

# My “Country” Lies over the Ocean: Seasteading and Polycentric Law

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“But more wonderful than the lore of old men and the lore of books is the secret lore of ocean.”

-H. P. Lovecraft (2003: 108)

The Seasteading Institute is a non-profit organization seeking to establish a floating community. Its mission is to experiment with a new society based on new ideas of government, namely by establishing something like a sovereign cruise ship with its own set of rules, regulations, and leaders.<sup>1</sup> This essay considers the implications of the Seasteading Institute upon notions of law and sovereignty and argues that seasteading could make possible the implementation or ordering of polycentric legal systems while providing evidence for the viability of private-property anarchism or anarchocapitalism, at least in their nascent forms. This essay follows in the wake of Edward P. Stringham’s edition *Anarchy and the Law* and treats seasteading and polycentric law as concrete realities that lend credence to certain anarchist theories. Polycentric law in particular allows for institutional diversity that enables a multiplicity of rules to coexist and even compete in the open market as well as the marketplace of ideas. In this context, it is important to remember John Hasnas’s (2008: 111) definition of anarchy as “a society without a central political authority.” *À la* Michael Polanyi (1951: 15), this essay treats polycentric law as a task or arrangement that “requires the balancing of a large variable of items against all others.” Friedrich Hayek (1976: 15) refers to something like polycentric law when he describes a “multiplicity of independent ends” that entails “a multiplicity of independent centres of decision.” These characterizations of polycentric law relate to what Randy Barnett (1986: 271) has called “nonmonopolistic law,” or what Adam Chacksfield (1993: 2) has called a system “where individuals would defend their own interests and pay protection agencies to do so.”

The Canadian Supreme Court seems to have contemplated polycentric law when it referred to “the best rationale for judicial deference to non-judicial agencies,”<sup>2</sup> and Talia Fisher (2010: 453) seems to have had polycentric law in mind when she described a system “based on private legislative and judicial bodies that operate for profit in a competitive market.” Barnett (1998: 158) explains that “[i]n a polycentric constitutional order, as distinct from a monocentric one, multiple legal systems exercise the judicial function and multiple law-enforcement agencies exercise the executive function”; he clarifies that these “multiple decision makers operate within constitutional constraints that permit them to co-exist and adjust to each other.”

Polycentric law would seem like law in a purely anarchist society were it not subject to overarching constitutional restraints, although Barnett has shown that constitutionalism is not incompatible with anarchism. The motivations behind polycentric law are partially sociocultural in that one goal of polycentrists is to meliorate conflict and instability in regions with heterogeneous cultures and ethnic or religious diversity.<sup>3</sup> Polycentric law is a legal order arising apart from the State and quite possibly arising “spontaneously out of the undirected actions of individuals seeking common standards for mutual coordination” (Bell 1991/92). The Seasteading Institute contributes to our understanding of polycentric law by providing what Elinor Ostrom (2005: 14), applying the Institutional Analysis and Development (IAD) framework, calls an “action situation,” which is the “social space where participants with diverse preferences interact, exchange goods and services, solve problems, dominate one another, or fight.” Seasteading’s inevitable challenge to traditional notions of State sovereignty offers a clarifying focus for the sustained examination of an action situation.

Seasteading is too new for us to predict whether it will work or even disrupt legal jurisdictions as we know them, but polycentric law, in some manifestation or another, has an ancient and prosperous history that seasteading could reanimate and illuminate. Less grand practices than seasteading such as offshore banking or international arbitration suggest that the theory and animus behind seasteading are already widespread and at variance with common assumptions about law, jurisdiction, and sovereignty.

## Part One

The lawfulness of seasteading pertains to the United Nations Convention on the Law of the Sea (UNCLOS), or the Law of the Sea Treaty, which was signed on December 10, 1982 and made effective as of November 16, 1994. According to Part V, Article 57 of this treaty, “The exclusive

economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” The exclusive economic zone is measured from the seaward edges of a particular country, which the treaty refers to as a “coastal State,” and the coastal State in turn enjoys sovereign rights within her exclusive economic zone, including the rights to mine, conserve, explore, or otherwise “use” the resources therein.

A coastal State, according to Part V, section 56, has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and of the seabed and its soil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds” (ibid). Coastal States therefore have almost total power over what takes place within their exclusive economic zones. It follows from these exclusive rights that coastal States also enjoy wide latitude to regulate and police activities occurring within their exclusive economic zones.

Outside of the exclusive economic zone and territorial waters is the region known as “international waters,” the “open sea,” or the “high seas.” This region is not subject to national jurisdiction; therefore, ships sailing in this region generally are subject to the jurisdiction of the State under whose laws the ship is licensed, registered, or commissioned.<sup>4</sup> The jurisdiction of a given ship is thus determined according to the “flag State,” or the State authorizing a ship to bear that State’s flag. Boats, crews, and various entities, national or otherwise, have certain freedoms in the “high seas,” such as the freedom to navigate, fish, lay submarine cables or pipelines, conduct scientific research, and undertake other specified activities, provided that these freedoms are exercised in a reasonable manner and with a reasonable regard for the interests of other nations.<sup>5</sup>

The U.N. General Assembly Resolution 2749 refers to the deep seabed as the “Common Heritage of Mankind,”<sup>6</sup> and the Law of the Sea Treaty proclaims “the seabed and ocean floor and subsoil thereof” to be “beyond the limits of national jurisdiction.”<sup>7</sup> Therefore, the “deep seabed,” “ocean floor,” and “subsoil of the ocean floor” must be distinguished from “international waters,” the “open sea,” or the “high seas” because the former three phenomena are as a rule protected—on paper at least—from the activities of nations and corporations, whereas the latter are “open” to the activities of nations and corporations.

Nations can maintain jurisdiction over crewmembers on a fleet in the high seas, but nations do not have jurisdiction over the high seas territory where the fleet is sailing. That is because the ocean itself is not “permanent property,” and a boat occupying such property does so temporarily. Any vessel

may temporarily occupy a spot of ocean for passing or successive use of the resources there.<sup>8</sup> For this reason, ships navigating the high seas are, effectively and functionally, floating foreign personalities or territories in relation to other ships navigating the high seas; put another way, these ships are like “floating islands” belonging to particular countries.<sup>9</sup> It is a well-established general principle of customary law that one country cannot assert jurisdiction over a ship belonging to another country or flying another country’s flag<sup>10</sup> and that a ship cannot lose its affiliation with a country simply by sailing into territory belonging to another country.<sup>11</sup>

The Seasteading Institute upsets any clear national affiliation or State-based categorization in relation to these general rules of the high seas. Seasteading communities are like sovereign cruise ships, and their floating territories are intended to be autonomous—that is, not subject to the jurisdiction of any particular State or country.

Patri Friedman (2009), the former executive director of The Seasteading Institute, uses the word “autonomous” in reference to seasteads as follows: “The Seasteading Institute does not envision seasteads to be completely autonomous, except by setting their own local policies.” Friedman’s use of “autonomous” refers in economic terms to something like “self-sufficient” or “non-dependent” rather than “sovereign” in the governmental sense of the word (that is, as a “sovereign nation” or a geographic space having supreme and independent authority over all affairs taking place within its jurisdiction). The communities envisioned by the Seasteading Institute’s leaders and promoters have no flag State because the communities themselves are the State or at least aspire to be an independent polity. Theoretically, then, the uncertain or liminal status of seasteaders means that a vessel of the Seasteading Institute would be immune from the criminal laws of other nations, since punishment of crimes on a foreign flag ship necessarily intrudes upon that ship’s sovereignty and, therefore, is tantamount to punishment of crimes committed on foreign soil.<sup>12</sup>

Punishment of crimes taking place on foreign territory can occur only if there is a proven connection between the criminal conduct and the prosecuting State sufficient to justify the prosecuting State’s protection and assertion of its interest.<sup>13</sup> This relative jurisdictional immunity from criminal prosecution has an inverse problem: the Seasteading Institute’s communities, being autonomous and hence States unto themselves, or like States unto themselves, are not subject to the protection of a “host” or “flag” State, and therefore do not have a nation to prosecute crimes on their behalf. In light of increased media attention to pirates and piracy in Somalia and elsewhere, this aspect of the Seasteading Institute’s communities has, perhaps, generated the most questions.

During an online question-and-answer session with Patri Friedman and Brad Taylor, one anonymous writer asked the following: “It is clear to me [...] that chosen territories for successful seasteading would initially be situated in the safer parts of the seas which are in turn a function of active military patrols keeping away pirates and invaders. If this is true, then how does it affect the structure of Seasteader territories because they will depend on naval powers for their viability.”<sup>14</sup>

Taylor dashed off this response: “Interesting question. I think seasteads could probably defend themselves against pirates in areas not patrolled by navies. In general, seasteads won’t be an attractive target for pirates (compared to a cargo ship with a small crew and millions of dollars worth of packaged goods), and very basic weapons should be enough of a deterrent.” This answer is highly speculative, to be sure, and to hash out a more detailed response would require that seasteading become a widespread and common practice so that experience could allow solutions to arise as events make solutions necessary and empirically quantifiable.

Taylor himself seems to acknowledge this point, saying, “If it proved more of a problem in the long run, I wouldn’t see a problem relying on the existence of navies. In areas without navies, seasteads could cooperate to provide patrols.” Nevertheless, Taylor’s answers here and elsewhere raise additional questions, especially as Taylor couches his answers in the conditional (“*If it proved more of a problem in the long run...*”) or protects them with selective qualifiers (“*I think*,” “probably,” “should be”).

More threatening than pirates is the danger posed by nations themselves. Would not nations challenge the sovereignty and territorial claims of seasteading communities? Friedman answers this question in detail. He is quoted at length to avoid any misrepresentation:

[S]easteads won’t initially be sovereign nations. What we want is de facto autonomy, not formal recognition by other states. From a legal point of view, they’d most likely exist as ships flying a flag of convenience. That legal position provides a fair degree of freedom within another country’s Exclusive Economic Zone, and lots more freedom in international waters. Of course, governments don’t always follow the rules, and there is a chance they’ll attack us anyway. If an existing country with a powerful military was committed to blowing us out of the water, there would simply be nothing we could do to stop it. Which is exactly the same case as most existing countries in the world—20 of which don’t even have armies, and very few of which have the power to resist a country like the U.S. [...] Seasteads need to respect the sovereignty of other countries—i.e., they shouldn’t attempt to prevent states from enforcing their laws, no matter how stupid those

laws are. We can help people escape bad laws, and over time that might make existing states respond, but if we mess with existing states and it comes down to a military conflict, there is no way we're going to win. [...] Most obviously, we need to refrain from doing anything which might anger existing states. If there's even a hint that we're exporting drugs or enabling terrorism, we're not going to be around long. That might make completely anonymous digital banking too risky, since it could be used to fund terrorism. We also need to avoid the major sin industries. We can see from the history of proto-seasteading that existing states will often make life difficult for those using the ocean for political reasons. [...] Some countries are more aggressive than others, and we should locate near relatively benign states. Locating near many states simultaneously—like in the Mediterranean—might also help by making each country feel less compelled to attack us.<sup>15</sup>

Friedman's claim that seasteading communities will not initially be sovereign communities could be misleading, pragmatic, or provisionally true. Elsewhere, Friedman (2009) has not been hesitant about his aim to enable the creation of "an actual libertarian state" made out of seasteading communities. Enabling such a State does not mean enacting such a State—it means making the creation of that state possible by providing the necessary conditions for growth. Thus, while the goal of the Seasteading Institute is for seasteading communities to become little States or polities, the practical approach to achieving that goal seems to be allowing these communities to be at least partially dependent upon a State in the beginning, and then gradually to wean these communities off their State-based reliance.

Friedman may not believe that seasteading communities are viable, at least at first, without some State oversight, simply because we live in a world that recognizes nationhood and operates according to deeply entrenched notions of statehood. Jettisoning any claims to sovereignty serves to placate potential concerns that existing States might have about seasteading, as well as any complications or conflicts of interest that might arise shortly after seasteading communities begin to proliferate, if they in fact do so. The first seasteading communities probably will not refer to themselves as nations; nor are they likely to refer to themselves as citizens or dependents of a nation. They are most likely to refer to themselves by the name of their communities, whatever those names might be, while simultaneously availing themselves of the benefits and protections of nations. The challenge for seasteaders who share the libertarian vision of mobile "customary law communities" (ibid.) on the high seas will be to avoid increasing or habitual reliance upon a particular nation for either benefits or protection. In other words, seasteading

communities risk sliding down the slippery slope toward traditional statehood, or else relying so heavily upon traditional notions of statehood that they indirectly validate statism. Seasteading apart from any State endorsement could result in the treatment of seasteaders as pirates rather than independent polities, although the likelihood of that is low because piracy by definition entails criminal activity such as robbery, violence, or kidnapping, which are anathema to the aims of seasteaders.

Other claims of Friedman merit special attention. (This essay will not address his more memorable comments about twenty States not having standing armies that could mount resistance to the United States, his aside that the world is run by rich white men, or his constant use of advocacy language—“we need to,” “what we want is,” “Seasteads need to,” “we can do,” “we need to do”—all of which raise important issues.) In particular, Friedman’s remark about “flags of convenience” bears mention because this practice is an alternative to the constant flying of the flag of one State, or to flying no flag at all. “Flag of convenience” refers to the symbol flown or broadcast by ships and indicating merchant registration in a sovereign State other than the State of the ship’s crew or owners. According to H. Edwin Anderson (1996: 157), “The term ‘flag of convenience’ has evolved to mean registration for primarily economic reasons in a country with an open registry. Previously, the term contemplated registration for political reasons or to conceal criminal or questionable activities.”

The take-away point about flags of convenience in the context of seasteading is that these flags offer seasteading communities liminal status between but not of nationalities. This intermediate status carries certain legal benefits, such as exempting a vessel from the rules and regulations of that vessel’s owner’s country, but more importantly it allows for the at-sea community to forge an identity that is not tied to a nation or country. Friedman’s comments would seem to suggest that seasteading will depend upon diplomacy and public relations as its most effective, indeed most workable, form of self-defense. This form of self-defense is not likely to mollify the fears of those who are interested in seasteading but unconvinced about its viability. Nor is it likely to be a selling-point for those interested in joining seasteading communities.

The self-defense explanations provided by Friedman have not and probably will not convince naysayers of the desirability or sustainability of seasteading, but until seasteading becomes a practical reality and not just an ideal possibility, we cannot know whether Friedman’s ideas will work. Experiments stand or fall only after they have been tested. Seasteading has not been tested. It is fitting to couch seasteading in terms of the anarchism (“an anarchist America”) described by Murray Rothbard (2007: 36) that “would

clearly not be a threat to anyone, not because it had no arms but because it would be dedicated to no aggression against anyone, or against any country”; that is not identified with a nation state; that forces problems of violence into smaller and more local scales; and that (2007: 38) relies on “private, voluntary defense efforts.”

Seasteading troubles most existing paradigms of law and sovereignty and unsettles established rules of maritime law. It provides a concrete answer to Rothbard’s question (2007: 37) about “how to get from the present system to the goal [of a libertarian system divorced from the nation state model].” It is conducive to general principles of customary law, some of which predate the rise of the nation state. These general principles have been tested and affirmed for generations, so seasteaders have that longstanding experience in their favor,<sup>16</sup> even if they have to face the seemingly insurmountable problem of self-defense.

## Part Two

Seasteading implicates polycentric law in two major ways. First, as a polity outside of a nation, a seasteading community can experiment with various kinds of polycentric legal mechanisms, from voluntarily funded law enforcement to market-based problem solving to alternative dispute resolution. Second, because a seasteading community is unlikely to be recognized as a legitimate sovereign, and because its members or citizens may not want it to be recognized as a sovereign—at least if “sovereign” means a centralized government with absolute power to coerce or command those within its jurisdiction—legal disputes impacting the entire community or undermining communal autonomy are not likely to be controlled by traditional paradigms of international law. In light of these two propositions, a seasteading community could bring about systems or orders of polycentric law just as the community itself is likely to be subject to variations of polycentric law because of its uncertain status—sovereign or not sovereign?—in the global marketplace. In light of the apparent interface between seasteading and polycentric law, it is not surprising that Friedman (2009) refers to seasteading communities as “customary law communities,” which is the term that Bruce Benson (2007) uses to describe communities regulated by polycentric law.

Arvi Hirvonen’s edition *Polycentricity: The Multiple Scenes of Law* (1998) collects several challenging and comprehensive essays on polycentric law by authors from diverse backgrounds and vantage points. He speaks of the postmodern aspects of polycentricity (1998: 192):



[N]ot only communism as an [*sic*] utopia of absolute equality and community but also the Western democracy, the Rule of Law, the *Rechtsstaat*, the Welfare State, are in crisis. The Great Legal Theories (the juridical paradigm) are unable to explain the phenomena of fragmentation of law through concepts of modern law. These theories still assert that the legal order is structured around a centre in relation to which all principles, rules and norms must be necessarily founded. The traditional jurisprudence bases itself on the ideas of the sovereign law-giver, the centralised and self-sufficient normative order, the coherent legal subject, and the rationality and calculability of legal regulation. This is despite the fact that, in the postmodern society, regulation had decentered (the emergency of new ‘sovereigns’ (speculative economy, mass media, information networks, technological and genetical engineering, purely technical risk-control, privatised social control and security, etc.)), and nation states are, on the other hand, become merged in international communities (like the European Union). This may lead to uncontrollable use of power or ethnically and racially pure communities where minorities have no legal guarantees.

This statement points to the disenchantment of certain thinkers with the generally accepted paradigms of law and government on an international scale. It also implicates polycentricity’s relationship to globalism and transforming jurisprudence. One need not share Hirvonen’s enthusiasm for the postmodern to understand or appreciate polycentric law.

Tom W. Bell (1991 “Privately Produced Law”: 1) has popularized the study of polycentric law, and his research and writing touch upon most if not all contemporary thinkers in the polycentric legal tradition. Bell calls polycentric law the “[o]verlapping jurisdictions or privately produced law in free and open competition” (*ibid*). Elsewhere he refers to polycentric law as “law arising from a variety of customs and private processes rather than law imposed by a single state authority” (1998: 1). If monocentric law signifies government that vests ultimate power in a central government made up of various branches—executive, legislative, and judicial, for instance—then polycentric law signifies government that does not vest power in a single body but rather deflects power among contending jurisdictions.

Some confusion might arise from the singular noun “polycentric law,” which suggests a monolithic arrangement of rules and regulations. But polycentric law is about formal pluralism, about competing rules and jurisdictions, about lines of intersection and departure, about private enterprise and private regulation, about market contest and resolution, about decentralization and dispersal of power, and about minimization of armed and military conflict by shrinking the polity into smaller units and thereby deflating

ideologies like nationalism. In short, polycentric law is “a system where competing private agencies define, judge, and enforce the law” (Friedman, 2009), a “strange and beautiful idea which is impossible to do justice in a short space, in part because it is so much a system of human action, not human design” (ibid.), and an “ecosystem” that “generates many legal systems through competition, innovation, and imitation” (ibid). If these claims seem hyperbolic or quixotic, it is because too many people in our era and society have forgotten or else ignored the fact that the “majority of legal systems throughout history [...] have been polycentric rather than monocentric” (Long 1994).

Polycentric law is not a vague and untested theory without bases in reality. Various theorists<sup>17</sup> have seen manifestations of polycentric law in the legal systems of the Kapauku Papuans of West New Guinea (Benson 1990: 15-21);<sup>18</sup> the Yuroks of Northern California as well as the Ifuago of Northern Luzon (Benson 1989: 1-26);<sup>19</sup> Celtic Irish Law (Rothbard 1978: 231-234); medieval Iceland (D. Friedman 1979: 400);<sup>20</sup> Anglo-Saxon customary law (Bell 1991 “Privately Produced”: 2); the nineteenth-century American West (Anderson and Hill 1979: 9-29); Puritan, Quaker, and Dutch settlements in early America (Auerbach 1983: 31-32); communes throughout America in the nineteenth-century (ibid. generally); Mormon settlements in the American West (ibid. at 56); Chinese, Jewish, and other immigrant communities in the United States (ibid. at 76); and the private arbitration mechanisms of today (Bell 1991 “Privately Produced Law”: 4). These examples from the past and present represent, to varying degrees, legal systems wherein private companies or parties rather than centralized governments adjudicate and settle disputes. All of these examples have in common, again to varying degrees, “the protection of individual rights and private property; voluntary agreements for the provision of security; non-violent dispute resolution; restitution (backed up by insurance against crime losses); compliance enforced primarily through the threat of ostracism; and the evolution of legal norms through entrepreneurial activity” (ibid. at 5).

Bell (1998: 1) points out that “[t]hree areas in particular stand out as likely fields for the development of polycentric law” in the current world: alternative dispute resolution, private communities, and the Internet. The Seasteading Institute seeks to establish private communities in the ocean and so would seem to represent the second of these areas, although seasteading communities would surely have Internet access and could arrange systems of alternative dispute resolution. It is a common assumption that control over law belongs to the State and not, as seasteaders and others would have it, to private parties or enterprises. Nevertheless, philosophical justifications for the State itself, including and especially those of Hobbes and Locke, disregard “the flaws

of the public [or state] model” upon which these common assumptions rely” (Fisher 2010: 435). These justifications dismiss or neglect to consider the defects of state-based paradigms primarily because the justifications presume that “where private market fails, the state will necessarily fare better” (ibid.). But the organization of communities to solve their collective problems and to chase common ambitions does not necessarily entail statehood as that word is traditionally conceived.

Surya P. Sinha’s *Legal Polycentricity and International Law* (1996) remains the most definitive and pioneering work on polycentric law. Sinha seeks, among other things, to challenge the putative universalism of workable law in a world with disparate cultures and diverse communities having sometimes wildly different legal norms and incompatible social theories. For Sinha, legal polycentricity—or polycentric law—is a solution to both existing and anticipated conflicts between varying legal and cultural traditions.

Although it eschews universalism as a legitimate organizing principle for society, polycentric law should not be conflated with moral relativism or bland multiculturalism; nor should it be understood as a rejection of natural law theory or other foundational principles. In fact, Sinha does not necessarily reject the validity of a Western or European nomos couched in vocabularies of universalism, but he does question the ability of a uniform axiological system to incorporate heterogeneous backgrounds and beliefs. A pluralistic order that takes into account divergent centers of backgrounds and beliefs, however, could achieve such a vast accommodation without threatening the priority or credibility of a Western or European nomos. Polycentric law is, therefore, a structural accommodation of competing value systems, not a value system unto itself. Polycentric law does not promote one ideological schema over another, but seeks to arrange differing schemas so that one does not impose upon or threaten another.

Michael Polanyi’s brilliant but oft-overlooked *The Logic of Liberty* (1951) brings to bear a number of insights upon seasteading vis-à-vis polycentricity. The most important of these entails central planning. Although seasteading would seem to lend itself to polycentricity, both by enabling little polycentric communities and by disrupting traditional notions of law and sovereignty shared by people across regions and nations, seasteading proponents have yet to address adequately the oversight function of the institute itself.

Will the Seasteading Institute become a central headquarters from which directions and laws issue to individual constituent seasteading communities? If so, how will the Seasteading Institute maintain its commitment to political liberty while also maintaining a corporate order whereby actions “are essentially those of one man at the top” and whereby “the ideas of the chief executive and his advisors” are commanded down “into a wealth of detail, co-ordinating the

men at the bottom of the pyramid who carry them out, and re-assigning to each a specific function” (Polanyi 1951: 113)? The actions of this corporate order, “carried out at the base of the pyramid, may [...] be said to be *centrally directed* or *centrally planned*” (ibid.), and this centrally planned order contrasts markedly with “spontaneously ordered systems in which persons mutually adjust their full-time activities over a prolonged period, resulting in a complex and yet highly adaptable co-ordination of these actions” (ibid. at 115).

Polycentric law is not centrally planned law, unless there are numerous centers doing the planning. If, arguendo, two systems were strategically essentialized—one centrally planned and one arising out of spontaneous order—into which system would we categorize the seasteading communities imagined by the Seasteading Institute? The same may be asked of most start-up businesses, but here the distinction between business and government is blurred beyond the everyday blurrings of government and business. The question remains whether seasteading communities can maintain independent or near-independent governments based on voluntary exchanges of private property and services without the centralized authority of the Seasteading Institute itself becoming a compulsory “state.”

The Seasteading Institute cannot plan spontaneous order, which is the regulatory apparatus of a polycentric legal order, but it can bring about spontaneous order. The difficulty in teasing out the distinction between planning or engineering order on the one hand, and bringing about or generating order on the other, is essential to a clear understanding of seasteading vis-à-vis polycentric law; for a seasteading community with one center of authority cannot, by definition, be *polycentric*, because polycentricity entails multiple, simultaneous centers of authority competing and yet harmonizing with one another. Without economic competition, moreover, the Seasteading Institute risks becoming a central authority that plans and designs for its constituent communities, unless, of course, the Seasteading Institute inspires numerous seasteading communities to arise and thus disable the controlling influence of the Seasteading Institute.

The only solution to this potential problem about central planning—and it is a tentative solution easier stated than applied—is for the Seasteading Institute to act as God allegedly acted according to Deists: like a grand designer, a clockmaker, who left his design to operate on its own. The Seasteading Institute might run afoul of polycentricity by centrally planning particular island communities, but it could instead provide whatever foundational support is necessary to set seasteading communities in motion and then leave those communities to their own devices, save for the support of private investors.

Because the Seasteading Institute's solutions to problems such as self-defense are speculative and provisional at best, it may be that spontaneous order will arise in these areas because there are too many factors and conditions that cannot be planned for. Seasteading is not yet widespread or commonplace, and the uncertainty of it could make for spontaneous order as unanticipated difficulties get handled when they come up. The point, in any case, is that the Seasteading Institute must enable polycentric law rather than sketch it out on a blueprint or model. To do so, the Seasteading Institute must limit its role to that of inventor and initiator and avoid becoming the epicenter of seasteading practices, principles, procedures, and law.

To suggest that the Seasteading Institute might overstep its authority and grow into a State unto itself is problematic—and arguably preposterous—in light of the size and scope of current nations. It will not do to say that the Seasteading Institute is tantamount to a State that holds a monopoly on law. The Seasteading Institute is not a State; in practical terms, it is a 501(c)3 non-profit corporation, which has a legal status that depends upon State approval, but that also exempts the Seasteading Institute from certain U.S. taxes.

Libertarian purists and some anarchocapitalists may not endorse all of the Seasteading Institute's connections to the State, including filing paperwork with the State, flying flags of convenience, paying taxes to countries of citizenship (the individuals, not the community itself will pay these), and so forth; but that disapproval speaks more about the ubiquity of States and statism than it does about the Seasteading Institute and its practices. Put another way, what other alternative does the Seasteading Institute have than to deal with a State when and where it must?

To contend that a libertarian community must arise entirely apart from the State—in the current era when statism is seemingly universal and the State is generally assumed to be the sole expositor, protector, and enforcer of law—is to ask too much of the seasteaders, whose floating polities cannot spring out of a vacuum or arise, as they could in previous eras, entirely apart from the “nation” paradigm. Given the omnipresence of States, the Seasteading Institute must avail itself of the protections of the State in the beginning, but it will comply with its ideals only if, over time, it can sustain itself without resort to the State. “Comply” here means to accomplish what seasteading leaders and promoters seek to accomplish: the creation of island communities that are not part of nations or States and that regulate themselves according to capitalist principles.

This discussion of polycentric law has focused on the macro-level and the ways in which seasteading implicates polycentric law in relation to other nations or States. But seasteading communities could give rise to polycentric legal orders within their own jurisdictions. A seasteading community could

arrange itself to have multiple centers of authority. On this score, Randy Barnett has some useful speculations. After addressing the principles that classical liberals championed to minimize monopolistic power—elections, federalism, separation of powers, free emigration, as well as the constitutional strategies of reciprocity, checks and balances, and exit—Barnett describes a polycentric legal order in which these classical liberal principles could be realized. He claims (1998: 258) that a polycentric legal order “will arise naturally if just two constitutional principles that depart from our current approach to law enforcement and adjudication are adopted.” These two principles are the nonconfiscation principle and the competition principle.

The nonconfiscation principle holds that “[l]aw enforcement and adjudicative agencies should not be able to confiscate their income by force, but should have to contract with the persons they serve” (ibid.). This principle is akin to the principle of freedom of contract, and freedom from contract, if we think of law enforcement and adjudication as services rendered for consumers (ibid. at 259-60). Monopolies are unable sufficiently to account for local interests and concerns because monopolies are both too big and their services too uniform to accommodate such particularities (ibid. at 260). A polycentric system operating according to the nonconfiscation principle would allow consumers to deprive law enforcement of revenues and thereby discipline law enforcement into a relationship of reciprocity with consumers (ibid.).

Law enforcement and adjudicative agencies would need consumers as much as consumers would need law enforcement and adjudicative agencies. The consumers and agencies would, each of them, have certain incentives, especially since the agencies would charge for their services just as hospitals, banks, private schools, or gas and electric companies charge for their services (ibid. at 260-61). Insurance companies would pay for large and unexpected expenditures, just as they do in monocentric systems (ibid. at 261). Charitable organizations would assist in subsidizing services for those having difficulty paying (ibid.), except that in a polycentric system, economic benefits would be maximized and poverty thus reduced, even if economic inequalities resulted. (Barnett devotes an entire section to “the rich” and an entire section to “the poor,” but those issues expand the discussion beyond the scope of this essay.)

Barnett discusses privately owned sidewalks and transportation services, court systems backed by insurance plans, profitable court systems that sell opinions to data retrieval services, the adoption of the English-style “loser pays” rule of lawsuits, alternative dispute resolution, and fee-for-service legal mechanisms as possible elements of a polycentric order (ibid. at 261-64). This essay is not an interrogation of Barnett’s theories, so it must gloss over these several ideas and maintain a descriptive rather than evaluative stance. It is

worth noting, however, that Barnett makes strong cases for the viability of these services based on the nonconfiscation principle, which would seem to be a reasonable starting-point for the fledgling seasteading communities.

The competition principle holds that “[l]aw enforcement and adjudicative agencies should not be able to put their competitors out of business by force” (ibid. at 258). This principle contemplates freedom *to* contract and is constructed along the proposition that third-parties act unjustly when they prevent the legitimate formation of contracts (ibid. at 271). This principle is directed mainly at the aforementioned law enforcement and adjudicatory agencies because “[s]ome think that law enforcement and adjudication are so important that we must make an exception to the background right of freedom of contract and permit a coercive monopoly to provide such services” (ibid.). But law enforcement and adjudication are extremely important services, and therefore they are even more dangerous when left in the hands of a coercive monopoly (ibid.).

Barnett concludes his discussion of the competition principle by calling for a comparative study of constitutional and polycentric orders, and he explains, *à la* the legal historian Harold Berman, that Western Civilization has in many ways already experimented with polycentricity from time to time and place to place. The implication seems to be that polycentricity has been tested and tried and has even proved workable, and that polycentricity is therefore possible in the current era. Accordingly, seasteaders would be on solid footing, so to speak, with a polycentric legal system.

Even if it is not possible to examine seasteading according to its practicality, there are definite precedents of polycentricity that suggest the practicality of polycentric law. If seasteading fails to work, it will not be because polycentricity was bound to fail from the outset, but because of factors and liabilities having to do with start-up costs or failure to convince society writ large of seasteading’s viability. The Seasteading Institute has taken great strides to ensure that its communities would be legal according to international and maritime law; it remains to be seen whether its communities are livable and functional.

## Conclusion

The Seasteading Institute and seasteading demand not just a hearing but also a chance to succeed. The Seasteading Institute currently is making efforts to show that it is serious about its mission and that seasteading is not a so-called “libertarian pipedream,” but a practical reality. Improbable is not impossible. Small is not weak. Vulnerable is not incapable. Until seasteading takes place, we cannot determine its viability. By the same token, any

dismissals of seasteading as a viable practice are based on assumptions, however reasonable those assumptions might seem. We cannot predict the future, but we can get ahead of ourselves. To the extent that knowledge is the understanding of past experience, and good knowledge is the accumulation of a vast network of interrelated experiences, seasteading is a necessary and timely experiment, providing as it does the first of possibly many experiences from which to evaluate and predict the course of future law and human action. The world may not be ready for seasteading in its fullest, most efficient manifestation, but until seasteading becomes a practical reality, the world cannot know whether seasteading will be instrumental to the future of law and government. An untried experiment gives no answers. Seasteading merits a try.

## Notes

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<sup>1</sup> The Seasteading Institute, “Introduction” [available at <http://seasteading.org/about-seasteading/introduction>] [last accessed 2/23/2011].

<sup>2</sup> Pushpanathan v. Canada (Minister of Citizenship and Immigration), 1 S.C.R. 982 (1998).

<sup>3</sup> Consider, e.g., Surya P. Sinha, *Legal Polycentricity and International Law* (Chapel Hill, North Carolina: Carolina Academic Press, 1996) (arguing among other things that global pluralism and diversity necessitate a rethinking of rules of law and that societies with various customs and values should not be subsumed under rubrics of universalism). See also Frank J. Garcia, Book Review of Surya P. Sinha’s *Legal Polycentricity and International Law*, 36 Virginia Journal of International Law 1085, 1087 (1996) (claiming that “[l]egal polycentricity is at heart a dialectical movement, attempting to transcend both the prevalent “thesis” of the possibility of a universal moral ideal and its antithesis, radical relativism, through an effort to embrace moral pluralism on a structural level. Such an embrace involves reconceiving legal systems as relations among various normative orders or “centers,” and seeking recognition of these multiple normative centers within their relevant legal systems”).

<sup>4</sup> Articles 5 and 6, Convention on the Territorial Sea and the Contiguous Zone (1958); see also Restatement Third, Foreign Relations Law of the United States § 501.

<sup>5</sup> Restatement Third, Foreign Relations Law of the United States § 521.

<sup>6</sup> G.A. Res. 2749 (XXV) ¶ 1, U.N. Doc. A, RES, 25, 2749 (December 1970).

<sup>7</sup> United Nations Convention on the Law of the Sea art. 1, para. 1, Dec. 10, 1982.

<sup>8</sup> See *Employers Mut. Cas. Co. v. Samuels*, 407 S.W. 2d. 839 (Tex. Civ. App. San Antonio 1966), writ. refused n.r.e. (February 15, 1967).

<sup>9</sup> See *Koru North America v. U.S.*, 12 Ct. Int’l Trade 1120, 701 F. Supp. 229 (1988).

<sup>10</sup> See *United States v. Flores*, 289 U.S. 137, 53 S. Ct. 580, 77 L. Ed. 1086 (1933); see also *Veldhoen v. U.S. Coast Guard*, 838 F. Supp. 280 (E.D. La. 1993) (judgment affirmed as modified on other grounds, 35 F.3d. 222 (5<sup>th</sup> Cir. 1994); see also *U.S. v. Pizdrint*, 983 F. Supp. 1110 (M.D. Fla. 1997).



- <sup>11</sup> U.S. v. Kun Yun Jho, 2006 WL 3488952 (E.D. Tex. 2006).
- <sup>12</sup> See, e.g., U.S. v. Caicedo, 47 F.3d. 370 (9<sup>th</sup> Cir. 1995).
- <sup>13</sup> U.S. v. Caicedo.
- <sup>14</sup> “Seasteading: Striking at the Root of Bad Government—The Idea Room with Patri Friedman and Brad Taylor,” *The Freeman: Ideas on Liberty*.
- <sup>15</sup> The Ideas Room (separate web link from previous note), *The Freeman: Ideas on Liberty*, The Foundation for Economic Education, *The Freeman: Ideas on Liberty*, The Foundation for Economic Education, <http://www.thefreemanonline.org/the-idea-room/question/323/>
- <sup>16</sup> See, e.g., Section IV, “Historical Case Studies of Non-Government Law Enforcement” in Stringham’s *Anarchy and the Law*.
- <sup>17</sup> For this list, I remain indebted to the bibliographical work done by Tom W. Bell in the previously cited “Polycentric Law,” “Polycentric Law in a New Century,” and “Privately Produced Law.”
- <sup>18</sup> Benson derives his conclusions largely from Leopold Popisil, *Anthropology of Law: A Comparative Theory* 9 (New York: Harper and Row, 1971).
- <sup>19</sup> Benson elaborates on this theme in “The Lost Victim and Other Failures of the Public Law Experiment,” *Harvard Journal of Law and Public Policy*, Vol. 9 (1986) at 399-427.
- <sup>20</sup> See also David D. Friedman, *The Machinery of Freedom*, 2<sup>nd</sup> ed. (La Salle, IL: Open Court, 1999). See also Birgir T. R. Solvason, “Institutional evolution in the Icelandic Commonwealth,” *Constitutional Political Economy*, Vol. 4, No. 1 (1993) at 97-125.

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