Towards a History of Essential Federalism: Another Look at Owen in America

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INTRODUCTION

Today we take the state for granted. We grumble about its demands; we complain that it is encroaching more and more on what used to be our private concerns, but we can hardly envisage life without it. In the world of today, the worst fate that can befall a human being is to be stateless. Hale’s “man without a country” does exist now, and he is wretched in ways which Hale could never imagine. The old forms of social identification are no longer absolutely necessary. A man can lead a reasonably full life without a family, a fixed local residence, or a religious affiliation, but if he is stateless he is nothing. He has no rights, no security, and little opportunity for a useful career. There is no salvation on earth outside the framework of an organized state.

—Joseph Strayer

The “we” is said with confidence. This sense of the importance of the state is one to which we moderns are committed. It is parallel to the master trend of American law toward centralization, as Lawrence Friedman has described it. “One basic, critical fact of 19th century
"law," Friedman writes, "was that the official legal system began to penetrate deeper into society." The master trend is "to create one legal culture out of many; to reduce legal pluralism; . . . to increase the proportion of persons, relative to the whole population, who are consumers or objects of that law. This master trend continues, and accelerates . . . ."

As part of this master trend and the corresponding emphasis on the state, we see official law as uniquely important. Thus, Ronald Dworkin begins *Law's Empire* by saying that "we live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things . . . ." Given this view of law's importance, it is no wonder that we focus on issues of official adjudication.

But there are other views in which, for example, state law itself is bounded by other rulers and other "law." We have the familiar statement of John Chipman Gray: "[T]he real rulers of a political society are undiscoverable . . . ." And pluralist tendencies continue. Lawrence Friedman tells us that the struggle between centralism and decentralism is persistent and continuing. "[D]ecentralization does not vanish," he says, "even in the teeth of the master trend of American legal history."

Both the narrative of legal centralism and that of state building at least implicitly concede a pluralist counter story. For example, both assume an earlier time when decentralization and a reduced "sense of the

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2. L. Friedman, *A History of American Law* 99 (1973). Bruce Mann's *Neighbors and Strangers: Law and Community in Early Connecticut* (1987) can be cited for the master trend and, particularly, for the hegemony of the formal legal system over dispute resolution. *Id.* at 10. In 1923, Arthur Corbin thought that pluralism within the law characterized the American system and that, "while the line between law and equity has become blurred and is disappearing, distinctions between Illinois rights and New York rights have been increasing." Corbin, *Rights and Duties*, 33 Yale L.J. 502, 507 (1923). "It should be remembered further that while there has been the constant tendency toward unification by the welding of law and equity . . . there has been an even greater development toward complexity and conflict due to the multiplication of independent political jurisdictions." *Id.*


The "sense of the state" may be taken as facts of America's history. As part of his

8. There is a link between the idea that America had little "sense of the state" and the fact that America had a federal system. In A. Vincent, THEORIES OF THE STATE 10 (1987), Andrew Vincent includes the United States in those societies "which do not have a tradition of Statehood." These societies "lack a historical and legal tradition of the State as an institution that "acts" in the name of the public authority . . . as well as a tradition of continuous intellectual preoccupation with the idea of the state." Id. (quoting K. Dyson, THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND INSTITUTION at viii (1980)). "There are two primary determinants of this lack of a state tradition; firstly, institutional structures, and secondly, juristic and ideological traditions." Id. at 10-11. The United States,

with its federal structure, does not foster a "sense" of the State. Federalism encourages centrifugal forces, distinct legal structures, and a general mistrust of centralism . . . . The State in its historical development, has been a centripetal force; the balance of forces rest at the centre, even though a State may tolerate or even encourage some local autonomy.

Id. at 11. Still, he concludes this point can be overemphasized.

Britain and the USA do have some sense of the State. There is a firm grasp of territorial integrity, sovereignty, citizenship and the rule of law and the like. The actual powers of the State in practice remain untouched. However such powers are not reflected on. The State is not seen as a public power which acts.

Id.

D'Entreves notes, however, that according to one view of the state, the state and the law are basically the same thing, and if we look for the state, we find officials. A. D'ENTREVES, THE NOTION OF THE STATE: AN INTRODUCTION TO POLITICAL THEORY 5 (1967). "For the jurist, the State can be nothing other than the body of laws in force at a given time and place. The State itself is created by the law. State and law coincide: the State is the legal system." Id.

For the relative unimportance of the idea of the state, see S. Huntington, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 35 (1981), noting that "the idea of the state implied the concentration of sovereignty in a single, centralized, governmental authority." Huntington indicates that this idea "never took hold among the English North American colonists," despite "fulminations of Blackstone." Id. The state, he says, appears in American political thought only at the end of the nineteenth century.

Yet somehow Austinian positivism, with its emphasis on the command of the sovereign, and the idea of law as founded in the State did take hold. Moreover, in America, even legal pluralist tendencies within the state system are presented as minimized by rules of priority.

The American system, like the English, has certain formal-seeming rules of hierarchical priority for the resolution of some of the above conflicts. These rules appear on the surface to resolve conflicts by reference to the differing degrees of "rank formality" of the competing laws. Thus the federal Constitution is supreme and takes precedence over all forms of law to the contrary; valid federal statutes take priority over contrary federal case-law and contrary state law generally, and so on . . . .

P. Atiyah & R. Summers, FORM AND SUBSTANCE IN AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING 56 (1987). Thus, one has a conventional map of a legal system. According to that map, the accuracy of which need not yet concern us, law is prescribed by a single, known official organ, or by two or more of them in compliance with a process that itself has been officially prescribed; law is interpreted and applied to disputes by a court or a set of courts, or by sets of courts linked through secondary rules that are calculated to reconcile or harmonize conflicts; statutes are administered, and regulations promulgated, by agencies coordinated closely or loosely under central authority; and compliance is known to be enforced where necessary by official authority whose physical power is in general adequate to the purpose.
discussion of America as a “plastic” and “malleable” society, Merle Curti refers to a “widespread commitment to anti-statism and voluntary associations.” Thus, there is a tension between the lawyer’s story of American history (in the beginning, America was founded under the Constitution, Blackstone was important, and the Marshall Court undertook national consolidation) and that told by others (in the beginning, America had little sense of the state and did not follow Blackstone). For lawyers, the master trend almost entirely ignores, if it does not conceal, the counter story.

This article is a preliminary effort to reach that story. It starts with Robert Owen’s visit to America and, particularly, his addresses to the American Congress.

That picture—the utopian lecturing to the politicians—is one to which we almost do not know how to react. We see a marginal figure speaking to central figures, an exotic addressing the mainstream. (Per-


When did this map become conventional in the United States? What relationships can be traced between the accuracy of the map at any point in time and its acceptance as conventional?


11. See, e.g., S. Huntington, supra note 8; S. Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920 (1982); A. Vincent, supra note 8 (America had little “sense of the state,” but, instead, a sense of “courts and parties”).

12. S. Huntington, supra note 8, at 35.

13. Robert Owen (1771-1858), a reformer, philanthropist, and communitarian, left Wales at the age of 10 and, by the age of 20, was the manager of a mill in Manchester. Shortly thereafter, he established himself as one of the wealthiest cotton spinners of his age. He managed the cotton mills at New Lanark, Scotland from 1800 until 1829, establishing a model system for the training of workers and children on the basis of ideas outlined in R. Owen, A New View of Society (1813-1814) and in R. Owen, Report to the County of Lanark (1821). It was at New Lanark that he made his name as the archetype of the benevolent entrepreneur. In educating the factory children, diminishing the hours of labour and quite spectacularly improving conditions, his main concern as he explained it, was to make the workpeople “rational” thus to bring “harmony” to the community, to make it a place where social peace would reign, rather, as he believed it had reigned in the rural community he had known as a boy in Wales.

Gatrell, Introduction to R. Owen, Report to the County of Lanark and a New View of Society at 9 (V. Gatrell reprint ed. 1970) (1st eds. 1821 & 1813-1814). Owen’s work at New Lanark turned him to communitarianism, and a number of American utopian experiments were based broadly on Owenism.
haps, however, he was an important exotic? Comparable, in some sense, to Gandhi meeting with the British?) We hardly know how to think about Owen in America because our sense that politicians are important and utopians are not, blinds us to the idea that, in their own time, they were both points on an experimental spectrum. Specifically, utopian thinkers, theorists, and practitioners, as much as politicians, must deal with questions relating to their structures and the existing structures, the future, as they envision it, and the present.

While one may emphasize substantive values in dealing with utopian communitarianism (cooperation or community, for example), nineteenth-century American utopianism also typically contains a structural or political value in its commitment to the idea of the small-scale political unit. This idea has certain affinities with the concept of federalism. Communitarianism can also be seen in relation to concepts of political and legal pluralism, which stress not merely single experiments (an emphasis in American federalist discussion), but also continuing experiments and a permanent diversity within the society. Issues of size, experimentation, and diversity are discussed by state politicians, as well as by utopians, and were strikingly in evidence in antebellum America.

Owen visited the United States in 1824-1825. This paper outlines

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The highest level of integration that man achieves consists in taking an existing set of institutions as one alternative and comparing it with other sets . . . . Thought at this comprehensive level has not been common to all cultures. In our Western civilization it has perhaps been confined to (1) the writings of utopian political theorists and (2) the thought and writings surrounding modern legislative processes.

Id.

15. "Owen was quite clear that he was the practical, realistic reformer who had demonstrated a workable future and that it was those who promoted illusions of a religious or political economic nature who were the really dangerous fantasists." V. Geoghegan, Utopianism and Marxism 13 (1987).

16. Not all utopians are communitarians. Bellamy’s ideas, for example, are statist. See A. Lipow, Authoritarian Socialism in America: Edward Bellamy and the Nationalist Movement (1982). See the discussion of Bellamy in K. Kumar, Utopia and Anti-Utopia 122-67 (1987). Nonetheless, the Kaweah community in California is sometimes described as Bellamist. See Y. Oved, Two Hundred Years of American Communes 240 (1988). On the Kaweah Cooperative Commonwealth, see R. Hine, California’s Utopian Colonies 78 (1966) (1st ed. 1953). Bellamy’s ideas apparently drew people to the colony, though Bellamy himself thought that such enterprises could succeed only on a national scale.

17. For an account of the visit, see A. Bestor, Backwoods Utopias: The Sectarian Origins & the Owenite Phase of Communitarian Socialism in America, 1663-1829, at 103-32 (enlarged ed. 1970). On Owen in general, see J. Harrison, Quest for the New Moral World: Robert Owen and the Owenites in Britain and America (1969), and more recently, A. Taylor, Visions of Harmony: A Study in Nineteenth Century Millenarianism (1987).
the views of Owen on questions of pluralism and federalism and compares them with the political theories of some of the Americans with whom Owen met. A utopian/political encounter seems particularly useful in this inquiry for two reasons. Because utopian theorists and practitioners conceive of themselves as an alternative to the existing social order, they are forced to confront the issue of their relation to the outside world and, particularly, to the state more directly than, for example, are the founders of limited-purpose internal associations, whose functions are not usually conceived so broadly. Moreover, the utopian community is a form of voluntary association (or even corporation), which is easy to conceptualize as bridging the categories of public and private or governmental and nongovernmental. Thus, we can fit voluntary associations into our treatment of federalism.\textsuperscript{18}

The parallel between Owen’s ideas and the propositions of American political federalism are well-known to utopian scholars. Thus, in his work on Owenism, Bestor quotes the familiar observation of Holmes, dissenting in \textit{Truax v. Corrigan},\textsuperscript{19} that the law should not “prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious.”\textsuperscript{20}

The idea that Owen and the utopian tradition may have relevance to federalism as a mainstream political issue is less familiar to those who concern themselves with legal and historical treatments of “federalism,” which are limited to official governmental structures.

I. OWEN IN AMERICA

\textit{The men most active in promoting the adoption of the New American constitution, and who wrote and perfected their “Declaration of Rights” acknowledged to the Founder of the Rational System, that they were, in 1825, after a trial of half a century, greatly disappointed in the result of the work...}

—Robert Owen\textsuperscript{21}

\textsuperscript{19.} 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).
\textsuperscript{20.} Id., quoted by A. Bestor, supra note 17, at 18; see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”). See generally Cloays, Paternalism and Democracy in the Politics of Robert Owen, 27 Int’l Rev. Soc. Hist. 160, 161-207 (1982).
\textsuperscript{21.} The Book of the New Moral World 149 (New York 1845).
Owen came to America as a leading exponent of a tradition in which enterprises were founded that are today called utopian. They were often known in their own time as communitarian. "Contemporaries were better able than we," Bestor writes, to recognize the obvious. What these enterprises had in common was the idea of employing the small experimental community as a lever to exert upon society the force necessary to produce reform and change. The ends might differ, with economic, religious, ethical and educational purposes mingled in varying proportions. But the means were uniform, consistent and well defined. These enterprises constitute a *communitarian* movement because each made the community the heart of its plan.\(^2\)

Not only was membership in a community a matter of individual choice, but the whole process by which communitarianism was expected to spread and remake the world was conceived in noncoercive terms. Voluntary imitation, the communitarian believed, would suffice. The community idea having succeeded, many nations would become gradually in union with it.

As Bestor indicates, "[T]he group procedure that was the heart of the communitarian program corresponded to a like tendency that ramified through many American institutions and many fields of American thought."\(^2\) Citing Gierke, Maitland, and de Tocqueville on political associations, Bestor is explicit on the connections to the ideas of federalism.

Federalism, in the sense opposed to consolidated nationalism, is an important complement of this respect for, and encouragement of autonomous groups. It is therefore no accident that many close parallels to the communitarian argument may be found in the classic expositions of the role of states in the American federal system… ingrained in American experience was the idea of group procedure—of trying political and social experiments upon units of society less than the whole—that communitarians found little difficulty in winning a hearing for their own proposals, couched as they were in familiar terms.\(^2\)

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22. *A. Bestor*, *supra* note 17, at 3.
23. *Id.* at 16.
24. *Id.* at 18-19.
Probably no one received a better hearing than Robert Owen. Oneida’s founder John Humphrey Noyes said, in 1870, that Owen, in 1824, “stirred the very life of the nation with his appeals to Kings and Congresses, and his vast experiments at New Harmony.” As Noyes saw it, New Harmony had “for its antecedent the vast reputation that Owen had gained by his success at New Lanark.” Owen “came to this country with the prestige of a reformer who had the confidence and patronage of Lords, Dukes and Sovereigns in the old world.”

Arthur Bestor has offered a detailed account of Owen’s American trip. Bestor records that, on November 26, 1824, Owen was received by John Quincy Adams, Secretary of State (whom Owen had already met when Adams was in England). He also saw President James Monroe and John C. Calhoun, among many others. And, Bestor writes, while there were “other conversations as well . . . surely none [was] so remarkable as the council ring in the Dennison Hotel, where Owen sat down with a group of Choctaw and Chickasaw Chiefs and gravely explained his new view of society through an interpreter.”

Bestor describes Owen’s American Tour (January 3 to April 13, 1825) as “one of the greatest triumphs of his career.” Before this,
Owen "had discussed his plans in small select groups, but from the beginning he had contemplated a great public campaign . . . that would culminate in the presentation of his plans to Congress." Bestor continues:

Owen reached Washington just as the House of Representatives brought the long presidential canvass to a close by choosing John Quincy Adams as the next occupant of the White House. It was a fortunate time for Owen. The electoral excitement was over, yet the Capital was crowded with the leading figures of American public life. Owen's prospective visit had been announced long before in the papers, and at that time the *National Intelligencer* had welcomed Owen as one of those "who seem to have had no thought but how to lessen the sufferings of the unfortunate and better the conditions of the human race in every quarter of the world."

Bestor notes that an even more extraordinary tribute to Owen was the fact that he was "readily granted the use of the Hall of Representatives in the Capitol for two addresses. The first time by arrangement with Henry Clay, the second time through the good offices of John Quincy Adams."

Bestor reports that Adams heard Owen, as did James Monroe, several members of the Cabinet, the Supreme Court, and the Congress. Owen then visited Jefferson and Madison. Bestor concludes that, "in every outward respect, Owen's 100 days in the east—it was precisely that—had been a triumphant success. The general attention paid to Robert Owen, when he visited the United States in 1824-1825, was extraordinary. Even taken by itself, it might be enough to prove the nonmarginality of the utopian tradition in America. Owen was a man of some importance, and this may be adequate as an explanation for his American triumph. But one may also agree with Bestor that some of Owen's preoccupations were shared by the Americans with whom he spoke. This shared concern may have provided additional reason for their interest in Owenism. Owen was committed to the idea of the small community as the basic unit of society, a family of..."
from 300 to 2,000 forming a link in a system of such families. This idea of federated small units had deep resonances with certain ideas in American political life. New Harmony itself died after a few years. But discussion of the images that Owen put forward, which inevitably raised issues of the relations between federated units, small groups and larger structures, minorities and majorities, continued.

Robert Owen’s thinking may be explored in a variety of ways in the American setting. In 1972, for example, Merle Curti suggested that one could consider the influence of Owen and the Owenite community, New Harmony, on the “American career” of such ideas as communitarianism, cooperation, and socialism. One could also, he said, consider such things as “family, education, sex relations and religion.”

Another approach would be to identify the relationships between the main tenets of Owenism and the “basic traditions and values in the American experience.” One such relationship would be the idea of Owen’s secular millennialism and the sort of millennialism found in America. Another relationship would be the issue of Owenism and the general American belief in “the feasibility of nonviolent social change” and “a related belief in the possibility of an easily achievable social harmony.” As to the idea of a nonviolent social change, Curti adds that change would come “through the contagious influence of successful small social experiments and demonstrations.” This idea of the inevitable spread of the (successful) social experiment marks Owenite thought.

While the nature of the transition itself is not detailed, the before and after pictures are clear in Owenite writing. Thus:

40. Curti, supra note 9, at 56.
41. Id. It is in the history of communitarianism or utopian socialism that Owen is remembered and known today, and this was also largely true in the early 1820s. But, as Bestor notes, by the “end of the 1820’s Owenism was identified in the public mind less with communitarianism, than with free thought.” A. BESTOR, supra note 17, at 228.

Bestor writes that the memory of speeches at the capitol in 1825 was largely obliterated in 1829 by his debate with Alexander Campbell in Cincinnati. This debate was designed, as Owen stated, “to prove that the principles of all religions are erroneous, and that their practice is injurious to the human race.” Id.; see M. MARTY, THE INFIDEL (1961); Madden & Madden, The Great Debate: Alexander Campbell vs. Robert Owen, 18 TRANSACTIONS CHARLES S. Peirce Soc’Y 207-26 (1982).
42. Curti, supra note 9, at 56.
43. Id. at 57.
44. Id.
IN THE OLD IMMORAL WORLD . . .

The governments have been formed by the necessities of the periods when they were respectively established, when men were ignorant and inexperienced, and when the animal propensities alone directed and governed the human race.

IN THE NEW MORAL WORLD . . .

The governments will be formed to proceed in the most open and direct course to give a new and highly superior character to the population of the world, and to surround the population in all climates, with new and highly superior external circumstances or arrangements; by which health of body and mind will be insured, and thereby, the gradual improvement of the race; by which the injurious distinctions of color and form shall be made to cease; by which one interest shall be made evident to, and be pursued by all; by which one language will, of necessity, soon be desired, written, and spoken; by which wars will cease, and national revenues will become useless or be easily obtained; by which the continuance of private property will be seen to be an evil of enormous magnitude, and will be, in consequence, eagerly relinquished by all; by which the various opposing religions of faith, which make men irrational, will die a natural death, and be succeeded by the simple religion of pure charity, which will cover the earth as the waters cover the sea, and induce all men to adopt the system of public property; by which falsehood shall be forever abandoned, and truth shall be universally established; and by which this earth shall, indeed, become a terrestrial paradise, and all its inhabitants a race of highly intelligent, moral, and superior beings.46

Owen’s speech to the Congress illustrates his belief that, since only persuasion was required, the road to success lay in gaining the commitment of men in power. Owen, Miliband says, “inherited the belief of eighteenth century thought in the benevolent despot as the agent of social change.”48

45. 28 The New Moral World 222 (May 9, 1835).

R.H. Tawney noted that, “[a]s far as the methods of its establishment was concerned, Owen’s Socialism, like Saint-Simon’s very different version, was that of authoritarian genus.” Tawney, Robert Owen, in THE RADICAL TRADITION 38 (R. Hinden ed. 1964). Owen first thought in terms of a “gift of enlightened rulers”; he later thought in terms, not of a political process, but of some
To the extent that Owen’s thought was federalist, it is assumed that he was influenced by the ideas of his associate, the scientist William Maclure. As Bestor has noted, the success of the federal system in the United States encouraged [Maclure] to hope that “thousands, or hundreds of thousands of small societies” might exist, separate yet federated, and might “traffic and deal with each other in the true spirit of equality, . . . exchanging labor for labor, without permitting avarice to introduce its poison in the form of coin . . . .”

Moreover, those societies would not counteract or injure one another. Maclure was particularly impressed with the traditional federalist justification of the possibility of experimentation in the local groups. Maclure noted that “[e]ach township might experiment on every thing that could conduce to their comfort and happiness, without interfering with the interests of their neighbors.” If a failure resulted, that failure “could only hurt the contrivers and executors of the speculation, forcing them to nullify their mistakes, and guaranteeing them against a perseverance in error.” Maclure included several short discussions on issues of representation and small size in his Opinions—discussions echoing familiar themes in American political discourse.

But there are differences, it seems, between Owen’s emphasis and Maclure’s. While based on small groups, Owen’s federalism does not stress experiment. Where Maclure’s conception is dynamic—includ-
ing the possibility of failure and error—Owen’s “federalism,” greatly tempered by paternalism and centralism, is not.63 Owen was, in general, considerably more certain of the universal applicability of his own vision than is characteristic of pluralists.64

These points can be illustrated by Owen’s presentation to the American Congress.65 In announcing the establishment of his new community at New Harmony, Owen was also saying that those who saw it would, of necessity, be converted to his approach instantly and without conflict. “I have been asked,” he said, “what would be the effect upon the neighborhood and surrounding country, where one or more of these societies of union, co-operation, and common property, should be established?”66 Owen’s answer was the following:

My conviction is, that, from necessity and inclination, the individual or old system of society, would break up, and soon terminate; from necessity, because the new societies would undersell all individual producers . . . from inclination, because it is scarcely to be supposed that anyone would continue to live under the miserable, anxious, individual system of opposition and counteraction, when they could with ease form themselves into, or become members of, one of these associations of union, intelligence, and kind feeling.67

of Feb. 25, 1825].

His view of his own system was that it was an experiment that could not fail itself and could not fail to be the basis of a new system, “unless we can imagine that there are human beings who prefer sin and misery to virtue and happiness.” Id. at 35.

53. See Adamiak, State and Society in Early Socialist Thought, 26 SURVEY 1 (1982); Clayeys, supra note 20. See generally A. Bstor, supra note 17; G. Cole, ROBERT OWEN (1925); J. Harrison, supra note 17; G. Lockwood, supra note 26.

54. Owen’s temperamental predisposition is captured in the comment of his father-in-law: “Thou needest to be very right for thou art very positive.” R. OWEN, THE LIFE OF ROBERT OWEN BY HIMSELF 99 (1920).

55. Addresses by Robert Owen (Feb. 25, 1825 & Mar. 7, 1825), reprinted in O. JOHNSON, supra note 52, at 21-64.

56. Address by Robert Owen (Mar. 7, 1825), reprinted in O. JOHNSON, supra note 52, at 52 [hereinafter Address of Mar. 7, 1825].

57. Id. The Noyes chapter “Inquest on New Harmony,” see J. NOYES, supra note 26, at 44-58, includes some comments of members of the Oneida community who read the Noyes chapter and then discussed it at an evening meeting. One said:

The people Mr. Owen had to deal with in Scotland were of the servile class, employees in his cotton-factories, and were easily managed, compared with those he collected here in the United States. When he went to Indiana, and undertook to manage a family of a thousand democrats, he began to realize that he did not understand human nature, or the principles of Association.

Id. at 53 (quoting S.R. Leonard). Along similar lines, Maclure suggested that “the materials in
The communities would create an environment in which this result would be inevitable. As Owen explained to the legislators:

Having discovered that individuals were always formed by the circumstances, whatever they might be, which were allowed to exist around them, my practice was to govern the circumstances; and thus by means imperceptible and unknown to the individuals, I formed them, to the extent I could control the circumstances, into what I wished them to become; and in this manner were the beneficial changes effected in the population under my care.68

Owen was also asked what the effects of these communities would be on the government and his answer was this:

[The communities] are in complete union with the principles on which the constitution of this country is founded. The constitution is essentially a government of the union of independent states, acting together for their mutual benefit. The new communities would stand in the same relation to their respective State Governments, that the States do now to the General Government . . . .68

Two observations are worth stressing about Owen's view of the relationship between his communities and the outside government. First, Owen envisions what we would call a private form, the voluntary association or corporation, turning into a unit within a governmental hierarchy, rather in the tradition of the Massachusetts Bay Company.60 His suggestion evokes the early history of the corporation with its emphasis on the public or quasi-governmental aspects of the form.61 Sec-

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58. Address of Feb. 25, 1825, supra note 52, at 27.
59. Address of Mar. 7, 1825, supra note 56, at 53.
60. John Winthrop and others met somewhere in Cambridge University, of which most of them were alumni, in August of 1629 and signed an agreement to emigrate to New England within seven months, provided they could carry over the government and charter of the Massachusetts Bay Company. The reason for this important proviso was to protect themselves from the king, who otherwise might confiscate their charter, as had happened to the Virginia Company only five years earlier. And it so happened, whether by chance or design, that the Massachusetts Bay Charter did not require the stockholders to meet in any particular place. The stockholders voted for the transfer and elected John Winthrop governor.
61. Owen's description of the New Harmony enterprise makes plain that, at one level, it is...
ond, while Owen referred to American political federalism, no one at the time he spoke was entirely certain what the relation of the central government to the states really was. When Owen said that he wanted the communities to be as states in their relations to a larger unit, he raised more issues than he perhaps appreciated. The nature of the federal union itself was far from clear, and the United States was, in a sense, as much an experiment as any utopian community.62

II. Minorities

*I would not have any one adopt my mode of living on any account; for, beside that before he has fairly learned it I may have found out another for myself, I desire that there may be as many different persons in the world as possible; but I would have each one be very careful to find out and pursue his own way, and not his father’s or his mother’s or his neighbor’s instead.*

—H.D. Thoreau63

The problem of minorities can exist no matter how small the relevant community. Pushed to its extreme, it becomes the problem of individual sovereignty, since the individual can be the minority in relation to the tiny community or to anything larger. The voluntary association—or nonstate “interest group”—can be the minority in relation to some part of government, and the individual federated state can be the minority in relation to the central government. We can use language of

conceived as a private undertaking, a corporation, or a voluntary association.

I am prepared to commence the system on my own private responsibility, or with partners having the same principles and feelings with myself; or by joint stock companies, under an act of incorporation from the state governments of Indiana and Illinois, in which the new properties which I have purchased, with a view to these establishments, are situated—or, by a general incorporated company, formed of the leading persons in each state, who could easily form arrangements by which the benefit of the system might be obtained, with the least loss of time, by all the inhabitants within each Government, belonging to the Union.


62. Thus, Kenneth Stampp has said that, “by the end of the 1820s, after the government under the federal Constitution had been in operation for forty years, the prevailing view of the Union in the political rhetoric of the time still remained that of an experiment.” K. STampp, THE IMPERILED UNION 29 (1980). He argues that “a substantial case for perpetual Union was not devised until several decades after the adoption of the Constitution.” Preface to id. at viii. On the idea of experimentation, see generally P. Nagel, ONE NATION INDIVISIBLE 13–31 (1964).

63. WALDEN 64 (Modern Library ed. 1950) (1st ed. 1854).
sovereignty with reference to individual sovereignty as much as to nation-state sovereignty. 64

Viewing the matter broadly, one sees that Owen and others concerned with groups are flanked on both sides by those concerned with either the state or the individual. Of those concerned with either groups or individuals, only some are centrally focused on questions of minorities, differences, or pluralism. Owen, as noted, was not. But Calhoun and the Indians are well-known among those whom we now associate with pluralist concerns.

We have some record of the conversation between Owen and Calhoun in a brief account of Calhoun’s response to Owen from Owen’s companion, Donald MacDonald. (When MacDonald met Harrison and Calhoun, the latter “remarked that he felt great interest in Mr. Owen’s proceedings & thought that there were now at work in the world some active principles which gave assurance of important improvements in society being very near at hand.” 65) The discussion that follows is, therefore, not found in any narrative record of interaction between Owen and Calhoun; in effect, what is provided is the other half of the imaginary conversations that began with Owen’s presentation of his new view of society. Calhoun’s thought leads us to an idea of pluralism that sees a group interest—in his case, a pro-slavery interest—as fundamentally important. 66

64. In doing this, we can attribute sovereignty to everything in between. Today, we tend to speak more of legitimacy than of sovereignty, but, as Ernest Gellner notes in a clever paraphrase, “[r]oughly speaking, legitimacy is sovereignty recollected in tranquillity.” E. GELLNER, LEGITIMATION OF BELIEF 24 (1974). There is an argument that small communities (assuming that they pass the Austinian test of numbers—“considerable” or “not extremely minute”) might be sovereign in Austinian terms, even though located within another state. This argument can be made by an analogy to the feeble but sovereign state that obeys the rare commands of the more powerful state. See J. AUSTIN, Lecture VI, in 1 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAWS 223 (R. Campbell ed. 1885). This would work best for the nineteenth century, on the theory that the larger state made few demands. Cf. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983) (on law creation by internal groups); Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 J. FAM. L. 741 (1987-1988) (for a discussion of pluralism in this sense and for the material on legal and political pluralism cited there).

Today, we may want to say that groups have a role in shaping official law (i.e. pressure groups that file amicus briefs) and also in translating, enforcing, and recreating law. See, e.g., Givelber, Bowers & Blitch, Tarasoff, Myth & Reality: An Empirical Study of Private Law in Action, 1984 WIS. L. REV. 443.


66. Calhoun (1782-1850) studied at Yale and the Litchfield School of Law, served in Congress until 1817, was then appointed Secretary of War by Monroe, and was Secretary of War
Calhoun's version of localism, found in the South Carolina Exposition and Protest, was first addressed to the Tariff Act of 1828. The exposition argued that the state had a legal right to "refuse obedience to a national act when the state deemed the act to be contrary to the Constitution." Calhoun's argument was directed essentially against the tyranny of the majority and was designed to protect the minority interest of the southern states—without secession.

When he met Owen, Calhoun was Vice President from 1825 to 1832 under John Quincy Adams and Andrew Jackson and finally became a Senator from South Carolina. He is largely remembered as having devoted his career to the cause of state's rights and the defense of slavery. See generally L. Hartz, The Liberal Tradition in America (1955); R. Hofstadter, The American Political Tradition (1948); C. Merriam, A History of American Political Theories 267-304 (1909); A. Spain, The Political Theory of John C. Calhoun (1968); Kateb, The Majority Principle: Calhoun and His Antecedents, 84 Pol. Sci Q. 583 (1969); Merriam, The Political Philosophy of John C. Calhoun, in Studies in Southern History and Politics 319-64 (2d ed. 1964) (1st ed. 1914).

67. Here is de Tocqueville's brisk summary of the facts of the tariff controversy: "The wars of the French Revolution and of 1812 had created manufacturing establishments in the North of the Union, by cutting off free communication between America and Europe." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 427 (Vintage ed. 1960).

When peace was concluded and the channel of intercourse reopened by which the produce of Europe was transmitted to the New World, the Americans thought fit to establish a system of import duties for the twofold purpose of protecting their incipient manufactures and of paying off the amount of the debt contracted during the war. The Southern states, which have no manufactures to encourage and which are exclusively agricultural, soon complained of this measure . . . .

As early as 1820 South Carolina declared in a petition to Congress that the tariff law was "unconstitutional, oppressive, and unjust" . . . . But Congress, far from lending an ear to these complaints, . . . . raised the scale of tariff duties in the years in the years 1824 and 1828 and recognized anew the principle on which it was founded. A doctrine was then proclaimed, . . . . which took the name of Nullification.

Id. at 427-28. Tocqueville then comments that this doctrine would, in principle, destroy the federal bond and actually bring back that anarchy from which the Constitution of 1789 delivered the Americans. Id. at 428. Tocqueville had earlier noted that "[i]n America the liberty of association for political purposes is unlimited," using the tariff-free trade controversy as an example. Id. at 200-01. "It must be acknowledged," he wrote, "that the unrestrained liberty of political association has not hitherto produced in the United States the fatal results that might perhaps be expected from it elsewhere." Id. at 201. He concluded that "[a]t the present time the liberty of association has become a necessary guarantee against the tyranny of the majority." Id. at 201-02.


69. The idea of the "tyranny of majoriy," see A. DE TOCQUEVILLE, supra note 67, at 276, was familiar earlier to readers of The Federalist. "It is of great importance in a republic, not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part." THE FEDERALIST No. 51 (J. Madison), quoted in A. DE TOCQUEVILLE, supra note 67, at 279-80.

One can speculate on the impact of Connecticut politics—and the feelings that resulted in the Hartford Convention—on Calhoun's later work. See Carroll, Calhoun and His Nullification Doctrine, 70 Living Age 444-46 (1861). "Calhoun derived his first reasonable ideas of nullification
Calhoun's developed doctrine for reconciling majority and minority interests, often referred to as a doctrine of the "concurrent majority," has been summarized this way:

The numerical majority consisting of men subject to self-centeredness . . . can be tyrannical and oppressive in the area of a self-centered minority's rights and interests . . . . [Therefore] each sectional majority or each major-interest majority should have the constitutional power to veto acts of the federal government, which represented the numerical majority, when those acts were deemed, by a majority of the people comprising the section or interest, to be adverse to the welfare of the section or interest.70

The emphasis on state, sectional, or interest-group difference, in fact on difference, is clear. But, of course, Calhoun remains a problem. "What weight ought to be attached, then, to the views of the late John C. Calhoun, whose consecration of his life to the defense of slavery should not blind his countrymen to his great ability?" Theodore Woolsey began his discussions of Calhoun's ideas of representation with a kind of apology.71

One reading of Calhoun in American history puts him and his concerns clearly in the past.72 Yet for those interested in groups and associations, Calhoun becomes an important figure. Thus, Alexander Pekelis wrote that, while "[t]he monistic conception has under various forms proclaimed that there has been but one law, the law of the state, and secession from the Hartford Convention . . . ." Id. at 444. Thus, it has been said that "[n]ot the South, not slavery, but Yale College and Litchfield Law School made Calhoun a nullifier." M. COIT, JOHN C. CALHOUN: AMERICAN PORTRAIT 42 (1950). Gordon Post notes that Calhoun studied with the federalist Timothy Dwight at Yale, noting that Dwight, "along with many other New Englanders in the early nineteenth century proposed secession as a solution for sectional conflict." Introduction to J. CALHOUN, supra note 68, at viii.

70. Post, Introduction to J. Calhoun, supra note 68, at xxii.
71. 2 T. WOOLSEY, POLITICAL SCIENCE: OR THE STATE THEORETICALLY AND PRACTICALLY CONSIDERED 292 (1877).
72. See R. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 103-10 (1940). Richard Hofstadter included a chapter on Calhoun entitled "John C. Calhoun: The Marx of the Master Class" in The American Political Tradition. See R. HOFSTADTER, supra note 66, at 67-91. Hofstadter believed that Calhoun's concepts of nullification and the concurrent voice "have little more than antiquarian interest for the twentieth-century mind." Id. at 68. For him, the point is that, "[b]efore Karl Marx published The Communist Manifesto, Calhoun laid down an analysis of American politics and the sectional struggle which foreshadowed some of the seminal ideas of the Marx's system." Id. Robert Dahl cites Calhoun as someone whose ideas anticipated modern consociationalism. See R. DAHL, DEMOCRACY AND ITS CRITICS 260 (1989).
and that there is but one government, the government of the state,” still “there has been no generation and no country which did not count among its best legal minds one or more opponents to this monistic theory.” Pekelis listed Calhoun among the thinkers who “approached the problem from different angles,” but were all essentially pluralistic. The different angles Pekelis named included the idea of concurrent majority.

* * *

The Chickasaw and Choctaw chiefs were in Washington in the fall and early winter of 1824-1825 to negotiate the terms of their removal from Mississippi to Oklahoma. As Secretary of War, Calhoun was directly concerned with this enterprise. As in the case of Owen and Calhoun, we have no transcript of the conversation between Owen and the Indians. But again we have an account from a companion of Owen’s, this time, his son. According to William Owen, his father cautioned the chiefs against adopting what had been found to be injurious in civilized life.

[He] said that he had come more than three thousand miles to promote plans, by which he hoped to make the red brethren superior to the whites. He said the Indians taken when young amongst white, would become like whites, and vice versa and he concluded that it would be possible to unite the good in the Indian and in the civilized lives, so as to make a being superior to both.

Robert Owen specifically addressed the Indians on the issue of separatism, but, on the basis of William Owen’s account, the answer was not entirely responsive. William Owen writes:

He was desirous of knowing whether the Indians would prefer amalgamating with the whites, or forming a separate body quite distinct from them. The Indian replied that he was aware that the whites were so superior to them that they could only cope with them by imitating them, which they were endeavoring to do as well as possible, tho’ still a great way

74. Id.
75. Id.
76. A. DeRosier, supra note 32, at 80-84.
77. W. Owen, DIARY OF WILLIAM OWEN 43-44 (J. Hiatt ed. 1906).
behind.\textsuperscript{78}

The conversation that we imagine between Calhoun and Owen uses the language of concurrent majorities and rests on the empirical point that the local forms will not be identical or committed to the same values.\textsuperscript{79} The conversation that we imagine between the Indians and Owen in which Owen expounds his new view, and the Indians stress the autonomy of the Indian nation,\textsuperscript{80} rests on the same point.

There is no discussion here of the history of government and the Indians. Nor does this piece do more than acknowledge John Calhoun's role as Secretary of War in the Indian removal.\textsuperscript{81} The Indian tribes are considered, not because their history may or may not reveal effective power or self-governance in the early nineteenth century in relation to the American government, but because they can be seen as representing the permanent (or at least indefinite) existence of the small group within the larger one. The emphasis is on the concession by the formal governmental structure of the special status of the Indians, conveyed in the suggestive language of Felix Cohen: "The decisions on Indian title can hardly be understood unless it is recognized that dealings between the Federal Government and the Indian tribes have regularly been han-

\begin{itemize}
  \item \textsuperscript{78} Id. at 43.
  \item \textsuperscript{79} Calhoun did not work out the problems of minorities within the sectional minorities. Kariel concludes that Calhoun "was wrong in attributing homogeneity to the sections." H. KARIEL, THE DECLINE OF AMERICAN PLURALISM 152 (1961). See generally L. HARTZ, supra note 66, at 145-77 (discussion of tensions in Calhoun's ideas).
  \item \textsuperscript{80} This is not the place to review the history of the Indians and the law in America. Perhaps it is enough to say that their status over time has been anomalous and difficult. At the same time, they have represented a leading example of the continuation of ideas of group authority, at least over group members. For recent treatments, see Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 1; see also C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW (1987); Resnik. Dependent Sovereigns: Indian Tribes, States and the Federal Courts, 56 U. CHI. L. REV. 671 (1989).
  \item \textsuperscript{81} Of course, as in the case of slavery, Calhoun's policies in relation to the Indians were not consonant with his ideas of minority interest to the extent that he argued against preserving the Indians as separate legal nations. He believed that, "[b]y a proper combination of force and persuasion of punishments and rewards, they ought to be brought within the pales of law and civilization." A. DEROSIER, supra note 32, at 41 (quoting Calhoun). Like the proposal to replace the manners and customs of the Indians with the Constitution and laws of the United States, this is the language of assimilation, not pluralism. Id. at 42.
\end{itemize}
dled as part of our international relations."" As in the case of Calhoun, Owen met with people who are associated with pluralist ideas in American history. If Owen had explained his new view of a (uniform) society to the Indian tribal leaders, they might well have responded by presenting a world in which a small semi-autonomous community was functioning under the protection of a larger political unit with possibly different values.

This emphasis on permanent diversity is not Owenite, nor is it a characteristic of Enlightenment thinking, which is a major source of Owenite views. As Harrison noted, there are pronounced intellectual rigidities in Owenism, derived from Enlightenment ideas: "Men and their beliefs would become simplified and standardized by the application of rational principles, and diversity—far from being a mark of excellence—would be greatly reduced."

America, before the Civil War, also exhibited a number of examples of radical individualism, which were not focused on communitarianism or politics at all. A digression into this material is needed to make the point that political theory that focused more on individual rights than Owen did was not necessarily more attentive to the problem of difference.

"Seen from a lower point of view, the Constitution, with all its faults, is very good," Thoreau wrote.

[T]he law and the courts are very respectable; even this State and this American government are, in many respects, very admirable, and rare things, to be thankful for, such as a great many have described them; but seen from a point of view a little higher, they are what I have described them; seen from a higher still, and the highest, who shall say what they are, or that they are worth looking at or thinking of at all?

82. Cohen, Original Indian Title, 32 MINN. L. REV. 28, 43 (1947).
83. For a discussion of semi-autonomous groups, see S. Moore, Law as Process (1978).
84. For one approach, see R. Nozick, Anarchy, State & Utopia 297-334 (1974) (Chapter 10 entitled "A Framework for Utopia").
85. J. Harrison, supra note 17, at 188. Harrison also noted, however, that, "[O]n the surface, Owenite communities seemed to be very tolerant." Id.; see also L. Hartz, supra note 66 (on the difference issue in Locke). "Locke has a hidden conformitarian germ to begin with, since natural law tells equal people equal things . . . ." Id. at 11.
86. H.D. Thoreau, Civil Disobedience (1849), in Walden and Other Writings of Henry David Thoreau 656 (Modern Library ed. 1950).
87. Id. "[T]he government does not concern me much," Thoreau continued, "[i]t is not many
And Thoreau expressed his views on reform:

As for adopting the ways which the state has provided for remedying the evil, I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to. I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad.\textsuperscript{88}

But the individualism of Thoreau was not the only individualism nineteenth-century America had to offer. We can illustrate with Josiah Warren and Lysander Spooner.\textsuperscript{89}

Josiah Warren, once of New Harmony,\textsuperscript{90} was interested in communitarian anarchism based on the idea of individual sovereignty. One can, in this case, offer material indicating that Warren was interested in diversity and individualism in the sense of serious differences between people. Thus, he wrote:

I do not mean to be understood that all are of one mind. On the contrary, in a progressive state there is no demand for conformity. We build on \textit{Individuality}; any difference between us confirms our position. Differences, therefore, like the admission
ble discords in music, are a valuable part of our harmony!\(^9\)

But the repeated references to music, and the notion of admissible discord, suggest not only Warren as a musician, band leader of New Harmony, but also Warren who believed fundamentally that, given the right sort of education, most people would make disciplined, correct choices and that conflict would be radically minimized through education.\(^9\)

While Warren is remembered as part of the American utopian or communitarian tradition, Lysander Spooner is cited as part of an indigenous anarchist or libertarian tradition in America.\(^9\) He is also occasionally recalled in relation to his operation of a private mail service in competition with the federal post office.\(^9\) Lysander Spooner’s position on sovereignty is elaborated in his late work, *A Letter to Grover Cleveland*:

The only real “sovereignty,” or right of “sovereignty,” in this or any other country, is that right of sovereignty which each and every human being has over his or her own person and property, so long as he or she obeys the one law of justice towards the person and property of every other human being. This is the only *natural* right of sovereignty, that was ever known among men. All other so-called rights of sovereignty are simply the usurpations of impostors, conspirators, robbers, tyrants, and murderers.\(^9\)

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91. J. NOYES, supra note 26, at 98 (quoting Warren’s *A Peep into Utopia*); see also J. WARREN, TRUE CIVILIZATION: AN IMMEDIATE NECESSITY AND THE LAST GROUND OF HOPE FOR MANKIND 18 (B. Franklin ed. 1967) (1st ed. 1863) (“No subordination can be more perfect than that of an Orchestra; but it is all voluntary.”).

92. G. LOCKWOOD, supra note 26, at 295. The present suggestion is that some thinkers, like Owen, Spooner, or Warren, whose ideas are rooted in natural law or enlightenment approaches, are concerned with variety, rather than difference. Issues of “interests” go deeper and overlap questions of “difference,” which are now discussed often in the context of feminism. See the work of Martha Minow. See, e.g., Minow, *Pluralisms*, 21 CONN. L. REV. 965 (1989).


95. L. SPOONER, A LETTER TO GROVER CLEVELAND 86 (1886); cf. B. PASCAL, *Pensées* No.
Law meant natural, universal, unalterable law. This was Spooner's argument for some decades, reflected in pamphlets, books, and encounters with government agencies. Here we see a position, like Owen's, that is not focused on pluralism, though it stresses individual

294 (W. Thayer ed. 1965) (1st ed. 1670) ("On what shall man found the order of the world which he would govern? . . . Shall it be on justice? Man is ignorant of it."). As to Marshall, Spooner said that

John Marshall has the reputation of having been the greatest jurist the country has ever had. And he unquestionably would have been a great jurist, if the two fundamental propositions, on which all his legal, political, and constitutional ideas were based, had been true. These propositions were, first, that government has all power; and, secondly, that the people have no rights.

L. SPOONER, supra, at 87.

96. Spooner's position on law and natural law elicited a strong response and critique from Wendell Phillips on the nature of law. See W. PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY (Boston 1847). Spooner argued that "law is an intelligible principle of right, necessarily resulting from the nature of man; and not an arbitrary rule, that can be established by mere will, numbers or power," L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 5 (B. Franklin ed. 1965) (1st ed. 1860), and that law is "simply the rule, principle, obligation or requirement of natural justice." Id. at 6. He believed that judges should declare slavery illegal on the basis of natural law. Wendell Phillips responded in the section of his Review called "What Is Law?" by quoting a number of positivist definitions of law as emanating from state authority. Phillips rejected Spooner's view of the world, emphasizing the association of law and government, law and officials, law and the state, as part of an activist (abolitionist) position.

Phillips was afraid that Spooner's abstract (or utopian?) natural law theories would mislead people. In short, his argument suggests that someone might have been paying attention to Spooner's arguments in the abolitionist context. But by the time that E.V. Zenker did his research on anarchism at the end of the nineteenth century, he reported that he was "quite unable to procure any book or essay by [the anarchist] Tucker, or a copy of his journal Liberty." E.V. ZENKER, ANARCHISM: A CRITICISM AND HISTORY OF THE ANARCHIST THEORY at vi-vii (1897). It is difficult to say anything specific about the influence of anarchist ideas.

Atiyah and Summers suggest that Spooner was not alone. P. ATIYAH & R. SUMMERS, supra note 8, at 237.

[W]hatsoever may have been the position of classical natural law theorists such as Aristotle and Aquinas, many American natural law thinkers did believe in a 'higher law' version of natural law, according to which positive law contrary to natural law was simply invalid as law or, even if valid, imposed no duty of obedience; indeed, in extreme cases, government action contrary to natural law gave rise to the right of rebellion or revolution.

Id.

For Phillips's discussion of the problems with Blackstone's definition of law, see W. PHILLIPS, supra, at 8 n.*.

If the reader asks why we do not cite Blackstone's definition—"Municipal law is a rule of civil conduct, prescribed by the Supreme power in a State, commanding what is right, and prohibiting what is wrong," . . . we think the last clause equivocal and superfluous, and, if taken in its obvious sense, false.

So, says Phillips, do many others, including Austin. On the general problem, Phillips argued that "[t]he Constitution will never be amended by persuading men that it does not need amendment."

Id. at 4; see also supra note 10.
Josiah Warren and Lysander Spooner remained committed to the same eighteenth-century understanding of right results through right reason (and, in Spooner's case, a self-evident natural law) that marks so much of Owen's thinking. It was not those who are associated with the utopian or anarchist tradition in America who best represent the possible pluralist implications of communitarian doctrine, but rather the slave-holder Calhoun, committed to the defense of his section, and the Indian tribes, who would for 200 years represent a special and anomalous case in American jurisprudence, a concededly autonomous (or semi-autonomous) internal group.

III. ESSENTIAL FEDERALISM

We could speak of an essential federalism of America and we would not, of course, have in mind just forty-eight or forty-nine American jurisdictions. We think of a wider and deeper network composed of a plurality of legal systems enjoying an extremely great amount of autonomy.

—Alexander Pekelis

As A.V. Dicey remarked, federalism requires a special state of mind on the part of the inhabitants. They must "desire union, and must not desire unity." The subject has been of absorbing interest to political theorists for some centuries and of particular interest to those countries like the United States, whose structure is federal. Often the issue is the relative balance of power between the several parts of the federal structure and, particularly, the relative power of the national state and

97. Spooner's arguments, thus, refer to "general principles of law and reason" and the "general sense of mankind," see, e.g., L. Spooner, No Treason: The Constitution of No Authority 29 (1870), such principles that we all act on in courts of justice and common life. Spooner opposed women's suffrage on the theory that no one, male or female, had the right to make laws. Spooner, Liberty 4 (June 10, 1882) (reprinting an article appearing in the February 24, 1877 edition of the defunct New Age).

98. Legal Techniques and Political Ideologies: A Comparative Study, in Law and Social Action 67-68 (1950). Some of Pekelis's work is directed to the issue of limitations on the power of "private governments." Id. at 98-106.

the internal, federated states. The issue of federalism has also been of interest to jurisprudence, particularly because of its implications for the doctrine of a single sovereignty. Thus, even John Austin was compelled to consider the case of federations, including the United States, in his work on jurisprudence.

In the United States, the question of what federalism means, in theory or practice, or historically, is not easily answered. We see various definitions of federalism attributed to leading figures. Hamilton is cited for an idea that emphasizes a strong national government. Jefferson and Madison are cited for the idea of a weak central government with the power basically retained by the states. As presented by lawyers, federalism becomes a federal structure in which the national government and its expositor of law, the Supreme Court, sits on top of all the internal structures. Official governmental law is seen as the only law. Federalism is taken to refer to governmental agencies.

Other ideas were, however, real to the nineteenth century. A school of "no-government" anarchist-individualists (including Lysander Spooner) was active in the abolitionist movement. Thoreau rejected the state as a matter not worthy of much concern. Even governmental matters relatively clear to us were quite open. The highest level of the legal hierarchy could be flatly ignored by a President: "John Marshall has made his decision: now let him enforce it!"

The comment, attributed

100. As to this, our sense of the inevitability of the present adjustment is doubtless ahistorical. To us of the present day it seems that the Constitution framed in 1787 gave birth in 1789 to a national government such as that which now constitutes an indestructible bond of union for the states; but the men of that time would certainly have laughed at any such idea . . . .

W. Wilson, The State 63 (rev. ed. 1900).

101. J. Austin, supra note 64, at 261.

102. For a discussion and review of the debate over centralized and decentralized power in fact and legal theory, see Scheiber, Federalism and Legal Process: Historical and Contemporary Analysis of the American System, 14 Law & Soc'y Rev. 663 (1980). See also Soifer & Macgill, The Younger Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1168 (1977) ("Federal and state powers ebb and flow relative to one another in response to messy and mutable social, political, and economic conditions.").

As has been noted, the images of the United States and its federalism have changed over time. See Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059 (1980). The nineteenth-century idea was that there were powerful states that somehow came together for certain purposes to form a national union, whose powers were defined and limited. The concept of federalism went along with an idea of demarcation. To a twentieth-century mind, the federated states are internal governing structures of a larger state, not private, for they too, after all, are governmental, but still lesser. "To the modern reader, American states seem to be, like cities, entities that are intermediate between the central (federal) government and the individual." Id. at 1105 n.118.

103. See 1 H. Greeley, The American Conflict 106 (1877); see also Miles, After John
to President Andrew Jackson, reflects the tension between law and politics, as well as the uncertainty as to the role of the Supreme Court as the expositor of the federal Constitution as against other parts of the federal structure.

In America, the debate over the meaning of federalism has had a long and sometimes bloody history. "Down to the time of the Civil War," Charles Merriam wrote, "the centers of political activity and interest had been the state and the nation, rivals in the contest for supremacy which finally resulted in armed conflict." But, Merriam adds, "[b]ack of this struggle lay an intense interest and devotion to the units and agencies of rural government, which had played so large and vital a part in the early days of the colonies and of the Republic." These units and agencies of government, the town, the county, had been the concern of the anti-federalists and the republicans, who focused on shared values, small communities, small units. The alternatives, posed by the Hamiltonians, were associated with centralist development and the commitment to sovereignty in the federal government. This idea of centralism was opposed by many, including Thomas Jefferson, who became, if anything, more concerned with small units as he became older. He wrote in 1824: "As Cato concluded every speech with the words, Carthago delenda est, so do I every opinion, with the injunction, 'divide the counties into wards.'

Thus, underneath many of the historical discussions of federalism and republicanism was a question about the correct size of the political unit. It has been recently said: "Lost today in the legitimate characterization of the Constitution as bent on setting limits to the power exercised by less than angelic men is the extent to which the Constitution is a grant of power to a centralized nation-state." Thus, Isaac

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Marshall's Decision: Worcester v. Georgia and the Nullification Crisis, 39 J.S. Hist. 519 (1973). As is well known, the comment is said to have been made as a response to Marshall's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), holding that the state of Georgia could not imprison missionaries who were working with the Cherokee Indians in Georgia because Indian land was not under the jurisdiction of the state. Marshall's decision, however, was not enforced. The missionaries stayed in jail. See U. Phillips, Georgia and States Rights 82-83 (1968); see also W. McLoughlin, Cherokees & Missionaries, 1789-1839, at 264-65 (1984).

104. C. Merriam, American Political Ideas 228 (1920).
105. Id. at 229.
106. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), quoted in H. Arendt, On Revolution 252 (1963). Arendt comments that this emphasis on wards is found in writing at the end of Jefferson's life and at a time when he had withdrawn from affairs of state. Id. at 253-54.
107. Kramnick, The "Great National Discussion": The Discourse of Politics in 1787, 45 Wm.
Kramnick, suggests that, among the paradigms being used in the political discourse of 1787, there was one which involved "the state-centered language of power." Some of the debate over the Constitution dealt with this issue in terms of size. How large should the republic be? The school, known now as anti-federalist, urged that the size should be small and, some add, about the size of the existing states. Late in his life, Jefferson was urging a size smaller than that. This emphasis on the small unit overlaps the interest, then and now, in voluntary associations.

Faction and voluntary association, mediating structures and interest groups, although they seem to be related and even, sometimes, seem to be the same thing, are often discussed in a way that fails to clarify whether the entities are different or whether only the values or adjectives attached to the entities are different. Faction, for example, seems to be a negative term. The terms voluntary associations and mediating structures seem positive.

We can start with the discussion of republicanism offered by Gordon Wood, who describes an approach in which division itself is perceived as bad. The public good is for everyone. "Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts." The "common interest" is carefully defined by Wood as follows: It is not, "as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals." Wood goes on to explain that this is not to say that private or competing interests were denied, they were simply to be ignored. "[A]part from the basic conflict between governors and people these were not to be dignified by their incorporation into formal political theory or into any serious discussion of what ought to be." The state was "to be considered as one moral whole," and "interests
and parties were regarded as aberrations or perversions, indeed signs of sickness in the body politic."\textsuperscript{114}

*The Federalist Papers* present a more complicated picture. In the essay *Factions* in *The Federalist* No. 10, Madison offered a now famous definition.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.\textsuperscript{116}

Reading the sentence with an emphasis on the word *adverse*, one might suspect that the point is ultimately substantive. Some groups and associations are fine, but "factions" are working toward bad ends. This reading is reinforced by the examples, which include: "[a] rage for paper money, for an abolition of debts, for an equal division or property, or for any other improper or wicked project" (note also the reference to "sinister views").\textsuperscript{116} In short, *Factions* in *The Federalist* No. 10 may be seen as groups, associations, parties, and sects that are doing the wrong things on the merits or as groups inherently adverse to the public interest.\textsuperscript{117} Other groups, for example, those described in *The Federalist* No. 51, are much less troublesome. There will be so many of them (groups, interests, sects) that they will not be dangerous. "Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority will be in little danger from interested combinations of the majority."\textsuperscript{118}

\textsuperscript{114} Id. at 58-59. Wood notes that some nineteenth-century thinkers did, however, conceive of factions as not only inevitable, but even desirable. Id. at 59.

\textsuperscript{115} THE FEDERALIST No. 10, at 17 (J. Madison) (R. Fairfield ed. 1961).

\textsuperscript{116} Id. at 23.

\textsuperscript{117} Cf. D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 65 (1984) ("Even if a particular interest is part of the aggregate of interests, that interest as an impulse uniting and actuating a group is indifferent to the aggregate. . . . Madison's definition seems to detect a factious impulse at the heart of even a respectable lobby.").

\textsuperscript{118} THE FEDERALIST No. 51, at 162 (J. Madison) (R. Fairfield ed. 1961). James Luther Adams attempted to reconcile these two essays by suggesting that the emphasis in *The Federalist* No. 10 was on economic groups, while in *The Federalist* No. 51, Madison focused on noneconomic and religious groups. He also suggested that "[m]isconceptions have arisen regarding Madison's view of mediating structures because of his somewhat pejorative definition of factions in *Federalist*, No. 10. . . . But Madison also saw in factions 'a salutary dispersion of power, a protection for freedom in society against potentially tyrannical intentions of the majority.'" Adams goes on to connect this problem with issues of church and state. See J. ADAMS, Mediating
And finally we reach the well-known discussion of de Tocqueville in which groups become the voluntary associations, which, while not without their negative side, are on the whole valuable and necessary. Several features of de Tocqueville’s discussion are initially striking. The first is the range of groups that he saw, political associations as against civil associations, governmental associations (townships, counties) as against other forms of association, and private fraternal groups. The second is the range of characteristics of these groups, from those that are single purpose and limited in duration to those that finally become internal states.

But for all this early discussion of group life in America, one is tempted to say that there was, there must have been, a clear and universal sense of the official state as the final arbiter, setter of the limits, creator and keeper of boundaries. As to this, let us consider a Mississippi case of 1837.

_Fisher v. Allen_ upheld a married woman’s capacity to own and transfer her assets—in this case, a slave. The married woman was a Chickasaw Indian, married according to the custom of the tribe. The


"[I]t is a hypothesis worthy of consideration that from Chickasaw custom was derived the first law giving a married woman in a common-law state any rights in her own property . . . ." _Id._ at 1117 (also considering the possibility that a woman who visited Louisiana and brought community property ideas back to Mississippi with her was a source of the law).

On the later history of the slaves of the Chickasaw, see United States v. Choctaw Nation, 193 U.S. 115 (1904). The tribes were on the side of the Confederacy. The litigation concerned the provisions of the treaty of 1866 regarding the Chickasaw freedmen, ignored by both the Indians and the government. For a discussion of this case, see Soifer, _The Paradox of Paternalism and Laissez-Faire Constitutionalism: The U.S. Supreme Court, 1888-1921_, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 170-71 (W. Samuels & A. Miller eds. 1987).
slave was given to a daughter. A year after the gift, the legislature passed a law abolishing the tribal character of the Indians, abolishing tribal laws and customs, and conferring on the Indians the rights of citizenship. Marriages between Indians were validated. The court held that the slave could not be seized to satisfy the debts of the husband, since the slave belonged to the wife, and the gift to the daughter was good. Under the Chickasaw tribal law, a wife had property rights not generally available in Mississippi, including a "right to own separate property, to dispose of it at pleasure, to create debts and in most things act as a feme sole." The court found that the statute could not "be construed to extend so far as to interfere with the rights to property previously acquired." Shortly after, as Judith Younger puts it, the Mississippi legislature "extended Fisher v. Allen to include all Missis-
issippi wives by enacting a Married Woman's Property Act."

The case is a part of a story of groups and government, outsiders and insiders, society and state. We see Indians, slaves, mothers, daughters, legislatures, and courts. Yet the configurations are not quite what we expect. We have slave-holding Indians who are married women. Among possible readings is an open-textured history in which a legislature voids tribal law, while simultaneously recognizing its marriages. A court limits the act of the legislature to sustain tribal law on property theories. A legislature generalizes the ruling of the court (incidentally supporting tribal law) so as to benefit all married women and perhaps to clarify the situation for creditors. Indian law (primitive? outsider?) sustains rights not recognized by official law (civilized? insider?) that recognizes Indian laws, nonetheless, and builds on them. It is not a clear story either of the triumph of group interest or of state hierarchy. It is a story of interactions and interpretations.

CONCLUSION

What shape does the history of essential federalism have? Whatever shape that history has or is given, it can not, I assume, be

121. Fisher, 3 Miss. (2 Howard) at 615.
122. Id. at 616.
123. Younger, supra note 120, at 61.
124. For an argument that some Indian tribes provide social and economic autonomy to women, see E. Leacock, MYTHS OF MALE DOMINANCE 236 (1981), mentioning Choctaw Indians specifically.
125. Friedman makes the point that the litigation involving married women's property typically involved issues of creditors rights. L. Friedman, A HISTORY OF AMERICAN LAW 211 (2d ed. 1985).
the same as the shape of the history of The State or of The Law, and the story does not begin with the Constitution, or the public/private distinction in particular courts. "We should look to the phenomena themselves for their proper periods," Marc Bloch suggests, noting that we would not write a diplomatic history from Newton to Einstein.\textsuperscript{126} We shape the story to the subject, and if we use official state materials, we view them, as part of a narrative in this context, differently from the way we would view them as part of a history of the law's approach to a particular problem.

It is conventional in work on groups and associations in America to turn to early commentators on our institutions and, particularly, to the observations of Alexis de Tocqueville, whose reflections on the structure of American society went far beyond the description of governmental institutions. "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America."\textsuperscript{127} Tocqueville's observations on the importance of voluntary associations in the American political system are so substantial that, writing in 1970, Hannah Arendt could still refer to de Tocqueville's chapters on this subject as "still by far the best in the not very large literature on the subject."\textsuperscript{128}

For all the strength of de Tocqueville's work, there is, however, reason to begin a preliminary consideration of these subjects, not with the observer/sociologist, but with the reformer/practitioner. Justice Joseph Story met Robert Owen on his American trip and wrote to his wife that Owen was "so visionary an enthusiast that he talks like an inhabitant of Utopia."\textsuperscript{129} Yet there is another sense in which Owen, like all practicing communitarians, had to be realistic. Owen came with a political commitment to the idea of communities that would become a worldwide network of communities and he related this to American political federalism. He was not, however, a conventional federalist in that he was not committed to that vision of diversity and experiment that has, for some time, marked discussions of the internal states as laboratories.

Owen visited the United States some years after New England federalists expressed their disaffection with the central government at

127. A. DE TOCQUEVILLE, supra note 67, at 198.
129. Letter from Joseph Story to his wife (Feb. 9, 1825), quoted in A. Bestor, supra note 17, at 106; see also 1 LIFE AND LETTERS OF JOSEPH STORY 485-86 (W. Story ed. 1851).
the Hartford Convention and some years before the major American controversies over slavery and secession. Perhaps because of those special historical concerns—like the slavery issue, which would finally threaten the nation itself—others in America had a more sophisticated vision, making up, at certain points, for something Owen himself lacked. At least one of the Americans Owen spoke with on his early visit, John C. Calhoun, was to arrive at a full-scale commitment to the importance of the veto power of the small group and to an attack on a monistic theory of sovereignty in a central state. Others, whom we may represent by Owen's meeting with Indian tribal leaders, became concerned with the problem of locating sovereignties within the larger state. A comparison between Owen's ideas and the ideas of some of the Americans he met reveals that others, more concerned with issues of diversity—or perhaps with maintaining their own differences—were also more systematic in attempting to solve the structural problems of permanent internal communities.

A lawyer comes now to the issues raised by decentralization and pluralism with strong preconceptions in favor of the importance of official law and the central state.130 This idea informs our historical narrative, and we may view with surprise and even amusement the image of Robert Owen, the "gentle bore,"131 lecturing the American Congress. Yet Owen's concerns were closer to those of the Congress than we presently appreciate, and the distance between the utopian and the legislators was not so great as presently appears.

130. In part, this is because local community values are not always good. "An appealing, albeit somewhat utopian, vision of participatory democracy informs [states rights arguments]. Yet the underlying reality of a long and largely successful history of exclusion, discrimination, and economic domination in local government remains a bit sobering." Soifer, Truisms That Never Will Be True: The Tenth Amendment and the Spending Power, 57 U. COLO. L. REV. 793, 797 (1986).

131. G. COLE, supra note 53, at 241 (quoting the characterization of Owen in H. MARTINEAU, BIOGRAPHICAL SKETCHES 313 (London 1869)).