution,"[111] James Madison gave a wonderful statement about the nature of the law in a personal letter to his friend Charles Ingersoll, who was a U.S. Representative from Pennsylvania.[112] The context of the letter was the national bank. Madison had opposed the bank as a member of the House in 1791, arguing that its creation was outside the constitutional powers of the federal government.[113] Nonetheless, the Bank Bill of

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[109] "Declaration and Resolves of the First Continental Congress," (Oct. 14, 1774), available at http://avalon. law.yale.edu/18th_century/resolves.asp.

[110] "Declaration of Independence," (July 4, 1776), available at http://www.archives.gov/exhibits/ charters/declaration_transcript.html.

[111] See, e.g., Colleen Sheehan, "James Madison: Father of the Constitution," in *Makers of American Political Thought* (April 8, 2013), available at http://www.heritage.org/research/reports/2013/04/ james-madison-father-of-the-constitution.

[112] James Madison to Charles J. Ingersoll (June 25, 1831), available at http://founders.archives. gov/ documents/Madison/99-02-02-2374.

[113] James Madison, "Speech on the Bank Bill," (Feb. 2, 1791), available at http://founders. archives.gov/ documents/Madison/01-13-02-0282.

1791 passed both houses of Congress and was signed into law by President Washington. Thus, the First Bank of the United States was established and given a twenty-year charter.[114] When the First Bank's charter expired in 1811, James Madison was the president and his party controlled Congress. Madison believed the constitutionality of the bank had been established by precedent.[115] Nevertheless, there were not enough votes in Congress to renew the Bank's charter, so the First Bank of the United States was permitted to expire.[116] In the absence of a national bank, the United States economy crept toward bankruptcy, facing difficulties that were only compounded by the War of 1812. Only the short duration of the war saved the country from further catastrophe.[117]

Given these embarrassments, calls arose to charter a new national bank. Congress, still full of Democratic-Republicans, passed a compromise measure. President Madison vetoed the bill, not because of constitutional objections, but because he believed the compromises went too far in preventing the bank from fulfilling its intended purpose.[118] A new bill was drafted to answer these concerns, which Congress approved and Madison signed into law. Thus, the Second Bank of the United States was chartered, again for a twenty-year term.[119]

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[114] See John Thom Holdsworth, "The First Bank of the United States," *National Monetary Commission* (Washington, D.C.: Government Printing Office, 1910), 17-20.

[115] See ibid., 82. The author references reflections of the time period made by former Secretary of the Treasury Albert Gallatin in a letter to the president of the Second Bank of the United States, Nicholas Biddle.

[116] See ibid., 97.

[117] See ibid., 109-11.

[118] See James Madison, "Veto Message on the National Bank," (January 30, 1815), available at http://millercenter.org/president/madison/speeches/speech-3626.

[119] See Davis R. Dewey, "The Second United States Bank," *National Monetary Commission* (Washington, D.C.: Government Printing Office, 1910), 152-56.

Opposition to the bank did not disappear entirely, and it grew heated again during President Jackson's tenure. With questions of the bank's constitutionality circling again, Madison wrote a letter to his friend Ingersoll to defend his change of mind on the subject. Madison says that the question turned on "how far legislative precedents expounding the Constitution, ought to guide succeeding legislatures, and to overrule individual opinions." He argues that the same principle should guide Congress that prevails in court. Law would be vague or unknown "if every Judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it." Similarly, if one legislature departed from the repeated constructions of the legislatures preceding it, not only would the Constitution be rendered uncertain, but so too would all laws made pursuant to it. Judges take an oath, just like legislators, to support the Constitution, "yet has it ever been supposed that [a judge] was required, or at liberty, to disregard all precedents however solemnly repeated & regularly observed, and by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community?" Madison concludes that legislators ought to take the same view of their oath, that there is "a necessity of regarding a course of practice … [as] a constitutional rule of interpreting a Constitution." Regarding the national bank, Madison found ample "evidence of the national judgment." The bank had been approved by successive legislatures controlled by different parties. It had been approved by multiple presidents and found constitutional by the Supreme Court in *McCulloch v. Maryland*. If this were not enough to "bar the individual prerogative," Madison could think of no limit.[120] Though Madison does not use the term "common

[120] James Madison to Charles J. Ingersoll (June 25, 1831), available at http://founders.archives.gov/documents/Madison/99-02-02-2374 (spelling and grammar are standardized throughout).

law" in his letter, the common-law spirit pervades his understanding of how officers from all three branches should behave. No member of government is to be an "independent constitutionalist," free to interpret the Constitution by his or her own lights.[121] Instead, each is to be bound to the historically unfolding meaning of the law, which results from the interplay of many minds.

Joseph Story is another leading figure who demonstrates the early American commitment to the common law tradition. Where Madison served in both the legislative and executive branches, Story is primary remembered for his long service on the Supreme Court. In 1837, Justice Joseph Story presented the findings of a committee that was "appointed to consider and report upon the practicability and expediency of reducing to a written code the common law of Massachusetts." He explained that when Americans' "ancestors first emigrated to this country … they brought with them the common law of the mother country" insofar as it was applicable to their changed situation.[122] The common law was thus "claimed as the birthright and inheritance of all the colonists." It continued its development after transplantation "by the gradual operation of judicial decisions and the positive enactments of the colonial, provincial, and state legislatures." In defining "the true nature or character of the common law," Story says that it

> consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which

[121] Bruce Ackerman, "The Common Law Constitution of John Marshall Harlan," 36 N. Y. L. Sch. L. Rev. 5 (1991). Ackerman contrasts the common law constitutionalism of Justice Harlan with the independent constitutionalism of Justice Black.

[122] Joseph Story, "Codification of the Common Law," in William S. Story, ed., *The Miscellaneous Writings of Joseph Story* (Boston: Little, Brown, and Co., 1852), 698-99. Story mentions certain exceptions to the general adoption of the common law including portions related to feudal tenures and ecclesiastical establishments. While the former was not adopted anywhere in the colonies, the latter was in several.

> cannot now be distinctly traced back to any statutory enactments, but which rest for their authority upon the common recognition, consent, and use of the State itself.

As a result, Story continues,

> [T]he common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form.… It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanical arts, and the exigencies and usages of the country.[123]

Such was the understanding of the common law when expounded upon by Story in the late 1830s.

Stoner argues that this "original understanding of the common law … colors every aspect of the Constitution and thus is essential to a complete account of the original understanding of the Constitution itself."[124] He acknowledges that though the Founders innovated in a number of ways, their innovations were tempered by the use of the familiar tools of the common law. This is seen in the language of the document. Many terms—*habeas corpus, ex post facto* laws, natural born citizen, good behavior, etc.—can only be properly interpreted through the common law. As Stoner also points out, the common law is seen in the style of the document, as it proceeds through enumeration rather than definition.[125]

Article III, which establishes the judiciary, also presupposes the common law. As Stoner explains, the common-law understanding of judicial power is demonstrated by

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[123] Ibid., 699-702.

[124] Stoner, *Common-Law Liberty*, 16.

[125] Ibid., 17. This last point is most clearly seen in the enumeration of congressional powers in Art. I, sec. 8. Stoner contrasts this enumeration with the definition proposed in the Virginia Plan, which gave Congress the authority "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."

Alexander Hamilton in Federalist 78.[126] Hamilton says that the judiciary is to act "as faithful guardians of the Constitution" by declaring as void any laws that violate the text. This both keeps the legislative power within its proper bounds and also protects minorities from oppression. However, Hamilton goes on to suggest that the courts will have a role in "mitigating the severity and confining the operation of such laws" as are "unjust and partial." These laws are, to Hamilton, in a different category than those which are "infractions of the Constitution."[127] This power, as with judicial review itself, is not written into the text of the Constitution. Nonetheless, Hamilton expects the judicial power to possess, as Stoner puts it, "the common-law judge's tools of art."[128] He clearly assumes judges "will, in common-law fashion, be appointed from the bar and that they will study and judge in the common-law mode."[129] Hamilton writes, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." Due to the immense "variety of controversies" that will arise, "the records of those precedents must unavoidably swell to a very considerable bulk." Thus, judges must put in "long and laborious study." Hamilton uses this as an argument for the permanent tenure of judges, for otherwise, few qualified individuals could be found who would be willing to "quit[] a lucrative line of practice to accept a seat

[126] See ibid., 18.

[127] Alexander Hamilton, "Federalist 78" in *The Federalist Papers*, ed. Clinton Rossiter, (New York: Penguin, 2003), 468-69.

[128] Stoner, *Common-Law Liberty*, 19.

[129] Ibid.

on the bench."[130] This is different from the role of judges in civil law countries, where judges are more like civil servants and can take the bench directly out of law school.[131]

The relationship between the Constitution and the common law was only further strengthened with the addition of the Bill of Rights. Many traditional rights under the common law are there enumerated, with special emphasis given to the legal process. The right to a trial by jury, already provided in criminal trials under Article III, is reinforced and broadened to include "Suits at common law."[132] Finally, as Stoner argues, the Ninth Amendment "loses much of its uncertainty if understood from the common-law perspective."[133] The Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[134] It gives evidence of the Founders understanding of the existence of common law rights that persisted despite remaining unwritten. That this Amendment is open to such uncertainty today is a strong indication of just how far from the traditional common-law perspective we have drifted.[135]

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[130] Hamilton, "Federalist 78," 470.

[131] See James G. Apple and Robert P. Deyling, "A Primer on the Civil-Law System," *Federal Judicial Center* (1995), 30.

[132] U.S. Const., Amendment VII.

[133] Stoner, *Common-Law Liberty,* 20-21.

[134] U.S. Const., Amendment IX.

[135] For a sampling of the opinions, see Randy E. Barnett, *"*Reconceiving the Ninth Amendment," 74 Cornell L. Rev. 1 (Nov. 1988); Russell L. Caplan, "The History and Meaning of the Ninth Amendment," 69 Va. L. Rev. 223 (Mar. 1983); Daniel A. Farber, *Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have* (New York: Basic Books, 2007); Kurt T. Lash, "The Lost Original Meaning of the Ninth Amendment," 83 Tex. L. Rev. 331 (Dec. 2004); Calvin R. Massey, "The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law," 1990 Wis. L. Rev. 1229 (1990); Chase J. Sanders, "Ninth Life: An Interpretive Theory of the Ninth Amendment," 69 Ind. L. J. 759 (Summer 1994); & Louis Michael Seidman, "Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism," 98 Cal. L. Rev. 2129 (Dec. 2010).

CHAPTER SIX

The Fourteenth Amendment and Changing Conceptions of Law in America

The previous chapter demonstrated that early America not only possessed the institutions of pluralism, it also possessed the organic conception of law that provided support and protection to those institutions. However, the situation has changed. It is incontrovertible that the federal government is far more powerful and extensive than in the time of Tocqueville. Not only have local freedoms diminished, America has also experienced a changing conception of law. Rather than viewing the law as an organic, bottom-up emanation from the people, we are now more prone to view law as a positivistic, top-down emanation from the state.

Of course, there are many reasons for these changes and many explanations of their origins. If we focused only on greater federal power and centralization, we might look to LBJ's "Great Society" or FDR's "New Deal." We might take our cues from a growing movement that blames "progressivism" more generally.[1] Alternatively, we might follow Robert Nisbet, who argues persuasively that Woodrow Wilson began the

[1] See, e.g., Richard Epstein, *How Progressives Rewrote the Constitution* (Washington, DC: The Cato Institute, 2006); Jeffrey Isaac, *The Poverty of Progressivism: The Future of American Democracy in a Time of Liberal Decline* (Lanham, MD: Rowman & Littlefield, 2003); Paul D. Moreno, *The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism* (New York: Cambridge University Press, 2013); James Ostrowski, *Progressivism: A Primer on the Idea Destroying America* (New York: Cazenovia Books, 2014); Michael Wolraich, *Unreasonable Men: Theodore Roosevelt and the Republican Rebels Who Created Progressive Politics* (New York: St. Martin's Press, 2014).

march toward centralization and bureaucracy, using World War I to institute the structures of the managerial state for which FDR is often credited (or blamed).[2]

However, if we expand our consideration to include America's changing conception of law, it becomes necessary to move our attention back in time to Reconstruction as a most critical event. In particular, the first two Reconstruction Amendments are worthy of attention. The Constitution provides the procedures for constitutional amendments in Article V. Proposed amendments may originate from two thirds of both houses of Congress or from a convention called by the application of two thirds of the states. Proposals via either method are ratified when accepted by three fourths of the states acting either through their legislatures or state conventions, an option decided by Congress.[3] This was the procedure followed for the first twelve amendments to the United States Constitution. With the Thirteenth and Fourteenth Amendments, however, the country deviated from the established procedure. Though the Fourteenth Amendment will be my primary focus moving forward, a review of the Thirteenth Amendment's ratification is also necessary for the purposes of context and comparison.

Where previous chapters have been about the history of political thought, this chapter shifts to the history of American political practice. I explore in great detail the particulars surrounding the proposal and ratification of the Reconstruction Amendments because this history is necessary to understand how and why the American practice of pluralism began to fade.

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[2] See Robert Nisbet, *The Present Age* (New York: Harper & Row, 1988), especially the chapter "New Absolutism."

[3] See U.S. Const., Art. V.

Battle for Control of Reconstruction

As the Civil War entered its final year, two additional battles were raging in the nation's capital. The first concerned which branch would take the lead in Reconstruction. President Lincoln proposed a generous policy for re-unification. His proposal was based on the executive's pardon power, which Lincoln interpreted as granting him the authority to place conditions on pardons. According to his plan, most participants in the rebellion would have all rights and property (excepting slaves) returned to them upon taking an oath of loyalty to the Union. If "a number of persons, not less than one tenth in number of the votes cast in such State at the Presidential election" in 1860 would take such an oath and establish a republican government, the state would once again be recognized and afforded protection under the Republican Guarantee Clause.[4] Lincoln did warn Southern states, however, that whether their legislators would be seated in Washington was a matter left, not to the Executive, but exclusively to the respective houses in Congress.[5]

The Radicals in Congress gladly exercised this right by rejecting the legislators sent from several reconstructed states and claiming the right to set policy for Reconstruction themselves.[6] Sen. Benjamin Wade (OH) argued that "the Executive ought not to be permitted to handle this great question to his own liking."[7] Wade co-sponsored the congressional plan for Reconstruction with Rep. Henry Winter Davis

[4] See Lincoln, "Proclamation 108," *Papers of Abraham Lincoln* (hereinafter cited as *PAL*), The American Presidency Project at the University of California Santa Barbara, John Wooley and Gerhard Peters, eds. available at http://www.presidency.ucsb.edu/abraham_lincoln.php; *see also* U.S. Const. Art. IV, sec. 4.

[5] See Lincoln, "Proclamation 108," *PAL*.

[6] See, e.g., Cong. Globe, 38th Cong., 1st sess., 3449 (July 1, 1864).

[7] Ibid., 3450.

(MD). The Wade-Davis Bill, which was far more severe toward the South, was passed by Congress on July 4, 1864.[8] Where Lincoln called for ten percent of a state's voters to pledge loyalty, the Radical Republicans wanted a majority.[9] Where Lincoln promised a restoration of rights to all but the civil and military leaders of the Confederacy, the Wade-Davis Bill sought to punish all who bore arms against the Union.[10] The bill was presented to Lincoln on the same day Congress adjourned session, giving him the opportunity to exercise a pocket veto.[11]

Radical Republicans were furious and responded with the Wade-Davis Manifesto of August 5, 1864. They argued that Lincoln had inaugurated anarchy: "A more studied outrage on the legislative authority of the people has never been perpetrated."[12] The Radicals claimed Lincoln had disregarded their rejection of Southern legislators and had attempted to bypass Senate confirmation with his appointment of military governors. They suspected Lincoln was lenient toward the South in an effort to gain electoral votes in his contest with their preferred candidate, John C. Frémont, in the election of 1864. They told Lincoln that if he wished to maintain their support, "he must confine himself to

[8] "Wade-Davis Bill," H.R. 244, An Act to guarantee to certain States whose governments have been usurped or overthrown a republican form of government, 38th Congress, 1st Session (July 4, 1864).

[9] See Cong. Globe, 38th Cong., 1st sess., 3450 (July 1, 1864). Sen. Wade said that Lincoln's plan "was not upon any principle of republicanism." His plan "was absurd" when considered "in light of American principles."

[10] See "Wade-Davis Bill."

[11] Abraham Lincoln, "Proclamation 115 - Concerning a Bill 'To Guarantee to Certain States, Whose Governments Have Been Usurped or Overthrown, a Republican Form of Government,' and Concerning Reconstruction" (July 8, 1864), *PAL*.

[12] "The Wade-Davis Manifesto" (Aug. 5, 1864), available at http://www.let.rug.nl/usa/documents/1851-1875/the-wade-davis-manifesto-august-5-1864.php.

his executive duties—to obey and execute, not make the laws—to suppress by arms armed Rebellion, and leave political reorganization to Congress."[13]

Battle over the Thirteenth Amendment

While Congress was fighting President Lincoln for control of Reconstruction, Members of Congress were also fighting each other over the Thirteenth Amendment—the amendment to end slavery once and for all. The Senate passed a resolution in favor of the amendment by a vote of 38 to 6.[14] The House did not vote on the amendment for another two months.[15]

Directly before the House vote, Rep. George Pendleton (OH) gave an impassioned speech against the Thirteenth Amendment.[16] His arguments, which are representative of those opposing the amendment, are worth reviewing in some detail.[17] Pendleton began by saying, "I am profoundly convinced that wise men will not lightly touch the organic law of a Government which has held its beneficent sway over thirty million people."[18] He then outlined his objections to the amendment. First, the chaos of war made the time inappropriate for such changes to the fundamental law. Second, the amendment could not be ratified without fraud, either in carving out new states that would approve of the amendment or in using military force to coerce Southern states into

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[13] Ibid.

[14] See Cong. Globe, 38th Cong., 1st sess., 1490 (April 8, 1864).

[15] See Cong. Globe, 38th Cong., 1st sess., 2995 (June 15, 1864).

[16] See Cong. Globe, 38th Cong., 1st sess., 2992 (June 15, 1864).

[17] See, e.g., Rep. Mallory (KY) at ibid., 2981; Rep. Edgerton (IN) at ibid., 2985; and Rep. Randall (PA) at ibid., 2991.

[18] Cong. Globe, 38th Cong., 1st sess., 2992 (June 15, 1864).

approving. Important in this argument is the presumption, along with President Lincoln, that the Southern states remained a part of the Union. Pendleton asked, "[I]f you should attempt to amend the Constitution by such means, what binding obligation would it have? What binding obligation ought it to have?"[19] Pendleton rejected the positivistic assumption that power is sufficient to declare law.

Pendleton's third argument was more complicated than the previous two. He contended that even procedural legitimacy would be insufficient for certain amendments to the Constitution. A three-fourths majority of the states is not competent to make any and every change. They could not, for instance, "change the Government into a hereditary monarchy … abolish the Senate and House of Representatives and convert this Government into an autocracy." Such changes would be "revolution, not amendment" since they would affect the fundamental nature of the government.[20]

To Pendleton and a number of his colleagues in the House, the proposed amendment was a revolutionary change that struck at the heart of federalism. Pendleton announced to the House, "I believe … in the doctrine of State rights. I know it is fashionable today to denounce it. I know that regard for it has been diminished in the public mind."[21] To Rep. John Baldwin (MA), who claimed that state sovereignty was nothing more than the "dream of theorists," Pendleton responded with references to the Federalist Papers. Hamilton had written that the proposed Constitution was only "a partial union or consolidation" and that "State governments would clearly retain all the

[19] Ibid.

[20] Ibid.

[21] Cong. Globe, 38th Cong., 1st sess., 2993 (June 15, 1864).

rights of sovereignty which they before had, and which were not … exclusively delegated to the United States."[22] Similarly, Madison had argued that national power extended "to certain enumerated articles only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[23] Pendleton argued that the history of the United States confirmed the wisdom of the Founders' arrangement, that the Federal Government should only regulate international and interstate relations. States should be left to administer their own internal affairs. He begged the House not to depart from the principle of federalism. Pendleton reminded his colleagues from the Northeast that Ohio was more populous than many of them. If federalism was disregarded and numbers became the sole criterion for political power, the other states may soon find themselves on the losing end: "[W]hile they attack the institution of slavery today you may smile, but tomorrow you will tremble when your religion, your manufactures, your capital are wrested from your control and subjected to their will." Pendleton grimly concluded, "We have gone too far toward consolidation already; … power is raising itself above law, above Constitution, and putting the safeguards of liberty and the guarantees of good government beneath his feet. … We must retrace our steps; we must return to State rights."[24] Pendleton's colleagues in the House initially heeded this call. The vote on the proposed amendment failed to obtain the required two-thirds majority (93 to 65, with 23 abstaining).[25]

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[22] Ibid., 2994; see also Alexander Hamilton, "Federalist 31" in *The Federalist Papers.*

[23] Cong. Globe, 38th Cong., 1st sess., 2994 (June 15, 1864); see also James Madison, "Federalist 39" in *The Federalist Papers.*

[24] Cong. Globe, 38th Cong., 1st sess., 2994 (June 15, 1864).

[25] See Cong. Globe, 38th Cong., 1st sess., 2995 (June 15, 1864).

Following the defeat of the Thirteenth Amendment in the House, Democrats suffered their own defeat in the November elections of 1864. Their numbers in the House dropped from 72 to 38, while the Republican numbers swelled from 85 to 136.[26] Based on these numbers alone, President Lincoln knew a second attempt to pass the Thirteenth Amendment would likely be successful. However, he was unwilling to wait until the incoming class of legislators took their seats to vote. Lincoln wanted action in the present session of Congress. He asked in his Fourth Annual Message, "[M]ay we not agree that the sooner the better?"[27] For the sake "unanimity of action" in the "great national crisis," Lincoln counseled the lame duck session of Congress that "some deference [should] be paid to the will of the majority simply because it is the will of the majority."[28] In so doing, Lincoln equated a vote for a Republican with approval of the particular plank in the Republican platform regarding passage of the Thirteenth Amendment, as if it was inconceivable that a member of the party might oppose the plan.[29]

To accomplish his ends, Lincoln and his Administration stooped to dubious means. Charles Dana, the Assistant Secretary of War claimed that Lincoln expedited the admission of Nevada into the Union to obtain another positive vote for the amendment.[30]

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[26] Members of third parties dropped from 27 to 19, and the House as a whole grew by 9 seats. See "Party Divisions in the House of Representatives, 1789-Present," Office of the Historian, U.S. House of Representatives, available at http://history.house.gov/Institution/Party-Divisions/Party-Divisions/.

[27] Abraham Lincoln, "Fourth Annual Message," (Dec. 6, 1864), *PAL*.

[28] Ibid.

[29] See "Republican Party Platform of 1864," (June 7, 1864).

[30] See Frank J. Williams, *Judging Lincoln*, (Carbondale, IL: Southern Illinois University Press, 2002), 135.

To swing votes, the President or his agents held up pieces of legislation, offered jobs, released family members from prison, and made strategic use of endorsements.[31] Some members were convinced to absent themselves from the vote. Rumors spread that the President had a slush fund of approximately $50,000 to bribe intransigent Democrats.[32] Even the radical Thaddeus Stevens reportedly recognized, "The greatest measure of the nineteenth century was passed by corruption, aided and abetted by the purest man in America."[33] Regardless of the methods that may have been used to procure votes, the Republicans successfully maneuvered the proposed Thirteenth Amendment through the lame duck Congress. On January 31, 1865, the measure passed 112 to 57 (with 13 not voting).[34]

On the following day, President Lincoln's home state of Illinois became the first state to ratify.[35] By the end of February, a total of eighteen states had ratified, including the Confederate states Virginia and Louisiana, whose reconstructed legislatures passed the amendment. Before the war came to an end on April 9, two additional states ratified.[36]

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[31] See ibid., 137.

[32] See ibid., 140.

[33] Ibid., 130.

[34] Cong. Globe, 38th Cong., 2d sess., 530 (Jan. 31, 1865).

[35] Abraham Lincoln, "Resolution Submitting the Thirteenth Amendment to the States," (Feb. 1, 1865); see also *The Constitution of the United States of America: Analysis and Interpretation*, Centennial Edition, Congressional Research Service (Washington: U.S. Government Printing Office, 2013), http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf, 30 FN5.

[36] See *The Constitution: Analysis and Interpretation*, 30 FN5.

Lincoln was then assassinated on April 15, thus promoting Vice President Andrew Johnson to the presidency.[37] Johnson remained committed to "a healing policy,"[38] much like Lincoln's generous plan for Reconstruction. Johnson's goal, as expressed in his First Annual Message, was to gradually restore both the General and the State governments. He believed military governments "envenomed hatred" by dividing "the people into the vanquishers and the vanquished."[39] Moreover, they would be exorbitantly expensive and would demand a dangerous consolidation of power in the federal government.[40]

Like Lincoln, Johnson appointed provisional governors who would oversee constitutional conventions and the installation of loyal governments in Southern states. This process was carried out in each of the seven states that had not yet been declared legal and in proper relation to the federal government.[41] Also like Lincoln, Johnson led Reconstruction efforts through a series of executive orders and proclamations. Within a month of Lincoln's death, Johnson revoked the commercial restrictions imposed against

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[37] See, e.g., E.M. Stanton, "Assassination of the President," *Evening Star* (Washington, D.C.), 15 April 1865, *Chronicling America: Historic American Newspapers*. Lib. of Congress, available at http://chroniclingamerica. loc.gov/lccn/sn83045462/1865-04-15/ed-1/seq-1/; see also Andrew Johnson, "Address upon Assuming Office," (April 17, 1865), *Papers of Andrew Johnson* (hereinafter cited as *PAJ*), The American Presidency Project at the University of California Santa Barbara, John Wooley and Gerhard Peters, eds. http://www.presidency.ucsb.edu/andrew_ johnson.php.

[38] Andrew Johnson, "First Annual Message" (December 4, 1865), *PAJ*.

[39] Ibid.

[40] See ibid.

[41] See Andrew Johnson, "Proclamation 135 - Reorganizing a Constitutional Government in North Carolina" (May 29, 1865), *PAJ*. Johnson issued similar proclamations for other states: Mississippi in Proclamation 136 (June 13, 1865), Georgia in Proclamation 138 (June 17, 1865), Texas in Proclamation 139 (June 17, 1865), Alabama in Proclamation 140 (June 21, 1865), South Carolina in Proclamation 143 (June 30, 1865), and Florida in Proclamation 144 (July 13, 1865). The four states with legally recognized governments were Arkansas, Louisiana, Tennessee, and Virginia.

the South[42] and reestablished federal law within the geographical boundaries of Virginia.[43] On May 22, 1865, Johnson announced the end of the naval blockade of Southern ports.[44] He then discharged all prisoners who had been sentenced by military tribunals during the war[45] and reiterated Lincoln's conditions for executive pardon of participants in the rebellion.[46] Johnson was at pains to provide for the former slaves while also respecting the interest of former slaveholders.[47]

Without a doubt, Johnson's actions contributed to the ratification of the Thirteenth Amendment. Beyond lifting restrictions on trade and providing a general program of amnesty, Johnson saw the "invitation … to participate in the high office of amending the Constitution" as a critical component to restoring harmony.[48] Not only would the

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[42] See Andrew Johnson: "Executive Order" (April 29, 1865), *PAJ*. This first proclamation only affected areas within military occupation. It was extended to cover the entire area in states east of the Mississippi River in Proclamation 137 (June 13, 1865) and west of the river in Proclamation 142 (June 24, 1865).

[43] See Andrew Johnson: "Executive Order - To Reestablish the Authority of the United States and Execute the Laws Within the Geographical Limits Known as the State of Virginia" (May 9, 1865) (This Order had the effect of reestablishing postal services and Article III courts. It also confirmed the Johnson's commitment to protect the existing state government.), *PAJ*.

[44] See Andrew Johnson: "Proclamation 133 - Raising the Blockade of Certain Ports," (May 22, 1865), *PAJ*. Johnson excepted a few ports in Texas, where fighting continued after Lee's surrender. These were lifted with Proclamation 141 on June 23, 1865.

[45] See Andrew Johnson: "Executive Order" (May 27, 1865), *PAJ*; *see also* Andrew Johnson, "Executive Order - General Orders: 109" (June 6, 1865), *PAJ*.

[46] See Andrew Johnson: "Proclamation 134 - Granting Amnesty to Participants in the Rebellion, with Certain Exceptions," (May 29, 1865), *PAJ; cf.* Lincoln, "Proclamation 108," *PAL*.

[47] See, e.g., Andrew Johnson, "Executive Order - General Orders: 138" (September 16, 1865), *PAJ*. Johnson ordered free government transportation for both freedmen traveling to find employment and for whites laboring on their behalf. He also ordered that all "stores and schoolbooks necessary to the subsistence, comfort, and instruction of dependent refugees and freedmen" be transported at government expense. *See also* Andrew Johnson, "Executive Order - General Orders: 145" (October 9, 1865), *PAJ*. Johnson ordered Major-General Howard, Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, to seek "an arrangement mutually satisfactory to the freedmen and the landowners" over disputed lands in the former Confederacy.

[48] Andrew Johnson, "First Annual Message" (December 4, 1865), *PAJ*.

amendment resolve the divisive issue of slavery once and for all, its ratification would confirm the status of Southern states as constitutional equals with their counterparts in the North.

Despite the importance placed on ratification, the call for states to ratify remained an invitation, not a compulsion. The invitation was for all states, both Union and Confederate. Congress ignored Senator Sumner's resolution that the Confederate states be excluded from the calculation of the number of states needed for ratification.[49] Sumner's fears were misplaced. Of the four states to initially reject the amendment, only Mississippi belonged to the Confederacy.[50] Other Southern legislatures, comprised of Unionists and representing small fractions of their respective states, willingly approved the amendment. Virginia, Louisiana, Tennessee, and Arkansas had ratified before Johnson took office. Upon Johnson's assurances of the limited scope of section two of the amendment, which grants Congress the authority to enforce the amendment with appropriate legislation, other ex-Confederate states followed suit.[51] On December 6, 1865, the three-fourths majority was completed with Georgia's ratification.[52]

Battle over the Fourteenth Amendment

Though the proposal of the Thirteenth Amendment involved corruption, the process was tame when compared to the Fourteenth Amendment. Reconstructed

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[49] See Cong. Globe, 38th Cong., 2d sess., 588 (Feb. 4, 1865).

[50] See *The Constitution: Analysis and Interpretation*, FN5, 30. Delaware (February 8, 1865); Kentucky (February 24, 1865); New Jersey (March 16, 1865); and Mississippi (December 2, 1865).

[51] See Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge, UK: Cambridge University Press, 2001), 229.

[52] See *The Constitution: Analysis and Interpretation*, FN5, 30.

legislatures in the South were given the freedom to accept or reject the proposal. No coercion was implemented against the states. With the Fourteenth Amendment, however, Congress refused to seat Southern legislators, thus failing to reach the constitutionally required two-thirds vote to propose an amendment. States were not free to vote as they wished, for ratification was used coercively as a condition for reentry into the Union. The Fourteenth Amendment, which dramatically redefined the role of states in our federal system, was imposed from above.

With the Thirteenth Amendment ratified, a critical step toward completing the work of restoration would be for the South to resume its place in Congress. Like Lincoln, Johnson held that each House possessed exclusive authority to judge "the elections, returns, and qualifications of [its] own members."[53] However, he insisted that congressional "authority cannot be construed as including the right to shut out in time of peace any State from the representation to which it is entitled by the Constitution."[54] While Johnson had no intent of interfering with congressional discretion over the qualifications of its members, he considered it his duty:

> to recommend … the admission of every State to its share in public legislation when, however insubordinate, insurgent, or rebellious its people may have been, it presents itself, not only in an attitude of loyalty and harmony, but in the persons of representatives whose loyalty cannot be questioned under any existing constitutional or legal test.[55]

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[53] Johnson, "First Annual Message." Johnson was quoting Article I, sec. 5: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." He did not consider how this provision related to Article V's mandate that "no State, without its Consent, shall be deprived of its equal representation in the Senate." Sen. Saulsbury raised precisely this point when debating against the creation of the Committee of Fifteen. See Cong. Globe, 39th Cong., 1st sess., 28 (Dec. 12, 1865).

[54] Johnson, "First Annual Message."

[55] Ibid.

The Thirty-Ninth Congress took its seat on December 4, 1865.[56] By this time, the war had ended, the Confederacy had disbanded, the rebellion had been declared over by proclamation, and the Southern states had participated in the sacred act of amending the Constitution. It was Johnson's view that this should prove sufficient evidence to justify the South's return to Congress.[57]

The Radical Republicans disagreed. During the summer months, leaders of the Radical Republicans began their scheming on how to obstruct the President's plan. Thaddeus Stevens wrote to Charles Sumner on June 14, asking, "Is there no way to arrest the insane course of the President in 'reorganization'?"[58] He followed with a letter on August 17, informing Sumner that he had written to President Johnson, urging him to delay action on his plan until Congress could convene. He concluded, "[W]e must try and keep out of the ranks the Opposition."[59] Senator Wade wrote to Sumner, expressing similar sentiments: "The salvation of the country devolves upon Congress and against the Executive."[60]

To achieve their ends, a group of the most radical members of Congress held a caucus on December 1, three days before session would begin. Knowing that they could not defeat President Johnson's policies if Southern representatives were admitted, the caucus resolved to establish a joint committee to which everything relating to

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[56] See Cong. Globe, 39th Cong., 1st sess., 1 (Dec. 4, 1865).

[57] See Johnson, "First Annual Message."

[58] "Thaddeus Stevens to Charles Sumner," (June 14, 1865), in Charles Sumner, *The Works of Charles Sumner*, Vol. IX, (Boston: Lee and Shepard, 1874), 480.

[59] Ibid., "Thaddeus Stevens to Charles Sumner," (August 17, 1865).

[60] Ibid., "B. F. Wade to Charles Sumner," (July 28, 1865).

Reconstruction would be conferred.[61] The plan was presented at the regular Republican caucus on the next day. The more conservative members of the party failed to recognize the Radicals' designs and adopted the plan unanimously.[62]

Session began two days later, and the dispute as to organization erupted immediately when the House Clerk refused to recognize Rep. Horace Maynard of Tennessee because his name was not on the roll.[63] Rep. James Brooks, a Democrat from New York, spoke in Maynard's defense. He at least wanted to give Maynard a chance to speak and present his credentials which had been certified by the Tennessee governor. Brooks pointed out that if Tennessee was not a loyal state in the Union and her people not citizens, then President Johnson was an alien usurper.[64] Virginia, too, was overlooked in the roll call, despite the unquestioned loyalty of the governor who certified its delegation.[65] Louisiana was now excluded, despite the fact that two of its representatives had voted for the Speaker in the prior Congress.[66] In the history of the country, Brooks exclaimed, such violence on the minority had not occurred in Congress, where over fifty

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[61] See Benjamin Burks Kendrick, *The Journal of the Committee of Fifteen on Reconstruction: 39th Congress (1865-67*) (New York: Columbia University, 1914), 139.

[62] See ibid., 141.

[63] See Cong. Globe, 39th Cong., 1st sess., 3 (Dec. 4, 1865); see also James Ford Rhodes, *History of the United States: From the Compromise of 1850 to the Final Restoration of Home Rule at the South in 1877*, Vol. 5 (1864-66) (New York: The Macmillan Company, 1906), 544. Rhodes writes that Edward McPherson, the House Clerk, had omitted the names of the elected Southerners at the behest of the Republican caucus.

[64] *See* Cong. Globe, 39th Cong., 1st sess., 3 (Dec. 4, 1865); *cf.* Cong. Globe, 38th Cong., 1st sess., 2896 (June 13, 1864) Sen. Sumner had already dismissed the logic that Rep. Brooks presents here. He argues that it is not necessary for a President or Vice President to be a citizen of a state so long as he is a citizen of the United States.

[65] *See* Cong. Globe, 39th Cong., 1st sess., 3 (Dec. 4, 1865).

[66] *See* Cong. Globe, 39th Cong., 1st sess., 4 (Dec. 4, 1865).

members were excluded from the House floor without debate.[67] The Clerk, under the cloak of parliamentary procedure, refused to permit debate until a Speaker was elected. Once that was done, Stevens introduced his resolution for the Committee of Fifteen. In a party-line vote, the resolution was adopted.[68] The Senate passed the resolution eight days later. That body made a significant change by transforming the joint resolution into a concurrent resolution, a change that obviated the need for executive approval and therefore postponed a showdown with Johnson over control of Reconstruction.[69]

The Committee was composed of nine representatives and six senators. Three members were Democrats, and the remaining twelve were Republicans. It was resolved that matters relating to Reconstruction would be referred to the committee without debate. The intent was that no member of the ex-Confederate states would be seated in Congress until the Committee made its report. A sub-committee of three was selected to liaise with President Johnson and request him to defer executive action on Reconstruction

[67] *See* ibid.; *see also* "Brooks, James (1810-1873)," *Biographical Directory of the United States Congress*, United States Office of Art and Archives, available at http://bioguide.congress.gov/biosearch/biosearch.asp. On the following day, Rep. Brook's seat was contested by William Dodge. The House ultimately sided with the Republican Dodge, and Brooks was removed. Dodge succeeded Brooks on April 7, 1866. Brooks was reelected for the 40th Congress, and he remained in his seat until his death on April 30, 1873. Rep. Alexander Coffroth, another Democrat, was also removed when Congress sided with the Republican who contested his election. *See* "Coffroth, Alexander Hamilton (1828-1906)," *Biographical Directory of the United States Congress*. Rep. Finck later complained that Congress had not only excluded eleven states from representation, "but members duly elected to both branches of Congress have been ousted from their seats by the action of a domineering majority, and in some cases others admitted, who no intelligent man will pretend represent the views of the majorities in their districts." Cong. Globe, 39th Cong., 1st sess., 2261 (April 28, 1866).

[68] *See* Cong. Globe, 39th Cong., 1st sess., 5-6 (Dec. 4, 1865).

[69] *See* Cong. Globe, 39th Cong., 1st sess., 30 (Dec. 12, 1865); *see also* Kendrick, *Journal of the Committee*, 145-46.

until the Committee concluded its work. Debates within the Committee were ordered to be kept in strictest confidence.[70]

The Committee's journal is of great importance in describing the background of the Fourteenth Amendment.[71] It records that one of the first activities the Committee undertook was to form three-person subcommittees to "report on the present condition of the States composing the late so-called Confederate States of America, and not now represented in Congress."[72] To expedite consideration of Tennessee, the state received the undivided attention of one subcommittee. The other three subcommittees were each tasked with investigating three or four states.[73]

Rep. John Bingham (R) reported his subcommittee's findings regarding Tennessee on February 15, 1866. Despite the unqualified recommendation that Tennessee be restored to the Union, the full committee debated the subject for two days. In an 8-7 vote, the matter was referred to a *new* three-person committee.[74] The reason behind this strange maneuver became apparent when the new subcommittee made its report on February 19. The recommendation was still that Tennessee be permitted to resume functions as a member of the Union, but now conditions were placed on admission.[75]

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[70] *See* ibid., 37-40. The amended resolution that created the committee did not make it a formal requirement for the committee to complete its report before Southern states could be readmitted to Congress.

[71] *See* Kendrick, *Journal of the Committee*, 18-20. Mass copies of the report were not printed upon the committee's completion of their work. The sole manuscript copy resurfaced in an auction of Sen. Fessenden's letters in 1808. Fessenden had been the committee chairman. Benjamin Burks Kendrick located the journal in 1910 and purchased it on behalf of Columbia University.

[72] Ibid., 47. Subcommittee appointments were announced on January 15 (p. 48).

[73] *See* ibid., 48.

[74] *See* ibid., 67.

[75] *See* ibid., 68-69.

The conditions recommended by the subcommittee were debated at length. As reported to the full House on March 5, the Committee recommended that Tennessee:

> 1.) "maintain and enforce in good faith their existing constitution and laws, 2.) exclud[e] those who have been engaged in rebellion against the United States from the exercise of the elective franchise" for periods provided by Tennessee law, 3.) "exclude the same persons for the like respective periods of time from eligibility to office," 4.) "never assume or pay any debt or obligation contracted or incurred in aid of the late rebellion," 5.) never "claim from the United States or make any allowance for compensation for slaves," and 6.) ratify the foregoing conditions.[76]

Representatives Andrew Rogers and Henry Grider, both Democrats on the Committee, submitted a minority report. They objected that placing conditions on restoration was an admission that states had been out of the Union, a position at odds with the claimed justification for the war. Because the Southern states *were* states, they were guaranteed representation by the Constitution and their members should be admitted to Congress upon taking the oath of office. Moreover, there was no question as to the loyalty of the representatives from Tennessee. Nothing should prevent their taking the oath at once.[77]

Despite this compelling logic, the idea of conditions for readmission gained momentum. Congress debated the content and propriety of such conditions through March and into April of 1866. On April 12, Sen. William Stewart suggested that the conditions take the form of a constitutional amendment. His proposed amendment forbade discrimination on the basis of race in the exercise of civil rights and suffrage. It voided debts incurred in aid of the rebellion and claims for compensation for emancipated slaves. Once a state legislature ratified the amendment and modified state

[76] Cong. Globe, 39th Cong., 1st sess., 1189 (March 5, 1866).

[77] *See* Cong. Globe, 39th Cong., 1st sess., Report No. 29 (March 5, 1866).

laws in conformity therewith, the state would be permitted to resume participation in Congress.[78]

The Committee took up the idea of a constitutional amendment and began discussing potential language. On April 28, the Committee voted to send their proposal to the House.[79] The Committee's proposed language for the Fourteenth Amendment was substantially the same as the final version. Congress added the Naturalization Clause to section one, relaxed the punitive measures of section three, and clarified the provisions regarding debt in section four.[80]

Pressure for Congress to take action on the proposed amendment (and the related question of restoration) was mounting both within Congress and without. On one hand, some Radicals feared that excessive delay would frustrate their ability to carry out their own reconstructive policies. An editorial in *The Nation* stated:

> The people are willing to keep the southern states out of the Union until certain conditions are complied with, but they want to know what those conditions are going to be. Congress has agreed upon none. The only thing Congress has agreed on is keeping the southern states out for the present, but this is simply the excavation for the foundation for the new building. The public is anxiously waiting to see the structure rise and is tired of hearing the builders wrangle over the style of the architecture.[81]

The editors were content for some degree of coercion, but they wanted Congress to move faster. The fear was that if Congress could not "unite on some comprehensive plan," they would "find the public thoroughly out of patience with Congress and quite ready to let

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[78] *See* Cong. Globe, 39th Cong., 1st sess., 1906 (April 12, 1866).

[79] *See* Kendrick, *Journal of the Committee*, 115-20. The language of the proposed amendment is followed by a proposed bill that provides the terms for the restoration of States to full political rights. It presented ratification of the amendment as one condition for reentry into Congress.

[80] Cf. ibid., 115-17 and U.S. Const., amend. XIV.

[81] Ibid., 292-93 (citing the editorial in *The Nation*).

the President and his friends have their own way."[82] Rep. Glenni Scofield shared this concern, arguing that if Congress did not move soon, fall elections might send to Congress legislators who were even more sympathetic to the South than President Johnson.[83]

A second reason to move forward with the proposed amendment was to provide additional support for the recently passed Civil Rights Act. Originally proposed by Sen. Lyman Trumbull, the final version of the Act granted citizenship to anyone born in the United States without regard to race or previous condition of involuntary servitude. The Act also enumerated rights to be guaranteed to all citizens: "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property."[84] Trumbull argued that the bill was merely declaratory, neither abridging nor conferring rights.[85]

Others may have been sympathetic to the desire to protect the freedmen's civil rights, but they questioned whether the bill was constitutionally permissible.[86] Among these was President Johnson, who argued that Congress had no constitutional authority to enact the law. He vetoed the bill and returned it to Congress with a catalogue of

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[82] Ibid., 293.

[83] See Cong. Globe, 39th Cong., 1st sess., 2250 (April 28, 1866).

[84] "Civil Rights Act of 1866," 14 Stat. 27 (April 9, 1866).

[85] *See* Cong. Globe, 39th Cong., 1st sess., 1760 (April 4, 1866).

[86] See, e.g. Cong. Globe, 39th Cong., 1st sess., 476 (Jan. 29, 1866) (comments by Sen. Willard Saulsbury); see also Cong. Globe, 39th Cong., 1st sess., 598 (Feb. 2, 1866) (comments by Sen. Garrett Davis).

objections. Johnson contended that the unprecedented intrusion on the prerogatives of states would "sap and destroy our federative system of limited powers."[87] He concluded:

> It is another step, or rather stride, toward centralization and concentration of all legislative powers in the National Government. The tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace.[88]

Both Houses of Congress promptly overrode the President's veto, and the Civil Rights Act became law on April 9, 1866.[89]

Perhaps surprisingly, one opponent to the move was the Republican Bingham. Though he favored the motivation behind the legislation, he acknowledged that Congress lacked constitutional power. Past interpretations of the Constitution, the express will of its Framers, and the Tenth Amendment all agreed that states reserved the right to enact laws for the government of the people within their respective borders. If Congress wished otherwise, the remedy was not to be "by an arbitrary assumption of power, but by amending the Constitution of the Unites States."[90] Bingham thought that section one of the proposed Fourteenth Amendment, a section he drafted, would answer this purpose.[91]

Thus, with pressure building to take action on the proposed amendment, the houses voted. The Senate approved the Fourteenth Amendment on June 8 (33 to 11).[92]

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[87] Andrew Johnson, "Veto Message" (March 27, 1866), *PAJ*.

[88] Ibid.

[89] *See* Cong. Globe, 39th Cong., 1st sess., 1809 (April 6, 1866). The Senate overrode the veto 33-15. *See also* Cong. Globe, 39th Cong., 1st sess., 1861 (April 9, 1866). The House overrode the veto 122-41, with 21 not voting.

[90] Cong. Globe, 39th Cong., 1st sess., 1291 (Mar. 9, 1866).

[91] See, e.g., Cong. Globe, 39th Cong., 1st sess., 1034 (Feb. 26, 1866) & 1089 (Feb. 28, 1866) (comments by Rep. Bingham).

[92] *See* Cong. Globe, 39th Cong., 1st sess., 3042 (June 8, 1866).

The House followed suit on June 13 (120 to 32).[93] On June 18, both Houses concurred in a joint resolution directing President Johnson to transmit the amendment to state legislatures for their consideration.[94]

Once again, President Johnson questioned the decency of proposing an amendment when eleven of thirty-six states were not represented. Moreover, he argued, "Grave doubts … may naturally and justly arise as to whether the action of Congress is in harmony with the sentiments of the people, and whether State legislatures, elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment."[95] Johnson made it clear that the act of submitting the amendment to the states was merely ministerial and neither committed "the Executive to an approval or a recommendation of the amendment to the State legislatures or to the people."[96] Johnson continued his attempt to put the brakes on the Radicals' plan, wishing to proceed on the basis of consent rather than force.

Of the eleven states in the Confederacy, only Tennessee initially ratified the amendment.[97] Tennessee's governor, "the violently radical 'Parson' Brownlow," called the state legislature for a special session, informing them that Congress desired ratification as a testament of their loyalty.[98] With one-third of its members absent, the

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[93] *See* Cong. Globe, 39th Cong., 1st sess., 3149 (June 13, 1866).

[94] *See* Cong. Globe, 39th Cong., 1st sess., 3237 (June 18, 1866).

[95] Andrew Johnson, "Special Message" (June 22, 1866), *PAJ*.

[96] Ibid.

[97] *See The Constitution: Analysis and Interpretation*, 31 FN6.

[98] Joseph B. James, *The Ratification of the Fourteenth Amendment* (Macon, GA: Mercer University Press, 1984), 19.

Tennessee Senate approved the amendment (14 to 6). In the House, opponents of the measure refused to attend and establish quorum. Warrants were issued for their arrest. When the detained members were awarded a writ of habeas corpus, the legislature refused to recognize the granting court's jurisdiction. With opponents of the measure held in custody, the House voted to ratify the amendment on July 19 (43 to 11). The House overruled the Speaker's objection that a quorum did not exist.[99] Brownlow sent a telegram to Secretary of War Stanton saying, "My compliments to the President, we have carried the Constitutional Amendment in the House, Vote 43 to 11, two of his tools refusing to vote."[100]

The House voted to admit Tennessee the next day.[101] After seven hours of debate, the Senate followed suit a day later.[102] Neither House seemed much "troubled by the informalities apparent in the proceedings of the Tennessee Legislature."[103] Sen. Lane admitted that Gov. Brownlow's telegram "was rather more forcible than classical," but given the "species of coarseness that seems to run through all the communications from [East] Tennessee," he found the communication "wonderfully respectful."[104]

The theory by which the state was readmitted was not particularly clear. Some wished to recognize Tennessee as a state because it had restored a republican form of

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[99] *See* ibid., 19-22.

[100] Ibid., 23 (quoting *New York Times* of July 20, 1866). Brownlow's telegram to Bingham was similar, though there he stated, "Give my compliments to the dead dog in the White House."

[101] See Cong. Globe, 39th Cong., 1st sess., 3980 (July 20, 1866).

[102] See James, *The Ratification of the Fourteenth Amendment*, 26; see also Cong. Globe, 39th Cong., 1st sess., 4007 (July 21, 1866).

[103] Cong. Globe, 39th Cong., 1st sess., 3976 (July 20, 1866) (statement by Rep. Boutwell).

[104] Cong. Globe, 39th Cong., 1st sess., 3994 (July 21, 1866).

government.[105] Others wished to admit the state because it adopted the constitutional amendment. Another group thought Tennessee had never left the Union and questioned the propriety of making ratification of an amendment a condition-precedent for representation in Congress. The diversity of views was not a matter of concern so long as they were united in the common result—Tennessee should now be recognized and entitled to representation.[106]

The lack of agreement regarding the conditions necessary for readmission became a problem, however, when one by one, all ten of the other Southern states rejected the Fourteenth Amendment.[107] Thomas B. Colby surveyed Southern reactions to the proposal. In various state legislatures and local newspapers, the Fourteenth Amendment was called "an 'insulting outrage,' an 'abominable,' 'obnoxious measure,' and a 'nefarious,' 'foul,' and 'monstrous proposition.'"[108] Southern legislatures were not the only ones to find the proposed amendment troubling. Delaware, Maryland, Kentucky, and California also refused to ratify.[109] With fourteen states opposed, the Fourteenth Amendment could not become law.

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[105] But cf. Cong. Globe, 39th Cong., 1st sess., 3976 (July 20, 1866) (statement by Rep. Boutwell) and 3998 (July 21, 1866 (statement by Sen. Sumner). These legislators complained that Tennessee lacked a republican form of government because a large percentage of its population was disenfranchised. Sumner focused only on the black population while Boutwell also referenced the ex-rebels.

[106] See, e.g., Cong. Globe, 39th Cong., 1st sess., 3996 (July 21, 1866) (statement by Sen. Doolittle cataloguing the various views).

[107] See *The Constitution: Analysis and Interpretation*, 31 FN6.

[108] Thomas B. Colby, "Originalism and Ratification," 107 Northwestern University Law Review 1627 (2012-2013); citing MS Senate Journal 8 (1866); Editorial, "The Constitutional Amendment in and Out of Congress," *Daily Sun* (GA; Jan. 12, 1867).

[109] See *The Constitution: Analysis and Interpretation*, 31 FN6.

Of course, this incensed the Radical Republicans. Sen. Doolittle (WI) is famous for remarking, "[T]he people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it."[110] It is unfortunate that many sources take Doolittle's statement out of context.[111] As a moderate, he was not speaking his own views but synthesizing the views of "what has been said all around me, what is said every day." For himself, Doolittle was curious about how the South could reject an amendment if, as some claimed, the South did not have valid legislatures.[112]

Yet that is precisely what the Reconstruction Act of 1867 claimed. The Act opened by declaring, "[N]o legal State governments … now exists in the rebel States."[113] The Act then divided the ten unreconstructed states into five military districts. President Johnson was ordered "to detail a sufficient military force" to enable the military commander within each district to "enforce his authority."[114] The commander was authorized to establish military tribunals to avoid the jurisdiction of existing courts.[115] New state constitutions were ordered, and they were required to extend the franchise to

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[110] Cong. Globe, 39th Cong., 2d sess., 1644 (Feb. 20, 1867).

[111] See, e.g., Thomas E. Woods, Jr., *The Politically Incorrect Guide to American History* (Washington, DC: Regnery Publishing, 2004), especially "Chapter 7: Reconstruction"; Joseph E. Fallon, "Power, Legitimacy, and the 14th Amendment," *Chronicles Magazine* (2002); John J. Chodes, *Destroying the Republic: Jabez Curry and the Re-education of the Old South* (New York: Algora Publishing, 2005), 108; Walter Coffey, *The Reconstruction Years*, (Bloomington, IN: AuthorHouse, 2014), 64-65.

[112] Cong. Globe, 39th Cong., 2d sess., 1644 (Feb. 20, 1867).

[113] "Reconstruction Act of 1867," 14 Stat. 428-29 (March 2, 1867).

[114] Ibid., section 2.

[115] *See* ibid., section 3.

all male citizens over twenty-one, regardless of race. Before a state would once again be entitled to representation in Congress, it must ratify a congressionally approved state constitution, elect a legislature under the new constitution, ratify the Fourteenth Amendment, and wait until that amendment was made a part of the Constitution through the ratification of the requisite number of states.[116]

President Johnson's veto message was forceful in its rejection of the Reconstruction Act. He declared the Act "in its whole character, scope, and object without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive to those great principles of liberty and humanity for which our ancestors on both sides of the Atlantic have shed so much blood and expended so much treasure."[117] Johnson continued, "Our victories subjected the insurgents to legal obedience, not to the yoke of an arbitrary despotism. When an absolute sovereign reduces his rebellious subjects, he may deal with them according to his pleasure, because he had that power before. But when a limited monarch puts down an insurrection, he must still govern according to law." He pointed out the absurdity of considering Southern legislatures competent to ratify the Thirteenth Amendment but not competent to reject the Fourteenth. Johnson praised the Constitution for "[c]ombining the strength of a great empire with unspeakable blessings of local self-government, having a central power to defend the general interests, and recognizing the authority of the States as the guardians of industrial rights." Such blessings, he was confident, would

[116] *See* ibid., section 5.

[117] Andrew Johnson, "Veto Message" (March 2, 1867), *PAJ*.

be lost if the nation continued to disregard its fundamental law.[118] It is important to remember that these concerns are not voiced by a man attempting to cover his racial bigotry. They are the words of a man who opposed secession and stood against his own state. Now, again, he stood for principle despite overwhelming odds.

On the very same day that Johnson issued his veto message, both Houses of Congress voted to override the President's veto.[119] With the new plan in place, Southern resistance began to wane. On April 6, 1868, Arkansas became the second state in the South to ratify. By the end of the summer, they were joined by Florida (June 9), North Carolina (July 2), South Carolina (July 8), Louisiana (July 9), Alabama (July 13), and Georgia (July 21). Virginia followed in October of 1869. Texas and Mississippi held out until early 1870.[120]

In the meantime, Northern states began to withdraw consent in protest. Ohio led in January 1868.[121] New Jersey followed suit in February 1868.[122] The legislature argued that the "necessary result of [the amendment's] adoption must be the disturbance of the harmony, if not the destruction, of our system of self-government."[123] New Jersey

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[118] Ibid.

[119] *See* Cong. Globe, 39th Cong., 2d sess., 1976 (March 2, 1867). Interestingly, Congress also overrode Johnson's veto of the Tenure of Office Act on March 2. After much complaining from the Executive Branch, the Act was finally declared unconstitutional in *Myers v. United State* (1926). *See* Cong. Globe, 39th Cong., 2d sess., 1966.

[120] *See The Constitution: Analysis and Interpretation,* 31 FN6.

[121] *See* "Joint Resolution: Relating to Withdrawing the Assent of the State of Ohio from the Proposed XIV Constitutional Amendment," in 65 Acts of Ohio 280-82 (Jan. 15, 1868).

[122] *See* "Fourteenth Amendment," NJ Department of State. In a Joint Resolution, the New Jersey Legislature voted to withdraw consent on February 20, 1868. The NJ Governor vetoed the resolution but was overridden by the Senate on March 5 and the House on March 24.

[123] Ibid., "Senate Joint Resolution No. 1."

had particular reason to be upset; in order to reach the two-thirds majority necessary to propose the Fourteenth Amendment in the Senate, a member from their state had been ejected, thereby denying the state of its equal suffrage.[124] The New Jersey legislature argued that the Amendment placed "unheard of powers in the hands of a faction," and the usurpations only grew larger with the Reconstruction Act.[125] Ignoring the coercion of ten Southern states and the rescission of two Northern States, Secretary Steward certified the Fourteenth Amendment on July 20, 1868.[126] This top-down imposition of a change to the nation's fundamental law was unprecedented.

Historiography of the Fourteenth Amendment's Ratification

Before commenting directly on the significance of the foregoing history on the theme of pluralism, a comment on the scholars' treatment of this history is in order. As Forrest McDonald points out, the historiography is "not altogether a savory one."[127] For the sake of convenience, I group scholars into three categories. Many of those who have given attention to the ratification history of the Fourteenth Amendment did so in the context of the Supreme Court's desegregation decisions in the 1950s. Many concluded that desegregation was not constitutional because the Fourteenth Amendment itself was

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[124] *See* ibid.; *see also* Forrest McDonald, "Was the Fourteenth Amendment Constitutionally Adopted?" 1 Ga. J. S. Legal Hist. 1 (1991), 7. Informal polls showed that the Fourteenth Amendment was one vote shy of reaching 34, the number needed for passage. The newly elected John Stockton of New Jersey was an opponent of the Amendment. Though he had been seated when session convened, a new motion was made not to seat him. This motion required a simple majority to pass rather than the two-thirds majority required by Art. I, sec. 5. The vote initially failed, but on a second vote the following day, Stockton was removed (22 to 21).

[125] Ibid., "Senate Joint Resolution No. 1."

[126] *See The Constitution: Analysis and Interpretation*, 31 FN6. Oregon also rescinded their ratification on October 15, 1868, but at this time, Secretary Seward had already certified the amendment as law.

[127] McDonald, 4.

illegitimate. The race-related context of their work casts a shadow of their intentions. For instance, Walther Suthon, Jr., a professor of law at Tulane University and one-time president of the Louisiana Bar Association, answered the skeptic who said that it was too late to seriously question the constitutionality of the amendment by saying, "[T]here is no statute of limitations that will cure a gross violation of the amendment procedure."[128] Pinckney McElwee wrote that due to "the invalidity of the purported 14th Amendment … our entire Democratic-Republican form of Government, our system of checks and balances, our way of life, is faced with a threat of utter destruction."[129] Joseph Call similarly argued that we will not enjoy our Constitution or individual liberty long if we do not "comprehend and fight to maintain the principles of [our] basic governmental structure."[130] The State Sovereignty Commission of Louisiana offered perhaps the most biting critique. The Commission claimed that the "integrationist propaganda" of recent Supreme Court opinions threatened "local self-government" and impended "rule by an autocratic judicial oligarchy."[131] After an extended polemic, the Committee concluded, "The Fourteenth Amendment is really not accurately labelled. It would be more correct to designate it as 'Military Edict No. 1.'"[132]

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[128] Walter J. Suthon, Jr., "The Dubious Origin of the Fourteenth Amendment," 28 Tul. L. Rev. 22, 43 (1953).

[129] Pinckney G. McElwee, "The 14th Amendment to the Constitution," 11 S. C. L. Q. 484 (1958). McElwee was a Judge Advocate General and member of the bar in Texas, Missouri, and Washington, D.C.

[130] Joseph L. Call, "The Fourteenth Amendment and Its Skeptical Background," 13 Baylor L. Rev. 1 (1961). Call was a Judge of the Superior Court in Los Angeles County.

[131] State Sovereignty Commission of Louisiana, "Unconstitutional Creation of the Fourteenth Amendment," 23 GA Bar J. 228 (1960).

[132] Ibid., 239.

As McDonald says in reviewing these articles, all "were directed against the desegregation decisions,"[133] decisions which are so widely accepted now that it is hard for anyone to raise questions about their legal soundness. When concern over the constitutionality of the desegregation decisions is combined with concern over the constitutionality of the Fourteenth Amendment's ratification—with its close connection to the Civil War and the end of slavery—the problem becomes even more extreme.

Of course, the suspect motives held by certain individuals does not necessarily invalidate the underlying concerns they raise, yet that is precisely what is assumed by a second group of scholars. This group defends the Fourteenth Amendment by, at best, papering over the procedural irregularities that brought it into being. At worst, they may resort to childish name-calling. Garrett Epps, writing for *The Atlantic*, speaks of "Fourteenth Amendment deniers" who would read the amendment out of existence to advance their "radical right-wing agenda." To argue that the amendment was not validly adopted, he says, is to partake in an "old white-supremacist myth" and "phony American history."[134] Other scholars within this second group are more careful than Epps in their review of history, yet their conclusions are no sounder. For instance, Felix Fernandez wrote to respond to the objections raised by scholars who questioned the validity of the Fourteenth Amendment. He took no issue with continued exclusion of Southern states from Congress, saying that Congress wisely exercises its constitutional power to supply a "breathing spell" before returning ex-Confederate states to power.[135] Likewise,

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[133] McDonald, 4-5.

[134] Garrett Epps, "Constitutional Myth #8: The 14th Amendment Doesn't Exist," *The Atlantic* (July 13, 2011).

[135] Felix F. Fernandez, "The Constitutionality of the Fourteenth Amendment," 39 S. Cal. L. Rev. 378 (1965-66), 396.

Fernandez approved of the use of ratification as a condition for re-entry. He said that "it was no ordinary amendment" and ratification would be a show of Southern "good faith," a "security [the North] had come to desire and expect."[136] Ultimately, Fernandez concluded that Congress was justified in its actions because the South had rebelled. The war gave Congress "the authority to view [their] powers expansively, and to draw upon them to the fullest extent." Congress took actions they found necessary, and when actions are necessary, "they will not violate the Constitution."[137]

Bruce Ackerman is another scholar within the second group. He admits that congressional actions during the ratification process violated both the letter and spirit of Article V of the Constitution. Even if one can justify the exclusion of states from the deliberative process before the amendment's proposal, "there is nothing in the text that contemplates Congress overriding a veto by the states of a proposed amendment."[138] Nonetheless, this is effectively what the Radical Republicans did. At this point, Ackerman says, the "hypertextualist" interested in defending the Fourteenth Amendment will "make a virtue out of necessity" and declare the amendment "part of our Constitution not by virtue of Article Five, but by virtue of Antietam and Gettysburg and the war power." Ackerman is uncomfortable with this conclusion because it places the amendment on a "much less attractive constitutional foundation" than the rest of the

[136] Ibid., 399.

[137] Ibid., 407; see also Akhil Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 364-80. Amar provides an updated account of Fernandez's defense of the ratification process. He attempts—albeit unconvincingly—to establish that the events surrounding the Fourteenth Amendment's proposal and ratification were within both the text and spirit of the Constitution. This judgment puts him at odds with his colleague, Bruce Ackerman, whose views are discussed below.

[138] Bruce Ackerman, *We the People: Transformations*, Vol. 2 (Cambridge, MA: Belknap Press, 2001), 111.

Constitution.[139] He rejects the "dichotomy between legalistic perfection and lawless force."[140] Ironically, Ackerman seeks to escape the difficulty by pressing what he calls a "pluralistic reading of the Founding text [the Constitution]." His pluralism is far removed from the pluralism discussed in this dissertation. Ackerman's "pluralists" see the amendment process of Article V as just *one* method of "higher lawmaking."[141] To the constitutional model, Ackerman adds one of his own creation. He finds permissible change arising from critical action taken by government that is confirmed by "decisive electoral victories."[142] Ackerman argues that this process of legitimate constitutional change occurred first during Reconstruction and again during the New Deal.[143]

Forrest McDonald represents a third, more moderate group of scholars. He reviewed the "repeated irregularities"[144] of the adoption; admitted that, despite its origins, the Fourteenth Amendment was likely here to stay; and concluded that Americans should be aware of the history "lest similar irregularities should surround another amendment in the future."[145] Douglas Bryant concludes in similar fashion and goes so far as to recommend that America "shore up the foundation of constitutional jurisprudence" by ratifying the Fourteenth Amendment once again.[146] This is almost as unlikely to occur as

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[139] Ibid., 115.

[140] Ibid., 116.

[141] Ibid., 16-17.

[142] Ibid., 21.

[143] See ibid., 23.

[144] McDonald, 1.

[145] Ibid., 18.

[146] Bryant, 581.

the Supreme Court striking down the Fourteenth Amendment as unconstitutional. Scholars in this group are useful for honestly acknowledging the shortcomings of the ratification process in a manner and at a time that keeps them untainted by the likelihood of impure motives. This chapter has attempted to emulate the tone and honesty of these scholars in the hope that a careful examination of Reconstruction history will help shed light on the fading practice of American pluralism.

Conclusion

This dissertation seeks to connect two ideas. First, associations are reflections of human nature and are constitutive of the state rather than concessions of the state. Second, this reality should be reflected in law. This chapter addresses the latter of these concerns. Just as the state is built from the bottom up by an assemblage of groups, the law develops from the bottom up in process that emphasizes social consensus. When, as with the Fourteenth Amendment, the law is imposed from the top down, it tends to lose the connection with society that gives it life.

I do not deny the legitimacy of the Fourteenth Amendment. I have not reviewed the amendment's tortured ratification history in order to revive the old fights against de-segregation or perpetuate the more contemporary fights about the citizenship status of children born to immigrants who are in the country illegally.[147] I *do* have sympathy for the noble goals that at least some of the Radical Republicans had when pushing for passage of the Fourteenth Amendment. Clearly, something needed to be done to protect the civil liberties of the recently freed slaves.

[147] See, e.g., Ann Coulter, *Adios America: The Left's Plan to Turn Our Country into a Third World Hellhole* (Washington, DC: Regnery Publishing, 2015), especially Ch. 3, "America to the Media: Whatever You Want, Just Don't Call Us Racists."

However, while attempting to solve this very real political problem, Congress brought about a revolution in our political regime. In their impatience for reform, members of government often resorted to force and fraud. They gave credence to the notion that law—including our fundamental law—is whatever *power* claims it to be. They cast aside the constitutional mechanisms that generate social consensus. This introduced a fissure in our understanding of law, which, as the next chapter reveals, would grow to affect our pluralist structures as well.

CHAPTER SEVEN

Justice Harlan and the Fourteenth Amendment

This chapter continues a review of the Fourteenth Amendment's history, showing how the amendment has been used to dramatically change American law and society. The previous chapter focused on the amendment's ratification. Contrary to Article V amendment procedures, the amendment was imposed from above in a watershed moment in American legal history. This chapter shows how, contrary to the spirit of the common law, the amendment has continually served as the level by which the pluralist structures in America have been undermined. I focus on two issues in particular, incorporation and apportionment. Not only does this narrow the enormous field of Fourteenth Amendment jurisprudence into something suitable for a single chapter, but the two topics also allow a continued exploration of the connection between law and pluralism. Moreover, the topics also permit an examination of one Supreme Court Justice who tried to resist the change, Justice John Marshall Harlan II, who served on the Supreme Court from 1955 until his retirement in 1971. Harlan's approach to both incorporation and apportionment reveals his commitment, not only to pluralism, but also to a conception of law that makes pluralism possible.

Early Challenges under the Fourteenth Amendment

Interpretation of the various provisions of the Fourteenth Amendment has been notoriously difficult from the beginning. To the extent that originalist theories have a place in constitutional law, they certainly do not apply when it comes to the Fourteenth

Amendment. As Thomas B. Colby points out, "Originalists have traditionally based the normative case for originalism primarily on principles of popular sovereignty: The Constitution owes its legitimacy as higher law to the fact that it was ratified by the American people through a supermajoritarian process."[1] However, for the reasons pointed out in the previous chapter, the Fourteenth Amendment sits on a foundation of coercion rather than consent. Constitutional representation was lacking both in the legislative proposal and state ratification. John Bingham, the framer of section one, cannot be interpreted as consistent with himself in the many comments he made throughout Reconstruction.[2] Debates in the "rump" Congress are likewise uninstructive. Statements can be found to support virtually any preconceived policy choices.[3] Originalist approaches to the Fourteenth Amendment are not particularly instructive.

Thus, it comes as no surprise that the Supreme Court struggled in the *Slaughterhouse Cases*, its first opportunity to interpret the amendment. The circumstances of the case show that the amendment had implications reaching far beyond race relations. The occasion came from a lawsuit raised, not by recently freed slaves seeking to vindicate their newly won rights, but by a group of white butchers in Louisiana. Their complaint involved, not a restriction of political rights like voting or due process, but an alleged restriction on an economic right to carry on their slaughterhouse businesses free from a state-created monopoly. Louisiana had passed a

[1] Thomas B. Colby, "Originalism and the Ratification of the Fourteenth Amendment," 107 NW. U. L. Rev. 1627, 1627-28 (2013).

[2] See generally Kurt Lash, "The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment," 99 Georgetown Law Journal 329 (2011).

[3] See generally William Nelson, "The Impasse in Scholarship," in *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988).

public health statute that prohibited the slaughter of animals outside the facilities of a single large slaughterhouse, operated by a corporation created by the state. By paying charges regulated by the state, butchers would be free to use this facility.[4]

A group of butchers brought a lawsuit challenging the constitutionality of this statute, alleging violations under a number of theories:

> That it creates an involuntary servitude forbidden by the thirteenth article of amendment;
> That it abridges the privileges and immunities of citizens of the United States;
> That it denies to the plaintiffs the equal protection of the laws; and,
> That it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of the amendment.[5]

The claim that legislative restrictions on the butchers' trade constituted "involuntary servitude" may have been creative lawyering, but it was ridiculous and was dismissed as such by the Court.[6] Claims regarding denial of equal protection and due process were likewise rejected.[7]

The only claim that merited sustained attention regarded the abridgment of the butchers' privileges and immunities. To resolve this question, the Court pointed to the distinction between citizenship in the United States and citizenship in the several states. The Fourteenth Amendment only restricts states from abridging the privileges and immunities of citizens of the United States. Privileges and immunities of state citizenship, while protected by state constitutions, receive no additional protection from

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[4] *Slaughterhouse Cases*, 83 U.S. 36 (1873), 59-61.

[5] Ibid., 66.

[6] See ibid., 69.

[7] See ibid., 80-81.

this provision.[8] Under the majority's interpretation, the Fourteenth Amendment was not intended to transfer the security of the vast range of civil rights, theretofore protected by the States, to the federal government. The Court held that when an interpretation leads to

> consequences [that] are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

The Court obviously recognized just how dramatic a change would be wrought by the minority's interpretation. The majority believed such a change should be evidenced by a clear declaration in the text of the law. With such clarity not present, the majority concluded that neither Congress nor the ratifying states had such an intention with the Fourteenth Amendment.[9]

Slaughterhouse was a controversial 5-4 decision. Justice Stephen Field, writing a dissent joined by three others, argued that the interpretation provided by the majority made the Privileges or Immunities Clause a "vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage."[10] Field's commitment to liberal individualism far surpassed any concern for constitutional federalism. Where the majority was unwilling to empower the federal government as "a perpetual censor upon all legislation of the States,"[11] Field had no such

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[8] See ibid., 73-76.

[9] Ibid., 78.

[10] *Slaughterhouse Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting).

[11] *Slaughterhouse Cases*, 83 U.S. 36, 79 (1873).

reservations. He considered the Fourteenth Amendment as a license for the Court to intervene any time when, in its opinion, a state restricted any of the "fundamental rights" which "belong to the citizens of all free governments."[12] Surprisingly, despite the fact that a number of contemporary scholars on both the right[13] and left[14] have agreed that the majority decided *Slaughterhouse* incorrectly, the case has never been overturned.

Following the *Slaughterhouse* decision, a number of notable Fourteenth Amendment cases arose in the late 1800s and early 1900s. On issues of race, the Court's response was mixed at best. There were some bright spots. For instance, in *Strauder v. West Virginia*, the Court held that it was a violation of Equal Protection to systematically exclude blacks from jury service.[15] Moreover, in *Yick Wo v. Hopkins*, the Court acknowledged that laws which are race-neutral on their face might be discriminatory in application, thus becoming violations of Equal Protection.[16] On the other hand, the Court struck down the Civil Rights Act of 1875, holding that the amendment only permitted Congress to regulate racial discrimination from *state* actors, not private individuals.[17] It

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[12] *Slaughterhouse Cases*, 83 U.S. 36, 97 (1873) (Field, J., dissenting).

[13] See, e.g., Michael W. McConnell, "Ways to Think about Unenumerated Rights," 2013 U. Ill. L. Rev. 1985, 1995 (2013) (McConnell writes, "In the 1872 *Slaughter-House Cases* … the Supreme Court rendered [the Privileges or Immunities] provision essentially meaningless and redundant."); see also, *McDonald v. Chicago*, 561 U.S. 742 (Thomas, J., concurring) (Thomas argues that the Second Amendment is incorporated against states, not through the Due Process Clause, but through the Privilege or Immunities Clause. He rejected the holding of *Slaughterhouse*.).

[14] See e.g., Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," 108 Harv. L. Rev. 1221, 1298 n.247 (1994-95) (Tribe argues that "the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause.); see also, Akhil Reed Amar, "Substance and Method in the Year 2000," 28 Pepp. L. Rev. 601, 631 n.178 (2001) (Amar says, "Virtually no serious modern scholar—left, right, and center—thinks that [Slaughter-House] is a plausible reading of the [Fourteenth] Amendment."

[15] See *Strauder v. West Virginia*, 100 U.S. 303 (1880).

[16] See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[17] *The Civil Rights Cases*, 109 U.S. 3 (1883).

also found that the Equal Protection Clause was not violated by anti-miscegenation laws[18] or laws requiring racial segregation.[19]

If the Court did not fully accept the Fourteenth Amendment's invitation to treat all citizens as political equals, it *did* eagerly put the amendment to other uses. Most notably, the Court used the amendment to build an imposing wall of protection for economic rights. Without overturning *Slaughterhouse*, the Court began to apply the logic of the minority opinion. Where states had long held freedom under their "police powers" to regulate economic affairs, this ability came under increasing supervision. As Robert McCloskey notes, the Court justified this supervision, in part, through the Commerce Clause. Indeed, the Court invalidated state regulations of commerce in at least fourteen separate cases from 1877 to 1886. The Court's dominant value during this period and the years to follow was not "nationalism" or "localism"; both ideas were suppressed "to defend the principle of laissez faire."[20] McCloskey continues:

> However, if the battle of laissez faire was to be waged with effectiveness, some more potent weapon than the commerce clause was needed, for, versatile though that instrument was, it was not a universal answer to the individualist's prayers.

Thus, the Fourteenth Amendment was pressed into service.[21] McCloskey sees the beginning of this movement in the "radical construction" of the amendment given by the minority in *Slaughterhouse* (1873).[22] The movement gained momentum when, in *Munn*

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[18] See *Pace v. Alabama*, 106 U.S. 583 (1883).

[19] See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[20] Robert G. McCloskey, *The American Supreme Court*, 5th ed. (Chicago: University of Chicago Press, 2010), 83-84.

[21] Ibid., 85.

[22] Ibid., 81.

v. Illinois (1877), the Court recognized that "[u]nder some circumstances," legislation regulating property might amount to a deprivation of property without due process of law.[23] McCloskey says of the decision: "[T]he Court recognized, back-handedly to be sure but without question, that the due process clause of the Fourteenth Amendment imposed a substantive limit on economic legislation."[24] The Court then made use of substantive (as opposed to procedural) due process to strike down a variety of economic regulations including laws concerning labor unions,[25] working hours,[26] and minimum wages.[27] Thus, the libertarians opened the door to use the Fourteenth Amendment in powerful, centralizing ways. They would soon have the amendment wrested from their grasp by progressives who would turn this power to different purposes.

By the 1930s, the nation was in the midst of the Great Depression, and the Court found itself frequently at odds with President Roosevelt and his New Deal program. Criticism for the Court began to mount.[28] When Roosevelt was reelected in 1936 by an overwhelming margin, the Court began to soften in its opposition. Justice Owen Roberts increasingly voted in the government's favor,[29] and Roosevelt would go on to appoint

[23] *Munn v. Illinois*, 94 U.S. 113, 125 (1877).

[24] McCloskey, *The American Supreme Court*, 86.

[25] See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915).

[26] See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

[27] See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[28] See McCloskey, *The American Supreme Court*, 108-13.

[29] See Lee Epstein et. al., "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" 101 Nw. U. L. Rev. 1483, 1497-98 (2007).

eight justices during his lengthy presidency.[30] The newly composed judiciary would continue the work of applying the Fourteenth Amendment.

The Fourteenth Amendment and the Incorporation Debate

A critical character in the history of Fourteenth Amendment interpretation was Roosevelt's first appointee, Justice Hugo Black. Roosevelt's first opportunity to nominate a Supreme Court Justice came in 1937 following the retirement of Justice Van Devanter. Working with Attorney General Homer Cumming, FDR crafted his criteria for selection: "a thumping New Dealer, easily confirmable and reasonably young, and from the South or the West since neither section was well represented on the Court." Many leading candidates were dismissed based on a determination that they were insufficiently liberal.[31] FDR favored Senator Hugo Black. Black had the virtue of being from the South (AL), yet he was aggressively liberal, unwavering in his support for New Deal legislation.[32] When Black's nomination was announced, the Senate broke with the tradition of confirming its members without reference to a committee. From the beginning, opponents of Black's confirmation raised questions about his bigotry, both his connection to the Ku Klux Klan and his resistance toward anti-lynching legislation while in the Senate. Despite these reservations, senatorial courtesy prevailed, and Black was confirmed 63-16, with 17 Senators not voting.[33]

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[30] "Members of the Supreme Court of the United States," *United States Supreme Court,* available at http://www.supremecourt.gov/about/members_text.aspx.

[31] Roger K. Newman, *Hugo Black: A Biography* (New York: Fordham University Press, 1997), 233-34.

[32] See ibid., 236.

[33] See ibid., 238-42.

Adamson v. California (1947)

A decade into his service on the bench, Black wrote an opinion that he would consider his most important.[34] The case was *Adamson v. California*, and it involved an appeal from Mr. Adamson, who had been convicted by a California jury of murder in the first degree. Adamson did not testify on his own behalf because this would allow the prosecutor to raise his prior convictions during cross-examination as a way to impeach his testimony. However, by not testifying, Adamson permitted the prosecutor to comment on his silence, encouraging the jury to infer guilt. At the time, California was one of the few American jurisdictions that did not prohibit comment about a defendant's silence. Most other states barred such references under constitutional or statutory provisions, bringing them in line with federal practice under the Fifth Amendment, which protects a defendant from being compelled to act as a witness against himself. Adamson urged the Court to hold that under the Fourteenth Amendment, states could not deprive defendants of the protection afforded by the Fifth Amendment.[35]

Justice Reed, writing for a five-person majority, rejected this claim. The Court held that the Bill of Rights, from the beginning, was "for the protection of the individual against the federal government, and its provisions were inapplicable to similar actions done by the states."[36] Moreover, the Court repeated its prior holdings: "The due process clause of the Fourteenth Amendment … does not draw all the rights of the federal Bill of Rights under its protection." In other words, the Court dismissed the claim that the

[34] See ibid., 352.

[35] See *Adamson v. California*, 332 U.S. 46, 47-50; 55 (1947).

[36] Ibid., 51.

Fourteenth Amendment was intended to "incorporate" the first eight amendments against the states. This interpretation, the majority continued, is consistent with "the constitutional doctrine of federalism."[37]

Justice Frankfurter added a concurrence in which he addressed the topic of incorporation more directly. He pointed out that in the seventy years since the Fourteenth Amendment was ratified, forty-three different justices had examined its meaning. Frankfurter continued:

> Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.[38]

Frankfurter expressed shock that certain ideologues would suppose that they knew better than seven decades' worth of justices, including those who were firsthand witnesses of the Fourteenth Amendment's proposal and ratification.[39] More importantly, however, he was concerned with any interpretation that would give "due process no independent function," instead confining it to nothing more than "a summary of the specific provisions of the Bill of Rights." If "due process" was shorthand for the first eight amendments, why does the phrase also appear in the Fifth Amendment? Frankfurter argued that incorporation "would … tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom."[40] It would render "due process" a static

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[37] Ibid., 53.

[38] *Adamson v. California*, 332 U.S. 46, 62 (Frankfurter, J., concurring).

[39] See ibid., 64.

[40] Ibid., 67.

concept, thereby disregarding its historical meaning as a dynamic force. Moreover, as noted in the majority opinion, incorporation would do violence to federalism by stripping states of a considerable degree of power for self-government. Federalism, as discussed in previous chapters, is valued for its ability to increase political participation and democratic stability.

Justice Black dissented in an opinion that he told his biographer was the culmination of "years of research and reflection."[41] Indeed, his review of the Fourteenth Amendment was extensive. Black's interpretation of the historical record led him to conclude that total incorporation of the Bill of Rights was intended by the drafters of the amendment. Moreover, he saw incorporation as a way to restrict judicial power by giving Fourteenth Amendment due process a definite and unchanging meaning.[42] It is a testament to Black's "independent constitutionalism" that he can so confidently pronounce the conclusions of his own research when they stand at odds with the similar research efforts of others.[43]

Justice Harlan on Incorporation

Neither Frankfurter nor Black got their way. The Court did not ultimately accept Frankfurter's argument that the Fourteenth Amendment in no way "incorporated" the Bill of Rights against the states. Similarly, the Court resisted Black's call for total

[41] Newman, *Hugo Black*, 352.

[42] See *Adamson v. California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting).

[43] Bruce Ackerman, "The Common Law Constitution of John Marshall Harlan," 36 N.Y. L. Sch. L. Rev. 5, 8 (1999). Ackerman contrasts the "independent constitutionalism" of Justice Black with the "common law constitutionalism" of Justice Harlan. The most well-known argument against Justice Black's position on incorporation is Charles Fairman's "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949).

incorporation. Instead, the Court charted a strange course known as "selective incorporation," where individual provisions in the Bill of Rights were gradually incorporated against the states on a case-by-case basis. Much of this activity, particularly in the realm of criminal procedure, took place during the Warren Court.[44] Chief Justice Earl Warren took the bench in 1953 and remained until his retirement in 1969. Thus, his tenure on the Court largely overlapped with the second Justice Harlan, who served from 1955 until his retirement in 1971.[45] Despite the fact that both men were appointed by President Eisenhower, Warren and Harlan possessed dramatically different judicial philosophies. In fact, Justice Harlan has been referred to as "the great dissenter" of the Warren court.[46]

Like Black, Harlan was committed to judicial restraint, but he had a different idea of how this goal should be achieved. Critically, Harlan believed judges should fully understand their place within the larger system. Necessary for this understanding is the recognition that the doctrines of federalism and separation of powers "lie at the root of our constitutional system."[47] Harlan's nuanced views on a judge's role are clearly illustrated in his opposition to incorporation.

Harlan clearly respected the Bill of Rights, but he understood them to be connected with a structure of government that emphasized a separation of powers. At the

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[44] See generally Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L. J. 1193 (1992).

[45] "Members of the Supreme Court of the United States," *United States Supreme Court,* available at http://www.supremecourt.gov/about/members_text.aspx.

[46] See generally Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford U Press, 1992).

[47] John M. Harlan, "The Bill of Rights and the Constitution," 50 A.B.A. J. 918, 920 (October 1964).

dedication of the Bill of Rights Room at the U.S. Subtreasury Building in New York City, Justice Harlan said that the Bill of Rights "speaks with such eloquent simplicity and clarity as to defy paraphrasing." After quoting the Bill of Rights in its entirety, Harlan went on to say, "While these amendments symbolize the respect for the individual that is the cornerstone of American political concepts, it would be a grave mistake to regard them as the full measure of the bulwarks of our free society." According to Harlan, more important in preserving liberty than "declarations of individual rights" is the structure of government—"first, the division of governmental authority between the states and the central government; second, the distribution of power within the federal establishment itself."[48] The principles of federalism and separation of powers are absolutely vital.

As for separation of powers, Justice Harlan was acutely aware of both the responsibilities and the limitations of the courts. He criticized the view "that all deficiencies in our society which have failed of correction by other means should find a cure in the courts."[49] He considered it "a compliment to the judiciary" that "some well-meaning people apparently believe that the judicial rather than the political process is more likely to breed better solutions of pressing or thorny problems." Nonetheless, Harlan argued that this was "untrue to the democratic principle." The legislative process

[48] Ibid.

[49] John M. Harlan, "Thoughts at a Dedication: Keeping the Judicial Function in Balance," 49 A.B.A. J. 943 (October 1963); *see also Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting) (Harlan repeated this principle, saying of the apportionment cases: "Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.").

might be slow and inefficient, yet Harlan understood that a transfer of legislative power to the courts would weaken both judicial independence and legislative responsibility.[50]

Harlan understood that incorporation might satisfy those who "see in the Fourteenth Amendment a set of easily applied 'absolutes' which can afford a haven from unsettling doubt."[51] However, he argued, "[O]ur federalism not only tolerates, but encourages, differences between federal and state protection of individual rights."[52] Different approaches are needed for different regions, economies, climates, cultures, histories, etc. For this reason, he called the doctrine of incorporation a "creeping paralysis" that was "infecting the operation of the federal system."[53] Supporters of incorporation have the noble goal of restraining judges,[54] yet their remedy may lead to results as destructive as the disease they fight. While other Justices encouraged a stultifying standardization, Harlan appreciated variety and recognized that "incongruity is at the heart of our federal system."[55] Harlan thought incorporation was a "simple device"

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[50] *See* Harlan, "Thoughts at a Dedication," 49 A.B.A. J. 943, 944 (1963).

[51] *Malloy v. Hogan*, 378 U.S 1, 28 (Harlan, J., dissenting)

[52] Harlan, "Bill of Rights," 50 A.B.A. J. 918, 920 (October 1964).

[53] *Griffin v. California*, 380 U.S. 609, 616 (1965) (Harlan, J., concurring).

[54] *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 150 (1968) (Black, J., concurring) (Black writes, "The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not.").

[55] *Malloy v. Hogan*, 378 U.S 1, 27 (1964) (Harlan, J., dissenting) (Harlan writes, "The Court concludes, almost without discussion, that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified,' ante, p. 1495. About all that the Court offers in explanation of this conclusion is the observation that it would be 'incongruous' if different standards governed the assertion of a privilege to remain silent in state and federal tribunals. Such 'incongruity,' however, is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be. Why should it be thought, as an a priori matter, that limitations on the investigative power of the States are in all respects identical with limitations on the investigative power of the Federal Government?").

that allowed Justices to disregard distinctions between states and the federal government, resulting in a "compelled uniformity."[56]

Incorporation is "simple," yet ineffective, because application of the Bill of Rights against the states can be both over-inclusive and under-inclusive of the demands of the Fourteenth Amendment. With over-inclusive operation, incorporation imposes on states higher burdens than necessary under the Fourteenth Amendment. Harlan recognized that "inclusion of a particular provision in the Bill of Rights might provide historical evidence that the right involved was traditionally regarded as fundamental,"[57] but this does not necessitate automatically transplanting federal case law for the first eight amendments into the state setting.[58] Incorporation involves, not only the application of the Bill of Rights to the states, but also the application of the complex and ever-changing Supreme Court interpretations of those rights. Harlan argued that this course of action could have one of two effects: 1.) "bringing us closer to the monolithic society which our federalism rejects," or 2.) "watering down protections against the Federal Government embodied in the Bill of Rights so as not unduly to restrict the powers of the States."[59] Both possibilities are deeply concerning.

Two cases are sufficient to demonstrate Harlan's position on the over-inclusiveness of incorporation. In *Malloy v. Hogan,* the majority incorporated the Fifth

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[56] Ibid. at 16.

[57] Ibid. at 22; *see also Duncan v. Louisiana*, 391 U.S. 145, 171-72 (1968) (Harlan, J., dissenting) (Harlan writes, "[I]t has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action." He goes on to call this an "accidental overlap.").

[58] See ibid. at 24.

[59] Ibid. at 28.

Amendment's privilege against self-incrimination against the states.[60] The underlying case involved Malloy, who was imprisoned for contempt for refusing to answer questions in a state investigation of crime. Malloy contended imprisonment was improper, arguing that he should not have to answer the questions due to the privilege against self-incrimination.[61] Connecticut's Constitution of 1818 protected against self-incrimination, in terms very similar to the Fifth Amendment of the U. S. Constitution. Moreover, as the state court stated, cases interpreting the Fifth Amendment's privilege have persuasive force in interpreting the state provision.[62] In applying the settled principles defining the privilege against self-incrimination, the Connecticut Supreme Court determined that Malloy was not covered.[63]

The U. S. Supreme Court was unhappy with this result, so the majority reversed the state court for failing to properly apply "the federal standard."[64] Harlan accused the majority of "[p]eremptorily rejecting all of the careful analysis of the Connecticut Court" despite being "unfamiliar with Connecticut law and far removed from the proceedings below."[65] He concluded, "The Court's reference to a federal standard is, to put it bluntly, simply an excuse for the Court to substitute its own superficial assessment of the facts and state law for the careful and better informed conclusions of the state court."[66] That is

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[60] See *Malloy v. Hogan*, 378 U.S at 6 (1964).

[61] See *Malloy v. Hogan*, 150 Conn. 220, 221-23 (1963).

[62] See ibid., 224.

[63] See ibid., 232.

[64] *Malloy v. Hogan*, 378 U.S at 13 (1964).

[65] Ibid. at 31-32 (Harlan, J., dissenting).

[66] Ibid. at 33.

precisely the problem that centralization invites; it replaces the solutions crafted by those most affected with a one-size-fits-all answer that is imposed from above.

Likewise, in *Duncan v. Louisiana*, the majority held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[67] Justice Harlan again critiqued the majority's reductionist approach:

> Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone.[68]

As in *Malloy*, the majority was oversimplifying the issue and not giving due regard to the legal analysis provided by the state court. Harlan could see no reason for "the Court's continuing undiscriminating insistence" on forcing federal interpretations of the Bill of Rights upon the states.[69] He preferred an approach that would "start with the words 'liberty' and 'due process of law' and attempt to define them in a way that accords with American traditions and our system of government."[70] Harlan referenced with approval the common-law approach propounded in *Davidson v. City of New Orleans*. Speaking of the due process clause, the Court stated:

> [T]here is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after

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[67] *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968).

[68] *Duncan*, 391 U.S. 145, 171-72 (1968) (Harlan, J., dissenting).

[69] Ibid. at 172.

[70] Ibid. at 176.

> an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.[71]

Without a doubt, as Harlan readily admitted, such an approach is difficult, "involving a much more discriminating process of adjudication than does 'incorporation.'"[72] However, as a preservative of liberty, a "due recognition of constitutional tolerance for state experimentation and disparity" is preferable to the majority's absolutist approach.[73]

Where Harlan addressed the issue of the over-inclusiveness of incorporation in both *Malloy* and *Duncan*, he addressed its under-inclusiveness most clearly in *Griswold v. Connecticut.* At issue was the constitutionality of a Connecticut law criminalizing the use of birth control, including use by married couples.[74] In his dissent, Justice Black argued in favor of constitutionality, not because he found the law inoffensive, but because he was blinkered by positivism. He was uncomfortable with any power—or any limitation of power—that was not immediately discernable in the written Constitution. Black felt the law in *Griswold* must be permissible because it was "not forbidden by any provision of the Federal Constitution as that Constitution was written."[75] Although the majority reached a different conclusion, they likewise did not find the law invalidated by

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[71] *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1877); see also *Duncan*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

[72] *Duncan*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

[73] Ibid. (To Harlan, the majority had "compromised on the ease of the incorporationist position, without its internal logic." The Court "simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out.'" In the present case, there was no need for the Court to foist a national standard on states for when a jury trial was required. The states have a better sense than the Supreme Court of what is appropriate and possible within their own state.).

[74] See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

[75] Ibid. at 527 (Black, J., dissenting).

the "specific guarantees in the Bill of Rights" but by "penumbras, formed by emanations from those guarantees."[76] The majority was unwilling to be so constrained as Black, but the underlying commitment to positivism remained. Through a feat of mental gymnastics, the Bill of Rights had to be twisted so as to encompass the law in question.

Justice Harlan disapproved of both approaches. While he agreed with the majority's conclusion, implicit in their analysis was the same historically impoverished idea found in Justice Black's dissent—that incorporation should limit the scope of the Fourteenth Amendment's Due Process Clause.[77] However, the inclusion of "due process" in the midst of the Bill of Rights (the Fifth Amendment) is sufficient evidence that it is a discrete concept and not shorthand for "the Bill of Rights."[78]

Harlan thought Black was correct to consider "judicial 'self restraint' … an indispensable ingredient of sound constitutional adjudication," yet he said Black's method was "more hollow than real," "historically unfounded," and "an artificial and largely illusory restriction."[79] Judges can impose their "'personal' interpretations" on constitutional thought, even when supposedly limited to the "'[s]pecific' provisions of the Constitution." Restraint, Harland argued, was better provided

> by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[80]

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[76] *Griswold*, 481 U.S. 479, 484 (1965).

[77] See ibid. at 499-500 (Harlan, J., concurring).

[78] See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[79] *Griswold*, at 501-02.

[80] Ibid. at 501.

Harlan's view of law was inseparable from the history that shaped it, a point he had in common with men like Gierke and Maitland. His pluralism is also seen in his repeated insistence on the importance of federalism and separation of powers. The incorporation cases involve governmental federalism specifically, rather than the broader "societal federalism" of Althusius. Nonetheless, the cases show that Harlan, like the many pluralists before him, opposed efforts of centralization and standardization.

Harlan's reasoning with respect to the law at issue in *Griswold* shows another pluralist element of his thought. Four years before *Griswold* would be argued before the Court, the Connecticut law criminalizing the use of contraceptives was challenged. The Supreme Court ultimately dismissed the suit for lack of standing. Though the law had been on the books since 1879, the Court found no evidence that it had ever been enforced, save a lone prosecution in 1940 that the Court considered a "test case." As a result, the Court found no immediacy of threat posed to the appellants.[81] Harlan dissented from the dismissal and penned a lengthy explanation. Much of the opinion involved a disagreement with the majority's application of the standing doctrine, but he also disagreed with the majority's interpretation of the 1940 "test case." Connecticut brought a lawsuit to prove the constitutionality of the statute and to put others on notice that prosecution was to be expected for violators. Harlan says "the very purpose of the … prosecution was to change defiance into compliance," a purpose that seems to have been realized since at least nine birth control clinics shut down after the case. Thus, Harlan found sufficient immediacy to the threatened harm.[82]

[81] See *Poe v. Ullman*, 367 U.S. 497 (1961).

[82] See *Poe v. Ullman*, 367 U.S. 497, 522ff. (1961) (Harlan, J., dissenting).

The element of pluralism comes in what Harlan called "the core of [his] disagreement" with the Court's decision to dismiss the case. He was profoundly sympathetic to the primary claim put forward by the married couples, namely that they had a "right to enjoy the privacy of their marital relations, free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted." This right is significantly impinged when they might be "forced to render criminal account of their marital privacy [at] the whim of the prosecutor." In this context, Harlan cited with approval both *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925).[83] *Meyer* involved a law that proscribed the instruction of foreign languages, a law passed at the height of anti-German sentiment in World War I.[84] *Pierce* involved a law that required all children to attend public schools.[85] The Court struck down both laws, but, as Harlan pointed out, they did not use some theory of incorporation to do so. Harlan approved of the Court's decision to base their judgment on the parental right to "establish a home and bring up children." States lack a supervisory power that allows them to dictate to parents what their children "must not learn." Similarly, a state cannot "standardize its children by forcing them to accept instruction from public teachers only."[86] Rights do not adhere *only* to individuals. Families have rights. Churches that form schools to instruct children have rights. For Harlan, those rights are to be respected under Due Process even if they lack analogs in the Bill of Rights. One of those rights, he believed, was the privacy of marital relations.

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[83] Ibid., 536 and 543.

[84] See *Meyer v. Nebraska*, 262 U.S. 390 (1923)

[85] See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

[86] *Poe v. Ullman*, 367 U.S. 497, 543-44. (1961) (Harlan, J., dissenting).

Justice Harlan and the Apportionment Cases

The congruity of pluralism and Justice Harlan's jurisprudence is further seen in his opinions in the apportionment cases. Apportionment refers to the process by which representation in a legislative body is distributed. The Supreme Court has decided a number of cases on the issue. In the 1962 case *Baker v. Carr*, the Court made a sudden "break with the past"[87] by "revers[ing] a uniform course of decision established by a dozen cases."[88] The case involved a claim from a group of Tennessee voters who alleged a deprivation of constitutional rights under the Equal Protection Clause.[89] Their claim centered on the fact that Tennessee had failed to reapportion its voting districts since its legislature passed the 1901 Apportionment Act. This failure allegedly resulted in the "debasement" of votes in districts whose populations had swelled relative to other districts.[90] The appellants petitioned the District Court to either reapportion the state or direct the state to hold legislative elections at large.[91] After a lengthy discussion, the majority held:

> (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief, and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes.[92]

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[87] *Baker v. Carr*, 369 U.S. 186, 339-40 (1962) (Harlan, J., dissenting; joined by J. Frankfurter).

[88] Ibid. at 266 (Frankfurter, J., dissenting; joined by J. Harlan).

[89] Ibid. at 187-88 (majority opinion).

[90] Ibid. at 194.

[91] Ibid. at 195.

[92] Ibid. at 197-98.

Confident that the District Court would be able to fashion a reasonable remedy, the Court remanded the case for further proceedings.[93]

Justice Frankfurter argued that the case involved "[a] hypothetical claim resting on abstract assumptions"[94] and excoriated the majority for launching the Court into a "mathematical quagmire"[95] where judgments were more political than judicial. Justice Harlan likewise criticized the majority for encroaching upon state freedom in "so intimate a concern as the structure of its own legislative branch."[96] He would have the complaint dismissed under the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted."[97] The issue concerns a state's right to allocate representation in its own legislature. Harlan says that the Court should first determine "to what extent that right is limited by the Federal Constitution" and whether Tennessee has "run afoul of any such limitation."[98] The complaint considered Tennessee's apportionment to violate Equal Protection, under the theory that votes cast in elections for the state legislature should have equal weight. As Harlan indicated, however, there is a "competing political philosoph[y]" regarding "the function of representative government." This alternative contends "that factors other than bare numbers should be taken into account." Harlan pointed to the U. S. Senate as a prime example. He contended that the Equal Protection Clause did not empower federal courts to reach into

[93] *See* ibid. at 198, 237.

[94] Ibid. at 267 (Frankfurter, J., dissenting; joined by J. Harlan).

[95] Ibid. at 268.

[96] Ibid. at 333 (Harlan, J., dissenting; joined by J. Frankfurter).

[97] Ibid. at 331. Citing Fed. Rules Civ. Proc., Rule 12(b)(6).

[98] Ibid.

states and judge whether their compromises among competing political theories were "desirable or undesirable, wise or unwise."[99] Harlan concluded his dissent saying, "Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication will view the decision with deep concern."[100] With these comments, we see echoes of the themes Harlan sounded in the incorporation cases. The Court's role is not to *make* law and impose it from above. Moreover, the Court ought to respect the diversity that federalism permits. It ought to resist the impulse to impose uniform adherence to its own abstract values.

Despite the dissent's warnings, the Court continued down its path of meddling in the "political thicket" of apportionment.[101] Less than two years after *Baker, Wesberry v. Sanders* came before the Court.[102] The case involved qualified voters in Georgia's Fifth Congressional District who claimed that population disparities among the districts deprived them of an equal vote.[103] Justice Black, writing for the majority, held that "the command of Art. I, § 2 that Representatives be chosen 'by the People of the several States' means that, as nearly as is practicable, one man's vote in a congressional election

[99] Ibid. at 333.

[100] Ibid. at 340.

[101] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

[102] *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[103] See ibid. at 2-3.

is to be worth as much as another's."[104] Thus, the "one man, one vote" rule was announced, here in reference to federal congressional districts.

Within the year, the Court extended the rule to state legislatures in *Reynolds v. Sims*.[105] Justice Brennan, writing for the majority, sarcastically informed the world that "[l]egislators represent people, not trees or acres."[106] The Court repeated its argument from *Wesberry: "*To say that a vote is worth more in one district than in another would … run counter to our fundamental ideas of democratic government"[107]—counter to the *Court's* ideas of democracy, perhaps, though not contrary to the ideas of the states involved in the litigation or the ideas of Congress who did not exercise its supervisory power over state election regulations.[108]

Justice Harlan wrote dissenting opinions in both *Wesberry* and *Reynolds*.[109] In *Wesberry*, Harlan accused the majority of an "artificial construction of Article I," an opinion in which the "talk about 'debasement' and 'dilution' of the vote is a model of circular reasoning."[110] He continued, "[B]y focusing exclusively on numbers . . . the Court deals in abstractions which will be recognized even by the politically

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[104] Ibid. at 7-8; *see also id.* at 27 (Harlan, J. dissenting) (Harlan countered Black's point, saying, "Although many, perhaps most, of them also believed generally—but assuredly not in the precise, formalistic way of the majority of the Court—that, within the States, representation should be based on population, they did not surreptitiously slip their belief into the Constitution in the phrase "by the People," to be discovered 175 years later like a Shakespearian anagram.").

[105] *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

[106] Ibid. at 562.

[107] Ibid. at 563-64; see also *Wesberry v. Sanders*, 378 U.S. 1, 8 (1964).

[108] *See Wesberry v. Sanders*, 376 U.S. 1, 29-30 (1964) (Harlan, J., dissenting).

[109] *See Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting); see also *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

[110] *Wesberry v. Sanders*, 376 U.S. 1, 25 (1964) (Harlan, J., dissenting).

unsophisticated to have little relevance to the realities of political life."[111] This was a truth that the Court, at one time, had recognized. For instance, in a *per curiam* decision in *MacDougall v. Green* (1948), the Court had made the fairly obvious point that "the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations." This same principle is often replicated by the states, who wish to protect "a proper diffusion of political initiative as between [their] thinly populated counties and those having concentrated masses." This is one of those "practicalities of government" ignored by those who "assume that political power is a function exclusively of numbers." In *McDougall*, the Court commented on how odd it would be to announce that this principle violated Equal Protection if practiced by states when it was clearly embedded in the Constitution for the federal government.[112]

Moreover, Harlan pointed out that the Court reached its decision only by viewing constitutional provisions in isolation, ignoring any clause that did not support its position. For instance, the Constitution guarantees every state "at Least one representative."[113] This constitutional requirement forces inequalities in representation. Using figures from the 2010 census, Montana is entitled to one representative with its population of around 994,000. Rhode Island is the first state to pass the threshold for two representatives. With just 60,000 additional people, Rhode Island is entitled to two representatives. Thus, Rhode Island has one representative per 528,000 residents, while Montana has one for

[111] Ibid.

[112] *MacDougall v. Green*, 335 U.S. 281, 283-84 (1948).

[113] U.S. Const., Art. I, sec. 2.

every 994,000 residents.[114] The apportionment is not equal, but it is clearly constitutional. Harlan concludes, "It is whimsical to assert in the face of this guarantee that an absolute principle of 'equal representation in the House for equal numbers of people' is 'solemnly embodied' in Article I."[115] Nonetheless, the majority was intent on enforcing its vision of justice and giving it the stamp of approval under the Constitution.

The majority opinion in *Reynolds* fared no better under Justice Harlan's crushing critique.[116] Harlan accused the majority of focusing on Section 1 of the Fourteenth Amendment to the exclusion of Section 2.[117] Not only was the Court's decision unsupported by the text of the Constitution, it lacked support in the historical practice of the states.[118] "As of 1961," Harlan wrote, "the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of

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[114] "Apportionment Population and Number of Representatives, by State: 2010 Census," *U.S. Census Bureau*, available at https://www.census.gov/population/apportionment/files/Apportionment%20Population%202010.pdf.

[115] *Wesberry v. Sanders*, 376 U.S. 1, 29 (1964) (Harlan, J., dissenting).

[116] *See Reynolds v. Sims*, 377 U.S. 533, 593 (1964) (Harlan, J., dissenting) (Harlan was careful to establish that nothing in *Baker or Wesberry* prevented the position he took in *Reynolds.* Where *Wesberry* "rested on Art. I, § 2, of the Constitution," *Reynolds* was the first time the Court reached "the arguments put forward concerning the Equal Protection Clause.").

[117] Ibid. at 594.

[118] *See* ibid. at 602-608 (Harlan explains that 15 of the 23 'loyal' states who ratified the 14th Amendment prior to 1870 either had "one house of their respective legislatures which wholly disregarded the spread of population" or "had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas." The 'reconstructed' states were forced to ratify the 14th Amendment as the price for reentering the Union. As Harlan contends, "The Constitutions of six of the 10 States contained provisions departing substantially from the method of apportionment now held to be required by the Amendment." He concludes, "It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it. . . . There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which concern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.").

population, and to some extent favored sparsely populated areas by a variety of devices."[119] Justice Harlan proceeded to catalogue the various factors that the majority ruled impermissible for states to consider in apportionment decisions:

> history; economic or other sorts of group interests; area; geographical considerations; a desire to ensure effective representation for sparsely settled areas; availability of access of citizens to their Representatives; theories of bicameralism (except those approved by the Court); occupation; an attempt to balance urban and rural power; [or] the preference of the majority of the voters in the State.[120]

Such considerations had a long history of practice in the states and approval in the courts, reflecting America's practice of political pluralism. However, long-term understandings and practices were to be swept aside because the current majority on the Court lacked the imagination to consider anything but population as a legitimate factor in drawing district lines.

As Harlan contended, the Court's interpretation of the Equal Protection clause depended solely on the "constitutionally frail tautology that 'equal' means 'equal.'"[121] The decision was not justified by theories of textualism, originalism, or precedent. The decision was only justified by the idea that the individual is the basis of society, that individuals are interchangeable "ciphers,"[122] and that abstract theory is preferred over

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[119] Ibid. at 610.

[120] Ibid. at 622-23 (internal citations omitted); *see also Baker v. Carr*, 369 U.S. 186, 339-40 (1962) (Harlan, J., dissenting) (Harlan writes, "By disregarding the wide variety of permissible legislative considerations that may enter into a state electoral apportionment, my Brother CLARK has turned a highly complex process into an elementary arithmetical puzzle.").

[121] *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).

[122] Ibid. at 623-24 (Harlan wrote, "I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that 'legislators represent people, not trees or acres,' ante, p. 1382; that 'citizens, not history or economic interests, cast votes,' ante, p. 1391; that 'people, not land or trees or pastures, vote,' ibid. All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note

experience. Not only did the decision give effect to the atomistic individualism so abhorred by pluralists, it was animated by a conception of law as the command of the sovereign, not the pluralists' view of law as an organic development that springs from the people themselves.

Few would deny that apportionment in some states was problematic. Not only did antiquated districts disadvantage densely populated urban areas, they also adversely affected minority voters.[123] Harlan certainly did not deny this truth. His concern was that the majority's decisions in the apportionment cases struck a decisive blow against federalism and the separation of powers, doctrines he considered essential for the continued vitality of American government. State legislatures made apportionment decisions; those decisions were ratified by Congress who chose not to exercise its supervisory power.[124] Yet, in these political matters of local concern, the Court determined to interject itself on one side of "competing political philosophies."[125]

Harlan argued that because certain individuals were "unable to obtain political redress of their asserted grievances," the Court felt as if it should "stretch to find some

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that people are not ciphers and that legislators can represent their electors only by speaking for their interests-economic, social, political-many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.").

[123] See, e.g., Charles L. Zelden, *Supreme Court and Elections: Into the Political Thicket* (Washington, DC: CQ Press, 2009), 25-37.

[124] *See Wesberry v. Sanders*, 376 U.S. 1, 42-43 (Harlan, J., dissenting) (Harlan reviews legislative history. In 1872, Congress required Representatives to be elected from districts "containing as nearly as practicable an equal number of inhabitants." The provision was carried forward until the apportionment act of 1929 changed the policy."); *see also Wood v. Broom*, 287 U.S. 1, 7 (1932) (Reviewing the legislative history of the 1929 act, the Court held, "It was manifestly the intention of the Congress not to reenact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929. This appears from the terms of the act, and its legislative history shows that the omission was deliberate. The question was up, and considered.").

[125] *Baker v. Carr*, 369 U.S. 186, 333 (1962) (Harlan, J., dissenting; joined by J. Frankfurter).

basis for judicial intervention."[126] The Court's willingness to intervene in this way would only invite more calls for intervention. Indeed, after the Court expressed willingness to venture into the political thicket in *Baker*, it then crafted its "one man, one vote" rule and applied it to congressional districts,[127] state legislatures,[128] and even to all the subdivisions of local government.[129]

Harlan contended that the line of cases beginning with *Baker* had "the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary."[130] The transfer of legislative power to the Courts allowed unelected Justices to substitute their judgment for the decisions made by both state and federal legislatures. This sort of paternalism, Harlan argued, "saps the political process" because "[t]he promise of judicial intervention . . . cannot but encourage popular inertia in efforts for political reform through the political process."[131] Rather than citizens investing time and energy to resolve deep-seated conflicts, there is the thought that factions can secure quicker victory through the courts. This is precisely the danger Tocqueville feared in democracies. He did not expect "tyrants, but rather schoolmasters."[132] He envisioned the

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[126] Ibid. at 339.

[127] See *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[128] See *Reynolds v. Sims*, 377 U.S. 533 (1964).

[129] See *Avery v. Midland County*, 390 U.S. 474, 484 (1968); the Court cited a "preliminary calculation by the Bureau of the Census for 1967" that estimated there were "81,304 units of government in the United States."

[130] *Reynolds v. Sims*, 377 U.S. 533, 589.

[131] *Wesberry v. Sanders*, 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

[132] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Barbara Winthrop (Chicago: U. of Chicago Press, 2000), 662. Perhaps it is in this way that progressives reconcile their seemingly contradictory impulses toward both populism and elitism. They take comfort in the thought that the undifferentiated masses are more easily manipulated by technocratic demagogues.

government as an "immense tutelary power" capable even of freeing people from "the trouble of thinking and the pain of living."[133] The sovereign thus "enervates . . . and finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd."[134] Harlan raised his voice to ask whether this was a price that America was truly willing to pay.[135]

Conclusion

America began with a strong practice of pluralism. The federal government was limited by a written constitution. States maintained considerable autonomy to act in their own interests. Administration was highly decentralized, bringing government within reach of average citizens, a fact that distinguished America from other nations. Participation in local affairs increased citizens' attachment to their respective communities and to one another, as they were continually reminded of their mutual dependence and the need for strong associations. The various associations—family, church, community, etc.—were respected for the unique roles they filled in society.

This societal structure found support in a conception of law that did not see law as simply the command of some far-away sovereign. Instead, the view found law emanating from the practices of the people and finding confirmation in judicial decisions that settled concrete cases and controversies. Law, from this perspective, was not so

[133] Ibid. at 663.

[134] Ibid.

[135] See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting); Harlan wrote, "Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable."

much about force and authority. Instead, it emphasized both social consensus and continuity.

America has gradually drifted from these commitments. Some developments have not been consistent with democracy. The ratification of the Fourteenth Amendment was a watershed moment in our history, yet is was forced from above by a radical minority. More recently, the Court has used the amendment to pull certain questions out of the democratic process, causing abrupt breaks with the past through judicial fiat. Other movements away from pluralism *have* been consistent with democracy. The modern welfare state often pulls responsibility away from traditional institutions and places it in the hands of the federal government and its innumerable agencies. The creation and growth of the welfare state has been controversial, yet it is often been supported by a majority of voters.

Now, despite our pretension of having a "government of the people, by the people, and for the people," the "people" have a profound sense of dissatisfaction with their government. Voters suspect that lawmakers do not truly stand for their interests, in part because Washington seems increasingly out of touch with the average citizen. There is a growing perception that Big Business captures the loyalty of politicians through legalized bribery in the form of campaign contributions. Individuals are left feeling powerless in a system of government that swells ever larger. Some get angry; others grow more and more apathetic. Partisan rancor, among both politicians and voters, is most unpleasant. The fight for power is all the more significant because so much power is at stake. The stakes draw attention to the activity of the federal government, where the number and complexity of issues lie beyond the comprehension of most citizens.

Justice Harlan's approach to the law might provide some model for us to build upon. We live in a time when judicial appointments are political showdowns. Nominees are judged more for the decisions they are expected to make than the methods and values they will use to reach them. The Court has set itself up as the only authority empowered to interpret the Constitution, and it bristles at any who dare question this assumption.

Justice Harlan, on the other hand, is an example of judicial humility. His decisions show a moderation that resists both grand theories and simplistic constructions. At a time when the Court ventured boldly into uncharted waters, Harlan displayed a deep respect for the lessons of history. While the Court insisted on uniform standards imposed by a centralized power, Harlan took pleasure in diversity. He understood that diversity was at times messy, but it was the necessary result of political freedom. That freedom, he knew, was facilitated by permitting the people to work through issues on their own. Thus, when the Court showed impatience with democratic change, Harlan resisted the temptation to move matters along more quickly by legislating from the bench. He appreciated the diverse roles carried out by the associations that make up political life, so he struggled against efforts to strip them of their functional autonomy.

This dissertation does not argue that a return to some earlier time is possible. It does not even argue that it is desirable. Instead, it contends that pluralism offers a powerful alternative to our current power structure. It provides a truer reflection of how society actually works. Individuals find themselves as part of a vast array of overlapping groups with a wide variety of purposes. By protecting the functional autonomy of these groups, pluralism brings authority closer to citizens, encouraging their greater investment in self-governance.

How might the values of pluralism be revived? First of all, we need a better understanding of what pluralism is and how we lost it. Providing such an understanding has been a primary goal of this dissertation. Beyond this, we must recognize that the theory itself cautions us to resist the temptation to design reforms. Reforms should evolve organically. This relates to the second major goal of this dissertation, which is to demonstrate the connection between a pluralist society and the understanding of law as a historically unfolding emanation from the people. Understanding law in this way can create the space needed to bring the virtues of pluralism back into our politics.

BIBLIOGRAPHY

Abbot, Philip. "The Three Families of Thomas Hobbes." *The Review of Politics*, 43:2 (Apr., 1981): 242-58.

Ackerman, Bruce. "The Common Law Constitution of John Marshall Harlan," *New York Law School Law Review*, Vol. 36 (1991), 5-32.

———. *We The People: Transformations*, Vol II. Cambridge, MA: Belknap Press, 1998.

Allen, W. B. & Gordon Lloyd. "Interpretive Essay," in *The Essential Antifederalist*. Lanham, MD: Rowman & Littlefield, 2002.

Amar, Akhil Reed. *America's Constitution: A Biography*. New York: Random House, 2005.

———. "The Bill of Rights and the Fourteenth Amendment," *Yale Law Journal*, Vol. 101 (1992), 1193-1284.

———. "Substance and Method in the Year 2000," *Pepperdine Law Review*, Vol. 28 (2001), 601-640.

Apple, James G. & Robert P. Deyling. "A Primer on the Civil-Law System." *Federal Judicial Center*, 1995.

Aristotle, *The Politics*, translated by Carnes Lord. Chicago: University of Chicago, 1984.

Austin, John. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, MA: Belknap Press, 1992.

Barker, Ernest. "Translator's Introduction," in Gierke, *Natural Law and the Theory of Society*. Translated by Ernest Barker. Cambridge: Cambridge University Press, 1934.

Barnett, Randy E. "Reconceiving the Ninth Amendment," *Cornell Law Review*, Vol. 74 (Nov. 1988), 1-42.

———. "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism." *University of Cincinnati Law Review*, Vol. 75 (2006), 7-24.

Ben-Yishai, Ayelet. *Common Precedents: The Presentness of the Past in Victorian Law and Fiction*. Oxford: Oxford University Press, 2013.

Benoist, Alain de. "The First Federalist: Johannes Althusius," trans. by Julia Kostova, *Krisis*, 22 (March 1999): 2-34.

Bentham, Jeremy. *A Fragment on Government with an Introduction to the Principles of Morals and Legislation*. Edited by Wilfred Harrison. Oxford: Basil Blackwell, 1948.

———. *Of Laws in General*. Edited by H.L.A. Hart. London: Athlone Press, 1970.

———. *The Works of Jeremy Bentham*. Edited by John Bowring (Edinburgh: William Tait, 1838-1843). 11 vols.

Bentley, Arthur F. *The Process of Government*. Chicago: University of Chicago Press, 1908.

Biographical Directory of the United States Congress, United States Office of Art and Archives. http://bioguide.congress.gov/biosearch/biosearch.asp

Black, Antony. *Guild And State: European Political Thought from the Twelfth Century to the Present*. New Brunswick, NJ: Transaction Publishers, 2003.

Bodin, Jean. *On Sovereignty*. Translated and edited by Julian H. Franklin. Cambridge: Cambridge University Press, 1992.

Boyd, Richard. *Uncivil Society: The Perils of Pluralism and the Making of Modern Liberalism*. Lanham, MD: Lexington Books, 2004.

Boyle, James. "Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism." *University of Pennsylvania Law Review*, 135:2 (Jan., 1987): 383-426.

Brady, Thomas, Euan Cameron, and Henry Cohn. "The Polity of Religion: The Peace of Augsburg 1555." *German History*, 24:1 (2006): 85-105.

Bryant, Douglas H., "Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment," *Alabama Law Review*, Vol. 53 (2001): 555-81.

Burke, Edmund. *Reflections on the Revolution in France*. New York: Oxford U Press, 1993.

Calabresi, Steven G. "Text vs. Precedent in Constitutional Law," *Harvard Journal of Law and Public Policy*, Vol. 31 (2008), 947-960.

Call, Joseph L., "The Fourteenth Amendment and Its Skeptical Background," *Baylor Law Review,* Vol. 13 (1961), 1-20.

Caplan, Russell L. "The History and Meaning of the Ninth Amendment," *Virginia Law Review,* Vol. 69 (Mar. 1983), 223-268.

Carney, Frederick S. "Translator's Introduction," included in *Politica.* Edited and translated by Frederick S. Carney. Indianapolis: Liberty Fund, 1995.

Chapman, Richard Allen. "*Leviathan Writ Small: Thomas Hobbes on the Family*." *American Political Science Review,* 69:1 (Mar., 1975): 76-90.

Chodes, John J. *Destroying the Republic: Jabez Curry and the Re-education of the Old South* (New York: Algora Publishing, 2005).

Coffey, Walter. *The Reconstruction Years*. Bloomington, IN: AuthorHouse, 2014.

Colby, Thomas B. "Originalism and the Ratification of the Fourteenth Amendment." 107 *Northwestern University Law Review,* Vol. 107 (2012-2013), 1627-1688.

Connolly, William E. *Pluralism*. Durham, NC: Duke University Press, 2005.

The Constitution of the United States of America: Analysis and Interpretation, Centennial Edition, Congressional Research Service. (Washington: U.S. Government Printing Office, 2013). http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf.

Coulter, Ann. *Adios America: The Left's Plan to Turn Our Country into a Third World Hellhole*. Washington, DC: Regnery Publishing, 2015.

Coyle, Sean. "Thomas Hobbes and the Intellectual Origins of Legal Positivism," *Canadian Journal of Law and Jurisprudence,* Vol. 16 (2003): 243-70.

Cropsey, Joseph. "Introduction," in Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*. Edited by Joseph Cropsey. Chicago: University of Chicago Press, 1971.

Dahl, Robert A. *Who Governs?* New Haven: Yale University Press, 1961.

Dewey, Davis R. "The Second United States Bank," *National Monetary Commission*. Washington, D.C.: Government Printing Office, 1910.

Dicey, A.V. "Combination Laws as Illustrating the relation between Law and Opinion in England during the Nineteenth Century." *Harvard Law Review,* Vol. 17 (1903-04), 511-532.

Dooyeweerd, Herman. *In the Twilight of Western Thought*. Grand Rapids, MI: Paideia Press, 2012.

———. *Roots of Western Culture: Pagan, Secular, and Christian Options*, translated by John Kraay. Grand Rapids, MI: Paideia Press, 2012.

Dow, David R. "Popular Sovereignty and Constitutional Amendment," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Sanford Levinson, ed. Princeton: Princeton University Press, 1995. 117-144.

Dreyer, Michael. "German Roots of the Theory of Pluralism," *Constitutional Political Economy,* Vol. 4, No. 1 (1993).

Dunning, William A. "The Monarchomachs: Theories of Popular Sovereignty in the Sixteenth Century," *Political Science Quarterly*, 19:2 (June 1904): 277-302.

Dyzenhaus, David & Thomas Poole, editors. *Hobbes and the Law*. Cambridge: Cambridge University Press, 2012.

Edwards, Michael. *Civil Society*, 3d Ed. Cambridge: Polity Press, 2014.

———. (editor) *The Oxford Handbook on Civil Society*. Oxford: Oxford University Press, 2011.

Eisenberg, Avigail. *Reconstructing Political Pluralism*. Albany, NY: State University of New York Press, 1995.

Elazar, Daniel J. "Althusius' Grand Design for a Federal Commonwealth," included in *Politica,* edited and translated by Frederick S. Carney. Indianapolis: Liberty Fund, 1995.

———. "Federalism," *International Encyclopedia of the Social Science. New York: McMillan, 1968.* 356–361.

Elshtain, Jean Bethke. "A Call to Civil Society," *Society*, Vol. 36, No. 5 (July/August 1999): 11-19.

———. *Democracy on Trial*. New York: Basic Books, 1995.

Endo, Ken. "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors,*"* *The Hokkaido Law Review* 44:6 (1994): 553-652.

Epps, Garrett. "Constitutional Myth #8: The 14th Amendment Doesn't Exist." *The Atlantic* (July 13, 2011).

Epstein, Lee, et. al., "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review*, Vol. 101 (2007), 1483-1542.

Epstein, Richard. *How Progressives Rewrote the Constitution*. Washington, DC: The Cato Institute, 2006.

Fairman, Charles. "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review*, Vol. 2 (1949), 5-139.

Fallon, Joseph E. "Power, Legitimacy, and the 14th Amendment," *Chronicles Magazine* (2002).

Farber, Daniel A. *Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*. New York: Basic Books, 2007.

Farber, Daniel A. & Suzanna Sherry. *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*. Chicago: University of Chicago Press, 2002.

Fernandez, Ferdinand F., "The Constitutionality of the Fourteenth Amendment," *Southern California Law Review*, Vol. 39 (1965), 378-407

Figgis, John Neville. *Churches in the Modern State*. New York: Longman's, Green, and Co., 1913.

———. *The Divine Right of Kings*. 2d Ed. Cambridge: Cambridge University Press, 1914.

Flathman, Richard E. *Pluralism and Liberal Democracy*. Baltimore: Johns Hopkins University Press, 2005.

Foskett, Ken. *Judging Thomas: The Life and Times of Clarence Thomas*. New York: William Morrow, 2004.

Franklin, Julian H. "Introduction," in *Bodin: On Sovereignty*. Edited and translated by Julian H. Franklin. Cambridge: Cambridge University Press, 1992.

Friedrich, Carl Joachim. "Introduction," in Johannes Althusius, *Politica Methodice Digesta*. Cambridge, MA: Harvard University Press, 1932.

Gelderen, Martin van. "A Political Theory of the Dutch Revolt and the *Vindiciae contra Tyrannos*." *Il Pensiero Politic*o, 19:2. (May 1, 1986): 163-181.

Gierke, Otto von. *Community in Historical Perspective*. Translated by Anthony Black. Cambridge: Cambridge University Press, 1990.

———. *The Development of Political Theory*. Translated by Bernard Freyd. New York: W. W. Norton & Co., 1939.

———. *Natural Law and the Theory of Society*. Translated by Ernest Barker. Cambridge: Cambridge University Press, 1934.

———. *Political Theories of the Middle Age.* Translated by Frederic William Maitland. Cambridge: University of Cambridge Press, 1900.

Grimm, Dieter. *Sovereignty: The Origin and Future of a Political and Legal Concept*. Translated by Belinda Cooper. New York: Columbia University Press, 2015.

Gunnell, John G. "The Genealogy of American Pluralism: From Madison to Behavioralism." *International Political Science Review*, 17:3 (Jul., 1996): 253-65.

Gutman, Amy. "Communitarian Critics of Liberalism," *Philosophy and Public Affairs* 14 (1985): 308-21.

Hale, Sir Matthew. *The History of the Common Law of England*, 6th ed., Charles Runnington. London: Henry Butterworth, 1820.

———. "Preface to Rolle's Abridgment." [1668], reprinted in *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England*, vol. I. (London: E. and R. Brooke, 1791): 263-82.

———. "Reflections by the Lrd. Chiefe Justice Hale on Mr Hobbes His Dialogue of the Law," in Sir William Holdsworth, *A History of English Law*, vol. V, 3rd ed. (London: Methuen & Co., 1924): 500-13.

Hamilton, Alexander, John Jay, & James Madison. *The Federalist Papers*. Edited by Clinton Rossiter. New York: Penguin, 2003.

Harlan, John M. "The Bill of Rights and the Constitution," *American Bar Association Journal*, Vol. 50 (October 1964), 918-920.

———. "Thoughts at a Dedication: Keeping the Judicial Function in Balance," *American Bar Association Journal*, Vol. 49 (October 1963), 943-945.

Haworth, Peter. "The Prudent Case for Robust Federalism and Limited Subsidiarity," *Nomocracy in Politics* (October 31, 2013), http://nomocracyinpolitics.com/2013/10/31/the-prudent-case-for-robust-federalism-and-limited-subsidiarity/.

Herring, Pendelton. *Group Representation Before Congress*. New York: Russel and Russel, 1967 [1929].

Hirst, Paul Q. "Associational Democracy," in *Prospects for Democracy: North, South, East, West*. Edited by David Held. Cambridge: Polity Press, 1993.

———. "Retrieving Pluralism," in *Social Theory and Social Criticism*. Edited by W Outhwaite and M. Mulkay. Oxford: Basil Blackwell, 1987.

Hirst, Paul & Grahame Thompson. *Globalization in Question*. Cambridge: Polity Press, 1996.

Hobbes, Thomas. *A Dialogue between a Philosopher and a Student of the Common Laws of England*. Edited by Joseph Cropsey. Chicago: University of Chicago Press, 1971.

———. *Leviathan*. Edited by Richard Tuck. Cambridge: Cambridge University Press, 1997.

Holdsworth, John Thom. "The First Bank of the United States." *National Monetary Commission*. Washington, D.C.: Government Printing Office, 1910.

Holmes, Oliver Wendell, Jr. *The Common Law*. Boston: Little, Brown, and Co., 1881.

———. "The Path of the Law," *Harvard Law Review*. Vol. 10 (1897), 457-478.

Holt, Mack P. *The French Wars of Religion: 1562-1629*. Second edition. New York: Cambridge University Press, 2005.

Hsaio, Kung Chuan. *Political Pluralism*. New York: Harcourt, Brace & Co, 1927.

Hueglin, Thomas O. "Althusian Federalism for a Post-Westphalian World, in *The Challenge of Cultural Pluralism*, edited by Stephen Brooks (Westport, CT: Praeger Publishers, 2002): 105-120.

-———. "Althusius, Federalism, and the Notion of the State," *Il Pensiero Politico*, 13.2 (January 1, 1980): 225-32.

———. "Bottom-up Federalism: The Early Modern Contribution to Local Governance in a Globalizing World," working paper IV-09, The Globalization & Governance Project, Hokkaido University (Dec. 7-8, 2001).

———. *Early Modern Concepts for a Late Modern World: Althusius on Federalism and Community*. Waterloo, Ontario: Wildred Laurier University Press, 1999.

———. “Johannes Althusius: Medieval Constitutionalist or Modern Federalist?” *Publius*, Vol. 9, No. 4 (October 1979): 9-41.

Hueglin, Thomas O. & Alan Fenna, *Comparative Federalism: A Systematic Inquiry*. Peterborough, Ontario: Broadview Press, 2006.

Isaac, Jeffrey. *The Poverty of Progressivism: The Future of American Democracy in a Time of Liberal Decline*. Lanham, MD: Rowman & Littlefield, 2003.

James, Joseph B. *The Ratification of the Fourteenth Amendment.* Macon, GA: Mercer University Press, 1984.

James, Max H. “The Polarity of Individualism and Conformity: A Dynamic Dream of Freedom, Examined in *Looking Backward*,” *Christianity & Literature*. Vol. 35, No. 1 (Fall 1985): 17-59.

Johnson, Andrew. *Papers of Andrew Johnson*. The American Presidency Project at the University of California Santa Barbara. John Wooley and Gerhard Peters, eds. http://www.presidency.ucsb.edu/andrew_johnson.php.

———. “The Constitutionality and Rightfulness of Secession” (Dec. 18-19, 1860). Hathi Trust Digital Library. http://babel.hathitrust.org/cgi/pt?id=mdp.39015035903064;view=1up;seq=1.

Kendrick, Benjamin Burks. The *Journal of the Committee of Fifteen on Reconstruction: 39th Congress* (1865-67). New York: Columbia University, 1914.

Kuyper, Abraham. *Guidance for Christian Engagement in Government: A Translation of Abraham Kuyper’s* Our Program, translated and edited by Harry Van Dyke. Grand Rapids, MI: Christian’s Library Press, 2013.

———. *Lectures on Calvinism*. Peabody, MA: Hendrickson, 2008.

Laborde, Cécile. *Pluralist Thought and the State in Britain and France, 1900-25*. New York: St. Martin’s Press, 2000.

Lash, Kurt T. “The Lost Original Meaning of the Ninth Amendment.” *Texas Law Review*, Vol. 83 (Dec. 2004), 331-430.

———. “The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment,” *Georgetown Law Journal*, Vol. 99 (2011), 329-424.

Laski, Harold J. “Historical Introduction,” in *A Defense of Liberty Against Tyrants: A Translation of the Vindiciae contra Tyrannos by Junius Brutus,* edited by H. J. Languet (New York: Lenox Hill, 1972): 1-60.

———. “Law and the State.”*Economica*, No. 27 (Nov., 1929), 267-95.

———. “The Personality of Associations.” *Harvard Law Review*, 29:4 (Feb., 1916): 404-26.

———. “The Pluralistic State,” *The Philosophical Review*, 28:6 (Nov., 1919): 562-75.

———. “Sovereignty and Centralization.” *The New Republic* (Dec. 16, 1916): 176-78.

Levinson, Sanford. “Introduction,” in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Sanford Levinson, ed. Princeton: Princeton University Press, 1995. 3-12.

———. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Change It)*. Oxford, Oxford University Press, 2006.

———. “Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Change It),” *Bulletin of the American Academy* (Winter 2007): 31-38.

Lijphart, Arend. *Democracy of Plural Societies: A Comparative Exploration*. New Haven: Yale University Press, 1977.

———. *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*. Berkeley: University of California Press, 1968.

Lincoln, Abraham. *Papers of Abraham Lincoln*. The American Presidency Project. John Wooley and Gerhard Peters, eds. http://www.presidency.ucsb.edu/abraham_ lincoln.php.

———. “Resolution Submitting the Thirteenth Amendment to the States.” (Feb. 1, 1865). http://teaching americanhistory.org/library/document/resolution-submitting-the-thirteenth-amendment-to-the-states/.

Lindblom, Charles E. *The Intelligence of Democracy*. New York: Free Press, 1965.

Lipset, Seymour Martin. *Political Man*. Garden City, NY: Doubleday, 1963.

Lobban, Michael. “Thomas Hobbes and the Common Law,” in *Hobbes and the Law.* Edited by David Dyzenhaus & Thomas Poole. Cambridge: Cambridge University Press, 2012.

Lowi, Theodore. *The End of Liberalism*. New York: W. W. Norton, 1969.

Madison, James. Ed. *Notes of Debates in the Federal Convention of 1787*. Bicentennial Edition. New York: Norton, 1987.

Magid, Henry Meyer. *English Political Pluralism: The Problem of Freedom and Organization*. New York: Columbia University Press, 1941.

Maitland, Frederic William. "Introduction," in *Political Theories of the Middle Age*. Translated by F. W. Maitland. Cambridge: University of Cambridge Press, 1900.

———. *State, Trust and Corporation*. Edited by David Runciman and Magnus Ryan. Cambridge: Cambridge University Press, 2003.

Massey, Calvin R. "The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law." 1990 Wis. L. Rev. 1229 (1990).

McClay, Wilfred. *The Masterless: Self and Society in Modern America*. Chapel Hill, NC: University of North Carolina Press, 1994.

McCloskey, Robert G. *The American Supreme Court*, 5th ed. Chicago: University of Chicago Press, 2010.

McClure, Kirstie. "On the Subject of Rights: Pluralism, Plurality, and Political Identity," in *Dimensions of Radical Democracy: Pluralism, Citizenship, and Democracy*. Edited by Chantal Mouffe. London: Verso, 1992.

McConnell, Michael W. "Ways to Think about Unenumerated Rights," *University of Illinois Law Review*, Vol. 2013 (2013), 1985-1998.

McDonald, Forrest. "Was the Fourteenth Amendment Constitutionally Adopted?" *Georgia Journal of Southern Legal History*, Vol. 1 (1991). 1-20.

McElwee, Pinckney G., "The 14th Amendment to the Constitution of the United States and the Threat that it Poses to Our Democratic Government," *South Carolina Law Quarterly*, Vol. 11 (1958), 484-519.

McFarland, Andrew. "Interest Group Theory," in *The Oxford Handbook of American Political Parties and Interest Groups*. Edited by L. Sandy Maisel, Jeffrey M. Berry, and George C. Edwards III. Oxford: University of Oxford Press, 2010.

Mills, C. Wright. *The Power Elite*. New York: Oxford University Press, 1956.

Mitchell, Wesley C. "Bentham's Felicific Calculus." *Political Science Quarterly*, 33:2 (Jun., 1918): 161-183.

Miyakawa, Scott T. *Protestants and Pioneers: Individualism and Conformity on the American Frontier*. Chicago: University of Chicago Press, 1964.

Moreno, Paul D. *The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism*. New York: Cambridge University Press, 2013.

Morton, Joseph C. *Shapers of the Great Debate at the Constitutional Convention of 1787*. Westport, CT: Greenwood Press, 2006.

Murphy, Mark C. "Was Hobbes a Legal Positivist?" *Ethics*, 104:4 (July 1995): 846-73.

Nelson, William. "The Impasse in Scholarship," in *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*. Cambridge, MA: Harvard University Press, 1988.

Newman, Roger K. *Hugo Black: A Biography*. New York: Fordham University Press, 1997.

Nicholls, David. *The Pluralist State: The Political Ideas of J. N. Figgis and His Contemporaries*. New York: St. Martin's Press, 1994.

———. *Three Varieties of Pluralism*. New York: St. Martin's Press, 1974.

Nisbet, Robert. *Conservatism: Dream and Reality*. New Brunswick, NJ: Transaction Publishers, 2002.

———. *Prejudices: A Philosophical Dictionary*. Cambridge, MA: Harvard University Press, 1982.

———. *The Present Age*. New York: Harper & Row, 1988.

———. *The Quest for Community*. New York: Oxford University Press, 1986.

———. *The Social Philosophers: Community and Conflict in Western Thought*. New York: Thomas Y. Crowell Co., 1973.

O'Sullivan, Luke. *Oakeshott on History*. Exeter, UK: Imprint Academic, 2003.

Oakeshott, Michael. *Hobbes on Civil Association*. Indianapolis: Liberty Fund, 1975.

———. *Rationalism in Politics*. Indianapolis: Liberty Fund, 1991.

Ossewaarde, M. R. R. "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *The Monist*, Vol. 90, No. 1, Sovereignty (January 2007): 106-25.

Ostrowski, James. *Progressivism: A Primer on the Idea Destroying America*. New York: Cazenovia Books, 2014.

Overeem, Patrick. "Johannes Althusius on Public Administration," *Administrative Theory & Praxis*, 36:1 (March 2014): 31-50.

Pocock, J. G. A. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Princeton: Princeton University Press, 1975.

Posner, Richard A. *Law, Pragmatism, and Democracy*. Cambridge, MA: Harvard University Press, 2003.

———. *Overcoming Law*. Cambridge, MA: Harvard University Press, 1995.

Postema, Gerald J. "Some Roots of Our Notion of Precedent." in *Precedent in Law*. Edited by Laurence Goldstein. New York: Oxford University Press, 1987. 9-33.

Prinsterer, Guillaume Groen van. *Unbelief and Revolution: A Series of Lectures in History*. Amsterdam: Groen van Prinsterer Fund, 1973.

Putnam, Robert D., et al. *Better Together: Restoring the American Community*. New York: Simon & Schuster, 2004.

———. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, 2000.

The Reports of the Committees of the House of Representatives: Made During the Thirty-Ninth Congress, 1865-66. 3 Vols. (Washington, DC: Government Printing Office, 1866).

Riley, Patrick. "Three 17th Century German Theorists of Federalism: Althusius, Hugo, and Leibniz," *Publius*, Vol. 6, No. 3 (Summer 1976): 7-41.

Rhodes, James Ford. *History of the United States: From the Compromise of 1850 to the Final Restoration of Home Rule at the South in 1877*, Vol. 5 (1864-66) (New York: The Macmillan Company, 1906).

Rogers, James E. Thorold. *The Story of Holland*. New York: G. P. Putnam's Sons, 1889.

Rosenblum, Nancy. *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought*. Cambridge, MA: Harvard University Press, 1987.

———. "Pluralism and Self-Defense," in *Liberalism and the Moral Life*. Cambridge, MA: Harvard University Press, 1989.

Rossiter, Clinton. *1787: The Grand Convention*. New York: W. W. Norton & Company, 1987.

Rowen, Herbert H., ed. *The Low Countries in Early Modern Times: A Documentary History*. New York: Walker & Co., 1972.

Runciman, David. *Pluralism and the Personality of the State*. Cambridge: Cambridge University Press, 1997.

Runciman, David and Magnus Ryan. "Editors' Introduction," in F. W. Maitland, *State, Trust, and Corporation*. Cambridge: Cambridge University Press, 2003.

Sanders, Chase J. "Ninth Life: An Interpretive Theory of the Ninth Amendment." *Indiana Law Journal*, Vol. 69 (Summer 1994), 759-848.

Scalia, Antonin. *A Matter of Interpretation; Federal Courts and the Law*. Princeton: Princeton University Press, 1997.

———. "Originalism: The Lesser Evil." *University of Cincinnati Law R*eview, Vol. 57 (1988-89), 849-865.

Schattschneider, E. E. *The Semisovereign People*. New York: Holt, Rinehart, Winston, 1960.

Schochet, Gordon J. "Thomas Hobbes on the Family and the State of Nature." *Political Science Quarterly*. 82:3 (Sep., 1967): 427-445.

Seidman, Louis Michael. "Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism." *California Law Review*, Vol. 98 (Dec. 2010), 2129-2159.

Seligman, Adam B. *The Idea of Civil Society*. Princeton: Princeton University Press, 1992.

Senior, Jennifer. "In Conversation: Antonin Scalia." *New York Magazine* (Oct. 6, 2013).

Sheehan, Colleen. "James Madison: Father of the Constitution," in *Makers of American Political Thought* (April 8, 2013), available at http://www.heritage.org/research/reports/2013/04/james-madison-father-of-the-constitution.

Skillen, James W. "From Covenant of Grace to Tolerant Public Pluralism: The Dutch Calvinist Contribution," in *The Covenant Connection: From Federal Theology to Modern Federalism,* edited by Daniel Elazar and John Kinkaid. Lanham, MD: Lexington Books, 2000, 71-100.

———. "The Political Theory of Johannes Althusius." *Philosopha Reformata*. Vol. 39 (1964): 170-90.

———. *Recharging the American Experiment: Principled Pluralism for Genuine Civic Community*. Grand Rapids, MI: Baker Publishing Group, 1994.

Skillen, James W. & Rockne M. McCarthy, eds., *Political Order and the Plural Structure of Society*. Atlanta: Scholars Press, 1991.

Skocpol, Theda. *Diminished Democracy: From Membership to Management in American Civic Life*. Norman, OK: University of Oklahoma Press, 2003.

Smith, Melancton. "Address by a Plebian" (New York, 1788), in *The Essential Antifederalist*. Edited by W. B. Allen and Gordon Lloyd. Lanham, MD: Rowman & Littlefield, 2002.

Smither, James R. "The St. Bartholomew's Day Massacre and Images of Kingship in France: 1572-1574." *The Sixteenth Century Journal*, 22:1. (Spring, 1991): 27-46.

Stanton, E.M. "Assassination of the President," *Evening Star* (Washington, D.C.). April 15, 1865. *Chronicling America: Historic American Newspapers*. Lib. of Congress, available at http://chroniclingamerica. loc.gov/lccn/sn83045462/1865-04-15/ed-1/seq-1/.

Stone, Brad Lowell. "Introduction," in Robert Nisbet, *Conservatism: Dream and Reality*. New Brunswick, NJ: Transaction Publishers, 2002.

Stoner, James R. Jr. *Common Law & Liberal Theory: Coke, Hobbes & the Origins of American Constitutionalism*. Lawrence, KS: University of Kansas Press, 1992.

———. *Common Law Liberty: Rethinking American Constitutionalism*. Lawrence, KS: University of Kansas Press, 2003.

Story, Joseph. "Codification of the Common Law," in William S. Story, ed., *The Miscellaneous Writings of Joseph Story*. Boston: Little, Brown, and Co., 1852.

Strauss, David A. "Common Law Constitutional Interpretation," *University of Chicago Law Review*, Vol. 63 (1996), 877-935.

———. "The Common Law Genius of the Warren Court," *William and Mary Law Review*, Vol. 49 (2007), 845-79.

———. *The Living Constitution*. Oxford: Oxford University Press, 2010.

Sumner, Charles. *The Works of Charles Sumner*. 15 Vols. (Boston: Lee and Shepard, 1874).

Suthon, Walter J. Jr., "The Dubious Origin of the Fourteenth Amendment," *Tulane Law Review*, Vol. 28 (1953), 22-44.

Taylor, Charles. “Atomism,” in *Philosophical Papers: Vol. 2, Philosophy and the Human Science* (New York: Cambridge University Press, 1985).

———. “Cross Purposes: The Liberal-Communitarian Debate,” in *Liberalism and the Moral Life*, ed. Nancy Rosenblum. Cambridge, MA: Harvard University Press, 1989.

Tocqueville, Alexis de. *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop. Chicago: U. of Chicago Press, 2000.

Tönnies, Ferdinand. *Community and Civil Society*. Edited by Jose Harris. Cambridge: Cambridge University Press, 2001.

Tribe, Laurence H. “Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,” *Harvard Law Review*, Vol. 108 (1994-95), 1221-1303.

Truman, David. *The Governmental Process: Political Interests and Public Opinion*. New York: Alfred A. Knopf, 1951.

Tuck, Richard. “Introduction,” in Thomas Hobbes, *Leviathan*. Edited by Richard Tuck. Cambridge: Cambridge University Press, 1997.

Vinogradoff, Paul. *Introduction to Historical Jurisprudence*. Kitchener, Ontario: Batoche Books, 2002 [1920].

Vorenberg, Michael. *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*. Cambridge, UK: Cambridge University Press, 2001.

Voyenne, Bernard. *Histoire de l’idée fédéraliste*, Vol. 1: *Les Sources*. Nice: Presses d’Europe, 1976. 93-111.

Walzer, Michael. “The Civil Society Argument,” in *Dimensions of Radical Democracy: Pluralism, Citizenship, and Democracy*. Edited by Chantal Mouffe. London: Verso, 1992.

———. “The Communitarian Critique of Liberalism,” *Political Theory* 18:1 (1990).

———. *Spheres of Justice*. New York: Basic Books, 1983.

White, Henry. *The Massacre of St. Bartholomew Preceded by a History of the Religious Wars in the Reign of Charles* IX. New York: Harper Brothers, 1868.

Whittington, Keith E. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence: University of Kansas Press, 1999.

Williams, Frank J. *Judging Lincoln*. Carbondale, IL: Southern Illinois University Press, 2002.

Witte, John Jr., "A Demonstrative Theory of Natural Law: Johannes Althusius and the Rise of Calvinist Jurisprudence," *Ecclesiastical Law Journal* 11 (2009): 248-265.

———. "Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic," *University of Detroit Mercy Law Review*, Vol. 87 (2009-2010): 565-627.

Wolraich, Michael. *Unreasonable Men: Theodore Roosevelt and the Republican Rebels Who Created Progressive Politics*. New York: St. Martin's Press, 2014.

Wolterstorff, Nicholas & Terence Cuneo, "The Right of the People to a Democratic State: Reflections on a Passage in Althusius," in *Understanding Liberal Democracy: Essays in Political Philosophy*. Oxford: University of Oxford Press, 2012. 227-44.

Wood, Gordon S. *The Creation of the American Republic, 1776-1787*. Chapel Hill, NC: University of North Carolina Press, 1969.

Woods, Thomas E., Jr. *The Politically Incorrect Guide to American History*. Washington, DC: Regnery Publishing, 2004.

Yarbrough, Tinsley E. *John Marshall Harlan: Great Dissenter of the Warren Court*. New York: Oxford U Press, 1992.

Zelden, Charles L. *Supreme Court and Elections: Into the Political Thicket*. Washington, DC: CQ Press, 2009.

Zuckert, Michael. *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition*. Notre Dame: University of Notre Dame Press, 1996.