

# Culture, Secularization and Democracy

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Lessons from Alexis de Tocqueville

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## Chapter 4

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### Associational life and liberty

A critical assessment of Tocqueville's *Democracy  
in America*

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## 4 Associational life and liberty

### A critical assessment of Tocqueville's *Democracy in America*

*David Thunder*<sup>1</sup>

#### 4.1 Introduction

Alexis de Tocqueville (1805–1859) understood the critical importance of associational life for a free and prosperous democratic nation as well as any modern thinker. His masterpiece, *Democracy in America*, is littered with quotations in praise of the salutary contribution of free associations to a prosperous, self-governing society. Free associations of citizens, erected for a multitude of purposes, whether philanthropic, economical, religious, recreational, or cultural, fulfil three purposes in modern democracy, according to Tocqueville: first, they permit citizens to satisfy a wide range of personal and social needs through voluntary cooperation with their fellow citizens; second, associations form civic character by cultivating habits of *independent action, responsibility, and civic participation*; and third, they permit citizens to develop associational bonds and loyalties that give them greater power than they would have as mere individuals to resist the despotic tendencies of democratic governments. Let us call these three advantages of associational life their *problem-solving, character-building, and anti-despotic* functions respectively.

From Tocqueville's perspective, the right to associate with one's peers in pursuit of purposes not established or tightly regulated by the state and its subsidiary agencies exists in permanent tension with the prerogatives of the 'people', which seem to press ever more aggressively for complete sovereignty over social life. In other words, freedom of association, understood as an effective capacity to build distinctive, coherent social groups with a life that is at least partly independent from that of 'the people', is threatened by the inexorable tendency of democratic governments to expand their jurisdiction over social life in the name of 'the people' and its sovereign prerogatives. In a post-aristocratic era, in which special privileges and prerogatives are viewed with suspicion and distrust, and differentiated legal and social status is viewed as an aberration from the equal rights of all men and women, the independent purposes and associated privileges and immunities of social groups, as corporate

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actors with a life that is not simply created at the behest of the demos, are more difficult to vindicate before the court of public opinion than perhaps in any preceding era.

Given this ineliminable tension between freedom of association and the ever more expansive ambitions of popular governments to shape the social fabric unilaterally in the name of ‘the people’ and in accordance with popular – or allegedly popular – conceptions of justice and good order, what sorts of mechanisms or principles might prevent a democratic government from over-powering associations or asserting such expansive regulatory prerogatives as to render them putty in the hands of the state? It is this question that I wish to explore in this chapter, starting out from a broadly Tocquevillian perspective on democracy and group life. While I begin by viewing the problem through a Tocquevillian lens, I ultimately seek a solution in an institutional proposal that takes us beyond Tocqueville’s predominantly cultural answer to this problem.

I begin by drawing on Tocqueville’s *Democracy in America* to unpack the problem-solving, character-building, and anti-despotic functions of free associations in a democratic society. Second, I explain why Tocqueville sees democratic culture and institutions as containing within themselves tendencies that could erode or even destroy the authority and power of free associations. Third, I probe the text of *Democracy in America* in search of clues as to how a democratic society might shore up and defend the rights and prerogatives of associational life against the despotic tendencies of democratic governments, and find that Tocqueville’s solution to this dilemma draws our attention predominantly to the critical role of social norms, civic culture, and local political institutions in curbing the despotic tendencies latent within democracy. Fourth, I argue that while Tocqueville is right to underline the critical role of habits of association and self-government, as well as their embodiment in local political institutions, his predominant focus on civic culture and local political institutions as safeguards of liberty does have some pitfalls, most notably his failure to give adequate attention to the protective function of an institutional and legal framework receptive to the non-democratic prerogatives and cultures of civil associations that do not coincide neatly with any territorial demos. Finally, I round out the argument by discussing, in a very preliminary way, how a hybrid form of federalism, incorporating non-territorial associations into the territorial pact or *foedus*, may, combined with the character and habits of a free and independent citizenry, play a critical role in protecting free associations of citizens against the despotic tendencies of democratic governments.

## **4.2 The three functions of free associations in a democratic society**

### *4.2.1 The problem-solving and character-building function of free associations*

I begin by drawing on Tocqueville’s *Democracy in America* to unpack the problem-solving, character-building, and anti-despotic functions of free associations in a democratic society. The problem-solving function of free associations is relatively straightforward. In a society deeply imbued by habits of association, citizens instinctively band together to develop solutions – naturally,

with varying degrees of success – to a multitude of social needs, from the mitigation of the effects of alcoholism and poverty to the satisfaction of recreational and sporting interests, to the funding of schools and seminaries:

Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small; Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes; in this manner they create hospitals, prisons, schools. (...) Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States.

(Tocqueville 2000, 2:2; 5.489)

Associational life not only provides citizens with tools for solving common problems; it also provides a social context favourable to the development of a character infused with civic spirit.

In a feudal society, citizens are constantly confronted with vivid reminders of their dependence on others and others' dependence on them because of their integration within a complex network of social ties over which they have limited control. In a democratic society, on the other hand, social relations are more contractual, commercial, and voluntaristic, so citizens can more easily lose sight of their intimate dependence upon others and others' dependence upon them, and retreat into an attitude of self-centred complacency, in which the concerns of others become alien or indifferent to them.

Tocqueville uses the term 'individualism' to capture this steady retreat from the public sphere. 'Individualism', he says:

is a reflective and peaceable sentiment that disposes each citizen to isolate himself from the mass of those like him and to withdraw to one side with his family and his friends, so that after having thus created a little society for his own use, he willingly abandons society at large to itself.

(Tocqueville 2000, 2:2; 2.482)

For Tocqueville, there is a tight relation between democracy and individualism. Democracy, by weakening the visible bonds between social classes and between past, present, and future generations, 'hides (each man's) descendants from him and separates him from his contemporaries; it constantly leads him back toward himself alone and threatens finally to confine him wholly in the solitude of his own heart' (Tocqueville 2000, 2:2; 5.489).

The principal antidote to individualism and the social apathy it induces is the habit of associating with one's peers to achieve one's ends. Whereas habits

of cooperation with others are practically inborn in feudal societies, due to the thick web of interdependent relations people are born into, habits of social cooperation have a more *intentional* or *artificial* character in democratic societies. The necessity of cooperation, beyond the sphere of the household, may present itself in certain well-defined contexts, such as economic exchange, but in general, is not thrust upon people in a democratic society by pre-existing social structures of mutual dependency. Democratic citizens can voluntarily unite within associations to further common purposes. These artificial associations provide the context within which habits of association are nurtured. Regular participation in the life of associations draws citizens out of the narrow sphere of the household, broadening their sympathies and liberating them from ‘the solitude of (their) own hearts’.

On Tocqueville’s account, there are two basic types of artificial association in a democratic society: *political* and *civil*. Tocqueville’s paradigmatic example of a political association is a local town hall in which the common affairs of citizens are examined and citizens freely deliberate about how to further common interests. Only one sort of political association can realistically draw citizens out of themselves, namely, political associations operating at a local level. Here, citizens have a clear incentive to participate in common deliberations and raise their sights above their petty concerns, namely, the desire to defend their private interests. For only at the local level, according to Tocqueville, can citizens see, with relative ease, how public decisions tangibly impact their private destinies:

Only with difficulty does one draw a man out of himself to interest him in the destiny of the whole state, because he understands poorly the influence that the destiny of the state can exert on his lot. But should it be necessary to pass a road through his property, he will see at first glance that he has come across a relation between this small public affair and his greatest private affairs, and he will discover, without anyone’s showing it to him, the tight bond that here unites a particular interest to the general interest.

(Tocqueville 2000, 2:2; 4.487)

Civil associations, though directed to narrower, more private ends than political associations, nonetheless broaden a person’s horizon and lift him out of the narrow confines of his immediate household concerns. Their ends could be considered intermediate between the purely private ends of the household and the purely public ends of the municipality or town hall assembly. The motor of civil associations is the desire to advance some cause or end that cannot be realised by one or two individuals alone. Nonetheless, this desire seems to translate into associations with more frequency and intensity in the United States than in Europe, according to Tocqueville, so one would infer that there is a significant element of cultural mores or habits at work as well.

Tocqueville does not draw any sharp boundaries between commercial and civil associations for understandable reasons. After all, many commercial

associations, such as community-based businesses and cooperatives, do effectively draw citizens out of the inward-looking attitudes of the private sphere. Nor does Tocqueville define civil associations in terms of the level of participation they entail. Presumably, there is a broad plurality of types of civil association, some more participatory in character than others. Nonetheless, a purely passive civil association would probably be of little interest to Tocqueville, given that the advantage he sees in associations is their capacity to motivate citizens to care about goods beyond the sphere of the household.

Tocqueville observes that ‘as soon as several of the inhabitants of the United States have conceived a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other, they unite’ (Tocqueville 2000, 2:2; 5.492). Like the habit of associating politically, the habit of associating civilly has a *civilising* effect on people, making them less inward-looking or individualistic, and more outward-looking or public-spirited. As Tocqueville puts it:

Among the laws that rule human societies there is one that seems more precise and clearer than all the others. In order that men remain civilized or become so, the art of associating must be developed and perfected among them in the same ratio as equality of conditions increases.

(Tocqueville 2000, 2:2; 5.492)

#### *4.2.2 The anti-despotic function of free associations*

Besides the problem-solving function of free associations of citizens and their salutary influence over the character and dispositions of citizens – in particular, their moderating effects on individualism – Tocqueville sees free associations as a vital counterweight to the despotic tendencies of the democratic state. The rise of the modern democratic state, as Tocqueville observes, has gone hand in hand with the dismantlement of the rights and privileges of rival corporate actors, leaving individual citizens ever more defenceless before the sovereign prerogatives of democratic rulers and administrations:

(...) all the diverse rights that in our time have been successively taken away from classes, from corporations, from men, have not served to elevate new secondary powers on a more democratic base, but have been concentrated on all sides in the hands of the sovereign. Everywhere the state comes more and more to direct the least citizens by itself and alone to conduct each of them in the least affairs.

(Tocqueville 2000, 2:4; 5.652)

The interposition of independent secondary powers, capable of resisting the centralising impulses of political rule, occurred almost effortlessly in a feudal, aristocratic society because an aristocratic mind automatically recognised a robust plurality of authorities and corporations. In an aristocratic era, no

single actor could plausibly secure enough social power and recognition to impose its designs upon all, because secondary powers were *built into the social landscape* by long-standing customs and deeply ingrained social and economic relations. In a democratic era, by contrast, in which the social landscape was populated by *equal citizens* freed from feudal ties, secondary powers were no longer a natural feature of the social landscape: they had to be constituted *artificially* through the consent of citizens:

The idea of secondary powers, placed between sovereign and subjects, naturally presented itself to the imagination of aristocratic peoples (...) because those powers contained within them individuals or families whom birth, enlightenment, and wealth held up as without peer and who seemed destined to command. For contrary reasons, this same idea is naturally absent from the minds of men in centuries of equality: it can only be introduced *artificially* then, and it is retained only with difficulty; whereas they conceive, so to speak without thinking about it, the idea of a lone central power that leads all citizens by itself.

(Tocqueville 2000, 2:4; 2.640, emphasis added).

Free associations, by uniting the power and prestige of many particular individuals, can erect corporate actors capable of standing up to the authority of the state just as aristocratic individuals and bodies could rival the authority of the King:

when plain citizens associate, they can constitute very opulent, very influential, very strong beings – in a word, aristocratic persons. A political, industrial, commercial, or even scientific and literary association is an enlightened and powerful citizen whom one can neither bend at will nor oppress in the dark and who, in defending its particular rights against the exigencies of power, saves common freedoms.

(Tocqueville 2000, 2:4; 7.668)

#### **4.3 The threat democratic culture and institutions pose to free associations**

The relation between democracy and free associations is ambivalent from Tocqueville's perspective. On the one hand, the equal social conditions favoured by democratic culture and institutions free citizens from the bonds of rigid social hierarchies and age-old institutions, leaving them at liberty to form new associations with their equals. On the other hand, Tocqueville perceived serious dangers lurking within democratic culture and institutions for the future of free associations. Democracy provides three conditions that together favour the regulation and control by a centralised administrative state of the most minute details of associational life, even to the point of destroying

the independence and reasonable prerogatives of non-state associations: first, a hankering by citizens after equal and uniform conditions for all, making them impatient with the notion that associations may enjoy robust autonomy, privileges, or prerogatives;<sup>2</sup> second, a deeply ingrained narrative of popular sovereignty that resonated with the democratic spirit of the age, elevating the prerogatives of the sovereign above those of rival associations; and third, a suite of powerful taxing and regulatory tools concentrated in the hands of a centralised administrative state. Once the strong prerogatives of princes, priests, and nobles were set aside, the democratic state could freely assert its democratic mandates over society and find a citizenry predisposed by its democratic spirit to view the directives of the State as authorised by ‘the will of the people’ and thus virtually unquestionable.

Indeed, the State could become a sort of ‘soft despot’ or gentle Master who looked out for citizens’ most minute interests, removing from them either the need or the incentive to associate to satisfy their everyday needs.

[This] ‘immense and tutelary power’ ‘willingly works for (citizens’) happiness; but it wants to be the unique agent and sole arbiter of that; it provides for their security, foresees and secures their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?’

(Tocqueville 2000, 2:4; 6.663)

The principal instrument of paternalism, in Tocqueville’s view, was the administrative, regulatory state, which could extend its regulatory tentacles into every aspect of social life, placing exhausting regulatory obstacles in the path of human intelligence and initiative: ‘Subjection in small affairs’, he remarks, ‘little by little (...) extinguishes (citizens’) spirits and enervates their souls’ (Tocqueville 2000, 2: 4; 6.665).

All of these dangers can be summed up by the tendency of the democratic spirit to elevate the will, interests, and prerogatives of the demos and its trustees above those of rival actors, whether individual citizens or groups acting in a collective capacity. Citizens of democratic societies, according to Tocqueville:

willingly enough grant that the power representing society possesses much more enlightenment and wisdom than any of the men who

2 As Tocqueville puts it, ‘as each (citizen) sees himself little different from his neighbours, he hardly understands why the rule that is applicable to one man should not be equally so to all others. The least privileges, therefore, are repugnant to his reason. The slightest dissimilarities in the political institutions of the same people wound him, and legislative uniformity appears to him to be the first condition of a good government’ (Tocqueville 2000, 2:4; 2.641).



compose it, and that its duty as well as its right is to take each citizen by the hand and lead him.

(Tocqueville 2000, 2:4; 2.641)

In this sort of democratic culture, those who cannot credibly claim to speak in the name of ‘the people’ at large, such as the members of free associations and their representatives, would tend to be viewed as subordinate or inferior to representatives of ‘the people’ such as legislators and government ministers.

This state of affairs puts free associations in a rather precarious position because the authority of ‘the people’, or a majority thereof, or the authority of anyone who can make a credible claim to speak on behalf of ‘the people’, can easily exert itself over the social fabric, even to the point of destroying the vibrancy and independence of free associations, or subsuming their privileges and prerogatives within the bosom of its own constitution, to be authorised or de-authorised at its own good pleasure. The first half of the 20th century puts before us especially vivid illustrations of these dangers, with the emergence, within modern democracies, of authoritarian and fascist movements making appeals to the sovereignty and prerogatives of ‘the people’, prepared to persecute or even kill ‘undesirable’ minorities.

#### **4.4 How culture and institutions may protect free associations from democratic despotism**

So far, we have seen that from Tocqueville’s perspective, the democratic spirit, and the democratic state buoyed up by narratives of popular sovereignty, pose a grave threat to the integrity and vibrancy of free associations because democratic citizens are predisposed to place an inordinate amount of faith in the authority of individual and corporate actors that can make a credible claim to act in the name of ‘the people’. Furthermore, actors with a democratic mandate are not confronted with powerful rivals with the sort of effective power and public prestige that princes, lords, and bishops enjoyed in a more aristocratic era. On the contrary, many citizens are relatively naked and defenceless before the modern democratic state – and even when they do associate, if they do not manage to gather a very large number of fellow citizens into a common enterprise, their enterprises can be crushed or regulated into compliance with relative ease by those who wield the administrative power and democratic authority of a modern state. Who, after all, may successfully stand their ground before the power and majesty of the ‘sovereign people’ and the ‘people’s parliament’?

Under these circumstances, what precisely is it that stands in the way of democratic despotism, the tyranny of the majority, or the tyranny of demagogues who pretend to govern in the name of ‘the people’? What resources do citizens have to defend their associations against the threats of administrative colonisation and micromanagement at best, outright aggression at worst, by governmental agencies acting in the name of the people? Tocqueville does not

often address this question in a systematic way, and to the best of my knowledge, never quite formulates it in this precise manner.

But by putting the pieces together, we can infer at least *three Tocquevillian convictions* that can help us answer this question. First, the most fundamental driving force of social tendencies, for Tocqueville, is *culture* – that is, social customs, collective narratives, self-understanding, and habits – rather than specific institutions or organisations. Second, even if culture is more fundamental as an explanatory variable than institutions, well-designed institutions can both foment and complement cultural tendencies. Third, two dimensions of a democratic society, in particular, can save it from the despotic drift of democratic power – first, the habit of association, and second, the existence of vibrant and consequential political institutions operating at the local level. These two ingredients of a democratic society can complement and strengthen each other in holding democratic despotism at bay.

The habit of association is not automatic or universal; for as Tocqueville himself remarks, it is much more ingrained in the American culture and way of life than in, say, French culture and way of life. Tocqueville understands that the habit of association is what saves Americans from becoming completely inward-looking and self-absorbed, and what prevents them from becoming so isolated from each other that the state would have to step in to solve the most elementary of social problems. A culture imbued with habits of association geared towards a variety of ends – whether philanthropic, commercial, religious, or political – helps to preserve the sort of character that is less introspective and more independent and public-spirited, and thus less liable to delegate to the state the management of a citizen's day-to-day life.

But whether this habit takes root in a society, or proliferates across it, seems to be partly a function of happenstance or good luck. Presumably, the type of education children receive at home and in school could help to cultivate the art of association; undoubtedly, the inter-generational upkeep of civil associations of various sorts could help to transmit the habit of association to future generations. But Tocqueville restricts himself, for the most part, to remarking upon the force of this habit on the American continent, and its salutary ethical, social, and political benefits. In other words, Tocqueville seems to view the principal support of free associations as a culture in which the art of association *happens to proliferate*.

Having said that, Tocqueville does not restrict himself to a discussion of the cultural basis for free and independent associations. He also considers local political institutions to play a vital role in nourishing the art of association. Tocqueville observes that it is only when citizens can see a clear positive connection between their private interests and their participation in political decision-making that they are motivated to exercise their civic rights in political assemblies. The types of decisions that can vividly interest citizens and draw them into the process of political decision-making are typically decisions that have a visible, tangible impact on the quality of their day-to-day lives, the amount of money in their pockets, or their property rights (Tocqueville 2000, 2:2; 4.487).

These types of locally salient and consequential decisions are made quintessentially in local political assemblies such as town halls. It is in these sorts of assemblies that citizens venture out of their private pursuits to help settle issues of common concern that affect their private pursuits: ‘When citizens are forced to be occupied with public affairs, they are necessarily drawn from the midst of their individual interests, and from time to time, torn away from the sight of themselves’ (Tocqueville 2000, 2:2; 4.486). The logical conclusion of this argument is that if we want to keep the habit of association and public-spirited attitudes alive and well, we need local political decision-making structures to have real clout or effective power over public affairs and to be genuinely susceptible to the influence of ordinary citizens.<sup>3</sup>

Of course, one might apply a similar logic to civil associations: if they are structured in such a way as to (1) wield effective power to solve citizens’ practical problems; and (2) permit citizens to influence their success and outcomes in practical ways, whether through decision-making or some other form of contribution, then civil associations can also offer citizens significant incentives to come out of their private affairs and at least concern themselves with ‘semi-public’ affairs of a larger social group. Furthermore, the habits of public deliberation and governance exercised in the context of associational life may be readily transferrable to other social contexts. While Tocqueville would surely not deny any of this, curiously he does not spend a lot of time discussing the power, prerogatives, and institutional structures of civil associations, their formal recognition within the political system, and the way their institutional design and context may either strengthen or inhibit the habit of association. Yet this is a matter of great importance for the future of democratic societies and is by no means of secondary importance for citizens’ capacity to resist democratic despotism.

#### **4.5 The institutional gap in Tocqueville’s analysis of associational freedom**

To sum up, there are two principal resources Tocqueville identifies within a democratic society for holding the despotic drift of democratic power at bay: (1) local political institutions that provide citizens with accessible decision-making structures giving them real power over their issues that affect their

3 As luck would have it, local townships in the United States did appear, at least in Tocqueville’s time, to enjoy substantive independence and prerogatives in what concerned their inner life. As Tocqueville remarks, ‘The townships generally submit to the state only when it is a question of an interest (...) which they share with others. For all that relates to themselves alone, the townships have remained independent bodies’ (1:1; 5.62). Having said that, the internal culture and institutional structure of the townships also have a decisive bearing on the extent to which citizens exert a direct influence over local government. For example, Tocqueville is of the opinion that ‘the spirit of the township is less awake and less powerful’ ‘as one descends toward the south (of the United States)’ (1:1; 5.76).

day-to-day lives and (2) a culture in which the habit of association is well-engrained, giving birth to lively associations able to respond to citizens' needs as well as, or better, than the state. This is all good, as far as it goes. But it remains unclear why the culturally engrained habit of association, and the associations to which it gives birth, would be powerful enough to resist the credible sovereignty claims of the territorial demos, whether the demos of the municipality or town assembly or the demos that authorises the state, given that local associations would have a hard time claiming to possess a democratic mandate comparable to that of the demos at large.

There are three reasons to doubt that the cultural habit of association would be sufficient to hold back the despotic tendencies of democratic power. First, discrete associations are often populated by small minorities, whose joint political and economic power is easily outweighed both by the voting power of the majority of the political community and the combined resources they place at the disposal of their democratic representatives.

Second, in a culture in which uniform positive law frequently takes precedence over local and variable customs, it is relatively easy for a general regulator, equipped with legislative power, to hem in or even destroy the privileges and prerogatives of civil associations within its ambit, given that particular associations do not usually enjoy public recognition as rival legislators or sources of law in their own right, except in a highly conditional sense, through freedom of contract modified by the sovereign regulations and policies of territorial governments.

Third, when an actor with a democratic mandate comes head-to-head with an association without a comparable democratic mandate, opposing such an actor is widely perceived as opposing the will of 'the people' at large, which is virtually unthinkable in a democratic culture. The will of a democratic parliament or assembly, which claims to serve as a proxy for the general will of the people, is difficult to resist by invoking the prerogatives of local associations, which seem alien to the logic of popular sovereignty and democratic authority. Invoking a generic freedom to lawfully associate can only get one so far, given that the lawful bounds of associational life are fixed, in practice, by the democratic sovereign.

Habits of association can be degraded and eroded over time, particularly in a culture in which the voice and prerogatives of the majority are constantly echoed through every corner of society, and backed up by a deeply ingrained narrative of democratic sovereignty. Local political institutions might be more accommodating towards local associations than a national parliament, but they are still susceptible to co-option by a numerical majority and may have limited sympathy for the claims of associations that find themselves in a voting minority. So neither the habit of association nor the presence of local political institutions are likely to offer sufficient protection to free associations against the risk of democratic despotism. Yet, Tocqueville does not appear to explicitly identify any institutional resources beyond democratic assemblies for fortifying or protecting free associations against democratic despotism. Why might this be?

It can hardly be explained by the notion that the institutional and legal standing of associations was fixed in stone or immune to change. Had Tocqueville put his mind to it, he might have explored potential mechanisms within the law itself, or within the design of representative institutions, for extending greater recognition to the rights and prerogatives of free associations. Given his rich sociological imagination and his careful analysis of the benefits of local political participation, surely he would have had the intellectual capacity and imagination to come up with institutional proposals for shoring up the independent prerogatives of free associations? It is therefore somewhat puzzling that he did not take his analysis of associational life any further than he did. The puzzle could also be framed as follows: Why is there such a remarkable asymmetry between Tocqueville's attention to the institutional basis for *political* associations, and his relative inattention to the institutional basis for *civil* associations?

In reality, we can only speculate about Tocqueville's reasons for not addressing the role of institutional structures beyond local political institutions in protecting free associations from a potentially overbearing demos. Here is one possible explanation: Although Tocqueville has a keen interest in the conditions most conducive to a functional and just democracy, his normative reflections are strongly rooted in his empirical observations, and he does not tend to theorise at much of a distance from what he observes on the ground. He hopes to learn what he can from the great American experiment, not produce a new institutional model of his own. From Tocqueville's own description of associational life in America, it appears that citizens largely developed the life of their associations based on their own initiative, and the relation between territorial political institutions and non-territorial associations was largely informal and spontaneous rather than defined by elaborate legal regimes.

Furthermore, representation in democratic assemblies was typically not drawn from associations as corporate bodies, but from the population at large, which suggests that associations derived their public standing from a combination of customary recognition and voting clout, rather than from their *formal integration* within the democratic process. The lack of formal integration of associations within the democratic process is made clear by Tocqueville's detailed and colourful description of local political institutions, which are formally constituted by a democratic mandate rather than by associational prerogatives. Of course, none of this rules out the capacity of local associations to influence legislative and policy outcomes. But this influence seems to have been part of the 'messy business' of politics, rather than a formal, institutionalised component of democratic life.

In what follows, I will venture tentatively onto the terrain of constructive institutional design, going beyond Tocqueville's tendency to focus predominantly on the description and assessment of existing institutional structures. A close reading of Tocqueville provides some good starting points for (1) identifying a *limitation inherent in modern democratic societies* – namely, their vulnerability to democratic despotism, and (2) identifying the limits of well-established cultural and institutional resources for tackling this limitation, and (3) proposing a direction of reform that might begin to overcome the limitations of these well-established solutions to the problem of democratic despotism. The direction of reform I have in

mind concerns the institutional relation between civil (non-territorial) associations and political (territorial) associations. Tocqueville prepares the way nicely for such a proposal insofar as his own description of American democracy highlights the need for a stronger institutional basis for free associations, an institutional basis that cannot be easily swept aside by the prerogatives of ‘the people’.

#### **4.6 Filling the institutional gap: How hybrid federalism might provide superior institutional protection to free associations**

The asymmetry in Tocqueville’s treatment of the institutional dimension of political and civil associations is striking. Specifically, it is remarkable that Tocqueville discusses the importance of local institutions of self-government in the *political* sphere at some length, yet leaves the institutional basis for independent initiative and self-government in *civil associations* rather nebulous from an institutional perspective. If we are to take his warnings to heart concerning the disproportionate prestige and power of democratic governments compared with the civil associations that fall under their sway, and the ease with which the democratic spirit elevates the demos above its parts, then it is unlikely that the *habit* of association, by itself, will be sufficient to protect associational life from democratic despotism. Associations themselves need some form of *institutional protection* that is not easily overcome by the ephemeral passions of a majority or the potentially despotic ambitions of a democratic assembly.

Territorial federalism, with its doctrine of reserved powers – the notion that those powers not explicitly delegated to the federal government are retained by local units of government – offers some important institutional protections against the accumulation of political power at the centre. Furthermore, insofar as the rights and privileges of cities and townships are laid out clearly in charters or state constitutions, this provides additional institutional protection for the autonomy of local political actors. What is a lot less clear is how the rights and prerogatives of civil or *non-territorial* associations are institutionally shielded, within a federal republic, against usurpation or colonisation by territorial political actors, acting in the name of ‘the people’ or the political community at large, whether the people of the nation, State, or municipality.

In principle, free associations should be protected in their activities and constitutions by freedom of contract, religion, and association. For example, a state would have a hard time dissolving a church or ecclesial community without finding itself sued in a court of law for violating freedom of religion, and states cannot disband voluntary associations willy-nilly without falling foul of the usual constitutional protection afforded to freedom of association. However, there is a lot of grey area between egregious attacks on civil associations on the one hand and unwavering respect for their integrity on the other. Since lawmakers have the right and capacity to regulate associational life, decide what counts as a ‘charitable organisation’, determine whether and

to what extent associations are liable to taxation, and even define the conditions under which an organisation can be recognised as an association for legal purposes, there is always a danger that an association whose goals are not consistent with the ideology or values of the majority or of a democratic government may be harassed, persecuted, or constrained in its activities even if it is not obviously harming any public interest.

The only way to robustly protect against this sort of outcome is to reconceive the relation between democratic power and the power and prerogatives of civil associations, in such a way that civil associations are viewed as *independent stakeholders* in the democratic project, with a standing in the public square that is not easily erased by shifting political coalitions or tyrannical majorities. Free associations must be somehow integrated into the social pact, and their right to self-regulate, within certain limits of public order, must be legally recognised and must enjoy substantial immunity to the efforts of democratic assemblies to remake associational life in their own image and likeness. In short, the territorial pact or *foedus*, which, in a democratic era, integrates territorial political actors and individual citizens, should be reframed in such a way as to integrate *non-territorial* actors as well.

The tradition of federalism, though currently strongly biased towards territorial units of governance, could potentially be rehabilitated in such a way as to render it more sensitive to the standing and rights of *non-territorial* groups. One of the distinguishing features of the federalist tradition, in all of its manifestations, is a special sensitivity to the need for complex governance arrangements to incorporate diverse social groups, while simultaneously permitting them to preserve some independent prerogatives of governance or domains of action.<sup>4</sup> A cooperative arrangement is instituted without radically subordinating the cooperating units to a single, homogeneous logic of decision-making and action. Daniel Elazar captures this spirit of federalism about as well as anyone, describing it as a judicious combination of self-rule and shared rule:

Federal principles are concerned with the combination of self-rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups, and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the

4 Within the short space of this chapter, I do not pretend to trace out the historical evolution and leading ideas of diverse strands of federalism. For a representative sample of the literature on federalism, I would refer the reader to works like Elazar 1987; King 1982; Frey and Eichenberger 2004; Kriesi and Trechsel 2008; Ostrom 1991; Althusius 1995/1614; Friedrich 1966; Spruyt 1996 (Spruyt's account of the Hanseatic League is particularly instructive); and of course, Hamilton, Madison, and Jay 2015.

common government are conducted in such a way as to maintain their respective integrities.

(Elazar 1987: 5)

There are two different ways the *foedus* (variously translated as treaty, agreement, or pact) can be unpacked. On the one hand, we can construe the *foedus* as being agreed to by governments acting in the name of *territorial* populations; on the other hand, we can construe the *foedus* as being agreed to by governments or rulers acting in the name of *non-territorial* groups. Although some federalist thinkers, most notably Johannes Althusius (1995 [1614]), understood a federal polity to combine *both territorial and non-territorial* units of governance, the general tendency of modern federalist theory has been to conceive the units to be federated as territorially defined. Thus, federalism is widely understood as a method of territorial or inter-territorial governance, rather than as a method for coordinating *both territorial and non-territorial* units of government. The strong territorial bias in many treatments of federalism (including Tocqueville's), which tend to use the term in reference to territorially defined relationships, might be explained by the fact that territorial relationships have become extraordinarily salient with the rise of the modern state, while non-territorial relationships have become comparatively less salient, especially in discussions of politics and power, with the dramatic decline of feudal relationships and the perception of non-territorial relationships as sources of oppression rather than liberation.<sup>5</sup>

It seems to me that the danger of democratic despotism cannot be successfully held at bay unless we remedy this long-standing neglect of the role of non-territorial corporate actors in the constitutional scheme of a modern nation. Ignoring them or treating them as nothing more than accidental by-products of individual choice fails to protect them as independent actors from domination by the demos and its representatives. Because federalism already contains within it the seeds of respect for group life, it seems like a very promising starting point for institutionalising better protections for the life and reasonable rights and prerogatives of free associations. In this section, I wish to gesture towards a form of federalism capable of more successfully integrating the non-territorial dimension of associational life.

It is hard to imagine a functional society bereft of any form of territorial governance. We are embodied beings who inhabit physical spaces. Our neighbours share our physical surroundings. Many of our vital needs depend

5 My point is not that feudal relationships should be resurrected, but that our historical abandonment of feudalism has narrowed our imagination, making territorial relations artificially salient and rendering non-territorial relations artificially marginal. Johannes Althusius (1557–1638) was one of the last prominent theorists of federal governance who showed great sensitivity to the role of non-territorial associations in the constitution of the republic.



on forms of coordination that are naturally tied to specific geographic units – whether planning and zoning laws, policing, city by-laws, rules of public order, or investment in local building projects or road infrastructure. So it makes perfect sense that the jurisdiction or functions of civil authorities would be defined territorially.

So far, so good. But a moment's reflection reveals that there are many coordination needs for which territorial governments are either motivationally or epistemically inadequate. For example, local schools require rulers who are privy to the intimate workings of the school and its operating ethos and are motivated to show special care and concern for its mission. Similarly, local businesses require their own managers who have intimate, inside knowledge of their workings and are both motivated to care for their employees and capable of setting policies and strategies that help the business thrive and expand over time. Similar considerations can be brought to bear on a broad range of other non-territorial associations.

If we assume that the purpose of civil order is to provide a normative and institutional framework within which citizens can pursue their goals in a more or less orderly, functional, and peaceful fashion, then federalism, as an account of civil order, must be capable of accommodating a variety of different layers or forms of social order within it. A purely territorially based political order that is blind to the role of non-territorial or civil associations, or even hostile to their positive contribution to the life of citizens, could easily descend into a dysfunctional tyranny or oligarchy. A territorial political order, however decentralised, that lacks reliable and socially recognised mechanisms for incorporating the needs and interests of non-territorial associations could inadvertently alienate large chunks of the citizenry by imposing policies that are harmful to large groups of citizens – whether accidentally or by design.

Another reason why federalism needs to pay close attention to non-territorial associations is that one of the crucial checks on political despotism is the power of civil associations to erect independent normative orders that can rival that of the municipality or State, or provide a counterweight to regulatory overreach by municipal or State authorities. Checks on power contained *within* territorial governments are not sufficient because majorities within territorial governments can impose their wishes and policies upon non-territorial associations if such associations are numerically weak or do not muster much political power.

I do not want to suggest that territorial accounts of federalism are completely blind to the role of civil society associations in supporting a shared civil order and enabling a rich variety of forms of human flourishing. There is obviously an acknowledgement by many advocates and theorists of federalism that federated governance requires a culture friendly to the principles of federalism, which seems to imply an important role for civil society groups. Furthermore, federalism normally accepts standard liberal principles of freedom of association and limited government, which imply a certain sphere of associational freedom and autonomy

and a certain degree of immunity to state regulation in non-state associations.<sup>6</sup> However, until the central account of federalism explicitly integrates non-territorial groups within its conception of governance and civil order, it will remain incomplete and potentially alienating to groups that are excluded from the social compact, inadequately considered by public policies, or regulated in ways that contradict or sabotage their missions and purposes.

A mixed or hybrid account of federalism would conceive the groups to be federated along two dimensions. First, territorial units, such as municipalities or regions, and second, non-territorial units, such as schools, universities, trade guilds, local businesses, churches, and cultural, artistic, and sporting associations. To be *federated*, in this context, means to be (1) articulated into moderately scaled units capable of joining the foedus of the association (for example, the constitution of an athletic federation) and (2) incorporated into the wider social compact, as a party to the *foedus* – the agreement or treaty or constitution that guides and binds the common life of a given territory.

A mixed account of federalism would have some clear advantages over a more narrowly territorial account. First, it would permit social groups to conserve and defend their *internal purposes and logics of action* in their interactions with other parts of society, by recognising their special prerogatives of action and giving them a corporate voice and standing in political life, instead of dissolving them into a cacophony of individual voices, powerless to resist the prerogatives of the ‘sovereign people’. Second, by fortifying the standing and prerogatives of non-territorial groups, a mixed account of federalism offers an invaluable resource for combating despotic and oligarchic tendencies in local, regional and national governments, which may exploit fickle popular majorities or achieve partisan ends by cobbling together electoral coalitions that may not even represent a majority of citizens.

#### **4.7 In conclusion**

I began this Chapter by highlighting the critical role of free associations of citizens in solving social problems, building public-spirited character, and limiting the despotic tendencies of democratic governments. I then considered in greater detail why modern democracy poses a serious threat to associational life, from Tocqueville’s perspective, primarily on account of its tendency to elevate the will of ‘the people’ above the will and interests of the free associations that make up the fabric of society. I found that Tocqueville’s answer to this threat, while paying close attention to the formative role of civil associations and decentralised and participatory democracy in drawing citizens out of their

6 I say ‘a certain degree’ of immunity and autonomy because it is always understood that civil associations are limited by values like the rule of law and civility, especially within a society whose laws already grant them a reasonable sphere of autonomy.

private concerns, was strangely silent about potential institutional mechanisms for protecting civil associations from domination by territorial political actors.

I proposed to fill this institutional vacuum by outlining some guiding principles for integrating and recognising the standing of *non-territorial* actors within the federal scheme. Admittedly, this constructive proposal needs to be fleshed out in greater detail, and its full implementation would require far-reaching changes to the prevailing civic culture of Western societies.

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