

ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

The Non-Fungible Value of Local Associations and its Invisibility to Law

Maria Cahill¹ 

¹University College Cork, Cork, Ireland

Email: maria.cahill@ucc.ie

(Received 16 May 2023; accepted 16 May 2023)

Abstract

This article centers on the idea that there is a non-fungible value inherent in local associations. It uses the work of Paul Kahn to animate what that value might be and to consider why law might not have a clear sightline to it. In *Democracy in Our America*, Kahn, leaning on Tocqueville's earlier work, reflects on the nature of volunteerism in local self-government and the value of local associations. Drawing on his experience-based account of the practice of local self-government, I suggest that local associations have a non-fungible value which comes in three dimensions: The dimension of care, the dimension of character, and the dimension of forum vibrancy. In *The Cultural Study of Law*, meanwhile, Kahn considers what the practice of the rule of law looks like and suggests that law is blind to other possible ways of framing and analyzing events. Building on this perspective, I reflect on how the practice of the rule of law ends up being blind to the value that is intrinsic to the local associations that vivify local communities. Through this lens, we can also understand more fully than has been possible to date why legal codifications of the principle of subsidiarity fail to result in a genuine preference for proximity.

Keywords: Local government; associations; democracy; subsidiarity; freedom of association; Paul Kahn; Tocqueville

A. Introduction

This article centers on the idea that there is a non-fungible value inherent in local associations. It uses the work of Paul Kahn to animate what that value might be and to consider why law might not have a clear sightline to it. In Kahn's *Democracy in Our America*, Kahn, leaning on Tocqueville's earlier work, reflects on the nature of volunteerism in local self-government and the value of local associations. Drawing on his experience-based account of the practice of local self-government, I suggest that local associations have a non-fungible value which comes in three dimensions: The dimension of care, the dimension of character, and the dimension of forum vibrancy. In Kahn's *The Cultural Study of Law*, meanwhile, Kahn considers what the practice of the rule of law looks like and suggests that law is blind to other possible ways of framing and analyzing events. Building on this perspective, I reflect on how the practice of the rule of law ends up being blind to the value that is intrinsic to the local associations that vivify local communities. Through this lens, we can also understand more fully than has been possible to date why legal codifications of the principle of subsidiarity fail to result in a genuine preference for proximity.

By suggesting the term “non-fungible value” of local associations, I seek to draw attention to the benefits of local associations that are not easily replaceable or interchangeable, that cannot easily

be substituted by something of equal value. First, use of this term is designed to draw attention to the irreducible dimensions of these local associations that are uniquely valuable for their own sake. Three non-fungible dimensions are identified in this article: The dimension of care, the dimension of character and the dimension of forum vibrancy. These three dimensions are mutually dependent for their development and mutually reinforcing in their synergy, such that although they can be distinguished intellectually, in practice they are non-disaggregable. Second, use of this term is designed to draw attention to the fact that it is difficult for *the state* to replace the associations in these ways. It is conceivable that other associations might be able to replicate or even to better the value provided by any particular local self-government association, but because it is never easy to establish an association in the first place and because each association will have a different way of engaging with the three dimensions, we can still maintain that, in principle, there is a non-fungibility to the value provided by specific associations.

In referring to “local self-government associations” or simply “local associations” throughout this article, I intend to refer to those associations that operate at local level to promote the good of local communities. At this level, it is difficult to draw firm distinctions between public and private associations, or between those that are political and those that are not political. Everyone here is a volunteer, and every association relies on human cooperation and compromise in the achievement of goals that are intended to increase civic welfare. One could certainly argue that the local town council is more obviously oriented towards the *public* good than, for example, the young adult debating club or the Tidy Towns volunteers or the local soup kitchen. But the members of those associations might contest that. Similarly, one could argue that the local town council is more obviously oriented towards the public *good* than, for example, the under-8s swimming club, or the men’s shed, or the cancer survivors’ choir. But that must be debatable, too. Kahn does focus on local self-government, and mostly on what he describes in one place as “the committees, boards, civic organisations that carry out the town’s affairs and perform the work of public administration and public service.”¹ At the same time, he is not blind to the range of associations that pursue ostensibly non-political purposes but in their own eclectic ways contribute significantly to the public good of the local community by bringing people together, even if only to allow them a space in which to develop a sense of identity, belonging and solidarity.² It is worth noting that, in their attentive and lengthy defenses of associations operating at local level, neither Tocqueville nor Kahn develops a systematic typology for distinguishing between public associations and private associations, formal associations and informal associations, publicly mandated standing institutions and spontaneously arising *ad hoc* arrangements, and so on. That is not to say that such a typology might not be helpful for some purposes, but to say that there is a need to recognize and leave space for fluidity here. Therefore, local associations and local self-government associations will be used interchangeably in this context.

This article is structured in the following way: Part B contemplates the practice of local self-government, as understood through the eyes of Tocqueville and Kahn, acknowledging the great decline in levels of volunteerism and participation, and exploring the factors that may explain this. Part C draws from Kahn’s experience-based reflections on local self-government to propose the non-fungible value of local associations across three dimensions of care, character, and forum vibrancy. Part D, meanwhile, considers the practice of the rule of law and the ways in which law presents itself to the world as the authoritative means by which to understand and frame a specific event. Part E uses this conception of the practice of the rule of law to explain why law has no sightline to the dimensions of care, character, and forum vibrancy that constitute the non-fungible value of local self-government associations. This section includes consideration of the principle of subsidiarity and argues that Kahn’s understanding of the practice of the rule of law offers an explanation for why codification of the principle of subsidiarity ends up failing to significantly protect local self-government.

¹PAUL W. KAHN, DEMOCRACY IN OUR AMERICA: CAN WE STILL GOVERN OURSELVES? 79 (2023).

²*Id.* at 293.

B. The Practice of Local Self-Government

Democracy in Our America is a practice-based, experience-based account of local self-government, which is also an homage to the principled defense of associations and local government to be found in Tocqueville's *Democracy in America*. Both are panegyrics for local associations. Tocqueville lauds private associations of all varieties, as well as extolling the propensity of the people to create and form connections in this way:

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. Finally, if it is a question of bringing to light a truth or developing a sentiment with the support of a great example, they associate. Everywhere that, at the head of a new undertaking, you see the government in France or a great lord in England, count on it that you will perceive an association in the United States . . . I often admired the infinite art with which the inhabitants of the United States managed to fix a common goal to the efforts of many men and to get them to advance to it freely.³

Kahn focuses on the formal and less formal associations that make up the practice of local self-government in his hometown of Killingsworth, Connecticut, a small New England town with a population of 6,400 persons. He does so from the particularly advantageous vantage point that his wife, Catherine Iino, has been First Selectman (mayor) of Killingsworth in Connecticut for twelve years at the time of the book's writing, and her experiences as well as their discussions of these experiences have richly informed its content. *Democracy in Our America* is therefore an experience-based reflection on the realities of local self-government. One central theme is the indispensable value provided by volunteers who freely participate in politics at local level, for whom Kahn reserves the highest praise (and to whom the book is dedicated), and the other is "the vital connection" between this kind of volunteerism and the quality of democracy at all levels, a point that Kahn credits Tocqueville as being the first to see.⁴

Perhaps unexpectedly for a lawyer and legal theorist, Kahn's *Democracy in Our America* is a work that focuses on local self-government as a *practice* that is driven by and ordered around people who roll up their sleeves and volunteer. It is not, for example, an exploration of the rules that mandate the existence and operation of local self-government institutions. Kahn's reflections make abundantly clear that local self-government is not national politics on a smaller scale or national politics done at local level. It is an earthier, a more human, a more immediately and intensely *political* politics, and it is mostly about assuming responsibility ourselves rather than choosing others to whom we can abdicate that responsibility. If the national level is organized around the principle of representation, the local level is organized around the practice of participation. As Catherine puts it, speaking about the townspeople: "Governing is not something done to them, but something 'we do together.'"⁵ Indeed, insofar as local politics mimics national politics, by using majority voting at town council meetings or popular referendums to decide local issues, Kahn believes that local government compromises its particular quality and essence, because these decision-making rules incentivize people to show up and vote only when a particular issue is of special concern to them, to vote only in accord with their particular personal interests, and then to take no responsibility for the implementation of the eventual decision.⁶

³ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489 (Harvey C. Mansfield & Delba Winthrop eds., trans., 2000) (1835).

⁴KAHN, *supra* note 1, at xv.

⁵KAHN, *supra* note 1, at 121.

⁶*Id.* at 78.

“[When] decisions at Town Meetings are formally democratic, they are actually among the least democratic moments in the life of the town.”⁷ For him, campaigns, town halls, council meetings, and referendums are important mostly only insofar as they can be opportunities to animate the community thereby inspiring more people to get stuck in and contribute in real ways to business of local self-government. “Self-government, in short, is not just whoever shows up at the Town Meeting to pursue a personal interest. It is a taking care of the public project by residents who have come to view it as their own responsibility.”⁸ The practice of local self-government, as it comes across very strongly in Kahn’s experience-based account, is about living a life in community with others, navigating their competing, complementary and mutual interests in order to develop and embody with them a set of values and behaviors that reinforce a sense of belonging and solidarity. These are the conditions in which the non-fungible value of local associations emerges.

At the same time, for both Tocqueville and Kahn, local associations are not just valuable for their own sake, and not just valuable for how they enhance the lives of local residents and local communities, but also because they have vital spillover benefits for the larger communities within which they are nested. Tocqueville’s thesis, in a nutshell, was that associations are indispensable in democracies, because democracies systematically individualize people, encouraging them, first, to make up their own minds about all manner of political, economic, social and moral questions eventually to the point at which they are not susceptible to being informed by experts or guided by authorities. And second, inspiring them to form strategic alliances where their interests, temporarily, overlap as opposed to lasting relationships based on commitments to shared identity or values.⁹ In short, associations are the antidote to the unadulterated individualism which is so conducive to tyranny of the majority, and only when we understand the vital importance of local associations will we know how to nurture functioning democracies that do not degenerate. The quality of the democracy will be commensurate with the quality of associational life lived by the members of that political community:

In democratic countries the science of association is the mother science; the progress of all the others depends on the progress of that one. 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 civilised or become so, the art of associating must be developed and perfected among them in the same ratio as equality of conditions increases.¹⁰

Tocqueville recognized with admiration the existing vibrant practice of association life in the United States of the 1830s and held it up as a model of what do to in the “democratic centuries” that were to follow.¹¹ Two centuries later, Kahn is acutely aware of how that practice of volunteerism and participation in the local community has declined across the board:

Forms of association that once supported a relationship between authority and responsibility are in decline: Church, family, and town. Absent these forms of living together—or their equivalent—we are increasingly on our own. This is evident in the decline of attendance at church services and the rise of a self-help industry. The ideology behind this industry is that the self is a project to be managed: We are each to make something of ourselves. The roles once served by ministers and community leaders are now filled by life coaches. The past no

⁷*Id.* at 69.

⁸*Id.* at 138.

⁹TOCQUEVILLE, *supra* note 3, at 408–09; see further *Id.* at 406.

Each then undertakes to be self-sufficient and finds his glory in making for himself beliefs that are his own about all things. Men are no longer bound except by interests, not by ideas; and one could say that human opinions form no more than a sort of intellectual dust that is blown around on all sides and cannot gather and settle.

¹⁰TOCQUEVILLE, *supra* note 3, at 492.

¹¹KAHN, *supra* note 1, at 645.

longer appears as a source of authority to be augmented, but as a source of injustice—personal and structural—to be eliminated. Not surprisingly, the most important book on justice in the last decades of the twentieth century began with an image of complete anonymity: There is no history, no place, and no association behind the ‘veil of ignorance.’¹²

Kahn reflects empathetically on the possible reasons for this decline and offers the following insights. For a start, people are exhausted and stressed at the end of their working day, and after their commute home. They do not necessarily feel connected to their place of residence and are more likely to move between towns and cities, so the claim that the town holds on their hearts is much weaker. They do not necessarily know their neighbors so their understanding of the town as a place of community is shakier.¹³ Second, at local level the stakes are lower because local volunteers “cannot save the economy or stop climate change”—although it might be that Kahn believes that this point is arguable, because he underscores that local volunteers can “respond to emergencies, preserve our local forest, maintain our facilities, care for the elderly, and make the town a safe and engaging place in which to raise children.”¹⁴ Either way, the point is that when people believe that the stakes are lower, they can become “easily distracted”¹⁵ by other things. Third, engaging in social activity online rather than in person can mean that neighbors are substituted for followers and real-world participation is substituted for virtual engagement:

Facebook may connect the world, but it disconnects Killingsworth. One hundred years ago, a resident’s vision started to blur at the town’s boundaries. Today it is just the opposite: matters within the town appear in a blurred fashion, if at all. If Killingsworth is to recover a sense of itself as a self-governing community, it will have to figure out how to shift residents’ gaze back to the town.¹⁶

For Kahn, the online space facilitates a different kind of social engagement, the key feature of which is “spectator anonymity,” which is “both voyeuristic and mob-like.”¹⁷ Kahn’s focus on the internet as “endlessly voyeuristic” contrasts with his emphasis on the value of participation because the central feature of the voyeur is that she is not participating.¹⁸ In real-world town council meetings, one might feel resentful of the person who shows up but does not say anything. The voyeur role is a deeper level of non-participation though because in this case “[o]ne can observe without being observed.”¹⁹

Fourth and finally, Kahn notes that there is a failure to sufficiently value volunteerism. In contrast with times past, for many people nowadays, “[p]ublic-spiritedness does not figure in their lives; it is not encouraged at work, in school, or in national political discourse.”²⁰ One senses, in fact, that part of his purpose with the book is simply to shine a warm spotlight on volunteers and volunteerism and the ethos of care that can be cultivated to such great effect within local communities. The worry, as Kahn does not shy away from saying in relation to his beloved Killingsworth, is that for lack of volunteers “the town will die: It will become just another suburb with no particular identity of its own.”²¹ This is not a question of whether one set of (liberal or

¹²See *id.* at 103. Most famously, the decline in associational life in America is charted in ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹³KAHN, *supra* note 1, at 184.

¹⁴*Id.* at 302.

¹⁵*Id.* at 303.

¹⁶*Id.* at 227.

¹⁷*Id.* at 268.

¹⁸*Id.*

¹⁹*Id.*

²⁰KAHN, *supra* note 1, at 184.

²¹*Id.* at 138.

conservative) policies will thrive or not, but the deeper question of whether the town will survive as a site of political engagement at all. If the town were to die, given intrinsic Tocquevillian connection between associational participation at local level and democratic quality more broadly, there would be collateral damage at national level. Kahn reminds us that: “Tocqueville’s basic methodological insight remains compelling: The local provides a window into the beliefs and values that inform our political practices generally. Studying the local, therefore, can help us to understand the changing character of American politics.”²² Thus, a vital key to rescuing U.S. politics from populist tendencies is to focus on local politics, and thereby helping to cultivate the conditions for a more prosperous national politics: “Killingsworth must remain the site of democratic pedagogy, for there is no plausible alternative for its residents. The political lessons that the town can teach come from tending to itself as a community of volunteers.”²³

A clear thread throughout Tocqueville’s *Democracy in America* and Kahn’s *Democracy in Our America* is that if one cannot bring oneself to value associations for their own sake, one must value them for the vital spillover effect that they have on the larger democracies in which they are nested. Beyond acknowledging these instrumental benefits, for both authors, the point is that associations should be appreciated for their own deep, intrinsic, and irreplaceable value.

C. The Non-Fungible Value of Local Associations

I. Non-Fungible Value: The Dimension of Care

Local self-government—participation in public life at a local level—enables the provision of services within and for the sake of the local community. The services are often responsive to specific local needs—for example, planning a town monument, gritting roads in winter, celebrating the achievements of a local hero or victorious team, resolving a zoning issue, or filling in potholes—which means that close and ongoing attention to the local lived experience of the residents is necessary to know that these particular services would enhance the life of the residents. Sometimes, the needs which require to be met arise because of unpredictable circumstances like “storms, fire, injury, disputes between neighbours, accidents, and most recently, the pandemic.”²⁴ And sometimes the services provided go well beyond what is technically required by law, as in this example that Kahn gives:

The town needed facemasks: Volunteers started sewing; a distribution table was set up at the dump; personal delivery was arranged for those who could not get there. None of this was legally required; no one had a right to these services. None of it was written down in a manual or set of regulations. No one was assigned these responsibilities in advance.²⁵

Of course, it might be the case that the national level could also solve these problems, and it might even be that the national level could solve these problems with the same attention to detail and successful, focused delivery, and it might even be that the national level might solve the problems more efficiently, drawing on greater financial resources, capacities, and expertise. It is also possible that the national level might never see the problem or might ignore it in hopes that it would go away or might genuinely wish to solve the problem but prefer to prioritize other more pressing issues. Part of the point is that the local level can pay attention to local needs more fully than the national level can. The other part of the point is that even if the national level could notice and become committed to solving a local problem, the solution would not come in the same way. From Kahn’s perspective, while national government “requires rules, bureaucratic order, representation

²²*Id.* at 72.

²³*Id.* at 302.

²⁴KAHN, *supra* note 1, at 54.

²⁵*Id.* at 54–55.

of multiple interest groups, and hierarchical authority,” local self-government is “direct, unmediated, and personal.”²⁶ At local level, “[r]esidents take responsibility for creating and maintaining a public ethos of care” and so the process and mode through which the solution arrives will look and feel very different.²⁷

Kahn’s reflection on the practice of local self-government as the creation and maintenance of “a public ethos of care”²⁸ is interesting for its resonance with Joan Tronto’s vision of an ethic of care. Her book, *Moral Boundaries: A Political Argument for an Ethic of Care*, critiques an understanding of care which sees it primarily (1) as a disposition or an emotion and (2) something that belongs to the private sphere because it is “ideally, a private concern,”²⁹ which only becomes public if the household fails to provide it. What is definitive about care, for Tronto, is “a perspective of taking the other’s needs as the starting point for what must be done,”³⁰ and her focus, like Kahn’s, is on the capacity for attentiveness to need and the assumption of responsibility for responding to that need in a way that “requires constant evaluation” and becomes “embedded in a set of implicit cultural practices rather than in a set of formal rules or series of promises.”³¹ Real responsiveness to need means, for her, that we are dealing with conditions of vulnerability and inequality by getting involved rather than giving detached care from a distance. The latter may actually do more harm than good, she believes, because it “can actually heighten a sense of the otherness of those for whom we must indirectly care.”³² Tronto’s central conclusion was that our political and social institutions should begin to reflect the fact care is a fundamental feature of human interaction. Kahn’s experienced-based reflection on the practice of local self-government maps out what it looks like when local political and social arrangements are animated by an ethos of care. When the practice of local self-government is functioning well, the local level is highly attentive to local needs in all the specificity of the circumstances in which they arise and takes responsibility for addressing them by providing responses that are proximately given and therefore bespoke and adaptable. All of this depends on volunteers. Kahn praises the commitment of local volunteers while acknowledging the nuances of how tricky it is to engage with the human dimension of real-world community-based problem-solving in a specific local place. By highlighting, at the level of experience, what is special about volunteering and local participatory politics, making clear that what matters is not only what gets done, but the fact that what is done is done in ways that magnify capacity for attention to specific local need and capacity to respond in more fully human ways, Kahn paints a vivid picture of the care dimension of the non-fungible value of local self-government associations.

II. Non-Fungible Value: The Dimension of Character

Democracy in Our America also makes incarnate the ways in which volunteering at local level develops the character of the individuals involved, endorsing Tocqueville’s thesis that participating in associations produces a character dividend. The stories that pepper Kahn’s book highlight examples of citizens supporting each other in the local community and working for the good of others, as residents are molded into citizens. Their commitment to the ethos of care means that they operate within the perfect conditions for the development of the virtues involved in caring for the needs of others: To notice others and pay attention to their needs, to take responsibility for finding a solution, to volunteer to work to achieve that solution, to persevere in this work despite the lack of reward or recognition, and to forbear criticism and complaint and

²⁶*Id.* at 55.

²⁷*Id.* at xv.

²⁸*Id.* at xiv.

²⁹JOAN TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 118–19 (2009).

³⁰TRONTO, *supra* note 29, at 105.

³¹*Id.* at 131–32.

³²*Id.* at 144.

indifference even from those who do not volunteer themselves. It also includes the virtues involved in working with others to provide care. As Kahn puts it:

A town that depends entirely on volunteers must pursue a politics of persuasion. No one will volunteer for an organization or activity that fails to respect his or her views If we cannot talk to each other, we will not volunteer to work with each other.³³

These virtues include the capacity to listen, to communicate, to dialogue and persuade, to reach consensus, to disagree and resolve conflict in ways that maintain or increase the strength of the relationships, to get behind the decision once it has been reached and work to implement it, even if it subjectively seems sub-optimal. By engaging in an ethos of care, people learn to assume responsibility for each other and to work together to solve problems, thereby developing their characters as citizens who have a great deal to offer their local communities.

Several times, Kahn uses education metaphors to convey the depth of character development that is possible within associations. He describes local self-government as a “school of liberty,”³⁴ insists that “Killingsworth must remain the site of democratic pedagogy,”³⁵ and maintains that: “[C]ivil society gives democracy a structure that resists the individualism of self-regard while keeping the mob at bay. Absent that structure, practicing self-government is like trying to run the schools without teachers: Students cannot educate themselves.”³⁶ The problem is that national level political institutions, in which election cycle attention spans and the party system supported by quick fix majority decision-making incentivize the creation of tribes and silos, such that leaders are indifferent to, if not actually intending, the alienation of a certain persistent minority. The capacity for care, and with it the potential for character development is much lower in such an environment. And yet, “a democracy cannot be better than its citizens.”³⁷ Thus, as Kahn notes, following Tocqueville, the capacity of associations to develop the character of their members as citizens is an indispensable contribution to the life of the nation. Because they have engaged in local self-government, those residents-turned-citizens will vote and discuss and perhaps even participate in national politics with an expanded competence. The character dimension is one of the ways that the local level offers a significant positive spillover legacy to the national level, and one of the points that Tocqueville and Kahn are keen to underscore. For these purposes, however, the point is slightly different: It is that local associations foster and achieve significant character development in their participants and that this is uniquely valuable, and something that is not easily replicated, not least by national level political institutions.

III. Non-Fungible Value: The Dimension of Forum Vibrancy

Kahn’s work also highlights that local self-government requires the existence of arenas in which the volunteering and the practices of constructive participation can be modeled, learned, and developed. Because “the reciprocal relationship of authority and responsibility is learned only through practice,”³⁸ everybody needs a space in which they have this vital experience. Forum vibrancy refers to associations within which the ethos of care is created and maintained and within which the virtues of attention, responsibility, responsiveness, selflessness, and volunteerism are staged as an immersive live exhibition. They allow more people to learn the practice of politics, as well as the art of living, in the best place in which to learn it, where the stakes are ostensibly lower and the relationships are ostensibly more important, meaning that everybody is more incentivized

³³KAHN, *supra* note 1, at 101–02.

³⁴*Id.* at 56.

³⁵*Id.* at 302.

³⁶*Id.* at 140–141.

³⁷*Id.* at 70.

³⁸KAHN, *supra* note 1, at 140.

to find a solution that works for everyone else. One of the ironies that becomes clear throughout *Democracy in Our America* is that the task of finding and articulating a common good amidst the messiness of the lived experience of disagreement between neighbors about how to solve local problems actually becomes more possible because of how difficult it is for neighbors and fellow residents to cut each other out or consistently ignore each other's positions. The intractability of their closeness over time can become the driver that makes their cooperative success first possible, and then remarkable. In short, forum vibrancy refers to the extent to which the association is marked by a strong participatory commitment to the care of the community.

As with the character dimension, both Tocqueville and Kahn see spillover benefits for the national level here. Vibrant forums at local level can provide important spaces for people to escape the relentlessness of individualism's excesses. Vibrant associations can act as a vital buffer between the state and the individual, foreclosing the risks of state tyranny and majority tyranny. The root of the argument here centers on equality: Equality has immediate advantages and attractions, as both Kahn and Tocqueville acknowledge. However, it also carries big risks: every voice is equally valid at the ballot box, no matter how affected by the problem or not, no matter how informed and thoughtfully engaged on the topic or not, no matter how self-interested, disinterested or uninterested it is in relation to the outcome. As experts and ideas diminish in their ability to influence the public sphere, Tocqueville argues that the power of the mass or the groundswell of public opinion becomes "augmented" to the point where it "leads the world."³⁹ Democracy causes people to repose "an almost unlimited trust in the judgment of the public; for it does not seem plausible to them that when all have the same enlightenment, truth is not found on the side of the greatest number."⁴⁰ One result of this is that it is more difficult to reverse a democratically-mandated decision. Another is that a person who finds himself at odds with the prevailing opinion is "immediately overwhelmed by his own insignificance and his weakness. The same equality that makes him independent of each of his fellow citizens in particular leaves him isolated and without defense against the action of the greatest number."⁴¹ These "destructive tendencies of democratic levelling," as Kahn puts it,⁴² are mitigated by the "mediating institutions of civil society that stand between government authority and equal citizens."⁴³ In this, he echoes Tocqueville who had previously put the point in this way: "It is clear that if each citizen, as he becomes individually weaker and consequently more incapable in isolation of preserving his freedom, does not learn the art of uniting with those like him to defend it, tyranny will necessarily grow with equality."⁴⁴ For both, the two options are as follows: Either democracy produces a mob or it produces a highly articulated civil society grounded on freedom of association. As Kahn explains:

The former leads to a populist authoritarian regime: All citizens are equal, because one leader has all the power. The latter pursues equality through citizen participation in countless civil society associations that form and reform in the pursuit of projects and interests. Equality, on this view, is realized not in the relationship of the individual to the whole of the people, but in the individual's participation alongside others in multiple associations and organizations.⁴⁵

The forum vibrancy dimension is then another of the ways that the local level offers a significant positive spillover legacy to the national level. But for our purposes, the point again is that local associations foster and achieve a level of forum vibrancy that is uniquely valuable, and not easily replicated, not least by national level political institutions.

³⁹TOCQUEVILLE, *supra* note 3, at 409.

⁴⁰TOCQUEVILLE, *supra* note 3, at 409.

⁴¹*Id.*

⁴²KAHN, *supra* note 1, at 64.

⁴³*Id.* at 65.

⁴⁴TOCQUEVILLE, *supra* note 3, at 489.

⁴⁵KAHN, *supra* note 1, at 42.

The value that local associations offer in terms of the care that they facilitate, in terms of the character development they precipitate and in terms of the level of the forum vibrancy at which they operate is something worth attending to and appreciating. The three dimensions are mutually dependent and mutually enhancing, in their composite, non-disaggregable synergy. In prioritizing care and character and the space within which people can pursue care and character, local self-government associations not only produce spillover effects that greatly enhance the kind of politics and the kind of democracy that becomes possible at national or international level, but, more importantly for these purposes, they also provide a non-fungible value across the three dimensions of care, character and forum vibrancy which is impossible to replicate at those levels. Having allowed Kahn's experience-based account of local self-government to shape our understanding of the non-fungible value of local self-government, we now turn to reflect on three intuitions about the rule of law that he presents in an earlier work.

D. The Practice of the Rule of Law

Consideration of the experience of local politics makes clear that the practice of local politics and the rule of law are neither coextensive nor coterminous. In *The Cultural Study of Law*, Kahn reflected in theory on the rule of law as one social practice among others and concluded that they are "competing worlds of experience."⁴⁶ We can choose to see a particular event as an example of the practice of politics or as an example of the rule of law, but if we do see an event as an example of the rule of law, we lose a sightline to the alternative:

The rule of law is just one way of perceiving the meaning of political events. To see the event as an instance of law's rule is to suppress alternative perceptions of the same event This competition among political perceptions will not appear unless we focus attention on that which law places outside of itself.⁴⁷

Law's effort to authoritatively frame a set of circumstances results in the suppression of alternative frames because law approaches every event by seeing it and evaluating it according to its own terms:

Law understands the meaning of an event *as an instance of a rule that already exists*. As a matter of law, that rule creates the possibility of the event. Legal perception sees the event in the light of its possibility, locating what is important about the event in the rule.⁴⁸

Whatever set of circumstances have arisen, whatever facts pertain, law categorizes reality by reference to the rules that have already been established. This is the first of the three intuitions: That law looks at the world in all its complexity and detail, and law always only ever sees itself.

Not only does law conduct itself in this way internally, eliminating alternative perspectives from its own vision of what is taking place, but, Kahn argues, law also competes to authoritatively frame the event externally. To do so, law deploys the practice of the rule of law. When we describe the principle of the rule of law, we usually speak about principles such as generality, nonretroactivity, clarity, congruence, equality before the law, and independence of the judiciary. Kahn focuses on the *practice* of the rule of law, articulating his sense that law as endlessly self-referential and self-legitimizing: "[T]he judge's perception of the event is a paradigmatic instance of the operation of the legal imagination. The judicial opinion describes the world that appears in and through the categories of the legal imagination."⁴⁹

⁴⁶PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 66 (1999).

⁴⁷*Id.* at 67.

⁴⁸*Id.* at 69–70 (emphasis added).

⁴⁹KAHN, *supra* note 46, at 72.

That is not to say, of course, that law is always univocal and does not tolerate any doubt or debate. On the contrary, law in fact generates doubt and debate about itself: Each side in a legal dispute will argue that their preferred interpretation of the law leads to the correct resolution of the dispute.⁵⁰ But eventually the ruling judge will choose one outcome which settles the law at least until these arguments need to be rehashed the next time. Moreover, law even allows and generates debate about the boundaries of its own jurisdiction and the types of things that it can and cannot do. Legal disputes can include issues about justiciability and jurisdictional boundaries, but again the ruling judge will eventually simply determine the answer. The practice of the rule of law entails that: “Law never lacks an explanation of itself, [for example], a justification of its own authority. Law does not exclude questions about its authority: Rather, it purports to answer such questions The rule of law, accordingly, always includes a theory of its own legitimacy.”⁵¹ This is the second intuition: That the practice of the rule of law means that law affirms itself and its own legitimacy at every turn.

If the first two intuitions about the practice of the rule of law are that law always only ever sees itself and law always affirms and reaffirms its own place in the world, how then can we understand the way in which law engages and competes with other ways of framing the events of the world? The competition between law and other ways of seeing the world is played out “in the political rhetoric of the community, as well as in the imagination of each citizen,”⁵² and the primary register in which this debate is conducted is through the grandiloquent contrasting of the rule of law with its rhetorical opposite, the rule of men. Law presents itself as having cornered the market on fairness, stability, equality, and legitimacy, and thus either overtly or implicitly presents opposing ways of understanding the world as being corrupt, chaotic, revolutionary, and anarchic, in other words, the “illegitimate—and dangerously tyrannical—rule of men.”⁵³ This is intended to shore up support for the rule of law, by casting a shadow over all of law’s competitors, from revolution to political action to love, and it gives the impression—whether or not it is intended to give the impression—that “outside law’s rule, there can be nothing of any political value at all.”⁵⁴ This is Kahn’s third intuition about the practice of the rule of law: That it includes the rhetorical insistence by law on law’s omnibenevolence within the community to the repudiation of alternatives.

E. Law’s Lack of Sightline to The Non-Fungible Value of Local Associations

Some of what law encompasses within and rejects as “the rule of men” might however, and perhaps with some rebranding, seem to us to be quite important. In *The Cultural Study of Law*, Kahn had already foreshadowed his later exploration of the value of local political associations, when he wrote that:

What law dismisses and devalues as ‘the rule of men’ can be seen in a completely different manner. It can appear, for example, as political leadership exercised by distinguished individuals meeting the unique political demands of the moment in an innovative fashion. Political argument need not be on law’s terms, [for example], an argument among conflicting claims of what the law is. There is a broader argument over the value of law’s rule in our political life. If we listen only to the voice of law, we will not see this conflict.⁵⁵

⁵⁰*Id.* at 117.

⁵¹*Id.* at 86.

⁵²*Id.* at 67.

⁵³KAHN, *supra* note 46, at 67.

⁵⁴*Id.*

⁵⁵*Id.* at 68.

Putting the three intuitions about the practice of the rule of law together offer a compelling perspective on why law might not be capable of seeing the non-fungible value of local self-government associations. If law looks at the world in all its complexity and detail, and law always only ever sees itself, if law is constantly affirming and reaffirming its own legitimacy and if law is rhetorical insisting on the value of the rule of law and the disvalue of its alternatives, local associations will be systematically occluded from our sight.

For a start, as far as Kahn is concerned, volunteerism, and voluntary participation is the essence of local self-government. But volunteering is, by definition, not mandated by law:

Killingsworth requires voluntary participation in a common order of governance It has no way, not even an informal way, to enforce a regime of volunteerism. There is no public shaming mechanism beyond the experience of awkwardness when declining a request for help from the [mayor] . . . residents freeride and shirk by relying upon their neighbor's volunteer services. Yet most are not even aware of this.⁵⁶

Therefore, volunteering is not “an instance of a rule that already exists;”⁵⁷ law cannot look at volunteerism and see itself. Moreover, the process of participating in the promotion of the ethos of care by attending to the needs of others and taking responsibility for meeting those needs with proximate help means that the work of local self-government also takes place outside of the range of law. Law's instinct may be to view events that occur as instances of a pre-existing legal rule, but this kind of voluntary participation and care cannot be captured on law's radar. As Kahn puts it simply and succinctly: “Law does not get much done in town; volunteers do.”⁵⁸ Local government is in crisis due to a decline in volunteerism, but law cannot be part of the solution because “[a] court cannot order us to be better citizens, to pay attention, or to volunteer Civil society is not re-formed on command.”⁵⁹ The only thing that could happen here is that by rhetorically insisting on the omnibenevolence of the rule of law to the repudiation of alternatives, law could contribute to the decline in the value that people place on public-spiritedness, care, and volunteerism, occluding all the non-fungible value that is offered by local associations.

Aside from a sense that law is generally blind if not inimical to the value of volunteerism simply because volunteering is not an instance of a legal rule, there are situations in which an event might have the potential to become an instance of the legal rule, but the volunteers might decide that they do not want to engage with the event on those terms. Kahn tells a story of how the residents of Killingsworth resolved an issue about where to build a middle school, having considered a number of possible sites and having power of eminent domain to acquire whatever property would be most appropriate. The incumbent mayor had the option to invoke the resources of law in order to acquire the very best site but instead worked to build consensus among the residents even though the consensus that emerged centered on a property that was objectively less ideal.⁶⁰ Although at the time Kahn regretted the under-deployment of law, over time he came to see that although the best *site* might have been achieved through the recourse to law, the best *outcome* to the controversy was that the town remained united and trust between residents was maintained. Had the townspeople resorted to legal rights to determine the dispute, law could have unwittingly alienated certain residents and thereby damaged participation and volunteerism in the community for years to come.⁶¹ In this case, although the issue could have been made visible to law as an instance of a legal rule, the practice of local self-government enabled the achievement

⁵⁶KAHN, *supra* note 1, at 119.

⁵⁷KAHN, *supra* note 46, at 69.

⁵⁸KAHN, *supra* note 1, at 115.

⁵⁹*Id.* at 135.

⁶⁰*Id.* at 114–15.

⁶¹KAHN, *supra* note 1, at 119.

of a solution without the issue ever becoming incorporated into law's way of looking at the world. Here the non-fungible value of the local associations—in particular in the dimensions of character and forum vibrancy—meant that residents could rely on the trust between them and the robust ways of dialoguing and problem-solving that they had developed between themselves so as to avoid the need to have recourse to law. Kahn rightly notes that implicit in the promotion of the rule of law is often the implication that “the rule of men” is a lesser form of self-government, and thus it is worth underscoring that, for these residents, at least on this occasion, the rule of law was the less worthy option. From the perspective of the practice of local self-government, then, there is a justified skepticism of law's value, because although law can do nothing to generate the kind of volunteerism that is necessary for a flourishing civil society, it has the potential to damage that very volunteerism and the vibrant civil society that it builds.

Before concluding this article, and conscious of the fact that neither Tocqueville nor Kahn say anything explicitly about subsidiarity, I want to use the arguments canvassed so far to reflect on the troublesome place of subsidiarity in law. In so doing, I also want to link Kahn's work on local self-government with the scholarship on city autonomy which makes a case for greater formal recognition of the practice of self-government within cities. Claims for city autonomy tend to be framed around, first, the enhanced quality of democratic participation that is possible within the city and/or second, the greater levels of expertise that city dwellers have about the problems that are specific to their communities.⁶² These arguments generally resonate well with Kahn's experience-based account of local self-government. City autonomy scholars, however, tend to invoke subsidiarity in support of their claims, hoping that by framing their claims in the language of subsidiarity they can enhance the credibility of their enterprise.⁶³ After all, subsidiarity espouses the idea that decisions should be taken at the level closer to the people affected by them, and if the nation state within an international organization or the state level within a federal arrangement or the regional level within a nation state all can have their relative autonomy recognized by law through the language of subsidiarity, why not also the city or, for that matter, the town or the village? It seems straight-forward at first glance. In the background, though, subsidiarity scholars consistently warn that the legal codification of the principle of subsidiarity does not result in increased autonomy for local levels; if anything, they insist, the reverse is the case.⁶⁴

This is the puzzle: If the principle of subsidiarity is a principled, but rebuttable, preference for proximity in public decision-making,⁶⁵ why would codifying this principle reliably produce a centralization of decision-making power? It could be that courts consistently misinterpret legal expressions of subsidiarity, skewing it towards the central levels. It could be that certain codifications of subsidiarity have been badly expressed because they establish a test of comparative efficiency for determining at which level decision-making authority should lie, and efficiency works in favor of the higher levels at which economies of scale can be achieved. At a deeper level, it could also be that subsidiarity is near impossible to codify as a legal rule in a way that stays true to its essential intention and purpose because its intention and purpose are not within the sightline of the practice of the rule of law. Efforts to codify subsidiarity articulate a test which compares the

⁶²See generally Yishai Blank, *Federalism, Subsidiarity and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 *FORDHAM URBAN L.J.* 536 (2010); RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* (2020); Loren King, *Cities, Subsidiarity, and Federalism*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV 299* (James E. Fleming & Jacob T. Levy eds., 2014); Daniel Weinstock, *Cities and Federalism*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV 266* (James E. Fleming & Jacob T. Levy eds., 2014).

⁶³Maria Cahill & Garry O'Sullivan, *Subsidiarity and the City: The Case for Mutual Strengthening*, in *CITIES IN FEDERAL CONSTITUTIONAL THEORY* 54 (Erika Arban ed., 2022).

⁶⁴See generally Erika Arban, *Re-centralising subsidiarity: Interpretations by the Italian Constitutional Court*, 25 *REG'L & FED. STUD.*, Apr. 2015 (2015); Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?*, 54 *SUP. CT. L. REV.*, 601–32 (2011) (Can.); Andreas Follesdal & Victor Muñoz Fraticelli, *The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada*, 10 *Les Ateliers de L'Éthique [ETHICS F.]* 89–106 (2015) (Fr.).

⁶⁵Maria Cahill, *Subsidiarity as the Preference for Proximity*, 66 *AM. J. JURIS.* 129, (2021).

relative merits and capacities of two different possible decision-making levels, which assumes both that their relative merits and capacities can be evaluated on the same scale and that all of the merits and capacities we are evaluating are visible to law. Kahn's study of the practice of local self-government suggests that what is important about the local level is the non-fungible value present in the three dimensions of care, character, and forum vibrancy. These can neither be measured on the same scale as the merits and capacities of decision-making at central level, nor, if Kahn is right about the practice of the rule of law, are they even visible to law. Thus, I want to suggest that the combination of Kahn's work on the practice of local self-government and the practice of the rule of law offers a deeper explanation of why codifying subsidiarity does not tend to strengthen the position of local level decision-makers: Once subsidiarity becomes codified as a legal rule, it can only see the things that law sees and cannot see the things that law does not see, and so it cannot recognize the non-fungible value of local self-government associations in towns or cities. To put it briefly, the problem with legal articulations of subsidiarity is not subsidiarity itself, but the practice of the rule of law. The example of the practice of local self-government thus offers a perspective from which we might want to challenge the ubiquitous benevolence of the practice of the rule of law. We might want to maintain the position that what is valuable about local associations is important enough that law should learn new ways to respect them more fully. When it comes to those associations which we believe offer significant non-fungible value, we might want to resist the temptation to appeal to subsidiarity as a quick fix, and instead to play a longer game, involving the effort to raise the profile of the non-fungible value of local associations and to begin to insist that law show greater deference to that which it cannot create through its efforts but can appreciably harm through its disregard.

F. Conclusion

Among his other contributions, as recognized elsewhere in this collection, Paul Kahn has offered interesting perspectives both on the practice of local self-government associations and the practice of the rule of law. He wants us to acknowledge the individual greatness of volunteers who give selflessly to their communities, to recognize the immense value provided by local associations, and to see that law is in competition with other ways of viewing the world, and that law should not always win. For both Tocqueville and Kahn, defending associations is work that is done within the context that the health of a democracy turns entirely on how well people associate with one another: "The science of association is the mother science [and] the progress of all the others depends on the progress of that one."⁶⁶ Strong associational life has significant spillover benefits for the larger context in which the associations are nested. Yet, these spillover benefits cannot be the starting point because they cannot be created *ex nihilo*. Instead, the starting point is attending to and appreciating the myriad of ways in which people come together and through which the non-fungible value of local associations, in three dimensions of care, character and forum vibrancy, spontaneously emerges.

Acknowledgment. Thanks to Marco Goldoni and Neil Walker, in particular, to Paul Kahn and the participants at the workshop from which this collection emerged, and to Garry O'Sullivan and Shaoming Zhu for their comments on earlier drafts of this article.

Competing Interests. The author declares none.

Funding Statement. The research conducted in this publication was generously funded by an Irish Research Council Laureate grant 2022/3860.

⁶⁶TOCQUEVILLE, *supra* note 3, at 492.