

The Sanctity of Association: The Corporation and Individualism in American Law

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I. INTRODUCTION: PROTECTING THE INDIVIDUAL OR THE GROUP?

American jurisprudence is frequently criticized for its preoccupation with rights and for what one commentator, Mary Ann Glendon, calls its "legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."¹ American law is condemned for its anti-social nature. Or, to put it another way, the American legal system is known for protecting the individual and not the group.

The Supreme Court, as the supreme expositor of American law, takes the lion's share of the blame for this tendency. Legal scholars T.A. Aleinikoff and Samuel Issacharoff, in their assessment of the controversial decision in *Shaw v. Reno*,² offer a representative criticism

1. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at x (1991). The emphasis on individualism is widely supposed to derive from the myth of the independent yeoman. Thus, J.G.A. Pocock, whom Glendon cites in this regard, asserts that "[t]he point about freehold in this context is that it involves its proprietor as little as possible in dependence upon, or even in relations with, other people, and so leaves him free for the full austerity of citizenship in the classical sense." J.G.A. POCOCK, *POLITICS, LANGUAGE AND TIME* 91 (1971). As far as the point about dependence goes, Pocock is correct, but he is wrong to suggest that freehold was supposed to discourage relations with others.

The independence of the freeholder, in American legal lore, was supposed to render him ideally suited to participate in civic life. It was thought to give him an interest that originated in his holding but transcended it. A good summary of this idea was given in the Virginia Constitutional Convention of 1829-1830 by Philip N. Nicholas, a banker from Richmond:

Ask one of our freeholders whose man he is, he will tell you he is his own man. . . . Do you believe, Mr. Chairman, that there is any property which attaches a man so much to the country as the land? There is none. His attachment to his home, is connected with the best sympathies of the human heart. . . . He will love his county which contains a home so dear to him, and defend that country at the hazard of his life.

DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S, at 393 (Merrill D. Peterson ed., 1966).

2. 509 U.S. 630 (1993).

of the Court for paying attention to the "equal treatment of individuals rather than the raising up of disadvantaged groups."³ In a similar vein, Glendon criticizes the Court for its decision in *Hodel v. Irving*,⁴ which struck down a Congressional reassignment to the Oglala Sioux tribe of lands previously owned by individual members of the tribe.⁵ To Glendon the case reveals the "extreme vulnerability of communities to individual rights on the one hand, and to imperatives of the [S]tate on the other."⁶ Another author, Aviam Soifer, concurs in this judgment, writing that in *Hodel* the "right of the individual had to prevail, almost by definition, over all competing considerations, whether utilitarian or rights-based."⁷

The charge that American law is preoccupied with individualism does not stop at the Supreme Court, nor is it restricted to the present. Many commentators contend that this exclusive dedication to individual rights stretches far beyond the Court—that it bespeaks a systematic deficiency in American law and legal theory. Soifer writes that the problem lies at the heart of American law: "[T]he American legal system lacks any theory to handle groups. The dominant legal paradigm in American law is the relationship between individual and [S]tate."⁸ Glendon likewise complains that "groups or associations that stand between the individual and the [S]tate all too often meet with judicial incomprehension."⁹ Glendon states *Poletown's* case in terms of "the interests of

3. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 600 (1993).

4. 481 U.S. 704 (1987).

5. Under the Dawes Allotment Act of 1887, tribal lands were distributed to tribe members in the belief that private ownership would make the Indians "civil" and promote assimilation. See generally JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN* (1991). Inheritance over the succeeding generations made individual holdings smaller and smaller, and Congress moved in 1983 to consolidate the small holdings and return them to the tribes. One tract of land owned by members of a Sioux tribe, described as "one of the most fractionated parcels of land in the world," boasted a forty-acre parcel owned by 439 people. See *Hodel*, 481 U.S. at 713. Two-thirds of these people received less than one dollar per year in rent, and the other third less than five cents. See *id.*

6. GLENDON, *supra* note 1, at 114.

7. AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 84 (1995).

8. *Id.* at 1.

9. GLENDON, *supra* note 1, at 114-15. Glendon criticizes the infamous decision in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), in a similar fashion. In this case, the court upheld a taking by the City of Detroit of land subsequently conveyed to General Motors. The taking was held to have a public purpose because it was effected in contemplation of increased employment in the area. See *Poletown*, 304 N.W.2d at 459.

communities.”¹⁰ She laments that its residents—because of ostensible defects in American rights-talk—“could not find a way to communicate effectively” about shared interests that stood apart from their individual property rights.¹¹

Further, critics maintain that American law has shown a similar disregard for the group throughout American history. Despite the many labors of civic republicans in the law schools and history departments, the prevalent impression is that the United States has been devoted to the interests of the individual from its earliest days. Thus, Glendon, who agrees with Soifer on the current state of affairs, traces this concern with the individual to the founding of the republic: “In the beginning, that is, at the Founding, there was no particular reason for American statesmen to pay special attention to families, neighborhoods, or other small associations. These social systems were just there, seemingly ‘natural’”¹² Legal historian Stanley Katz agrees, contending that the

federalism of the Constitution embodies a liberalism prevalent at the end of the eighteenth and the early nineteenth centuries, which was concerned principally with individuals and with rights: “life, liberty, and property,” in John Locke’s famous formulation, or the right to pursue that form of social peace and prosperity that the eighteenth century referred to as “happiness.”¹³

Here Katz provides a convenient formulation that blends liberalism, rights, and the Constitution in defense of the proposition that the nation has been attentive to the rights of the individual from the very first.

There are not many voices on the other side. Most notably, political theorist Barry Shain has denounced what he terms the “Myth of American Individualism,” contending that American political thought is based on Protestant communitarian values rather than autonomous individual values.¹⁴ Legal scholar John Garvey has argued at length that theories of individual autonomy do not adequately explain why or how we should protect freedom.¹⁵ Otherwise, there is not much in the

10. GLENDON, *supra* note 1, at 110.

11. *Id.* at 111.

12. *Id.* at 115.

13. Stanley N. Katz, *The Legal Framework of American Pluralism: Liberal Constitutionalism and the Protection of Groups*, in BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA 11, 12-13 (Wendy F. Katkin et al. eds., 1998).

14. See generally BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* (1994).

15. See generally JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996). Garvey addresses this Article’s concerns most explicitly in chapter eight (Groups) and chapter nine (Churches). See *id.* at 123-38, 139-54. In particular, Garvey argues against the individualist explanation and justification for group action and protection. “The dominant school of thought about this problem maintains that group action has value because it is an aggregate of valued individual actions.” *Id.* at 133. Although he does

scholarly world to undermine the notion that American law has historically been committed to the individual at the expense of the group.¹⁶

But is the indictment of American jurisprudence for an undue concern for the rights of the individual well-founded? This Article argues that it is not. Commentators have been able to claim that American law favors the individual rather than the group only because they have ignored the group that the United States has traditionally championed: the corporation. If anything, American jurisprudence is hyper-corporate rather than hyper-individualistic. While critics impugn American legal culture for its anti-social tendencies and for its failure to protect the group, the group has actually enjoyed extraordinary protection throughout the course of American history.

American society and law display a deep reverence for the group, as long as it assumes corporate or quasi-corporate form. This reverence is not fleeting; rather, it has deep historical roots. In fact, it was there before the republic came into being and it played a profound role in the founding of the nation. Moreover, these roots are not only traditional, but philosophical and religious as well.

This Article explores those roots, with three goals in mind. First, to correct the mistaken notion that American law has historically demonstrated a commitment to the individual at the expense of the group, and to suggest how this critique should be restated. Second, to re-evaluate modern cases that are often thought to stand for expressions of individual rights, as cases actually protective of group rights. Third, to contend that American reverence for the corporate form explains why America's favorite group—the corporation—came to be as powerful as it is today.¹⁷

not deny that some organizational behavior is properly understood in such terms, Garvey insists that we *must remember that much group activity can be understood only in terms of collective interests and goals, which are not identical with those of the individuals who compose the group.* See *id.* at 138 (“We value actions by the group because they accomplish these interpersonal goals, or promote these goods.”).

16. Aviam Soifer occupies an unusual place in this debate. Although he maintains, as noted in this Article, that American law is dedicated to the relationship between the State and the individual—at the expense of intermediate groups—he implies that there is a marked need for an account of groups in American history. See SOIFER, *supra* note 7, at 73 (“Moreover, the absence of a sense of history remains one of the most noteworthy and most troubling aspects of recent treatment of groups in legal scholarship as well as at the highest levels of United States and English judge-made law.”).

17. The legal history of the corporation has never been seriously and systematically examined. The common wisdom is that the power of the American

Parts II and III of this Article establish the importance of the corporation in revolutionary America by comparing the fate of the corporation in the French and American Revolutions.¹⁸ Parts IV and V continue by analyzing one of the most important and most neglected subjects in the legal history of the new republic: the early nineteenth-century controversy over the incorporation of churches.¹⁹ In Part VI, this Article first shows that an understanding of the corporate underpinnings of our jurisprudence calls for a re-evaluation of cases commonly believed to vindicate the rights of the individual. Then it returns to the critics of the supposed American individualism, arguing that their criticisms need to be redrawn so as to recognize the corporate character of the law.

The “sanctity of association” is not just a phrase. It describes a commitment to joint action whose significance for modern and historical law has passed almost unnoticed. An appreciation of this sanctity has

corporation is the result of a series of perfidious dealings—sometimes described in terms of collusion between businessmen and judges—which began around the time of the passage of the Fourteenth Amendment and which were distinctly un-American.

This Article challenges that assertion, arguing that the power of the corporation derives in large part from the American predisposition toward associations. Individualism was not at the center of political and legal theory in colonial and revolutionary America. Rather, in theory and in practice Americans thought in corporate terms; the eighteenth-century American intellectual heirs of John Locke, like Locke himself, were champions not of a neutral individualism, but of a corporate liberalism. For the use of this phrase with respect to the late nineteenth and early twentieth centuries, see generally R. JEFFREY LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920* (1982).

18. In both practice and theory, the French were hostile toward corporate life while Americans proved, generally, to be hospitable. See *infra* Parts II-III.

19. This issue is important because it shows that when Americans had to resolve the most difficult kind of problems, they quickly turned to corporations. Moreover, in the life of the churches, as in that of the nation, the Revolution led to a struggle between democratic and hierarchical social ordering. The history of religious incorporation thus provides a lens through which to view the dilemmas confronting the new republic and it illustrates vividly the fact that the new nation had committed itself at a very early date to allowing small republics to dwell within its borders—borders both geographic and legal.

Part V concludes by arguing that the incorporation of churches was the first step in a general relocation of sovereignty in corporations. General incorporation of religious societies paved the way for general incorporation of business societies and, as the century progressed, legislatures announced that people did not need the permission of the sovereign—i.e., the Legislature—to form corporations. Originally, corporations could form only with the permission of the monarch, as granted in a special charter. Special incorporation was eventually replaced in most states by general incorporation, which allowed incorporation on a much more widespread basis. Courts obliged the incorporators as well. From the time of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), well beyond *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), the constitutional law of corporations took deep breaths of American political theory. In the process, the corporation became a person. Although many contend that this was only an artificial person, the law resorted to artifice because it found itself dealing with a distinctive and collective moral being. See *infra* Part V.

two lessons to teach: one about the present and one about the past. Constitutional law cannot be fully understood without reference to enduring moral postulates on the importance of association. Because we have focused on the individual rather than the corporation as the bearer of rights, we have misconceived the nature of the liberty that is protected by American law. The historical significance, which is highlighted by the experience of the churches, is that it is wrong to believe that the Founders committed the new nation to pure individualism—and thus to neutrality—in such important matters as religion. In practice, the nation committed itself to freedom as conceived in a Christian and Protestant light. This was freedom defined within corporate bounds, that is to say, a freedom based on widely-shared moral understandings. Moreover, the modern tendency to discount the influence of religion on the American past has led us to miss the important role of churches in the growth of general incorporation and thereby to forget the undeniably “moral” origins of the corporation.

II. THE FRENCH REVOLUTION AND CORPORATE LIFE

Why turn to the French Revolution in an Article about corporatism in the United States? One reason is that the French republican approach to the corporation is strikingly different from the American approach and thus provides an instructive contrast.

The common view is that the United States is so hostile to groups that it tends to wear away their very identities over time. As Soifer puts it, “Much law is devoted to macadamizing and pulverizing,”²⁰ by which he means that American law puts inordinate pressure on groups. Yet it was the French Revolution, rather than the American, that showed unremitting hostility toward the corporation. The theory and practice of French anti-corporatism will help put American attitudes into perspective.

Critics of the American approach often show an affinity for European alternatives and seem especially beguiled by French ways. They have been quick to point to the efforts of European nations, notably France, for commendable examples of group protection.²¹ Glendon prefers

20. SOIFER, *supra* note 7, at 137.

21. Other scholars have noted a tendency on the part of legal theorists and historians to look abroad for theories to explain American political and constitutional life. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 5-6 (1991); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV.

Rousseau, the philosopher of the French Revolution, to John Locke, comparing the Genevan favorably to “the stolid English and Scottish writers of ‘republican’ persuasion for whom private property was the necessary base for the virtuous independent-minded citizen.”²² Professor Frank Michelman approves of “the modern republican commitment to social plurality”²³ and of the Western philosophical tradition celebrating “values that are communal and objective.”²⁴ He finds these values in a tradition that stretches from Aristotle through Rousseau to Kant.²⁵ Cass Sunstein, in arguing for a diversity-enhancing approach to education that corresponds to the position of the antifederalists, notes a similarity between “the antifederalists’ views and those of Rousseau.”²⁶ Elsewhere he lauds the governments of France, Germany, Italy, and Britain for promoting “high-quality broadcasting”²⁷ and the German Constitutional Court for promoting diversity on German television.²⁸ Akhil Amar, in arguing that the Bill of Rights actually does protect the rights of groups, relies on Rousseau to help make the point.²⁹

523, 529-35 (1995).

22. GLENDON, *supra* note 1, at 32.

23. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1532-33 (1988).

24. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 150 (1977-1978).

25. *See id.* In drawing this single line, Michelman forgets that French thought on the character of civic personality was quite different from American. Thus, he cites Hannah Arendt's *On Revolution* for her “stunningly expressed commendations of freedom as ‘public happiness.’” *Id.* at 152 n.30. Yet in hoping to find a style of thought that applies to American constitutional practice, he does not see the difference between a French approach to sovereignty and an Anglo-American approach. Arendt, however, was quite aware of the difference, noting that

just as Montesquieu's theory of the separation of powers had become axiomatic for American political thought because it took its cue from the English constitution, so Rousseau's notion of a General Will, inspiring and directing the nation as though it were no longer composed of a multitude but actually formed one person, became axiomatic for all factions and parties of the French Revolution, because it was indeed the theoretical substitute for the sovereign will of an absolute monarch.

HANNAH ARENDT, *ON REVOLUTION* 155 (1963).

26. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 36 n.31 (1985) (“Similarities between the antifederalists’ views and those of Rousseau are readily apparent. Surprisingly, however, Rousseau’s name seldom appeared in the antifederalist literature and is mentioned only once in *The Complete Anti-Federalist*.”).

27. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 80 (1993). On the subject of the popularity of Jerry Lewis movies in France, Sunstein maintains a dignified silence.

28. *See id.* at 77-79.

29. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 26 (1998), which states:

The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express

A study of French approaches to incorporation argues strongly that it is wrong to look overseas for the best examples of group protection. The phrase "macadamizing and pulverizing" comes from the medieval historian Maitland, who used it to call attention to a very strong tendency on the part of the French to pulverize groups smaller than the State. Indeed, Soifer credits Maitland fully for his insight, asserting that "it was Maitland who led the brigade of the leading English legal scholars to urge the ubiquitous reality and vital importance of group entities."³⁰ In fact, in his writings Maitland contrasted the United States with France, pointing to the United States as a land in which group personality was finding a home in law.³¹

Maitland's insight was extremely important, but its significance has not been fully appreciated. Others have been sensible of a distinction between France and America on the notion of a "general will," but Maitland traced the operation of the unitary will to a general theory hostile to the corporation and trust. When he sought an example of a legal culture that was hostile to groups, he turned to France. Conceding that England was itself heading in the French direction and noting that Hobbes thought of corporations—organized groups within the State—as "troublesome entozoa,"³² Maitland cautioned that it was in France rather than England where "we may see the pulverizing, macadamizing tendency in all its glory . . . reducing to impotence, and then to nullity, all that intervenes between Man and State."³³

reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government. In the words of Rousseau's . . . social contract, "the sovereign can act only when the people are assembled."

Id. (quoting 3 JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* CH. XII (1762)) (emphasis added).

30. SOIFER, *supra* note 7, at 73.

31. See FREDERICK W. MAITLAND, *Moral Personality and Legal Personality*, in *MAITLAND: SELECTED ESSAYS* 223, 229 (H.D. Hazeltine et al. eds., 1936).

32. *Id.*

33. *Id.* Maitland is introduced here for several reasons. The first is that his work suggested the approach that this Article takes. The second is that he saw quite clearly, long before others, that the problems involved in respecting corporate rights—"group" rights—pertain to many sorts of corporate entities, and that to solve them requires some understanding of what constitutes group personality.

Are corporations merely fictional persons? To answer that they are is to subscribe to a doctrine of utility that has never been fully accepted in the United States, although courts have often said that they are. For if the State creates the corporate entities that live within its borders, it may dismantle them at will. Maitland's essential point in this regard is that in both England and the United States there are a great many corporate

He was right.³⁴ With a clarity and ferocity not to be found in revolutionary America, spokesmen for French nationhood made clear on many occasions that true liberty was expressed in the direct relationship between the individual citizen and the nation. It had little room for intermediate bodies larger than the natural individual but smaller than the State.

A. *The French Revolution and the Attack on Corporations*

The French did not mince words. On August 18, 1792, the National Assembly decreed that a "State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country."³⁵ On the basis of this absolutist doctrine regarding corporate life, the French government reached into facets of life that the American government has rarely presumed to reach. By 1792 some very un-American things had been justified by this line of thought.

As everyone knows, the French Revolution established the nation as the protector of the individual and the enemy of privilege based on tradition.³⁶ The *Declaration of the Rights of Man* begins with the promise that "Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only

entities organized to different ends, and that an answer meant to decide a question with regard to profit-making concerns may just as well implicate religious bodies.

One of the important implications of his observation is that those who would protect "group" rights are going to have to consider that opposing interests may have excellent claims of their own to recognition as a group. Another is that adherents of group protections, though they may either deny or fail to realize it, will often argue on some premise of natural law. What is it, for instance, that privileges the integrity of the racial group over that of the State? The answer is trickier than many care to acknowledge.

Moreover, Maitland observed that a theory of corporate rights cannot confine itself to the ordinary rubrics of law. As has been said above, modern analysts tend to want to protect the "social" claim of the group against the property claim of the individual. Maitland knew that no such division could be made easily, and that groups claimed to own property just as individuals did. Thus, he reminded his readers that the debates of the French Revolution on the ecclesiastical settlement were about property as well as status; in fact, his studies lead us to say that the two are always found together. See *id.* at 230. The question, "Who owes this debt to the nation?" is closely related to the question, "Is this entity a juristic person?"

34. Maitland moved on to note that the ownership of other property was open to the same attack that succeeded against the church. If the State was a "real" person who could take property from "artificial" persons such as the church, other corporate individuals had to worry at the example: "And as with the churches, the universities, the trade-gilds, and the like, so also with the communes, the towns and villages." *Id.* at 230.

35. *Id.* at 229-30.

36. See JOHN McMANNERS, *THE FRENCH REVOLUTION AND THE CHURCH* 25 (1969) (explaining revolutionary policy regarding the Catholic Church in "light of the attack on privilege which was the driving force of the Revolution").

on public utility."³⁷ The body to decide questions of public utility was the "Nation," considered in the third article of the *Declaration* to be "essentially the source of all sovereignty."³⁸

France had moved very quickly to give legal expression to its theory of corporations. On November 2, 1789, the National Assembly passed an act confiscating the lands held by church corporations; from then on all such property was to be "at the disposal of the nation."³⁹ The nation would, in turn, pay for the support of the clergy and for the maintenance of religion. Although the *Declaration* provided for the protection of property,⁴⁰ the fate of the church showed that no similar protection was to be afforded to corporations. This corporate insecurity had been hinted at in the statement that "civil distinction," i.e., inequality, could be sanctioned only for reasons of "public utility."

Soon after its property was sacrificed on the altar of national necessity, the Catholic Church lost control of its own workings. The constitution of the French Church itself was changed by the Assembly, which passed the Civil Constitution of the Clergy in July of 1790.⁴¹ Aside from providing for the election of bishops and priests, the Civil Constitution took a further remarkable step: it decreed that papal pronouncements of any kind were no longer to have any force "unless they have been presented to the legislative body, seen and verified by it."⁴² Papal documents were not even to be distributed, read, or published until they had been sanctioned by the Assembly.

This system of censorship is instructive because it sharpens the distinction between an individual liberty and a group liberty. The *Declaration* had promised that because the "unrestrained communication of thoughts and opinions [was] one of the most precious [r]ights of

37. DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS BY THE NATIONAL ASSEMBLY OF FRANCE (1789), *reprinted in* REVOLUTION FROM 1789 TO 1906, at 30, 30 (R.W. Postgate ed., Harper & Brothers 1962) (1920).

38. *Id.*

39. DECREE CONFISCATING CHURCH LANDS, NOVEMBER 2, 1789, *reprinted in* REVOLUTION FROM 1789 TO 1906, *supra* note 37, at 32, 32.

40. The last article upheld the right to property: "The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity." DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS BY THE NATIONAL ASSEMBLY OF FRANCE, *supra* note 37, at 31.

41. See THE CIVIL CONSTITUTION OF THE CLERGY (1790), *reprinted in* THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907, at 16, 16 (Frank Maloy Anderson ed., 2d ed. 1908).

42. *Id.* at 23.

[m]an, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty, in cases determined by the law."⁴³ It was made obvious that this protection did not extend to corporate communications. Thus, it is striking that the revolutionaries promised an "unrestrained communication" at the same time they aimed to restrict the kind of corporate speech that the Pope engaged in.

Such anti-corporate actions were premised on the belief that the nation ought to exercise a general superintendency over all the groups within its borders. The opportunistic cleric, Talleyrand,⁴⁴ insisted that property belonging to clergymen was different from other property because it was intended for a function, rather than for the enrichment of individuals.⁴⁵ Even if the nation did not have the right to destroy the whole body of the clergy, Talleyrand believed that the State was entitled to "destroy particular aggregations of this corps if it judges them harmful or simply useless."⁴⁶ Talleyrand went further still. Not only did the nation, by right, have control over the property belonging to religious bodies, it possessed "a very extended empire over all corporate bodies existing within its confines."⁴⁷ It was equally true that the "Nation, for the very reason that it is protector of the wishes of the founders, can, and even must, suppress benefices that have come to have no functions."⁴⁸ Talleyrand explained at some length just how extensive the authority of the State was to be:

One is always correct in saying, in ordinary language, that the properties were given to the Church: which has never meant anything, if not that these properties have been, *to the discharge of the State*, destined for the use of religion, the maintenance of the temples, the relief of the poor, and, finally, for works of public benefit, and they must always fulfill this intended objective. One is also correct in saying that they were given irrevocably; . . . they are irrevocably assigned for this purpose, whatever fate may befall the particular corps they were assigned to at first. . . .⁴⁹

Talleyrand thus made his stand on the use to which the property could be applied, but he did not appear to quibble with the idea that the nation was entitled to enforce these uses.⁵⁰

43. DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS BY THE NATIONAL ASSEMBLY OF FRANCE, *supra* note 37, at 31.

44. McManners explains that Talleyrand, in going along with the attack on church properties, was "planning a political career based upon collaboration with the inevitable." MCMANNERS, *supra* note 36, at 27.

45. See Talleyrand on Ecclesiastical Property, in THE FRENCH REVOLUTION 113, 114-15 (Paul H. Beik ed., 1970).

46. *Id.* at 115.

47. *Id.*

48. *Id.*

49. *Id.* at 116 n.1 (emphasis added).

50. This Article does not mean to suggest that there was no disagreement on such

The treatment of the Catholic Church in the French Revolution illustrates a thorough contempt for corporations in general, and the attack on corporate activity reached far beyond the church. In June of 1791 the Assembly passed a law restricting association of laborers.⁵¹ The first article of the French Constitution laid out its anti-corporate premise explicitly: "[the] destruction of all kinds of corporations of Citizens of the same status and profession being one of the fundamental bases of the French Constitution," they were no longer to be tolerated.⁵²

It is tempting to think that the French were merely abolishing outmoded associations so as to bring the nation into the next century. It is difficult to take issue with the Constitution of 1791 in its desire to eliminate "irrevocably the institutions that have injured liberty and the equality of rights."⁵³ The Constitution seems equally reasonable as it notes that, according to this desire, the Assembly has abolished the nobility.⁵⁴

Yet the anti-corporate tendency becomes more obvious as the Constitution observes that associations of professions have been made unlawful and that the "law no longer recognizes religious vows, nor any other obligation which may be contrary to natural rights or to the

issues. In the debate on the Civil Constitution of the Clergy, for instance, the Archbishop of Aix reproached the revolutionaries for usurping a spiritual jurisdiction. Christ had not assigned the maintenance of the spiritual life to magistrates, but to the Apostles and their successors: "Jesus Christ gave his mission to the apostles and their successors for the well-being of the faithful; he entrusted it neither to magistrates nor to the king: his concern was an order in which magistrates and kings must obey." 6 HISTOIRE PARLEMENTAIRE DE LA RÉVOLUTION FRANÇAISE, OU JOURNAL DES ASSEMBLÉES NATIONALES, DEPUIS 1789 JUSQU'EN 1815 11 (Paris, B. Buchez & P. Roux eds., 1834) [hereinafter *HISTOIRE PARLEMENTAIRE*] ("Jésus-Christ a donné sa mission aux apôtres et à ses successeurs pour le salut des fidèles; il ne l'a confiée ni aux magistrats, ni au roi: il s'agit d'un ordre de choses dans lequel les magistrats et les rois doivent obéir."). In the same debate, one M. le curé le Clerc contended that the spiritual power belonged to the church, and that it was imprescriptible: "The powers of the church are inalienable and imprescriptible; their essence is divine: she may thus exercise them in all their independence." *Id.* at 19 ("Les pouvoirs de l'église sont inaliénables et imprescriptibles; leur essence est divine: elle peut donc les exercer dans toute leur indépendance.").

51. See LAW OF JUNE 14, 1791 ON ASSOCIATIONS, reprinted in *REVOLUTION FROM 1789 TO 1906*, *supra* note 37, at 37, 37.

52. *Id.* The greatest failure of the United States to allow freedom of association, of course, comes in the area of labor.

53. CONSTITUTION OF 1791, reprinted in *THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907*, *supra* note 41, at 58, 61.

54. See *id.*

constitution.”⁵⁵ This mistrust of associative activity is made still more clear by the provision for freedom of petition because the guarantee applies only to the individual: the citizen enjoys “[l]iberty to address individually signed petitions to the constituted authorities.”⁵⁶ Persons gathered in assembly do not enjoy the right.

The attack went further still. Workers’ corporations (i.e., labor unions) had been prohibited by the Decree for Reorganizing the Local Government System, passed in December of 1789.⁵⁷ Citizens were to meet in assemblies and it was provided that the assemblies were to form themselves not “by crafts, professions, or corporations, but by quarters or districts.”⁵⁸ The law on association stipulated that “[c]itizens of a like calling or profession, employers, shopkeepers, workers and journeymen . . . shall not, when they shall meet together, name a president, or secretaries, or syndics, nor keep registers, nor pass resolutions or make decisions, nor form regulations for their so-called common interests.”⁵⁹

It is evident from all this activity that there was a principle at work, one that made for a persistent theme in French history. The French were to restrict association, particularly religious association, for more than a hundred years to come. The Law of Associations, passed in 1901, provided that “[n]o religious congregation can be formed without an authorisation given by a law which shall determine the conditions of its operation.”⁶⁰ Congregations already in existence that failed to meet the requirement were to be dissolved, their property to be liquidated in court.⁶¹

To the question of the proper place of the corporation in a republic, the French had given a resoundingly clear answer. The French Revolution was a program designed to reeducate persons into citizens and to reconfigure corporations into units serviceable to the republic.

55. *Id.*

56. *Id.* at 62.

57. DECREES FOR REORGANIZING THE LOCAL GOVERNMENT SYSTEM, *reprinted in* THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907, *supra* note 41, at 24, 25.

58. *Id.*

59. DECREE UPON THE ORGANIZATION OF TRADES AND PROFESSIONS (1791), *reprinted in* THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907, *supra* note 41, at 43, 43.

60. LAW OF ASSOCIATIONS, *reprinted in* THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907, *supra* note 41, at 659, 660.

61. *See id.* at 661.

B. Rousseau: Association, Republicanism, and the Citizen

Why was this their response? The answer is that there was a theory underlying the practice: that only the nation and the citizen possessed a civic personality. The revolutionary Thouret put it most succinctly in declaring that because "the suppression of a corporation is not murder[,] the revocation of a corporation's right to possess the funds of the land is not a theft."⁶² In other words, a corporation is not a person and thus was to be subjected to the "general will," which was the only force that could "effect the destruction of everything."⁶³

He thus appears to leave the individual, whose destruction *is* murder, secure in the possession of his property. The individual, it appears, is a "natural" individual, a person protected in all that is his by the increasingly "natural" state. Thouret's reference to the general will was itself a recapitulation of a much lengthier formulation by Rousseau, who had insisted that the maintenance of the "general will" depended on the direct relation between the individual and the State, unmediated by corporate entities.⁶⁴ As far as Rousseau was concerned, a government that presided over associations was one that could not give voice to the general will; if "the general will is to be truly expressed," he wrote, "it is essential that there be no subsidiary groups within the State, and that each citizen voice his own opinion and nothing but his own opinion."⁶⁵

This mistrust of corporate activity can be translated directly into a dislike of society itself.⁶⁶ Rousseau was not consistent in his feelings toward society, but he evinced deep doubts about the benefits that it conferred. Society appears to be little more than a collective illness in some of his writings: "[O]ne is strongly inclined to believe that the history of human illnesses could easily be written by following that of

62. HENRI HAYEM, *LE DROIT DE PROPRIÉTÉ ET SES LIMITES* 196-97 (1910) ("la suppression d'un corps n'est pas un homicide," "la révocation de la faculté aux corps de posséder des fonds de terre ne sera pas une spoliation.").

63. *Id.* ("[I]l n'y a que la volonté publique qui puisse opérer la renonciation de tous . . .").

64. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), *reprinted in* *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* 167, 194 (Ernest Barker ed. & Gerard Hopkins trans., 1948).

65. *Id.*

66. Rousseau's attitudes varied over time, and some of his writings are more amenable toward society. Yet it is still safe to say that the society of which he approves is closely regulated by a central intelligence, and that it is not characterized by autonomous associations.

civil societies.”⁶⁷ Association denatures man, with terrible results, for “[i]n becoming sociable and a slave he becomes weak, fearful, [and] servile.”⁶⁸ In his more extreme statements Rousseau took aim at cooperation itself: “[F]rom the moment one man needed the help of another . . . equality disappeared, property was introduced . . .”⁶⁹

His solution to the problem is what sets Rousseau apart from his American contemporaries: it is to make the representative superior to the constituent. What was needed, he claimed, was a sovereign author who would prevent the evils of association.⁷⁰ He made this point most dramatically in his essay on the theatre, which emphasized the importance of authorship in overcoming the debased condition of society.⁷¹ Having explained the deleterious influence that immoral theatre exerts on a society, he contended that the proper function of drama was moral education.⁷² How could this be done by actors who were themselves no better than the people they were to educate? It was certain that “[w]e will, then, at first have bad actors, and we will at first be bad judges. *Will they form us or will we form them?*”⁷³

The danger to public morals was so great, he insisted, that the only remedy was for the State to write the plays: “[The solution] is, in order to make the dramas of our theatre suitable to us, to compose them ourselves; *we should have authors before we have actors.*”⁷⁴ If we were to translate this into a maxim of republican political life, we would say, “Authorities come before constituents.”

III. THE AMERICAN REVOLUTION AND THE PUBLIC CORPORATION

A. *The Colonial Beginnings of Corporate Culture*

“We are a company,” declared Governor John Winthrop in the famous speech he delivered as he and a shipload of fellow Puritans sailed from England to found a religious commonwealth in New England in 1630.⁷⁵ In using the word “company” Winthrop was probably speaking

67. JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men (Second Discourse)*, in JEAN-JACQUES ROUSSEAU, *THE FIRST AND SECOND DISCOURSES* 77, 110 (Roger D. Masters ed., Roger D. Masters & Judith R. Masters trans., 1964).

68. *Id.* at 111.

69. *Id.* at 151.

70. See JEAN-JACQUES ROUSSEAU, *POLITICS AND THE ARTS: LETTER TO M. D’ALEMBERT ON THE THEATRE* 119-20 (Allan Bloom trans., 1968).

71. *See id.*

72. *See id.*

73. *Id.* at 119 (emphasis added).

74. *Id.* at 120 (emphasis added).

75. SAMUEL ELIOT MORISON, *BUILDERS OF THE BAY COLONY* 72-73 (1930).

informally, but it is true that Massachusetts was not only a company of Christians but a corporation as well.⁷⁶ Winthrop continued by explaining the Christian purpose of the enterprise in republican terms, cautioning that "the care of the publique must oversway all private respects."⁷⁷ Such attention to the general good was necessary to ensure "that ourselves and posterity may be the better preserved from the common corruptions of this evil world."⁷⁸

Winthrop and his company were launching an early English corporate republican venture in the New World, but it was not the only one. To the south lay Virginia, a colony that had also begun its life as a corporation and was at the same time a small nation.⁷⁹ English colonists had begun a venerable tradition in which corporators dedicated their property and their labors (or the labors of others) to a public purpose.

Their early endeavors also led to a threefold legacy that was to endure long after the American Revolution: a dogged insistence on the rights of the people rather than the rights of the person, a habit of federated government, and a firm belief in a Providential social contract. This last point may be the most important because it is the least understood. Modern commentators assume that social contracts are premised on a rampant individualism. However, the contracts that colonial Americans liked to cite were contracts between a people, such as the people of Massachusetts Bay, and a ruler, such as God or a monarch.⁸⁰

These agreements were much more explicitly religious in seventeenth-century New England than in other times and places, but when the Stamp Act prompted the colonies to begin declaring their rights in the mid-1760s, they did not waste their time on theories involving individual social contracting; instead they emphasized the various agreements that the English monarch had supposedly entered into with his English-

76. As Robert Cover puts it, "Perhaps the most compelling historical example of the use of private law in the generation of a *nomos* was the creation of a polity out of the corporate charter of Massachusetts Bay." Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 31 (1983).

77. MORISON, *supra* note 75, at 73.

78. *Id.*

79. Colonial Virginia is often thought to be utterly unlike colonial Massachusetts, in that Virginia was devoted exclusively to profit, whereas Massachusetts dedicated itself to the promotion of religion. For a very effective statement of the position that Virginia was also interested in religious advancement, see PERRY MILLER, *ERRAND INTO THE WILDERNESS* 99 (1956).

80. On the extremely complicated subject of the various covenants in which the Puritans believed, see PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* 365-462 (1954).

American *peoples*.⁸¹ To demonstrate the religious character of American liberty at length would go beyond the bounds of this Article, but it must be noted because it accounts for much of the communal content of American liberty as well.⁸² It can hardly be denied that Revolutionary ideology retained Protestant overtones, at the very least.⁸³

How can this corporate Protestant ideology be reconciled with the individualistic philosophy of John Locke? Given the obvious indebtedness of the founding generation to John Locke and his reputation as a proponent of a neutral individualism, it is necessary to emphasize that he was closer to Governor Winthrop's views than we now think. Thomas Jefferson, for instance, thought of Locke in the company of republicans such as Sidney.⁸⁴ He was not an individualist in any modern sense, and his constitutional thought was largely religious in origin. Locke has an undeserved reputation for individualist thought because we have focused on the wrong part of his story.⁸⁵ Modern commentators have been impressed, favorably or not, with the fact that Locke devoted much attention in the *Second Treatise* to the activities of individuals in a state of nature. Gordon Wood, for example, writes that Locke's social contract is "not a governmental contract between magistrates and people, rulers and ruled, but an agreement among

81. For documents emanating from the Stamp Act, see generally PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766 (Edmund S. Morgan ed., 1959). For an excellent assessment of the controversy over the Stamp Act, see generally EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION (2d ed. 1962).

82. For an extended argument on the religious character of American corporatism and for a denial that American political thought is individualistic, see generally SHAIN, *supra* note 14. Although Shain exaggerates the religious dimension, he provides a wealth of evidence showing that the role of religion has been underestimated in understanding the nature of theories of American freedom.

83. See EDMUND S. MORGAN, THE CHALLENGE OF THE AMERICAN REVOLUTION 88 (1976).

84. "When Jefferson refers to Locke's politics, he links him, not with Bacon and Newton, but invariably with Sidney." GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 171 (1978).

85. See SHAIN, *supra* note 14, at 191-92. Shain explains that Locke's belief in independence does not translate into anything like modern individualism. According to Locke, he writes, a man "was free when he was allowed to participate in the shaping of the laws that would bind him." *Id.* at 191. This contrasts with the individualism of John Stuart Mill, who believed

that all societal limitations that go beyond the similar protection of other autonomous individuals, whether tacitly consented to or not, were repressive and illegitimate.

In this sense, Americans in the 18th century may have been Lockean, but this does not mean that they understood personal or familial independence in a modern individualist fashion any more than Locke likely did.

Id. at 192.

isolated individuals in a state of nature to combine in a society.”⁸⁶ Glendon likens Locke’s man in a state of nature to that of Hobbes, because what they share is solitude: “Locke’s man, too, was a loner.”⁸⁷ Because he begins with individuals and the property they accrue in a state of nature, Locke is held to be a proponent of individualism.

What we often forget is that the actual aim of the *Second Treatise* was to defend the rights of *the people* against a greedy monarch. Locke’s individuals did not stay in a state of nature for very long. They quickly associated so as to protect a corporate right against encroachment by an individual. Thus, he maintained that “when the government is dissolved, the people are at liberty to provide for themselves . . . for the society can never by the fault of another lose the native and original right it has to preserve itself.”⁸⁸ The *Second Treatise* is actually anti-individualistic in that it takes the most powerful individual in the land and makes him a mere trustee of a corporate good.

Moreover, although Locke did offer a secular justification for popular sovereignty, his message was distinctly religious in two senses. The *Second Treatise* was written because of the conflict between James II and his Protestant subjects. The rift had developed in large part because of the belief that James intended to make England Catholic.⁸⁹ The original enemy of a Protestant people had been the Pope, but several Stuart monarchs had made themselves (at least as many of their subjects saw the matter) into allies of the Pope and thus into enemies of the Protestants.⁹⁰ The *Second Treatise* was meant to weigh in on the side of Protestantism as one of the rights of a free people.

Locke’s argument is also explicitly religious. A glance at the *Second Treatise* shows that arguments about the state of nature are liberally complemented with Biblical proof. The famous argument on property, for instance, begins with an appeal to both reason and revelation.⁹¹

86. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 283 (2d ed. 1998). Wood maintains that Americans relied on this formulation increasingly in the years after 1776. *See id.*

87. GLENDON, *supra* note 1, at 68.

88. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 220, at 123 (Thomas P. Peardon ed., 1952).

89. *See* EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 100 (1988).

90. *See id.* at 100-17.

91. *See id.* § 25, at 16. Locke stated:

Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat [sic] and drink and

Because Locke was arguing against the theory that the monarch held his position by virtue of divine right, this religious emphasis makes sense. As Edmund S. Morgan has shown, the triumph of popular sovereignty meant that the divine right of monarchs was replaced by the divine right of the people; thinkers such as Locke played an important part in the transition.⁹² In the process, they did not exclude God from political and legal theory so much as re-identify the earthly agent through whom He manifested His will—the collective entity known as “the people.”⁹³

A final point, coming from Locke’s involvement in colonial affairs, helps to correct the common misconception regarding the kind of society and government he favored. He is well known for the declaration that “in the beginning all the world was America.”⁹⁴ This statement conjures an image of a multitude of possessive individuals acquiring property in a state of nature; however, the plan of government that he designed for these wilds had a distinctly feudal flavor.⁹⁵ The Fundamental Constitutions that he drafted for the Carolinas in 1669 provided that a hereditary nobility would own two-fifths of the land in the new colonies.⁹⁶ The members of this class would also compose the upper house of the Legislature and would propose legislation to the lower house, which would vote on acceptance but would not be able to amend.⁹⁷ Such a plan was obviously premised not on any theory of the primacy of the individual, but on a theory that sought the common good by balancing the various parts of the State. Locke was a republican, as Jefferson maintained, although his republicanism had an aristocratic flavor to it.

such other things as nature affords for their subsistence; or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah and his sons; it is very clear that God, as King David says, “has given the earth to the children of men,” given it to mankind in common.

Id. (quoting *Psalms* 115:16).

92. See MORGAN, *supra* note 89, at 119-20.

93. *Id.* at 267. Thus, Morgan maintains that James Madison “invented” an American people in order to make up for the deficiencies of a national government hamstrung by state sovereignty:

To that end he envisioned a genuine national government, resting for its authority, not on the state governments and not even on the peoples of the several states considered separately, but on an American people, a people who constituted a separate and superior entity, capable of conveying to a national government an authority that would necessarily impinge on the authority of the state governments.

Id.

94. LOCKE, *supra* note 88, § 49, at 29.

95. See *id.*

96. See MORGAN, *supra* note 89, at 129.

97. See *id.*

B. The American Revolution and Individualism

The preoccupation with group rights that characterized both the early history of the colonies and the political thought that colonists read made itself evident in the American Revolution. Locke's linking of individualism with tyranny, and the coupling of his constitutional theory with religious belief, was reproduced in the American colonies at the time of the Revolution. Thus, the Reverend Samuel West emphasized, in a sermon given in Boston in 1776, that a claim made by a representative and collective body against an individual was presumptively legitimate:

If it be asked, Who are the proper judges to determine when rulers are guilty of tyranny and oppression? I answer, the public. Not a few disaffected individuals, but the collective body of the [S]tate . . . for, as it is the collective body that invests rulers with their power and authority, so it is the collective body that has the sole right of judging whether rulers act up to the end of their institution or not. . . . [T]he public is always willing to be rightly informed, and when it has proper matter of conviction laid before it its judgment is always right.⁹⁸

West's argument here is very similar to Locke's, and it is also the argument made in the Declaration of Independence—that a sovereign individual who engages in “a long train of abuses” must be made to pay the price by the people who suffered at his hands.⁹⁹ This emphasis on association was to be affirmed repeatedly in the practices of the revolutionaries. Although the colonies began modestly with their assemblies, in just a few years associations, congresses, and conventions besieged the new nation.

The next two decades would show that locating this people, this “collective body of the State,” was more difficult than it sounded because there was no single body of the State. It was a federated body, and just as federalism had formed an essential part of the argument against British measures such as the Stamp Act and Sugar Act, so it would influence the political life of the new nation. In the end, many federated bodies would emerge, and the corporation would be among them.

98. SAMUEL WEST, ON THE RIGHT TO REBEL AGAINST GOVERNORS (ELECTION DAY SERMON) (Boston 1776), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 419, 423 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

99. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); LOCKE, *supra* note 88, § 225, at 126.

C. *A Corporate Political Theory for the New Nation*

The great driving engine behind the corporatism of American politics was federalism, for it was a truism that a national representative assembly had to provide for a variety of local interests. The colonists who had opposed British measures in the 1760s and 1770s had insisted that the Empire was a federation, and they did not retreat from their belief in federation after the Revolution. The interplay between the national government and the states is one of the fascinating features of early national life. The First Continental Congress of 1774 was brought into being, as Edmund S. Morgan observes, by "regular colonial assemblies, by extralegal provincial congress, [and] by committees of correspondence."¹⁰⁰ In turn, the Second Congress announced that each colony was a "free and independent state."¹⁰¹

Americans, attached to their notions of federalism and separation of powers, were committed to the idea that there had to be counterbalancing corporations within a well-governed nation. Thomas Jefferson, who was among the most French of the Founders, was hostile to granting privileges to what we now would call "private" corporations.¹⁰² Yet he believed that it was the essence of the union to have federated bodies within the frame of a national government. In his first inaugural address he proclaimed: "We are all republicans—we are federalists."¹⁰³ French republicans could not have said the same.

Indeed, French republican theory held that there was a national supremacy over all the bodies within the nation¹⁰⁴—a belief antithetical to Jefferson's assertion that the United States government enjoyed only those limited powers conferred by the states. He wrote that their "association as a nation was only for special purposes . . . and the states composing the association chose to give it powers for those purposes [and] no others."¹⁰⁵ The national government could not legitimately "adopt any general system, because it would have embraced objects on which this association had no right to form or declare a will."¹⁰⁶

Likewise, Jefferson denounced the view that deposing the King had thrust America back into a state of nature. He objected to this "Vermont

100. MORGAN, *supra* note 89, at 263.

101. *Id.*

102. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 320 (1992).

103. THOMAS JEFFERSON, *FIRST INAUGURAL ADDRESS* (1801), *reprinted in* THE PORTABLE THOMAS JEFFERSON 290, 292 (Merrill D. Peterson ed., 1975).

104. See *supra* Part II.

105. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), *in* THE PORTABLE THOMAS JEFFERSON, *supra* note 103, at 479, 482.

106. *Id.*

doctrine," according to which the people of Vermont claimed that the Revolution had freed them from Massachusetts by returning everyone to a state of nature; he denied that "on changing the form of our government all our laws were dissolved, and ourselves reduced to a state of nature."¹⁰⁷ The removal of the sovereign, King George, did not impinge on other items on which the people had agreed when they made the social contract: "For my part, if the term *social contract* is to be forced from theoretical into practical use, I shall apply it to all the laws obligatory on the [S]tate, and which may be considered as contracts to which all the individuals are parties."¹⁰⁸ The abrogation of certain articles of the contract, he contended, did not render the others invalid.¹⁰⁹

Jefferson's denial that the Revolution abolished all "municipal laws" provided an acknowledgement of the authority of the various municipal entities to make those laws,¹¹⁰ an acknowledgement that Rousseau could not have made. It also amounted to a tacit statement that theories about a state of nature would not easily be manipulated into justifications for the rights of individuals to begin making all social arrangements anew; those individuals were still fixed within their various regulating bodies and they were not going to escape merely because Americans had deposed the King.¹¹¹

John Adams argued still more vigorously that the nation's authority *had* to be reposed in local bodies.¹¹² The Frenchman Turgot had criticized America for following English custom in dividing power among various organs of government.¹¹³ French doctrine required a

107. Letter from Thomas Jefferson to Edmund Randolph (Feb. 15, 1783), in 6 THE PAPERS OF THOMAS JEFFERSON: 21 MAY 1781 TO 1 MARCH 1784, at 246, 247 (Julian P. Boyd ed., 1952).

108. *Id.* at 248.

109. *See id.*

110. *Id.*

111. *Cf.* SHAIN, *supra* note 14, at 95. Barry Shain argues that in late eighteenth-century America "autonomy and self-government were goals most appropriate to communities, or at the very minimum, to the family. They were clearly not appropriate goals for individuals." *Id.* He also asserts that "Revolutionary-era Americans' distrust of the socially unbounded individual is further evidenced in their attitude toward the self." *Id.* at 100.

112. *See generally* JOHN ADAMS, A DEFENSE OF THE AMERICAN CONSTITUTIONS, reprinted in THE POLITICAL WRITINGS OF JOHN ADAMS 105 (George A. Peek, Jr. ed., 1954).

113. Turgot was famous for his condemnation of associations in France. *See* 2 OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800, at 166 (Ernest Barker trans., 1958).

unitary authority.¹¹⁴ But where was this authority to be found, Adams wondered? The theory was nonsensical, he maintained: "It is easily understood how all authority may be collected into 'one center' in a despot or monarch; but how it can be done when the center is to be the nation is more difficult to comprehend."¹¹⁵

Adams believed that Turgot was identifying the nation with its representative assembly and hence elevating the representative above the constituent. Was the Frenchman asserting that the nation's "assembly should be the center in which all the authority was to be collected and should be virtually deemed the nation?"¹¹⁶ Adams thought so. He devoted an entire work to refuting what seemed to him a dangerous doctrine.¹¹⁷ It would not do to identify the constituency with a majority of its representatives; the way to avoid that identification was to preserve the integrity of the various bodies that composed the nation.

If we imagine Adams responding directly to Rousseau, he would have explained that sovereign *actors* must tell the *authors* what to write. The doctrine of federalism, which preserved the powers of the states and in its extreme form even made them supreme over the national government, was the most forceful expression of this belief. Although such a theory is not a call for the kind of general incorporation that was to sweep the nation in the nineteenth century, it could easily become one.

D. *The General Will and the Municipal Association*

Indeed, it is clear that the theory went beyond a federalism that merely required the federal government to show respect for the states. One of the most notable translations of American theory into practice was the influence that the towns had in the years following the Revolution. The saga of the adoption of the Massachusetts Constitution demonstrates the existence of a more general rule regarding the power and authority wielded by smaller corporate units in dealings with larger ones.¹¹⁸ There may be no finer illustration of the difference between the French and American scenes. These corporate bodies retained an influence out of proportion to their numbers and, by presuming to instruct the state governments, they insisted that the corporate constituent was superior to the representative.¹¹⁹ In contrast to France, where the general will

114. See *supra* Part II.

115. ADAMS, *supra* note 112, at 123.

116. *Id.* at 124-25.

117. See *id.*

118. See *infra* notes 121-22 and accompanying text.

119. See *infra* notes 123-26 and accompanying text.

created the corporation, the opposite was true in America.¹²⁰

Equality of representation was one issue on which the towns showed their power. The commitment to equality of representation on an individual basis, which was overriding in France, did not dominate the American scene.¹²¹ Thus, when the Legislature of Massachusetts authored its constitution at the end of the 1770s, the question arose as to how an equitable representation might be achieved. The state convention explicitly denounced a plan that would ignore traditional corporate rights, giving equal weight to each person. Corporate towns already in existence would have to be represented:

Representation ought to be founded on the Principle of equality; but it cannot be understood thereby that each Town in the Commonwealth shall have Weight and importance in a just proportion to its Numbers and property. An exact Representation would be unpracticable even in a System of Government arising from the State of Nature, and much more so in a state already divided into nearly three hundred Corporations.¹²²

Massachusetts was not to cast itself back into a rational pursuit of a perfect but impracticable justice, a pursuit that would require it to ignore rights that towns had acquired prescriptively.

Even the smallest towns demanded representation, and they generally considered the members of the state legislature as deputies who ought to follow instructions.¹²³ Further, they explicitly denied any direct relation between the state government and the individual.¹²⁴ As the town of Lincoln contended, the State was "Constituted of a great number of Distinct and very unequal Corporations which Corporations are the *Immediate Constituant part of the State and the Individuals are only the*

120. The subsequent history of the municipal corporation suggests that it did not maintain its constitutive integrity. As John Garvey and Rick Hills note, cities are generally supposed, at law, to be subordinate to the states. See GARVEY, *supra* note 15, at 225; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1206-30 (1999).

121. Equality of representation was quite important in American affairs, but it did not achieve the total victory that it did in France.

122. ADDRESS OF THE CONVENTION, MARCH 1780, reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 434, 438 (Oscar Handlin & Mary Handlin eds., 1966) [hereinafter POPULAR SOURCES].

123. See Oscar Handlin & Mary Handlin, *Introduction to POPULAR SOURCES*, *supra* note 122, at 42.

124. See *id.* at 45.

*Remote parts in many respects.*¹²⁵ This is the doctrine of federalism, but applied against the state government by the smaller municipal corporations. It mirrors arguments made on behalf of state governments that the national government should not interfere directly in the affairs of the individuals who live in the states.¹²⁶

The 1780 Massachusetts Constitution recognized the entitlements claimed by the towns, providing for compromise in the question of apportionment but reserving to the towns the right to amend in the future.¹²⁷ The constitution went further still, tacitly likening Massachusetts itself to the smaller corporations within it. Government was nothing more than “a voluntary association of individuals: . . . a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”¹²⁸ In this respect the corporation was quite similar to the State—it was merely a voluntary association of individuals. This fundamental likeness between the corporation and the government was to unleash, in the following century, such furious corporate activity as the world had never before seen.

IV. INCORPORATION AFTER THE REVOLUTION AND THE CHURCHES

The Revolution had barely ended when the demand for private incorporation began to explode.¹²⁹ In the years to come the presumptive legitimacy of the public corporation also attached itself to the private association. The state legislatures, which now held exclusive rights to incorporate, a power once held by the monarch, handed out corporate charters with abandon.¹³⁰

125. *Id.* (emphasis added).

126. Thus Madison, in listing objections to the Constitution, noted the fear that the federal government would govern the people in the states directly: “This one tells us that the proposed Constitution ought to be rejected, because it is not a confederation of the States, but a government over individuals.” *THE FEDERALIST* NO. 38, at 237 (James Madison) (Edward Mead Earle ed., 1964).

127. See Handlin & Handlin, *supra* note 123, at 50. The constitution struck a balance between individual and town representation on this point. The vote to amend appears to have required a two-thirds vote by the population of the state. The voters were to be convened, in the first place, according to the towns they lived in. Representatives of the towns were to do the actual business of amending. See *THE CONSTITUTION OF 1780, reprinted in POPULAR SOURCES, supra* note 122, at 441, 471.

128. *THE CONSTITUTION OF 1780, supra* note 127, at 441.

129. See OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 106-33 (1969); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & MARY Q.* 51, 51 (1993).

130. See Maier, *supra* note 129, at 51. Gordon Wood notes that the numbers of charters issued rose at a very high rate:

The states issued 11 charters of incorporation between 1781 and 1785, 22 more

Why did this happen? As Pauline Maier observes, this is “[o]ne of the great unanswered questions about the American Revolution.”¹³¹ There are undoubtedly several reasons, but one is the American fondness for association coupled with an attachment to the principles of federation, which led increasingly to the exercise of public powers by corporate bodies that were not themselves governments.¹³² To put it another way, the spirit of the Massachusetts town became the spirit of the nation.¹³³ Private groups came to wield enormous power in part because the government was unable to wield them effectively, and in part because they seemed to have a greater entitlement. Thus, just as the state governments passed on the business of business to the corporation, so they passed the businesses of education and religion to corporations as well.

Though American culture is famous for its individualism, the most notable feature of the American landscape after the Revolution is the emergence of societies. The first enterprises dedicated to improvements in farming, each styled the “Society for the Promotion of Agriculture,” were founded in South Carolina, New York, Massachusetts, and Connecticut between 1785 and 1792.¹³⁴ In 1787 the “Philadelphia

between 1786 and 1790, and 114 between 1791 and 1795. Between 1800 and 1817 they granted nearly 1,800 corporate charters. Massachusetts alone had [30] times more business corporations than the half dozen or so that existed in all of Europe.

WOOD, *supra* note 102, at 321.

131. Maier, *supra* note 129, at 51.

132. Maier mentions a very similar explanation, without endorsing it:

For contemporaries, the proliferation of corporations could signal, in effect, an extension of American federalism down into day-to-day, local associational relationships, so that “the whole political system” was “made up of a concatenation of various corporations, political, civil, religions, social and economical,” in which the nation itself was a “great corporation, comprehending all others.”

Id. at 82 (quoting *Corporations*, in 3 ENCYCLOPEDIA AMERICA 547, 547 (F. Lieber ed., 1836)).

133. Maier argues that Massachusetts was exemplary in its treatment of the corporation. “If there is a key to the corporation’s popularity, it must lie in the history of New England and particularly of Massachusetts.” *Id.* at 53. While this Article agrees that Massachusetts was very important—as the treatment of the Massachusetts towns indicates—the example of the churches, discussed *infra* Part IV, argues that Massachusetts by itself cannot explain the remarkable American attitude toward corporate entities.

134. J. FRANKLIN JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* 51 (1940).

Society for Alleviating the Miseries of Public Prisons” was founded.¹³⁵ Many other little societies dedicated to undeniably social causes sprang up, even though they did not call themselves “societies”; eight years after the end of the war the number of colleges in the country had nearly doubled, from nine to seventeen.¹³⁶

Most importantly, Americans formed religious societies. Churches led the way in the move from incorporation by special charter to general incorporation. The first general incorporation act was passed in South Carolina in 1778, the next in New York in 1784, and another in Pennsylvania in 1791.¹³⁷ General incorporation for businesses did not come until later.¹³⁸ New York provides an instructive contrast between the business and the church corporation because, even as late as 1821, the state constitution permitted incorporation for non-religious purposes only after a two-thirds vote of each house.¹³⁹

The history of church incorporation also reveals some of the most important ways in which political theory has connected with legal reality in the United States. The churches provide a direct comparison with France. Their experience affords microcosmic views of the legal and constitutional problems still to be faced by the young nation. Was the country going to be run on the basis of aristocratic or democratic principles?¹⁴⁰ What was the proper extent of religious freedom, and how was it to be implemented? These questions were faced by the national and state governments, and by the religious corporations as well.

The issue of church incorporation also reminds us that the meaning of the constitutional guarantees respecting freedom of religion were not nearly as settled at the time of the Founding as we are inclined to believe.¹⁴¹ By comparing the moral issues of religion with the legal question of incorporation, the religious example helps us understand the bounds of freedom and diversity in the new republic. A constitutional

135. *Id.* at 76.

136. *See id.* at 82-83.

137. *See* William G. McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, in *ESSAYS ON THE AMERICAN REVOLUTION* 197, 215-16, 235, 243-44 (Stephen G. Kurtz & James H. Hutson eds., 1973).

138. *See* WOOD, *supra* note 102, at 321; McLoughlin, *supra* note 137, at 244.

139. *See* Maier, *supra* note 129, at 76.

140. For the argument that corporations were aristocratic and hence at odds with the nation's democratic ethos, *see id.* at 61-62, 66-68.

141. For a prominent statement of the belief that the Founders and contemporary religious sects favored religious exemptions, and that therefore the Constitution should be construed to favor exemptions, *see generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). For an alternative statement of the history of the First Amendment religion clauses, *see generally* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

commitment to freedom of conscience and disestablishment left many practical legal issues unresolved. Should denominations be allowed to incorporate? Should they want to incorporate? If religions were to become corporations, who would be the incorporators? Would management of these corporations be monarchic, aristocratic, or democratic?

More generally, the problem posed by the churches demonstrates that in these early republican days Americans sought to vindicate the most important of their rights not as individuals, but as groups. The history of the churches provides a clear example of the tendency of American society to use the corporation as the primary vehicle to realize public goods, and they remind us that scores of organizations of all kinds were coming into being at the same time. The universities and colleges that began to crowd the American landscape, many of them representative of denominational aspirations,¹⁴² as well as myriad business ventures and a host of other associations, all serve as evidence of this instinct to associate.

Finally, given the inevitable desire to generalize American legal experience, it is essential to note that diversity of response was a distinctive feature of American attempts to respond to the problems presented by religious freedom. Federalism required that the states remain free to devise their own solutions to the problems posed by religious liberty, for the First Amendment bound only the national government. Although state constitutions commonly promised religious freedom, they did not typically explain just what that entailed. Thus, a diversity of responses was inevitable almost from the start.

A. Virginia Rejects Incorporation

The first issue to be addressed in the incorporation controversy was whether to allow incorporation of religions at all. Virginia, which had an established Anglican Church until the Revolution, is the state whose approach to religion was most French.¹⁴³ In 1776 the Legislature began

142. For a perceptive evaluation of the spread of the college as an instance of American localism, see DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 160 (1965) ("The distinctively American college was neither public nor private, but a *community* institution. In America it was of a piece with the community emphasis which already distinguished our civilization.").

143. This Article focuses on several states as a representative sample: Virginia, Massachusetts, and New York. It also makes passing reference to other states.

to debate the issue of disestablishment; by 1779 the Anglican Church had lost the right to tax in support of ministers.¹⁴⁴ A statute of 1784 allowed the incorporation of denominations but it was repealed in 1786.¹⁴⁵ The Anglican Church—now the Episcopal Church—lost its legal personality.¹⁴⁶

There were two arguments against incorporation: First, that the State did not have the authority to grant privileges to particular denominations, even if the privileges were made widely available.¹⁴⁷ Second, voluntary organizations such as religious groups did not need state recognition.¹⁴⁸ The opponents of incorporation, notably the Baptists, sought not only to prevent the future evils that they believed would result from incorporation but to make up for those from the past as well.

Disestablishment was just a happy first step for those subscribing to either of these arguments, and critics of the Anglican supremacy insisted that the church should not be left in possession of property that it had received from the colonial government before the Revolution.¹⁴⁹ One petition insisted that the lands

which were procured at the expense of the Community in general, appears to us ought to be considered under our present happy constitution, as the Publicks at large and as Such ought to be put to any use . . . that our Honorable Legislature Shall think proper, to promote the welfare of this State.¹⁵⁰

In 1802, the petitioners got their wish when the Legislature deprived the Episcopal Church of its glebe lands.¹⁵¹ The constitutionality of the act was affirmed in 1802, albeit by the barest of margins.¹⁵² Virginia had

144. See McLoughlin, *supra* note 137, at 218.

145. See *id.* at 233.

146. See *id.* at 233-34.

147. McLoughlin writes that

it is not surprising that radical pietists and deists saw in a general-incorporation system precisely the same specter of state encroachment upon religious liberty and the beginnings of a new league between rulers and priests; they did not believe that incorporation was permissible even upon individual choice. No religious group had the right to enslave itself to or seek special privileges from the [S]tate.

Id. at 232.

148. See *id.* at 233.

149. See *id.*

150. H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 122 (1910).

151. See *id.* at 147; McLoughlin, *supra* note 137, at 233-34. The church was allowed to keep lands obtained since 1777. See ECKENRODE, *supra* note 150, at 148.

152. Chancellor George Wythe dismissed a request for injunctive relief against the operation of the act, and the case was appealed. Edmund Pendleton, noted for his support of the church, died shortly before the case was decided, and the court was deadlocked, two to two. Thus Wythe's decision stood. See ECKENRODE, *supra* note 150, at 148-49 (discussing *Turpin v. Lockett*, 10 Va. (6 Call.) 113 (1804)).

followed the French example insofar as deprivation of property was concerned.

Yet the state did not follow the French further. Virginia did not, like France, claim a general superintendency over the religious affairs of the disestablished church or of any other church.¹⁵³ Instead it showed that American constitutional doctrine could create real difficulties for the very societies it intended to help.

By following an early and severe version of the state action doctrine, Virginia made church societies in general unknown to the law. The state would not endorse any religion, and it left the authority of their church governments entirely dependent on the voluntary obedience of church members.¹⁵⁴ This suited the Baptists, who were known as "voluntaryists"; that is, they thought that membership in a church and adherence to a faith should be completely voluntary matters in which the governments, and their courts, should not be permitted to meddle.¹⁵⁵

Other denominations were not as happy with the denial of incorporation. The Episcopal Church found not only that it had been deprived of the property at issue in its contest with the Baptists, but that in the process it had become virtually unknown to the law. Thus in *Turpin v. Lockett*,¹⁵⁶ which upheld the dispossession of church lands, Chancellor Tucker reasoned that "ecclesiastical corporations," which had been created to support the establishment of religion, no longer existed after disestablishment.¹⁵⁷ In *Selden v. Overseers of the Poor*,¹⁵⁸ which once more upheld the confiscation of the lands, he again declared that Virginia's Episcopal Church was not a corporation.¹⁵⁹

153. See McLoughlin, *supra* note 137, at 234. Virginia simply left religious societies unknown to the law, and its position "left that state out of the mainstream of American religious development despite its pioneering efforts in establishing the free exercise of religion." *Id.*

154. See *id.* at 233-34.

155. McLoughlin points out that New England's Baptists, unlike those of Virginia, were sharply divided on the issue of "voluntaryism." See *id.* at 237-42.

156. 10 Va. (6 Call.) 113 (1804).

157. He wrote that "ecclesiastical corporations . . . being erected for the purpose of perpetuating the rights of the established church, must be presumed to have ceased, as soon as that constitution was established, which did not admit of any establishment of religion in Virginia." *Id.* at 133.

158. 38 Va. (11 Leigh) 127 (1840).

159. In deciding the case in the lower court of chancery, Tucker declared:

And here . . . it is to be observed, that the Church of England, (and, *a fortiori*, the Episcopal [C]hurch in Virginia) is not, and never was a common law corporation. The Church of England is not degraded to the rank of a corporation—it is one of the estates of the realm. A bishop, or a parson, is a

Then he noted the consequence of the incorporeal character of the Episcopal Church on its hierarchy—it no longer existed. “[W]e may venture to ask—‘How came Virginia by a bishop?’ The answer is, ‘She has none.’ By courtesy, indeed, certain eminent divines, selected, and so styled by their brethren, are denominated bishops; but legally speaking we have none.”¹⁶⁰ The church could have no more power, that is, than courtesy would afford it: “Their only power is in the voluntary submission of the members of their society; their only authority is derived from the regulation of conventions; (bodies equally unknown to the law with themselves;)”¹⁶¹

Lack of a corporate status also presented a grave obstacle to Catholic worship, if only because the unincorporated body could not easily hold property and pass it on. Another case involved an attempt by a man named Joseph Gallego to create a trust for the construction of a Catholic Church in Richmond.¹⁶² The trust was held invalid because the identities of the beneficiaries of the trust were uncertain.¹⁶³ As Virginia’s Court of Appeals explained, gifts to an unincorporated beneficiary were gifts to no one.¹⁶⁴ Tucker noted that “as the society or congregation is not incorporated, it may well be asked, who are to be regarded as the beneficiaries entitled to the advantage of this bequest? Who can present himself as a claimant of this aid designed for the roman catholic religion? . . . Who indeed, constitute the society?”¹⁶⁵

Given that the answers to these questions must always be indefinite, he concluded that “there cannot be a trust without a cestui que trust; and if it cannot be ascertained who the cestui que trust is, it is the same thing

corporation, says Mr. Blackstone, but the church is not.

CASES ON CHURCH AND STATE IN THE UNITED STATES 16 (Mark De Wolfe Howe ed., 1952) (quoting BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 472 (St. George Tucker ed., Philadelphia, Birch & Snell 1803)).

160. *Id.* at 17.

161. *Id.* at 18.

162. *See* Gallego v. Attorney Gen., 30 Va. (3 Leigh) 450 (1832), *overruled by* Protestant Episcopal Educ. Soc’y v. Churchman, 80 Va. 718 (1885).

163. *See id.* at 462.

164. *See id.* at 450.

165. *Id.* at 466. Judge Carr agreed:

The bare statement seems sufficient to shew, that under the general rule . . . these would be void. Who are the beneficiaries? [T]he roman catholic congregation residing in Richmond. And who are they? Suppose you name them to-day: are those the same persons who constituted the congregation yesterday? [O]r who will constitute it to-morrow? Will none remove from, or come to Richmond, to reside? Will none be converted to or from the roman catholic religion?

Id. at 461-62.

as if there was none.”¹⁶⁶ Virginia’s refusal to allow incorporation had obviously created difficulties for any churches that might have wanted to come to court to have their disputes settled. The people of Virginia had put a firm wall of separation between church and state.¹⁶⁷

B. New York and Massachusetts Say “Yes”

Remaining unknown to the law was one way to handle religious freedom and disestablishment, but it would not suit denominations in other states. One reason, already obvious, is that many clergy could not long have remained content with the kind of thinking that held that Virginia had no Bishop except by courtesy. Additionally, churches held property—property that would come under attack from outside the church and come into dispute within. The question of who owned the property could be answered much more certainly when the church was incorporated.

In 1784, New York passed an act allowing general incorporation.¹⁶⁸ The statute, besides allowing men to incorporate freely for religious purposes, also provided for the assignment of church property to lay trustees.¹⁶⁹ This provision was repeated in a statute of 1813.¹⁷⁰ The reason that the property was commended to the care of lay trustees was to ensure that the hierarchy of the churches could not wrest ultimate control of the church away from the parishioners.¹⁷¹ This assignment of property was the direct expression of the close connection that early Americans saw between civil and religious liberty. It was a literal translation of Locke’s insistence that the powers of government are held

166. *Id.* at 466. Likewise, Judge Carr added: “For it is to the roman catholic congregation for the time being, that the legacies are given.” *Id.* at 462.

167. This Article does not endorse the idea that Jefferson’s “wall of separation” metaphor is the only metaphor by which to interpret the First Amendment. That is a controversial subject, and although the incorporation debate is relevant, thorough treatment would require an entire piece. For the argument that the United States Supreme Court adopted Jefferson’s view too blithely, see GARVEY, *supra* note 15, at 139-54; MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6-7 (1965).

168. See HOWE, *supra* note 167, at 45; McLoughlin, *supra* note 137, at 234-35.

169. See PATRICK J. DIGNAN, *A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932)*, at 52-53 (1935); McLoughlin, *supra* note 137, at 234.

170. See DIGNAN, *supra* note 169, at 64.

171. As Archbishop Marechal reported in 1818, the property arrangements established by law led American Catholics “to believe that they also have the right to elect and dismiss their pastors as they please.” *Id.* at 108-09.

only in trust. Like their counterparts in secular governments, clergy would have to secure the consent of their people if they were to continue as governors in their churches. Their inability to control the property of the churches would prevent them from abusing their positions of trust.

Massachusetts also settled on incorporation as a solution to the problems posed by religious liberty, although Massachusetts, with its domestic congregational establishment, did not proceed through exactly the same steps as New York. Congregational churches were established in each town; that is, the boundaries of the parish and the town were coextensive and tax monies—called a “general assessment”—were paid to the town’s parish.¹⁷² The Massachusetts Constitution of 1780 provided that the assessment could be paid to whichever religion commanded a majority in the town, as well as to any churches deciding to incorporate.¹⁷³ Thus Massachusetts used tax monies to support religion, but in the wake of the Revolution it made the revenues available to a broader range of denominations.

Incorporation thus represented the first attempt by Massachusetts to accommodate the demands of religious tolerance. The next issue was how to address the circumstances of non-incorporating denominations such as the Baptists. In 1810 the Supreme Judicial Court made clear that unincorporated denominations could not avail themselves of the assessments.¹⁷⁴ “If the construction which was contended for was right, then a Roman Catholic teacher might maintain an action similar to the plaintiff’s.”¹⁷⁵ In *Barnes v. First Parish*,¹⁷⁶ the court explained that “the constitution has not provided in any way for the legal support of any teacher of piety, religion, and morality, unless he be a public Protestant teacher of some incorporated religious society.”¹⁷⁷ Later on, in line with the intention of an act of 1811, the court decided that unincorporated religious societies could also avail themselves of the tax exemption.¹⁷⁸ In 1824 the Religious Liberty Act ended the general assessment and replaced it with a completely voluntary system of general

172. See McLoughlin, *supra* note 137, at 226-30, 236-37.

173. See *id.* at 236-37.

174. See *Barnes v. First Parish*, 6 Mass. (5 Tyng) 401 (1810). “For, although the constitution contemplates different denominations of Protestant Christians, yet no religious societies are referred to, unless incorporated; and no teachers are mentioned as existing, who are not entitled to a maintenance.” *Id.* at 413.

175. *Id.* at 413-14.

176. 6 Mass. (5 Tyng) 401 (1810).

177. *Id.* at 412.

178. See *Adams v. Howe*, 14 Mass. (13 Tyng) 340 (1817). The statute of 1811 now “puts corporate and unincorporated societies upon the same footing, and makes no distinction between such as have an ordained minister specially settled over them, and such as are occasionally taught by preachers who may be ordained at large, or as ministers of other parishes.” *Id.* at 344.

incorporation.¹⁷⁹

In the years following the American Revolution, the general incorporation of religious denominations found approval as a means of answering the difficult questions related to establishment and free exercise. Virginia was an exception. Its disapproval of formal incorporation, however, did not signal that the state disapproved of associations as such, or of religious associations in particular. Virginia's denial of corporate status reflected a belief that voluntary associations, in order to be truly voluntary, could not be state-supported. It did not represent the hostility toward associations and corporations that was felt by Rousseau and his intellectual heirs.

The early years of religious incorporation, if the field is surveyed broadly, gave a ringing affirmation of the role that corporations and associations could play in resolving thorny public issues. The experience of the churches demonstrates that disestablishment in the United States, which was going to be a federated process simply by virtue of dual federalism, was hyper-federated. It also serves as a caution against facile assertions that American society and the law were supremely individualist in the years after the Revolution.

V. THE MORAL CONSTITUTION OF THE CORPORATION AND THE ACCOMMODATION TO GROUP PERSONALITY

To state the achievement of the corporate solution in another way, it allowed important public purposes to be addressed by society, or societies, thus avoiding the joint dangers of individualism and being co-opted by government. In this sense incorporation provided a solution to one of the most vexing problems that had been posed by antifederalists: The United States was too big to have a government "of the people." Antifederalist Richard Henry Lee, writing as "The Federal Farmer," insisted in 1787 that fair representation required "that every order of men in the community . . . can have a share in it."¹⁸⁰ The republic, he contended, was too big too allow such extensive representation.¹⁸¹

Madison's famous response was *The Federalist No. 10*, in which he argued that the vast extent of the nation would actually represent a

179. See McLoughlin, *supra* note 137, at 242.

180. [Richard Henry Lee], Letters from the Federal Farmer to the Republican, Letter II (October 9, 1787), reprinted in *ESSENTIAL WORKS OF THE FOUNDING FATHERS* 269, 269 (Leonard Kriegel ed., 1964).

181. See *id.* at 269-70.

greater number of interests: "Extend the sphere, and you take in a greater variety of parties and interests . . ."¹⁸² His solution was to increase the number of groups so as to encourage a multiplicity of interests, which is just what the newly-incorporated churches were preparing to do as the nineteenth century progressed.

It is not too much to say that incorporation led to the invention of a new type of legal personality. States could play some role in the maintenance of religious belief while avoiding, or appearing to avoid, any interference with religious freedom. For the most part, the various denominations, though insistent that they depended on the voluntary adherence of their followers, also wanted this state recognition. That is to say that they wanted their moral personalities translated into legal personality.

As the experience of the churches suggests, this recognition required compromise, so that the corporate enterprise should not deviate far from American ways. In some respects, the most interesting feature of the incorporation of churches is the way in which the legal systems of the states made way for what we might call a "moral constitution," expressed in a set of beliefs about what distinguished a good corporation from a bad one. Should a corporation, for example, be ruled by one person, by a few, or by many? As time passed, the rules governing the "moral constitution" evolved, and the new moral personalities pushed themselves on the states in a way that the individual could not.

From this vantage point, the religious corporations provide a concrete illustration of Tocqueville's observations on the importance of association in American society. The principle of association had replaced the niche once occupied by privileged orders in Europe. In America, the corporation was expected to offer the moral sustenance to the nation that had been the business of the aristocracy in Europe.

A. *Majority Rule*

One of the first questions faced by the church societies was also faced by the governments at the same time: Who should govern? From the first, an important feature of a properly-constituted corporation in the early republic was that it should not be ruled by one person, whether king or minister. Madison stated this presumptive rule by questioning the wisdom of the ancients when they allowed individuals to govern. In one passage of *The Federalist* he observed:

It is not a little remarkable that in every case reported by ancient history, in

182. THE FEDERALIST NO. 10, at 61 (James Madison) (Edward Mead Earle ed., 1964).

which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of preeminent wisdom and approved integrity.¹⁸³

Concluding that it was undesirable for a people to “so far abandon the rules of caution as to place their destiny in the hands of a single citizen,”¹⁸⁴ Madison argued that his contemporaries should “admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government.”¹⁸⁵

A similar rule prohibiting any individual from holding extensive powers of government was applied to the governance of religious societies as well.¹⁸⁶ Thus, as noted above, the property of incorporated churches typically had to be held by a number of trustees.¹⁸⁷ As a modern scholar can see, this was not a rule of nature, but it was very similar to the rule of government that Locke had devised by ruminating about life in a state of nature.¹⁸⁸ Because the people were the ones who

183. THE FEDERALIST NO. 38, at 233 (James Madison) (Edward Mead Earle ed., 1964).

184. *Id.* at 234.

185. *Id.* at 235. This point was preliminary to the central purpose of *The Federalist* No. 38, which was to argue that, just as Americans ought to learn from the mistakes of the ancients, so they should avail themselves of the lessons that their experience under the Articles of Confederation would teach them about their own mistakes. *See id.* at 233-42.

186. *See supra* notes 169-71 and accompanying text.

187. *See supra* notes 169-71 and accompanying text.

188. This characterization is supplied by Philip Hamburger, who distinguishes between natural law as “traditional right reason” and natural law as “a mode of reasoning about the liberty of individuals in the state of nature.” Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt’s Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2121 (1994).

This description of Locke’s natural law reasoning is important because it distinguishes between natural law considered in terms of substantive rules of justice, and natural law considered in procedural terms. Hamburger points to a procedural rule as one of the most important that Locke furnished: That in civil society no one could be judge in his own cause. *See id.* at 2121, 2134-36. From this procedural entitlement, according to Hamburger, Locke derived a rudimentary theory of judicial review: “On this basis, numerous writers, most notably Locke, reasoned further that if a dispute arose between a people and their government, the latter could not decide between them, for it could not be judge in its own case.” *Id.* at 2122.

The distinction is crucial in modern law in areas such as voting rights, in which fundamental disagreements often stem from differences, as Larry Alexander has put it, between those who advocate “a substantive conception of democracy” and those who champion “a procedural conception of democracy.” Larry Alexander, *Still Lost in the Political Thicket (or Why I Don’t Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327, 329 (1997). One of the lessons of the early church experience is that the

actually created the nation's wealth, they were entitled to withhold it from a leader who was violating his public trust. It would be incongruous to permit one person to be able to run the congregation's affairs without accountability. The legislatures were saying, in effect, that monarchy was no more legitimate in church government than in secular government, and they were generally happy to impose this belief as a rule of law.

Originally, the prescribed form of government was aristocratic rather than democratic. Control of the property of a given parish was vested in trustees and not in the whole body of the congregation. Over time, however, there was relentless pressure to extend control in democratic fashion. This happened in Massachusetts through judicial construction of the Constitution of 1780 in *Baker v. Fales*,¹⁸⁹ decided in 1820. The Supreme Judicial Court refused to restore "to the churches the power they once enjoyed, of electing the minister without concurrence of the people or congregation."¹⁹⁰ It was "not at all consistent with the spirit of the times, that the great majority should . . . be subject to the minority."¹⁹¹ The court, although sensible that religion presented a special legal problem, operated on a premise of majority rule drawn from political philosophy and consonant with "the spirit of the times," but one that was nowhere explicitly written in law.

Likewise, whereas the trustee system of New York began on a quasi-aristocratic basis, by the middle of the century the New York Court of Appeals construed incorporation statutes of 1784 and 1813 to increase the power of the congregation at the expense of the trustees. In *Robertson v. Bullions*,¹⁹² the court decided that the *members* of the congregation were in fact incorporated and the trustees were merely "the managing officers of the corporation."¹⁹³ "These officers," declared the court, "are trustees, in the same sense with the president and directors of a bank, or of a railroad company."¹⁹⁴ Religious societies were "not to be regarded as ecclesiastical corporations, in the sense of the English law, which were composed entirely of ecclesiastical persons . . . but as belonging to the class of civil corporations to be controlled and managed according to the principles of the common law."¹⁹⁵ According to the

two conceptions of justice are often intertwined. Procedural allocations may discriminate against denominations with doctrinal commitments that are inconsistent with the initial allocations.

189. 16 Mass. (15 Tyng) 488 (1820).

190. *Id.* at 521.

191. *Id.*

192. 11 N.Y. 243 (1854).

193. *Id.* at 250.

194. *Id.*

195. *Id.* at 251-52.

court, it was the "intention of the legislature, to place the control of the temporal affairs of these societies in the hands of the majority of the incorporators, independent of priest or bishop, presbytery, synod, or other ecclesiastical judicatory."¹⁹⁶ By statute, "the salary of the minister is put absolutely, and at all times, under the control of a majority of the congregation," not the trustees alone.¹⁹⁷ Appointments were also determined by the laity:

It would be in vain, for any donor of property or funds to the congregation, to prescribe the religious faith of the minister to whose support the avails should be devoted; for, until the salary should be fixed by a majority of the congregation, not one dollar of the revenues of the society could be appropriated by the trustees to its payment.¹⁹⁸

Just as American governments had introduced safeguards to ensure that they would never be subject to the tyrannical rule of an individual, so American churches were being required to subject themselves to democratic precepts. Law was being fashioned to accommodate a democratic moral personality.

B. Incorporation and Catholicism

The issue of majority rule relates closely to a second important moral attribute of incorporation: anti-Catholicism. In *McGinnis v. Watson*,¹⁹⁹ the Supreme Court of Pennsylvania, in the course of deciding that the majority of a congregation could annex the church with the Associate Reformed Synod, declared that the State could not punish "regular and orderly changes in religion . . . without condemning the Reformation."²⁰⁰

What about a church whose express purpose was to condemn the Reformation? The Catholic experience of incorporation points to one of the peculiarities of American law in the first half of the nineteenth century: in many states Catholic Churches were allowed to incorporate, but only according to Protestant rules.

The law was tolerant and intolerant at the same time. Catholic

196. *Id.* at 263-64. The holding left church doctrine at the mercy of the majority: If "a trust was intended in favor of persons of a particular religious faith; then, I hold it to be clear, that a religious corporation in this state, can be the recipient of no such trust." *Id.* at 262-63.

197. *Id.* at 263 (emphasis added).

198. *Id.*

199. 41 Pa. 9 (1861).

200. *Id.* at 19.

congregations were allowed to worship freely in the new nation, but their freedom was qualified. In Massachusetts Catholic churches could worship but not incorporate.²⁰¹ In other states, notably New York, Catholic churches could incorporate but were subject to the trustee requirement.²⁰² This requirement, which vested control of the church's government in a group of laymen rather than in a member of the church hierarchy, was obviously antithetical to the governmental structure of the Catholic Church.

This discrimination was intentional, and it led to a longstanding conflict. Courts in Virginia, New York, Pennsylvania, and Massachusetts all expressed, at one time or another, hostility toward Catholicism.²⁰³ The result of this hostility was a lengthy battle between the church hierarchy and the state legislatures.²⁰⁴ On many occasions, there were also battles between trustees and their bishops.²⁰⁵ The eventual result was an accommodation, as states began to recognize that the Catholic form of government required a different disposition of church properties.

In 1863, New York passed a statutory amendment allowing Catholics to "incorporate accordingly as may be most suitable to their discipline."²⁰⁶ The amendment provided for a high degree of ecclesiastical control over the lay trustees and was considered a victory by the church. Other states followed New York's lead, and in the next few years Connecticut and New Jersey passed similar statutes.²⁰⁷

The problem was not resolved completely, however, until 1913, when the Pennsylvania Legislature likewise relented to the demands of the church hierarchy.²⁰⁸ With this statutory amendment, the long struggle over incorporation came to an end. It was a struggle that demonstrated both the capacity of the American system to tolerate diversity, and its rigidity as well.

201. As Dignan notes, Catholics enjoyed nominal freedom in Massachusetts even while the Congregational churches continued to enjoy a privileged status. *See* DIGNAN, *supra* note 169, at 20-22.

202. *See id.* at 64-66, 73-76.

203. *See id.* at 64-84; *see also supra* notes 162-66, 175 and accompanying text; *infra* notes 210-14 and accompanying text.

204. *See id.* at 67-140 (detailing the trustee controversy).

205. *See id.*

206. *Id.* at 207.

207. *See id.* at 210.

208. *See id.* at 234.

*C. The Protestant Constitution and the Rule of
Distinct and Independent Societies*

The dispute over Catholicism also illustrates the manner in which the new nation, despite its ability to accommodate diversity, was committed to traditional beliefs and practices. Given that the United States was founded on the will of the people, it was inevitable that their will would begin to find its way even into the laws that governed religion. It was inevitable that the character of American government and society would impress itself on the church corporations. This struggle, therefore, offers a good look at the group nature of the new extended polity of the United States.

To many Americans at the time of the Revolution, it was obvious that freedom was a Protestant commodity. The Reverend Samuel West, mentioned above for his contention that "the collective body of the state" alone was entitled to determine whether a government was tyrannical, also contended that civil government itself was sanctioned by the Bible.²⁰⁹ After the Revolution, even those dedicated to religious liberty were prone to identify Protestant rules as essential rules of good government.

This was made plain in debates over the 1855 passage in New York of an incorporation law aimed specifically at the Catholic hierarchy.²¹⁰ The bill, which meant to ensure that bishops could not evade the trustee system of ownership, was supported by Senator Brooks, who professed it his "aim to show that the political State is Protestant in its character, if not in its constitution—that its Republican success has been mainly founded upon its Protestant religion, that other systems of faith are not in harmony with true civil and religious liberty."²¹¹ Though speaking many years after the Revolution, Brooks sounded just like preachers from 1776. Freedom itself had a particular religious content and was thus inseparable from right religion.

Quite apart from their disagreement with the Senator, Catholics made an extremely important observation about this species of freedom. It was premised on a view of popular sovereignty that centered not on the individual but on the group. In one New York parish, lay trustees

209. "This account of the nature and design of civil government, which is so clearly suggested to us by the plain principles of common sense and reason, is abundantly confirmed by the sacred Scriptures" WEST, *supra* note 98, at 423.

210. See DIGNAN, *supra* note 169, at 194.

211. *Id.* (citation omitted).

attempted to force the selection of a new priest, claiming the right to choose and discharge priests.²¹² According to Father John Carroll, who mediated the dispute, the trustees asserted an American right of self-government with respect to church affairs:

I solemnly aver that those who excite these troubles maintained in my presence by their lawyers in a public tribunal, and upheld with all their might . . . that all right to exercise ecclesiastical ministry was derived from the people Then they deny that they are or ever have been subject to my episcopal authority; and when the words of the Pope's brief were shown them, in which all the faithful in the United States are subject to the Bishop, they impudently dared to assail the brief as imposing a yoke on them contrary to American laws.²¹³

This kind of thought, he asserted, threatened "*the unity and catholicity of our Church*," which would degenerate into "distinct and independent societies, nearly in the same manner as the congregation Presbyterians of our neighboring New England States."²¹⁴

In pointing to the danger of separating into "distinct and independent societies," Carroll put his finger on one of the distinguishing features not just of New England religious life, but of American life in general: It was characterized not by excessive attention to the individual, but by a solicitude for the small group. Whether he realized it or not, he was taking an active part in the process of incorporation that was making federalism and separation of powers into a rule of American law. In attempting to make a place for the moral personality of his church in New York law, he was helping to create a nation that was itself composed of small nations.

D. Alexis de Tocqueville and the Sanctity of Association

Aviam Soifer wryly notes that "[i]t is *de rigueur* to begin any serious discussion of the role of groups in America with Alexis de Tocqueville's observation[s]" about the part that associations played in American society.²¹⁵ This Article has put him, perversely, near the end. Yet the meaning of Tocqueville's analysis is often overlooked, as Soifer notes, in favor of disputes over vague notions of "communal versus individualistic values."²¹⁶ It may be that placing him after the discussion of church corporations will help focus his remarks.

The story of the churches certainly illustrates Tocqueville's thesis. The churches provide a concrete example of the role that voluntary

212. See *id.* at 74-75, 81-84.

213. *Id.* at 83 (citation omitted).

214. *Id.* at 75 (citation omitted).

215. SOIFER, *supra* note 7, at 32.

216. *Id.*

associations played in the early national years of American society, as they show the way in which the corporate form began to move nearer to the heart of American law. If we attribute to these early Americans an obsessive, possessive individualism such as that which besets us today, we have missed the significance of the incorporation of the churches.

Tocqueville did not, and for confirmation of the sanctity of associations in general in the early republic, we need only look through his eyes. Long before the end of the debate over Catholic control of church property, he observed that American government had handed over much of its business to associations, which served almost as competitors in the provision of the public good.²¹⁷ Regretful of the attack mounted against tradition by the general will in his native France, he remarked on the essential public service done in America by voluntary associations.²¹⁸ The species of liberty that would be decried in the next century by Americans themselves as mere bourgeois individualism was seen by Tocqueville as the antithesis of individualism and the sine qua non of democratic freedom.²¹⁹

As Tocqueville saw the issue, in the French Revolution despotism was the result of the assertion that the only true civic relation was that of the individual and the State, coupled with an insistence on equality.²²⁰ The Revolution had destroyed all corporate pretenders to sovereignty, eliminating "those individual powers which were able singlehanded to cope with tyranny."²²¹ The nation had, in effect, confiscated their powers, for "the government alone . . . has inherited all the prerogatives snatched from families, corporations, and individuals."²²²

By contrast, wrote Tocqueville, Americans had "used liberty to combat the individualism born of equality, and they have won."²²³ Their liberty, which began with the freedom of the individual, found its purest

217. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513 (J.P. Mayer ed. & George Lawrence trans., 1969) ("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.").

218. See *id.* at 697 ("An association, be it political, industrial, commercial, or even literary or scientific, is an educated and powerful body of citizens 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.").

219. See *id.* at 511.

220. See *infra* notes 221-22 and accompanying text.

221. *Id.* at 15.

222. *Id.*

223. *Id.* at 511.

expression not in the immediate relationship between the individual and the State, but in the practice of voluntary association.

The spirit of association led to civic triumphs in several areas, and Tocqueville saw quite clearly that corporate activity was not restricted to one area of endeavor. He believed that one victory of the Revolution was recorded in the field of religion, in which America had combined the “two perfectly distinct elements which elsewhere have often been at war with one another.”²²⁴ These elements were “the *spirit of religion* and the *spirit of freedom*.”²²⁵ Tocqueville believed that such a combination was not possible under a government that believed that corporations existed only at the sufferance of the sovereign.

In America, the liberty to be let alone was combined, via freedom of association, with a liberty to achieve a higher good.²²⁶ According to Tocqueville, though American freedom was based on the individual, it found social expression even outside of government.²²⁷ The political freedoms reminded the American “that he lives in society.”²²⁸ Moreover, Americans learned their civic duties through a wide variety of associations. Political associations were “only one small part of the immense number of different types of associations found there.”²²⁹ Americans of every age were “forever forming associations” of every kind: “religious, moral, serious, futile, very general and very limited, immensely large and very minute.”²³⁰

The legitimacy of these associations did not depend on the prior approval of the government.²³¹ Combination managed what was accomplished by governmentally-accorded privilege in other nations, and the associations allowed the de facto inequality that was no longer tolerable at law: “associations must take the place of the powerful private persons whom equality of conditions has eliminated.”²³² The

224. *Id.* at 46.

225. *Id.* at 47.

226. For a good exposition of the differences between the two liberties, see generally ISALAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958), *reprinted in* *FOUR ESSAYS ON LIBERTY* 118 (1969). This Article does not follow Berlin in calling them “negative” and “positive,” mainly because there are always people willing to misunderstand the point that he tried to make. Subsequent commentators have found it very easy to assume that positive liberty is an unqualified good, and that negative liberty is, in the main, a bad thing. This was far from the point that he sought to establish. For his attempt to deal with critical commentary on the distinction, see *id.* at ix.

227. See TOCQUEVILLE, *supra* note 217, at 512.

228. *Id.*

229. *Id.* at 513.

230. *Id.*

231. “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.” *Id.*

232. *Id.* at 516.

American government was now dependent on the social formations that in theory preceded it. The theory that underlay federalism and the separation of powers had been extended to bodies that could not properly be said to be within the government.

VI. THE CORPORATION AND MORAL PERSONALITY IN THE PRESENT

This section explores the importance of the corporate form in modern law by returning to those who criticize American law for its individualism. There is little point in tracing the influence of the business corporation into the present day. No one doubts the enormous powers of these leviathans; to demonstrate that they receive extraordinary protection under American law would not speak to the criticisms leveled by the advocates of group protection.

It is more to the point to understand that the powers of corporate entities are too often misdescribed in terms of individualism, and are too often justified simply by reference to their property rights. The Article thus addresses the modern issue in two ways: First, it shows how the gains made by corporations in the nineteenth century have provided for some extremely important but unappreciated instances of group protection in the twentieth century. The contention here is that American law actually has extraordinary tolerance for group rights and diversity, particularly when the group is a corporation that has dedicated property to sustaining a way of life that is considered compatible with widely shared American values. Second, the Article returns to the criticism of individualism leveled at American law, in order to make a more accurate and pointed assessment of the subject of group protection and its failures. Here the Article argues that the supposedly individualistic tendencies of the American legal system are better viewed as the flip side of the predisposition toward groups that are voluntarily assembled with property to devote a cause. In short, when the law appears to demonstrate an aversion to group rights, it is often resisting an attempt to assign people to a group without their clear consent and refusing to vindicate a claim that is not supported by property.

A. Group Personality and the State: A Two-Way Street

The government has made a special place for the corporate and moral personality of the group, a place that has been earned as the result of

compromise between the State and the group. The reason that the significance of the eighteenth and nineteenth-century moral vision of the corporation is not purely historical is that it shows how some of these compromises were struck. During this time American government and American corporations came to an accommodation and, as a result, a new kind of moral personality appeared on the legal landscape. As the century progressed even the business corporation came to be treated more often as a person at law. The most important instance of this tendency came in *Santa Clara County v. Southern Pacific Railroad*,²³³ in which the United States Supreme Court announced that the corporation was a person within the contemplation of the Fourteenth Amendment.²³⁴

The corporate personality enjoyed an extraordinary range of privileges, but it was also often limited by compromises with the State.

233. 118 U.S. 394 (1886).

234. Morton Horwitz has contended at length that the *Santa Clara* decision did not recognize the corporation as a natural entity. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 65-107 (1992). Instead, he argues it accepted the argument that corporate interests should be understood as the interests of the shareholders considered individually. He points to jurists such as Justice Field, who had written in the California case of *County of San Mateo v. Southern Pacific Railroad*, 13 F. 722 (C.C.D. Cal. 1882), that "whenever a provision of the constitution, or of a law, guarant[e]es to persons the enjoyment of property . . . the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents." *Id.* at 744.

Moreover, Horwitz asserts that the natural entity theory of the corporation "was not available at the time the case was decided," HORWITZ, *supra*, at 70, and was not to emerge until the end of the nineteenth century. See *id.* at 70-74.

The most obvious flaw in this argument is that the Court in *Santa Clara* did actually rule that the corporation was a person, without offering any theoretical justification, and it did not explicitly maintain that the corporation merely represented the interests of the individuals who made it up. Beyond this, Horwitz's argument is not exhaustive, for it consults only the opinions of a few jurists—who might just a few years back have been denounced by authors such as Horwitz as "formalists"—and the writings of some contemporary legal theorists. He takes no account of what was forcing the law to accord a brand new status to the corporation, i.e., what social phenomena were forcing the law into retreating from the concession theory of corporate creation. It is interesting to learn that the theory of the time was confined to individual property rights, but we should not be surprised that theory did not fully describe what the courts were actually doing.

It is hardly surprising that judicial language did not fully express the nature of the claims that judicial opinions were vindicating; indeed, one of the most important of this Article's contentions is that, even in the present day, the courts have not found language that adequately explains the advantages that corporate entities enjoy under the law. In addition, with regard to the individual nature of the claims being sustained, Horwitz shows only that individual incorporators were allowed to assert their rights as individuals in claiming on behalf of the corporation. He does not show that those rights were identical, or that they were assumed by the courts to be identical.

As Garvey notes, we continue to describe corporate and other group rights as the rights of the individuals who compose the group, but our descriptions do not always accurately describe the nature of the rights we protect, or accurately identify the "person" bearing the rights. See GARVEY, *supra* note 15, at 123-28.

Perhaps most importantly, corporate law had to embody some of the precepts of American political theory, such as rules regarding democratic control. As *Dartmouth College v. Woodward*²³⁵ showed, this meant that corporations, like governments themselves, originated in contracts.²³⁶ The effect of the decision was thus to protect the corporation against state intrusions, in accord with the argument that the colonies had used against England in the years after 1764—that a colonial charter was a contract between a King and his people.²³⁷ Of course, in this case it was the State that was bound by the democratic rule of governance; the trustees of the College were undoubtedly very happy with the result. It is hard to imagine that they felt they had been forced to compromise very much.

The area of church law shows that the extension of protection to religious corporations was often accompanied by compromise with the government. Churches were forced to make some concessions to the character of the states and nation in which they made their claims of religious liberty; they had to prove, in effect, that they were sociable. As the dispute over the proper way to incorporate churches highlights, churches often had to accept rules of property ownership, and thus forms

235. 17 U.S. (4 Wheat.) 518 (1819).

236. It is easy to miss the real significance of *Dartmouth College* by fixing too quickly on the fact that the Court vindicated a property right, as Gerald Frug does:

In determining where to draw the public/private distinction for corporations, the courts first decided what was important to protect against state power. In *Trustees of Dartmouth College v. Woodward* . . . the United States Supreme Court gave its response to this question, an answer that came straight from Locke: what needed protection was property.

Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1102 (1980) (citation omitted).

It is more instructive to note the kind of property right that the Court recognized, and the civic relations supposed and supported by this understanding. The integrity of the corporation was secured by the ruling, with the result that the functions performed by the trustees were their property. That is to say, these functions were appropriate to them, and were more properly exercised by them—under the terms of the charter—than by the State. The case is thus better seen in light of the relation between property and propriety that has recently been expounded by Greg Alexander and Carol Rose. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 194-203 (1998); CAROL M. ROSE, “*Takings*” and the *Practices of Property: Property as Wealth, Property as “Propriety,”* in *PROPERTY AND PERSUASION* 49, 64 (1994).

237. As the Handlins point out, in cases such as *Dartmouth College* the Court was adopting arguments similar to those advanced by American revolutionaries. They cite the Berkshire County convention in 1774: “Any franchises and liberties . . . granted to a corporation and body politic . . . cannot legally be taken from such corporations and bodies politic, but by their own consent or by forfeiture.” HANDLIN & HANDLIN, *supra* note 129, at 154.

of government, that did not comport well with their organization or doctrine. The sociability requirement was expressed in its most extreme form in *Late Corporation of the Church of Jesus Christ of Later-Day Saints v. United States*,²³⁸ which upheld congressional dissolution of the Mormon Church corporation. One of the reasons that the dissolution was upheld was that polygamy was considered by many to be uncivilized.²³⁹ Justice Bradley had no difficulty in affirming that Congress's action was constitutional, given that the "organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism."²⁴⁰ Moreover, in the view of the Court the Mormons had distinguished themselves primarily by their lawlessness; Bradley referred to "the past history of the sect; to their defiance of the government authorities; to their attempt to establish an independent community; to their efforts to drive from the territory all who were not connected with them in communion and sympathy."²⁴¹

The message, by the end of the nineteenth century, was clear: compromise was essential to corporate protection. In fact, the influence of the compromises into which the churches and the states entered is felt even now by some of the churches.²⁴² Notably, in certain respects the Catholic Church still feels the effects of the Protestant constitution. To begin with, the Roman Catholic Church as such is not known to American law, except in the insular possessions gained during the Spanish-American War.²⁴³ Thus, as one American court put it, the idea that the church can own property is an "inconceivable assumption."²⁴⁴ It is a sovereign power that can acquire property only "by treaty with the government at Washington."²⁴⁵ This means that in the event that someone makes off with some church property in the United States, the Pope cannot come to court to collect it.

On the other hand, neither can lay trustees or the body of any

238. 136 U.S. 1 (1890).

239. *See id.* at 49.

240. *Id.*

241. *Id.*

242. Garvey suggests that the decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the effect of which "was to free congregational majorities to believe as they like," and thus to weaken the hierarchy's control over the church, could have a farther-reaching effect. GARVEY, *supra* note 15, at 146.

243. *See* CARL ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 47 (1917); *see also* Santos v. Holy Roman Catholic & Apostolic Church, 212 U.S. 463, 465 (1909) (recognizing "the legal personality of the Roman Church"); Municipality of Ponce v. Roman Catholic Apostolic Church, 210 U.S. 296, 322 (1908) (discussing property interests of Spain and the Catholic Church).

244. ZOLLMANN, *supra* note 243, at 48 (quoting *Bonacum v. Murphy*, 104 N.W. 180, 182 (Neb. 1905)).

245. *Id.* (quoting *Bonacum*, 104 N.W. at 182).

particular congregation, for the compromise is that archbishops typically own church property.²⁴⁶ Happily for the hierarchy, the property of the church is thus neither in lay hands nor under the control of a majority of each parish.²⁴⁷ Of course, in a property contest between the Pope and his American bishops, it appears that American law would have to side with the bishops.

The result of this compromise is privilege of a kind that is not often recognized. This fact calls to mind Tocqueville's observation that American associations were assuming the privileged position that the aristocracy had once held in France.²⁴⁸ Corporations fare well in American law not merely because of their power, but also because of the presumptive legitimacy of their associative activities.

It seems evident that such sentiments were capitalized on by the monstrous combinations bearing the misleading name of "trusts"—close relatives of the corporation. There is the example of H.H. Rogers, a prominent figure in the Standard Oil Trust, who gave testimony in the New York Legislature in 1879. When asked to explain the relation of the Trust to the oil refiners, Rogers spoke of a rather mystical quality called "harmony" and of a natural association between husband and wife.²⁴⁹ Ninety to ninety-five percent of them, he said, were in "harmony" with the Trust.

246. That is why, for example, in the famous test case of the Religious Freedom Restoration Act (RFRA), *City of Boerne v. Flores*, 521 U.S. 507 (1997), Archbishop Flores had standing to sue.

247. Mere parishioners are excluded from church governance in other denominations, as well. In the church takings case of *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), for example, parishioners made a motion to intervene, and the motion was denied. The Second Circuit ruled that the denial was proper

because the proposed intervenors lack[ed] any legally protectable interest in this matter. Under New York law, as a Protestant Episcopal Church, St. Bartholomew's is a corporate body placed in the trusteeship of its church warden and vestrymen. To the extent that the proposed intervenors are members of the parish, they enjoy only the right to vote in the election of the church wardens and vestrymen. Thus, the Rector, Wardens and Members of the Vestry is the proper party to litigate the constitutionality of encumbrances placed on Church property.

Id. at 360 (citations omitted).

248. See TOCQUEVILLE, *supra* note 217, at 516 ("Among democratic peoples associations must take the place of the powerful private persons whom equality of conditions has eliminated.").

249. See DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 417-18 (1973).

- Q. When you speak of their being in harmony with the Standard, what do you mean by that? . . .
- A. If I am in harmony with my wife, I presume I am at peace with her, and am working with her.
- Q. You are married to her, and you have a contract with her?
- A. Yes, sir.
- Q. Is that what you mean?
- A. Well, some people live in harmony without being married.
- Q. Without having a contract?
- A. Yes; I have heard so.²⁵⁰

After being pressed further on the details of the union, Rogers asked “*Well, is it a railroad abuse, or is it an abuse to be in harmony with people?*”²⁵¹ This was a very embarrassing question to ask of a government that was itself, in theory, based on voluntary association. It was also a question designed to play on the notion that harmonious relations leading to property acquisition do not depend on government approval for their legitimacy.²⁵²

At the time of Rogers’s testimony, of course, the trusts were seeking to avoid legal recognition rather than receive it. Nonetheless, they help make the point that because associating was assumed to be the thing that people should be doing even in the absence of government, associations should at the least not be hindered by government.

B. *The Corporation: Don’t Come to Court Without It*

Why is this long tradition of group protection in the United States not more widely recognized? There are two reasons. First, it may be that even if the law often vindicates the rights of the group, it does so only if it can articulate those rights in terms of individual property rights. This seems to be what Glendon has in mind when she maintains that the residents of Poletown were unable to express how their shared interests differed from their individual property rights,²⁵³ and what Horwitz means in denying that late nineteenth-century cases relied on an entity theory of corporate rights.²⁵⁴ In other words, where we might expect to see a group right, instead we see only the same old property right. Gerald Frug explained the outcome of *Dartmouth College* in this way:

250. *Id.* at 418.

251. *Id.* (emphasis added).

252. In this regard, note the assertion made in the Massachusetts Constitution that government was nothing more than “a voluntary association of individuals . . . a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” THE CONSTITUTION OF 1780, *supra* note 127, at 441.

253. See GLENDON, *supra* note 1, at 110-11.

254. See HORWITZ, *supra* note 234, at 65-107.

In determining where to draw the public/private distinction for corporations, the courts first decided what was important to protect against state power. In *Trustees of Dartmouth College v. Woodward* . . . the United States Supreme Court gave its response to this question, an answer that came straight from Locke: what needed protection was property.²⁵⁵

In *Dartmouth College*, as in so many cases since, it appears that the courts are too quick to resolve a group protection right into an individual property right.

The second reason for this recognition is that we are convinced that our legal system is individualistic. We have failed to develop a language adequate to deal with the position that the group actually occupies. Because we believe that the American tradition is one of individualism, we have all begun to speak in a language that seeks to make it so.²⁵⁶

These two tendencies—to speak mistakenly in the language of individualism and to look askance at the importance of property rights—are not confined to academic commentaries. The Supreme Court has exaggerated the importance of individual rights in its decisions and from time to time has shown itself unaware of the power that the property-wielding corporation has enjoyed in American law.

Perhaps the most famous misstatement of the nature of American rights comes from the case that established the one-man, one-vote rule. In *Reynolds v. Sims*²⁵⁷ the Court announced, “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”²⁵⁸ To contend that this is true, and to suggest that it has always been the case,²⁵⁹ is to ignore that at the time the

255. Frug, *supra* note 236, at 1102 (citation omitted).

256. This tendency to speak in terms of individual rights, while protecting group rights, leads to the question of whether—even if the corporation does deserve extraordinary protection under the law—it deserves to be protected as a “person.” Garvey writes of the confusion that attaches to the use of this word:

I learned in grade school that the plural of “person” was “people.” I learned in law school that it was “persons.” Initially I wrote this off as loose talk—natural enough coming from people who routinely mispronounced Latin and French nouns. It gradually dawned on me that not all the characters in law books *were* people. Some *were* corporations, unincorporated associations, trusts, cities, and churches. And the only way of talking collectively about them was to use that peculiar locution “persons.”

GARVEY, *supra* note 15, at 123.

257. 377 U.S. 533 (1964).

258. *Id.* at 562.

259. *See id.* at 564 n.41 (quoting James Wilson, delegate to the Constitutional Convention, for the belief that “elections ought to be equal,” and that they were equal “when a given number of citizens, in one part of the state, choose as many

nation was founded, the typical solution to the problem of representation was to compromise between equal representation and representation weighted to reflect interests.²⁶⁰ It is also to forget that one of the purposes of the bicameral legislature was to represent the interests of propertied people out of proportion to their numbers. Thus Daniel Webster, speaking in the Massachusetts Constitutional Convention of 1820, insisted that property ought to remain the basis of representation in the Senate.²⁶¹ Webster, who argued and won the *Dartmouth College* case, believed that because men of property supported education, government, and religion, they should be protected in their possession.²⁶²

In short, representatives have often represented people who owned acres and trees, and organizations, rather than individuals as such. It might be objected that the *Reynolds* Court was merely calling for an end to a long tradition of representation of property rights, but that is not exactly what it did. It pretended a continuity between the present and the past on the issue; in fact, in addition to trotting out James Wilson, the Court quoted *Yick Wo v. Hopkins*²⁶³ for the proposition that “the political franchise of voting” is “a fundamental political right, because preservative of all rights.”²⁶⁴

Yick Wo, of course, had much more to do with property rights than voting rights. It is no coincidence that the Anglo-American tradition has long hallowed property as the preservative of all rights. Yet, even as Americans vaunt the property right, there seems to be little conviction as to the reason that property is believed to be fundamental.²⁶⁵ Seen in this light, the Court’s loose use of history and its tendency to gravitate toward dicta may well indicate a failure to come to terms with certain essential features of American law. In fact, even in *Reynolds* the Court was unable to explain the nature of the right that it was protecting, for the *Reynolds* rule has more to do with group rights than with individual rights.²⁶⁶

representatives, as are chosen by the same number of citizens, in any other part of the state”).

260. See *supra* notes 118-27 and accompanying text.

261. See 1 THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS, 1800-1833, at 61-81 (Charles M. Wiltse ed., 1986).

262. See *id.* at 73-76. “I cannot, therefore, sir, agree that it is in favor of society, or in favor of the people, to constitute government, with an entire disregard to those who bear the public burdens, in times of great exigency.” *Id.* at 73.

263. 118 U.S. 356 (1886).

264. *Reynolds*, 377 U.S. at 562 (quoting *Yick Wo*, 118 U.S. at 370).

265. See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333 (1996) (“There are many reasons why one might say that property is an important right. But why would anyone say that property is the keystone right, the central right on which all others rest?”).

266. See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding*

This emphasis on the importance of groups is greater still when the Court is dealing with groups that have property, although this fact too is often overlooked. There is a tradition of mistakes—whether accidental or not—that has led us to recharacterize a group property right as an individual right of some other, “purer” kind. The most famous recent expression of this tendency to divorce the substantive claim from the property interest of the group asserting it came in *Employment Division, Department of Human Resources v. Smith*.²⁶⁷ The Court in this case denied the Free Exercise claim made by two Native Americans who were dismissed from their jobs because of their ritual use of peyote, a use that was in accord with the ceremonies of the Native American Church.²⁶⁸ They were subsequently denied unemployment benefits, a denial which they contested on Free Exercise grounds.²⁶⁹ Justice Scalia explained in his majority opinion that such claims were never upheld on Free Exercise grounds alone, but only when accompanied by another claim.²⁷⁰ He went on to list a number of cases presenting such hybrid

in *Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998). Issacharoff and Karlan maintain that voting rights are primarily defined in terms of groups:

The Court's difficulties in talking about race are exacerbated by its confusion regarding the nature of voting and reapportionment. If “[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals,” then redistricting stabs at the heart of the Fourteenth Amendment every time. Every reapportionment involves treating voters as members of a few, crudely defined groups rather than treating them as individuals with unique constellations of attributes and concerns. Voting does have several profoundly individualistic dimensions, which arise from the way in which it recognizes the voter as a full-fledged member of the community capable of participating actively in self-governance, but redistricting is not one of them. Reapportionment is almost entirely about the collective, aggregative aspects of the political process.

Id. (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))).

“We have argued elsewhere that even *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny should be viewed as cases about group political power and majoritarian control rather than purely about individual rights.” Issacharoff & Karlan, *supra*, at 2282 n.30 (citing Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 211-13 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1717-18 (1993)).

267. 494 U.S. 872 (1990).

268. *See id.* at 874.

269. *See id.*

270. The Court provided:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise

claims but failed to note that the distinguishing feature in these cases was generally the presence of a corporation (or other associative entity) making a property claim.

One of the cases identified by Justice Scalia as a First Amendment case is *Pierce v. Society of Sisters*,²⁷¹ which is well-known for vindicating a Catholic Free Exercise claim made against an Oregon statute requiring that children be educated in public schools.²⁷² Yet the case does not deserve its reputation. It was decided not on free exercise grounds, but on the basis of substantive due process.²⁷³ The outcome had much more to do with the fact that the case was brought by a corporation that claimed invasion of a property right than with the protection of free exercise guaranteed by the Constitution. That is to say, without the “Society” and the school that it owned, the “Sisters” would have been in a much more precarious position. The majority opinion begins by recognizing that the Society of Sisters is an Oregon corporation that has dedicated property to the enterprise of Catholic education.²⁷⁴ Later it asserts that the corporate appellees “are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools,” and declares that “this [C]ourt has gone very far to protect against loss threatened by such action.”²⁷⁵

Commentators do not often recognize the role that property actually played in the disposition of the case.²⁷⁶ Nor do they frequently observe

Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.

Id. at 881 (citations omitted).

271. 268 U.S. 510 (1925).

272. In characterizing *Pierce* this way, Justice Scalia echoed Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965), who cited *Pierce* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), as cases decided under the First Amendment: “The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned . . . Yet the First Amendment has been construed to include certain of those rights.” *Griswold*, 381 U.S. at 482.

Justice Black objected to this explanation of the two cases, arguing in dissent that “the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept.” *Id.* at 516 (Black, J., dissenting). He pointed out that in *Pierce* the Court ruled “that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an ‘arbitrary, unreasonable, and unlawful interference’ which threatened ‘destruction of their business and property.’” *Id.* (Black, J., dissenting) (quoting *Pierce*, 268 U.S. at 536).

273. John Attanasio suggested this point.

274. See *Pierce*, 268 U.S. at 531-32.

275. *Id.* at 535.

276. For a very good article that examines the property issues in the case, see generally Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the*

that there was another appellee in the case, the Hill Military Academy, which was also an Oregon corporation.²⁷⁷ The Military Academy, presumably, dedicated its property to a different kind of education but benefited from the same ruling as the Sisters. *Pierce* is one of the cases cited by Justice Scalia as a hybrid because it vindicated a claim that parents have a right to educate their children as well as a free exercise claim.²⁷⁸ Does *Pierce* not also suggest that it is better to present a free exercise claim as a corporation with a property interest at stake?

The legal system has also managed to accommodate the demands of other moral personalities even though they do not take true corporate form. In another of the cases cited by Justice Scalia, *Wisconsin v. Yoder*,²⁷⁹ two kinds of quasi-corporations came under attack by the State of Wisconsin: the family and the Amish people, considered as both a religious and social unit. This case leaves little doubt that the Court was doing something other than protecting an individual's right to exercise religion freely, for the majority opinion announced its views on corporatism, nature, and society.²⁸⁰

In deciding whether Amish children should be exempt from a requirement of compulsory attendance at public schools in Wisconsin, the majority opinion considered it very important that the Amish religion was an old one that had preserved essential social values.²⁸¹ The Amish were older than America itself. The Amish family deserved further consideration as a "natural" social unit because, though separate from American society, it was self-sufficient.²⁸² Far from being anti-social,

Child as Property, 33 WM. & MARY L. REV. 995 (1992).

277. See *Pierce*, 268 U.S. at 532-33. The Court stated:

Appellee, Hill Military Academy, is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating and conducting for profit an elementary, college preparatory and military training school for boys between the ages of five and twenty-one years. . . . It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable.

Id.

278. See *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 881 (1990).

279. 406 U.S. 205 (1972).

280. See Katz, *supra* note 13, at 20 (recognizing *Yoder* for the group protection it affords and contending that the Court has since retreated from the protection of groups).

281. "We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles." *Yoder*, 406 U.S. at 223.

282. The Court declared:

the Amish ethic was highly compatible with the concerns of other Americans.²⁸³

Most strikingly, the Amish “communities” created a dependable individual who would have found favor with the Founders themselves:

When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson’s ideal of the “sturdy yeoman” who would form the basis of what he considered as the ideal of a democratic society.²⁸⁴

The Amish had earned a privilege on the basis of their corporate claim to be anterior to the State,²⁸⁵ as well as on the basis of their ability to turn out the kind of individual who had created the United States. Here we see that the protection of the individual and that of the group are not so far apart as we might think, and the Court inadvertently summed up much of its thinking on corporate rights when it observed that “[t]he child is not the mere creature of the State.”²⁸⁶

Even more clearly than in *Pierce*, the claim in *Yoder* was vindicated because it was brought on behalf of communities whose existence went back beyond the United States. Additionally, the communities possessed the American virtue of a capacity for hard work and demonstrated their “sociability” via their commercial activities. The Court made it clear that similar exemptions would not be available to individuals who simply rejected “the contemporary secular values accepted by the majority,”²⁸⁷ and that “the very concept of ordered liberty precludes allowing every person to make his own standards on

The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country.

Id. at 225.

283. “There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.” *Id.* at 224.

284. *Id.* at 225-26.

285. According to the Court:

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State’s enforcement of a statute generally valid as to others.

Id. at 235 (emphasis added).

286. *Id.* at 233 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

287. *Id.* at 216.

matters of conduct in which society as a whole has important interests."²⁸⁸ Further, the Court was satisfied that the desire of the Amish to be exempted from a public education requirement was "not merely a matter of personal preference, but one of deep religious conviction, *shared by an organized group*, and intimately related to daily living."²⁸⁹ Like the Society of Sisters, the Amish were members of an ancient and organized religion that demonstrated its sociability and self-sufficiency in a way of life that blended both morality and economy.

What is the difference between the situation presented in *Pierce* and *Yoder*, and of that in *Smith*? It cannot be explained by a simple reference to a hybrid right, without further reference to the character of that right. In *Pierce* and *Yoder* the plaintiffs were societies that dedicated their own property to maintaining a way of life—a way of life separate from but compatible with American ways. By contrast, the plaintiffs in *Smith* represented corporate interests of a kind long believed to be incompatible with the "American" way of life and long marginalized, largely because the Indian tribes have been perceived to hold their property communally rather than privately.²⁹⁰ Further, the property at issue in *Smith*, state unemployment benefits, belonged in the first instance to the government rather than to the plaintiffs.

This point, implicit in *Smith*, is made much more clearly in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,²⁹¹ another case involving a Free Exercise claim made on behalf of tribes.²⁹² Here the Court determined that the United States could build a road through land that was held sacred by a number of tribes without violating their Free Exercise rights.²⁹³ The opinion comes down to the bare fact that the Indians could not claim a Free Exercise violation because they did not own the lands in question.²⁹⁴ As Justice O'Connor put it, "Whatever

288. *Id.* at 215-16.

289. *Id.* at 216 (emphasis added).

290. For a systematic account of the centuries-old story of the desire of English colonists, and then Anglo-Americans, to transform (i.e., destroy) Indian society via the introduction of private property, see generally Liam Séamus O'Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America*, 31 ARIZ. ST. L.J. 1207 (1999).

291. 485 U.S. 439 (1988).

292. This is one of the cases presented by Soifer to demonstrate that the legal system has not adequately recognized the group personality of the Indian tribes. See SOIFER, *supra* note 7, at 84-85.

293. See *Lyng*, 485 U.S. at 451-53.

294. See *id.* at 453.

rights the Indians may have to the use of the area . . . do not divest the Government of its right to use what is, after all, *its* land.”²⁹⁵ She might well have gone on, had the history of church incorporation suggested itself to her, to note that American law had formed a longstanding habit of vindicating religious claims most enthusiastically when those claims were made within familiar bounds of property law.

As *Pierce* and *Yoder* make clear, the exemptions claimed in both *Smith* and *Lyng* are generally reserved for societies that are both independent, in the sense of being self-sufficient, and compatible with American society, in the sense that they have a product to exchange with the broader society. They are not extended in the fullest sense to societies whose ways seem to the courts to be fundamentally incompatible with the rules of American civil society, or to individuals. Although the language of the law often makes it seem that the strongest claim is that of the property-holding individual, these cases argue that it is the property-holding society that receives the greatest favor. Indeed, given the church cases, it becomes obvious that even though the interest that is being defended is stated in terms of property rights held by individuals, what is really being defended is a way of life of a group.²⁹⁶

C. *Sovereign Endorsement and Involuntary Association*

If it is incorrect, then, to argue that the legal system is preoccupied with the rights of the individual at the expense of the group, what is the source of the charge of individualism that is made by so many critics? There are two closely-related sources: a reluctance on the part of the government to endorse the chosen activities of groups, and a similar hesitancy to group people against their will. By the same token, as the religion cases suggest, when groups are identified as voluntary in their composition and have dedicated property to their chosen pursuits, then they may well qualify for special favor from the government. In fact, the relevance of the religion cases becomes much clearer as we see that in some respects the Equal Protection and Due Process Clauses of the Fourteenth Amendment are adjudicated in a similar fashion to the Establishment and Free Exercise Clauses of the First Amendment. Two cases known for their individualism help to make these points: *Regents*

295. *Id.*

296. Garvey urges us to recognize that in cases involving property, the Court often protects the right of the group rather than the individual:

Look now at a very different kind of explanation for the Court's behavior in this area. It is this; the freedom that the law seeks to protect is not the freedom of individual church members but the freedom of churches as groups. The group is a legal and moral person distinct from its members . . .

GARVEY, *supra* note 15, at 146-47.

*of the University v. Bakke*²⁹⁷ and *Shaw v. Reno*.²⁹⁸

Bakke is another case that is widely misunderstood solely as an instance of the preoccupation of American law with the rights of the individual. Yet it is a case in which the Court highlighted the odd way that the conflicting claims of government, social groups, and individuals were to be mediated according to the demands of the Fourteenth Amendment.

To begin with, *Bakke* shows hostility not to groups as such, or to claims made on behalf of groups, but to attempts by the government to assign people to groups—to operate on the basis of what equal protection analysis usually refers to as a “suspect classification.” Critics have noted *Bakke*’s insistence that government owed protection to the individual, but have not paid enough attention to the mode of analysis, which focuses more on the anti-grouping principle than on the individual.²⁹⁹ The Constitution, wrote Justice Powell, did not allow the government to create groups based on “color, ethnic origin, or condition of prior servitude.”³⁰⁰ To do so would be to impose a divide in an arbitrary fashion, distorting social fact with governmental fiction.³⁰¹

Shaw makes the point in a different way, emphasizing the connection between sovereign endorsement and involuntary grouping. Consider the most important passage in the case:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.³⁰²

This line of thought, to which the Court is adhering quite strictly,

297. 438 U.S. 265 (1978).

298. 509 U.S. 630 (1993).

299. See *Bakke*, 438 U.S. at 289. “It is settled beyond question that the ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’” *Id.* at 289 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

300. *Id.* at 293.

301. See *id.* at 295. “[T]he white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.” *Id.*

302. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

amounts to a prohibition of government endorsements of “such perceptions.”

The Court is forbidding endorsements by the government that imply people share the same interests because they are of the same race. Thus, Richard Pildes and Richard Niemi have come much nearer the mark in explaining *Shaw* than have other scholars; in their view, *Shaw* signifies a concern on the part of the Court for “[e]xpressive harms” that is “in general, social rather than individual.”³⁰³ These expressive harms are notable not for the injuries they inflict on individuals but for “the way in which they undermine collective understandings.”³⁰⁴

It would still be more accurate to say that *Shaw* is concerned with preventing expressive harms through which the *government* assigns people to groups on the basis of race. Justice O’Connor is concerned with de jure social harms alone. This echoes the constraint that *Bakke* places upon the government, on the theory that endorsement is harmful because it creates a class on the basis of race.

In this respect *Shaw* is merely the flip side of the American rule on group-protection. The law will recognize groups that are clearly the result of voluntary association and will even favor them, but it will not create them itself. The body of jurisprudence that results is suspiciously similar to concerns over endorsement found in First Amendment law. Nonetheless, there is no doubt that this similarity derives not from an American tradition of individualism, but from one of corporatism.

Indeed, this devotion to corporatism is evident in another feature of the *Bakke* opinion that is not observed by many commentators: the nature of its defense of diversity. In addition to stating the anti-grouping principle as a prohibition imposed on the government, the case represents an extraordinary statement on the ability of groups to prescribe and follow their own agendas. Whereas government action undertaken on the basis of racial classification is suspect, a university’s right to determine its own mission and to set appropriate standards of admission can allow some consideration of race. In effect, Justice Powell alerted the University of California that insofar as it behaves as a private institution in the business of providing education, it can forget that it is also an arm of the government. A “diverse student body,” wrote Justice Powell, is “clearly . . . a constitutionally permissible goal for an institution of higher education.”³⁰⁵ What government could not do according to the terms of the Fourteenth Amendment, universities—

303. Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 507 (1993).

304. *Id.*

305. *Bakke*, 438 U.S. at 311-12.

corporations of academics—could do in the name of the academic freedom guaranteed them by the First Amendment.³⁰⁶ They were, in other words, free to define their own purposes, even when the government might not avail itself of the same means.

The resulting jurisprudence establishes an academic freedom—a First Amendment freedom—that can be exercised only by a privileged group. In appreciating the character of this freedom, it is essential to observe that the privilege does not belong to those who would be the immediate beneficiaries of diversity-based admissions, i.e., applicants drawn from minority groups. It belongs to the people who set the university's agenda, the corporators, and it can only be exercised by people who are actually in a position to receive enough applications to make selection of a diverse student body possible to begin with.

Thus, the *Bakke* rule on diversity can be stated as a property right, particularly if property is understood in terms of propriety. As scholars such as Carol Rose and Gregory Alexander have argued, there is a distinction between property considered “as an engine for the maximization of preference satisfactions” and “property as propriety, as the foundation of decency and good order.”³⁰⁷ In this case the University is told that it can act within its own sphere, to engage in such acts as are appropriate to its mission and such as are necessary to order its affairs. It is also told that it cannot go beyond its own bounds, for instance, to take care of business that more properly belongs to the federal or state government. This is a property claim based on the propriety of the chosen means considered in relation to a corporate purpose. The tacit message of the Court is that the University gets to make its own rules, even though some of them might be impermissible when employed by a government actor.³⁰⁸

It may seem anomalous that an equal protection argument on behalf of diversity should fail while a similar First Amendment claim should

306. See *id.*

307. ROSE, *supra* note 236, at 64. See generally ALEXANDER, *supra* note 236, at 194-203.

308. This rule, that an entity may not go beyond its own proper bounds in racial matters, is repeated in a long line of cases, and notably in *City of Richmond v. Croson*, 488 U.S. 469 (1989), in which the Court ruled that while Richmond might adopt race-conscious means to remedy either discrimination in which the city itself had engaged, or discrimination occurring within its bounds, it had no authority to adopt such means to remedy discrimination that had occurred outside its borders: “Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.” *Id.* at 509.

succeed, but this strange conversion is a testament to the hold that the corporation has on the American legal mind. Nor is this kind of thinking restricted to *Bakke* and *Shaw*; there are other cases suggesting convergence between religion and equal protection cases. Justice O'Connor's reasoning in *Shaw* is quite similar to the reasoning in her concurrence in *Lynch v. Donnelly*,³⁰⁹ in which she expressed the *Lemon*³¹⁰ establishment test simply in terms of endorsement.³¹¹ Moreover, Justice Kennedy's concurrence in *Board of Education v. Grumet*,³¹² which reads as if it addressed the same issue as *Shaw*, noted a close similarity between equal protection and First Amendment analysis. Government, he wrote,

may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate people on the basis of religion.³¹³

In attempting to understand this seeming confusion of legal categories more fully, it is tempting to wonder what the Court is worried about. In the area of race-conscious redistricting, that is a difficult question to answer if we think in terms of the individual. As critics of *Shaw* have pointed out, it is difficult to see what the injury to any individual plaintiff actually was.³¹⁴

309. 465 U.S. 668 (1984).

310. The *Lemon* test has emerged from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

311. Thus, although she would have applied a two-prong test, each prong concerned itself exclusively with the issue of endorsement. Justice O'Connor insisted that the "central issue in this case is whether [the City] has endorsed Christianity by its display of the creche. To answer that question, we must examine both what [the City] intended to communicate in displaying the creche and what message the City's display actually conveyed." *Lynch*, 465 U.S. at 690.

312. 512 U.S. 687 (1994).

313. *Id.* at 728. This Article does not mean to assert here that there is a simple congruence between the two lines of analysis, so as to suggest either that a majority of the Court treats establishment and equal protection the same way, or that adoption of the endorsement test forecasts the way an individual Justice will vote in a particular case. Thus, although it is noted that Abner Greene and Ira Lupu have debated this issue, this Article does not attempt to decide that debate. See Abner S. Greene, Kiryas Joel and *Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 27-51 (1996) (arguing for a connection between race and religion); Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 113-20 (1996) (arguing against the connection).

However, this Article does intend to point out that sensitivity to language regarding voluntary and involuntary grouping, rather than to language regarding individual rights, argues that there is some connection between race and religion in the minds of some of the members of the Court.

314. See Issacharoff & Karlan, *supra* note 266, at 2288 ("The preceding discussion suggests two things. First, a coherent concept of standing grows out of a clear definition

In this setting, the injury is better understood in terms of a commitment to honoring the group that is voluntarily assembled and that has come to court to vindicate the use of its property. It must also be understood in terms of a tradition holding that the government takes its instructions from its corporate constituents. Considered in this light, the injury would appear to be found in a departure from a traditional American rule regarding sovereign authorship—the endorsement is the departure and this departure inflicts harm per se.

The comparison with France helps to make this point clearer. The Court's fear is that the government will wind up like the author of Rousseau's plays, as a sovereign author that shapes its constituents and constituencies to its will.³¹⁵ To Rousseau's central question—"Will they form us or will we form them?"³¹⁶—the Court's answer is that they (the constituents) will form us (the government). In giving this answer the Court has remained consistent with its decision in *Pierce*. Oregon had defended its attack on private schools as an effort to remold its constituents in order to produce a uniform citizenry that integrated the diverse elements of American society in one body politic.³¹⁷ The brief for the Society of Sisters quoted an official pamphlet explaining Oregon's law in terms of such integration: "Mix the children of the foreign-born with the native-born, the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American."³¹⁸

By rejecting this argument, the Court appears to have accepted the Society of Sisters' claim that Oregon's plan bore a "ruthless and even cruel implication which is subversive of American ideals of home and parental authority. If the children, against the will of their parents, are to be 'mixed' by legislative mandate, it is difficult to perceive where this sort of legislation will end."³¹⁹ Moreover, as Barbara Woodhouse notes, the Oregon measure was understood not merely as an intrusion on the

of the relevant injury. Second, the Supreme Court has failed to articulate any theory of injury that coherently accounts for the standing rule it has produced.").

315. See *supra* Part II.B.

316. ROUSSEAU, *supra* note 70, at 119 (emphasis added).

317. See Brief on Behalf of Appellee, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 583), in 23 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 259, 306-07 (Philip B. Kurland & Gerhard Casper eds., 1975).

318. *Id.* at 307.

319. *Id.*

family but on the rights of the institutions that formed the basis of American society as well.³²⁰ It was

an assault on a certain way of life. As the brief for Society of Sisters pointed out: "If the state can thus destroy the primary school, it can destroy the secondary school, the college and the university. Harvard, Yale, Columbia, Princeton . . . [a]ll could be swept away, and with them would depart an influence and an inspiration that this country can ill afford to lose."³²¹

In choosing between the right of the State to shape its constituents in order to integrate them, and the right of the private institution to live according to its own ways, the Court, then as now, endorsed the rights of the constituent over those of the sovereign author.

VII. CONCLUSION

As this Article's analysis suggests, critics of the Court have reason to complain. Is it appropriate to treat people without either property or privilege as if they had both? Is it sensible to treat race-redistricting cases—in which minority group members are seeking greater inclusion in the political order—in the same fashion as free exercise and establishment cases—in which group members are seeking exemption from some requirement of the political order? The traditional answers to these questions are, at the very least, problematic. And that is precisely the reason why many critics of American law look to Rousseau as a guide. His insistence that the truest body politic was an indivisible people is certainly compatible with the desire to achieve complete inclusion in the people of the United States.

Yet Rousseau is not available to us. The direct and absolute relationship between the individual and the sovereign state, on which his republicanism was premised, is foreign to American republicanism. The American people have been divided and subdivided so many times that their true nature seems to lie in division rather than in unity. It is thus difficult to speak of the American people as if it were one body. In addition, however desirable sovereign authorship may be, the theory that underlies it has never really taken root in the United States and is unlikely to do so in the near future. The government is not in the habit of assembling groups; it is in the habit of receiving instructions from them. The tragedy is not that American law has too little room for groups, but that it has too much room for the group that has come together of its own volition and put property to certain uses.

The challenge is not to teach the Court how to speak the language of

320. See Woodhouse, *supra* note 276, at 1104-05.

321. *Id.* (quoting Brief on Behalf of Appellee, *supra* note 317, at 355-56).

Rousseau—although that would be a trick—but to find a tenable way to vindicate the claims of groups that diverge in important ways from those traditionally honored by American law. In seeking to protect groups that have historically been underprivileged, the challenge is to find new ways to demonstrate that interests are voluntarily shared and affiliations voluntarily entered into.

When faced with the individual who neither belongs to an approved group nor has property to devote to a cause, American law has long given the same answer: Go and associate with others so as to become a bigger person, a corporate person. This answer, which has proved satisfactory in areas such as religion, has proved less so in others. It is not an adequate answer, and we will never find one as long as we insist that the problem with American law is that it pays too much attention to the rights of the individual.

