
The American Law of Association: The Legal-Political Construction of Civil Society

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Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them.

—Johannes Althusius

The legal-political status and power of associations in American society is an age-old historical question. As early as the 1830s, Alexis de Tocqueville famously observed,

Americans of all ages, all stations in life, and all types of disposition are forever forming associations. . . . In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.¹

The recent revival of theoretical interest in the concept of “civil society” has breathed new life into this old problem of associations. In an effort to demarcate a crucial sphere of social activity between the private lives of individuals and the public power of nation-states, theorists of civil society have refocused attention on associations and associational life as prerequisites of freedom, community, democracy, and dissent in the twenty-first century. But the gap between the proliferation of theories about the emergence of civil society and the paucity of historical investigations of changes in the nature and power of associations over time raises troubling interpretive issues of its own – most importantly, a tendency to idealize the civic association and to exaggerate its separateness from state power and other forms of social, economic, and political organization.

1. Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer (New York: Harper & Row, 1969), p. 513.

This article is an effort to begin redressing this gap between civil-society theories and associational history. Part One offers an outline and critique of three reigning theoretical approaches (market, critical, and historical) to civil society. It also introduces the critical sociolegal notion of associations as legal and political constructions rather than spontaneous private collaborations. Part Two then examines the actual legal-political underpinnings of civil society through a survey of nineteenth-century American associational law. This broad-brushed historical introduction to the legal status and public regulation of diverse early American associations, ranging from towns, municipal corporations, and churches to business corporations, charities, and fraternal and benefit associations, demonstrates just how thoroughly law and politics penetrated even the most seemingly private of American fellowships. Accordingly, the twin goals of this essay are first, to acknowledge the diverse and complex nature of associationalism in the United States; and second, to illuminate the public coercive powers that underlie much supposedly private voluntary activity.

The history of association in America is vast. One gets some sense of its tremendous scale and scope simply by listing some dominant associations in the American experience: The Corporation of the City of New York, the Republican Party, the United States Senate, the New York Stock Exchange, the Chicago Board of Trade, the Standard Oil Trust, Carnegie Steel Corporation, Brook Farm, the Harmony Society, Dartmouth College, Harvard University, the State

of California, the American Anti-Slavery Society, the American Federation of Labor, the Congress of Industrial Organizations, the National Grange of the Patrons of Husbandry, the Farmers' Alliance, the Populist Party, the Ku Klux Klan, the National Rifle Association, the United States Marine Corps, the Roman Catholic Church, the Church of Jesus Christ of Latter-Day Saints, Fannie Mae, the Ford Motor Company, the Women's Christian Temperance Union, the American Medical Association, Massachusetts General Hospital, the American Bar Association, the United States Supreme Court, the National Football League, Motion Picture Association of America, the Young Mens' Christian Association, the National Association for the Advancement of Colored People, the Boy Scouts of America, the John D. and Catherine T. MacArthur Foundation, the Russell Sage Foundation, the Brookings Institution, the American Enterprise Institute, the American Civil Liberties Union, the American Association of Retired Persons, the Parent-Teacher Association, Teachers Insurance and Annuity Association, the American Red Cross, the Blue Cross and Blue Shield Association, the Metropolitan Life Insurance Company.

Lesser associations dominate the organization of daily social and economic life in the United States. Economic associations in the form of corporations and partnerships control most American economic activity. In 1996, almost 5,000,000 corporations (over 7,000 with assets of \$250,000,000 or more) and another 1,654,256 partnerships filed U.S. tax returns.² For the same period, the *Encyclopedia of Associations* listed over 22,000 national non-profit associations in the United States, with an additional 100,000 associations with primarily regional, state, or local affiliation. Just eleven of the largest reporting religious organizations in the United States in 1999 accounted for a total of 218,213 individual churches.³ The number of public elementary and secondary schools in the same year totaled 88,548, with an additional 27,000 private institutions.⁴ Official governmental entities, of course, constitute a whole other level of associational activity. Beyond the 50 states, 435 U.S. House Districts, 1,916 State Senate Districts, 4,675

2. Susan Pace Hamill, "From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations," *American University Law Review* 49 (1999): 81-180, 83.

3. Assemblies of God, 11,920; Church of God in Christ, 15,300; Church of Jesus Christ of Latter-Day Saints, 10,811; Churches of Christ, 14,400; Evangelical Lutheran Church in America, 10,889; Jehovah's Witnesses, 10,883; National Baptist Convention, USA, 33,000; Presbyterian Church, USA, 11,295; Roman Catholic Church, 22,728; Southern Baptist Convention, 44,887; United Methodist Church, 36,170 (*Statistical Abstracts of the United States* [Washington, DC: GPO, 1999], "Religious Bodies - Selected Data"). The numbers here reflect self-reporting religious bodies of 60,000 or more members.

4. Office of Educational Research and Improvement, *Statistics in Brief* (Washington, DC: GPO, 2000), 8; Office of Educational Research and Improvement, *Digest of Education Statistics*, 1999 (Washington, DC: GPO, 2000), 74.

Lower State House Districts, 170,000 political precincts, and the multiplicity of state and federal governmental departments and agencies, the Congressional Information Service reports some 84,955 distinct local governments in the United States including 3,043 county governments, 31,555 special district governments, and 19,279 municipal governments. The state of Illinois alone counts among its governmental subunits 102 counties, 1,282 municipalities, 1,433 townships, 997 independent school districts, and 2,995 special government districts.⁵ The lists could go on, but the point is clear - associationalism, broadly construed so as not to exclude either its economic or its political dimensions, is a defining feature of American life and history.

But what makes this proliferation of associationalism especially interesting is the degree to which it challenges some common assumptions about the mainsprings of American social, economic, and political development. The predominance of associationalism conflicts with some simple stories America tells itself about the centrality of private and voluntary individual action to its history. The associations enumerated above immediately call attention to the overwhelming force of collective rather than individual action in American history. More significantly, they also suggest the legal, public, and coercive dimensions of American collective action. Despite repeated theoretical attempts to reduce associational activity to its individual and voluntaristic components (e.g., choices, transactions, contracts, and rights), the history of American associationalism speaks more to that basic insight of Thomas Hobbes that human association rests upon the deployment of power and sovereignty. Associationalism is fundamentally about collective governance - about the legal constitution of groups and bodies politic and the rules and bylaws that regulate the interrelationships of members.⁶ Beneath the language of consent and contract, elements of coercion, restriction, and inequality remain irreducible parts of American associationalism. Albert Venn Dicey was but one in a long line of British legal

5. David Rusk, *Cities Without Suburbs* (Washington, DC: Woodrow Wilson Center Press, 1995), 95; Thomas J. Sugrue, "All Politics is Local: The Persistence of Localism in Twentieth-Century American Politics," (unpub. ms., 2001), 8.

6. As the student of Hobbes, Michael Oakshott, put it, "Governing is an activity which is apt to appear whenever men are associated together or even whenever, in the course of their activities, they habitually cross one another's paths. Families, clubs, factories, commercial enterprises, schools, universities, professional associations, committees, and robber gangs may each be the occasion of this activity. And the same is true even of gatherings of persons (such as public meetings), so long as they are not merely ephemeral or fortuitous. Indeed, it may be said that no durable association of human beings is possible in the absence of this activity. (Michael Oakshott, *Morality and Politics in Modern Europe: The Harvard Lectures* [New Haven: Yale University Press, 1993], 8)

and political thinkers to highlight the problematic and paradoxical nature of the “right of association.” Acknowledging the obvious emancipatory quality of the individual freedom to act in concert with others, Dicey went on to note that the association,

whether a political league, a church, or a trade union, by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders. Its combined power is created by some surrender of individual liberty on the part of each of its members, and a society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately.⁷

It is precisely this coercive, legal and political, governing element in all American associations – state, town, political party, corporation, trust, union, church, school, and civic organization – that is all too frequently obscured in the contemporary fascination with civil society.

I. CIVIL SOCIETY AND ITS CRITICS

The concept of “civil society” is the product of a long and complex theoretical evolution. The range of possible meanings of the term is reflected in its very lineage, from Aristotle’s early elaboration of the interrelationship of household (*oikos*) and polity (*polis*) through the social contract theories of Hobbes and Locke to the critical tradition spawned by Hegel, Marx, and Gramsci. But most recent excitement about civil society is owed to its role in the intellectual renaissance attending the fall of communism in central and eastern Europe. A key aspect of that renaissance is a pervasive antistatism featuring the return of a concept of civil society as a separate sphere best kept autonomous from and aligned against the state. From Solidarity’s society-centered union building to Václav Havel’s soaring rhetorics of antipolitical politics, a powerful aversion to all-encompassing, one-party states has resuscitated a worldview highlighting some familiar, normative antinomies: society versus the state, private versus public, and law versus politics.⁸

One of the least compelling new versions of civil society reduces it to its economic dimension, the market. Oddly mirroring Marx and Engel’s initial revision of Hegel, some reformers and theorists have decided again that the key to civil society “is to be sought in political economy,” to which the state and politics are “subordinate.”⁹ According to the market

revival of civil society, communism failed primarily because of the inherent limitations and contradictions of a state-centralized, planned economy. From this failure, one learned of the economic necessity of a free, self-regulating market and its constitutional accouterments – private property, individual rights, and the rule of law. Intellectuals and advisors variously identified as neoconservatives or neoliberals have used the shibboleth “civil society” as a synonym for economic privatization, freeing private markets from totalitarian state intrusions.¹⁰ The confluence of anticommunist, antistatist, and free market ideologies since the 1980s has given powerful impetus to a narrow, economic interpretation of civil society. A simple, nineteenth-century laissez-faire spin is added to the rebellious central-eastern European call to “Let me be, leave me alone, don’t try to tell me how to live.”¹¹

The critical revival of the concept of civil society is all too cognizant of the dangers of economic reductionism. In opposition to the dualist separation of private economy and public state, the critical understanding of civil society takes on the repressive powers of both market economics and bureaucratic politics. As Jean Cohen and Andrew Arato put it in their comprehensive synthesis of critical perspectives, “As we know from the history of the West, the spontaneous forces of the capitalist market economy can represent as great a danger to social solidarity, social justice, and even autonomy as the administrative power of the modern state.”¹² Highlighting the social rather than the economic transformations of the late twentieth century, critical theorists emphasize the oppositional and dissenting power of civil society as an autonomous sphere of social intimacies, associations, communications, and social movements that lie outside both market and state and mitigate their coercive and antidemocratic tendencies.

The critical perspective on civil society is complex and multidimensional, ranging from vague forms of communitarianism to detailed analyses of social

versity Press, 1977), 389. Engels’ full statement from “Ludwig Feuerbach” reads, “The state – the political order—is the subordinate, and the civil society – the realm of economic relations – the decisive element.” One of the best guides to the elaboration of Hegel’s notion of civil society is Z.A. Pelczynski, ed., *The State and Civil Society: Studies in Hegel’s Political Philosophy* (Cambridge: Cambridge University Press, 1984); Z.A. Pelczynski, “Solidarity and ‘The Rebirth of Civil Society’ in Poland, 1976–1981,” in *Civil Society and the State: New European Perspectives*, ed. John Keane (London: Verso, 1988), 361–80.

10. George Schöpflin, for example, decries the lack of a liberal or “civic segment” in eastern Europe characterized by “its openness to new ideas, to the market, to initiative, to risk-taking, to technological change in economics” (George Schöpflin, “Culture and Identity in Post-Communist Europe,” in *Developments in East European Politics*, eds. Stephen White, Judy Batt, and Paul G. Lewis [Durham: Duke University Press, 1993], 16–34, 32).

11. Mihály Vajda, “East-Central European Perspectives,” in *Civil Society and the State*, 333–60, 350.

12. Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), viii.

7. Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England*, 2d ed. (London: MacMillan and Co., 1914), 154 (also see Appendix, Note I: “The Right of Association”).

8. Václav Havel, “Anti-Political Politics,” in *Civil Society and the State: New European Perspectives*, ed. John Keane (London: Verso, 1988), 381–98.

9. Karl Marx, “Preface to *A Critique of Political Economy*,” in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford Uni-

movements and the public sphere. Its goals are also diffuse, from the relatively simple aim of community regeneration to a more elaborate ideological agenda centered on the emancipatory role of social movements, intellectual dissent, and civil disobedience in modern democracies. But all forms of the critical revival have a common theoretical insistence upon the autonomy and priority of the social sphere of civil society over and against the polity and the economy. Cohen and Arato contend that only such a three-part model “distinguishing civil society from both the state and the economy has a chance both to underwrite the dramatic oppositional role of this concept under authoritarian regimes and to renew its critical potential under liberal democracies.” Only a truly separate civic sphere of authentic and self-constituting associational life (unions, cooperatives, intellectual schools, social movements) can provide the “normative integration and open-ended communication” necessary to true democracy. The critical revival can be as utopian and idealistic as the market revival, seeing civil society as not “related to the control or conquest of power but to the generation of influence through the life of democratic associations and unconstrained discussion in the cultural public sphere.”¹³

Historical assumptions play a crucial role in the revival of the concept of civil society. Indeed, both economic and critical theorists rely on a rough chronological story of declension wherein a nineteenth-century liberal moment of economic emancipation and political democratization is supplanted by twentieth-century corporate and bureaucratic welfare states. A bourgeois market economy and public sphere no sooner declare their independence from mercantilist and absolutist states than they are swallowed up again by new administrative police and welfare regimes that see all of civil society as subject to regulatory and disciplinary policymaking. The nineteenth century is seen as something of a golden age in terms of the separation of society from polity, economy from state, private from public, and the rule of law from politics. And the Anglo-American experience is the paradigm case.

American historians thus have something to add to the debate on civil society. And indeed, a significant American historical tradition has been built around the very issue of civil society and associations, especially in the nineteenth century. That tradition holds that the power and autonomy of civil society in American life and the concomitant weakness of the American state are the central components of an exceptional American political tradition. The *locus classicus* of that tradition is Alexis de Tocqueville’s *Democracy in America*.

Like some twentieth-century commentators, Tocqueville posited what he called the “watchfulness” of civil society as an independent check on the twin evils of

despotism and administrative centralization.¹⁴ The great danger in the age of democratic revolution, according to Tocqueville, was that the disparate social powers of the old regime (formerly exercised by corporations, classes, castes, churches, and nobles) would ultimately reconsolidate in a new, all-encompassing paternal state. Democratic individualism threatened to yield a bleak world in which “an innumerable multitude of men, alike and equal” – each “withdrawn into himself” and “unaware of the fate of the rest” – “glut their souls” with “petty and banal pleasures.” Intense individualization and private selfishness thus ironically prepared the way for a new kind of state despotism. For over this new common man, Tocqueville prophesied, “stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. It would resemble parental authority if, father-like, it tried to prepare its charges for a man’s life, but on the contrary, it only tries to keep them in perpetual childhood.” The crucial distinction between society and state is finally obviated when totalitarian democratic states, having “taken each citizen in turn in its powerful grasp and shaped him to its will,” then “extends its embrace to include the whole of society”:

It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform. . . . It does not break men’s will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.

Tocqueville’s vision of modern tyranny – of atomistic individualization in a centralized democratic police state – was as bleak as it was prescient.¹⁵

What could control this disastrously despotic tendency in new democracies? Tocqueville found an answer in the nineteenth-century United States – where despotism was tempered by a strong civil society through the mediating power of independent, self-mobilizing associations. Tocqueville commented lavishly on the American reliance on political, industrial, and moral and intellectual associations to meet “all the affairs of social life”:

14. Tocqueville found society’s watchfulness functioning particularly well in small nations where it

penetrates everywhere and attention is paid to the improvement of the smallest details; national ambition is greatly tempered by weakness, and their efforts and resources are almost entirely directed toward internal well-being and are not liable to be dissipated in vain dreams of glory. (*Democracy in America*, p. 158)

15. *Ibid.*, 691–92.

13. Cohen and Arato, *Civil Society*, ix.

If some obstacle blocks the public road halting the circulation of traffic, the neighbors at once form a deliberative body; this improvised assembly produces an executive authority which remedies the trouble before anyone has thought of the possibility of some previously constituted authority beyond that of those concerned. Where enjoyment is concerned, people associate to make festivities grander and more orderly. Finally, associations are formed to combat exclusively moral troubles: intemperance is fought in common. Public security, trade and industry, and morals and religion all provide the aims for associations in the United States.¹⁶

This ubiquitous “free action of the collective power of individuals” was more than an ethnographic observation for Tocqueville. It was a linchpin in his political and social theory. Tocqueville put his faith in such civil societies over the state, believing that “the collective force of the citizens” was a surer route to democracy and prosperity than “the authority of government.” The civil virtues of associations replaced aristocracy as an independent check on tyranny in a democracy. An association was a powerful citizen body “which cannot be twisted to any man’s will or quietly trodden down, and by defending its private interests against the encroachments of power, it saves the common liberties.”¹⁷ In the United States, strong societal and associational ties, coupled with the “absence of administrative centralization,” produced the happy democratic circumstance wherein “the majority, though it often has a despot’s tastes and instincts, still lacks the most improved instruments of tyranny.” Consequently, Tocqueville recommended to other democracies strong protection for the “natural” and “inalienable” right of association.¹⁸ “If men are to remain civilized,” Tocqueville concluded, the independence of civil society must be defended from central administration – “the art of association must develop and improve.”¹⁹

After World War II, American historians fashioned Tocqueville’s observations on the absence of central administration, the separation of civil society and state, the antidespotic role of associations, and the notion of civil society as voluntary, self-generating,

16. *Ibid.*, 189.

17. *Ibid.*, 91, 697.

18. *Ibid.*, 262, 193. As Tocqueville suggested,

The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. Short of attacking society itself, no lawgiver can wish to abolish it.

He recommended to European nations making the transition from the old regime: “Instead of entrusting all the administrative powers taken from corporations and from the nobility to the government alone, some of them could be handed over to secondary bodies temporarily composed of private citizens” (*ibid.*, 696).

19. *Ibid.*, 517.

and noncoercive into an impressive historiographical tradition. The essence of that tradition was an exceptionalist reading of American history emphasizing the comparative lack of strong public institutions in the United States (a central state or an encompassing notion of the common good or general welfare) and the dominance of the sociological (peculiar American mores, manners, customs, sentiments, and habits) over the political. Arthur M. Schlesinger, Sr. encapsulated that tradition at the outset of his pioneering 1949 essay on associational life “Biography of a Nation of Joiners”:

Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammelled right to form voluntary associations. This conception of a state of minimal powers actually made it necessary for private citizens to organize for undertakings too large for a single person. By reverse effect the success of such enterprises hindered the enlargement of governmental authority.²⁰

Schlesinger went on to describe the “lusty progeny” of voluntary associations (religious, moral, economic, professional, nativistic) that emerged from “the loins of religious voluntarism” in the antebellum era: the American Bible Society (1816), the American Sunday School Union (1824), the American Tract Society (1825), the American Temperance Society (1826), the American Peace Society (1828), the General Union for Promoting the Christian Observance of the Sabbath (1828), the American Lyceum Association (1831), the American Anti-Slavery Society (1833), the Order of United Americans (1844), the United American Mechanics (1845), the Order of the Star-Spangled Banner (1849), the American Medical Association (1847), the American Association for the Advancement of Science (1848), the American Society of Engineers and Architects (1852), the National Teachers’ Association (1857). According to Schlesinger, such associations played a positive and continuing social role in American democracy (to which he unfavorably compared political institutions like the New England town meeting) as they worked to “emphasize conventional moral and ethical standards, transmit existing social values and *avoid political involvements.*”²¹

20. Arthur M. Schlesinger, “Biography of a Nation of Joiners,” in *Paths to the Present: American Manners and Morals Seen in the Light of the History that has Conditioned them* (1949; Boston: Houghton Mifflin, 1964), 24–50, 24.

21. *Ibid.*, 45, 48–49 (emphasis added). Schlesinger also explicitly agreed with Tocqueville on the antidespotic thrust of associations (and despotism had clear connotations in postwar America):

It is with calculated foresight that totalitarian dictators ensure their rise to power by repressing or abolishing political, religious, labor, and other voluntary groups. The existence of these microcosms of democracy constitutes a potential threat they dare not

Oscar and Mary Handlin incorporated a similar approach to associations and civil society into their influential history of American liberty. The Handlins deemed such “nonpolitical modes of action” depending upon “spontaneous cooperation or acquiescence” to be absolutely central to an exceptional American understanding of liberty that eagerly embraced “alternatives to the use of coercive power through the state.”²² In contrast to Old World statist traditions that simply absorbed privileged and exclusive corporations as bodies politic and arms of the government, an American society that had “lost the capacity for agreeing upon a definition of the common interest” embraced private, voluntary, narrow, and fragmented associations as a substitute for “a whole community acting through the state.”²³ Despite the presence of a powerful commonwealth tradition in early American states like Massachusetts, by the 1830s Americans began to reject the “compulsory, inclusive character” of public, governmental bodies in favor of the “voluntary, fragmented character” of private associations.²⁴ Instead of depending upon the coercive legal sanction of “externally endowed powers” of state, associations rested more spontaneously and consensually on “the ability to elicit and to manage effectively the support of their members.”²⁵ Like Tocqueville, the Handlins concluded by unambiguously embracing the voluntary association as a check on tyranny and a noncoercive social alternative to political organization. “By sustaining the conviction that desirable ends could be attained without calling upon the state,” the voluntary association “set limits upon the use of political power” and established itself as essential to the distinctive traditions of liberty and democracy in America.²⁶

ignore, undermining the absolute obedience which they insist citizens owe to the state. Hence joiners are among the earliest casualties of the totalitarian system.

22. Oscar and Mary Handlin, “Voluntary Associations,” in *The Dimensions of Liberty* (Cambridge: Harvard University Press, 1961), 89–112, 89–90.

23. Handlins, “Voluntary Associations,” 90, 95, 97.

24. Of which, of course, the Handlins are the famous historians. See Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Cambridge: Harvard University Press, 1947).

25. *Ibid.*, 100, 96.

26. *Ibid.*, 111–12. Recently American social historians have returned to Tocqueville’s emphasis on American voluntary associations in assembling an alternative to the postwar synthesis of Schlesinger and the Handlins. Drawing on the more critical revival of the idea of civil society, contemporary social historians emphasize the dissenting power of an autonomous sphere of social intimacies, associations, and social movements that function in modernizing societies as counterweights – sites of social resistance – to repressive tendencies in both market economics and state politics. Some examples of this critical historical revival are Mary P. Ryan, *The Cradle of the Middle Class: The Family in Oneida County, New York, 1790–1865* (New York: Cambridge University Press, 1981); and Lori D. Ginzberg, *Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth-Century United States* (New Haven: Yale University Press, 1990).

Through the work of historians like Schlesinger and the Handlins, Tocqueville’s approach to the role of associations and civil society in democracy has become a staple of nineteenth-century American history. And indeed, much contemporary American social commentary about current crises in democratic life has returned to this history, generating something of a Tocqueville revival – a nostalgic yearning for the rich civic associations of an earlier America. But as with the revival of other versions of civil society, a more considered and critical analysis might be in order before climbing aboard this historical return to nineteenth-century institutions and ideas.

The convergence of economic, social, and historical analyses around the problem of civil society is remarkable but also a bit unsettling. For despite profound political and ideological differences among the market, critical, and historical revivals, all three perspectives employ the same problematic interpretive schema. All three insist upon a harsh conceptual separation of the private sphere of civil, associational, and social life from the public sphere of politics, governance, and the state. Although all but the most simplistic renderings of civil society acknowledge the interaction and interpenetration of private and public spheres, they vigorously defend their ultimate separateness. Indeed, their theoretical and ideological agendas rest on defending the autonomy of the economy, civil society, and voluntary association from undue state intrusion. Highlighting the importance of apolitical, nonstate actions like market exchange, critical communication, social organizing, and an entire American exceptionalist tradition of noncoercive governance, the revivals of civil society have resurrected an essentially nineteenth-century interpretive tradition of separating economy and society from the state. In the process, they have also revitalized a privileged, normatively-charged language to describe an apolitical society. The market, civil associations, and social movements are understood as “self-liberating,” “self-constituting,” “self-mobilizing,” “self-creating,” “spontaneous,” “noncoercive,” and, of course, “voluntary.”²⁷ The implication is that the private realm of civil society is natural, organic, consensual, and inevitable. In contrast, the public sphere of law, government, and state appears artificial, fabricated, coercive, and ephemeral.

Employing the overlapping distinctions of society versus polity, private versus public, and nature versus history makes for a compelling interpretive paradigm.

27. “Self-liberation” denotes some of the descriptive literature of eastern European revolutions. See for example, Michael H. Bernhard, *The Origins of Democratization in Poland: Workers, Intellectuals, and Oppositional Politics, 1976–1980* (New York: Columbia University Press, 1993), 10. “Self-constitution” and “self-mobilization” come from Cohen and Arato, *Civil Society*, ix. “Self-constitution” is also Arthur Schlesinger’s phrase, along with “self-created” in “Nation of Joiners,” 32, 49. “Spontaneous” and “noncoercive” are the Handlins ubiquitous descriptions of voluntary associations. Oscar and Mary Handlin, “Voluntary Associations,” 89, 92, 111.

But not one without critics. Indeed, strong counter-traditions appear in the political-philosophical, legal, and historical literatures founded upon the denial of just such clear separations of economy, society, and state.

In political philosophy, a rich civic tradition stretching back to Aristotle and Cicero insists upon the thick interconnectedness of society and polity. Human beings in that tradition are fundamentally and naturally political animals made for citizenship and government. Civil society – social organization and civil coordination – is deeply implicated in and ultimately dependent upon distinctly political forms of action. That political tradition was not obliterated by the social contract and Scottish Enlightenment ideas that gave rise to the rhetoric of civil society. For John Locke, of course, *civil* society was but a synonym for *political* society – that society existing beyond nature and conjugal and familial bonds. According to Locke, civil society represented “those who are united into one Body [a Body Politick], and have a common establish’d Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders.” Law and state were integral to the Lockean vision of civil society resting directly upon the “power of making Laws,” the “power of War and Peace,” and the “Legislative and Executive Power.”²⁸ Similarly Adam Ferguson’s influential *Essay on the History of Civil Society* (1767) was rooted directly in a Scottish Enlightenment tradition that duly noted the generative powers of law, police, and governance in the “progress of society.” Ferguson’s civil society treatise explicitly challenged the idea of separating society and economy from government and politics. The foundation of civil society remained thoroughly political, dependent upon communal ties, civic virtue, political economy, and an active citizenry. Without such regular governmental objects as “national defence, the distribution of justice, [and] the preservation and internal prosperity of the state,” Ferguson warned, “society itself no longer exists.”²⁹

Even G.W.F. Hegel, whom many civil society theorists point to as the catalyst for separate spheres, ultimately had much more to say about the interdependence of society and state. In the earliest version of the *Philosophy of Right*, Hegel’s lectures on “Natural Right and Political Science” (1817–1818), he defined civil society as composed of three elements:

(1) The mediation of needs and their satisfaction in a system involving the needs of all: *political economy* [*Staatsökonomie*].

(2) The protection of property through the *legal system* [*Rechtsverfassung*].

(3) General provision for the welfare of individuals both individually and to ensure the existence of right: the *police* or *public authority* [*Polizei*].³⁰

Far from defending the autonomy of society from the state, Hegel posited a notion of civil society constructed by political economy, law, and police. The very notions of *Staatsökonomie* (in which civil law, economics, and the origin of modern states were intertwined) and *Polizei* (which referred to the overarching regulatory responsibility of public administration for the common welfare) signaled the irretrievably overlapping jurisdictions of the economic, the social, and the political in Hegel’s thought. Hegel also developed the preeminent critique of naturalism – the idea that civil society was the natural or spontaneous expression of freedom. For Hegel like Ferguson, civil society represented a historical not a natural phenomenon, the product of a particular moment in the historical evolution of modern European societies. It brought emancipatory possibilities as well as despotic dangers. But in the end civil society remained of a time and place, not an inevitable and transcendental ideal.

But ultimately, the political philosophies of Locke, Ferguson, and Hegel were elaborations, not critiques, of the idea of civil society. The best explicit attack on the notion of an autonomous and private sphere of socioeconomic activity best kept separate from the state comes from an extraordinary twentieth-century American tradition of critical jurisprudence. From the historical and sociological jurisprudence of Roscoe Pound and Morris Cohen to legal realism and

30. Georg Wilhelm Friedrich Hegel, *Lectures on Natural Right and Political Science*, trans. J. Michael Stewart and Peter C. Hodgson (1817–1818; Berkeley: University of California Press, 1995), 166; Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H.B. Nisbet (1821; Cambridge: Cambridge University Press, 1991), 220–74. For an example of the way in which Hegel’s tripartite division can be coopted into a more autonomous, privatized, apolitical version of civil society, see the definition of Edward Shils:

The idea of civil society is the idea of a part of society which has a life of its own, which is distinctly different from the state, and which is largely in autonomy from it. . . . This idea of civil society has three main components. The first is a part of society comprising a complex of autonomous institutions – economic, religious, intellectual, and political – distinguishable from the family, the clan, the locality, and the state. The second is a part of society possessing a particular complex of relationships between itself and the state and a distinctive set of institutions which safeguard the separation of state and civil society and maintain effective ties between them. The third is a widespread pattern of refined or civil manners.

In Shils’s hands, political economy, law, and police become associations, constitutionalism, and manners. Edward Shils, “The Virtue of Civil Society,” *Government and Opposition* 26 (1991): 3–20, 3–4.

28. John Locke, *Two Treatises of Government*, ed. Peter Laslett (1698; Cambridge: Cambridge University Press, 1960), 324.

29. Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (1767; Cambridge: Cambridge University Press, 1995), 131. Of course, the other great figure of the Scottish Enlightenment investigating the relationship of civil society, political economy, and legal state was Adam Smith. For an indication of his early understanding of the interdependence of economy and police, see Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (1762–1763; Oxford: Oxford University Press, 1978), 331–33.

the early critical legal studies movement, American legal thinkers have mounted a continuous campaign against apolitical, naturalistic thinking about law and society. From natural law to *laissez-faire* constitutionalism to law and economics, naturalistic theories have held that there exists a correct, apolitical, and non-coercive private social order to which human beings naturally aspire, frustrated only by the corruptions of power spawned by the interventions of politics and state. The jurisprudential critique of such ideas holds some lessons for the revival of civil society.

The jurisprudence of Roscoe Pound was a sustained attack on the false separation of law from society and a direct challenge to *laissez-faire* constitutionalism. In "Liberty of Contract" (1909), Pound exposed the fallacies resulting from overly individualistic, private, and antistatist conceptions of justice. Natural law, purely juristic notions of polity and economy, and the harsh separation of law and social fact generated a reductionist and mechanical late nineteenth-century jurisprudence wherein "the relation between employer and employee in railway transportation," for example, was treated "as if they were farmers haggling over the sale of a horse." Fictions like liberty of contract and the free market only masked a deeper mobilization of political and economic power and a suppression of real liberty. Pound advocated instead a more realistic "sociological jurisprudence" that embraced a pragmatic critique of naturalism, a denial of the harsh separation of the social and the legal, and an emphasis on the decided social effects of law.³¹

Morris Cohen and Robert Hale were two of the most important of Pound's embellishers. Morris Cohen's "Property and Sovereignty" was his explicit critique of the separation of the private and the public, the civil and the political, *dominium* and *imperium* – a separation that Cohen saw at the heart of the dangerous, antiprogressive jurisprudence of the late nineteenth century.³² Cohen brilliantly deconstructed the naturalistic distinction between property and sovereignty by demonstrating their historical and legal interdependence. In the middle ages, "ownership of the land and local political sovereignty were inseparable." That close relationship of "private" property and "public" power continued unabated into the modern era. Cohen's work was an extended proof of the "character of property as sovereign power compelling service and obedience" and the "fact that dominion over things is also *imperium* over our fellow human beings."³³

31. Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18(1909): 454–87, 454–55; Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911): 591–619, 25 (1912): 140–68, 489–516, 502.

32. Morris R. Cohen, "Property and Sovereignty," *Cornell Law Quarterly* 13 (1927): 8–30.

33. Cohen, "Property and Sovereignty," 12–13. Cohen elaborated on the legal and political construction of private property, and indeed, the very substructure of society:

Robert Hale continued Cohen's examination of the way in which private law conferred "sovereign power on our captains of industry" in his "Coercion and Distribution in a Supposedly Non-Coercive State."³⁴ Hale took direct aim at the individualist and noninterventionist economic philosophies of his time, suggesting that

the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom and with restrictions, moreover, out of conformity with any formula of 'equal opportunity' or of "preserving the equal rights of others."³⁵

Hale argued that neoclassical economic theories obscured the proactive role that positive law played in structuring the so-called "private" bargains that had such an immense effect on the distribution of wealth and power in the United States.

By the late twentieth century, legal realists and critical legal scholars honed such insights into a full-fledged critique of a narrow form of legal liberalism. Founded upon a normative vision of civil society against the state, legal liberalism held that law's defining role in a free society was the enforcement of the public/private distinction – the defense of the natural private rights of individuals (and businesses) against the nefarious public interventions of government. The lasting contribution of realistic and critical scholars of law was a thorough demonstration of the distortions and injustices that flowed from this narrow conception of the nature and aspirations of individuals and the fallacious public/private compartmentalization of power and right. Most obviously, the legal fiction of the American business corporation as a private, rights-bearing "person" exercising its natural and neutral liberty to contract in a free, "self-regulating" market bore little resem-

The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence the ownership of land and machinery, with the rights of drawing rent, interest, etc., determines the future distribution of the goods that will come into being. . . . Thus not only medieval landlords but the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty.

34. *Ibid.*, 29. Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly*, 38 (1923): 470–94.

35. Hale, "Coercion and Distribution," 470.

blance to the actual mobilization of legal and political power that underwrote the early twentieth-century corporate economy. From Roscoe Pound to Duncan Kennedy, the question of this underwriting – the degree to which public legal power inconspicuously structures social and economic life (while simultaneously generating a legitimating illusion of naturalness, neutrality, and noncoercion) – has animated a critical American legal tradition quite dubious of efforts to articulate a privileged sphere of private, noncoercive activity immune from issues of public power.³⁶ With its subtle appreciation of the ongoing public, constructive, and constitutive force of law, that legal tradition makes it difficult to resuscitate nineteenth-century notions of an autonomous and private civil society, whether defined as market economics or a mediating sphere of critical, communicative associations.

The skepticism of critical legalists about the legendary American private sphere has received historical support from some actual investigations of polity and society in the nineteenth-century United States. Challenging the portrait of a flourishing *laissez-faire* civil society, an extensive historical literature, from the “commonwealth studies” of the Handlins and Louis Hartz to the legal histories of Willard Hurst, Harry Scheiber, and Morton Horwitz has definitively demonstrated the ubiquitous role of state and law in positively constructing the antebellum market economy through subsidization, corporate charters, public land policies, eminent domain, mixed enterprise, and the transformation of private law doctrine.³⁷ More recently, a diverse group of legal, political, and economic historians have begun putting together an alternative history of the positive role of the state in the legal and political construction of nineteenth-century American social and economic life.³⁸

36. Duncan Kennedy, “The Role of Law in Economic Thought: Essays on the Fetishism of Commodities,” *American University Law Review* 34 (1985): 939–1001; Robert W. Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (1984): 57–125; Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); Robert J. Steinfield, “The Philadelphia Cordwainers’ Case of 1806: The Struggle over Alternative Legal Constructions of a Free Market in Labor,” in *Labor Law in America: Historical and Critical Essays*, Christopher L. Tomlins and Andrew J. King (Baltimore: Johns Hopkins University Press, 1991), 20–43.

37. Oscar and Mary Flug Handlin, *Commonwealth*; Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (Cambridge, MA: Harvard University Press, 1948); James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge: Harvard University Press, 1964); Harry N. Scheiber, “Government and the Economy: Studies of the ‘Commonwealth’ Policy in Nineteenth-Century America,” *Journal of Interdisciplinary History* 3 (1972): 135–51; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

38. See for example, William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York:

This legal-political historiography has obvious implications for the Tocquevillian paradigm of civil society in the United States, especially with respect to the nature and status of proliferating associations. And indeed, a few historians have taken explicit aim at the idea of associations as an autonomous American alternative to governmental action. Richard John’s study of the nineteenth-century U.S. Postal Service challenges Tocqueville on the absence of central administration by charting in detail the formative influences exerted by the national government through its control of the mails.³⁹ In his discussion of Sabbatarianism, John also contests the false conceptual separation of associations from the state, showing the degree to which the General Union for Promoting the Observance of the Christian Sabbath (like other voluntary reform associations) built directly on the national communications infrastructure constructed by the federal postal system.

Theda Skocpol has also observed the close interdependence of voluntary associations and governmental policymaking in her pioneering study of veterans’ and mothers’ pensions. Attacking the fallacies of American voluntarism and the “night watchman state” – myths that obscured a great mass of pre-New Deal social-welfare policymaking – Skocpol describes in great detail the complex interconnections binding associations (from the Grand Army of the Republic to trade unions to the National Congress of Mothers) to the formal machinery of governance. “Voluntarism and governmental action have never been simple opposites in the United States,” she concludes. “Voluntarism often leads toward involvement with government, and gives rise to new demands for public social provision.”⁴⁰

Such historiographical revisions, coupled with the

Cambridge University Press, 1991); and Colleen A. Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton: Princeton University Press, 1994). For an excellent overview of this literature, see Richard R. John, “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835,” *Studies in American Political Development* 11 (1997): 347–80.

39. Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University Press, 1995).

40. Theda Skocpol *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992), 14–18. Skocpol singles out several examples of the persistence of an exceptionalist, anti-statist historiography in the social welfare literature, e.g., Daniel Levine’s characterization of the pre-New Deal United States as a “land of abundance,” where citizens saw “no reason for people to be poor and therefore no reason for any but the most minimal, mostly private, charity,” and Roy Lubove’s contention that “voluntary association provided an alternative to politics and governmental action. It enabled groups of all kinds to exert an influence and seek their distinctive goals without resort to the coercive powers of government.” For Skocpol’s most recent exploration of the interconnection of associations and the state, see Skocpol, Marshall Ganz, and Ziad Munson, “A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States,” *American Political Science Review* 94 (2000): 527–46.

critiques of critical legal scholars and the qualifications of political philosophers, suggest the basis for a new look at the legal and political underpinnings of voluntary associations in the nineteenth-century United States. No doubt associations played a crucial role in the development of American society, economy, and polity. What remains to be determined is the historical relationship of those associations to the early American legal state and the kinds of lessons that can and cannot be drawn from that experience.

II. LAW AND ASSOCIATIONS IN NINETEENTH-CENTURY AMERICA

Tocqueville was certainly correct to highlight the importance of associations in nineteenth-century America. He was also right to emphasize their role as a political check on despotism. To that point, Tocqueville is in perfect synch with a great mass of nineteenth-century American legal and political commentary. Where Tocqueville and several historians and theorists err, however, is in the implication that early American associations represented a primarily social alternative or private opposition to state or political action. To the contrary, the theory and practice of nineteenth-century association law reflected a different orientation – an understanding captured in Johannes Althusius's notion of government itself as fundamentally an "art of association." Nineteenth-century legislators, judges, and commentators defended associations not as alternatives to a legal-constitutional state, but as constitutive components of it. Associations did not arise outside of and immune to coercions of public power as natural counterweights to the artificial sovereignty of the state. Rather they were in fact legally-constituted and politically-recognized delegations of rule-making authority and public resources. Associations often functioned in the nineteenth century as explicit technologies of public action – modes of accomplishing public objectives different from the Franco-Germanic leviathan, but no less essentially governmental. Early American associations were a mode of governance, resting upon an elaborate system of laws, powers, and discriminations.⁴¹

This legal-political nature and power of early American associations was to some extent foreshadowed in Tocqueville's famous example of spontaneous collective action – the neighbors bonding together to remove an obstacle blocking the public road. Tocqueville talked about this phenomenon in almost classic civil society terms: "This improvised as-

sembly produces an executive authority which remedies the trouble before anyone has thought of the possibility of some previously constituted authority beyond that of those concerned."⁴² But here Tocqueville was exactly wrong. Someone had already thought about the possibility of some previously constituted authority in this case – for some length of time and in great detail. The collective action Tocqueville observed was a perfect example of what was known in early American common law as the *summary abatement of a public nuisance*. What looked to Tocqueville like a natural, voluntary, and spontaneous assembly was in fact an official legal and police action carried out by citizens as prescribed and circumscribed by the coercive authority of public law. As a device for defending tenuous new rights of access to the nation's growing public infrastructure, the common law of nuisance explicitly authorized individuals and groups to immediately and summarily remove private obstructions and encroachments to public highways and waterways. This common law of public nuisance was one of the most important sources of sovereign police power in the nineteenth century, protecting the public rights of the people from the trespasses of private interest. What Tocqueville stumbled upon was not a voluntary assembly at all; rather it was one of the more extreme tools of public force available in the early American polity.⁴³

Tocqueville's example suggests the need to probe below the surface of collective action to get at the underlying rules and regulations that govern its form, function, and force. It also suggests the need to acknowledge the close interrelationship of public and private, power and liberty at the heart of American associationalism. The nineteenth-century associations celebrated by Tocqueville did embody a distinctive, antidespotic form of governance. But they should not be confused with private social alternatives to politics. The harsh separation of public and private, state and civil society, in American legal and political thought is a surprisingly recent creation. In contrast, early nineteenth-century legal and political thought emphasized the nexus of association and government in the slightly oxymoronic ideas of self-government and popular sovereignty. Far from separating civil society from the state, early American legislators, judges, and theorists collapsed the distinction in the notion of

42. Tocqueville, *Democracy in America*, 189.

43. Ernst Freund dubbed nuisance law "the common law of the police power, striking at all gross violations of health, safety, order, and morals." Sidney and Beatrice Webb similarly noted that the capacious social obligations entailed by nuisance law included almost "every conceivable neglect or offence" – a good portion of the "framework of law in which the ordinary citizen found himself." Ernst Freund, *Standards of American Legislation* (Chicago: University of Chicago Press, 1965), 66; Sidney and Beatrice Webb, *The Development of English Local Government 1689–1835* (London: Oxford University Press, 1963). For a fuller discussion of the common law of public nuisance in nineteenth-century America, see Novak, *People's Welfare*.

41. I owe the very useful notion of "technology of public action" to Hendrik Hartog's interpretation of the political theory of early New York City waterlot grants. Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* (Chapel Hill: University of North Carolina Press, 1983), 66.

self-rule through a great hierarchical chain of self-governing associations ranging from the body politic itself, through towns and counties, to corporations (municipal, civic, and business), and unincorporated groups like religious societies, charities, and reform organizations. Although antidespotic in its preference for self-rule from the bottom-up, this governing tradition was hardly weak or noninterventionist. Indeed, the heart of true self-government was the ability to enact rules and regulations binding individual members of the association for the good of the whole. As a host of nineteenth-century thinkers made explicit, associations embodied a powerful strategy of American political development.

Early American legal theorists expended a great deal of effort elaborating the idea of associative self-government in a well-regulated society. Treatise writers like James Wilson, Nathaniel Chipman, and Zephaniah Swift waxed eloquently about the social-political nature of human beings and the tendency toward association. “Man, by the force and habit of association and abstraction,” Nathaniel Chipman argued, “acquires the conception of an aggregate of individuals, as forming a distinct entity, – a moral person, capable of rights and duties. Such is the idea of a community, of a society.”⁴⁴ James Wilson cited Cicero: “Nothing, which is exhibited on our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, – *jure sociati* – are denominated states.” Civil society and association were natural objects of persons, and for theorists like Chipman and Wilson they were also the building blocks of states and governments. Wilson illustrated the progression through which the “union of wills and of strength” resulted in a “state or body politic”:

If a number of people who had hitherto lived independent of each other, wished to form a civil society, it would be necessary to enter into an engagement to associate together in one body, and to regulate, with one common consent, whatever regards their preservation, their security, their improvement, their happiness.⁴⁵

As Wilson implied, civil society was not only synonymous with political society, it culminated in public regulation not private *laissez-faire*. Zephaniah Swift extolled the civil establishment of a “free and well-regulated government” whereby “every member of the society submits to numerous restraints upon his conduct . . . for the purpose of vesting in the hands of government, the power of furnishing him compleat security and protection.”⁴⁶ Francis Hilliard defended

44. Nathaniel Chipman, *Principles of Government: A Treatise on Free Institutions* (Burlington, VT, 1833), 39.

45. James Wilson, *The Works of James Wilson*, ed. Robert Green McCloskey, 2 vols. (Cambridge, MA: Harvard University Press, 1967), 1:239.

46. Zephaniah Swift, *A System of the Laws of the State of Connecticut*, 2 vols. (Windham, CT, 1795), 16.

the principle of regulating in the common interest as the basis for civil society: “General expediency, – public policy, – is often the highest measure of right; perhaps we should not go too far in saying, that, with regard to the rules which govern society, it is the only measure.”⁴⁷ The notion of civil society as employed in early American legal-political thought was not an alternative to or a weapon against government. It was its very foundation.

One of the best practitioners of the early American science of jurisprudence, especially concerning matters of association, government, and liberty was Francis Lieber. Like Tocqueville (along with other nineteenth-century theorists like J. Toulmin Smith, Rudolf von Gneist, Francois Guizot and Otto von Gierke), Lieber’s legal and political thought attempted to locate an alternative to the despotic trajectory of modern European governments toward absolutism, administrative centralization, and “organization” (what Max Weber would later call bureaucracy).⁴⁸ Lieber was critical of what he termed the Gallican understanding of power and liberty – “the general disposition in the executive and administration to do all it possibly can do, and to substitute its action for individual or minor activity and for self-reliance.” Such an absorbing paternal power in the central government culminated in “a vast hierarchy of officers, forming a class of mandarins for themselves, and acting as though they formed and were the state, and the people only the substratum on which the state is founded.”⁴⁹ Such Franco-Germanic views were an invitation to absolutism and a denial of popular sovereignty.

But Lieber refused to locate a solution to the political problem of despotic centralization in an apoliti-

47. Francis Hilliard, *The Elements of Law: Being a Comprehensive Summary of American Civil Jurisdiction* (Boston, 1835), vi.

48. Francis Lieber, *Manual of Political Ethics* (Boston, 1839); Francis Lieber, *On Civil Liberty and Self-Government*, 3d ed., rev. (1853; Philadelphia, 1891). A good personal biography of Lieber (though inadequate on his jurisprudence) is Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge: Louisiana State University Press, 1947).

49. Lieber, *Civil Liberty and Self-Government*, 248–49. Lieber’s hostility to French government and thought was extreme. As his student Theodore D. Woolsey pointed out, *Civil Liberty and Self-Government* was written with 1848 and the government of Napoleon III in clear view – “a centralized power swallowing up all minor authority in the great leviathan, and calling that a government of the people, because the people gave their consent to it once and forever.” To call Lieber unsympathetic would be an understatement:

The French acknowledge as the first thing to be obtained, power, force; and their philosophical writers, such as Rousseau, seek, almost exclusively, a philosophical or legitimate source of that power. Hence their view of universal suffrage, and the power, be it that of an all-powerful Caesar, or of a concentrated single chamber, all-providing and all-penetrating, when once established, arising out of it. (*Ibid.*, 9, 197)

See also Francis Lieber, “Anglican and Gallican Liberty,” in *Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers* (Philadelphia, 1881), 371–88.

cal realm of civil society. Much the way Tocqueville worried about individualization, Lieber fretted that an atomized, antipolitical, and inward-turning populous would only exacerbate despotic tendencies, providing an aggrandizing public state with a docile and privately distracted citizenry.⁵⁰ Instead, Lieber endorsed the deeply rooted Anglo-American legal-political practices that he denoted in his *magnum opus* as *Civil Liberty and Self-Government*. Civil liberty and self-government did not consist of the “mere negation of power” or the “mere absence of action.” Lieber argued that “a weak government is a negation of liberty” – a government “must have the power to perform its functions.”⁵¹ Self-government and civil liberty consisted rather of the active exercise of public power through a distinctive set of self-ruling associations – “a vast system of institutions, whose number supports the whole, as the many pillars support the rotunda of our capital.” For Lieber, institutions and associations were the local, organic rule-making bodies that delicately balanced power and liberty – that, in fact, united “self-government and self-government.”⁵² There were many kinds of institutions, which Lieber defined as “a system or body of usages, laws, or regulations of extensive and recurring operation, containing within itself an organism by which it effects its own independent action, continuance, and generally its own farther development.”⁵³ But it was the self-governing institution – the one most resembling associations, corporations, and local bodies politic – that was central to Anglican civil liberty. The local, self-governing association was

of a co-operative character, and thus the opposite to centralism. It is articulated liberty, and thus the opposite to an inarticulated government of the majority. It is of an inter-guaranteeing, and, consequently, inter-limiting, and in this aspect the negation of absolutism.

The self-governing association was not concerned with “vague or theoretical liberty,” but with the reg-

50. As Lieber put it, “Self-government is in its nature the opposite to political apathy and that moral torpidity or social indifference which is sure to give free play to absolutism, or else to dissolve the whole polity” (Ibid., 251).

51. Ibid., 249, 298, 144.

52. Ibid., 300, 320.

53. Lieber enumerated a range of institutions, past and present, good and bad, expedient, and unwise, human and divine: a bank, parliament, a court of justice, the bar, the church, the mail, a state, the Lord’s supper, a university, the Inquisition, property, the sabbath, the feudal system, the Roman triumph, the Hindoo castes, the bill of exchange, the French Institute, our presidency, the New York tract society, the Areopagus, the Olympic games, an insurance company, the janizaries, the English common law, the episcopate, the tribunate, the captainship of a fishing-fleet, the crown, the German book-trade, the Goldsmiths’ Company, our senate, our representatives, our congress, our state legislatures, courts of conciliation, the justiceship of the peace, the priesthood, a confederacy, the patent, the copyright, hospitals for lunatics, estates, the East India Company (ibid., 301–2).

ulated and relative “civil” liberty (“within the social system and political organism”) that engaged the practical “realities of life.” Indeed, the essence of such associations and the root of the Anglo-American tradition of self-government was the bylaw (the law of the place or community) – the right of institutions and associations to pass the laws and regulations “necessary for its own government” which “shall stand good in the courts of law, and shall be as binding upon every one concerned as any statute or law.”⁵⁴

This merger of society and state in a theory of self-government through a panoply of local, corporative, rule-making associations held great sway in nineteenth-century America. Contrasting sharply with civil society theories emphasizing autonomy from the state and *laissez-faire* definitions of liberty, this legal-political version of associationalism was part of an activist practice of well-regulated governance encompassing all levels of cooperation, from the formal institutions of national and local governments to voluntary groups and economic partnerships. Although the legal concept of the corporation is perhaps its most explicit manifestation, it included everything from church to state. The same general theories and many of the same legal practices (e.g., charters, bylaws, suretyship, mandamus, *quo warranto*, police power) governed the activities of associations ranging from the body politic itself to the smallest and most intimate human fellowships.

An actual legal-empirical investigation of this full spectrum of nineteenth-century American associations would require a project on the scale of Otto von Gierke’s magisterial four-volume undertaking on the German Law of Fellowship.⁵⁵ But one can get some sense of the actual practice of the American law of associations through a brief and partial survey of the principal self-governing bodies of antebellum American society. Such a survey highlights the similarities that bound all early American associations together in a remarkably consistent jurisprudential notion of the form and substance, rights and duties intrinsic to legal group relationships – the most important similarity being the omnipresent role of law and the state in constituting and regulating such social groupings. But such a survey also suggests the important legal-political distinctions drawn between different types and ranks of associations in this jurisprudential hierarchy. Such distinctions, created over time in law

54. Ibid., 300, 319, 24, 322.

55. Otto von Gierke, *Das Deutsche Genossenschaftsrecht* (The German Law of Fellowship), 4 vols. (Berlin, 1868–1913). Substantial parts of Gierke’s treatise are available in English. See Frederick W. Maitland, *Political Theories of the Middle Age* (Cambridge: Cambridge University Press, 1900); Ernest Barker, *Natural Law of the Theory of Society 1500 to 1800* (Cambridge: Cambridge University Press, 1958); Antony Black, *Community in Historical Perspective* (Cambridge: Cambridge University Press, 1990).

and statecraft, explicitly bestowed different amounts of legal and political power on different kinds of social groupings. This legal infrastructure of associationalism was just as significant in the constitution of nineteenth-century American civil society as the more often emphasized allocation of individual rights of property and citizenship. Understanding this intricate legal framework of associationalism is thus a prerequisite to any attempt to grasp the unequal distribution of social and economic power that so distinguishes nineteenth-century American social relationships.

Hannah Arendt captured an infallible insight into the public nature and character of the early American polity when she noted that “the true objective of the American Constitution was not to limit but to create more power, actually to establish and duly constitute an entirely new power center.”⁵⁶ Early American governance was fundamentally a matter of systematic political reconstitution – a matter of state-building. That project involved well-known experiments in the construction of basic national political-economic institutions like the Departments of War and Foreign Affairs; the Treasury Department and a national currency and tariff; a national judiciary and Supreme Court; the Post Office and other national infrastructural improvements; and the policing of territories. But even more significant (although frequently overlooked) is the degree to which antebellum American state governments were preoccupied with establishing and incorporating the thousands of jurisdictional subunits and associational entities that politically constituted early American civil society.

State legislatures devoted an extraordinary amount of time and energy to the process of specially delegating and demarcating the rights and powers of particular groups, jurisdictions, and corporate bodies. The state of Connecticut (though small) was fairly typical in the extent and detail of the establishment and regulation of its diverse associational components. Between 1789 and 1865, Connecticut passed over 3,000 so-called “special” acts incorporating and policing associations filling five thick volumes.⁵⁷ The state organized these statutes under some 46 Titles that provide a glimpse into the scale and scope of official state-established associational activity in the early nineteenth century:

- | | |
|------------------------------|-------------------------------|
| 1. Academies | 24. Manufacturing Companies |
| 2. Agricultural Societies | 25. Masonic Lodges |
| 3. Aqueducts | 26. Markets |
| 4. Banks | 27. Mechanics Societies |
| 5. Boroughs | 28. Medical Institutions |
| 6. Bridges | 29. Mining Companies |
| 7. Burial Grounds | 30. Monument Societies |
| 8. Canals | 31. Musical Societies |
| 9. Charitable Associations | 32. Powder House Companies |
| 10. Churches | 33. Railroad Companies |
| 11. Cities | 34. Religious Associations |
| 12. Colleges | 35. Saving Societies |
| 13. Companies Navigation | 36. Schools |
| 14. Ecclesiastical Societies | 37. School Districts |
| 15. Ferries | 38. School Societies |
| 16. Fire Companies | 39. Scientific Associations |
| 17. Fishing Companies | 40. Sewer Companies |
| 18. Governors Guard | 41. Steam Boat Companies |
| 19. Highways | 42. Theft Detecting Societies |
| 20. Highway Districts | 43. Towns |
| 21. Hotel Companies | 44. Turnpike Companies |
| 22. Insurance Companies | 45. Villages |
| 23. Library Companies | 46. Work House |

Connecticut’s listing captured a fundamental insight into early American associationalism, namely, the fluidity with which legislators and jurists connected the great range of associations from formal political entities (cities, towns, villages, and boroughs) to public utilities (fire companies, sewer companies, highway, canal, and bridge companies) to eleemosynary institutions (schools, academies, colleges, and libraries) to economic corporations (banks, insurance companies, mining companies) to civic associations (charities, musical societies, masonic lodges, and religious organizations). Connecticut did not deploy the modern distinctions – private versus public, economic versus social, or political versus civic – in categorizing forms of association. Rather, all these associations were catalogued together as state-created constituent parts of civil society. Connecticut was hardly alone. Every two years, Illinois published a similar compendium of associational legislation chartering and regulating towns, cities, schools, colleges, business and manufacturing corporations, insurance companies, and ferry, highway, and railroad companies.⁵⁸ Massachusetts’s nineteenth-century “special” statutes filled eighteen 1,000-page volumes.⁵⁹ And though the

56. Hannah Arendt, *On Revolution* (New York: Macmillan, 1963), 152.

57. *Resolves and Private Laws of the State of Connecticut, 1789–1865* vols. (New Haven, 1837–1871). Also known as “private” acts, these statutes were often published separately to distinguish them from the more “public” acts of general legislation. Here the public-private distinction is deployed to designate the specific versus general (applying to some versus applying to all) character of the legislation rather than the presence or absence of the state. The presence of the state is only too apparent in all these statutes.

58. See for example, *The Private Laws of the State of Illinois, 1851, 1853, 1855*, 3 vols. (Springfield, 1851–1855).

59. See for example, *Private and Special Statutes of the Commonwealth of Massachusetts for the Years 1898, 1899, 1900, and 1901* (Boston, 1902), vol. 18. The state of Maine published its “private or special” laws from 1820 to 1828 in a single volume containing some 569 pieces of legislation, most of which were acts of associational incorporation. *Private of Special Laws of the State of Maine, 1820–1839* (4 vols., Portland, 1828), vol. 1. For similar compendia, see *Private and Special Statutes of the Commonwealth of Massachusetts, 1797–1805*, 3 vols. (Boston, 1805); *Private Laws of the State of North Carolina*; and *Private Acts of the State of Tennessee*.

legislative establishment of associations is overwhelmingly a state government activity, the federal statute book is also replete with the official promotion of association, particularly through public land grants for communities, colleges, schools, seats of government, seats of justice, internal improvements, and other associative activities.⁶⁰ Law teacher Timothy Walker was right on the mark in 1837 when, like Tocqueville, he noted the explosion in association-building: “Corporations are multiplying to such a degree as even to excite alarm in some minds, lest individual freedom of action shall be swallowed up in the prevailing spirit of association.”⁶¹ As legal historian Willard Hurst acknowledged in 1945, “A full relation of the influence of voluntary associations upon the development of American economy and culture would leave few fields of human interests untouched.”⁶²

Indeed, it is impossible to glance through the *United States Statutes at Large* or the legislative proceedings of any American state in the early nineteenth century and not see this ubiquitous emphasis on the public constitution of corporate and associative bodies – the active legal-political construction of a well-ordered civil society. Often, however, these myriad governmental actions are overlooked as simple and routine governmental practices – the mere official registration of group activity. That is a mistake. The public incorporation and regulation of associations was but the most conspicuous manifestation of a complex and sophisticated political theory of associational government that was highly debated throughout the nineteenth and into the early twentieth century. The question of the identity of and the distinctions between specific forms of organization – partnership, corporation, unincorporated association, charitable trust, mutual benefit society, labor union, municipal corporation – raised the most intricate and significant public legal issues of the time. In many ways, the legal-political status of divergent associational bodies, from the government of the nation to the regulation of local social clubs, was the principal jurisprudential question of the nineteenth century.

The early American law of associations was highly differentiated. It often proceeded on a case-by-case basis in which the particular nature of the group’s activity determined its own special legal status and powers. The numerous special charters and statutes of state legislatures coupled with a highly flexible judicial case law produced an associational regime in which it often seemed that each type of association generated its own distinctive law – for example, a

special law for towns, municipal corporations, insurance companies, mutual benefit societies, charities, schools, churches, banks, railroads, reform organizations, literary clubs, etc.⁶³ But while no clear consensus existed among early American jurists on the exact nature and implications of the general legal categories of association, most employed some of the distinctions enumerated below:

Associations⁶⁴

I. CORPORATE

- A. Sole (one person – usually a religious or local official)
- B. Aggregate (many persons)
 - 1. Ecclesiastical
 - 2. Lay
 - a. Eleemosynary
(academies, schools, colleges)
 - b. Civil
 - i. Trading
(banks, railroads, manufactories)
 - ii. Non-Trading
(fraternal, benefit, and literary societies)

II. QUASI-CORPORATE

III. UNICORPORATE

- A. Profit
 - 1. Partnerships
(mining partnerships, statutory joint-stock associations)
 - 2. Trusts
 - B. Nonprofit
 - 1. Charitable
(religious societies, benefit societies)
 - 2. Non-Charitable
(social clubs, fraternal orders, professional societies, unions)
-

63. A classic example of this specialization of the American law of association is the nineteenth-century law of mining partnership. Being an unincorporated trading venture, a mining partnership would usually be subject to dissolution upon the withdrawal of a single partner. Given the special conditions and uncertainty of mining, however, American jurists created an exception allowing “one person to convey his interest in the mine and business without dissolving the partnership.” As California Supreme Court Justice Crocker summed up the need for common law flexibility in the law of association: “It is impossible to lay down a perfect code of rules upon the subject: but like other legal rules, they must be settled as they arise in cases requiring their determination. Such rules must be governed by the peculiar condition and circumstances of the country” (*Skillman v. Lachman*, 23 Cal. 198; 83 Am. Dec. 96 [1863], 98, 102).

64. For some examples deploying these categories, see William Blackstone, *Commentaries on the Laws of England*, 4 vols. (1765–1769; Chicago: University of Chicago Press, 1979), 1:455–

60. *United States Statutes at Large, 1789–1845*, ed. Richard Peters (Boston, 1848), vol. 1; see especially “Table No. IV. Comprising the Acts of Congress from 1789 to 1845, Inclusive. Relating to the Public Lands,” xcvi–cxviii.

61. Timothy Walker, *Introduction to American Law: Designed as a First Book for Students*, 7th ed. (1837; Boston, 1878), 223.

62. James Willard Hurst, “The Use of Law in Four ‘Colonial’ States of the American Union,” *Wisconsin Law Review* (1945): 585.

The main juristic division of associations was between those which received the formal benefits of incorporation through an official charter from the state and those that did not. And between incorporated and unincorporated associations stood the amorphous legal category of quasi-corporations – special public associations and governmental institutions given partial attributes of incorporation. James Kent listed counties, towns, and school districts as the principal quasi-corporations. Later treatise writers used the designation for “every local subdivision of a state, other than a municipality, created by general law as an agency of the state to effect the administration of public affairs,” for example, non-chartered towns, road districts, public commissioners, boards of supervisors, school trustees.⁶⁵ But while the special state privileges of incorporation were an important sign of the public obligations and powers of corporate associations, one should not jump to the conclusion that unincorporated associations were less powerful, more private, or less hampered by legal and governmental intervention. The American law governing unincorporated partnerships, joint-stock associations, stock exchanges, trade unions, employers’ associations, mutual benefit societies, and, most obviously, trusts could be even more powerful and regulatory than the American law of corporations. The public force of law and statecraft pervaded the whole hierarchy of early American associations. While the juridical categories *corporate*, *quasi-corporate*, and *incorporate* were important associational distinctions, it is perhaps more useful to survey early American associations according to their political, economic, and social identities.

State

At the very top of the hierarchy of nineteenth-century associations stood the body politic itself – the nation-state. Nineteenth-century legal and political commentators were fond of thinking of the whole founding of the American nation-state as but a series of giant acts of associationalism, whereby thirteen British corporations transformed themselves into a single governing entity. James Kent began his “History of the American Union” by asserting that “the association of the American people into one body politic [began] while they were colonies of the British empire.” The

73; James Kent, *Commentaries on American Law*, 12th ed., 4 vols. (Boston: Little, Brown, and Co., 1873), II:267–315; Sydney R. Wrightington, *The Law of Unincorporated Associations and Business Trusts* (Boston: Little, Brown, and Co., 1923), 4–5; Herbert A. Smith, *The Law of Associations: Corporate and Unincorporate* (London: Oxford University Press, 1914), 20.

65. Kent, *Commentaries*, II:274; Henry H. Ingersoll, *Handbook of the Law of Public Corporations* (St. Paul: West Publishing Co., 1904), 19–22. The uncertain category of “quasi-corporations” is another good example of just how differentiated and unsystematic the law of associations could be. English author Herbert Smith noted the inclusion as quasi-corporations of trade unions, friendly societies, industrial and provident societies, and registered workmen’s clubs (Smith, *Law of Associations*, 21).

New England colonies in particular, with their similar manners, religion, laws, and civil institutions, quickly developed “a very intimate connexion” and a “habit of confederating together for their common defence.” Kent saw the United Colonies of New-England as a paradigmatic political association built upon explicit “articles of confederation” and a self-governing “congress of two commissioners delegated from each colony . . . with power to deliberate and decide on all points of common concern.” That association was the “foundation of a series of efforts for a more extensive and more perfect union of the colonies” that culminated, of course, in independence and that ultimate charter – the Constitution of 1787.⁶⁶

William Sullivan similarly viewed the establishment of the government and constitution of the state of Massachusetts as an act of association

making the whole community of people “a body politick,” by voluntary association or “social compact” or agreement, whereby each one covenants with the whole, and the whole with each one, that the whole people shall be governed by certain laws, for the common good.⁶⁷

Sullivan’s emphasis on association as a basis for law-making, governance, and regulation was highlighted as well by James Wilson. Wilson illustrated the intimate connection of association, civil society, body politic, and law in his discussion of the Mayflower Compact, the first American constitutional association. That 1620 political covenant constituted a “civil body politick” for “better ordering and preservation,” establishing a power “to enact, constitute, and frame such just and equal laws and ordinances . . . for the general good of the colony.” By 1639, that civil society yielded a house of representatives “determined to make the laws of England the general rule of their government.” This compact and these principles of legislation bequeathed Massachusetts Bay “all the blessings of a government, in which prudence and vigour went hand in hand.”⁶⁸ For Kent, Sullivan, and Wilson, civil society and association were not opposed to the state, they were formative acts of state- and law-making. They were the basis of an active tradition of

66. James Kent, *Commentaries on American Law*, 4 vols. (New York, 1826), I:189–205, 189–90. Kent’s rendering of foundational associationalism also made its way into such practical political and instructional manuals as Joseph Burleigh’s *The American Manual*. Burleigh began his survey of the “Origin of the American Constitution” by noting “several instances of an association of the people of America for mutual defence and protection, while owing allegiance to the British crown.” The most important being the league of the United Colonies of England to “regulate their general concerns, and especially to levy war and make requisitions upon each component colony for men and money according to its population” (Joseph Bartlett Burleigh, *The American Manual* [Philadelphia, 1853], 83–84).

67. William Sullivan, *The Political Class Book: Intended to Instruct the Higher Classes in Schools in the Origin, Nature, and Use of Political Power* (Boston, 1831), 19.

68. Wilson, *Works*, I:360–61.

law and governance and the foundation of American constitutionalism. The body politic itself became the paradigm for understanding the nature and powers of all lesser associations.

Town

But in terms of daily governance and the practical realities of nineteenth-century American life, the United States Constitution (yet alone any original colonial American social compact) was of less significance than the proliferation of associations of local government. As Tocqueville noticed, one of the keys to American traditions of democracy and liberty was administrative decentralization through the local governing institutions of towns and counties. These local governmental associations continued to function in the nineteenth century true to their roots in the ancient English tradition of the hundred – as self-governing, corporate communities.⁶⁹ Nineteenth-century American counties, towns, and villages were more than just subordinate governing jurisdictions in an administrative hierarchy. As Frederic William Maitland was fond of pointing out, the local governmental association “is not a mere stretch of land, a governmental district; it is an organized body of men; it is a *communitas*. We must stop short of saying that it is a corporation.”⁷⁰

One thing early American towns had in common with corporations was a state charter. The charter, or special act of incorporation, was the most visible political tool in the legal construction of nineteenth-century civil society. It combined a formal state recognition of association with an explicit delegation of public powers, private rights, and communal responsibilities. Chartered associations were neither natural nor spontaneous, they were political creations of state. The town charter was perhaps the classic case, and its form was replicated in a flurry of acts of incorporation (for everything from turnpikes to manufacturing corporations to religious, charitable, music, and stage companies) that preoccupied state legislatures for much of the early nineteenth century.

Tennessee was quite explicit about this legal-political delegation of power when, in 1832, it incorporated the town and inhabitants of M’Minnville as a “body politic and corporate” with perpetual succession, a

69. Tocqueville, *Democracy in America*, 61–98. Tocqueville also recognized the autonomy of American local governmental associations:

In all that concerns themselves alone the townships remain independent bodies, and I do not think one could find a single inhabitant of New England who would recognize the right of the government of the state to control matters of purely municipal interest. (Tocqueville, 67)

70. Frederic William Maitland and Frederick Pollock, *The History of English Law Before the Time of Edward I*, 2 vols., 2d. ed. (Cambridge: Cambridge University Press, 1952), 1:534.

town seal, and the rights and powers to “sue and be sued, plead and be impleaded, grant, receive, purchase and hold real, mixed and personal property, or dispose of the same for the benefit of said town.” With such a legal-political status also came the self-governing power and authority to pass and enforce bylaws and ordinances. The legislature formally granted M’Minnville public law-making powers and privileges:

To preserve the health of the town, prevent and remove nuisances, to provide for licensing and regulating auctions, taxing, regulating or restraining theatrical or other public amusements and shows within the bounds of the corporation, to restrain and prohibit gambling, to establish night watches and patrols, to [plan, establish and repair] streets, lots and alleys, . . . to establish necessary inspections within the town, to erect and regulate markets, to provide for the establishment and regulation of a fire company, and the sweeping of chimneys, to procure water on the public square by digging wells or otherwise, to erect and regulate pumps, to impose and appropriate fines, penalties and forfeitures for a breach of their by-laws or ordinances, to appoint a recorder and town constable, to lay and collect taxes for the purpose of carrying the necessary measures into operation for the benefit of said town, to restrain tippling houses, and to pass all laws and ordinances necessary and proper to carry the intent and meaning of this act into effect.

The charter went on to designate appropriate town officers (aldermen, mayor, constable, commissioners); to prescribe their elections, terms of appointment, and oaths; and to regulate town finances (taxes, revenues, expenses, and debts).⁷¹

Such associational charters reflect the important role of *place* in the nineteenth-century understanding of self-government via bylaws (laws of the place or community, laws of the dwellers or settlement, laws of the by or pye).⁷² But more importantly, they suggest the predominance of a pattern in the American law of associations of the explicit public creation and regulation of such bodies politic – of their charters, of their officers, of their bylaw-making powers, of their public duties and responsibilities, and of their internal governance and finance. That pattern of the legal and political construction of civil society extended from the top to the bottom of the associational hierarchy from nation-executive-legislature-constitution to town-mayor-aldermen-charter to corporation-president-board-act of incorporation.

71. “An Act to Incorporate the Towns of M’Minnville and Fosterville,” chap. 33, October 11, 1832, in *Private Acts Passed at the Called Session of the Nineteenth General Assembly of the State of Tennessee* (Nashville, 1832), 17–21.

72. See Francis Lieber, *Civil Liberty and Self-Government*, 323.

Municipal Corporation

The charter was certainly a key element in the nineteenth-century American tradition of local self-government, establishing associations and corporations as public creations, instruments of decentralized governance. In the case of municipal corporations or nineteenth-century cities, charter privileges and powers were the basis for a quite distinctive style of quasi-independent public rule, described best in Hendrik Hartog's account of the original corporate powers of the Municipal Corporation of New York.⁷³ But municipal corporations also reflected two other components in the nineteenth-century mix of public associationalism – the public power of bylaws (in this case municipal ordinances) and the principle of mutual suretyship.

A bylaw was simply a “private law made by a corporation constituted by a statute or charter, custom or prescription, for the orderly government of their members and affairs.” The power to make bylaws was implicit in the act of incorporation. As Nathan Dane noted with the appropriate corporeal metaphor, “As the natural body has reason to govern itself, so bodies corporate must have laws.”⁷⁴ The implications of this bylaw-making power for American governance were immense when considering the corporation as municipality. Like the town of M'Minville, the city of Albany, New York, was incorporated with the power to make bylaws for the “good order and government” of the city. Included within that local policing power were literally hundreds of regulatable offenses, activities, professions, and economic interests:

Forestalling; regrating; disorderly and gaming houses; billiard tables; combustible and dangerous materials; the use of lights and candles in livery or other stables; the construction of fireplaces, hearths, chimneys, stoves, and many other apparatus capable of causing fires; the gauging of all casks of liquids and liquors; the place and manner of selling hay, pickled and other fish; the forestalling of poultry, butter and eggs; the purchase of wheat, corn and every kind of grain and other articles of country produce, by “runners”; the running of dogs; weights and measures; buildings; chimneys and chimney sweeps; roads; wharves and docks; the weighing and measuring of hay, fish, iron, cord wood, coal, grain, lime and salt; markets; cartmen and porters; fires; highways and bridges; roof guards and railings; the selling of cakes and fruit; the paving or flagging of sidewalks; the assize and quality of bread; the running at large of horses, cows, or cattle; and vagrants, common mendicants, or street beggars.⁷⁵

73. Hartog, *Public Property and Private Power*.

74. Nathan Dane, *A General Abridgment and Digest of American Law*, 8 vols. (Boston, 1823), I:457, 460.

75. *Laws of the State of New York* (Albany, 1826), chap. 185, 191, 193.

Such corporate bylaws in the case of municipalities amounted to the very powers of governance itself. Moreover, all such bylaws were still subject and subordinate to the more general rules and requirements of state, constitution, and common law. Although traditions of corporate and local self-governance brought a certain degree of institutional autonomy, it never brought an exemption from politics and law.

Mutual suretyship went to the issue of the public responsibilities rather than the public powers of incorporated public associations. It reflected Maitland's idea of local corporate bodies as organizations of mutually-assuring citizens, a *communitas*. Although nineteenth-century municipal corporations provided numerous examples of this phenomenon, one of the most remarkable was the persistence of the duty of the local body politic to compensate victims of the crime of riot – a duty statutorily enforced in the famous Philadelphia anti-Catholic riots of 1844 and New York City's Civil War draft riots.⁷⁶ That municipal duty had ancient roots in the Saxon law of police and the medieval English notion of the hundred, whereby residents of localities became mutual pledges for the good behavior of one another. As Maitland observed, when “communal duties” went neglected by the hundred, for example, when a murder or robbery failed to produce the malefactor, the whole was made liable for restitution.⁷⁷ The “great principle of the law,” as Lord Mansfield put it, was that citizens would be “sureties for one another,” and it was written into the compensation requirement of the English Riot Act of 1714.⁷⁸ These English notions of suretyship and communal liability were well received by nineteenth-century American jurists and commentators. As Alexander Addison noted in 1800, “Combining public and private interest” by making neighbors

76. For examples of statutes imposing liability on municipal corporations, see *Pennsylvania Laws* (1841), 416, chap. 144; *New Hampshire Laws* (1854), 1416, chap. 1519; *New York Session Laws* (1855), 800, chap. 428; *New Jersey Laws* (1864), 237, chap. 150. On the Philadelphia litigation see *Donaghue v. The County*, 2 Pa. St. 230 (1845); *Hermits of St. Augustine v. The County*, Brightly's Rep. (Pa., 1847); *St. Michael's Church v. The County*, Brightly's Rep. (Pa., 1847); *Commissioners of Kensington v. County of Philadelphia*, 13 Pa. 76 (1850); *County of Allegheny v. Gibson's Son & Co.*, 80 Pa. St. R. 397 (1879); and Michael Feldberg, *The Philadelphia Riots of 1844: A Study of Ethnic Conflict* (Westport: Greenwood Press, 1975). On the New York City draft riots, see *Davidson v. Mayor of New York*, 25 Superior Ct. 230 (New York, 1864); *Darlington v. Mayor of New York*, 31 NY 164 (1865); *Scheillein v. Board of Supervisors of the County of Kings*, 43 Barb. 490 (New York, 1865); *Newberry v. Mayor*, 1 Sweeney 369 (New York, 1869); and Iver Bernstein, *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War* (New York: Oxford University Press, 1990).

77. Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed., 2 vols. (Washington, DC: Lawyers' Literary Club, 1959), I:556–60.

78. “An Act for Preventing Tumults and Riotous Assemblies, and for the More Speedy and Effectual Punishing of the Rioters, 1 Geo I, stat. 2, chap. 5 (1714); *Ratcliffe v. Eden*, Cowp. 485 (England, 1776), 488.

liable for robberies and riots “promoted obedience to the laws, and secured the testimony and force of every man, in aid of public authority.”⁷⁹ Such local, public-spirited, associational rhetoric remained the justification for municipal compensation statutes throughout the early nineteenth century. In 1863, New York Superior Court Justice Monell compensated draft riot victims arguing,

Under our free institutions, private interest must yield to the public good, so sometimes in the due dispensation and distribution of justice, private wrongs, which the government was powerless to avert, may be redressed by removing the burden from the individual, and placing it upon the whole community.⁸⁰

Such municipal corporate duties of mutual suretyship and public responsibility were frequently upheld by nineteenth-century judges as part and parcel of the early American law of public associations.

Business Corporation

But in many ways, the public-regarding legal powers and responsibilities outlined above are to be expected of public associations like towns and municipal corporations. They are the easy cases in which to demonstrate the legal and political construction of civil society in nineteenth-century America. They still leave a number of questions unanswered. What about the other kinds of economic and social organizations in Connecticut’s list of associations? What about academies and agricultural societies, banks and bridges, charitable associations and churches? After all, are these not the organizations one is really referring to when one talks about associations?

One of the problems with much of the existing literature on civil society and associations is precisely a lack of recognition of the overarching legal continuities linking early American political, economic, and civic associations. Of course, there were significant distinctions between the municipal corporation and the business corporation and the incorporated fraternal society; however, it is important to recognize first a crucial similarity – their frequently shared public corporate form.

As William Blackstone made clear, the state acts of incorporation for associations of all sorts (such as those for “the advancement of religion, of learning, and of commerce”) created an “artificial person” or a “body politic” that involved the grant of special “privileges and immunities” and the “coercive power” necessary to enforce its own laws, rules, and obligations. When persons were

consolidated and united into a corporation . . . as one person, they have one will; . . . this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation.

Accordingly, such states as Connecticut, Tennessee, and New York chartered the range of American associations with discrete powers (1) of perpetual succession; (2) to sue and be sued; (3) to purchase and sell real and personal property; (4) to contract and be contracted with; and most importantly, (5) to make bylaws for the government of the association or corporation.⁸¹ Transportation companies and public utilities received special public grants of land, rights of way, and powers of eminent domain. But even non-economic societies, such as the Masons and literary clubs, received basic powers to draft constitutions and pass bylaws regulating officers, membership, dues, profits, penalties, personal conduct, and all facets of group activity, from the consumption of liquor to the removal of offenders. Even unincorporated associations received some of these powers through judicial constructions of common law and equity, and other more specific grants via special legislative enactments.

This point is illustrated by further legislation relating to the town of M’Minville, Tennessee. Two days after the legislature formally incorporated the public town itself, in remarkably similar statutory language, the state created a different association – the M’Minville Turnpike Company – to connect up the new town to Murfreesborough. In place of “the inhabitants of M’Minville,” the subscribers for stock in the road were established as a new “body politic and corporate” with the same corporate abilities to “contract and be contracted with, sue and be sued, plead and be impleaded, have a common seal, hold mixed, real and personal estate, and dispose of the same.” Again, the legislature explicitly designated proper officers (commissioners, directors, and president), prescribed the mode of election and appointment, and regulated finances (including a special duty to contribute to the common school fund). And, again, special self-governmental powers and duties were delegated to the turnpike company officers that closely resembled the police and eminent domain powers granted the town: the powers to lay out, mark, and construct the road; to cut, dig, quarry, and take land, timber, gravel, stone, and earth from the lands of adjoining persons; to erect a toll gate and to charge state-prescribed tolls; and to take responsibility for keeping the road in good repair.⁸²

The M’Minville Turnpike Company was a typical

79. Alexander Addison, “Charges to Grand Juries,” *Addison’s Reports* (Pa., 1800), 89.

80. *Davidson v. Mayor*, 240.

81. Blackstone, *Commentaries*, I:455–73. For a fuller but comparable discussion of American incorporation see Kent, *Commentaries*, II:267–315.

82. “An Act to Establish a Turnpike Road from the Town of Murfreesborough to the Top of the Ridge in the Direction to

early American business corporation. Although it is common today to think of business corporations as quintessentially private enterprises, the business corporation first emerged in the nineteenth century as a distinctly public entity. Business corporations were originally understood as special, artificial creations of the legislature whose quasi-public purposes entitled them to the special privileges attending formal statutory incorporation. Business incorporation was viewed as a gift of the sovereign bestowed upon select groups of individuals as quid pro quo for the carrying out of certain important public tasks. This special public quality of early American business corporations was readily apparent in kinds of activities sanctioned through statutory incorporation. Of the 335 special charters granted to profit-seeking corporations before 1801 (317 of which were granted by state legislatures after 1780), 219 were for turnpike, bridge, and canal companies, 67 were for banks and insurance companies, and 36 issued for water, fire, and harbor companies. Only eight charters were granted to private manufacturing companies. That pattern of distribution continued in most states to the Civil War. The Pennsylvania legislature granted 2,333 business charters in the period from 1790 to 1860 – 1,497 were for transportation companies, 428 were for banking and insurance, 140 for water and gas associations, and only 180 (less than 8 percent) for manufacturing. Georgia boasted a similar break-down of 546 business incorporations between 1799 and 1860: 46 percent were transportation and public utility companies, 21 percent were financial companies, and 12 percent covered manufacturing corporations.⁸³ The overwhelming majority of early American business incorporations were granted to companies devoted to

public utilities and public infrastructural development.

In return for performing the quasi-public tasks that the states chose not to pursue directly, for example, the development of roads, rivers, harbors, canals, railroads, water, gas, telegraph, insurance, and banking, early American business corporations extracted general benefits of incorporation like a unitary legal personality and limited liability. But even more significantly, what early American business corporations obtained from state legislatures was a host of more specific statutory privileges and public franchises that were not available to other private individuals or through other forms of voluntary collective action. Willard Hurst provided a partial listing of powers delegated to business corporations that were simply unavailable in the private sphere:

To establish a turnpike, canal, or railroad right of way; to fix tolls, within a broad range of discretion for the use of facilities (notably transport facilities) on which the users were much dependent; to issue promises to pay (bank notes), which the law would permit to circulate as a medium of exchange; to exercise the state's power of eminent domain; to enjoy an implicit, if not explicit, monopoly of some profitable field of enterprise (as when the legislature granted only a limited number of railroad or bank charters in a given locality); to erect dams for power or navigation improvement or other works which without a statutory franchise would be open to legal attack as a public or private nuisance.⁸⁴

In exchange for these very valuable public prerogatives, states usually carved out what Ernst Freund called “an enlarged police power.” State legislatures retained extraordinary powers to regulate the early American business corporation. In addition to the common law of *ultra vires*, limiting corporations to only these powers and purposes explicitly granted in their charters, states routinely imposed a series of special restraints on corporate behavior, regulating:

The objects for which corporations may be organized; conditions as to minimum number of organizers, and sometimes as to their residence; conditions as to denomination of shares and their transferability; manner of organization, name, subscription and payment of capital, and preliminary contracts; regarding officers and members rights, including general meetings, right to vote, qualification and

M'Minville,” chap. 34, October 13, 1832, *Private Acts Passed at the Called Session of the Nineteenth General Assembly of the State of Tennessee* (Nashville, 1832), 21–25. The legislature closely prescribed the “public” rates of toll for this “private” corporation:

For every twenty head of sheep, twenty cents; for every twenty head of hogs, twenty cents; for every twenty horned or neat cattle, fifty cents; for every horse or mule not in a drove, six and one fourth cents, if in a drove, two cents; and so in proportion for any less or smaller number of said animals; for every four wheel pleasure carriage, twenty-five cents; for every two wheel riding carriage, twenty-five cents; for every loaded wagon, twenty-five cents; and for every empty wagon, twelve and a half cents; and for a man and horse, six and a fourth cents; for every cart, twelve and a half cents; for every hogshead of tobacco including the above sum for oxen, mules or horses drawing the said carriage or wagon, cart or tobacco, twelve and a half cents.

83. Joseph S. Davis, *Essays in the Earlier History of American Corporations*, 2 vols. (Cambridge: Harvard University Press, 1917), II:2; Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (Cambridge, MA: Harvard University Press, 1948), 38; Milton Sydney Heath, *Constructive Liberalism: The Role of the State in Economic Development in Georgia to 1860* (Cambridge, MA: Harvard University Press, 1954), 308.

84. James Willard Hurst, *The Legitimacy of the Business Corporation* (Charlottesville: University Press of Virginia, 1969), 20. As Hurst noted, many of these special grants did not require formal incorporation, that is, state legislatures also granted such privileges to unincorporated associations (as well as some individuals). But they were only available through the official public action of state legislatures.

number of directors, their election, term of office, and removal, the power to make and alter bye-laws [*sic*]; the management of corporate business, including payment of dividends, acquisition and disposition of real estate, and the contracting of loans; liability and power to assess; increase and reduction of capital; change of name and purposes; duration, extension, liquidation, consolidation; registration of officers and shareholders; and requirement of accounts and reports.⁸⁵

The early nineteenth-century American business corporation was understood as a special creation of public power subject to special regulation and control by the state that created it. Even after the opinion of John Marshall in the *Dartmouth College Case* and the increasing use made of general incorporation laws, states never relinquished their general police powers to regulate business corporations for the public safety, morals, health, and welfare. As Vermont Supreme Court Chief Justice Isaac Redfield noted in his definitive opinion on early American business regulation, corporate grants were to be construed strictly “in favor of the public” so as not to abridge legislative power to regulate persons and property. The “police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state,” consequently state legislatures had the power “as public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety.”⁸⁶ Although some theorists of capitalism and civil society view the business corporation as the quintessential economic voluntary association, an exemplar of private collective action, and an alternative to the

85. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan and Co., 1904), 359. Willard Hurst enumerated even more particular legislative reservations:

Distinctive to transportation company charters were statutory stipulations for provision of promised facilities (that, on pain of forfeiture, minimum capital be subscribed and paid in, operations begin within some specified time, and works be kept in good order and not abandoned), for tolls to be within set minimum and maximum levels, to be fair and reasonable, and to be conditioned on substantial service, and for certain operations reports to be regularly filed. Distinctive to bank charters were particular requirements as to minimum capital paid in, specie reserves, personal liability of bank directors for various kinds of misconduct, special liability of stockholders for debts of the bank, and the rendering of reports and the opening of books to legislative inquiry. Distinctive to insurance company charters was a slow elaboration of special financial regulations, directed at creating an adequate insurance fund and protecting its integrity against careless or fraudulent diversion. (Hurst, *Business Corporation*, 39)

86. *Thorpe v. Rutland and Burlington Railroad Company*, 27 Vt. 140 (1855), 147, 149–50. Thomas M. Cooley relied heavily on Redfield’s opinion for his own synthesis on corporations and police power:

public organization and state regulation of market relations, its historical origins reflect the visible hand of legal and political construction.

Societies: Religious, Benevolent, and Fraternal

The business corporation, then, very much fits the model of early American public associationalism. The legislative acts of economic incorporation that dominated state statute books before the Civil War generated a series of quasi-public utilities and public service associations that reaped special state privileges in return for taking on public obligations like the construction of public works. But what is perhaps even more surprising is the degree to which early American non-profit associations – churches, mutual benefit societies, and social clubs took on some of the same public characteristics. Indeed, in some ways nonprofit benefit associations and public administrative boards in the areas of religion, poor relief, welfare, education, literary and scientific pursuits, and fraternal and social activities were the original progenitors of the distinctly public form of the early American business corporation.⁸⁷ During the same period (1790 to 1860) in which the state of Georgia incorporated a total of 64 manufacturing firms, the state legislature formally chartered 528 academies, 314 churches and religious societies, 85 lodges, 40 charities and benevolent societies, 14 scientific societies, 12 mutual benefit societies, 10 libraries, and 6 temperance societies.⁸⁸ The history of the corporation and the association in the United States has been very much skewed by the disproportionate attention granted to economic and business organizations at the expense of the rich legal and legislative history of the incorporation of churches, charities, schools, colleges, mutual benefit societies, social clubs, and literary and scientific associations.

As suggested by the numbers above, a good deal of the activity of so-called voluntary and benevolent associations in the United States began with the formal

All contracts and all rights, it is held, are subject to this power; and all regulations which affect them may not only be established by the State, but must also be subject to change from time to time, with reference to the general well-being of the community. . . . Rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety. (Thomas M. Cooley, *A Treatise on the Constitutional Limitations* [Boston: Little, Brown and Co., 1868], 575–76)

87. See for example, Ronald E. Seavoy, “The Earliest Corporations: Benevolent Public Service Organizations and Municipalities,” in *The Origins of the American Business Corporation, 1784–1855* (Westport: Greenwood Press, 1982), 9–38; and Milton Sydney Heath, “Antecedents of the Corporation in Georgia,” in *Constructive Liberalism*, 293–308.

88. Heath, “Antecedents,” 304.

creation of such entities by a special act of the state legislature. The state incorporation of such societies brought some of the same public considerations and consequences that attended the creation of other political and economic corporations. As with the town of M'Minville, the town of Kennebunk, Maine was officially incorporated by the state legislature with "all the powers, privileges and immunities, and subject to all the duties and requisitions of other corporate towns" in June, 1820.⁸⁹ In March, 1821, the state legislature created another Kennebunk corporation, only this time not a turnpike company. Rather, the state incorporated several citizens and associates into a "body politic" known as the Kennebunk Literary and Moral Society.⁹⁰ Although one currently tends to think of such literary and moral associations as spontaneous, voluntary, private, and unregulated manifestations of civil society, this group was chartered much like towns and turnpikes with explicit public delegation of the powers

to make contracts, and to establish such rules and regulations as may be necessary for the promotion of the objects of such Society, [to] sue and be sued, [to] take, hold and possess real or personal estate, not exceeding three thousand dollars, and may have a common seal.

The legislature regulated the place of meetings, reserved the right to amend or repeal this charter, and officially held valid and effectual all "transactions of said Society while acting as a voluntary association, so far as they are not repugnant to the laws of this State."⁹¹ The Kennebunk Literary and Moral Society was followed ten months later by the Kennebunk Insurance Company with a similar charter establishing a "body politic" (to sue, be sued, etc.), delegating public powers and privileges according to an earlier act respecting the "powers, duties, and restrictions of Insurance Companies," regulating capital stock, the division of shares, officers, and elections, and granting the power of making necessary bylaws, rules, and regulations.⁹²

The point is that literary and moral societies, like other religious, benevolent, and fraternal societies

89. "An Act to Divide the Town of Wells, and Incorporate the Northeasterly Part Thereof as a Town by the Name of Kennebunk," chap. 3, June 14, 1820, *Private or Special Laws of the State of Maine from 1820 to 1828 Inclusive* (Portland, 1828), 6–7.

90. Edward E. Bourne, John Lillie, John Skeele, Joseph Green Moody, Benley Smart, Enos Hoag, Moses Varney, Edward Greenborough, Charles Haynes, John Frost, and Israel W. Bourne. The enumeration of primary individuals is typical of these incorporations.

91. "An Act to Incorporate the Kennebunk Literary and Moral Society," chap. 60, March 8, 1821, *Private or Special Laws of the State of Maine*, 65–66.

92. "An Act to Incorporate the Kennebunk Insurance Company," chap. 109, February 2, 1822, *Private or Special Laws of the State of Maine*, 141–44.

were viewed by legislators and jurists as another component of the public civil society being actively constructed in early nineteenth-century America. They were of a piece with the public towns, counties, municipal corporations, turnpike companies, and banks created through the direct action of the state in the same period. In Portland, Maine, between 1820 and 1828, remarkably similar language and provisions incorporated the town itself as well as its lesser associational "bodies politic": the Abyssinian Religious Society of Portland, the Portland Athenaeum, the Beethoven Musical Society of Portland, the Portland Bridge Company, the Portland Charitable Cordwainers' Society, the Portland Female Charitable Society, the Portland Female Orphan Asylum, the First Baptist Society of Portland, the Portland Glass Manufacturing Company, the Mariner's Church of Portland, the Methodist Society of Portland, the Portland Mutual Fire Insurance Company, the Portland Nautical Society, the Portland Stage Company, the Portland Steam Boat Navigation Company, and the Portland White Mountain Stage Company.⁹³

The New York state legislature was as active as any state before the Civil War in politically constructing and regulating the constituent components of its civil society. Between 1777 and 1857, the New York statute book was chock-full of special statutes devoted to the corporate creation, financial assistance, and subsequent regulation of its nonprofit associations. In addition to passing 200 statutes relating to specific literary and scientific societies and another 350 establishing and regulating academies, the New York legislature enacted 300 acts respecting particular churches. Most of these acts were formal acts of incorporation. But also included among them were state land grants to churches, state provisions of relief and financial assistance, special exemptions from taxation, and laws regulating church real estate, the sale of pews, and the election of officers and trustees. The following New York churches were all the subjects of special state statute before the Civil War:

African Wesleyan Methodist Church in Brooklyn; Albany Methodist Episcopal Church; Albany United Presbyterian Church; Apostolic Church in Geddes; Ashbury African Church; Ashocan Church in Marbletown; Associate Reformed Congregation of Hamptonburgh; Associate Reformed Union Church in Bloomingburgh; Atlantic Street Baptist Church; Baptist Church in New York, Southport and Elmira, Strong Place; Baptist Church of Christ in New York, Queens County; Baptist Church and Society of Dundee; Baptist Society in Brooklyn, Cazenovia, Norwich; Bethel Baptist Church in New York; Bethel Free Church in Troy; Bethesda Church in Saratoga Springs;

93. *Private or Special Laws of the State of Maine from 1820 to 1828 Inclusive* (Portland, 1828).

Bleeker Street Presbyterian Church; B'nai Jeshurun Congregation; Broadway Baptist Church; Caledonia Presbyterian Society; Catholic Church in New York; Central Presbyterian Church in New York; Charlestown Congregational Society in Lima; Christ Church in Germantown, Milton, North Hempstead; Christ's Church in New York, Oswego; Christian Church of Ellington; Church Charity Foundation; Church of England in America; Churches at Pittston; Congregational in Kingsborough, Owego; Congregational Society of Canaan; Corporation of the Berean Baptist Church in New York; Dutch Churches in Albany, New York; Dutch Congregation in Greenbush; Dutch Reformed Church of Poughkeepsie; Emanuel Congregation in New York; Episcopate of the Diocese of New York; First Baptist Church in Livingston, Porter, Newfane, New York, Scipio, Venice, Williamsburgh; First Baptist Society in Albany, Buffalo, Elbridge, Macedon, Parrysburgh; First Bridgewater Congregational Society; First Congregational Church of Sempronius, Westford; First Congregational Church and Presbyterian Society in Le Roy; First Congregational Society in Bloomfield, Bridgewater, West Pulteney; First Free Presbyterian Church; First Methodist Church in Parma; First Methodist Episcopal Society of Dundee; First Methodist Society in Perry; First Presbyterian Church of Brooklyn, Delhi, Florida, Glens Falls, Goshen, Ithaca, Jamaica, Lyons, Medina, Milford, New York, Salem; First Presbyterian Congregation in Amity, Argyle; First Presbyterian Society in Gates, Pittsford; First Protestant Reformed Dutch Church in Ghent, Roxbury; First Reformed Protestant Dutch Church in Clarkstown; First Religious Society in Homer, Rome, Whites town; First Society of the Methodist Episcopal Church in Chemung, Holly, Newtown; First Universalist Society in East Bloomfield; First Welsh Congregational Society in Steuben; Forest Presbyterian Society at Coxsackie; Free Church of Sherburne; Free Will Baptist Church in Fabius; French Church du St. Esprit in New York; General Synod of the Reformed Protestant Dutch Church; Genesee Conference; German Lutheran Church in New York; German Mission Church in Buffalo; German Mission Church and Congregation of Rochester; German Reformed Church in New York; Grace Church in Jamaica, New York, White Plains; Hedding Society of the First Methodist Episcopal Church in Cayuta; Kingsborough Congregation; Lewiston Presbyterian Church; Litchfield Presbyterian Society; Low Dutch Congregation of Queens County; Lutheran Congregation in Athens; Lutheran Zion Church in Athens; Methodist Church in Brooklyn, Geneva, Havana, Junius, Plattsburgh, Warsaw, Whitestown; Methodist Church East Circuit of New York; Methodist Episcopal Church in Albany, Gilboa, New York, Poughkeepsie; Methodist Episcopal Society in Stockton;

Methodist Missionary Society; Methodist Society in Auburn; Methodist Union Society in Pompey; Milton Centre Society of Lansing; New South Dutch Church in New York; Pearl Street Presbyterian Church; Plymouth Congregational Society of Rochester; Presbyterian Church of Amsterdam, Freehold, Geneva, Greenbush, Mount Pleasant, Newtown, New York, Peekskill, Salem, Schenectady, Sing Sing, Smithtown; Presbyterian Church and Congregation of South Salem; Presbyterian Congregation of Freehold, West Bloomfield; Presbyterian Society of Acre, Rochester; Protestant Episcopal Church Missionary Society in New York; Protestant Episcopal Church of Flushing, Jamaica, Newtown, New York, Poughkeepsie; Protestant Presbyterian Congregation of Cambridge; Protestant Reformed Dutch Church of Farmerville; Reformed Dutch Church of Bushwick, Deerpark, Fishkill, Linlithgow, Minaville, New York, Shawangunk, Union, Union Village; Reformed Low Dutch Churches of Oyster Bay and North Hempstead; Reformed Presbyterian Church in New York; Reformed Presbyterian Congregation of Galway; Reformed Protestant Dutch Church of Albany, Flatbush, Florida, German Flats, New York, Orange, Schenectady, Tappan; Reformed Protestant High and Nether Dutch Congregation of Middleburgh, Schoharie; Regular Baptist Church and Society of Hartford; Rome Ridge Society; St. Andrew's Church in Harlem, New Berlin, Richmond; St. Ann's Church in Brooklyn, Florida; St. George's Church in New York, Schenectady; St. James Methodist Episcopal Church of Kingston; St. John's Church in Brooklyn, Johnstown; St. Luke's Church in New York; St. Mark's Church in New York; St. Mary's Church of New York, Rochester; St. Patrick's Cathedral; St. Paul's Church at Paris, Sing Sing; St. Peter's Church in Albany, Auburn, New York, Peekskill, Waterville; St. Phillip's Chapel in Phillipstown; St. Stephen's Church in New York; Sanctity Church in Germantown; Second Baptist Church and Society of Ulysses; Second Methodist Society in Murray; Second Reform Dutch Church in Rotterdam; Second Protestant Reformed Dutch Church in Albany, Glenville; Second Presbyterian Society in Carmel; Second Street Methodist Church; Sempronius Congregational Society; Seventh Day Baptists; Seventh Presbyterian Church in New York; Shaari Rochmim; Shearith Israel in New York; Sunday School Union of Methodist E. Church; Third Associate Reformed Church in New York; Third Congregation of the Associated Reformed Church in New York; Third Presbyterian Church of Rochester; Tomhannock Methodist Episcopal Church in Pittstown; Trinity Church in New York, Utica; Union Church in Paris; Union Congregational Society in Manlius, Pompey; Unitarian Congregational Society of Syracuse; United Congregation of Galway and Charlton; United

German Evangelical Lutheran; United German Lutheran Churches in New York; United Presbyterian Congregation in Albany; Universalist Society in Troy; Ursuline Convent; Washington Street Baptist Society of Buffalo.⁹⁴

Such statutory lists are a concrete manifestation of the particular legal and political construction of early American associationalism. The official state charter was a symbol of the public control exercised by legal and governmental institutions over even religious associations. As Carl Zollmann noted (without irony) in his comprehensive survey, *American Civil Church Law*, the state charter was “the supreme law of a religious corporation.”⁹⁵ Church charters created religious corporations and routinely regulated their mode of formation, the election and power of church officers, the term of office, the qualifications of voters, and the disposition of church property and income.⁹⁶ Moreover, as with the business corporation, states retained their general legislative powers to regulate such religious corporations in the public interest. As the New York Supreme Court made clear in *Brick Presbyterian Church v. Mayor of New York* (1826) and *Coates v. Mayor of New York* (1827), corporate deeds and covenants did not exempt religious corporations from police power “to order the use of private property [so] as to prevent its proving pernicious to the citizens generally.”⁹⁷

Other kinds of nonprofit benevolent and fraternal organizations also were special favorites of nineteenth-century state legislatures. The following table lists charitable associations that were chartered or the subject of special legislative acts in New York before the Civil War:⁹⁸

1. Albany Bible and Common Prayer Book Society; 2. Albany Bible Society; 3. Albany City Hospital; 4. Albany Humane Society of Mechanics; 5. Albany Mechanics' Benefit Society; 6. Albany Mechanics' Society; 7. Albany Society for the Relief of Orphan and Destitute Children; 8. Albany Hospital; 9. Albion Benevolent Society of NY; 10. American Baptist Home Mission Society; 11. American and Foreign Bible Society; 12. American Seamen's Friend Society; 13. American Tract Society for the Condition of the Jews; 14. American Bible Society; 15.

- American Tract Society; 16. Ancient Britons' Benefit Society of New York, Utica, and Remsen; 17. Assistance Society in NY; 18. Association for the Benefit of Colored Orphans in NY; 19. Asylum for the Relief of Children and Widows; 20. Asylum for Friendless Boys; 21. Bakers' Benefit Society; 22. Baptist American and Foreign Bible Society; 23. Baptist Education Society; 24. Baptist Missionary Society; 25. Baptist Theological Seminary; 26. Benevolent and Provident Society; 27. Black River Annual Conference; 28. Black River Baptist Missionary Society; 29. Black River Literary and Religious Institute; 30. Bloomville Religious Society; 31. Baptist Historical Society; 32. Brooklyn City Hospital; 33. Brooklyn African Woolman Benevolent Society; 34. Brooklyn Benevolent Association; 35. Brooklyn Benevolent Society; 36. Brooklyn African Tompkins Association; 37. Buffalo Firemen's Benevolent Association; 38. Buffalo Marine Hospital; 39. Buffalo Mechanics' Society; 40. Buffalo Orphan Asylum; 41. Butchers' Benevolent Society; 42. Baptist Union; 43. Buffalo Juvenile Asylum; 44. Caledonian Society; 45. Cartmen's Benevolent Society; 46. Carvers' and Gilders' Benevolent Society; 47. Castile Society; 48. Catskill Mechanical Society; 49. Central Asylum for Deaf and Dumb; 50. Columbian Friendly Union Society; 51. Congregational Society of Spencer; 52. Cayuga Asylum for Destitute Children; 53. Clinton Liberal Institute; 54. Consumption Hospital; 55. Deutscher Kranken Verein; 56. Presbyterian Society; 57. Missionary Society of the Protestant Episcopal Church; 58. Deveaux College; 59. Eastern Dispensary; 60. East Genesee Annual Conference of the Methodist Church; 61. Elmira Mechanics' Society; 62. Episcopate of Western NY; 63. Erin Fraternal Benevolent Association; 64. Evangelical Lutheran Ministerium; 65. Eye Infirmary; 66. Emanuel Congregation; 67. Eye and Ear Infirmary; 68. Female Assistance Society; 69. Female Association of NY; 70. Firemen's Benevolent Association; 71. First Baptist Society; 72. First Universalist Society; 73. First Methodist Episcopal Society; 74. Franklin Association; 75. Free School Society; 76. Free Will Baptist Society; 77. French Benevolent Society; 78. Friendly Society; 79. Friendly Sons of St. Patrick; 80. First Congregational Society; 81. First Presbyterian Society; 82. General Protestant Sunday School Union and Church Book Society; 83. General Society of Mechanics and Tradesmen; 84. General Society of Mechanics; 85. General Theological Seminary; 86. Genesee Conference; 87. Genesee Missionary Society; 88. Genesee Gospel Society; 89. Geneva Friendly Society; 90. German Charitable Society; 91. German Evangelical Society; 92. German Lutheran Missionary Society; 93. German Mutual Assistance Society; 94. Grand Chapter of Free Masons; 95. German Mission Congregation; 96. Genesee Wesleyan Seminary; 97. Hamilton Free School; 98. Hebrew Benevolent

94. Henry H. Havens, *General Index to the Laws of the State of New York, 1777–1857*, 2 vols. (Albany: Weed, Parsons and Co., 1866), 187–95.

95. Carl Zollmann, *American Civil Church Law* (New York: Columbia University Press, 1917), 81.

96. See, for example, “An Act for the Relief of the Protestant Episcopal Church in the State of New York,” *Laws of the State of New York, 1789–1796* (Albany, 1887), III:566; “An Act to Enable the Corporation of the First Presbyterian Church in the City of New York to Hold Real and Personal Estates of the Yearly Value Therein Mentioned” (*ibid.*, 433).

97. *Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y., 1826) and *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y., 1827), 605–6.

98. Havens, *Index to the Laws New York*, 174–83.

Society; 99. Hibernian Benevolent Association; 100. Hibernian Benevolent Society; 101. Hibernian Provident Society; 102. Hibernian Universal Benevolent Society; 103. House Carpenters' Benevolent Society; 104. Humane Society; 105. Hudson Mechanical Society; 106. Hudson Orphan Relief Asylum; 107. Hebrew Female Benevolent Society; 108. Ithaca Mechanics' Society; 109. Journeymen Ship Joiners' Benevolent Association; 110. Laborers' Union Benevolent Association; 111. Leake and Watts Orphan House; 112. Little Falls Mechanics' Association; 113. Life Saving Benevolent Association; 114. Local Preachers' Association; 115. Lying-In Hospital; 116. Manhattan Provident Society; 117. Mariners' Benevolent Association; 118. Mariners' Family Industrial Society; 119. Marshall Infirmary; 120. Masonic Hall Association; 121. Mechanics' and Manufacturers' Society; 122. Mechanics and Tradesmen of NY; 123. Mechanics' Benefit Society; 124. Methodist Book Concern; 125. Methodist Episcopal Chapel Society; 126. Mechanics' Humane Association; 127. Ministers' Relief Association; 128. Missionary Society of Methodist Episcopal Church; 129. Mutual Aid Society of NY; 130. Mutual Benefit Society of NY; 131. Mutual Benefit Society of Cordwainers; 132. Mutual Benefit Society of Mechanics; 133. Mendelsohn Benevolent Society; 134. Methodist Episcopal Society; 135. Methodist Episcopal Church Sunday School Union; 136. New England Society; 137. New York African Clarkson Association; 138. New York African Society; 139. NY Ministers' Mutual Assistance Society; 140. NY Auxiliary Bible and Common Prayer Book Society; 141. NY Baptist Missionary Society; 142. NY Beneficial Society; 143. NY Benevolent Association of Bookbinders; 144. NY Dispensary; 145. NY Bible and Common Prayer Book Society; 146. NY Evangelical Missionary; 147. NY Female Assistance Society; 148. NY Female Society for Lying-In Women; 149. NY Hebrew Assistance Society; 150. NY Hermans Brothers' Benevolent Society; 151. NY Hebrew Mutual Benefit Society; 152. NY Hibernian Benevolent Burial Society; 153. NY Hospital; 154. NY Institution for the Blind; 155. NY Institution for the Deaf and Dumb; 156. NY Journeymen Shipwright and Caulkers' Benevolent Society; 157. NY Masons' Society;

Again, the scope and specificity of this formal legislative attention to associational life is the striking aspect of these statutes. Indeed, this final table speaks directly to the two main concerns of this essay. First, the sheer breadth of the list emphasizes the great range of early American associationalism. Even within the single legislative category of "charitable societies," the diversity of organizations ranges from religious missionary societies to widows' and orphans' charities to masonic leagues to hospital funds to mechanics' benefit societies to antislavery reform

organizations. Charitable societies were but one example of nonprofit associations generally. And though such benevolent or fraternal organizations are what most scholars mean when they use the term "voluntary associations," this survey suggests that such associations need to be understood in wider context. Social societies (churches, charities, benefit societies, clubs) need to be seen in terms of their direct relation to public political corporations (towns, municipalities, public boards) and private economic corporations (turnpike companies, banks, water companies). For the whole great range of political, economic, and social associations were created within the same period of American history with remarkably similar legal and legislative language. These were the intermediate associations upon which American state, economy, and civil society were simultaneously built. They need to be investigated together.

The second concern goes to that adjective "voluntary." For also reflected in New York's expansive list of statutes on charitable associations is the direct role of the state in the creation and policing of early American associationalism. In contrast to interpretive and theoretical emphasis on the private, voluntaristic, and spontaneous nature of associations, the formal statutory lists draw attention to their legal and political construction. The state charter was frequently the highest law directing the organization of early American associations – regulating their structure, powers, membership, leadership, constitution, and bylaws. Other statutes made special provisions for the granting of land, tax exemptions, franchises, and other forms of public relief and assistance. Courts added another layer of public legal construction of civil society in their elaboration of common law rules governing the full range of political and social, profit and nonprofit, incorporated and even unincorporated associations. Although social theorists frequently think about churches, clubs, civic societies, and benevolent and fraternal societies only in terms of the social relations of their individual members, it is important not to forget their corporate identity and their legal and political *raison d'être*. There is an extensive and complicated *Civil Church Law* in the United States – the product of many state statutes and an extraordinary number of judicial opinions; there is *Law of Public Corporations* as well as a *Law of Private Corporations*; there is a *Law of Voluntary Societies* and even a *Law of Unincorporated Associa-*

99. Zollman, *Civil Church Law*; Charles Fisk Beach, *Commentaries on the Law of Public Corporations including Municipal Corporations and Political or Governmental Corporations of Every Class* (Indianapolis: The Bowen-Merrill Co., 1893); Beach, *Commentaries on the Law of Private Corporations: Whether with or without Capital Stock, also of Joint-Stock Companies and all of the Various Voluntary Unincorporated Associations Organized for Pecuniary Profit or Mutual Benefit* (Chicago: T.H. Flood, 1891); William C. Niblack, *The Law of Voluntary Societies* (Chicago: Callaghan & Co., 1894); Sydney R. Wrightington, *The Law of Unincorporated Associations* (Boston: Little, Brown, and Co., 1923).

tions.⁹⁹ Until this enormous, complex history of legal-political struggle, as reflected in state statutes, local litigation, judicial opinions, and public legal commentaries, is incorporated into the history of American associationalism, scholars will continue to oversimplify the crucial story of the relationship of private and public, individual and collective action in American history.

The short statutory survey included in this essay barely opens this discussion. The judicial opinions in which so much of the American law of association is determined remain to be examined, to say nothing of the bottom-up records of local legal contests. So too, this survey stops short of some of the most interesting and distinctive American associations: the political party, the labor union, the business trust, the agricultural cooperative, the professional association, the mutual benefit insurance company. The very important role of law and politics in constructing those powerful political, economic, and social organizations in modern American life needs to be fully interrogated. A whole range of questions remains to be answered, most importantly the question of the legal-political distinctions drawn between different kinds of association. As suggested above, despite the similarities of formal charters and state statutes, it often seemed as if early American law recognized a different set of rules for each kind of political, economic, and social organization. Beneath the distinctions of corporate, quasi-corporate, and unincorporate, and beneath the formal categories of the law of corporation, partnership, and agency, each association historically developed its own set of special powers, rules, and capacities. The complex process by which business corporations, agricultural cooperatives, unions, churches, benevolent societies, and professional associations obtained very different kinds of authority from the state is a story that remains to be told. Despite these limitations, this survey does suggest the outlines of an alternative approach to the construction of early American civil society.

CONCLUSION

Through such legal institutions as the charter, the corporation, bylaws, and associational constitutions and legal principles like the right of association, mutual suretyship, and police power, nineteenth-century officials, legislators, judges, and citizens established the legal-political framework that regulated the interrelationships of individuals, groups, and their government. That distinctive American law of associations was integral to the construction of the public civil society created in the nineteenth-century United States. From the original constitutional charter that established the national government to myriad acts of state incorporation to the police laws regulating unincorporated partnerships and associations, an elaborate law of associational and corpo-

orative behavior governed nineteenth-century American social, economic, and political life.

The result, as Alexis de Tocqueville noted, was a remarkably associative society. Churches, political parties, and local (town, city, county) governments wielded enormous power and won intense personal loyalties as bodies politic. A proliferation of incorporated societies – religious, educational, literary, charitable, arts, commercial, manufacturing, labor, professional, medical, insurance, ethnic, mutual benefit, moral, and reform – dominated the socioeconomic scene (and state statute books). The constant participation of Americans in civic, associational, and other mutual projects impressed visitors and commentators throughout the century. As James Bryce still observed in 1888, “There is in the United States a sort of kindness, a sense of human fellowship, a recognition of the duty of mutual help owed by man to man, stronger than anywhere in the Old World.”¹⁰⁰

But, as the survey above suggests, this omnipresent associational tendency was a product of law and politics. Early American economic and social associations did not spontaneously arise outside of and as an alternative to the nascent American state. Rather, they were bound to the creation of a new civil society in the political sense intimated by Ferguson, Locke, and Hegel. They were part and parcel of an early American state-building tradition of *political economy*, *police regulation*, and moral and social *policymaking*. Associations and civil society did not exist beyond the state in nineteenth-century America, in a privileged, autonomous, antipolitical private sphere. They were instead crucial components of a formative American legal-political tradition.

Ultimately, then, an understanding of the history of democratic civil society in the United States and all its ramifications (the role of the market, the role of public opinion and dissent, the role of political participation, and, less optimistically, the role of exclusivity on the basis of ethnicity, race, and gender) must rest on a due appreciation of politics and law, especially the American law of associations. Although not found in any one treatise or under any one legal category, that law and its subsequent revisions and transformations was absolutely central to the history of the American economy, society, and polity in the nineteenth century and beyond.

This point returns us to the contemporary revival of civil society. Whether the products of attempts to revive *laissez-faire* market economics or to encourage popular dissent or to simply pine nostalgically for the communitarianism of the past, current proponents of a revived concept of civil society autonomous from the state and politics can learn much from a nineteenth-century American history in which those things were deeply entwined in a public

100. James Bryce, *The American Commonwealth*, 2d ed. rev., 2 vols., (London: MacMillan and Co., 1891), II:484.

law of association. First, critiques of despotism (of the eastern European kind or the more common central-bureaucratic kind) need not devolve into antipolitics, antistatism, or a fetishization of society to be effective. Nineteenth-century scholars such as Lieber and Gierke built a political theory of associations hostile to administrative centralization and arbitrary power but founded directly upon the public legal powers of self-governing, politically-active groups and communities. Second, nineteenth-century American experience can alert one to the dangers of separate public/private spheres rhetoric. The naturalizing fiction of a nineteenth-century non-coercive private sphere of market and associational activity frustrated progressive efforts to unmask the public construction of private power well into the twentieth century.

Indeed, nineteenth-century American associational history invites an alternative critical perspective, recognizing the interdependence of politics and society and the dangers of attempts to separate out group and corporate behavior from questions of public power. That perspective suspects that the modern tendencies toward centralization of state and privatization of individual lives are complementary not antagonistic developments. It seeks an alternative to both in a defense of the distinctly public powers and rights of politically-active associations, from rejuvenated towns and cities to politically-savvy civic groups to national social and political movements. The public associational tradition challenges recent flights from the political to the social, the cultural, and the ephemeral by suggesting the constant, constitutive force of politics and law in everyday life. This same legal-political awareness simultaneously works to unmask the public power of the so-called "private" in American life – from the power of the AMA over public health care to the influence of the NRA on crime and criminal law.

In a 1991 article in *Dissent*, Michael Walzer defended the important role of political power in the creation of a civil society. But he also endorsed a "radically different" supplemental social mobilization:

more like union organizing than political mobilization, more like teaching in a school than arguing in the assembly, more like volunteering in a hospital than joining a political party, more like working in an ethnic alliance or a feminist support group than canvassing in an

election, more like shaping a co-op budget than deciding on national fiscal policy.¹⁰¹

Along with conservative calls for more entrepreneurial activity and communitarian concern with the decline of social leagues, Walzer's list is suggestive of some of the priorities of the revival of apolitical renderings of civil society. Beyond the skepticism captured in Ralph Waldo Emerson's quip, "At the name of a society all my repulsions play," there is something troublingly familiar about this return of private civil society. Are such private social activities simply a new way for individuals to again escape politics – in Tocqueville's words, to withdraw into self, children, neighbors, and friends unaware of the fate of the rest of one's fellow citizens?¹⁰² Does the retreat into civil society (despite early successes in eastern Europe) ultimately only reinforce the despotic power of a sovereignty that, in Gierke's analysis, always "strives towards the exclusion of subjects from public life"?¹⁰³

Forty years ago in the shadow of totalitarianism, Hannah Arendt penned a lasting defense of the public realm, cautioning against just such an "enlargement of the private." She distrusted the "modern enchantment with 'small things,'" the public expansion of the "extraordinary and infectious charms" of private, everyday life. The enchantment of a whole people, she warned, "does not constitute a public realm, but, on the contrary, means only that the public realm has almost completely receded, so that greatness has given way to charm everywhere."¹⁰⁴ Despite ominous warnings about the unification of civil society and the state, today there seems to be more danger in persistent illusions about the private and the continued enervation of public life. It is perhaps time again to challenge modern enchantment with the charming dreams of a noncoercive social sphere of authentic interaction and a stateless civil society. It is perhaps time again to realistically reassess that most encompassing realm of powers – the political – and the degree to which the public affects even the smallest of private things. That is certainly the case with the American law of so-called voluntary associations.

101. Michael Walzer, "The Idea of Civil Society: A Path to Social Reconstruction," *Dissent* (1991): 293–304, 303.

102. Tocqueville, *Democracy in America*, 692.

103. Gierke, *Community in Historical Perspective*, 110.

104. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 52.