Emblems of Federalism

Carol Weisbrod
University of Connecticut

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Law and Society Commons, and the Public Law and Legal Theory Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol25/iss3/7
EMBLEMS OF FEDERALISM

Carol Weisbrod*

This Article reviews non-state federalism—more accurately "not only state federalism"—sometimes called pluralism or essential federalism,¹ and contrasts it with conventional political federalism, referred to here as "monumental federalism" and presented through a description of a painting by Erastus Field.²

Conceptions of non-state federalism can take several forms. Some versions of non-state federalism stress the idea of sovereignty, noting that sovereignty can be located in groups other than the state. These versions fit well with the way we view Indian tribes, religious groups, and other organizations

* Professor of Law, University of Connecticut. J.D., Columbia Law School, 1961.
A paper including a discussion of Yoder v. Helmuth, No. 35747 (Ohio C.P. Wayne County Nov. 7, 1947), was presented at the Conference of the International Communal Studies Association, Elizabethtown, Pennsylvania, in July 1991. That paper has been published in Communal Societies, under the title Communal Groups and the Larger Society: Legal Dilemmas, 12 COMMUNAL SOC'Y 1 (1992). Earlier versions of the present essay were presented as a Clason Lecture at Western New England College School of Law in October 1991 and at the University of Michigan Journal of Law Reform Symposium, Preservation of Minority Cultures (Feb. 15, 1992) (audiotape on file with the University of Michigan Journal of Law Reform). I learned from the conversation in each of these settings.

I would also like to thank the following individuals for assistance of various kinds: Milner Ball, Anne Goldstein, Richard Kay, Leon Lipson, Carl Schneider, Aviam Soifer, Pamela Sheingorn, and Stephen Weisbrod.

1. Alexander Pekelis uses the phrase "essential federalism" to describe American federalism. He sees American federalism as consisting of a plurality of legal systems each of which possesses a great deal of individual autonomy. These legal systems include not just states, but private groups, such as unions and churches, as well. ALEXANDER H. PEKELIS, LAW AND SOCIAL ACTION 67-68 (1950); see also Carol Weisbrod, Towards a History of Essential Federalism: Another Look at Owen in America, 21 CONN. L. REV. 979, 1003–11 (1989). Harold Laski writes that "any society, at bottom, is essentially federal in nature." HAROLD J. LASKI, POLITICS 68 (1931). Laski argues that because society is essentially federal, a state's power will be more effective as it becomes more widely dispersed. Voluntary associations, therefore, should be "integrially related to the process of government." Id. at 69.

2. This Article does not use Field's work of art to consider theories of criticism or interpretation. Rather, the present Article is a contribution to a hypothetical "emblem book" whose subject is the history of American "essential federalism." The Oxford Companion to Art defines emblem books as "books of symbolic pictures accompanied by explanatory texts." THE OXFORD COMPANION TO ART 369 (Harold Osborne ed., 1970). The pictures used here as symbols are a painting by Erastus Field, see infra notes 6–26 and accompanying text, and a photograph of a courtroom scene, see infra notes 74–104 and accompanying text.
whose functioning can be seen in terms of unofficial but state-like authority and law.\textsuperscript{3} In these versions of federalism, an individual really belongs to two sovereign groups: state and church or state and tribe.

Another version of non-state federalism sees the individual as belonging to many different kinds of groups—some voluntary and others not\textsuperscript{4}—only some of which can comfortably be called sovereign. Here the state often is presented with the question of how it should deal with a particular interaction between an individual and a group that has resulted in the individual suffering an injury so acute that the state is asked for help.\textsuperscript{5} This Article suggests that in dealing with individual/group issues, representatives of the state should focus on questions arising out of the particular injury and the particular group affiliation, instead of the characteristics of the groups involved (for example, whether they can be called sovereign, or whether they operate legal systems). The state representatives then should determine on a case-by-case basis whether state intervention is justified or sensible.

Part I of this Article describes monumental or state-centered federalism in part through a description of a painting by Erastus Field. Part II discusses some theoretical alternatives to the state-centered model of federalism, focusing on the ideas of the Dutch politician and theologian Abraham Kuyper and

\textsuperscript{3} For an exercise in formal pluralist analysis along these lines, see Carol Weisbrod, \textit{Family, Church and State: An Essay on Constitutionalism and Religious Authority}, 26 J. FAM. L. 741 (1987–88) (analyzing the relations between church and state in the United States and using religion as an example of non-state authority).

One can, of course, call individuals “sovereign,” as do certain anarchist thinkers, and use individuals as the basic unit of analysis. \textit{See} Weisbrod, \textit{supra} note 1, at 1003 (discussing individualist anarchism and the concept of self as sovereign). One also can redefine law so that it exists in the minds of individuals—in which case every individual operates a legal system and it becomes possible to discuss state recognition of conscience in terms of legal pluralism. Carol Weisbrod, \textit{Practical Polyphony: Theories of the State and Feminist Jurisprudence}, 24 GA. L. REV. 985, 1007–11 (1990) (discussing Leon Petrazycki's ideas).

These more individualistic conceptualizations of sovereignty can be contrasted to cultural pluralism, which often assumes a state-centered universe. \textit{See generally} Nomi M. Stolzenberg & David N. Myers, \textit{Community, Constitution, and Culture: The Case of the Jewish Kehilah}, 25 U. MICH. J.L. REF. at 633, 660 (1992).

\textsuperscript{4} \textit{See} Aviam Soifer, \textit{On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition}, 48 WASH. & LEE L. REV. 381, 383 (1991) (discussing “involuntary associations,” groups we are born into and may be unable to leave—for example, racial groups or families).

\textsuperscript{5} The group might also ask for help from the state (when an individual at first has agreed to a group enterprise, for example, and then resists it and refuses to leave the premises when asked to do so).
the Russian anarchist Prince Peter Kropotkin. Part III offers an overview of the individual-group-state relation in practical terms, as seen from within a state system, and begins a discussion on the practice of shunning. Part IV uses an Amish shunning case to illustrate the problem of state intervention in individual-group conflicts and, by comparing that case with others, suggests the types of questions that the state system might raise when faced with this issue.

I. MONUMENTAL FEDERALISM

Erastus Field's *Historical Monument of the American Republic* can be seen as a pictorial representation of the conventional features of American federalism. Field's painting is about history, not about theories of federalism, but it seems that much of the painting, to the extent that it describes political (rather than social) history, implicates federalism. The painting was begun in the 1860s and Field finished most of the piece by 1867. In 1876, Field added the Philadelphia Centennial Exhibition Hall to the top of what was called the Central Tower, and, in 1888, he finished the painting by adding the two end towers. Mary Black, who compiled a catalog of Field's work, recorded that Field saw the painting as "the culmination and chief work of his long career." Frank Jenkins described the painting as follows:

From a formal garden, reminiscent of the brand-new park of an industrial town, rise ten great towers, circular and polygonal in plan, made up of sections diminishing as they rise. These are encrusted with

---

6. The painting is reproduced on page 798. The painting is on exhibit at the Museum of Fine Arts in Springfield, Massachusetts as part of the Morgan Wesson Memorial Collection. I appreciate the courtesy of the Museum in authorizing reproduction here.


8. Id. Field was an itinerant painter who spent most of his career in the Northeast. Mary C. Black, *Erastus Salisbury Field and the Sources of His Inspiration*, 83 ANTIQUES, Feb. 1963, at 201, 201–04. Black writes that in 1933 the painting was found rolled up in the attic of a relative's home, and "[i]t was rescued by Madeline Ball Wright, Field's grand-niece, from ignominious storage in a shed behind a pig sty in Plumtrees in the mid-1940's." BLACK, supra note 7, at 47.
an incredible array of architectural bric-à-brac. Almost every style is represented—Egyptian, Greek, Roman, even medieval machicolations are introduced. Seven of the telescope-like towers are joined near their summits by delicate iron suspension bridges, across which steam-trains puff.  

As Black noted in her catalog, “Every level of every tower in Field’s Monument is keyed to an incident in American history . . . .” Apparently, the “idea of an historical painting on a grand theme had been with Field since the beginning of his career. The evolution of his plan followed a long progress likely to have been conceived as early as November 1824 when he entered Samuel Morse’s studio as an apprentice student.”

Field himself published a descriptive catalog of The Historical Monument of the American Republic which predates the addition of the two final towers. The catalog begins with a paragraph explaining Field’s ultimate intention: he wanted a real structure to be built. Following the plan depicted in the painting, the structure would have a central tower surrounded by other large and elaborate towers. The various human figures in the painting would be statues with “[t]he dark figures . . . represented in bronze to denote the colored race.”

The Field catalogue contains a note of apology. “I am not a professed architect,” Field wrote, “and some things about it may be faulty. Be that as it may, my aim has been to get up a brief history of our country or epitome, in a monumental form.” Field explained that the columns represent the colonies and the states. He also described not only each of the towers, but each of the small pictures on the towers, beginning

10. BLACK, supra note 7, at 41.
11. Id. at 42. Black notes that “Field was as violently opposed to slavery as Morse was for it. While both men opposed secession, their divergent views made the interpretation of the Monument as it came from Field a far different painting than anything Morse might have created.” Id.
13. Id. at 1.
14. Id.
15. Id.
with the settlement of Jamestown by the English in 1607.\textsuperscript{16} The figures on the first or central tower consist of armies, presidents, and the forty-fourth Congress.\textsuperscript{17} The other towers have elaborate representations of various battles and incidents in American history, placing considerable emphasis on the Civil War. Outside the towers we see ladies and gentlemen out for a walk and troops "marching around the monument which illustrates the centennial anniversary of the American Independence."\textsuperscript{18} The \textit{Monument} includes text from the Declaration of Independence\textsuperscript{19} and a long essay on the critical importance of the Bible. The platform of the main towers, which Field called The True Base or T.T.B., represents American history.\textsuperscript{20} Although conceived as a plan for an architectural work, Field's monument remains a painting. No structure based on the painting has ever existed.\textsuperscript{21}

We can view Erastus Field's folk painting as representing a federal scheme focused on political units (states and colonies), imbedded in huge towers, which are connected in various ways to the whole. It is a painting emphasizing public officials, armies, and great political controversies. It seems to represent a conception of federalism involving the federal government and the states—hierarchical, integrated, and titanic—which is dominant in American history. Field's painting was said

\begin{itemize}
  \item 16. Id. at 1, 4. Field's description of a portion of the eighth tower in the center of the painting indicates the level of his detail:

  Above the constitution are seen individuals watching for a chance to assassinate the heads of the government. Seward is on his bed. Above on the great platform the assassin Booth is shooting the President. Washington is near by expressing astonishment at such a deed. Under the canopies on the pillars, people are weeping. Above is seen the funeral procession of the President. Above is his tomb. On the top of the eighth tower President Lincoln is ascending in a fiery chariot and an angel is in the act of crowning him.

  Id. at 10.

  Frederick Robinson observed that while the painting "cannot be called great art, it is outstanding in the field of folk-art. And of even greater importance it provides still further insight into the philosophy and thought of 19th century America." Frederick B. Robinson, \textit{Erastus Salisbury Field}, \textit{Art in Am.}, Oct. 1942, at 244, 253.

  17. Field, supra note 12, at 10–11.
  18. Id. at 11.
  19. Id. at 6.
  21. The painting is perhaps in a tradition of "impossible buildings." See \textit{The Graphic Work of M.C. Escher} 5, 22 (1967) (classifying three of Escher's lithographs, \textit{Belvedere}, \textit{Ascending and Descending}, and \textit{Waterfall}, as "impossible buildings").
\end{itemize}
to be preoccupied with height. And so, one might say, is political federalism. Furthermore, the federalist position from the start focused on central authority, a tendency which is generally seen to have strengthened over time. It is standard, I think, to assume that the New Deal marks an immense consolidation of the centralized-activist American republic, perhaps along the lines of the structurally integrated model used by Erastus Field.

At the same time, even the version of federalism which Field presented suggests the multiple-sovereignty account of non-state federalism. For instance, on one of the towers of Field’s Monument is a depiction of William Penn’s treaty with the Indians. Penn’s treaty has significance for the way we look at federalism because Indians are one of the groups prominent in current thinking about group rights. It is this sense of

22. See Jenkins, supra note 9, at 126.

23. This vision of the centralized-activist state animates the work of many legal academics. Although, Mirjan Damaska notes, the American view of the liberal activist state continues to recognize the “autonomy of the individual” and sees that limited governmental role is desirable, even while “government responsibility for the solution of social problems is increasingly recognized.” Mirjan R. Damaska, The Faces of Justice and State Authority 72 n.1 (1986). For a discussion of the activist state in its extreme form, see id. at 80–88.

Akhil Amar describes our current political framework as follows:

We inhabit a world whose constitutional terrain is dominated by landmark Supreme Court cases invalidating state laws and administrative practices in the name of individual constitutional rights. Living in the shadow of Brown v. Board of Education and the second Reconstruction of the 1960’s, many lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials—especially federal courts—as the special guardians of those rights.

Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1133 (1991) (footnotes omitted). He notes also that “[w]hat has been lost in this twentieth-century debate is the crucial Madisonian insight that localism and liberty can sometimes work together, rather than at cross-purposes.” Id. at 1136.

24. The picture of the treaty is derivative, apparently taken from Benjamin West’s painting Penn’s Treaty with the Indians. Black, supra note 8, at 203.

Penn’s treaty with the Delaware Indians may be mythical. See Francis Jennings, The Ambiguous Iroquois Empire 236 (1984)(noting that Penn’s early Great Treaty with the Delawares “exists only in tradition”). Jennings also says, however, that there is “much reason to believe the legend of the Great Treaty of friendship made by Penn with the Delawares . . . . The legend has been so strong that Benjamin West painted a tremendous anachronistic canvas of the imagined scene.” Id. at 245–46.

group right that the early Penn treaty illustrates; that Penn’s arrangement with the Indians was a treaty recognizes the notion of tribal sovereignty. We are accustomed to saying that the Indians’ tribal sovereignty marks their entirely anomalous status in American law.26

If we say that the great treaty tradition which found its way into Erastus Field’s Monument is also a part of the federalist tradition, we then might ask whether the treaty approach to internal groups has manifested itself in relation to groups other than Indians. One answer would be that those theorists who focus on groups in the context of the problem of private government at least implicitly employ this approach, whether they place emphasis on the control of groups or on group autonomy. Thus, it is not surprising, for example, that in 1930 Zechariah Chafee referred to the fact that “[c]onflicts between the state and powerful organizations are bound to arise, and it may be wiser to demarcate their respective functions by treaty negotiations than by litigation, in which the state necessarily acts as judge in its own cause.”27 The group sovereignty perspective also is linked to the issues of group rights raised in some of the historical and current28 discussions of international human rights.29

Despite the growth of federal activity, even the New Deal30 period provides examples of non-state federalism. One illustration of this decentralization is the community-building programs of the New Deal.31 The Indian Reorganization Act32

26. See, e.g., JENNINGS, supra note 24, at 244 (noting that Penn conceived of the Indians as “having their own governments”).
27. Zechariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 993, 1027 (1930).
28. For recent discussions on the rights of groups and indigenous populations, see generally THE RIGHTS OF PEOPLES (James Crawford ed., 1988) (including essays on the subject of “peoples” or group rights in the international context); Symposium, The Rights of Ethnic Minorities, 66 NOTRE DAME L. REV. 1195 (1991) (collecting essays on national, ethnic, and minority rights).
30. It was clear by the 1930s that big changes had occurred. Felix Frankfurter, for instance, contrasted an earlier period, when “[t]he interdependencies of men were relatively narrow, and there was no conception of the state as an active promoter of civilization,” with a later time when the function of “[g]overnment is no longer merely to keep the ring, to be a policeman, to secure the observance of elementary decencies . . . . It is being drawn upon for all the great ends of society.” FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 15, 24 (1930). He noted too that federal activity expanded without state activity contracting. Id. at 28–29.
31. See generally PAUL K. CONKLIN, TOMORROW A NEW WORLD: THE NEW DEAL COMMUNITY PROGRAM (1959) (giving an account of the New Deal’s community building program and its emphasis on collectivism over individualism).
is another example, if we stress the point that its architect John Collier was himself a sympathetic reader of Peter Kropotkin's book *Mutual Aid.* Legal pluralism within a statutory framework also can be seen in the movement which culminated in the Uniform Commercial Code. The Code is not federal. It has been enacted uniformly (if not quite identically) across the state level and contains many pluralist aspects. None of this denies the significance of the New Deal's centralizing influence. It asserts simply that there is an argument that a commitment to small units continued through the New Deal itself.

**II. SOME THEORETICAL ALTERNATIVES**

In the 1930s, theoretical writings about the state occasionally included works by writers concerned with the problem of state intervention in the activities of the small group. The presence

---

33. KENNETH R. PHILP, JOHN COLLIERS CRUSADE FOR INDIAN REFORM 7–8 (1977). For a discussion of the relevance of Kropotkin's ideas to decentralization, see infra text accompanying notes 49–57. John Collier, Commissioner of Indian Affairs from 1933 to 1945, said:

The Indians and their societies disclose that social heritage is far, far more perduring than is commonly believed . . . . Indeed, this capacity for perdurance is one of the truths on which the hope of our world rests—our world, grown so pallid in the last century, and in many regions of life so deathly pallid, through the totalitarian horror. The sunken stream can flow again, the ravaged desert can bloom, the great past is not killed. The Indian experience tells us this.

John Collier, *United States Indian Administration as a Laboratory of Ethnic Relations,* 12 SOC. RES. 265, 302–03 (1945).


35. This emphasis on the importance of small units continues. See Gerald E. Frug, *The City as a Legal Concept,* 93 HARV. L. REV. 1059 (1980) (advocating the granting of real power to cities); Carol M. Rose, *The Ancient Constitution v. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism,* 84 Nw. U. L. REV. 74 (1989) (arguing that, despite the triumph of federalism, Americans do have a tradition of localism).

36. See, e.g., HAROLD J. LASKI, LIBERTY IN THE MODERN STATE 134–35 (1930) (arguing in favor of noninterference with the activities of voluntary bodies except where the group's activity is "intended directly to alter the law, or to arrest the continuity of general social habits"); Chafee, supra note 27. As noted below, we usually tend to focus much more on issues relating to individuals as victims or rights-bearers rather than on groups.

of such writers suggests that the theories available in the 1930s (or today) were not limited to the contributions of the eighteenth-century antifederalists, but included some treatments that addressed a recognizably modern world. Moreover, theoretical discussion did not rely solely on the mainstream English political ideas and theories of eighteenth-century writers, but also included political ideas which might have been important later, to a population which included substantial elements which were not English.

Peter Kropotkin, the Russian anarchist prince, and Abraham Kuyper, then leader of the Dutch Anti-Revolutionary Party and later the country's Prime Minister, both visited America in the late nineteenth century. Their writings help to illustrate two versions of non-state federalism which could have been familiar to a hypothetical late nineteenth-century viewer—Erastus Field. These authors spoke from different, if not opposed, traditions; one is associated with the left and anarchism, the other with the religious right and conservatism. What they shared was a view of the state as one entity among others whose role was important in relation to smaller units. Both of them saw the United States as involving this model.

A. Abraham Kuyper

Abraham Kuyper, the Dutch theologian and politician, probably is remembered less today in the United States than Peter

37. Recognizing such contributions is worth less if methods of constitutional interpretation focus solely on the framers' intention. It only becomes important when we think about constitutional theory as not limited to that question.

38. See Paul Avrich, Anarchist Portraits 79–106 (discussing Kropotkin's tour of America); Ex-Dutch Premier, Dr. A. Kuyper, Dead, N.Y. Times, Nov. 9, 1920, at 15 (mentioning Kuyper's lecture tour of the United States).

39. See infra notes 49–57 and accompanying text (discussing Kropotkin).

40. Dirk Jellema concludes his article on Kuyper by saying that Kuyper was the most notable figure the Netherland's Christian political movement had produced. Dirk Jellema, Abraham Kuyper's Attack on Liberalism, 19 Rev. Pol. 472, 485 (1957). Jellema makes it clear that it is difficult to categorize Kuyper. He writes that

[a] good example of the confusion, which that movement has sometimes caused historians, can be given from Kuyper's career, and can indeed serve as a summary of that career: in the same year that an English historian dubbed him a clerical reactionary, the leader of the Dutch anarchists saluted him as a kindred spirit.

Id.
Kropotkin. Dirk Jellema provides a useful introduction to Kuyper's theoretical approach:

Society is made up of social groups, related organically, rather than of individuals related impersonally. These

41. Kuyper, who lived from 1837 to 1920, developed his ideas in the context of Dutch society, a notably pluralistic society structured on the basis of religious and ideological “pillars.” See generally David O. Moberg, Religion and Society in the Netherlands and in America, 13 AM. Q. 172, 172 (1961). Moberg suggests that this concept could be followed in the United States. See id. It may be, in fact, that a study of Dutch society and its approach to problems of pluralism is important for any student of federalism, diversity, or tolerance. HAROLD R. ISAACS, IDOLS OF THE THIPE: GROUP IDENTITY AND POLITICAL CHANGE 156–57 (1975). It may be that the high point of Dutch pluralism has passed. See AREND LJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 52 (1977) (referring to the structure as consociationalism, or “segmented pluralism.”).

Kuyper's publications are largely available only in Dutch, though a few of his works have been translated into English. The commentary on his work often is written from within the Reformed Church and is published in religiously focused journals. Useful articles discussing Kuyper in one such journal include James D. Bratt, Abraham Kuyper's Public Career, REFORMED J., Sept. 1987, at 9, and George Marsden, Where Have All the Theologians Gone?, REFORMED J., Apr. 1986, at 2. The debate over Kuyper's theology is detailed in JAMES BRATT, DUTCH CALVINISM IN MODERN AMERICA 14–33 (1984). See generally James W. Skillen, Introduction to ABRAHAM KUYPER, THE PROBLEM OF POVERTY 9–22 (James W. Skillen ed., 1991) (discussing Kuyper and his ideas); see also POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY 397 (James W. Skillen and Rockne M. McCarthy eds., 1991) [hereinafter POLITICAL ORDER] (“At the basis of Kuyper's entire social philosophy is his faith in the trinitarian God who establishes or casts down, blesses or curses, all human formative efforts in culture and society.”). The tradition of pillarization in the Netherlands undoubtedly provided a basis for at least one discussion of decentralization in education. See ROCKNE McCARTHY ET AL., SOCIETY, STATE, & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM 141–43 (1981) (describing the system of educational pluralism in the Netherlands).

Ideas of decentralization and pluralist frameworks can take people to different places when it comes to responding to specific political questions. Those influenced by Kuyper, for example, went in different directions on the New Deal. For some, Roosevelt's administration was understood as an extension of state power into fields better left alone. Bratt characterizes this as "reactionary Kuyperianism." See BRATT, supra, at 148–49. Another, "more moderate brand" of Dutch Calvinism tended to see the New Deal more positively, "approving of its Social Security, collective bargaining, and regulatory measures." Id. at 149. Still, Bratt concludes, "instinctive wariness of the state balanced every positive note with a precaution." Id. at 150.

Kuyper was described in The Independent as "the most prominent of Dutch theologians and... Professor of Hebrew and Dogmatic Theology in the Free University of Amsterdam. He is also a member of the Dutch Parliament and a leader of the Anti-Revolutionary Party, as well as editor of its organ, The Daily Standard." ABRAHAM KUYPER, FALSE THEORIES OF SOVEREIGNTY, 50 THE INDEPENDENT 1918 (1898).

Kuyper was in the United States in 1898 in part to receive an honorary degree at Princeton. The lectures that he gave at that time were published under the title Calvinism. See ABRAHAM KUYPER, CALVINISM (1899) (collecting six lectures by Kuyper delivered at the theological seminary at Princeton). His ideas are of interest here primarily because of their focus on anti-state sovereignty arguments in a theological context. Kuyper's emphasis on what he called sphere sovereignty is strikingly parallel to that presented by other nontheological schools of political thought.
groups, or spheres, received their sovereignty from God, not from the state. They are prior to the state. The state is necessary because of sin, and is due to God's gratia universalis. The state's function is to serve society; that is, to serve the social spheres which make up society. This means that the state's role is to uphold and strengthen the sovereignty of the social spheres. It has been the partial destruction of the sovereignty of these social spheres intermediate between individual and state which has brought about the present social crisis.

These spheres include, in the narrower sense, such things as family, town, province, church, school, occupational groups; and, in the wider sense, such things as science, literature, art, ideology. The state may not interfere with the sovereignty of these spheres. Thus it may not interfere with municipal autonomy, or artistic freedom, or freedom of conscience, or freedom of speech, or freedom of education. A sound theoretical notion of freedom, said Kuyper, is possible only with a correct view of society, one which recognizes sphere sovereignty; otherwise there is no theoretical check on the power of the majority.

Kuyper's social thought thus tends more towards syndicalism or Guild Socialism than it does towards a hierarchically organized corporative state. Society is not arranged vertically but horizontally. The state's task is to protect the social spheres. This may, of course, mean extensive state intervention in certain cases, notably when a social sphere is too weak to exercise its true sovereignty; then the state must help it become strong. Each sphere has its own specific sovereignty which it must not go beyond; if it attempts to, the state must intervene.42

In addressing the problem of conflict between the spheres and the issue of government regulation of the spheres, Kuyper would have authorized state intervention in only three cases:

1. if different spheres should clash, the State government may compel mutual regard for the boundary lines of each; 2. it may also intervene to defend individuals in those spheres against abuse of power by others (e.g. in the case of excessive unemployment, cruelty to a child); 3. it may coerce all spheres to

42. Jellema, supra note 40, at 482–83 (citations omitted).
Spring and Summer 1992] Emblems of Federalism

contribute financially and with whatever means are necessary to maintain the natural unity of the State. 43

Kuyper saw some of the problems, but he also seemed to assume particular solutions. If, for example, we believed in the "natural unity" of states, we probably would not be so concerned about creating institutions to define and preserve that unity. Moreover, he apparently missed certain issues and some of his work raises other problems. 44 Thus, James Bratt, in his discussion of Kuyper's work, raises a "troubling question that Kuyper never resolved." 45 The question is, "[w]hat place would the secular have in the reformed nation? How could Kuyper simultaneously assert, as he did, pluralistic tolerance and spiritualized politics? 46 Bratt also suggests that Kuyper's assumption that "a high degree of harmony and equity naturally existed among [the spheres]" is problematic. 47 It also has been noted that "Kuyper's political philosophy does not grow and deepen to the point where he is able to elaborate the notion of public justice as the norm of state life." 48

B. Peter Kropotkin

The pluralist vision and the detailed questions it raises are visible again when we look at the ideas of Peter Kropotkin. 49

44. See generally Ivo Schöffer, Abraham Kuyper and the Jews, in DUTCH JEWISH HISTORY 237 (1984); Ivo Schöffer, The Jews in the Netherlands: The Position of a Minority Through Three Centuries, 15 STUDIA ROSENTHALLIANA 85, 97–98 (1981). Schöffer refers to Kuyper as "the founder of the Calvinist 'pillar'" and notes that Kuyper "would have preferred the Jews to retire within their close community also, sacrificing so to speak what he considered their wrong-headed emancipation." Id. at 97.
45. BRATT, supra note 41, at 26.
46. Id.
47. Id.
48. POLITICAL ORDER, supra note 41, at 402 (noting that while Kuyper sees that the "government's task is to protect confessional and societal pluralism," the meaning of public justice is loose and ambiguous).
49. Prince Peter Kropotkin was born in Moscow in 1842 to a Russian aristocratic family. He worked as a geologist and zoologist, developing in the course of his investigations a critical perspective on Darwinian theory which is reflected in his book Mutual Aid. See Ashley Montagu, Foreword to PETER KROPOTKIN, MUTUAL AID (1955). In that book Kropotkin stated:

[N]either the crushing powers of the centralized State nor the teachings of mutual hatred and pitiless struggle which came, adorned with the attributes of science,
Kropotkin outlined one version of his view of federalism in his autobiography, *Memoirs of a Revolutionist*.\(^5^0\) Kropotkin wrote:

> We saw that a new form of society is germinating in the civilized nations, and must take the place of the old one. . . . This society will be composed of a multitude of associations, federated for all the purposes which require federation: trade federations for production of all sorts,—agricultural, industrial, intellectual, artistic; communes for consumption, making provision for dwellings, gas works, supplies of food, sanitary arrangements, etc.; federations of communes among themselves, and federations of communes with trade organizations; and finally, wider groups covering all the country, or several countries, composed of men who collaborate for the satisfaction of such economic, intellectual, artistic, and moral needs as are not limited to a given territory. All these will combine directly, by means of free agreements between them. . . . There will be full freedom for the development of new forms of production, invention, and organization; individual initiative will be encouraged, and the tendency toward uniformity and centralization will be discouraged. Moreover, this society will not be crystallized into certain unchangeable forms, but will continually modify its aspect, because it will be a living, evolving organism; no need of government will be felt, because free agreement and federation take its place in all those functions which governments consider as theirs at the present time, and because, the causes of conflict being reduced in number, those conflicts which may still arise can be submitted to arbitration.\(^5^1\)

Kropotkin's ideas, and those of anarchism generally, always have been associated with a no-government position. But

---

\(^{50}\) Id. at 292. In the course of his career as a philosophical anarchist, Kropotkin was arrested and imprisoned several times. He spent many years living in Europe and England and made two visits to the United States. After the 1917 revolution, the Kropotkin family returned to Russia, where Peter Kropotkin died in 1921. Id. at Foreword.

\(^{51}\) KROPOTKIN, supra note 50, at 398-99.
Kropotkin's ideas lead quite naturally to an emphasis not only on no-government, but also on limited government and on decentralization and communitarianism. In this respect, Kropotkin can be associated with movements ranging from guild socialism to syndicalism, which saw the state's role as providing a framework within which group life would be possible.

Kropotkin summarized his general position in a speech he gave in the United States, in which he declared that mankind's progress "points in the direction of less government of man by man, of more liberty for the individual, of freer scope for the development of all individual faculties, for the greatest development of the initiative of the individual, for home rule for every separate unit, and for decentralization of power."

Kropotkin also said,

I am a strong federalist, ... and I think that even under the present conditions the functions of government could be with great advantage decentralized territorially. Your theory of home rule in America I consider a distinct step in advance of the European centralized state, and it ought to continue in all directions.

Here, as with Kuyper, critics have raised questions. E.V. Zenker argued in his book on anarchism that Kropotkin was essentially deceived as to human nature, particularly as to his notion of a universal feeling of solidarity. Specifically addressing the point under discussion here, Camillo Berneri warned that Kropotkin's theory suffers because it is "not too much concerned with the dangers inherent in the autonomy of small groups."

---

53. For an account of Kropotkin, see Avrich, supra note 38, at 53–106. Thanks also to Ya'Avoc Oved for providing me with a copy of his article, Ya'Avoc Oved, *The Future Society According to Kropotkin* (Hana Lash trans., 1991) (translation on file with the University of Michigan Journal of Law Reform).
55. Id. at 85.
The difficulties with pluralist theories are familiar. Critics of such theories regularly indicate points of uncertainty about these ideas, and those who have seen practical attempts have noted how many questions about pluralism remain unanswered.

One of the many contexts in which these issues are highlighted today in the United States is in the Amish practice of "shunning." Shunning provides a particularly appropriate context for examining the difficulties involved in pluralist theories because, although shunning sometimes is seen simply as a bad practice, it widely is understood as the sanctioning system on which the Amish community depends. Shunning

---

58. The difficulties vary, of course, depending on the particular pluralist theory being discussed. Sometimes they relate to the fairness of the competition between groups for the favor of government (a common criticism of interest group pluralism) or to the problem of how groups are created in the first place. Sometimes difficulties are raised concerning the primary ambiguity over the amount of coercion which the central authority is understood to exercise over the groups. This is the concern here.

59. For example, one might note here Mark Tushnet's comments on Robert Cover's pluralist theory. See Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1527-31 (1985).

60. See, e.g., Jacob Robinson et al., Were the Minorities Treaties a Failure? 68 (1943) (raising various questions concerning state control and education that still remained under the system of the Minorities Treaties).

61. John A. Hostetler and Gertrude E. Huntington describe Amish shunning as follows:

Excommunication and shunning (Bann and Meidung) are the church-community's means of dealing with obdurate and erring members and of keeping the church pure. How shunning should be practiced was the central question in the controversy that led the Amish to secede from the Swiss Brethren. The doctrine was intrinsic in the Anabaptist movement from its very beginning. The Anabaptist concept of the church was of a pure church consisting of believers only; persons who violate the discipline must first be excommunicated, then shunned. This method of dealing with offenders, the Amish say, is taught by Christ (Matthew 18:15-17), and explained by the Apostle Paul (I Corinthians 5:11) that members must not keep company with unrepentant members nor eat with them. The passage is interpreted to mean that a person who has broken his vow with God and who will not mend his ways must be expelled from the fellowship just as the human body casts off an infectious growth. The practice of shunning among the Swiss Mennonites was to exclude the offender from communion. A more emphatic practice was advanced by Jacob Amman. His interpretation required shunning excommunicated persons not only at communion but also in social and economic life. Shunning means that members may receive no favors from an excommunicated person, that they may not buy from or sell to an excommunicated person, and that no member shall eat
SPRING AND SUMMER 1992] Emblems of Federalism

is unlike the many issues which create tensions between groups and the state because the group practice is different. Familiar examples of such issues are controversies over medical care or education. On the contrary, shunning, as a group practice, can be viewed as similar to the practices of other groups or, indeed, of the state itself. That is, we can construe expulsion and exclusions, outlawing, incarceration, and even capital punishment as forms of avoidance (or shunning). The point here is that shunning is a practice which in large part defines the group. It is a prime mechanism, in addition to group education and religious ritual, through which the "we" which constitutes the group is maintained.

In general "we" belong to many groups, so that the term "we" has a shifting reference. These groups—"intermediate groups"—are often understood to play a significant role in life. Sometimes the role the intermediate groups play is attacked as a form of private government. Sometimes the groups are seen as establishing normative codes to which individuals choose to be committed. The point here is that there are many groups, although the focus at any point in time will tend to be on one. Chester Barnard illustrated this multiplicity of association by describing a "typical" citizen: "Mr. A, a citizen of Massachusetts, a member of the Baptist Church, having a father and mother living, and a wife and two children, is an expert machinist employed at a pump station of an important water system." Barnard makes it clear, though,

---

JOHN A. HOSTETLER & GERTRUDE E. HUNTINGTON, CHILDREN IN AMISH SOCIETY 6-7 (1971).

62. Eugen Ehrlich wrote, "All of us then are living within numberless, more or less compactly, occasionally quite loosely, organized associations, and our fate in life will, in the main, be conditioned by the kind of position we are able to achieve within them." EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 63 (Walter L. Moll trans., 1962). Ehrlich identified exclusion and avoidance as the source of coercive power generally. Id. at 63-64.

63. The term "intermediate groups" refers to those various groups to which an individual may belong. These groups are conceptually intermediate between the individual and the state. Some groups extend over many states.


that these were only some identifications among many others that Mr. A might have:

We impute to him several moral codes: Christian ethics, the patriotic code of the citizen, a code of family obligations, a code as an expert machinist, a code derived from the organization engaged in the operation of the water system. He is not aware of these codes. These intellectual abstractions are a part of his "system," ingrained in him by causes, forces, experiences, which he has either forgotten or on the whole never recognized. Just what they are, in fact, can at best only be approximately inferred by his actions, preferably under stress. He has no idea as to the order of importance of these codes, although, if pressed, what he might say probably would indicate that his religious code is first in importance, either because he has some intellectual comprehension of it, or because it is socially dominant. I shall hazard the guess, however, that their order of importance is as follows: his code as to the support and protection of his own children, his code of obligations to the water system, his code as a skilled artisan, his code with reference to his parents, his religious code, and his code as a citizen . . . . It not only takes extraordinary pressure to make him violate any of his codes, but when faced with such pressure he makes great effort to find some solution that is compatible with all of them; and because he makes that effort and is capable he has in the past succeeded.66

Sometimes, however, the codes do not fit together. In such cases, some group will find that its norm has been violated and that group will respond. Amish shunning cases involve the sorts of tensions to which Barnard refers. An Amish individual may be an American, Amishman, father, husband, farmer. At one moment these codes fit, and then suddenly they do not.

A particularly difficult problem arises when the group disciplines an individual member for breaking its code in a manner that ordinarily would be a basis for civil liability in the state system. In such a case the individual first must decide whether or not to seek help from the state.67 In response, the state then

66. Id. at 267–68.
67. Some groups and some individuals will neither litigate nor defend in the state system.
must decide whether to intervene, recognizing that not intervening also is taking a substantive position.

A typical shunning case that includes state intervention would involve an individual who is shunned by the community as a sanction after withdrawing or being expelled from it, and who then sues the community in tort. Although recent cases of this type have involved an individual's relations with groups that are primarily religious, individuals, in theory, also could raise tort claims in response to discipline by secular groups. An individual might base such a claim for avoidance on a theory of conspiracy to boycott, alienation of affections, defamation, or tortious interference with contract. The claim also might allege malice. The community's defense (if it is a religious community) typically would be that the shunning was a religious practice protected by federal and state constitutions. Any community also might raise a common-law tort defense arguing that the behavior, if tortious, was privileged.

Religious groups provide a particularly useful context for addressing questions about pluralism because the issues raised by their interaction with the state are presented so clearly. I am less interested here in the legal categories in which these problems are discussed (that is, tort, contract, First Amendment) than in the issues which underlie those categories. Because shunning involves the conflict of two legal systems, it tests and defines our commitment to pluralism and diversity. Because these cases suggest that the state's power is limited by the group's ability simply to refuse to comply with any court order, the cases highlight the limits of law.

68. A well-known example of such a case is Bear v. Reformed Mennonite Church, in which Robert Bear brought suit against the Reformed Mennonites, following his excommunication from and shunning by the community. 341 A.2d 105, 106 (Pa. 1975). Bear claimed that the shunning resulted in tortious interference with a business relationship and alienation of his family's affections. Id. at 106-07. The Reformed Mennonites argued that they had a complete defense in the Free Exercise Clause of the First Amendment. Id. at 107. The lower court accepted this defense but the Pennsylvania Supreme Court rejected it and remanded the case for trial. Id. at 108. The conflict between Robert Bear and the Reformed Mennonites continued in various legal forums, including a federal case that was dismissed in 1986. "Shunned" Mennonite Loses Another Court Battle, UPI, Feb. 28, 1986 (LEXIS, Nexis library, UPI file). For further discussion of Bear, see text accompanying notes 97-98.


For a discussion of problems arising out of contract cases involving ex-members of 19th-century utopian communities, see CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980).

69. Various sorts of exclusions from trade unions and professional associations might provide an example.
We begin with the assumption that a crime is not excused even when described as a group sanction. For example, the state forbids private executions, whether as a family sanction or a group sanction. The state similarly forbids private incarceration.

The case that I will use (with some interpolations from other cases) to explore the issues raised thus far is Yoder v. Helmuth, decided in Ohio in 1947. Although it did not result in an

70. See Missouri Couple Sentenced to Die in Murder of Their Daughter, 16, N.Y. TIMES, Dec. 20, 1991, at A33 (reporting the conviction of fundamentalist Muslim parents for killing their rebellious teenage daughter).

71. Thus, we are as surprised as Charles Merriam when he describes the university jail at the University of Berlin, the "academic hoosegow" in which Bismarck and others were held. CHARLES E. MERRIAM, PUBLIC AND PRIVATE GOVERNMENT 2 n.3 (1944). "This was a revelation to me," Merriam writes, "for in my day the school authorities could throw a man out but they could not throw him in." Id.

Merriam's image of a university jail evokes the world of legal pluralism, in which multiple authorities operate within parallel systems of rules and sanctions. In the age of the modern state, the world of legal pluralism is a difficult world to keep in focus. Our idea of law is monist: one authority, one set of rules. This is particularly true to the extent that our sense of law is dominated by ideas about the criminal law. Criminal law in general is not a major source of ideas of legal pluralism, whether these ideas take the form of claims of religious exemption, local or customary law, or the so-called "cultural defense." Criminal law seems to be more associated with ideas of the unity of law—law indifferent to persons, law rooted in a sense of impersonal justice—ideas which go deeply to our sense of what the rule of law in the modern state is about. Similarly, we are largely committed to the idea that the State has a monopoly on the use of violence.

At the same time, in some other significant contexts, most obviously contracts and commercial law, we acknowledge that pluralism is intrinsic to the subject. Contracts are exactly about the law of the individual parties; commercial law is filled with references to the custom of the trade. In recent times—though not historically—we have seen the field of domestic relations move from the criminal law model, in which the state had a single conception of the good family and the good life, to a contracts model, in which the law provides a fairly open framework for individual choices. These fields are inheritors of the tradition of decentralization and of a pluralist view of the social structure as a whole.

Torts are somehow in the middle. Torts are, to begin with, civil wrongs which are conceived as private rather than public. Torts, at the same time, have a strong public aspect. Leon Green has said, "'We the People' are a party to every lawsuit and it is our interest that weighs most heavily in its determination." Leon Green, Tort Law Public Law in Disguise, in THE LITIGATION PROCESS IN TORT LAW 115, 115 (2d ed. 1977). Tort actions often, if not always, have, or have had, an analogue on the criminal law side. The field as understood currently, is, in its nature, fluid and concerned with the balancing of interests rather than, it seems, the application of rules.

72. Yoder v. Helmuth, No. 35747 (Ohio C.P. Wayne County Nov. 7, 1947) (relevant case documents on file with the University of Michigan Journal of Law Reform). Material on Yoder v. Helmuth has been provided to me by the Mennonite Historical Library at Goshen College, Goshen, Indiana, and by the Wayne County Common Pleas Court, Wayne County, Ohio. I appreciate the courtesy of both of these institutions. The case is unreported but extensively described in WILLIAM J. SCHREIBER, OUR AMISH NEIGHBORS 97-117 (1962) and in Yoder, supra note 68. See also Note, The Right Not to Be Modern Men: The Amish and Compulsory Education, 53 VA. L. REV. 925, 936 (1967). See generally JOHN A. HOSTETLER, AMISH SOCIETY (rev. ed. 1968). Note that issues of shunning or disfellowship can arise also in conventional custody cases. See, e.g., Johnson v. Johnson,
elaborate judicial discussion, the facts of the case are particularly useful for present purposes, first because the plaintiff said that he was no longer a member of the group which shunned him, and second because the case, which was not appealed, resulted in the award of damages and an injunction directed against the shunning.\footnote{Plaintiff's Petition at 1; Journal Entry at 1; Court's Finding at 204–05.}

IV. ESSENTIAL FEDERALISM IN ACTION

Imagine the Monumental federalism depicted in Erastus Field's painting with a new inset picture, a photograph taken in 1947 in an Ohio courtroom—in fact an Associated Press picture of Andrew Yoder in court, published in Time Magazine.\footnote{The Mited Man, TIME, Nov. 17, 1947, at 26.} Four of the defendant Amishmen sit around a table in an identical posture, each resting his head on his hand, all looking at each other. In the background, a number of spectators talk to each other and watch the proceeding. A photograph of Yoder himself has been superimposed on the center bottom of the picture, placed by the photographer in such a way as to reinforce the alienation of the individual from the group. The caption reads: "Andrew Yoder (center) & Fellow-Amishmen: The plain people called it pride."\footnote{Id.} Wherever Andrew Yoder was when this photograph of the courtroom was taken, the photographers and composite people from Time obviously believed that the individual was the center of this story. His oppressors surround him and the public surrounds them, all within the walls of the courtroom.

Contrasts between the Field painting and the trial photograph initially may seem obvious. One is a work of the intellect and imagination, the other a photograph.\footnote{On the Amish rejection of photographs, see DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 34 (1989).} One stresses conventionally important public events and shows almost faceless human figures often set in perfectly aligned

\footnote{564 P.2d 71, 76 (Alaska 1977) (holding that liberal visitation rights would overcome the access problems of a non-custodial father who had been disfellowshipped by the Jehovah's Witnesses), cert. denied, 434 U.S. 1048 (1978). See generally Carl E. Schneider, Religion and Child Custody, 25 U. Mich. J.L. Ref. 879 (1992) (exploring the ways courts may consider a parent's religiously motivated behavior in making child-custody decisions).}
rows. The other tells a story about the plain people, four individuals surrounded by other individuals, faces clear and marked. One can be seen as a kind of federalist plan which remains unrealized, the other might be said to represent the actual sociological truth of the real world.

But the contrast between the two pictures is not as strong as initially might be thought. Field, like the creators of the composite photograph, depicted historical materials and events—creating a particular view of reality through his juxtaposition of these literally representational scenes. Further, ideology too is real and may be depicted in constructed photographs as well as in an imagined ziggarut. There are similarities, but the pictures present important contrasts nonetheless.

Perhaps the photograph is best understood as a final hypothetical detail on Field's central tower. If we imagine the inclusion of the photograph in the Field painting, we reinforce the human dimension of federalism and the relationship among individuals, groups, and the state which is at its center.

A. Another Yoder Case

Our images of traditional societies often involve monoliths. It is clear, however, that even in such societies there are internal differentiations, which sometimes rise to the level of splits and separations. Andrew Yoder had been a member of a conservative Amish group, the old order of the Amish Mennonite Church. Disagreeing with them over several matters (including his need of a car to get a sick child to medical treatment) he left the conservative group's church for that of a more liberal group. He then was shunned by his first group. He felt, he said, "like a whippped [sic] dog." Yoder brought suit and alleged that the

77. The reference is, of course, to Wisconsin v. Yoder, 406 U.S. 205 (1972), a case which is remembered for its powerful vindication of Amish values and social structures. But as even that case indicated, there are other aspects of Amish life with which we are less comfortable. See Marie R. Deveney, Courts and Cultural Distinctiveness, 25 U. Mich. J.L. Ref. 867 (1992).

78. Plaintiff's Petition at 1-2. Yoder argued that he had not been expelled. Id. at 3. The church version of the events spoke of an expulsion. Defendant's Answer at 1.

79. Plaintiff's Petition at 1-2. For more discussion on the practice of shunning, see supra note 61 and accompanying text.

defendants "wilfully, intentionally and maliciously entered into a secret combination and conspiracy" to boycott him in accordance with the rules of the old order of the Amish Mennonite Church. 81 William Schreiber gives an account of the proceedings in Our Amish Neighbors, quoted here at length:

The "Meidung"—mite, avoidance, shunning, boycott—had been in effect for about five years in 1947. Yoder charged in court that the purpose of the "Meidung" was to compel him "to submit to church officials [sic] in the management of his trade, religious and business affairs, and it excluded [sic] him from all social and business relations with the members of said church by persuasion and intimidation." His own brother had been requested to boycott and avoid him and to have no dealings with him and had been told that his refusal to do so would place him, the brother, under the ban and make him also an object of the boycott. More than that, Yoder declared, the church authorities had approached his father to demand he remove him, Andy, from the farm which he had been operating under lease.

Yoder listed other injurious instances of the application of the "Meidung": at farm sales old friends would speak, but then actually shun his company; at one funeral he had been forced to eat under an apple tree while the others had dined in the house; at another a farm hand had requested Andy to eat at a separate table in a corner of the room; at various threshings he had been made to eat in the cellar. Worst of all, and here the boycott had showed its ugliest side, he had not been able to obtain help for his own harvesting operations, and the men he did get to help him were likewise banned from the church.

Andy J. Yoder summed up the reasons for leaving the Old Order Amish church in this way: (1) he had needed an automobile to afford transportation and to facilitate his farming operations; (2) he had needed transportation to Wooster, fifteen miles distant, so that his daughter, crippled with polio, might have treatments; (3) he had been opposed to the rule of his church which prohibited male members from wearing rubber suspenders; (4) he had been against the boycott rule; (5) he had believed that he, too, had a natural and indefeasible right to worship God

81. Plaintiff's Petition at 2.
according to the dictates of his own conscience. Yoder estimated that the damage to him in the injury of his own health and in isolation from society had amounted to some $40,000. He had also asked the court that the defendants be immediately enjoined from continuing the boycott. 82

Yoder's general claim was that the boycott violated his civil rights. 83 The judge's charge to the jury also framed the question in terms of Yoder's civil rights:

The law gives to each and every individual the right to believe and belong to any Church that he chooses, or to no Church, if he so chooses. And no church or its ruling body has the right, under the law, to deny any of its members these rights, including the right, if he so chooses, to withdraw from membership in the Church. 84

The judge also referred to the action/belief dichotomy, familiar in discussions of religious exemptions from valid state laws: "When one puts his religious belief into practice and thereby interferes with the civil rights of another it is unlawful." 85

The charge to the jury continued with an argument to the effect that there can be no acquiescence to evil acts, even when performed by religious groups. "Sincerity of religious belief . . . is no valid legal excuse to deny anyone his guaranteed human rights." 86 The judge concluded that

under the right of freedom of religious worship, the Plaintiff had a legal right to withdraw from the Helmuth Congregation and to buy an automobile if he so chose, and not to be disciplined . . . . He also had the legal right to freely enjoy the

82. Schreiber, supra note 72, at 98–99 (quoting Plaintiff's Petition at 3).
83. See Plaintiff's Petition at 6–7; Charge to the Jury at 189–90; see also Charles E. Westervelt, Jr., Torts-Disciplinary Action by Religious Society as Infringement of Civil Liberty, 9 Ohio St. L.J. 370, 370 (1948). Westervelt approved of the granting of the injunction in these terms: "Under no circumstances can a religious group be permitted to resort to concerted action in derogation of an individual's civil rights. It seems evident that the 'mite' was an intentional and coercive interference with the plaintiff's right to be unmolested in business and society, and was, therefore, properly enjoined." Id. at 71.
84. Charge to the Jury at 196.
85. Id.
86. Id. at 197.
relationship of his entire family and the freedom of business intercourse unrestricted by any unlawful restraints thereon . . . 87

The jury awarded damages, but only a portion of those requested. 88 Schreiber writes that "[t]he verdict was not appealed, but neither were steps taken to comply with the court order." 89 As a result, some Amish property was sold, though some of the award was paid by an unknown third party. 90 The judge also issued an injunction against the defendants, ordering them to stop their boycott of Yoder. 91

As noted above, this case and others like it raise a general question whether such state interventions into individual/group relations serve the function of state dispute settlement or whether they are examples of what Charles Merriam referred to as the "poverty of power." 92 The controversy in Yoder clearly continued after the law had spoken, and those watching the case knew that the court order was not the end of the story. An article in Time magazine noted that "[Yoder] would be permitted to worship in an Amish Church but he would have no voice in the church or be admitted to communion." 93 The article concluded that "[t]o the stubborn Amishmen, who frown upon court actions, God's law came before that of men. Andrew would still be under a mite of a mite." 94 A Newsweek article commented that while the judgment would not be appealed, "[t]he Amish have their own ways of meeting such ausländer edicts." 95

87. Id. at 198–99. The charge to the jury did not reach such issues as admission to communion.
88. Journal Entry at 1 (jury's verdict on damages); see also SCHREIBER, supra note 72, at 111.
89. SCHREIBER, supra note 72, at 113.
90. Id. at 113–14. Schreiber mentions reports that the third party was a prominent businessman who had extensive business dealings with the Amish. Id. at 115. But one commentator notes:

The consequences of this interference with a religious practice were truly tragic. One of the ministers against whom the judgment was rendered lost his farm at a forced sale to provide money to satisfy the judgment. He subsequently died, his wife claims, of a broken heart. Andy Yoder's daughter died shortly after the trial, and Andy Yoder hung himself.

Note, supra note 72, at 936 n.62. 91. Court's Finding at 204–05.
94. Id.
95. The Amish 'Mite', NEWSWEEK, Nov. 17, 1947, at 30; see also Wins Ostracism Suit, supra note 80, at 2.
Yoder demonstrates that while there are few cases on shunning, the state-centered system seems at times more inclined to react for a victimized member of a group and against the particular intermediate community. A non-Amish jury found for the victim in the 1947 Yoder case, and the judge gave priority to the individual's right against the group, noting that he believed that this matter of religious freedom is an individual matter.96 The shunning improperly burdened the individual's right to leave the group.

A ruling in favor of the shunned member, or former member—a distinction to which I will return—is not, however, inevitable. This is an area in which many rules exist, and a great deal of legal language is available. But as is true in any complex case, the rules and the language do not dictate a single answer.

One approach might be to say that the larger state should defer to the community on this issue, either on the theory of a free-exercise defense or on the theory that according to common-law tort approaches, the behavior was privileged. This was the position of the lower court in Bear v. Reformed Mennonite Church,97 another shunning case:

The short answer to Plaintiff's averments of injury to his business and marital interest would be, in light of the foregoing, a summary a fortiori dismissal. More considered analysis reveals that the fatal defect of Plaintiff's allegations is the fact of privilege, the presence of which will bar a cause of action for [inter alia] interference with business relations

. . . .

With respect to Plaintiff's allegation of interference with business relations, it is determinative that Defendants' "shunning," as a religious practice, has for its partial purpose maintenance of Defendant Church's spiritual integrity . . . . Likewise, it is dispositive of Plaintiff's allegation of alienation of affections that the practice of "shunning" is within the constitutional immunity afforded by the First Amendment . . . .98

We could reinforce this conclusion by referring to contract law concepts. We could say that the member, in exercising his

96. SCHREIBER, supra note 72, at 112–13.
98. Bear, 24 CUMBERLAND L.J. at 172.
freedom of religion, knowingly joined a church that used shunning as a sanction and was now subject to that sanction. John Howard Yoder put the argument this way: "[I]n contractual terms, Andrew Yoder was suing the church for consistently applying a forfeiture clause in a contract which he had freely made (in awareness of the existence of a forfeiture clause) and had intentionally broken."

We thus can consider the individual who is subjected to discipline as a member of the smaller community without the right to appeal to the larger authority. We might decide to do this because we believe it effectuates individual's choices, because it strengthens intermediate communities' power against the state, and/or because we believe that the state's intervention here would not be effective.

Alternatively, we could advocate legal relief for the individual on the theory that she had rights as a member of the larger community, that these rights had been infringed by a group claiming greater power than it was entitled to, and that the interests of the larger community require protection of the individual. This concern for state interests is revealed in the position of the Pennsylvania Supreme Court in *Bear*:

In our opinion, the complaint, in Counts I and II, raises issues that the "shunning" practice of appellee church and the conduct of the individuals may be an excessive interference within areas of "paramount state concern," i.e. the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth may have authority to regulate, even in light of the "Establishment" and "Free Exercise" clauses of the First Amendment.

We may take this position because we believe that the tyranny of small groups is more intense and dangerous than the tyranny of large ones, or because we are not sympathetic to the particular

---

group and assume that a person victimized by it must be protected. This could be true whether or not we are sympathetic to the individual victim. 101

In contrast to the positive image of the Amish presented by the court in Wisconsin v. Yoder, an Ohio Court treating an Amish shunning problem wrote in 1913 of the "strange and peculiar sect composed of Low Germans [which] 397 years ago construed portions of the Bible as shown by Art. 16 of the Amish Confession of Faith." The Ohio court was not impressed with the group's history:

Some things become more precious by age, but the crude and unnatural conceptions as disclosed are in sharp conflict with modern legal civil rights, which tend to infringe upon inherent family and business life, and which harmonizes better with the views of his Satanic Majesty and his satellites or representatives on earth. Of course courts have nothing to do with men's religious views howsoever antiquated, except when such acts infringe civil right; all we need to state is that no religious views can be the means of infringing civil rights. 103

On the basis of this negative view of a particular intermediate group, the larger culture may be unsympathetic to many religious groups that use strong forms of shunning because of the groups' commitment to "unusual" religious beliefs and social forms, and because of the groups' willingness to engage in social ostracism to the extent of even rejecting family members.

But even if the outside world is sympathetic to the victim rather than the group, does this mean that the State should intervene? What other possibilities are there? Are there cases in which we expect a certain amount of self-help from the victim? This position is illustrated by a contemporary comment on the 1947 Yoder case in the journal United Evangelical Action, in which the writer stressed that Andrew Yoder had a remedy:

Yoder could, with ease, move a bare mile away and then have dealings to his heart's content with other farmers. Likewise,

101. Of course there is no reason to assume that the victim in a shunning case is fighting for democratic principles or for a more open society. Although he may be doing precisely that, it is equally possible that the person shunned is denouncing the group for having deviated from the true faith.


103. Id.; see also ZECHARIAH CHAFEE, JR & EDWARD D. RE, CASES AND MATERIALS ON EQUITY 1221-22 (1958) (using Ginerich among illustrative cases dealing with equitable intervention).
he could easily have all business dealings with non-Amish if he so chose. Instead, Yoder insists on living within a communal body which he himself does not advocate. Horace Greeley would say, "Go West; young man, go West."104

Historically, excommunication from a small community could be described in terms of prison and fetters,105 rather than as a merely psychological restraint, perhaps because one could not leave the physical environment for another community easily, or at least not without a letter of identification and a good character. But what if one could leave? The notions of decentralized pluralism and voluntary association assume that people can pass freely into and out of communities.106 We generally assume that the “exit” option cannot be eliminated altogether,107 but question how heavily it can be burdened. The practice of shunning or excommunication is, after all, designed in part to keep people in or to restore them to communion.

Sometimes leaving the group or the jurisdiction is not an effective remedy. For example, what if a church not only shuns — typically described as passive behavior — but actively denounces and defames? A church might do this either on the theory that it was disciplining a present member for the


105. See Yosef Kaplan, The Social Functions of the Herem in the Portuguese Jewish Community of Amsterdam in the Seventeenth Century, in DUTCH JEWISH HISTORY 111, 115 (Jozeph Michman ed., 1984) (describing excommunication as “[a] prison without bars” or “iron fetters which the eye cannot see but which the body feels very strongly.” (citations omitted)). This discussion suggests the importance of what one exits into. That is, does the largest group require membership in some internal subgroup or is it possible to be, in effect, a citizen of the world? What happens when no other group will accept an individual who must be a member of some group and who has been excluded from his original group? This is part of the meaning of outlawry.

106. Whether they can enter communities is a separate issue, complicated by our expanding conceptions of impermissible discriminations.

107. This reaches the issue of voluntary slavery. See James Crawford, The Rights of Peoples: Some Conclusions, in THE RIGHTS OF PEOPLES, supra note 28, at 159 (raising the question “Should individual rights, including the right to opt out of groups or communities, prevail over the interests of those groups or communities?”). Crawford also notes that “[t]he crucial issue is that of ‘minorities of minorities’: if minority rights are genuinely collective, then it presumably follows that dissenting members of minority groups can be compelled to comply with the wishes of the majority.” James Crawford, The Rights of Peoples: “Peoples” or “Governments”?, in THE RIGHTS OF PEOPLES, supra note 28, at 55, 60.
(ultimate) good of the member or for the good of the others, who observe and are fortified by the example.

If a church takes the position that one cannot renounce membership and that, therefore, jurisdiction over members is perpetual, what position should the State take? From a contract perspective, much might depend on whether the individual, in joining the church, knew of the group's position on the issue or of how severe the sanctions were. Clearly, whether the church declares eternal membership is not the end of the issue. It may be that religious groups see themselves as units that one can join but not leave. But one can in fact join different groups. From the original group's point of view, that is apostasy; from the new group's point of view, it is conversion. And from the State's point of view? The answer to that question will require examination of the context in which it is asked, not an automatic conclusion that one identification or another must control.  

In addition to whether an individual's exit is possible, financially or psychologically, or whether we see the membership issue in the way that a church sees it, serious questions remain as to what types of interventions would resolve the disputes. If damage awards are ordered, the individuals hold

---

108. In one case, for example, a court might say that the group can shun the former member because (1) in the group's view one is always a member, and (2) the internal discipline of the group and the example which must be taken to set for present members require this result. In another case a court might say that the individual who left his money ambiguously to "my church at the time of my death," must be taken to mean the church he was most recently attending rather than the church that was boycotting him though still claiming him as a member.

On this point it was said of Andrew Yoder: "Yoder lives in a free country and if he does not want to obey the Amish law he can quit the Amish church. Despite this, Yoder has insisted on remaining an Amishman, continues to wear a beard and wants to be a unit of the Amish body." Berg, supra note 104, at 7. But perhaps the "Amish Body" has many parts and "who decides this?" is a subject in itself. The 1947 Yoder case indicates that Yoder's position was that he was no longer a member of the more conservative group.

In another case, the court allowed a tort action by a former member against a church which believed that members could join the church but could not withdraw from it. See Guinn v. Church of Christ, 775 P.2d 766, 786 (Okla. 1989). In Guinn, the court distinguished between church's behavior towards members while still members and its behavior against former members. Id. at 769–75, 777–85. See generally LYNN R. BUZZARD & THOMAS S. BRANDON, JR., CHURCH DISCIPLINE AND THE COURTS (1987) (discussing remedies for churches in dealing with church discipline issues).

109. John Hostetler has discussed the issue of freedom of movement and relocation as a way of avoiding the strict meidung among the Amish. HOSTETLER, supra note 72, at 311.

110. Although we can view the law as involving the application of rules, it is generally thought that law also focuses on resolving disputes. Discussions of the use of law as a tool for dispute resolution assume that the law's power is sufficient to the enterprise
liable may or may not pay them. Others may come forward to pay, or the state may take more stringent measures to enforce the awards, possibly creating a new victim class. Injunctive relief—orders directed against the behavior itself—are likely to be futile, both because the courts cannot mandate intimate relations and because avoidance tactics would make it difficult to know whether an order had been respected. It is not difficult to imagine the shift from collective ostracism under the command of a religious authority to individual ostracism (which the court order would not prohibit) once the religious directive had been withdrawn through state coercion. Indeed, it is tempting to think that the state legal system, faced with this problem, might turn to the defense of privilege as one way of avoiding the issue.

The lower court in *Bear* was extremely sensitive to the issue of remedies:

Weighing heavily in this court's adjudication of the instant dispute is the fact that if any injunction were granted, its enforcement would be impossible, its effect nugatory. It is a suggestion both idle and vain that the elusive nuances of a marital relationship, or the varied complexities of economic and social intercourse could be coercively reinstated by injunctive relief.  

All of this would be true without reaching the specific issue of religious freedom. But, as the court pointed out, "[c]ompounding the problem of enforcement is the collateral problem of the injury—denial of religious freedoms—an injunction would work upon Defendants. Neither precedent, nor conscience, nor logic can support injunctive relief in such circumstances."

### B. Boycott in Several Contexts

Perhaps we can advance our understanding of what is involved in the shunning cases by looking at a number of related cases, related because they all involve the strategy of boycott or

---


avoids the so-called passive (but of course passive/aggressive) remedy of exclusion from community. The effort here is to move away from a narrow First Amendment reading of shunning, which would focus largely on the modern law of church and state. Instead, the shunning issue is considered against the background of group behavior generally and is compared with other exclusionary sanctions. We can start with an example of a "no-intervention" case; one in which an intact family shuns an adult member. The concern for psychological child abuse may justify removal of a child from a family which threatens him emotionally, but I believe there is not yet such a claim that would protect adults where the injury was based entirely on exclusion from the family.

We then can move to political boycotts—for example, feminists or others shunning movie houses which show pornographic films, or consumer groups shunning certain products for reasons having to do with consumer protection issues. We view these boycotts as political expressions, and we assume that even though they may involve, for example, intentional inflictions of emotional distress, boycotters should not be subject to tort liability. The boycott is allowed to proceed.

To illustrate this "no-intervention" possibility, we can review a 1982 Supreme Court case, *NAACP v. Claiborne Hardware Co.* The case involved a boycott of white merchants in Mississippi initiated by a local branch of the NAACP. The purpose of the boycott was to secure compliance from the town's white establishment with a long list of demands focusing on equality and racial justice. Thus, it has been said that the case is about "economic pressure to engage in political activity." Organizers enforced the boycott against the white merchants by posting "watchers" in front of various white-owned business places. The boycott also was enforced against blacks, who were pressured to participate in the boycott through a variety of tactics, at least some of which were violent. The Mississippi courts found that the NAACP had committed a common-law tort and held it liable

113. *See State v. Glidden*, 8 A. 890, 896–97 (Conn. 1887) (describing the origins of the word "boycott" as arising from an incident where Captain Boycott, a landlord's representative, was in effect shunned by angry tenants in 19th-century Ireland).

114. A remedy for intentional infliction of emotional distress in this context, for example, seems unlikely, despite the obvious pain involved. In a marital context, issues of desertion as well as issues of spousal abuse might become relevant.


116. *Id.* at 889.


118. *Claiborne Hardware*, 458 U.S. at 903.

119. *Id.* at 904–06.
for damages. The United States Supreme Court reversed and held that the Mississippi courts' ruling violated the NAACP's First Amendment rights.

The *Claiborne* case involved several possible victim groups. We can view the case as one involving black victims of the white society. We can view the group of white merchants who sued in the Mississippi courts for protection against the NAACP boycott as victims. There were also, at least in theory, black victims who had been coerced by the group to which they belonged by reason of skin color, though it is not clear whether they were members of the particular organization operating on behalf of blacks generally.

What was the relevant community here? We might say that the NAACP was one part of a larger community—the republic. We also might say that it was disciplining another part of that community, the white merchants, because they failed to follow (or failed to pressure others to follow) the rules of the whole, which guaranteed justice to blacks. Do we expect private groups to do this? Or do we ordinarily leave such discipline to the police or to the political process? The answer may well be determined by whether we believe that all groups have access to the political process or whether we believe that special judicial solicitude may be in order to protect the access rights of those who historically have been denied access to the process. Or we might define the relevant community narrowly, not “the republic” but “the black community.” We also might say that the black victims were being disciplined by a group—the NAACP. But were they members? Was the NAACP authorized to discipline on behalf of the black community as a whole? Conceivably the black victims of the boycott might have said that

120. *Id.* at 890–96.
121. *Id.* at 932–34.
122. Do we have to strain to see this? We strain less if we recall Nazi boycotts against Jewish merchants, or KKK boycotts against Catholic merchants. Hendrik Van Loon did not believe that the latter had a place in his discussion of tolerance, being merely “manifestations of bad manners and a lack of decent public spirit.” *HENDRIK W. VAN LOON, TOLERANCE* 169 (1925).
123. Similarly, in *Yoder* we might say that one victim was Andrew Yoder and other victims were those members of the group who were frightened into joining the boycott against Yoder by the threat of group sanctions.
124. This explanation might work, except that we usually think of discipline as arising out of a group’s superior position in a hierarchical relationship.
126. The question of membership is often, but not always, framed in the language of contract law as the issue of entrance and exit. Different groups may have different conventions regarding membership, and the state also may have an interest in the question, particularly where religious freedom issues are involved.
their sense of membership related more to the larger black community or the town, for example, than it did to the NAACP. If so, the NAACP was not disciplining members, but coercing non-members.

As a final point, we can note that the case seems to concede that "social ostracism" is a legitimate sanction; the Court referred to "social ostracism" as if it was preceded by the word "mere." Presumably, the Court based its comment on the familiar idea that the state has a monopoly on violence and that all other sanctions are somehow less effective. This tends to minimize the fact that nonviolent sanctions may be immensely powerful, whether they involve the threat of dismissal from employment or the threat of excommunication from a church.

The NAACP's actions in this case can be justified as an example of the political use of boycott by an oppressed minority, persecuted as a group and insisting on the right to respond as a group. It was a tort as an exercise of First Amendment rights. Perhaps too, as was suggested recently, it was boycott as "a classic instance of popular republican politics." But perhaps we should examine some other cases.

127. The Court said, "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damage award. But violent conduct is beyond the pale of constitutional protection." \textsc{Claiborne Hardware}, 458 U.S. at 933.

128. \textit{See} James W. Hurst, \textsc{Law and Social Process in United States History} 268 (1960) ("[T]o take life, inflict physical pain, or confine the body were ways of enforcing rules which (our) legal order recognized as properly held only at the command of law."). Presumably, only the state is allowed to use violence because violence is the most effective sanction.

129. Michael Walzer quotes R.H. Tawney: "[T]he man who employs, governs ... He occupies what is really a public office. He has power, not of pit and gallows ... but of overtime and short time, full bellies and empty bellies, health and sickness." \textsc{Michael Walzer, Spheres of Justice}, 293 n.* (1983).

130. It was a right which was not always obvious to the American legal system. As Alexander Pekelis wrote: "Of course an individual may stop reading, or advertising in [a newspaper]. But if a group decided not to patronize that paper and tried to induce others to do likewise, the ghosts of criminal conspiracy, combinations in restraint, or secondary boycott would be raised again them." \textit{Pekelis, supra} note 1, at 189. The labor movement, he said, had made significant progress on this issue because "[c]ollective bargaining was granted to labor by statute." \textit{Id.} He noted that labor's second basic right—to picket and to boycott—was won by "effecting a change of judicial attitude." \textit{Id.} Pekelis also saw the necessity of the group engaging the sympathies of the larger society, so that in effect the boycott gets larger and larger. \textit{Id.} at 193.

Here is an example in which I think state intervention would generally be thought appropriate and necessary: A fourth-grade black child distributes Valentines to her white classmates. The cards are torn up and returned to her as an element of her exclusion from the classroom community of white children. I think we feel that, whether or not this is popular politics, this type of behavior in public schools should not be allowed. It is not that we feel that an injunction should necessarily be issued, but that the teacher should do something. Why do we feel this? Because the victim is a child; because the child’s injury is personal and immediate; because love has been met by hate in the rejection of a gift; because the racism involved is palpable and shocking, and we are trying as a society to rid ourselves of racism; because there is a continuity in purposes between the school room, the people in it, and the state; and because we doubt that the wooden chairs in the classroom create a group whose autonomy should be protected by the state. Perhaps we also feel that the exit option is not available to the child—the state, after all, insists that she be in school—or, if the option is available (through private education, for example), it is too expensive to consider realistically. Whatever social utility might be involved in the collective acts here are plainly outweighed by the acute injury inflicted.

What should we feel, then, about the Korean grocer doing business in a black neighborhood who is boycotted by former customers because he hit or killed a black customer whom he believed to be stealing? This case is more troublesome and seems to fall somewhere between the NAACP case and the fourth grader case. Is the grocer’s injury personal and immediate like the fourth grader’s? Or is the injury economic, like that in Claiborne Hardware? Is this victim similar to the victim of the Nazi boycott—a person attacked by state-backed mobs? Or like the victim of the KKK in a state opposed to racism? Is the neighborhood the community whose membership is being purified? Are we certain about the relation between the purposes of the state and those of the neighborhood? If the neighborhood is
part of society and not the state, it may have objectives that are completely different from state purposes. We assume that the teacher is able to do something in response to fourth-grade racism, both because it occurs in the classroom context and because of the ongoing teacher/student relationship. Who is the comparable figure in the grocer case? Finally, do we think that the grocer should exit? Should he sell—be forced to sell—his business to avoid the boycott?

In summary, I have tried to look at a range of factors in a variety of cases to see why some are more likely candidates for state intervention than others. In making such an evaluation, the factors to consider are the nature of the injury, the possibility and costs of exit or self-help, and the efficacy of state intervention. The summary, if in the form of a chart, would look something like this:

(A) Who is the plaintiff (target of the boycott)?
   (1) White merchants?
   (2) Small black child?
   (3) Korean grocer?
   (4) (Former) Amishman?

(B) In relation to that plaintiff and the boycott, how do we view and weigh the problem of
   (1) Consent (did the plaintiff consent to the system in which she is being boycotted)?
   (2) Exit (can the plaintiff withdraw from the situation, and if so in what way (physically, psychologically) and at what cost)?
   (3) Remedy (what is the state remedy and what impact will it have)?
   (4) Autonomy of the Group (to what extent is the group one whose purposes are consistent with those of the state)?

To fill in the chart, we might try differentiating the cases and say, for example, that the small child did not consent to the

---


137. These factors are, in part, reformulations of two of Chafee's concerns, the "Strangle-hold" and the "Hot Potato" policies. See Chafee, supra note 27, at 1021–23, 1026–27.
boycott and that Andrew Yoder did. Or we might reject this attempt to distinguish the situations and say that, at some level, in some way, there was consent in each of the cases (children's consent given by their parents who consent to the social contract; merchants consenting by opening a business which involves the possibility of consumer-reactive boycotts). We also might say that exit is possible but costly in all cases, and that the child is least able to exit. Even as to autonomy, we might view all the cases as being the same—the state standing ultimately in the same supervisory role with respect to each internal group, imposing certain minimum standards of process, for example, on all group action—or we might say that there is and should be the possibility of substantial discontinuity between the purposes of groups inside the state and the state itself.\textsuperscript{138}

The autonomy factor noted above raises both the issue of the boycott's context, and the question of whether the case involves adjustment of an ongoing, largely adversarial bargaining relationship, or a breach within a preexisting community. Boycotts as a means of political expression, for example, probably arise in what we think of as adversarial settings. John Howard Yoder explored this issue in arguing that labor conflict cases are not an appropriate analogue for cases of membership discipline and particularly not for shunning cases:

\begin{quote}
[A] labor boycott is applied to a party to whom the boycotters' relation is \textit{one of conflict}, with the intention of prevailing in that conflict at the cost of the party boycotted, in the case of shunning the person shunned is an unfaithful member of the group, who has not always been an economic rival, [and the group intends to benefit the individual] by making him aware of what was involved in his severing of fellowship with the group . . . . \textsuperscript{139}
\end{quote}

There is "no intention of coercing him against his will, if he does not honestly change his intention."\textsuperscript{140}

\begin{footnotes}
\textsuperscript{138} The point here is not to fill in the chart, but to suggest that such a chart may have utility in thinking about these problems.

\textsuperscript{139} Yoder, \textit{supra} note 68, at 76, 93 (emphasis added). For an overview of state law relating to different kinds of groups—unions, churches, families—see DAVID A. FUNK, \textit{GROUP DYNAMIC LAW} (1982).

\textsuperscript{140} Yoder, \textit{supra} note 68, at 76, 93. Yoder continued with a discussion of the issue of the secondary boycott:

And whereas in a secondary boycott an unrelated third party is threatened with boycott should he deal with the boycotters' opponent, in the analogical Amish situation the third party is also a former member of the group, and therefore his relation to the group is actually not as a third party but as another second party,
One can of course reject the analysis that distinguishes labor and shunning cases. We can say, for example, that labor cases arise not in a conflict setting but in a community setting because workers often feel a dual loyalty to the union and to the employer.\footnote{On issues of dual loyalty, see FUNK, supra note 139, at 420–21 (stressing the different ultimate purposes of the two groups).} We can note that hostility within a community that reaches the point of faction and schism is as much a conflict as any other noncommunal interaction; that the labels “discipline” or “conflict,” like the labels “rebellion” or “civil war,” have to do with raw numbers and power. But perhaps if we avoid the terms “conflict” and “community” and look instead at the nature of the injury suffered, we can recreate John Howard Yoder’s distinction in a way that is less vulnerable to this criticism. We can say that the true injury in a religious shunning case is not economic (as it is in a labor case) but personal, an injury to relationships and to the self. It is ongoing, immediate, pervasive. One cannot withdraw from it to go home (as one can from the strike, or the grocery store) because it attacks the very relations that inhere in the notion of “home.” From this perspective, religious shunning is most like the case of the fourth grader whose valentine is rejected by her classmates. It results in the same sort of pain. The problem under this approach, then, is that the law does not provide remedies for all pain.\footnote{If we conclude that the state should not intervene in the religious shunning cases, this is not because the interest invaded is trivial. On the contrary, the interests touched are very large, perhaps the largest in life, but of such a quality that the state cannot do a great deal to protect them. One might say, though, that the law often does “protect” such interests through a monetary remedy. Perhaps that is what the legal system should do in these cases. If injunctions won’t work, money may at least help. What would be the impact of seriously considering various tests for equitable relief—clean hands, for example? Would the individual’s earlier participation in the shunning of another member constitute a bar to relief via estoppel? Is that why Andrew Yoder said that he opposed the ban in general?} If we think that the state can and should intervene in the case of the child in public school, does that mean that the same is true for a religious shunning case? This is not obvious, not only because adults are involved,
but also because the religious community is not a public school classroom. It is a group distinct from the state in contrast to the schoolroom which, creates a group that is linked to the state.

We can look to tort law for answers to these questions, noting that this body of law has traditionally protected relationships in various ways. However, even if tort law can offer a vocabulary to facilitate state intervention, I doubt whether the loose formulations of tort law can help us answer the normative question of whether the state should intervene. One can say that on particular facts there was no tort, or one can argue that a tort was committed, but that because of some relationship (religious, communal) the tort was privileged. One can respond, however, that the privilege was somehow abused by the group and, thus, unavailable. The result of a common-law torts analysis will be a balancing of the individual's injury (and/or the state's interest) against the community's interest and will involve some uncertain mix of the factors noted above.

Another relevant legal vocabulary is introduced (although the substantive questions remain the same) if the problem is framed as one of protecting federal constitutional rights. Yet another set of relevant concepts framing the questions is found in the current academic discussions of liberalism and communitarianism.\(^{143}\) One part of that discussion is precisely concerned with the question of the relation of the liberal state, with its traditional concern for tolerance, to groups which are themselves intolerant as, in some dimension, they must be to be the sort of groups they are. Even groups defined by casual circumstances—groups constituted as those waiting for the street light to change—exclude those who do not share those circumstances.\(^{144}\) The conversation on pluralism, in short, is inevitably linked to the discussion of inclusion, exclusion, and tolerance.

**CONCLUSION**

Present discussions of tolerance typically focus on those who are intolerant because they are racist or intolerant because their world views are not those of the Enlightenment.\(^{145}\) The present

---

143. For a view of the communitarian critique as a recurrent corrective of liberalism, see Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).
144. Is this a problem of tolerance?
145. One example of this latter point is treating religious groups that refuse to use secular textbooks as intolerant towards the values of the larger society of which both that group and other groups are a part.
legal academic conversation takes place in a context that is extremely sensitive to issues of diversity and the strengths of intermediate groups.\textsuperscript{146}

We might want to say that we are not looking for a framework within which to approach these issues because we already have one in the federal Constitution. But what do we mean by the Constitution?\textsuperscript{147} And, what understanding of the relations between groups and the state does our Constitution assume at any point in time? A position on the question of group autonomy would seem to be part of the social-political reality that underlies a constitution. This is the level of "inclination" that Chafee invoked when he analyzed the issue of internal disputes and associations as raising a classical conflict between the state and groups:

Our reaction toward any particular dispute in a club or trade union or church or college is almost sure to be influenced by our inclination toward one side or the other in this undying controversy. We shall be a bit more favorable to judicial intervention if we believe that the state is the sole ruler of all that goes on within its borders, and is the necessary safeguard of the individual against the closely pressed tyranny of associations. We shall be more doubtful of the probable wisdom of state participation in the affairs of such a group if we are accustomed to think of the state itself as just one more kind of association, which, like the others, should keep to its own functions, and which must be judged according to the value and efficiency of the services it renders us in return for rather high annual dues.\textsuperscript{148}


\textsuperscript{148} Chafee, \textit{supra} note 27, at 1029 (citations omitted). Chafee's list of groups is instructive. I think that we read Chafee's observations as if they were directed either to churches (to which deference is owed under the First Amendment) or to social clubs (the same, except, arguably, when implicated in business or professional life). Chafee, however, did not restrict his concerns in this way. His distinctions were between business (profit-making) and nonbusiness groups. The question that Chafee raised is still vital for us.

It may be that we do not seek the ideal state because, as Robert Dahl suggested, we find the costs too great. See \textit{ROBERT A. DAHL, AFTER THE REVOLUTION?} 36–37 (rev. ed. 1990).
Our sense of what the problem actually is also changes. It is no longer enough to be tolerant of internal groups in Voltaire's sense. In discussing these matters, we increasingly attempt to go beyond tolerance, to see these issues from other points of view, and to argue that our own frame of reference is only one among many possible orientations.

But we do not say that this sensitivity beyond toleration means that all things must be tolerated. That to which the group is committed might be evaluated differently at different times or places, but the principle that some things are not to be tolerated is assumed, exactly because our own self-definition requires that we do not tolerate certain things. The shunning problem replicates this issue in a miniature society.

Groups and communities require for their self-definition that some things not be tolerated as consistent with membership. As suggested earlier, if we, as the outsiders, engage in (official) empathetic and compassionate behavior towards the individual excluded, we damage the theory of multiple communities to which at least one version of our pluralism is committed. If we vindicate pluralism in theory, engaging in empathetic behavior towards the group, we fail at the same time to assist a fellow

---

For a recent defense of the "activist" state against the attacks of both the right and the left (critical legal studies) anti-statism, see Owen M. Fiss, Why the State?, 100 HARV. L. REV. 781 (1987).

149. See VOLTAIRE, PHILOSOPHICAL DICTIONARY 482–89 (Peter Gay trans., 1962) (defining toleration). The contrast here is between toleration that permits (or does not destroy) and that which does not permit (and destroys and persecutes).

This idea of toleration provides the background for many discussions of the Bill of Rights. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The idea relates historically to an intolerance that was also murderous, arising in a context in which those who knew the truth would not tolerate error. Voltaire, by contrast, wrote: "We are all steeped in weaknesses and errors; let us forgive each other our follies; that is the first law of nature." VOLTAIRE, supra, at 482.

Under the impact of egalitarianism and secularism, today we may ask not only that groups not be murdered but that they not be burdened excessively. Our view of state interference may be less official butchery than official failure to take into account group needs or conditions of survival.

150. Because if we do tolerate them, we have colluded. Here is Martha Minow's statement of the question for the state: "What mix of concerns for group rights or cultural preservation, on the one hand, and individual rights and freedoms, on the other, should a given society pursue if it hopes to respect cultural diversity without colluding in the domination or oppression of some of its own members?" Minow, supra note 146, at 102. Minow notes immediately that this statement of the issue is too simple because it omits problems of political and economic organization, coordination, etc. See id. at 102.

151. Those things also may vary and change and become more or less in accord with the sensibilities of dissidents who may gain more control over time. For example, chess clubs may change into game clubs. We, inside or outside the community, may attempt to redefine the group; "we" here may or may not include the state.
member of our own community, an Amish-American\textsuperscript{152} perhaps, who asks for our assistance. The dilemma is a constant. Its resolution is to be found in specific cases, rather than in a single principle or rule.

The feeling for pluralism reduces itself more to a stance, or a mind-set, than it does to an agenda or an answer. It becomes a preoccupation more than a thesis, relating to horizontal rather than vertical relations. Because we are here, our positions on these issues matter, whether or not we intervene. A strong central state in fact exists, and all parts of American society are touched by it. Even a group like the Amish can achieve only relative isolation in the United States.\textsuperscript{153} One can hardly see the walls in the photograph of the Amish courtroom scene, but they are there, part of the towering monument of Erastus Field.

\textsuperscript{152} See E.D. Hirsch, Jr., \textit{Cultural Literacy: What Every American Needs to Know} 98 (1987) ("It is for the Amish to decide what Amish traditions are, but it is for all of us to decide collectively what our American traditions are, to decide what 'American' means on the other side of the hyphen in Italo-American or Asian-American.").

\textsuperscript{153} Hostetler and Huntington indicate that the Amish want "limited isolation." See Hostetler & Huntington, \textit{supra} note 61, at 6. They note also that "[i]t is only in North America that the name and the distinctive practices of the Amish have survived." See \textit{id.} at 3.