

NONPROFIT ADVOCACY

— AND —

THE POLICY PROCESS

A SEMINAR SERIES

VOLUME 3

*In the States,  
Across the Nation, and  
Beyond*

DEMOCRATIC AND CONSTITUTIONAL PERSPECTIVES  
ON NONPROFIT ADVOCACY

*Edited by*

Elizabeth J. Reid



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## About the Center on Nonprofits and Philanthropy

The Urban Institute's Center on Nonprofits and Philanthropy (CNP) explores the role and impact of nonprofit organizations and philanthropy in democratic societies. By deepening the understanding of the multiple roles that nonprofits play—as service providers and as avenues of civic participation and public voice—CNP research endeavors to address the relationships among nonprofits, government, and the market from a variety of perspectives.

The Center strives to build the necessary research tools, contribute to sensible theory, and develop applications that illuminate both policy and practice in the nonprofit sector. CNP's research projects combine qualitative and quantitative data, the theoretical framework of civil society, and practical public policy considerations.

A major component of the Center is the National Center for Charitable Statistics (NCCS), which serves as the national repository of statistical information on the nonprofit sector. NCCS is building a national nonprofit data system based on IRS Forms 990 and other information. These data enable researchers to develop a comprehensive picture of nonprofit-sector trends as well as in-depth analyses of financial data. For information visit our web site, <http://www.urban.org/centers/cnp.html>.

Dissemination of CNP research findings includes electronic publications on the Internet as well as policy briefs, working papers, and monographs. In addition to the *Nonprofit Advocacy and the Policy Process Seminar Series*, CNP holds regular seminars, discussion groups, and conferences to discuss research findings and topics of current interest to the field.

**Elizabeth T. Boris** is the first director of the Center on Nonprofits and Philanthropy at the Urban Institute and was the founding director of the Nonprofit Sector Research Fund at the Aspen Institute, where she worked from 1991 to 1996. Prior to 1991, she was vice president for research at the Council on Foundations, where she developed and directed the research program for 12 years. The author of many research publications and articles on philanthropy, including *Philanthropic Foundations in the United States: An Introduction*, Dr. Boris is also coeditor with Eugene Steuerle of *Nonprofits and Government: Collaboration and Conflict* (Urban Institute Press, 1999). She is active as a board member and advisor to many nonprofits and is past president of the Association for Research on Nonprofits and Voluntary Action and the Insights editor for *Nonprofit and Voluntary Sector Quarterly*.



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## About the Series

The Center on Nonprofits and Philanthropy convened a series of 10 seminars during 2000-2002 to explore the engagement of nonprofit organizations in the policy process and the regulation of their political activities. **Nonprofit Advocacy and the Policy Process: A Seminar Series** examined the current regulation of nonprofit advocacy, proposed reforms, and the impact of regulation on nonprofit contributions to civic and political participation, policymaking, and representative democracy. The papers presented during the seminars, as well as summaries of the general discussions, are disseminated through a series of edited volumes.

- Volume I, *Structuring the Inquiry into Advocacy*, published in October 2000, covers the seminars held during the winter and spring of 2000. It introduces advocacy as a concept, examines the structure of nonprofit political regulation under federal tax and election law, and discusses the evolving relationship between nonprofit organizations and money-driven elections. This volume has had considerable resonance with policymakers and leaders in the nonprofit sector.
- Volume II, *Exploring the Organizations and Advocacy*, includes papers and findings from seminars held during the fall and winter of 2000-01. Because of the diversity of elements that were discussed during the seminar sessions, this second volume is divided into two issues. Issue 1, *Strategies and Finances*, examines strategies for influencing policy and election outcomes as well as the ways in which nonprofit organizations fund their advocacy activities. Issue 2, *Governance and Accountability*, examines the internal operations of nonprofit organizations and how their mission, capacity, governance, and constituency shape their advocacy and their internal and public accountability.
- Volume III, *In the States, Across the Nation, and Beyond*, includes the findings and papers from the fall 2001-2002 seminars. This volume focuses on constitutional theoretical frameworks that shape the law and practice of nonprofit advocacy in American democracy.

Additionally, a background paper for the seminar series has evolved to include findings from the seminars and future research questions generated from the seminar papers and participants' comments. The Seminar Series publications are posted on our web site, <http://www.urban.org/advocacyresearch>. The series is made possible by the generous support of the Robert Sterling Clark Foundation, the Ford Foundation, the Nathan Cummings Foundation, and the Surdna Foundation.

Elizabeth T. Boris  
Director of the Center on Nonprofits and Philanthropy

SEMINARS IN THE SERIES ON  
**NONPROFIT ADVOCACY**  
— AND —  
**THE POLICY PROCESS**

**The Spring/Summer 2000 Series: Structuring the Inquiry into Advocacy**

- SEMINAR 1 Nonprofit Advocacy: Practices and Perspectives
- SEMINAR 2 Regulating Nonprofit Advocacy: The Rules, Rationales, and Practices
- SEMINAR 3 Politicians, Parties, and Access in the Policy Process

**The Fall/Winter 2000–2001 Series: Exploring the Organizations**

- SEMINAR 4 Advocacy Strategies and Influence
- SEMINAR 5 Financing Nonprofit Advocacy
- SEMINAR 6 Representation, Participation, and Accountability

**The Spring/Fall 2001 Series: In the States, Across the Nation, and Beyond**

- SEMINAR 7 Nonprofit Advocacy in the States
- SEMINAR 8 Nonprofit Advocacy in Global Perspective
- SEMINAR 9 Constitutional Perspectives on Nonprofit Advocacy
- SEMINAR 10 Nonprofit Advocacy and Democracy

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## Executive Summary

*Democratic and Constitutional Perspectives on Nonprofit Advocacy* contains the complete text of five papers that were presented in seminars 9 and 10 of the seminar series, Nonprofit Advocacy and the Policy Process. The seminars examined the constitutional and theoretical frameworks that shape the law and practice of nonprofit advocacy in American democracy. Papers and discussion examined interpretations of the application of First Amendment rights of speech and association to groups and the grounds and the conditions under which the expressive roles of groups are constitutionally protected. Likewise, the series reviewed the relation between nonprofit taxation and first amendment rights and asked whether limitations imposed on the political speech of exempt organizations as a condition of exemption constitute unconstitutional burdens on fundamental rights. The final two seminars also explored how elements in democratic theory about pluralism, deliberation, factionalism, and popular dissent, for example, help us interpret the role of groups in a democratic system of government and frame historical and contemporary political debates about how we govern ourselves.

### Summary of Chapters

#### Defining the Bounds of the Right of Association

Professor **Evelyn Brody**, professor of law at the Chicago-Kent College of School of Law and cohost of the seminar series, looks at the conflicts that emerge between individual rights, group rights, and government regulation. The paper explores the limited constitutional right of association in American society. Professor Brody explores the social and political role that citizens have in exercising vigilance over how associations form and operate, and reviews the fundamental constitutional norms that protect the rights of organizational autonomy in governance and functioning.

#### How the Constitution Shapes Civil Society's Contribution to Policymaking

**Mark Tushnet**, of the Georgetown University Law Center, examines the relation between the Constitution and civil society's institutions. The paper points out that civil society's institutions are creatures of law, including constitutional law, and so—on the most abstract level—cannot be understood of as operating entirely outside the domain of the state. Likewise, the paper examines contemporary U.S. constitutional doctrine, primarily the law of free speech, in relation to civil society's institutions, and argues that the constitutional protections given to those institutions' efforts to influence policymaking are less robust than might be expected, consisting primarily of a ban on discrimination against particular viewpoints.

#### The Theory and Practice of Free Association in a Pluralist Liberal Democracy

Professor **William Galston**, director of the Institute for Philosophy and Public Policy at the University of Maryland and an attorney, offers an account and defense of a particular conception of freedom of association. The paper begins by exploring the historical development of the idea of limits to public power within the U.S. constitutional tradition. It then turns to the resources that political theory can offer—in particular, value pluralism, political pluralism, and expressive liberty—to characterize and justify limits to public authority. Building on this foundation, the paper examines some contemporary controversies over the definition and application of the principle of free association. It concludes with a discussion of the distinction between the negative (protective) and affirmative (promotive) role of civil associations in the political process.

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How to Profit from  
Nonprofits:  
Tocqueville on  
Associations

**Delba Winthrop**, of Harvard University, is coauthor of a recent translation of Tocqueville's *Democracy in America*. Although Tocqueville's *Democracy in America* has nothing to say about "nonprofit advocacy," nowhere is more said about "associations." Professor Winthrop's paper focuses on four issues: First, what does Tocqueville mean by "association" and what purposes does he think the activity of associating serves in a liberal democracy? Second, what makes the Americans he describes as adept at associating as they are? Third, what is distinctive about his view? And finally, what is the relevance of this view today? Whether his observations and recommendations are still useful depends on whether they can be adapted to our current situation, differences of historical development and of scale notwithstanding.

Nonprofit  
Organizations and  
Democratic Theory:  
Toward a Theory of  
Continuing Mediated  
Consent

Professor **Frances R. Hill**, professor of law at the University of Miami School of Law and co-host of the seminar series, uses the concept of consent to explore the hypothesis that groups facilitate effective citizenship and government accountability and legitimacy only if groups themselves are based on meaningful participation by their members. To explore the multiple dimensions and implications of consent, the paper examines three theories of consent developed in classic democratic theory. The work of Hobbes, Locke, and Rousseau treated consent as the only basis for legitimate government. Each, however, developed a different theory of consent and a different theory of the relationship of the people to government authority. Hobbes linked consent to representation but not participation. Locke linked consent to continuing participation through elected representatives. Rousseau turned to socialization of the people to rob consent of its disruptive potential. Neither Hobbes nor Locke nor Rousseau developed a theory of groups. This paper engages in a thought experiment that asks what each theorist might have said about the role of members in groups and how this might have related to a theory of the role of groups in relation to government. Based on this thought experiment, the paper explores the role of nonprofit advocacy organization through the concept of continuing mediated consent. It suggests that many nonprofit advocacy organizations are as distrustful of continuing consent linked to participation as was Rousseau and that they are closer to Hobbes's concept of representation without participation than to Locke's link between consent and participation.

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# 1 Defining the Constitutional Bounds of the Right of Association

EVELYN BRODY \*

*As a matter of democratic theory, the right of association is something we cannot live without; but as a matter of social governance, the right, if uncontained, is something we cannot live with.*<sup>1</sup>

The Constitution of the United States defines the shape and scope of American government, and the Bill of Rights gives the American people certain rights—among these the right of free speech and the right of assembly. Nowhere in either the Constitution or the Bill of Rights does the “right of association” appear. Despite the central role of organized groups as intermediary bodies in American society, the constitutional right of association is surprisingly recent and limited.<sup>2</sup> Indeed, our “right of association” was not officially recognized by the U.S. Supreme Court until 1957, in *NAACP v. Alabama ex rel. Patterson*.<sup>3</sup> Since then, the jurisprudence of this right has proceeded by fits and starts, unlike that surrounding rights specifically laid out in the First Amendment, such as speech, religion, and assembly. As we examine the structure for regulation of association and the role of the courts, we will appreciate the limits of the law in remedying private discriminatory and anti-democratic behavior.

This chapter does not, however, attempt to set out a normative prescription for creating political and moral values. For every advocate of group rights and group autonomy there is another staunch advocate of individual autonomy and protection from group tyranny. In the end, the debate leads me to caution that while we have a social and political obligation to exercise vigilance over how associations form and operate, we must recognize that our fundamental constitutional norms protect the rights of organizational autonomy in governance and functioning.

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\* Professor of Law, Chicago-Kent College of Law. I appreciate helpful suggestions from attendees at Urban Institute Seminar 9, “Advocacy and Democracy: Rights, Theories, and Practices,” particularly Elizabeth Boris, Miriam Galston, Frances Hill, Betsy Reid, and Mark Tushnet. A longer version of this piece, *Entrance, Voice and Exit: The Constitutional Bounds of the Right of Association*, appears in the *University of California at Davis Law Review*, vol. 35, no 4, 821–901 (2002).

## Framework for Analysis

In general, the associational jurisprudence draws from our broader political structure that enshrines individual autonomy as its core norm. Despite our political system's liberal grounding in the rights of individuals, the Bill of Rights protects not only individual but also corporations. By contrast, courts view groups defined only by common characteristics—such as national origin or sex—as contributing (or not) to individual self-definition. Among ascriptive characteristics, however, race sometimes receives a dual treatment, as protection against racial discrimination is specifically enshrined in the Civil War amendments to the Constitution.

### Constitutional Interpretation and the Role of the Courts

Under the separation of powers dictated by the Constitution, legislatures are the democratically elected and deliberative bodies institutionally competent to design comprehensive schemes that take into account all affected interests. The legislature can reverse an erroneous statutory interpretation by the courts, but is powerless to disturb a right found by the courts to be rooted in the Constitution;<sup>4</sup> accordingly, courts attempt to ground their decisions in legislative interpretations, and engage in constitutional interpretation only as a last resort. Moreover, the U.S. Supreme Court can hear only a limited number of cases each year, and has the discretion to accept or reject petitions for certiorari. As a result of these institutional features, constitutional jurisprudence develops slowly and without coordination, through a changing makeup of justices—who often produce multiple opinions—amid a changing social landscape.<sup>5</sup> Until the Supreme Court sets out an interpretation, precedent might be set in only one of the federal circuits, or inconsistent or conflicting precedents might co-exist. Moreover, the state supreme courts are the final interpreters of state constitutions and state statutes, which might provide greater protection than does the U.S. Constitution or federal statute—although, as *Boy Scouts of America v. Dale*<sup>6</sup> illustrates, the courts can strike down one person's state right if it clashes with another's federal right.

As a result of these judicial institutional impediments, it should not be surprising that the constitutional “right of association”—which appears nowhere in the Constitution—has developed only sporadically since the Supreme Court officially recognized it in the late 1950s. Cases that might have been construed as associational—such as those brought during the internal war on Communism—needed only a jurisprudence of individual speech;<sup>7</sup> indeed, with the recognition of corporate speech rights, a right of association might be superfluous for other cases as well. The instantly notorious decision in June 2000 involving the Boy Scouts of America has, to some, firmly declared the inviolability of “expressive” associations, but, to others, only raised more questions about the bounds of protected association.

### General Legal Framework for Associational Rights

While associations have been described as “little governments,” they are not bound by the Bill of Rights, and, although lacking the power to incarcerate those who breach their rules, they effectively enjoy the power of exile through the right to expel. Courts have traditionally adjudicated disputes between a member and a secular organization under simple contract and property laws.<sup>8</sup> Disputes with members rarely raise constitutional issues. “In those situations where no arm of government is found to be par-

ticipating in the alleged interference with free association the only recourse is to the remedies prescribed by statute or by the courts of equity.”<sup>9</sup>

In general, though, legislatures follow a *laissez-faire* approach. State corporate and other enabling statutes generally only provide for the barest of structures for organizational formation and operation, leaving to the parties to work out and provide for any additional desired governance restrictions and membership protections. Statutes permit—but do not require—nonprofit organizations to have members with rights to elect the board of directors and to exercise other extraordinary powers set forth in the statute or the articles of incorporation (such as approving a decision to merge or liquidate). Member control is more common in the “mutual” nonprofit, such as a labor organization, social club, or business league. Most charities and social welfare organizations, moreover, have no members, or have members only in the ceremonial sense. Many nonprofits that use the term “member” offer only affinity, not authority. A nonprofit corporation without members, by negative definition, has a self-perpetuating board of directors. Notably, any procedures for expulsion adopted by the organization will be treated as part of the bargain, and an organization that follows its procedures is not generally second-guessed by the courts.

Among the oldest American associations are, of course, churches. Specific constitutional impediments to government regulation of church affairs appear in the Religion Clauses of the First Amendment, which both guarantee freedom of religion and prohibit government favoritism or establishment. Even so, courts will adjudicate property and contract matters raised by members, applying the traditional mode of evaluating associational claims. However, while holding congregational churches to any procedural processes they adopt, courts will accept the rulings of hierarchical churches on doctrinal matters.<sup>10</sup>

Disputes over membership are thus governed by “private” law, with courts generally willing to defer to the organization’s determination of due process so long as the member is afforded notice and an opportunity to be heard. In particular, courts more closely scrutinize exclusion or expulsion from commercial and professional associations, such as membership in a medical association necessary for hospital privileges.<sup>11</sup> This public policy recognizes the interests of third parties—for example, consumers and patients—as well as the interest of the would-be member to practice his or her trade. The courts’ authority in this area, however, is not rooted in the Fourteenth Amendment’s Due Process Clause, but rather in their inherent equity powers. In general, if voice within an organization fails, an excluded or departing member is free to form a new association.

The first important Supreme Court decision affecting associational rights arose early in the nineteenth century. Until enactment of the Fourteenth Amendment and the “incorporation” of the Bill of Rights in the Fourteenth Amendment’s Equal Protection clause, protection against interference by the states in corporate activity was sought by invoking the Contracts Clause. An 1819 case—*Trustees of Dartmouth College v. Woodward*<sup>12</sup>—held that the governing structure of a college was a contract protected by the Contracts Clause of the Constitution, and thus could not unilaterally be altered by state legislation absent a reservation power. The Supreme Court first articulated a constitutional right of association (as opposed to assembly) only in the 1957 case *NAACP v. Alabama ex rel. Patterson*. Nearly 20 years later, in 1977,

the Court addressed the opposite issue, the limits of state-compelled association. In *Abood v. Detroit Board of Education*,<sup>13</sup> the Court required a public-sector “agency shop” to allow non-union members charged dues for collective bargaining purposes to opt out of paying for the union’s expenses of unrelated expressive activities. In the 1984 decision *Roberts v. U.S. Jaycees*,<sup>14</sup> the Court upheld a state law treating the Jaycees as a “public accommodation” subject to a law prohibiting discrimination against women in the admission of voting members. In June 2000, the Supreme Court decided *Boy Scouts of America v. Dale*, holding that a state’s interest in eradicating discrimination against sexual orientation could not trump the expressive associational rights of an organization for the development of boys and young men. The constitutional bounds of the freedom of association as described by *NAACP*, *Abood*, *Roberts*, and *Dale* are supplemented by numerous cases regarding political parties, freedom of religion, freedom of speech, freedom of assembly, and freedom of “intimate” association (regarding the family and other small groups).

The most recent Supreme Court decisions evince a willingness to protect an organization’s right to choose its membership and speech—from the political to the commercial. The same week it decided *Boy Scouts of America v. Dale*, the Court upheld (by a seven-to-two vote) the California Democratic Party’s challenge to a state referendum requiring a blanket primary process, under which a voter of one political party could vote for candidates of another party. “Such forced association has the likely outcome—indeed, in this case the intended outcome—of changing the parties’ message,” wrote Justice Scalia for the Court. “We can think of no heavier burden on a political party’s associational freedom.”<sup>15</sup> In June 2001, the Court (by a six-to-three vote) upheld the right of United Foods, Inc., to be free from making congressionally-mandated contributions to a fund that touted the virtues of generic mushrooms. “We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself,” Justice Kennedy wrote for the Court.<sup>16</sup>

In general, as described below, the Supreme Court’s associational jurisprudence can roughly be summed up in just a few principles:

1. A constitutional right to associate exists if it is linked to another constitutional right: intimacy (such as family matters) or expression (speech). (This chapter concentrates on expressive association.) No single principle (such as “commerciality”) has been adopted by the Court to distinguish expressive from nonexpressive association. For expressive association, until recently the non-profit form appeared necessary; in any case it is not sufficient.
  2. If the state has a legitimate purpose, it can require an organization that is not “intimate” or “expressive” to admit a member. Otherwise, the state must have a compelling interest which must outweigh the associational interest, and the state-compelled association must be narrowly targeted to further that interest.
  3. If a member can voluntarily enter and exit the association, the internal governance structure and the strength of the member’s internal voice option are irrelevant.
  4. If the affiliation is compelled by the state, then the member cannot be compelled to pay for speech unrelated to the reason she is compelled to join, again regardless of how democratic the process is for determining the speech.
-

5. Constitutional rights do not inhere in amorphous groups, such as identity groups.

## Entrance: Development of “The Right of Association”

“Congress Shall  
Make No Law”:  
The Fine Print

We enjoy First Amendment and other Bill of Rights protections against state action, not private action. However, “state action” can appear in various guises. Where the actor is itself a state agency, such as a public college or employer, it must adhere to Equal Protection and other constitutional requirements. By contrast, in theory, private organizations can operate in all their fractious and insular splendor, free of what Nancy Rosenblum calls the “logic of congruence”—the demand “that the internal life and organization of associations mirror liberal democratic principles and practices.”<sup>17</sup> Yet the state regulates private speech and association all the time. Because these rights are not absolute, public parades and speeches can be restricted as to time, place, and manner; private employers, landlords, and home sellers may not discriminate based on race and other protected characteristics; charities may be compelled to register with state and federal agencies; and Congress and the states may regulate certain campaign finance activities.<sup>18</sup>

Rights clash, and a liberal legal system recognizes the negative side to these positive freedoms: One person’s “freedom to” is also a “freedom from,” and can be another’s *lack* of freedom. One’s liberty to speak means another’s inability to be free from hearing. In resolving the tension between the state’s interests in equality and civility and the individual’s interest in liberty, courts consider the constitutional strength of the right being regulated. The state’s interest in eradicating discrimination or in furthering the good society might lead it to condemn “bad” speech—like the distribution of literature asserting the inferiority of those of certain races. The First Amendment, however, forbids government to censor private speech based on its content; nor may government prohibit private association simply because it furthers non-egalitarian purposes. Indeed, with a few notable exceptions discussed below, it is not considered “state action” for the courts to recognize and enforce lawful private discriminatory arrangements.

Before the civil rights movement, to the extent the federal or state governments acted to limit associations, it was political associations (and political speech) they were worried about. Even the first Supreme Court cases recognizing a right of association reflected ancillary associational concerns—for example, defending the right of the NAACP to hire a lawyer, and to “do business” in the Southern states without having to disclose its membership lists. After *Brown v. Board of Education*, and with the enactment of increasingly expansive civil rights legislation, more and more “private” activities became subject to regulation: housing, employment, and education. *Boy Scouts of America v. Dale* represents the first defeat for the application of a state anti-discrimination law; time will tell how broadly it will apply.

Finally, the Supreme Court distinguishes between (prohibited) regulation of speech and (permissible) regulation of conduct. Nor is association to commit a crime protected; the Court upheld the conviction of members of the Communist Party essentially on the theory that the defendants conspired to overthrow the government.<sup>19</sup>

Recognizing a  
Right of Association:  
The NAACP and  
Membership Lists

In 1957, the Supreme Court declared a constitutional right of association in finding that the NAACP need not disclose its membership lists to hostile state authorities. The Court conceived of the right of association as belonging to the individual members—as augmenting the power of their individual speech. The opinion employed sweeping First Amendment language not limited to political, or even social, issues:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, *it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>20</sup>

Later cases returned to the idea of the association as amplifier. In a case involving a lobbying group, the Court declared that the value of a private association “is that by collective effort individuals can make their views known, when individually, their voices would be faint or lost.”<sup>21</sup>

In the explicitly political realm, the Supreme Court has considered numerous cases involving the right of political parties to control their processes. In 1981, the Court unambiguously declared “the freedom to associate for the ‘common advancement of political beliefs,’ [which] . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”<sup>22</sup> Five years later, the Court reiterated: “The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.”<sup>23</sup>

Among several cases involving the associational rights of the NAACP in its battle to advocate for civil rights in Southern states, the most relevant to our issues involved states seeking to require the NAACP to produce the names and addresses of its membership.<sup>24</sup> The Court recognized that the states had no legitimate interest in these lists, but rather sought to publish the information in order to induce private parties to harass the members through firings and physical intimidation. We do not know to what extent membership protection also extends to contributors.<sup>25</sup> Professor Frances Hill observes that “exempt organizations can be used by people to obscure how they’re raising and using money for any number of purposes, including political activity.”<sup>26</sup> Indeed, *Buckley v. Valeo* upheld government-required disclosure in the context of campaign finance reform, and, in campaign finance reform legislation enacted in July 2000, Congress required near-contemporaneous disclosure of contributions to tax-exempt organizations formed for political purposes but not required to register with the Federal Election Commission.<sup>27</sup>

Federal Anti-Discrimination Laws: *Runyon v. McCrary*

Almost by definition, private association can conflict with anti-discrimination laws in a variety of contexts. The 1976 Supreme Court decision *Runyon v. McCrary*<sup>28</sup> is the most interesting and the most jurisprudentially troubling case in this area. Forced to desegregate their public schools by *Brown*, Southern states took drastic action, financially starving their public schools and providing funds to or for the benefit of whites-only private schools. When Michael McCrary and other black students were denied admission to unintegrated private schools, their parents brought a civil suit against the schools under a post-Civil War federal law prohibiting racial discrimination in the making and enforcing of private contracts. Having found that these schools, because of their methods of soliciting for students were “more public than private,”<sup>29</sup> and did not fall under any exceptions in the statute, the Supreme Court addressed the constitutionality of the federal law.

The Court proceeded to uphold the federal statute against the schools’ claim of freedom of association. First, the Court suggested that, because private discrimination enjoys no constitutional right of enforcement, the courts can never enforce private agreements to discriminate.<sup>30</sup> Second, the Court held that requiring a school to admit black children does not require the school to alter its message, because “parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and . . . the children have an equal right to attend such institutions. . . . [A]s the Court of Appeals noted, ‘there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.’”

The lesson of *Runyon v. McCrary* might simply be that race is different, education is different, and racial discrimination in education is a unique evil.<sup>31</sup> In dissent, however, Justice White warned that stretching the definition of “contract” to these relationships exposes the courts to a flood of pretextual lawsuits over admission to private associations. However fears of such challenges for admission to private associations have not been borne out.

State Public Accommodations Laws: *Roberts*

While federal law bars discrimination on the basis of race, color, religion, or national origin in “places of public accommodation,” many states and municipalities have gone further, both in their enumeration of protected classifications, and in their definition of “public accommodation.” The U.S. Constitution, however, provides an outer limit to the reach of these statutes and ordinances.

In 1984, eight years after *Runyon v. McCrary*, the Supreme Court considered the application of Minnesota’s anti-discrimination law to the local chapters of the United States Jaycees, which excluded women from voting membership.<sup>32</sup> In sharp contrast to the holding of *Runyon v. McCrary*, Justice Brennan declared: “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.”<sup>33</sup>

Nevertheless, the Court unanimously upheld the application of Minnesota’s anti-discrimination law to the Jaycees. The Court described two types of protected rights:

“intimate” association (protected by a penumbra of privacy rights) and “expressive” association. The Court found that such an open and large membership business organization as the Jaycees did not qualify as intimate. It further concluded that, under the facts, the state’s interest outweighed the Jaycees’: “We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”

In upholding the right of women to be admitted as full voting members, the Court did not suggest that the Jaycees must alter its existing purpose of promoting the interests of young men. Rather, it found that the Jaycees had not proven that having female voting members would alter its voice. Justice Brennan dismissed the Jaycees’ argument by labeling it as “social stereotyping” and “unsupported generalizations about the relative interests and perspectives of men and women.”<sup>34</sup> Emphasizing the instrumental as well as the fulfillment aspects of association, Brennan declared that stereotyping “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”

Justice O’Connor’s often-discussed concurrence would instead divide organizations into either of two groups, depending on their predominant characteristic: “expressive” associations (entitled to constitutional protection under the compelling-state-interest, least-restrictive-means test) and “commercial” associations (subject to rational anti-discrimination regulation). Justice O’Connor wanted to avoid “the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination.”<sup>35</sup> She suggested that once an association “enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”<sup>36</sup>

The holding of *Roberts* attracted no dissents on the Supreme Court, but a great deal of criticism from commentators. To Nancy Rosenblum, “the majority opinion . . . was wrong. It is gravely underprotective of expressive organizations.”<sup>37</sup> She concluded: “The only sure result of compelled association is that male Jaycees join the company of those historically discriminated against in seeing themselves as victims of powerful, hostile social forces and of a government indifferent to their freedom of association.”<sup>38</sup> Douglas Linder characterized as “wholly implausible” Justice Brennan’s “argument that not only did application of the Minnesota statute represent the least restrictive means of ensuring equal access to the Jaycees’ goods and privileges, but that it presented no serious burden at all.”<sup>39</sup> In defense of Justice Brennan’s sex-blindness, Deborah Rhode argues for a more contextual analysis: “If men and women as groups tend to differ in their approach to certain moral or political issues, it does not necessarily follow that the particular men and women likely to join a particular organization will differ.”<sup>40</sup> We consider criticisms of Justice O’Connor’s alternative commerciality test below.

The Boy Scouts of  
America v. Dale

When the Supreme Court dropped the *Roberts* shoe, it apparently already held the Boy Scouts shoe in the other hand. The possibility that a state might require the Boy Scouts of America to abandon its position against godless or gay members was raised by the litigants in *Roberts*—indeed, the Boy Scouts filed an *amicus curiae* brief on

behalf of the Jaycees—and was much on the minds of the Justices during the *Roberts* oral argument. Sixteen years, however, separate the two decisions, and there was no guarantee that a case involving the Boy Scouts' policy would ever reach the Court. Under both federal civil rights law (which does not prohibit discrimination on the basis of sexual orientation) and many state and local anti-discrimination laws, a membership association is not the typical "place of public accommodation." Notably, the California courts excluded the Boy Scouts from its statute's definition.<sup>41</sup> Finally, though, the New Jersey Supreme Court held that the Boy Scouts were a public accommodation under its statute, and that the Boy Scouts' policy violated state law.

Under principles of federalism, the New Jersey Supreme Court's interpretation of its state statute cannot be reversed by a federal court, and the court had ruled unanimously. Moreover, if the people of New Jersey are unhappy with this statutory interpretation, the state legislature can clarify its definition of "public accommodation." Therefore, when the Supreme Court agreed to hear the Boy Scout's case, it could only mean that the Court was prepared to visit the constitutional issue. Not only was this bad news for James Dale, the expelled gay troop leader, but it also put the nonprofit sector in a difficult position: Strategically, charities did not want to support the type of discrimination engaged in by the Boy Scouts; tactically, however, they feared that if they did not weigh in on the Boy Scouts' side, the pluralism of the sector could be jeopardized. In the end, filing a total of 14 *amici curiae* briefs on behalf of James Dale, were 37 nonprofits, 7 cities, and 11 states; for the Boy Scouts, 43 nonprofits filed 21 briefs. Different organizations of Methodists—the largest sponsors of Boy Scout troops—filed on *both* sides.

At the end of its term, June 28, 2000, the Supreme Court upheld the constitutional right of the Boy Scouts of America to define its expressive activities in a way that excludes gay troop leaders.<sup>42</sup> Even with years of warning and the deluge of filings, though, the Court produced a surprisingly anemic decision. Unlike the unanimous decision in *Roberts*, the *Dale* Court split five to four, and coalition-building among the Justices can result in odd opinions. Still, Justice Rehnquist's opinion for the Court seems both result-oriented—almost tailored to achieve victory for the Boy Scouts—and so broad that the limits of the holding are difficult to assess. *Dale* will either dramatically change the associational jurisprudence or be quickly limited to its facts.

In essence, five Justices held that the Boy Scouts are entitled to define their membership as they see fit because of the expressive nature of their activities. Indeed, Justice Rehnquist's opinion defined "expressive" broadly to reach organizations—like the Boy Scouts—that neither form in order to make particular statements nor to clearly articulate particular policies:

"[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."<sup>43</sup>

Moreover, Rehnquist recognized the expression of the *organization*, even if it conflicts with the views of individual members: "[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's

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policy to be ‘expressive association.’”<sup>45</sup> In sum, “The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”<sup>45</sup>

Because James Dale was admittedly an exemplary Scout and leader—whose identity as a homosexual came to light only as a result of a story in his college newspaper—the *Dale* opinions struggle with the distinction between speech and status. After all, both *Runyon v. McCrary* and *Roberts v. United States Jaycees* taught us that stereotypical conclusions about individuals do not outweigh the state interest in eradicating discrimination in public dealings—that constitutionally membership and message are not to be equated. Instead, the state has a right to demand that in such associations, a member, regardless of ascriptive characteristics, could be expelled only for violating the beliefs of the organization or other cause. By contrast, the *Dale* majority treated Dale as a billboard for a point of view simply because he is gay, and refused to take into account the Boy Scouts’ failure to expel heterosexual members who disagreed with the Scouts’ policy, declaring: “The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.”<sup>46</sup>

In dissent, Justice Stevens charged: “[I]f merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities. That cannot be, and never has been, the law.”

To Professor Dale Carpenter, “unpopular opinion will suffer disproportionately under the dissent’s approach because associations with controversial opinions often speak ambiguously and equivocally in order to protect themselves from popular backlash.”<sup>47</sup> As Professor Richard Epstein describes:

In light of the demands on its organization, no one should think for a second that the Scouts’ bland declarations represent a lack of understanding, conviction, or foresight. Rather, they represent the kind of studied compromise that a large and successful organization must make to stave off schism or disintegration. And it does take a certain courage to resist devoted loyalists who want a stronger edge to the organization. Noncommodifiers should admire the way in which the Scouts has organized its affairs and they should recognize the dangers of state intervention that would force the Scouts to take hard-edged positions.<sup>48</sup>

Professor Epstein defends the decision in *Dale* on the broad ground that, in the absence of a monopoly, the state should not bar a private organization from discriminating. After all, someone barred from one association can simply join or form another. This approach does ignore the high social and emotional (if not economic) costs of both entry and exit. While the law regulates monopolies, it does not regulate “switching” costs. Yet some organizations are more desirable to join than others: The bigger the organization, the greater its social legitimacy and the better the network effects. To be sure, an unhappy departing member or rejected potential member could

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start a new organization, but this new entity carries what the organizational literature calls “the liability of newness.”

In reading the voluminous commentary that has already issued, I am most struck by the contrast with the reaction to *Roberts*. As women pressed their rights to be admitted to the brotherhood, wherever centers of male power existed, a contrary result in *Roberts* was almost unthinkable. (Recall that the decision was unanimous.) By contrast, even some in the gay rights community read *Dale* as desirable—essentially, in preserving the rights of gay organizations to discriminate against straight members in leadership roles. This concern for the autonomy of minority organizations reflects a false symmetry. No one has read *Roberts* as suggesting that private women’s groups must admit men.

The Supreme Court’s close decision in *Dale* might have ended the legal battle, but the dispute has now shifted to the private and political arenas. Some parents have withdrawn their sons from the Boy Scouts; some municipalities have sought to terminate the Scouts’ right to use public facilities;<sup>49</sup> Reform Jewish leaders recommended ending troop sponsorship; local United Ways debated terminating support; and the recently enacted education bill blocks federal money to any state or local agency that discriminates against the Boy Scouts of America in providing equal access to school premises or facilities.<sup>50</sup> Troops in Oak Park, Illinois, defied the restriction, and were expelled; but a local council in New Jersey agreed with the local United Way from which it received funds not to discriminate.<sup>51</sup> A new association for boys that does not discriminate against gays—Scouting for All—has sprung up. *Newsweek* reports that 30 percent of Scout parents disagree with the discrimination policy.<sup>52</sup> This simultaneous exercise of voice and exit dramatically illustrates both the virtues and consequences of a freedom to associate. In the end, we accept high transactions costs in entering and exiting associations because the alternative—obliteration of difference—brings higher social costs in the form of reduced autonomy and liberty.

Limits of a  
Commerciality Test:  
Is All Expressive?

*Dale* did not overrule *Roberts*, but there might be little left of its holding save the Jaycees’ failure to prove its expressiveness. We do know, however, that the *Dale* majority needed Justice O’Connor’s vote, and she authored the concurring opinion in *Roberts* that would compel predominantly commercial associations to yield to state interests in eradicating discrimination. Professor Michael Dorf finds that the Rehnquist Court “often employs the economic/non-economic distinction as a substitute for a public/private distinction.” Yet, as Professor Michael Dorf describes, “the fit is quite poor”:

As de Tocqueville knew, “private” associations are very much enmeshed in, and supported by, commercial activity. Moreover, these same private associations serve fundamentally public functions. There may be constitutionally sound, indeed pressing, reasons to confer some form of regulatory immunity on various activities or associations because they are local or private. But in our inter-connected world those reasons will rarely be justified by the objective characteristics of the activities or associations. Seen this way, the attempt to separate the economic from the non-economic is a flight from the sorts of value judgments necessary to construct a viable domain of regulatory immunity.<sup>53</sup>

Consider the difficulty of applying Justice O'Connor's test to a fraternal, ethnic- or religious-based organization that both sells discount insurance and engages in significant lobbying. Is it primarily commercial or primarily expressive? If commercial, then under Justice O'Connor's approach the state could overrule any discriminatory membership test. Incidentally, the associational (and commercial) drive would more likely go in the other direction: A number of federal postal unions have offered "associate" memberships—at lower dues and without a vote—to federal workers who want to sign on to their health insurance programs, but are not covered by collective bargaining.<sup>54</sup>

Some commentators have decried the seemingly open-ended invitation of *Dale* for a range of entities to declare themselves "expressive" to avoid the commerciality tag—and even businesses can express ideologies. As Professor Jed Rubenfeld describes the coming flood, "Almost all associations—every business, every apartment complex, every residential neighborhood—. . . that wants to discriminate should now be able to file an action under the First Amendment and to demand strict scrutiny of virtually every discrimination law applied against it." And, he declares, these claims should be successful "if strict scrutiny were honestly applied in such cases": "After all, why shouldn't states be obliged to accommodate discrimination—exemptions for, say, small businesses or small neighborhoods genuinely dedicated to expressing the belief that blacks, Jews or women don't belong in the same places as whites, Christians, or men?"<sup>55</sup>

Other commentators not only support Justice O'Connor's commerciality test, but also have urged that it be tightened to avoid giving a free pass to an organization once it can show itself to be primarily expressive. As Professor William Marshall illustrated, "a noncommercial advocacy organization such as 'Save the Whales' would . . . be entitled to exclude black females even though the exclusion has nothing to do with the positions that the organization maintains."<sup>56</sup> Professor Marshall (writing before *Dale*) proposed instead adopting a test that focuses on the relationship between the organization's discriminatory criteria and its advocacy, such as "the white supremacist group, [whose] exclusion of blacks directly advances its ideological position."<sup>57</sup> Professor Carpenter (writing after *Dale*), would adopt a tripartite test: (1) commercial organizations should be subject to all anti-discrimination laws, (2) expressive associations would not be subject to anti-discrimination laws; and (3) quasi-expressive associations would be classified on a per-relationship basis depending on whether a particular affiliation involved an "activity or internal operation" that "is primarily expressive . . . [or] commercial".<sup>58</sup>

While Justice Rehnquist's opinion in *Dale* proclaims a broad autonomy for expressive associations, a narrower relatedness requirement between message and desired discrimination should give the Boy Scouts the result it sought. Professor Samuel Issacharoff criticizes the Court for departing from the "functional approach" of *Roberts*, which would have asked "what the purpose of the organization is, what compromises of that purpose would be entailed in the proposed regulation of its activities, and what societal interest would be advanced that would justify the imposition of the restriction on organizational independence."<sup>59</sup>

To Richard Epstein, however, the *Dale* case is correct but only because it is not broad enough. This ardent defender of individual liberty argues that all non-

monopolistic private associations, commercial as well as expressive, should enjoy associative autonomy: “What must be recognized is that freedom of association is “derivative” not only of speech, but also of liberty and property as ordinarily conceived.”<sup>60</sup>

Bringing Religion  
into the Mix:  
Expanding  
“Charitable Choice”

We are beginning to get a glimpse of another form of state-compelled association that adds a troubling religious aspect to the constitutional analysis. The House has passed, and the Senate is now debating, President Bush’s proposal to expand the government’s authority to contract for social services not just with secular organizations, but also with churches—“faith-based organizations” to use the current euphemism. This proposal raises two separate associational concerns: The rights of recipients to obtain social services free of unwanted religious messages, and the rights of employees of the faith-based organizations to obtain and retain work free of discrimination.

In 1996, the welfare reform act adopted “Charitable Choice” legislation that permits faith-based groups to compete for welfare-to-work programs such as job training and child care.<sup>61</sup> The 2001 proposal would embrace a variety of new social service programs, including juvenile justice, crime prevention, housing assistance, job training, elder care, hunger relief, and domestic violence prevention. In a very real sense this is commercial activity—for-profit businesses as well as nonprofit compete to supply these services.

Under the proposal, as under existing Charitable Choice legislation, no discrimination as to clientele would be allowed, and any client who objects to the religious message provided must be provided with a secular alternative service provider. Employment is another matter: “The Community Solutions Act of 2001,” passed 233-198 by the House on July 19, 2001, provides that a funded religious organization shall enjoy exemption from the Civil Rights Act of 1964, thus permitting it to hire only co-religionists to provide funded services; moreover, while other provisions maintain the standard federal employment nondiscrimination obligations on the basis of race, color, national origin, disability, age, and sex, the proposal would preempt additional classifications under state and local laws, thus permitting discrimination on the basis of sexual orientation, marital status, or pregnancy.<sup>62</sup> Congressman Bobby Scott of Virginia dubs this “the civil rights poison pill.”<sup>63</sup>

Moreover, the House proposal would allow funding agencies to provide “indirect assistance” to faith-based organizations via vouchers provided to clients. Supreme Court rulings under the Establishment Clause have upheld voucher-type programs, on the theory that the consumer rather than the state chooses the religious provider, but the incidental benefit to religious providers must be part of a neutral legislative scheme.<sup>64</sup> In floor debate, Congressman Nadler complained about the “effort to allow the administration to completely rewrite the billions of dollars of social service programs into vouchers, without any legislative investigation into what we are talking about there, without congressional consideration, and allowing religious groups to subject the most vulnerable in our society to religious pressure and proselytizing using Federal dollars.”<sup>65</sup>

As we further blur the distinction between public and private through the privatization of social services, the voucher trend becomes dangerous from the other direc-

tion. The fundamental compelled association is citizenship, and one of the most expensive compelled payments is for public school education. Note that only the funding is compelled, not attendance—parents are free to send their children to private school.<sup>66</sup> However, the push from the Right for vouchers for primary and secondary school education illustrates what an opt-out structure could look like if the democratically determined tax base were disaggregated. Indeed, consider what public choice theory has taught us about the process by which the government determines its message.

## Conclusion

A right to choose one's associates presents the fundamental clash between an egalitarian political structure and discriminatory private action—the tension between equality and liberty. Of course the state has an interest in eradicating barriers to fulfillment, advancement, and social justice. Of course individuals seek the freedom to resist homogenization. We will never resolve the conflict between the benefits of communitarianism, pluralism, and social capital building that associations provide, and their impediment to the benefits of solidarity, tolerance and respect, and patriotism that a nation seeks.<sup>67</sup>

As a matter of constitutional law, however, the Supreme Court finds associational autonomy only where another constitutional right exists, notably a First Amendment right of expression. But whose expression counts? Because there is really no such thing as “the” association, the law assigns or ignores individual rights no matter what approach it takes to membership disputes. Difficult though these legal questions may be, they are not constitutional questions; as we saw, the Court respects the decision-making structure and processes of organizations as part of the members' bargain. What protects participants where voice fails is the right of exit—and the right to form new associations. On the other hand, while in a sense organizations thus have rights, constitutional jurisprudence still views individual members of identity groups as individuals.

As a result of this laissez-faire approach to collective activity, the fact that an association forms as a nonprofit organization tells us little about the value of its speech or capacity for civic capacity building: Some associations are democratically run by members, others do not even have members. Expressive associations form on all sides of social issues. As Justice Brennan once commented, “We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”<sup>68</sup>

## NOTES

1. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203-04.”
  2. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST., amend. I.
  3. 357 U.S. 449 (1957).
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4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
  5. *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (referring to the unreliability of the “case-by-case, day-by-day majority of this Court” to protect First Amendment freedoms). However, I leave to others an analysis of the most important and fascinating group in this endeavor—the U.S. Supreme Court itself.
  6. 530 U.S. 640 (2000).
  7. Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1520-24 (2001). *See also* DAVID FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 41-53 (1962) (discussing the right to join a trade union).
  8. *See Schwartz v. Duss*, 187 U.S. 8 (1902) (upholding, as against a claim by the heirs of deceased members of the Harmony Community, the contractual agreement of these members to contribute their property irrevocably to the group).
  9. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 239 (1961).
  10. *See* Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1382-89 (1981).
  11. The most widely cited case for this proposition is *Falcone v. Middlesex County Medical Soc’y*, 170 A.2d 791, 799 (N.J. 1961); *see* Note, *Development in the Law: Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1037-55 (1963) (discussing *Falcone* in the context of associational action affecting nonmembers). *Cf. NAACP v. Golding*, 679 A.2d 554, 562 (Md. App. 1996) (observing that state courts, too, “have acknowledged the need for increased judicial oversight in one instance, i.e., where the private organization has assumed a position of ‘real economic power’ akin to monopoly status.”).
  12. 17 U.S. (4 Wheat.) 518 (1819).
  13. 431 U.S. 209 (1977).
  14. 468 U.S. 609 (1984).
  15. *California Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000).
  16. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).
  17. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36-41 (1998) (warning of the dangers of applying “the logic of congruence” between public institutions and private organizations).
  18. *See Buckley v. Valeo*, 424 U.S. 1 (1976), and later cases, discussed below.
  19. *Dennis v. United States*, 341 U.S. 494 (1951) (affirming the conviction of leaders of the American Communist Party of violating the Smith Act of 1940, which made it a crime to teach or advocate the overthrow of the government by force or violence). However, there was no evidence in this case that the defendants ever did anything more than teach abstract principles, and the case, while never overruled, remains of doubtful precedence. *See Yates v. United States* (1957) (although not overruling *Dennis*, reversing 14 Smith Act convictions). *See generally* THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 97-160 (1970) (discussion the application of sedition laws). For a history of the prosecution of Communist Party members and the Supreme Court decisions, *see* MICHAEL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (Greenwood Press 1977).
  20. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460-61 (citations omitted) (emphasis added).
  21. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 292 (1981).
  22. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).
  23. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986). *See also* *Eu v. San Francisco County Central Democratic Committee*, 489 U.S. 214 (1989), discussed below.
  24. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449; *Bates v. Little Rock*, 361 U.S. 516 (1960).
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25. See Elisa Crouch, *Clinton Foundation Plots Tactics Members Face Subpoena Deadline Today for Releasing Donors List*, ARKANSAS DEMOCRAT-GAZETTE, Feb. 22, 2001, at A1.
  26. Quoted in Harvy Lipman, *Lawmakers' Dispute with Clinton Library Seen as Test of Donor Privacy*, CHRON. PHILANTHROPY, Mar. 8, 2001.
  27. I.R.C. §§ 527(j) and 6104(a), as added and amended by Pub. L. 106-230, § 2(a) (July 1, 2000). In general, although charities can be required to disclose the names of substantial donors to the Internal Revenue Service, these names are not subject to public disclosure along with the rest of the IRS Form 990 information return filed by exempt organizations. See I.R.C. § 6104(d)(3)(A) (donors to charities other than private foundations are not subject to public disclosure). However, the names and addresses of officers and directors of all exempt organizations are disclosable, as is similar information filed in annual reports with the states.
  28. 427 U.S. 160 (1976).
  29. *Id.* at 173 n.10.
  30. See *generally* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (the 14th Amendment “erects no shield against merely private conduct” and inhibits “only such action as may fairly be said to be that of the states”, but judicial enforcement of a racially restrictive covenant constitutes proscribed state action).
  31. See *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) (holding that Congress, through enactments outside the Internal Revenue Code, did not intend the definition of charity in Code section 501(c)(3) to include groups that violate “established public policy”—in this case, racial discrimination in education). The *Bob Jones* “public policy” test has not been extended to other forms of discriminatory activity, such as sex discrimination, or to racial discrimination beyond the educational context. See *generally* Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984). See also David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy, and “Charity” in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000).
  32. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
  33. *Id.* at 623.
  34. “In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, . . . the Jaycees rely solely on unsupported generalizations about the relative interests and perspectives of men and women.” 468 U.S. at 625. Six weeks after the Supreme Court’s opinion, the national Jaycees voted to admit women. See Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1898 (1984).
  35. *Roberts*, at 622 (O’Connor, J., concurring).
  36. *Id.* at 636. The Minnesota Supreme Court, in holding the public accommodation law applicable to the Jaycees, had found that, “[l]eadership skills are ‘goods’, [and] business contacts and employment promotions are ‘privileges’ and ‘advantages.’” *United States Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981).
  37. See Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 81 (Amy Gutmann, ed., 1988).
  38. *Id.* at 86.
  39. Linder, *supra* note 34, at 1892.
  40. Deborah L. Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 120 (1986) (Freedom of Association Symposium).
  41. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. Mar. 23, 1998) (Boys Scouts of America not covered by California’s Unruh Civil Rights Act, and so may deny a homosexual the right to be a troop leader), *and* *Randall v. Orange County Council, Boy Scouts of America*, 952 P. 2d 261 (Cal. Mar. 23, 1998) (same, and so may deny membership to someone refusing to affirm a belief in God).
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42. The decision did not involve the membership of a boy who was not also a leader.
  43. 530 U.S. at 655.
  44. *Id.*
  45. *Id.* at 656.
  46. *Id.* at 655-56. To one commentator, however, the Court's characterization of Dale as an "activist" suggests that the Boy Scouts required more than gay status. David McGowan, *Making Sense of Dale*, 18 CONST. COMMENTARY 121, 140 (2001). "On this view, the question whether the Scouts would have a speech-based right to exclude a gay man who was not an activist is left unresolved." *Id.*
  47. Carpenter, *supra* note 7, at 1542.
  48. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 127 (2000). See also McGowan, *supra* note 46, 144-54 (describing the range of "Scouts' viewpoint(s)" in detail). "[H]omosexuality threatened to fragment the Scouts as an organization precisely because Scouting's sponsors do not agree on what message to send on the subject." *Id.* at 154.
  49. See *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (Mar. 21, 2001) (granting an injunction preventing the Boy Scouts from using the Broward County schools during off hours, because the exclusion was not content neutral). "[T]he hurt of exclusion is part of the price paid for the freedom to associate. . . . Freedom of speech and association has its costs, and tolerance of the intolerant is one of them." *Id.* at 1310.
  50. Public Law 107-110, "No Child Left Behind Act of 2001" (Jan. 8, 2002), sec. 9525 ("Equal Access to Public School Facilities").
  51. See Maria Newman, *United Way to Continue to Aid Scouts*, N.Y. TIMES, Aug. 31, 2001, nat'l ed. at A19 (describing a growing number of local councils that have decided to follow a nondiscriminatory policy, despite the possibility of disaffiliation). But see Robert L. Smith, *Troop Caught in Middle Over Gay Ban*, [CLEVELAND] PLAIN DEALER, Aug. 24, 2001 (reporting on the transfer of a Scout troop from its 90-year church sponsor to another, after the original sponsor asked all organizations using church property to sign a nondiscrimination policy; the troop was told that it would lose its Boy Scouts charter if it complied).
  52. David France, *Scouts Divided*, NEWSWEEK, Aug. 6, 2001. See also the Brief of Amici Curiae the General Board of Church and Society of the United Methodist Church, et al., available in LEXIS, usplus file, as 1999 U.S. Briefs 699, at 6 (Nov. 24, 1999), declaring—
 

[W]hile some BSA members may believe that gay boys and men are immoral, *amici curiae* and the public entities involved in the Boy Scouts do not, rendering untenable the Boy Scouts' assertions that we, Scouting's members, have come together to express a shared view of the morality of gay boys and men or that the inclusion of gay boys and men in the Boy Scouts will impair our ability to express those views that did, in fact, bring us all together.
  53. Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2165 (2001). See, e.g., George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 56, *supra* note 37 ("the trouble is that by sleight of hand, O'Connor transforms the Jaycees into a 'non-expressive' association"); Frank H. Easterbrook, IMPLICIT AND EXPLICIT RIGHTS OF ASSOCIATION, 10 HARV. J.L. & PUB. POL'Y 91, 98 (1987) ("For most people economic rights . . . are more important than whether the Jaycees admit women or whether a political party must seat the delegates selected in a primary rather than a caucus."). Cf. Dorf, *supra*, at 2185 ("even if the Boy Scouts are in some sense a non-commercial organization, they are very much a public one, and it is this dimension of the organization that the Court's decision most clearly overlooks"). Moreover, Linder commented in his post-*Roberts* article, "It is not at all obvious that equality of access to expressive associations may not be just as important. Are the ben-
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efits of membership in the Boy Scouts (predominantly expressive) less important than the benefits of membership in the Jaycees (predominantly commercial)?” Linder, *supra* note 34, at n.74.

54. See, e.g., *American Postal Workers Union v. United States*, 925 F.2d 480, 483 (D.C. Cir. 1991) (holding that associate member dues constitute unrelated business taxable income to the union).
55. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 812 (2001).
56. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. L. REV. 68, 79 (1986).
57. *Id.* at 79-80.
58. Carpenter, *supra* note 7, at 1572-80. Cf. *Chicago Area Council v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759 (Ill. App. May 1, 2001) (because the Chicago Area Council of Boy Scouts of America contends that its employment policy covers only “role-model” or communicative positions, remanding to determine whether a gay job applicant “was seeking a nonexpressive position that does not abridge the *Dale* decision”).
59. Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 297 (2001). Professor Issacharoff continues:

[T]he Boy Scouts' claim to independence as a condition of imparting distinct values to its members . . . would then have to be weighed against the sheer number of boys who pass through the ranks of the Scouts, the general inclusiveness of the membership process, the community interest in the socialization of children at a particularly formative stage, the customary reliance on school grounds and other public facilities to carry out scouting functions, and the general interpretation of Scouting and the core values of the society.

*Id.* at 297-98 (footnotes omitted).

60. Epstein, *The Boy Scouts*, *supra* note 48, at 120.
61. The original “Charitable Choice” legislation, enacted as part of the 1996 welfare reform, appears at 42 U.S. C. § 604a (1997). This provision permits states to contract with private organizations (for-profit or nonprofit) for the provision of certain social services, but if the state does so, it may not discriminate against faith-based organizations. A client must be offered a secular alternative, if requested. Challenges to this statute are in progress.
62. H.R. 7, Community Solutions Act of 2001, 147 CONG. REC. H 4222, H 4242 (July 19, 2001), at Section 201, enacting new section 1991 of Title 42, at paragraphs (e) and (f). Congressman Frank commented in floor debate:

“But, sadly, all too often in America, religion becomes a proxy for race. When Orthodox Jews get this money in Brooklyn, no blacks will be hired. When the Nation of Islam gets this money in Baltimore to deal with public housing, no whites will be hired. In fact, religion is all too often correlated with race. And when you say to religious groups, provide a purely secular activity with Federal tax dollars but in employing people to serve the soup or build the homes or clean up or give drug treatment, hire only your own co-religionists, you are empowering people de facto to engage in racial segregation.”

*Id.* at H 4255.

63. 2001 TNT 81-39 (April 26, 2001), *Scott Release on Faith-based Plan's "Poison Pill"* (April 24, 2001).
64. See *Everson v. Board of Ed.*, 330 U.S. 1 (1947) (upholding a state's expenditure to provide transportation to school children, including parochial school children). Cf. Board

- of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (declaring unconstitutional the creation of a special school district designed to be coextensive with a religious community). See generally Nomi Maya Stolzenberg, *A Tale of Two Villages (Or, Legal Realism Comes to Town)*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 290, 314 (Ian Shapiro & Will Kymlicka, eds., 1997) (describing Kiryas Joel as a homogeneous, exclusive and religious community dependent on the rights of private property and contract (including restrictive covenants), as well on the rights of “family privacy” and private education). *Id.* at 303.
65. 147 CONG. REC. at H 4229 (July 19, 2001). See also 2001 TNT 137-13 (July 17, 2001), *Conyers Letter to Judiciary Committee Chair Sensenbrenner on H.R. 7 Concerns* (reproducing July 12, 2001 letter) (“such ‘voucherized’ programs would be exempt from the requirement that the religious organization not discriminate against beneficiaries on religious grounds as well as the requirement that any sectarian instruction, worship, or proselytization be ‘voluntary’ and ‘offered separate’ from the government funded program.”).
66. *Pierce v. Society of Sisters*, 268 U.S. 510 (1924).
67. See also William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 875 (1999) (permitting discrimination is a necessary social cost for the benefits of preserving the distinctiveness of private organizations).
68. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).
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# 2 How the Constitution Shapes Civil Society's Contribution to Policymaking

MARK TUSHNET<sup>1</sup>

Probably the most important function asserted for civil society today is as a counterweight to “the state.”<sup>2</sup> Other functions—moral formation through education and otherwise, investment, and much more—can be performed by state institutions, but the institutions *of* the state cannot serve as counterweights *to* the state. The institutions of civil society provide venues where individuals can develop social, economic, and political views different from those disseminated by the state. Then, with those alternative views in hand, individuals can attempt to induce the state to adopt policies consistent with the alternative views and reject the policies the state had been pursuing. Sometimes governments delegate implementation of public policy to civil society's institutions, as when hospitals affiliated with churches are paid by the government for providing medical services to indigents. For present purposes, I am most interested in the first of these roles, that is, with institutions of civil society as breeding grounds for the *development* of policy alternatives rather than as *purveyors* or *implementers* of policy proposals themselves.<sup>3</sup>

I want to raise questions falling into two broad categories about the extent to which civil society *can* perform the function of developing policy alternatives. The first category is abstract and theoretical. It proceeds from the observation that “the state” structures the legal regime, defining the boundaries within which the institutions of civil society lawfully operate and, even more important, defining the entitlements that constitute those institutions themselves. In the absence of a strong natural-law-like theory of private property, the institutions of civil society *depend on* the state for their very existence. And, even with such a theory, civil society institutions depend on the agency of the state that enforces that theory.

The second category deals with the degree to which the U.S. Constitution, as it is interpreted today, actually defines what the institutions of civil society can do.<sup>4</sup> I divide this category further: first, what limits does the Constitution place on the general regulation of civil society institutions, and second, what limits does the Constitution place on regulation of civil society institutions that receive distinctive benefits from the state? With respect to the latter question, I examine the law of unconstitutional conditions and the related law dealing with selective subsidies granted to some groups but not others.

Simply describing contemporary law dealing with civil society institutions proves to be more difficult than one might think. The relevant constitutional doctrines deal with a right of expressive association and with problems of discrimination based on content and on viewpoint. In all the aspects of its complexity, U.S. constitutional doctrine is premised on a deep individualism that generally gives institutions only protections derivative of those given individuals. That is, the doctrinal categories mesh awkwardly with the institutional realities of civil society.

The issues I explore briefly here are among the most difficult in contemporary constitutional law, largely because they raise fundamental questions about the very categories in which we think about the institutions of the state and civil society. I do not expect to resolve the issues here, although I do state my position on many of them, but hope only to illuminate them as a predicate for clear thinking about the relations among the Constitution, the state, and civil society.

## The State's Inevitable Role in Defining the Boundaries of Civil Society

I will frame my discussion around contemporary versions of the civil society institution on which Jürgen Habermas focused, the coffee house.<sup>5</sup> Today, someone who wanted to open a coffee house would have to get a license to operate a food service, would have to comply with zoning requirements, and more. Even someone who used her house as an informal coffee house might run into regulatory trouble: Zoning boards (and her neighbors) might insist that she provide adequate off-street parking if more than a certain number of people came to her house on a regular basis,<sup>6</sup> and at some point her neighbors might bring an ordinary tort suit asserting that she was creating a nuisance.

The example of nuisance law shows that the real issue is how the state defines the contours of private property rights, and not simply what limits there might be on statutory regulation of private property. Nuisance law is designed as an accommodation of competing property rights. The more broadly the neighbors' property rights are under nuisance law, the less the person who hopes to operate an informal coffee house can do—entirely independent of the existence of statutory regulations like zoning laws. So, to move immediately to the most general level, the state structures civil society through the legal definition of private property rights, and—at this general level—civil society's institutions have unfettered freedom only to the extent that we accept some natural-law-like constraints on the state's ability to define private property in any way the state chooses.

The coffee house example deals with the location of civil society's institutions in physical space. More important, of course, are the locations in what might be called *juridical* space, the array of rules dealing with such matters as corporate status and its obligations, reporting requirements to satisfy rules dealing with limitations on the activities of charitable institutions, and the like. Yet, the analytic points about the necessary role of the state in defining civil society institutions' place in juridical space are the same as those dealing with their place in physical space. In juridical space as well as physical space, civil society's institutions are free only to the extent that we can

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identify natural-law-like constraints on state power. So, for example, a corporation is free if, and to the extent that, we treat corporate status as a natural-law right, of the sort we sometimes give to the physical integrity of individuals' bodies.

The U.S. Supreme Court has noted the relation between legislative regulation, judicial definitions of property law, and natural-law-like limits on government power. *Lucas v. South Carolina Coastal Commission* involved a challenge to a regulation adopted by the Coastal Commission that effectively prevented Lucas from using his property in an economically productive way.<sup>7</sup> The Coastal Commission justified the regulation as a measure of environmental protection, analogous to common law prohibitions on public nuisances. The Supreme Court held that the regulation was a taking of Lucas's property for which the state must compensate him. The Court indicated, however, that legislative regulation of equivalent scope would be permissible without compensation if the limitation "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>8</sup> The regulation, the Court said, "must . . . do no more than duplicate the result that could have been achieved in the courts" under the law of private or public nuisance.<sup>9</sup> Yet, the Court indicated, the "background principles" that courts could invoke probably had to be rooted in something like a general common law, for the Court required the state courts to come up with some reasonably extensive analysis of why the regulation was consistent with background common law principles.<sup>10</sup> The background principles of common law to which the Court referred are the natural-law-like constraints on judicial development of property rules.

The nuisance law example identifies a final abstract feature of state regulation of civil society institutions. At base the question is not *whether* the state regulates those institutions, but *which institution* of the state does so. The legislature does so in enacting zoning regulations. The courts do so in defining the contours of property law. And, notably, the courts do so as well in identifying natural-law-like limits on the definition of property law and, more generally, in identifying constitutional limits on the government's regulatory power. Civil society institutions, then, are *never* free from state regulation. The only interesting questions, at the abstract level, are about institutional differences between courts and legislatures with respect to the kinds of regulation each is likely to impose on civil society institutions.

State institutions necessarily define the contours of civil society institutions. Civil society institutions are therefore not independent of state institutions, and—at this most abstract level—may not be available as constraints upon state institutions. This is not to say, however, that state institutions, whether legislative or judicial, may not give civil society institutions a larger or smaller sphere of action. And, the larger the sphere state institutions give civil society institutions, the more effectively, it might seem, the latter might constrain the former. Yet, in some sense the size of the sphere of freedom exists at the state's sufferance. To the extent that people working within civil society institutions understand that, they may be limited in the enthusiasm with which they challenge or attempt to constrain the state; they may fear, that is, that the more enthusiastically they try to constrain the state, the more likely it is that the state, acting through its legislature or courts, will constrict the sphere of freedom afforded civil society institutions. This sort of self-censorship may skew policy development toward whatever the center of the spectrum is at any particular time. This

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is not a terribly strong conclusion, but I doubt that more can be said at this abstract level about the way in which state institutions define the contours of civil society institutions.

## Contemporary U.S. Constitutional Law on the Regulation of Civil Society Institutions

I turn next to more specific questions about U.S. constitutional law, and the restrictions courts place on legislative regulation of civil society institutions, primarily through the First Amendment. Conventionally, we think of the First Amendment as marking out a domain of activity that government cannot regulate. But, as the analysis in the preceding section indicates, that conventional understanding fails adequately to take into account the role of courts as definers of rights. A better perspective is that the First Amendment—and its interpretation by courts—is the mechanism by which courts, themselves an institution of government, regulate expressive activity.

Unfortunately, the structure of the law, particularly in connection with selective subsidies and unconstitutional conditions, is either boringly simple and analytically uninteresting, or extraordinarily complex and close to impossible to describe accurately. The easy description is that the government may restrict speech or selectively subsidize it if, on balance, the limitations on speech are not too severe when compared with the government's non-speech related goals. The "severity" standard is, like all balancing tests, quite subjective, and those who invoke it have difficulty explaining why the balance they would strike should be preferred to the balance struck by the government agencies that imposed the restrictions. An important theme is that the Supreme Court's application of the balancing test places a higher value on the role of civil society's institutions in communicating views to the public—(what I earlier called their role as purveyors of policy)—than on their role in providing locations other than the state for developing novel views on public policy. Constitutional doctrine, as I see it, provides the greater protection for the less important role of civil society's institutions.

Complex descriptions falter when, as they inevitably do, they seem to contradict fairly strong and stable intuitions about the appropriate results in particular cases. However, the very complexity of the analysis helps us understand how the argument in Section I should be elaborated: Complexity occurs because we cannot escape from the fact that institutions of the state necessarily define the boundaries of civil society. Some hypothesized regulations seem to go too far, and we want the courts to limit legislatures. But we soon understand that giving authority to the courts to limit legislatures does not guard against the risk that the state, acting through the courts, will go too far.

A preliminary point is that U.S. constitutional doctrine distinguishes among different *types* of speech, and tolerates greater regulation of so-called low-value speech than of high-value speech. So, for example, the government has greater power to regulate sexually explicit speech than it does to regulate commercial speech.<sup>11</sup> Typically it is said that the highest value speech is expressly political. The lines between differ-

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ent types of speech are often unclear. The law of obscene speech developed precisely around the problem of distinguishing between obscene speech, which the Supreme Court said could be highly regulated, and ordinary artistic and political speech, which can be regulated much less extensively.<sup>12</sup> Because we are interested here in the effects of civil society institutions on the development of public policy, I focus here on the rules applicable to government regulation of speech that is unquestionably in the “high value” category.

A second preliminary point is also something of an anticipatory summary. The relevant constitutional law can be structured around an interest in determining the appropriate *level* of civil society activity, or around an interest in determining the appropriate *distribution* of that activity. Roughly, the law can be concerned with how much speech there is, or it can be concerned with whether regulation skews whatever speech there is in one direction or another.<sup>13</sup> The doctrine that concerns us here began in the 1930s and '40s with a concern about the level of activity, but has since been transformed so that concern over the level plays a much diminished role while concern over distribution has become the focus.

#### Neutral and Generally Applicable Laws versus Viewpoint Discrimination

I begin by returning to the examples of nuisance law and zoning regulations. Neither is *directed specifically* at civil society institutions. These rules are, in the terms currently used in U.S. constitutional law, neutral laws of general applicability. They are neutral and generally applicable because ordinary commercial enterprises as well as civil society institutions must comply with them. More precisely, these laws are neutral and generally applicable because their application is not triggered by the communicative dimension of the regulated activity. Newspapers cannot complain that complying with wage-and-hour laws increases their costs and thereby reduces the amount of information they can distribute. The reason is that wage-and-hour laws are neutral and generally applicable. They are applied to newspapers because of something other than the communicative aspect of newspaper operations—that is, because the newspapers *employ* people, not because they employ people to write news articles.

To say that the rules are neutral and generally applicable is not to say that they have no distinctive or disparate impact on civil society institutions.<sup>14</sup> That is, they can affect the distribution of civil society activity. Suppose the demand for coffee houses is more elastic than the demand for hardware stores or other ordinary commercial enterprises. A neutral and generally applicable rule, for example one that requires the enterprise to provide adequate off-street parking, will then adversely affect coffee houses more than it will adversely affect hardware stores.<sup>15</sup> So, neutral and generally applicable rules—including the rules defining property rights—may have a disparate impact on civil society institutions. Again, we must identify some limits on the state’s ability to define property rights and other neutral and generally applicable laws if civil society institutions are to have any zone of free action.<sup>16</sup>

Contemporary U.S. constitutional doctrine places some limits on the legislature’s ability to limit directly or indirectly the ability of civil society institutions to serve as locations in which people might develop challenges to government policy. The first limit is the strongest: Regulations imposed on the general public must be viewpoint neutral.<sup>17</sup> A government may not adopt a regulation specifically saying that coffee

houses in which people support existing government policy can operate but those where people oppose existing policy cannot. A trickier question under contemporary constitutional law involves restrictions that are based, not on the viewpoints people offer, but on the general topics they want to talk about. Suppose, for example, the government prohibits coffee houses where discussions of politics occur but allows coffee houses dedicated to discussing the arts of prior centuries.<sup>18</sup> The case law dealing with what we can call topic-based restrictions is sparse, because governments rarely have tried to impose such regulations on the general public. To the extent that the cases exist, they suggest some degree of discomfort among today's justices with topic-based restrictions.<sup>19</sup>

Beyond that the constitutional restrictions on viewpoint neutral regulations that limit the ability of people to disseminate their political views are quite modest. Starting in the late 1930s, the Supreme Court began to develop a doctrine that restricted government's ability to adopt regulations that had such limiting effects. So, for example, the Court struck down a regulation that, in the name of avoiding littering, prohibited the distribution of handbills (*Schneider v. State*, 308 U.S. 147 (1939)). This doctrine was concerned with what I have called the level of civil society activity. According to the Court, courts had to balance interests in the dissemination of ideas against the general public interests in environmental quality and the like, to determine whether a regulation had too severe an impact on the interests in speech. How courts apply balancing approaches depends on the members of the court, and a decade after *Schneider* the Court was less sympathetic to the claims of speech when it upheld a regulation barring the use of sound amplifying equipment on any public street, which included the use of such equipment by political candidates driving through neighborhoods to publicize their campaigns.<sup>20</sup>

The main problem with these regulations, from the point of view of free speech theory, is that viewpoint neutral regulations almost always have a disparate impact on some types of speech and therefore on what I have called the distribution of civil society activity. Consider the sound amplification case. Political candidates with enough money to buy advertising time on radio and television do not need to send cars through neighborhoods advertising their candidacies. The sound amplification regulation therefore restricts the effective dissemination of the political views of candidates with less money than their opponents.<sup>21</sup> The Court's decisions allowing viewpoint neutral regulations meant that free speech law could not be concerned at its core with the level of civil society activity, because any regulation lowers that level.

Having accepted the view that the Constitution allowed government to lower the level of civil society activity by means of viewpoint neutral regulations, the Court then became less and less concerned about the problem of disparate impact and the distribution of civil society activity. Under contemporary constitutional doctrine, facially neutral regulations applicable to the general public are, as a general rule, constitutional even if they have a fairly severe disparate adverse impact on people with particular views. The most dramatic example is *Clark v. Community for Creative Nonviolence*, which upheld against a free speech challenge a regulation of the National Park Service that prohibited people from sleeping overnight in national parks, as applied to a group representing the homeless who wanted to use the very fact that its members *had to* sleep overnight in a national park area across from the White House as a way of dramatizing the impact national housing policy had on them.<sup>22</sup>

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Some residue of the prior approach remains, however. In 1994 the Supreme Court unanimously invalidated a city's ban on the display by homeowners of signs on their property, which had been applied against a resident who placed a sign opposing the Persian Gulf War on her front lawn.<sup>23</sup> The Court emphasized that displays of this sort were "a venerable means of communication that is both unique and important," and emphasized that they "ha[d] long been part of our culture and our law."<sup>24</sup> "[R]egulations short of a ban" might be permissible, however.<sup>25</sup>

Reconciling this case with the main stream of modern doctrine is not easy. Perhaps the best one can do is say that viewpoint neutral regulations that interfere with *traditional* methods of *expressing* political opinions may be unconstitutional if they go farther than necessary to advance valid public interests other than suppressing speech. I have emphasized two words here, because they indicate the rather slight limits contemporary constitutional doctrine places on government regulations of civil society institutions. First, the Court appears to be more willing to uphold regulations of innovative methods of political expression, such as CCNV's "sleep in," than regulations of traditional methods. Yet, in the modern world it may be that *only* innovative methods of political expression are effective in communicating political views. The idea here is that one has to attract attention before people today will try to figure out what one has to say, and that attracting attention requires innovation, including a substantial admixture of activities like sleeping that do not immediately seem to be expressive.<sup>26</sup> Perhaps the Court's intuition is that free speech doctrine must preserve civil society activity at some minimum level, determined in large measure by tradition.

Second, and perhaps related to the Court's concern about tradition, contemporary doctrine focuses quite closely on expressing political views. Yet, as I have suggested, civil society institutions are important more as locations where political views are formed than as locations where such views are expressed. Constitutional rules that restrict regulation of expression may be insufficient to protect civil society institutions from regulations that interfere, perhaps quite significantly, with their ability to help shape views.

#### The Right of Expressive Association

So far I have discussed core free speech doctrine. The recently articulated right of expressive association might provide different protections to civil society institutions. Professor Brody's chapter deals with the recent cases in detail, and I confine my comments to some issues directly related to the question of state regulation's effect on the ability of civil society institutions to develop policy alternatives.<sup>27</sup>

The structure of the right of expressive association appears to be the following.<sup>28</sup> Some, although perhaps not all, civil society institutions may claim the protections of that right. For those that can, the right restricts the state's power to impose regulations that affect the substance of the views purveyed by the institution by altering the institution's composition (or internal organization more generally).<sup>29</sup>

Several aspects of the right of expressive association deserve specific attention here. First, it protects against changing expression by means of changing an institution's composition or internal organization. That is why it is a right of expressive *association*. The core free speech principles described above protect against efforts to change views by other regulatory interventions.

Second, it is a right of *expressive* association. That is, it can be claimed only by civil society institutions that engage in some significant amount of expressive activity directed outward. Yet, some of civil society institutions' most important effects occur not in the dissemination of policy alternatives, but in the associations themselves, which indirectly shape members' views. In terms suggested by Jon Elster, expression may be more important as a *by-product* of civil society institutions than as their point.<sup>30</sup> The experience of totalitarian societies suggests that the simple possibility of getting together in a space free from state surveillance is one of civil society's largest contributions to restricting state power. A right of expressive association may do little to ensure that civil society institutions provide that space, because the contribution to constraining state power does not come from the institutions' expressive activity.

Third, as Professor Brody shows, the Supreme Court's decisions do not make it clear which civil society institutions can claim the protections of the right of expressive association and which cannot. Consider once again a coffee house, this time one whose owners want only Republicans as patrons. The state has a general antidiscrimination law that prohibits discrimination on the basis of political affiliation in places of public accommodation. Can the coffee house owner claim the protection of the right of expressive association? As Professor Brody argues, it cannot matter that the coffee house is organized as a for-profit or a not-for-profit enterprise. The distinction between organizational forms lies solely in who distributes and benefits from whatever surpluses the enterprises generate, and those matters have no relation at all to the purposes served by the right of expressive association.

A more basic question is also more troublesome. The right of expressive association exists to protect the expression of the protected entities. The Boy Scouts, for example, communicated something to the general public about its views on social issues, and the Supreme Court agreed with its submission that changing its membership requirements would change the message it communicated. The Republican coffee house, though, does not itself do anything expressive. It provides a venue at which people gather to discuss and shape their own views, but the coffee house has no views of its own.<sup>31</sup>

A right of expressive association understood to protect only institutions that are expressive in the sense—that they *have* messages they wish to disseminate—would not protect the Republican-only coffee house.<sup>32</sup> Yet, one would think that a right of expressive association with any substance would have to protect that enterprise. One might be tempted to deal with these problems by saying that the right of expressive association attaches because of the message sent by the very existence of an association with discriminatory policies (or with other internal policies the state seeks to affect by its regulations). The difficulty then is that the right of expressive association would seem to protect enterprises whose operators credibly assert that they engage in racial discrimination because they want the very existence of their enterprises to communicate the message that racial discrimination is morally good.<sup>33</sup> And, finally, if we cannot sustain a distinction between for-profit and not-for-profit enterprises for purposes of the right of expressive association, that right would become the vehicle for undermining civil rights laws whose constitutionality has seemed unassailable.

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I am not sure that there is any way to escape the difficulty I have identified. We can have a vigorous right of expressive association, broad enough to cover civil society institutions that seem entitled to coverage, but then also broad enough to raise questions about the constitutionality of basic civil rights laws in their core applications. Alternatively, we can have a narrow right of expressive association, which would add little to the protections civil society institutions receive from core free speech principles. Finally, to reiterate the conclusion I drew from analyzing those latter principles, civil society institutions receive some, but not great, protection under free speech law directly.

The reason for the relatively restricted scope of protection afforded civil society institutions arises, I believe, from the analysis with which this chapter began. The protections those institutions receive are defined by the courts, which are themselves arms of the government. Legislatures and courts clearly do care about different things, but neither is enthusiastically committed to nurturing institutions that fundamentally challenge the social organization that produces the legislatures and courts that define the boundaries of civil society's institutions. And so those boundaries are drawn in ways that permit modest challenges to the state.

#### Selective Subsidies, Government Speech, and Unconstitutional Conditions

The problem of unconstitutional conditions is perhaps the most difficult in contemporary constitutional doctrine. The problem arises when the government makes available some benefit—(corporate status or a tax exemption)—only to those who comply with specific requirements, some of which implicate constitutional values. The problem is most acute when the government makes the benefit available on the condition that the recipient refrain from engaging in activity that the government could not prohibit directly.

The literature is large and quite contradictory.<sup>34</sup> Scholars develop the general principles they favor—and say they find embedded in existing law—by identifying criteria that justify imposing conditions they tend to like while barring the imposition of conditions they tend to dislike. This is analytically unproductive, particularly because it seems reasonably clear that the decided cases do not generate any single set of principles to which the Court can be said to adhere. Probably the best view of the cases and the doctrine is that conditions imposed by the government on receipt of benefits are constitutionally permissible if they do not go too far in restricting the public benefits that flow from activities that the government cannot prohibit directly. But, as we have seen, the application of such balancing tests depends critically on the individual views of Supreme Court justices, and thus little can be said of a general nature about the true scope of contemporary doctrine.

Unconstitutional conditions have a mirror image in selective subsidies, where the law is more clear.<sup>35</sup> Conditions deny a benefit to someone who *refuses* to do what the government wants. Selective subsidies provide a benefit to someone who *does* what the government wants. The equivalence of selective subsidies to conditions on expenditures shows why one tempting solution to the problem of unconstitutional conditions is unavailable. One might be tempted to say that the government may place no speech-related conditions on its grants. But, that would be the equivalent of saying that the government must subsidize all speech, at least within broadly defined

categories, a position that cannot be sustained without drastic revision in common intuitions about what the government is allowed to do.<sup>36</sup>

The law dealing with selective subsidies for speech begins by distinguishing between speech by the government and speech by private parties or, for our purposes, civil society institutions. The government can say whatever it wants, with no obligation to ensure balance or provide a forum for alternative views. The point is obvious when we think of the government actor as the President or governor of a state. But, more important, the government can also speak through other actors, by hiring them to say what the government wants.<sup>37</sup> Constitutional doctrine is unconcerned with the possibility that government speech might skew public understanding of some social or political issue.<sup>38</sup> Earlier I argued that contemporary doctrine was more concerned about the distribution of civil society activity than with its level. Now we can see that even the concern for distribution is tempered by the possibility that government speech, unconstrained by requirements of balance, will tilt public understanding in the direction the government favors.

The government may say whatever *it* wants, without constitutional limitation. In particular, it may be “viewpoint discriminatory.” A Republican governor can make speeches favoring only the Republican platform and criticizing Democratic initiatives. When we join this observation to the government’s ability to speak through private parties whose voices it purchases, we face an immediate difficulty for the law of selective subsidies. The criteria used to select those who receive subsidies might be understood as the government’s specification of what speech it wants to buy. In that event, the government could create a program subsidizing art, and provide funds through that program only to artists who support the Republican platform.

No one thinks that conclusion sound. The escape hatch lies in distinguishing between programs “designed to facilitate private speech,” and programs designed “to promote a government message.”<sup>39</sup> Viewpoint discrimination is permitted in the latter programs, but is prohibited in the former. As the Court’s formulation indicates, the constitutionality of what the government does turns on the government’s purposes—its “design”—in creating the program. This is a situation that lends itself to manipulation, which is likely to occur in the characterization of the program. Consider a city that leases its civic auditorium at below-market rates to some artistic productions, operas and “serious” plays for example, but not to other artistic productions, such as rock-and-roll performances (or performances by heavy-metal rock-and-roll groups) and musical comedies. Is this a program of selective subsidies to facilitate art generally, in which case the exclusions would be impermissibly viewpoint based, or a program to facilitate “serious” or “family-friendly” art, in which case the exclusions are part of the program’s purposes?<sup>40</sup>

The problem goes deeper than conscious manipulation, however. Recent controversies have involved selective denials of access to “Adopt-a-Highway” programs and personalized license plates.<sup>41</sup> Typically the state wishes to exclude particular groups from access to the programs because, the state believes, including them in the programs either would send a message that the state endorsed the groups, or would be inconsistent with the programs’ goals of raising civic spirit. How, though, do we determine whether inclusion sends a message that the state can properly control, and how do we determine whether the programs’ purposes are to subsidize a wide range

of views among the public or to promote civic spirit? The usual answer relies on something like social meaning: We determine the message or the purposes by assessing the actual meaning of the message or the programs in contemporary society.

At this point, however, two dilemmas arise. First, some institution of the state has to determine social meaning, and it is not at all obvious why the courts' determination of social meaning should prevail over that of legislatures' or other law-makers'. Second, we can imagine that the social meaning of a program granting awards only to Republican artists might be that such a program is actually government speech unconstrained by a ban on viewpoint discrimination.<sup>42</sup>

The "Adopt-a-Highway" example shows, finally, why relegating the decision to the courts need not provide surer guarantees of free speech than giving legislatures the final say. Proponents of restrictions on access to "Adopt-a-Highway" programs—and proponents of selective subsidies generally—contend that excluding some groups from the program actually enhances civic spirit or the social benefits of civil society institutions, including their public advocacy. The idea is that simply observing the participation of certain groups will discourage civic participation by other groups. The Supreme Court has said, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>43</sup> That has never been more than an assertion of the Court's own sense that it is in a better position to decide what programs maximize speech than are legislatures. That the Court has that sense of its relative ability is not surprising; that anyone else should accept the Court's assertion without arguments that the Court has failed to supply is questionable. Selective subsidies may deny access to public benefits because of the potential recipients' views. That does not mean, however, that such subsidies reduce or skew the distribution of speech in a normatively problematic way.

The selective subsidy cases contain one final theme. The government may not refuse to subsidize someone to punish him or her for engaging in constitutionally protected activity. Again, determining when the government has a punitive aim may not always be obvious; the government quite often will be able to assert, with some credibility, that its goal was not to punish but to preserve public funds for projects that the public regarded as more worthy. A surrogate measure of punishment is sometimes available, however. *FCC v. League of Women Voters* involved a federal statute that denied a federal subsidy to noncommercial education broadcasters that engaged in editorializing.<sup>44</sup> The Court held the denial unconstitutional. The accepted explanation for the result is that the denial amounted to a penalty rather than a simple refusal to subsidize, because the subsidy was denied to broadcasters that used money from private sources to support their editorializing activities. In the jargon of the field, no penalty exists when a civil society institution is able to use a segregated fund. The subsidy goes into one fund and is allocated in a manner consistent with the conditions the government imposes on subsidy recipients; the segregated private funds can be used for the activities the government does not want to subsidize.

Allowing selective subsidies and the maintenance of segregated funds might seem a simple solution to the problem posed by viewpoint-related selection criteria. But, as recent experience with charitable choice programs suggests, the solution lowers the level of speech and skews its distribution. At present, social service providers

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affiliated with religious institutions may receive government grants if the money is placed in segregated funds. Establishing such a fund and ensuring that it continues to comply with government requirements is costly. Not all potential service providers can afford the costs, or at least not all believe that their overall missions are advanced by accepting government funds and paying the costs of complying with government regulations. The “segregated fund” solution may lower the level of service provision compared to what it might be were the social service providers allowed to accept the money into their general funds. Analogously, the cost to advocacy groups of establishing segregated funds affects the level of speech they can engage in, if only because the money spent on establishing and administering the segregated fund reduces the amount available to spend on advocacy.

The “segregated funds” solution also affects the distribution of speech, again because of compliance costs. Well-to-do institutions find it easier to bear those costs than do impecunious ones. Again, charitable choice is an example. Larger and more well-established denominations like the Catholic and Lutheran Churches receive substantial government funds to support their social service activities.<sup>45</sup> They can afford to pay the compliance costs, have the resources to hire professionals who can help them comply, and have the experience to navigate through complex grant bureaucracies. Smaller churches, like the many spread throughout inner cities, have none of those resources. If the missions of the larger denominations and the smaller churches differ, the “segregated funds” solution has a disparate impact, promoting the larger denominations’ missions relative to those of the smaller churches. Again, precisely the same point can be made with respect to other civil society institutions, including advocacy groups. Better endowed advocacy groups by their very size are likely to have greater influence on public policy than smaller ones. They also are more likely to find it easier to establish segregated funds, thereby enhancing the advantage already accruing to them because of their size.

With all these distinctions in hand, we can turn at last to the problem of unconstitutional conditions, which is simply the obverse of the problem of selective subsidies. When, if ever, can the government make a benefit such as a tax exemption available only to those groups that advocate things of which the government approves, or only to those groups that refrain from advocating things of which the government disapproves?

First, it seems clear that the government may not impose a condition on receipt of a benefit that works as a penalty for exercising a constitutional right. So, for example, the government may not make the benefits of incorporation available to groups generally, but not to those who have criticized the government or only to those who agree not to criticize the government in the future. There the inference that denial of the benefit is designed to penalize government’s critics is strong. In contrast, the “no penalty” rule would seem to allow the government to permit nonmedia entities for example to incorporate but require media entities to operate as partnerships or sole proprietorships.<sup>46</sup>

Second, the problem of defining the scope of a program recurs in connection with unconstitutional conditions. Consider, for example, a provision that makes tax-exempt status available to groups that advocate for or against increased public funding for the arts, but not to any other advocacy groups.<sup>47</sup> In one view, this is a program

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“designed to facilitate private speech,” from which exclusions are not permitted. Yet, in another view, it is a program designed to facilitate private speech *about arts funding*, and exclusions are permitted when they are relevant to confining the program to its purposes.

Third, the Court has established rules with respect to conditions that reproduce the problem of disparate impact. *Regan v. Taxation with Representation* upheld a statute that generally denied tax deductions to almost all charities if a substantial part of their activities was lobbying, but made an exception for veterans’ organizations even if those organizations engaged in lobbying.<sup>48</sup> The Court argued that the distinction between veterans’ organizations and other charitable organizations would be impermissible “if Congress were to discriminate invidiously . . . [to] aim at the suppression of dangerous ideas,” but, it continued, “veterans’ organizations are entitled to receive tax-deductible contributions regardless of the content” of their lobbying.<sup>49</sup> This may simply state that the *only* limitation on government’s power is the prohibition on penalties. As a practical matter, veterans’ organizations are likely to lobby disproportionately for some programs and against others. So, one sort of invidious discrimination—that arising from conditions with a disparate impact—is not unconstitutional.

Finally, viewpoint discrimination in its most pristine form may sometimes be unconstitutional. Could Congress make contributions tax-deductible to veterans’ organizations that lobbied *for* increases in defense spending but not to veterans’ organizations that lobbied *against* such increases? Here the question would be whether lobbying for increases in spending should be regarded as private speech, in which case the statute would be unconstitutional, or whether it should be regarded as government speech. As noted above, the answer turns on the social meaning of the program. I am reasonably confident that, were we to ask today what the social meaning of such a program was, we would answer with some confidence that it was a program of private speech. Unfortunately for analytic clarity, that is not the right question. The right question is, In a social world where Congress enacted such a program, would people understand the program to be government speech or private speech? We cannot answer *that* question with any confidence because the world in which the question would arise is so far from our own that our present intuitions are peculiarly unreliable.

The relatively limited *constitutional* protection afforded civil society’s institutions as they engage in efforts to influence policymaking means that the protections they receive come through the exercise of judgment by legislators, executive officials, and other policymakers. Paradoxically, then, the very institutions on which we rely to serve as counterweights to the state must depend on the state for their existence.

## Conclusion

All this leaves things in a quite unsatisfactory analytic state. We can adopt the easy way out and say that conditions and selective subsidies are unconstitutional when they have too severe an impact on the level or distribution of speech. The determination of what is too severe, however, is bound to be highly subjective. Efforts to impose greater structure on the analysis regularly founder. I have suggested that the

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reason for the difficulty of the problem lies in our persistent desire to maintain a distinction *in law* between the state and civil society coupled with our sporadic recognition that any distinction in law is drawn by institutions of the state itself.<sup>50</sup> In that event, perhaps the easy way out is the only way out.

## NOTES

1. Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I develop some of the themes in this Chapter differently in *Tushnet*, 2000, which can be read as a complement to the arguments here.
  2. The literature on defining *civil society* is large, and wide differences exist among those who write about it. For present purposes I intend to avoid any precise definition, and simply evoke the fairly common sense of civil society as composed of institutions like ordinary interest groups and churches (in a religiously pluralist society). (Church establishments in non-pluralist societies might not function as counterweights to the state.)
  3. Different constitutional issues from the ones I discuss here arise when civil society's institutions implement government policy. In particular, the Establishment Clause has a special place in constraining the government's ability to use religious institutions to implement government policy.
  4. I will occasionally note but not explore in detail the special characteristics of the constitutional law applicable to churches and church-related institutions. For a general discussion, see *Tushnet*, 2001.
  5. Habermas, 1989.
  6. This is a common problem faced by informally organized church or prayer groups.
  7. 505 U.S. 1003 (1992).
  8. *Id.* at 1029.
  9. *Ibid.*
  10. For an argument that the regulation in *Lucas* could have been justified by background common law principles, see Babcock, 1995.
  11. *Compare* *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) (allowing substantial restrictions on the location of theaters showing sexually explicit motion pictures), *with* *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001) (invalidating restrictions on the location of tobacco advertising).
  12. The most extensive discussion of the reasons for focusing on matters of definition is in Justice Brennan's dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).
  13. In light of the argument in Section I, I think it important to be explicit at this point that concern over levels and distributions is concern over the level or distribution under one set of regulations compared to the level or distribution under another, and not with attaining the "right" level or distribution in some abstract sense.
  14. An early case invoking the rule that civil society institutions must comply with neutral laws of general applicability is *Associated Press v. NLRB*, 301 U.S. 103 (1937), which upheld the constitutionality of requiring the Associated Press to engage in collective bargaining with its employees. The provisions negotiated in a collective bargaining agreement between a newspaper and its employees might affect the substance of news coverage. For example, a contract requiring extra pay for reporters who work the night shift might reduce the amount of coverage provided on events that occur late in the evening.
  15. Complying with the regulation requires both enterprises to incur costs and thus to raise the prices they charge. On the assumption that demand for coffee houses is more elastic than the demand for hardware stores, a larger proportion of the coffee houses' potential customers will go elsewhere for entertainment than will the potential patrons of the hardware stores.
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16. Subject to the earlier observation that some state institution will inevitably define the zone within which *it* allows civil society institutions to operate freely.
  17. As we will see, the situation is different when the restrictions are placed on civil society institutions that receive special benefits from the government.
  18. I put aside, for present purposes, the obvious difficulties in distinguishing between discussions of politics and discussions of art. Those difficulties are so severe that the hypothesized regulation would almost certainly be unconstitutional under doctrines triggered not by the substantive content of a regulation but by the vagueness of its wording or the breadth of its coverage.
  19. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), described as viewpoint-based a regulation that distinguished between discussions of politics as such and discussions of a variety of subjects, including politics, from a religious perspective. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1970), required careful procedures by a public authority that decided to allow some entertainment programs in a public auditorium but not a production of the musical "Hair."
  20. *Kovacs v. Cooper*, 336 U.S. 77 (1949).
  21. Strictly speaking, such a regulation does not have a disparate adverse impact on viewpoints, because in theory there need be no association between the substance of a candidate's views and his or her relative wealth or poverty. In reality, of course, relative wealth and poverty at least correlate significantly with substantive views.
  22. 468 U.S. 288 (1983).
  23. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).
  24. *Id.* at 54, 58.
  25. *Id.* at 58 n. 17.
  26. The CCNV case illustrates the difficulties that can arise in defining the activities that are protected by the First Amendment. The Court's decision indicated some discomfort with treating the CCNV's activities as speech at all, although in the end the Court did apply First Amendment doctrine to those activities.
  27. I discuss other aspects of the right of expressive association in Tushnet, 2001.
  28. Any description of the contours of the right of expressive association must be quite tentative. As Professor Brody points out, the Court's most recent discussion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), appears to articulate a quite broad right, but with relatively little supporting analysis.
  29. The right of expressive association adds nothing to the core free speech principles that govern regulations targeted specifically at the views the institution purveys.
  30. Elster, 1983, at pp. 43–108 (discussing various processes in which by-products are more important than the goals intentionally sought).
  31. Indeed, the coffee house owner may be indifferent as to the views disseminated to the public. The restriction on who is admitted to the coffee house might simply be a profit-maximizing choice. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (involving a racially discriminatory coffee shop located in a city-owned parking facility, where the policy of racial discrimination may have been adopted—as far as the record reveals—simply because it made the coffee shop more profitable than it would have been had it operated in a nondiscriminatory manner).
  32. Suppose the coffee house owner converts it into a membership-only enterprise, and sells memberships to everyone who asserts that he or she is a Republican. (The model here are the so-called private clubs that serve alcoholic beverages in jurisdictions that do not allow places open to the public to do so.) I find it hard to believe that the constitutional analysis would change simply because of this sort of formalistic shift in the manner of operations.
  33. I have inserted the qualification *credibly* in this example because the Dale case requires that courts *defer* to an organization's assertion that complying with a regulation would
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- adversely affect the message it sends to the public, but does not seem to require that the courts *accept* unquestioningly mere assertions.
34. For representative works, see Sullivan, 1989 (offering a view from a political liberal); Epstein, 1993 (offering a view from a political conservative).
  35. I believe that the reason for greater clarity in the law of selective subsidies is that problems of selective subsidies have arisen almost exclusively in connection with subsidies for speech activities, whereas problems of unconstitutional conditions have arisen across a wider range of subjects, making it more difficult to discern common themes.
  36. The conventional example is that the government may provide funds to groups that disseminate a “Just Say No to Drugs” message without being obliged to do the same for groups that purvey a “Say Yes to Drugs” message.
  37. This is the accepted understanding of *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld a regulation that prohibited doctors administering family planning programs subsidized by the federal government from informing their patients of the availability of abortions as a response to family planning problems. See *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (explaining *Rust* on this basis).
  38. The best explanation for the fact that government speech is subject to no constitutional limitations whatever is that we (or judges) are confident that ordinary political processes will provide strong enough protection against the kinds of distortion in public understanding that might otherwise be of concern.
  39. *Legal Services Corp. v. Velazquez*, 121 S. Ct. 1043, 1049 (2001).
  40. The Court has consistently avoided confronting the problem identified here, sometimes invalidating the program on other grounds, as in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), and sometimes upholding the program by interpreting the program’s definitions as not excluding participation on constitutionally problematic grounds, as in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).
  41. *Cuffley v. Mickes*, 208 F. 3d 702 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001) (holding that a state may not refuse to allow a chapter of the Ku Klux Klan to participate in its “Adopt-a-Highway” program); *Lewis v. Wilson*, 253 F. 3d 1077 (8th Cir. 2001) (holding that a state may not refuse to grant a personalized license plate ARYAN-1 on the ground that doing so would violate the state’s public policies and would be inflammatory).
  42. This dilemma appears more clearly in connection with unconstitutional conditions. See text accompanying note 58–59 below.
  43. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).
  44. 468 U.S. 364 (1983).
  45. For a general survey, see Monsma, 1996.
  46. A non-punitive explanation for the exclusion would be to make the personal assets of the entities’ owners available to compensate those who the media enterprises libel.
  47. To put the point in unconstitutional conditions terms, the exemption is available on condition that the groups engage in nothing other than arts advocacy.
  48. 461 U.S. 540 (1983).
  49. *Id.* at 548. The Court mentioned the possibility that a non-qualifying veterans’ organization could use a segregated fund for its lobbying activities and obtain tax-deductible contributions for its other activities. *Id.* at 544.
  50. Another account of the difficulty locates its origin in our desire to maintain a distinction in law between the public realm and the private realm, coupled with our recognition that such a line can be drawn only by public institutions. See, e.g., Seidman and Tushnet, 1996, at pp. 72–90. I believe that the two accounts are at base the same. Seidman argues, in a recent book, that the best we can do is to allow that line to be drawn by the courts, which in his view are staffed by people who are more likely to be aware of their private roles than are legislators (Seidman, 2001).
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# 3 The Theory and Practice of Free Association in a Pluralist Liberal Democracy

WILLIAM A. GALSTON

This paper offers an account—and theoretical defense—of the concept of freedom of association. It begins with a threshold question: In what larger context is this conception located? My answer: in the complex of principles and institutions we call liberal democracy. Liberal democracy’s distinguishing feature is the idea of limits on the legitimate scope of state power—even when that power is exercised in perfect accord with democratic norms. There are certain liberties of individuals and groups that the state *must* respect.

In other words, liberal democracy is a form of government in which the state is not the sole or comprehensive authority. By recognizing its limits, the state acknowledges the existence of non-state sources of authority, including individual conscience, family relations, faith communities, and civil associations. These non-state sources of authority are not simply a gift or concession of the state; they have an independent existence that helps ground the moral claims flowing from them.

Within this system of limited government and multiple authorities, what is it that free associations do? What are their functions? In the first place, associations have a *social* function, allowing human beings to act on their social nature. Associations are *expressive*, giving life to diverse conceptions of human well-being, in the company of others who share that vision. They are *productive*, allowing groups to do civic work in a manner at least partly independent of formal governing institutions. They are *formative*, helping to shape the character and outlook of those who participate in them. And they have both negative and positive relations with political institutions. Negatively, they help protect the liberty of individuals and groups against oppressive state power. Affirmatively, they can help shape both the ends public institutions pursue and the means through which they pursue these ends. (That is the function of lobbying, theoretically conceived.)

In the next section, this paper explores the historical development of the idea of limits to public power, taking as my points of reference some important cases in U.S. constitutional law. It then inventories the resources that political theory can offer to characterize and justify limits to public authority. With this foundation in place, it will examine some contemporary controversies in which different dimensions of freedom of association are debated and applied. While these remarks focus principally

on the negative/protective role of associations, a bit more about their affirmative/promotive role will be addressed in the concluding section.

## Civic and Expressive Dimensions of American Constitutionalism

Reflecting the nativist passions stirred by World War One, the state of Nebraska passed a law forbidding instruction in any modern language other than English. A teacher in a Lutheran parochial school was convicted under this statute for the crime of teaching a Bible class in German. In *Meyer v. Nebraska*, the Supreme Court in 1923 struck down this law as a violation of the liberty guarantee of the Fourteenth Amendment. Writing for the court, Justice McReynolds declared:

“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. . . . The desire of the legislature to foster a homogeneous people with American ideas prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff.”<sup>1</sup> The majority decision identified the underlying theory of the Nebraska law with the Spartan regime, as well as with Plato’s *Republic*, which it quoted at length and sharply distinguished from the underlying premises of liberal constitutionalism.

Through a ballot initiative in 1922, the people of Oregon had adopted a law requiring parents and legal guardians to send all students between the ages of 8 and 16 to public schools. The Society of Sisters, an Oregon corporation that among other activities maintained a system of Catholic schools, sued to overturn this law as inconsistent with the Fourteenth Amendment. In *Pierce v. Society of Sisters*,<sup>2</sup> in 1925, the Supreme Court emphatically agreed:

“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>3</sup>

Consider, finally, the case of *Wisconsin v. Yoder*, decided by the Supreme Court a quarter century ago.<sup>4</sup> This case presented a clash between a Wisconsin state law, which required school attendance until age sixteen, and the Old Order Amish, who claimed that high school attendance would undermine their faith-based community life. The majority of the Court agreed with the Amish and denied that the state of Wisconsin had made a compelling case for intervening against their practices: “[H]owever strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. . . . [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.”<sup>5</sup>

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The purview of this approach is not confined to parents and families. The U.S. Supreme Court has recognized rights of association that limit the purview of otherwise applicable public principles. For example, in *Roberts v. U.S. Jaycees*, the Court enunciated a notion of “expressive” freedom of association as a category worthy of protection as an important counterweight to potentially overweening state power:

According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. . . [and] Freedom of association . . . plainly presupposes a freedom not to associate.<sup>6</sup>

Taken together, these cases stand for two propositions. First, in a liberal democracy, there is in principle a division of authority between the state and other human associations. The state has the right to establish certain minimum standards, such as the duty of parents to educate their children, and to specify some minimum content of that education, wherever it may be conducted. But parents have a wide and protected range of choices as to how the duty to educate is to be discharged. Suitably revised and extended, these considerations apply to the liberties of civil associations as well. Second, there are some things the liberal state may not do, *even in the name of forming good citizens and strengthening civic unity*. The appeal to the requisites of civic life is powerful, but not always dispositive when opposed by claims based on the authority of parents or the liberties of individuals and associations.

A free society, these cases suggest, will defend the liberty of individuals to lead many different ways of life. It will protect a zone within which individuals will freely associate to pursue shared purposes and express distinctive identities. Most important, it will adhere to what lawyers would call a rebuttable presumption in favor of liberty: the burden of proof lies on those who seek to restrict individual and associational liberty, not those who defend it.

During the 20th century, the extension of state power has multiplied the public principles held to be binding on families and civil associations. Many of these principles are designed to ensure that these associations do not arbitrarily exclude, or abuse, specific individuals; they promote public purposes widely accepted as morally compelling.

We are familiar with the moral advantages of central state power; we must also attend to its moral costs. There is what might be called a paradox of diversity: if we insist that each civil association mirror the principles of the overarching political community, then meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism. If, as I shall argue, our moral world contains plural and conflicting values, then the overzealous enforcement of general public principles runs the risk of interfering with morally legitimate individual and associational practices.

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My argument constitutes a challenge both to the classical Greek conception of the political order as the all-encompassing association and to the Hobbesian/Austinian/Weberian conception of unfettered sovereign power. A liberal polity guided by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity.

That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (for example, patriarchal gender relations) of which many strongly disapprove. It will allow many associations to define their membership in ways that may be seen as restraints on individual liberty. And it will, within limits, protect those whose words and way of life express deep disagreement with the regime in which they live. But unless liberty—individual and associational—is to be narrowed dramatically, these costs must be accepted.

## The Resources of Liberal Theory

I spoke earlier of the resources liberal theory can bring to bear on the adjudication of disputes between state power and individual freedom. Three concepts are of particular importance.

**Expressive Liberty** The first concept is what I call “expressive liberty.” By this I mean the absence of constraints, imposed by some individuals on others, that make it difficult or impossible for the affected individuals to live their lives in ways that express their deepest beliefs about what gives meaning or value to life.<sup>7</sup> An example of such constraints would be the consequences of the Inquisition for Iberian Jews, who were forced either to endure persecution or renounce their religious practices.

Expressive liberty offers the opportunity to enjoy a fit between inner and outer, belief and practice. Not all sets of practices will themselves rest on, or reflect a preference for, liberty as ordinarily understood. For example, being Jewish is not always (indeed, is not usually) a matter of choice. But once that fact is established through birth and circumstance, it becomes a matter of great importance for Jews to live in a society that permits them to live in accordance with their understanding of an identity that is given rather than chosen, and that typically is structured by commandments whose binding power does not depend on individual acceptance. Expressive liberty protects the ability of individuals and groups to live in ways that others would regard as unfree.

For most people, expressive liberty is a precondition for leading complete and satisfying lives. Part of what it means to have sincere beliefs about how one should live is the desire to live in accordance with them. It is only in rare cases that constraints imposed by other individuals and social structures do not affect the ability of believers to act on their convictions. For most of us, impediments to acting on our deepest beliefs are experienced as sources of deprivation and unhappiness, resentment and anger. Expressive liberty is a human good because its absence is an occasion for misfortunes that few would willingly endure.

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While expressive liberty is a good, it is not the only good, and it is certainly not unlimited. It does not protect every act flowing from sincere belief—human sacrifice, for example. But it does protect a range of practices that many will regard as objectionable—for instance, male circumcision and the gender separation commanded by Orthodox Judaism.

**Value Pluralism** Expressive liberty would not be very significant if the zone of legitimate beliefs and practices were narrow—that is, if the moral considerations that lead us to forbid human sacrifice also rule out a wide range of other practices and limit us to a single conception of the human good. But this does not seem to be the case. Something along the lines of Isaiah Berlin’s moral pluralism perhaps offers the best account of the moral universe we inhabit. He depicts a world in which fundamental values are plural, conflicting, incommensurable in theory, and uncombinable in practice—a world in which there is no single, univocal highest good that can be defined philosophically, let alone imposed politically.

A handful of propositions will clarify the basic thrust of value pluralism.

- Value pluralism is offered as an account of the actual structure of moral experience. It advances a truth-claim about that structure, not a description of the perplexity we feel in the face of divergent accounts of what is valuable.
- Pluralism is not the same as relativism. Philosophical reflection supports what ordinary experience suggests—a non-arbitrary distinction between good and bad or good and evil. For pluralism as for any serious position, the difference between (say) saving innocent lives and shedding innocent blood is part of the objective structure of the valuational universe.
- The domain of value contains a multiplicity of genuine goods that are qualitatively heterogeneous and cannot be reduced to a common measure of value. The effort to designate a single measure of value either flattens out qualitative differences or (as in John Stuart Mill’s version of utilitarianism) embraces these differences in all but name.
- These qualitatively distinct values cannot be fully ordered; there is no highest good that enjoys a rationally grounded priority for all individuals. This is not to say that it would be unreasonable for a particular individual to organize his or her life around a single dominant good, but only that there is no rational basis for extending that decision to, or imposing it on, others who understand their lives differently.
- No single good or value, or set of goods or values, is overriding in all cases for the purpose of guiding action. Even if A is by some standard loftier or nobler than B, it may be the case that B is more urgent than A in specific circumstances, and it may be reasonable to give priority to urgency over nobility for decisions that must be made in those circumstances.

**Political Pluralism** The political pluralism developed by early twentieth-century British theorists such as J.N. Figgis, G. D. H. Cole, and Harold Laski provides a third source of support for the account of liberalism under development here. For the current purposes, the key idea offered by these thinkers was a critique of the state, understood as the sole

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source of legitimate authority. Instead, they argued, our social life comprises multiple sources of authority and sovereignty—individuals, parents, associations, churches, and state institutions, among others—no one of which is dominant for all purposes and on all occasions. Non-state authority does not exist simply as a concession or gift of the state. A well-ordered state recognizes, but does not create, other sources of authority.<sup>8</sup>

The theory of multiple sovereignties does not imply the existence of separate social spheres, each governed by its own form of authority. Political pluralism is consistent with the fact of overlapping authorities whose relationship to one another must somehow be worked out. For example, neither parents nor state institutions have unfettered power over the education of children. From a pluralist point of view, the state cannot rightly resolve educational disputes with parents by asserting the comprehensive authority of its conceptions over theirs. Nor can parents assert a comprehensive authority over the state when conflicts erupt over their children's education. Rather, the substance of particular controversies shapes our judgment concerning the appropriate allocation of decisional authority.

It is said that during medieval times, Bulan, King of the Khazers, summoned four wise men to his kingdom—a secular philosopher, a Christian scholar, a Moslem scholar, and a rabbi. After interrogating them one by one on the content and basis of their beliefs, Bulan called his people together in an assembly, declared that he accepted Judaism, and decreed that all Khazers would thenceforth be instructed in and practice Judaism as their communal faith.<sup>9</sup>

I suspect that this chain of events strikes most readers today as strange. Would it be less strange if—rather than one man deciding for all—the people had assembled themselves and, after the most scrupulous democratic deliberation, settled on Judaism as the official religion of the Khazer nation? I think not. There is a threshold question: does the state possess the legitimate power to make collectively binding decisions on this matter? If not, the question of how such decisions should be made is never reached. From a pluralist perspective, religion is a clear example of a matter that is not subject to unlimited state power.

In matters of this sort, individuals and civil associations are not required to give an account of—or justify—themselves before any public bar. So, for example, representatives of minority religions could not rightly be compelled by a congressional committee to explain the essentials of their faith. Indeed, as Ira Katznelson has recently argued, such individuals are not morally required to give an account of themselves to anyone, public or private: a meaningful pluralism entails “the right not to offer a reason for being different.” Katznelson builds on Susan Mendus' metaphor of “neighborliness.” We owe our neighbors civil behavior that is mindful of the impact on them of what we do, but ordinarily “neighbors do not owe each other reasons” for the way they choose to lead their lives.<sup>10</sup>

## How the Sources of Liberal Theory Fit Together

This argument began with the suggestion that there are three important but sometimes neglected resources on which liberal theory can draw. It remains to sketch the relationship among them.

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I need not dwell on the relationship between expressive liberty and moral pluralism. Suffice it to say that if moral pluralism is the most nearly adequate depiction of the moral universe we inhabit, then the range of choiceworthy human lives is very wide. While some ways of life can be ruled out as violating minimum standards of humanity, most cannot. If so, then the zone of human agency protected by the norm of expressive liberty is capacious indeed. Moral pluralism supports the importance of expressive liberty in ways that monistic theories of value or accounts of the ultimate good do not.

There is a relationship of mutual support between moral pluralism and political pluralism. Moral pluralism suggests that not all intrinsic goods are political goods; many are social, or private. These goods are heterogeneous. In particular, the goods of family, of social life, and of religion cannot be adequately understood as functionally related to the political order. These goods affect politics, but they do not exist only for the sake of politics. Not every religion can be reduced without remainder to “civil” religion; not every parental decision serves (or needs to serve) the common good. Because this heterogeneity of value precludes instrumental rank-ordering, political goods do not enjoy a comprehensive priority over others in every circumstance.

Moral pluralism lends support to the proposition that the state should not be regarded as all-powerful, while political pluralism helps define and defend the social space within which the heterogeneity of value can be translated into a rich variety of worthy human lives. This mutual support does not rule out all hierarchical relations between the state and other activities, however. In a free society with a multiplicity of individual and associational beliefs, practices that give expression to these beliefs are bound to come into conflict. In some cases the contending parties will be able to negotiate some accommodation.

But not always. State power can legitimately regulate the terms of the relationship among social agents, provided that the public structure is as fair as possible to all and allows ample opportunities for expressive liberty. In this respect, unlike others, the state enjoys a certain priority: it is the key source of order in a system of ordered liberty. To be sure, state institutions typically have the power to exceed these bounds and to encroach on the liberties of individuals and associations. In democracies, these encroachments may well enjoy the support of a majority, and the democratic state may claim that only the people have the right to resolve disputes about the definitions and scope of liberty. That states often behave in this manner does not mean that they do so legitimately. As Rousseau reminded us, power and right are very different, and we cannot infer the latter from the former. Like other regimes, democracies can become oppressive when they disregard their limits.

## Pluralist Liberal Democracy and Freedom of Association

A pluralist liberal democracy will contain numerous associations embodying very different conceptions of how human beings ought to relate to one another and of the goals they ought to pursue. This raises the issue of the proper relation between the state’s general public principles and the particular principles that guide the diverse subcommunities. Before exploring this issue systematically, I want to reflect briefly on the reasons why it seems so pressing in the United States today.

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To begin with, the past decade has witnessed an increasing awareness of the existence and importance of civil society—that network of intimate, expressive, and associational institutions that stand between the individual and the state. The indigenous American discussion of this sphere goes back to Tocqueville; interest in it has been reinforced by Catholic social thought, by the events of the past decade in Eastern Europe and the former Soviet Union, and by the felt inadequacies of both contemporary hyperindividualism and of our national public life.

At the same time, three converging trends have turned this sphere into a flashpoint. U.S. civil society is becoming increasingly diverse; previously marginalized or minority groups are becoming more and more assertive; and the reach of public authority is expanding into areas that were once considered substantially private. The application of general public principles to diverse associations, never a simple matter, is now more complex than ever before. The definition of common citizenship and of compelling public purposes is therefore more urgent.

Within pluralist democratic orders (as in all others), there must be some encompassing political norms. The question is how “thick” the political is to be. The answer will help determine the scope of legitimate state intervention in the lives of individuals, and in the internal processes of organizing that make up civil society.

The constitutional politics of pluralist democracies will seek to restrict enforceable general norms to the essentials. By this standard, the grounds for national political norms and state intervention include basic order and physical protection; the sorts of goods that many traditions have identified as necessary for minimally decent individual and collective life; and the components of shared national citizenship. It is difficult, after all, to see how societies can endure without some measure of order and material decency. Since Aristotle’s classic discussion of the matter, it has been evident that political communities are organized around conceptions of citizenship that they must defend, and also nurture through educational institutions as well as less visible formative processes.

But how much farther should the state go in enforcing specific conceptions of justice, authority, or the good life? What kinds of differences should the state permit? What kinds of differences may the state encourage or support? I want to suggest that an understanding of liberal democracy guided by principles of expressive liberty, moral pluralism, and the political pluralism of divided sovereignty yields clear and challenging answers in specific cases.

Let me begin with a simple example. While we may regret the exclusion of women from the Catholic priesthood and from the rabbinate of Orthodox Judaism, I take it that we would agree that otherwise binding antidiscrimination laws should not be invoked to end these practices. What blocks the extension of these laws is our belief that religious associations (and perhaps others as well) enjoy considerable authority within their own sphere to determine their own affairs and in so doing to express their understanding of spiritual matters. We can believe this without necessarily endorsing the specific interpretation of gender roles and roles embedded in broader religious commitments.<sup>11</sup>

Beyond general rights of free association, there are limits on the polity’s ability to enforce even core public commitments on subcommunities when these principles

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clash with religious convictions. Consider Bob Jones University, whose students were prohibited on religious grounds from engaging in interracial dating. In many cases of conflict between First Amendment-protected associations and compelling state interests such as ending racial segregation, the flat prohibition of conduct judged obnoxious by public principles seems hard to square with the minimum requirements of free exercise. But associations conducting their internal affairs in a manner contrary to core public purposes can legitimately be burdened, even if not banned outright. In such cases, a policy of what might be called “reverse exception”—that is, the removal of all forms of otherwise applicable public encouragement and favor—may well be the most appropriate course. As the Supreme Court declared in its decision denying Bob Jones’s request for reinstatement of its federal tax exemption, “the Government has a fundamental, overriding interest in eradicating racial discrimination [that] substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”<sup>12</sup>

But let’s move to a less clear-cut example. Consider the issues raised in the case of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*<sup>13</sup> A private fundamentalist school decided not to renew the contract of a pregnant married teacher because of its religious belief that mothers with young children should not work outside their homes. After receiving a complaint from the teacher, the Civil Rights Commission investigated, found probable cause to conclude that the school had discriminated against an employee on the basis of religion, and proposed a consent order including full reinstatement with back pay.

As Frederick Mark Gedicks observes, this case involves a clash between a general public norm (nondiscrimination) and the constitutive beliefs of a civil association. The teacher unquestionably experienced serious injury through loss of employment. On the other hand, forcing the school to rehire her would clearly impair the ability of the religious community of which it formed a key part to exercise its distinctive religious views—not just to profess them, but also to express them in its practices. The imposition of state-endorsed beliefs on that community would threaten core functions of diverse civil associations—the expression of a range of conceptions of the good life and the mitigation of state power. In this case and others like it, a liberal pluralist politics and jurisprudence would give priority to the claims of civil associations.<sup>14</sup>

Current U. S. federal legislation and constitutional doctrine reflect this priority to a considerable degree. Thus, although Title VII of the Civil Rights Act prohibits employment discrimination on the basis of religion, section 702 of the statute exempts religious organizations. In the case of *Corporation of the Presiding Bishop v. Amos*,<sup>15</sup> decided in 1987, the Supreme Court not only upheld this accommodation in principle but also extended its reach to a wide range of secular activities conducted under the aegis of religious organizations.<sup>16</sup>

This does not mean that all religiously motivated practices are deserving of accommodation. Some clearly are not. Civil associations cannot be permitted to engage in human sacrifice. Nor can a civil association endanger the basic interests of children by withholding medical treatment in life-threatening situations. But there is a basic distinction between the minimal content of the human good, which the state must defend, and diverse conceptions of flourishing above that baseline, which the state must

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accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line should be drawn. An account of liberal democracy built on expressive liberty and on moral and political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity.

The expansion of the modern state means that most civil associations are now entangled with it in one way or another. If limited (even involuntary) participation in public programs requires civil associations to govern the totality of their internal affairs in accordance with general public principles, then the zone of legitimate diversity is dangerously narrowed. A liberal pluralist jurisprudence consistent with the overall theory I am defending would limit the reach of public principles to those areas in which (for example) civil associations are participating directly and substantially in programs that confer public benefits on their members.

## Conclusion: The Negative and Affirmative Roles of Civil Associations

In the introduction to this paper I sketched a number of different social functions that civil associations may perform. Some of these functions involve interactions between associations and official state institutions. These relations may be divided into the negative and the affirmative: those that are in the main protective, seeking to insulate individuals and groups from the exercise of state power; and those in which civil associations seek to influence the way in which state power is used. This paper has focused on the negative, liberty-protecting functions of civil associations, and one may well wonder how the principles on which I have based my argument shape our understanding of their affirmative, policy-promoting functions.

Answering this question with precision would require another paper, but I can sketch the outlines of my approach. The beginning of wisdom is to acknowledge the force of the distinction between, on the one hand, state benefits or subsidies conferred on associations and, on the other, state recognition of associational liberties. To the extent that the state goes beyond recognition of immunities and confers privileges on civil associations, public purposes will inevitably, and within limits properly, shape the conduct of civil associations. As Bob Jones University discovered, tax exemption granted pursuant to public policy can be withdrawn when vital public purposes are seen to be undermined by specific civil practices.

I have suggested that the negative, protective functions of civil associations can be defended on grounds of constitutional and even moral principle. That is the case for some but not all of their affirmative, promotive functions as well. For example, an individual citizen needs no special status or permission to advocate on behalf of the poor and downtrodden, and citizens may band together to petition the government on their behalf. Because these activities are core elements of democratic citizenship, they enjoy a strong presumption of constitutional protection. The freedom to engage in these activities requires no special legal status or mandated performance.

The situation becomes far more complex when groups of citizens enter into what amounts to a legal relationship with public institutions, in which their activities—both advantages and restrictions—are shaped by public policy. In such circumstances,

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the freedom of action of civil associations must be defined and defended on the basis of considerations that will be strongly influenced by contested political and ideological commitments. For example, the tax code defines an elaborate web of qualifying conditions for advantages that some but not all groups enjoy. In the bustle of daily activity in the voluntary sector, practitioners sometimes are tempted to regard these advantages not as conferred privileges but rather as guaranteed immunities. In the process, they may overlook the need to justify these advantages to others as serving a shared conception of justice and the common good. Our constitutional tradition is hospitable to a zone of protected rights and liberties, but it is hostile to the creation of special privileges and unaccountable power.

## NOTES

1. 262 U.S. 401, 402.
  2. 268 U.S. 510.
  3. 268 U.S. 535. I agree with Macedo that we should not oversimplify the holding of these cases to create parental or associational rights that always trump civic concerns. The point (and the language of the opinions makes this clear) is that neither such rights nor the civic domain enjoys a generalized priority over the other. Rather, they are independent claims, conflicts among which must be adjudicated with regard to the structure of specific situations. See Macedo, *Diversity and Distrust*, chapter 3.
  4. 406 U.S. 205 (1972).
  5. 406 U.S. 215, 232.
  6. *Roberts v. U.S. Jaycees*, 468 U.S. (1984), 622–23. For two superb discussions of the issue raised by this case, see the essays by George Kateb and Nancy Rosenblum in Amy Gutmann, ed., *Freedom of Association* (Princeton, NJ: Princeton University Press, 1998).
  7. Expressive liberty constitutes the portion of negative liberty that bears directly on questions of identity. So understood, it implies a reasonable basis for distinguishing between those liberties that stand in a significant relation to living our identity and those that do not. Expressive liberty also requires some basis for arguing that the liberties it comprises are weighty relative to others. While the account I offer in the following paragraphs moves in this direction, there is much more to be said on these topics.
  8. For elaboration, see Paul Q. Hirst, ed, *The Pluralist Theory of the State: Selected Writings of G. D. H. Cole, J. N. Figgis, and H. J. Laski* (London: Routledge, 1989). Hirst's introduction offers an unusually clear guide to the central themes of pluralist thought.
  9. See Jehuda Halevy, *Kuzari: The Book of Proof and Argument*, edited with an introduction and commentary by Isaak Heinemann (Oxford: East and West Library, 1947), pp. 50–51.
  10. Ira Katznelson, *Liberalism's Crooked Circle: Letters to Adam Michnik* (Princeton: Princeton University Press, 1996), pp. 171–173. Katznelson takes the first quotation from an article by Patha Chatterjee.
  11. For an important collection of essays, many generally sympathetic to the accommodationist position, see Nancy L. Rosenblum, ed., *Obligations of Citizenship and Demands of Faith* (Princeton, NJ: Princeton University Press, 2000). For the most systematic argument against this position, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001), especially chapter 2. For a response to Barry, see my review in *The Public Interest*, no. 144.
  12. 461 U.S. 574 (1983), at 604.
  13. 477 U.S. 619 (1986).
  14. Frederick Mark Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights," *Wisconsin Law Review* (1989): 101–103.
  15. 483 U.S. 327 (1987).
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16. For an argument (from a scholar generally sympathetic to wide associational liberty) that *Amos* goes too far, see Nancy L. Rosenblum, "Amos: Religious Autonomy and the Moral Uses of Pluralism," in Rosenblum, ed., *Obligations of Citizenship and Demands of Faith*, chapter 6.

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# 4 How to Profit from Nonprofits Tocqueville on Associations

DELBA WINTHROP

**W**hat would Tocqueville have to say about nonprofit advocacy and democracy? He might have been too astonished by the question to say a word. The Americans he describes never advocate doing anything that is not for profit. His America is the home of self-interest and, above all, of the doctrine of self-interest well understood. But, as most everyone knows, although he has nothing to say about “nonprofits,” he has a lot to say about “associations.”

Some of what Tocqueville has to say about associations sounds so familiar that it hardly bears repeating, whereas other aspects of it may strike us as irredeemably dated. In his *Democracy in America*,<sup>1</sup> published in two volumes in 1835 and 1840, he calls for a “new political science . . . for a world altogether new” (*DA I* Intro p. 7). Presumably, this new world was his world; not surprisingly, he speaks to the issues and parties of his time. Yet his world, both the America he visited in 1831–32 and the post-revolutionary France to which he returned, is not so different from our own. There are, to be sure, differences of historical development and, most obviously, of scale. But it is still worth considering whether his observations and recommendations might be adapted to our present situation, and if so, in what spirit.

In our world, Tocqueville is now the darling of conservatives. Some like his firm endorsement of the doctrine of self-interest well understood; others, his appreciation of the value of religion in public life; and most, his strictures against big government. He is respected by liberals or progressives and by others on the left for his acknowledgment of the justice of equality (no small point), his recommendation of more community and more participation, and his recognition of the place of compassion in a democracy. I do not know how the generality of avowedly nonpartisan bureaucrats and policy analysts tend to regard him, but their opinion of him could hardly be worse than his of them: He denies the possibility of nonpartisanship and reserves some of his most strident rhetoric for attacks on them. That being said, he does entrust some of his most important instruction, including his most comprehensive and sustained analysis of associations, to those who guide democracies formally and informally—to “legislators,” that is, those who fashion governments, and to moralists and philosophers. Lawyers, at least American lawyers of the 1830s as he portrays them, could not hope to find better press even in an American Bar Association publication. It is, however, easy to find something supportive of one’s position and flattering to oneself in Tocqueville while overlooking his reservations and criticisms. Conservatives should notice that Tocqueville’s embrace of self-interest well understood is not

quite heartfelt and that he shows it to be inseparable from a commitment to democratic political institutions. Those on the left should see that his doubts about compassion are almost as grave as the ones he expresses about excessive reliance on experts and on government in place of associations. And all of the above should reflect on Tocqueville's observations on ambition and pride—qualities they often exhibit, which their theories and policies rarely accommodate.

Tocqueville, to repeat, does not speak of “nonprofits,” or even of “interest groups,” for that matter. But it is hard to think of anyone who uses the term “association” more frequently or more broadly than he does. With eye-catching exaggeration, he calls just about every grouping of two or more people an association—from a marriage to the human race, and between these, a private club, a business venture, a temperance society, a political party, a township, a nation. In addition, he contends that there is an art of association, even a science of it. Yet as one might suspect, given the diversity of collections of people he is willing to term associations, he has no simple, straightforward teaching on association and associations. Nor does he have much to say about some issues that may be of urgent concern to many contemporary readers—for example, about how associations affect the substance of public policy—because it is just this sort of issue that is of little concern to him in *Democracy*. He cares about associations insofar as they benefit the hearts and minds of human beings who live in democratic societies.

I leave Tocqueville's controversial discussion of “the conjugal association” and his curious remark about the human race for other occasions. Here I shall focus on four issues: First, what does he mean by an “association” and what purposes does he think the activity of associating serves in a liberal democracy? Second, how or why are the Americans he describes as adept at associating as they are? Third, what is distinctive about his view? And finally, what, if any, is the present relevance of this view? I limit my remarks almost exclusively to *Democracy in America*, Tocqueville's best known book today, and within it, to his characterizations of American associations.

## What Is an Association?

At first glance, Tocqueville is more helpful in calling attention to the range of associations found in American life than he is in specifying the characteristics they share. “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” (*DA* II 2.5 p. 489). Americans also have political associations, not just parties and pressure groups, but numerous “permanent associations created by law”—local governments. And they have moral and intellectual associations.

The broad outlines of Tocqueville's picture of American associations are probably familiar: One may suppose that economic and social associations will emerge readily, because Americans are both materialistic and compassionate. These will allow people to meet daily needs they could not meet on their own. Yet because these associations must be created by spontaneous efforts, they tend to be haphazard and temporary. Even when successful, they involve risks and often bring only modest ben-

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efits. They tend to focus on provision for relatively short-term and often narrowly conceived needs. They are useful because they serve real needs and because they enable associates to perfect techniques they might employ in associating for other purposes. But with their substantial risks and limited gains, these associations may fail to inspire individuals to make the efforts required to maintain them, especially when it appears that needs might be met in some other way—for example, by government.

Less obvious and potentially more valuable, in Tocqueville's view, are the associations Americans form for moral and intellectual ends. In order to bring to the public eye new or uncommon sentiments and ideas, individuals support one another, persuade others, perhaps even change mores and ultimately laws; thus "the heart is enlarged, and the human mind is developed" (*DA* II 2.5, p. 491). The temperance society, which at first amused Tocqueville, is illustrative: Ordinary citizens set to educating their fellows about the evils of drink, combining forces to make a public example of their sobriety (*DA* I 2.4, p. 181, 2.5, p. 215, 2.6, p. 232; II 2.5, p. 492). Their uniting over a *moral* concern might also temper democracy's greater intoxications, individualism and materialism (see *DA* II 2.3, 2.10). In addition, the issues raised indirectly by their activity, the relative merits of modes of governance and the hierarchy of human goods, are, arguably, intellectual as well as moral issues.

Such associations would be difficult to maintain without a readily available means to air the unpopular sentiments and ideas they often stand for, and in Tocqueville's day, this was a newspaper (*DA* II 2.6). A newspaper enables one person to articulate a sentiment or thought shared by other readers, thereby giving encouragement to each, and it provides a forum in which they might debate and persuade. The felt need for many forums and for the vitality of a free press, Tocqueville contends, depends in turn on political associations, especially local governments (*DA* II 2.6). Among citizens who take a hand in local government, one might expect to find some who have an interest in public affairs as well as in their own private concerns. It is they who feel the need to keep up with the little matters of the day and to have a quick and easy means of exposing and being exposed to a range of opinions about them.

When citizens have the habit of associating, the vitality of political associations should be relatively easy to sustain. These, in turn, are indispensable because only they make clear to all the greatness of what is at stake—the government of society. Among political associations Tocqueville includes governments, especially local governments, as well as political parties. The New England township is a "primary school" of freedom (*DA* I 1.5, p. 57); political associations such as parties are "great schools, free of charge, where all citizens come to learn the general theory of associations" (*DA* II 2.7, p. 497). A political association "draws a multitude of individuals outside themselves at the same time; however separated they are naturally by age, mind, fortune, it brings them together and puts them in contact. They meet each other once and learn to find each other always." Here citizens are forced to figure out what is necessary to organize common efforts. Individual will and reason are pooled to advance an interest that is shared, but nonetheless still recognized as partisan, or partial. Thus, one's own interest is neither sacrificed nor unreflectively identified with the interests of all. To promote a political association's goal effectively, we might suppose, some thought must be given about how to link its partial interest to a more general interest, or at least about how to persuade a democratic majority that this merits

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attention. Political associations are free schools: free because they teach the habits of freedom rather painlessly; schools because they employ and impart reasonable expectations about what makes freedom possible for individuals and communities.

Thus Tocqueville's Americans, by participating in a vast array of associations, become accomplished in an art and a science of association. They may thereby gain an ability to meet more of their shared needs without the aid of a strong central government. This, in turn, may prepare them to preserve their freedom against government, should that ever be necessary. Furthermore, in exhibiting the range of sentiments and ideas democracy can foster, their own sentiments and ideas may broaden. Finally, each participant learns to subordinate his or her will to common purposes, as members of a free community should. Especially in political associations, which aspire to the formidable goal of governing society, each participant comes to see just how worthwhile success at associating can be.

Tocqueville does not spell out what makes a group of people an association, as distinguished from a mob. Later, I shall consider in greater detail what I take to be his most instructive model of an association, the New England township. Provisionally, I can specify some general characteristics shared by the associations he describes: First, at the core of any association will be a shared idea or sentiment and a determination to publicize and promote it. Second, association members are able to *subordinate* their own wills and reason to that shared end, without *surrendering* these to any person or persons. Third, besides approving of the idea or sentiment promoted, participants will be attracted to an association because they see it as potentially independent and strong, and thus worthy of their efforts on its behalf. Fourth, associates will appreciate that they have an *interest* in furthering the shared goal, yet they will value association not just as a means to advance an interest, but as an outlet for ambition and as a source and object of personal pride. Fifth, a widespread perception of associations as advantageous in these ways and a willingness to act on the perception are largely matters of habit and taste; expediency and rational calculation, alone or together, will not accomplish this. Finally, all democratic associations ultimately serve the common human causes of independence and dignity.

Before considering in greater detail why associations work so well in Tocqueville's America, it is necessary to say more about one of the most obvious aspects of *Democracy in America*: its seemingly exaggerated rhetorical emphasis on associations.

### The Purposes of Association in Liberal Democracy

Tocqueville expresses admiration, even astonishment and amusement, at the facility with which Americans associate and at the ubiquity and variety of their associations (*DA* I 1.2, 2.4, 2.6; II 2.5). Americans are all but born with a determination to associate; schoolchildren at play apply the rules of association to their games (*DA* I 2.4). But, on reflection, why should Tocqueville find this so remarkable? After all, isn't this what people who live together do? "To associate" is, in the most fundamental sense, to make oneself a part of a society. Human beings as we find them are, as a rule, born into families, political communities, and often religious communities. So why would Tocqueville make so much of association, as if it were always a more or less contrived or self-conscious activity? This is a question to which I shall return.

At the base of the association that comprises America, as well as of all partial associations within it, Tocqueville finds the "dogma of the sovereignty of the people."

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In nations where the dogma of the sovereignty of the people reigns, each individual forms an equal portion of the sovereign and participates equally in the government of the state.

Each individual is therefore supposed to be as enlightened, as virtuous, as strong as any other of those like him.

Why therefore does he obey society, and what are the natural limits of this obedience?

He obeys society not because he is inferior to those who direct it or less capable than another man of governing himself; he obeys society because union with those like him appears useful to him and because he knows that this union cannot exist without a regulating power (*DA I 1.5*).

In the United States, the dogma of the sovereignty of the people is not an isolated doctrine that is joined neither to habits nor to the sum of dominant ideas; on the contrary, one can view it as the last link in a chain of opinions that envelops the Anglo-American world as a whole. . . . [T]he generative principle of the republic is the same one that regulates most human actions (*DA I 2.10*).

Here, however, is a complication: The same principle that Tocqueville, in the first volume of *Democracy*, refers to as the dogma of the sovereignty of the people (*DA I 1.4, 1.5, 2.10*) he speaks of in the second volume as “Cartesianism” and “individualism” (*DA II 1.1, 2.2*). The politics Americans practice, he thus suggests, is suffused with, if not actually derived from, a philosophic doctrine. His second volume is an exploration of the likely *practical* consequences of this philosophic doctrine, of its effects on reason and sentiment, and consequently on habits or mores, and thereby on politics. It is especially this study that brings to light the burdens under which all liberal democratic associations operate and the urgency of an art and science of association to sustain them.

The Cartesianism Tocqueville’s Americans practice (without necessarily having studied Descartes) is a habit of mind by which each of them attempts to reach all conclusions *de novo*, abjuring the authority of tradition and the value of habit, believing only in their own ability to do things better (*DA II 1.1*). The individualism they laud is a “reflective” sentiment, prompted by an “erroneous judgment” (*DA II 2.2*). Although similar to the sentiment of self-love or self-preference, it is not so much a sentiment as a conviction that one should (and can) live one’s life without paying serious attention to anyone but oneself, one’s family, and one’s friends.

The doctrine of the sovereignty of the people means that any reasonable person consents to live as a member of some polity with laws and obligations of various sorts, accepting these as legitimate and authoritative. Political and associational life should then become habitual, so to speak “second nature.” But that is not what happens in the democratic practice Tocqueville depicts. The very doctrine meant to justify association in fact tends to erode everyday opinions and habits of sociability. Each act in each aspect of life comes to be referred to the pretension that each person is capable of a rational determination of his own interests. In thought and sentiment, we constantly recur to a “natural” apolitical, asocial state, only to have to remove ourselves from it yet again. No wonder Tocqueville thinks he has to make such a big deal of associations!

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The worrisome scenario of individualism Tocqueville sketches is one of equal and independent individuals, preoccupied with their own well-being, tending eventually, while remaining equal, to become weak and dependent. Forbidden by democratic dogma to acknowledge any intellectual authority, they are tempted to seek refuge for their own unsure judgment in an anonymous and unaccountable “public opinion.” Having learned to insist on both material prosperity and equality, they are resentful of unequal prosperity and become suspicious of unregulated undertakings, all the while remaining restive in the face of their unattained goals. Ever aware, however vaguely, of their own unfulfilled desires, priding themselves on their love of equality, they easily develop compassion for their fellows in need. Yet this very compassion reminds them of their own neediness and may further intensify their own sense of weakness. The inclination to surrender one freedom after another to the only entity that seems powerful enough to provide for the needs and desires of all becomes ever more pressing. However much adherents to the dogma of the sovereignty of the people may value democratic participation, they yearn for benefits they can have readily, without the bother of participation. So they are easily tempted to abandon efforts on their own behalf to a “mild despotism” exercised by “school-master” administrators. Such a government may be competent and effective. But its deepest appeal lies in its promise to make individuals secure and to promote their happiness, while relieving them, Tocqueville says sarcastically, of “the pain of living” and “the trouble of thinking” (*DA II 4.6*). In doing so, it may gradually “rob each of them of several of the principal attributes of humanity” (*DA II 4.7*). Thus the tendency of individualism to invite mild despotism threatens worse than a loss of political freedoms, as if that would not be lamentable enough.

From his *Americans*, Tocqueville claims to have learned how to “combat” individualism (*DA II 2.4, 2.8*), and thereby to steel resistance to the lure of mild despotism. To this combat, they bring an art and science of association, and they wage it by means of a doctrine of self-interest well understood and free political institutions.

## Self-Interest Well Understood

Tocqueville’s *Americans* like to think of themselves as individuals, able to figure things out for themselves and to tend to their own affairs with as little regard as possible for the opinions and concerns of others. Yet they sometimes bring themselves to cooperate with one another by means of a “general theory,” made famous by *Democracy in America*, which Tocqueville calls “self-interest well understood” (*DA II 2.8*). The theory maintains that one’s own interest is, as a rule, best secured in pursuing a general good. Beginning with an affirmation of the propriety of self-interest, it attempts to turn self-interest against itself. It would persuade individuals to sacrifice at least some of their private interests for the sake of preserving the rest. In this, it is an improvement on self-interest poorly understood, a strict utilitarianism which reasons that “the useful is never dishonest.” American moralists do argue that virtue is useful, and they do encourage one to think that one always does and should prefer oneself. But they also insist that part of one’s interest consists in realizing that one’s “particular interest is to do good.” (*DA II 2.8, p. 501*)

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This becomes the basis of a moral doctrine universally accepted in America. Having learned the doctrine, Americans take to explaining everything they do by means of self-interest. To do so, Tocqueville says, is to do themselves an injustice. It is also to contradict their doctrine by honoring it above their interests, or to demonstrate that honoring something above oneself and one's interests is in one's interest.

Tocqueville affirms self-interest well understood as the moral doctrine best suited to modern democratic times. It is "clear and sure," and by "accommodating" to human weaknesses (*DA* II 2.8), it easily gains wide acceptance and effectively improves the general level of behavior. As we have just seen, however, it is neither complete nor altogether self-evident. Nor is it likely to produce true or lofty virtue. What is to be said in its favor is that it aims at keeping individuals strong and responsible. In the end, the doctrine may "form . . . citizens who are regulated, temperate, moderate, farsighted, masters of themselves." It may thus provide a substitute for virtue, instilling habits of virtue without requiring elevated motives of generosity or pious self-forgetting.

Tocqueville offers this doctrine as a replacement for the aristocratic and religious moral teachings of the Old World. But as he foresees, in the new democratic world, the more likely alternative to a morality of self-interest well understood is a habit of compassion. Compassion, literally an ability to feel what another person feels, is in fact an ability to imagine that one could find oneself in the same situation and would experience the same feelings as the other. In a democracy, where all are presumed to be equal and alike, each should be able, as we would say today, to "identify" with all others. In particular, when Tocqueville's American sees someone else in need, he fancies himself in the same sort of need, so he readily comes to the other's aid. His compassion is not at odds with his self-interest. Indeed, it relies on it. A "sort of tacit and almost involuntary accord is made between them according to which each owes the others a momentary support which he himself will be able to call for in his turn" (*DA* II 3.4).

Why might Tocqueville prefer the doctrine of self-interest well understood to compassion? Consider the "almost involuntary" and the "momentary" in the remark just quoted. Compassion, even more than self-interest well understood, requires individuals to feel alike in their *neediness* and their *weakness*. Can individuals who feel needy and weak be counted on to assist one another effectively, even with the best of intentions? Can they be supposed able and willing to sustain cooperation after the *moment* of great need has passed? Compassion is more likely to increase than to diminish the temptation to succumb to a mild despotism. While the doctrine of self-interest also runs a risk in raising awareness of neediness, it stresses the importance of attending to one's own needs in a responsible way. Yet it, no less than older moral doctrines or the newer democratic inclination to compassion, may prompt aid to others. Although it demands a voluntary sacrifice of some of one's interests, it still respects the existence, if not the urgency, of these other interests and therefore of a possible amplitude of mind and heart. Besides, in resting its demand on a general rule, it gives a reason for continuous mutual assistance, hence for associations.

These associations, grounded as they are on the doctrine of self-interest well understood rather than on generosity, piety, or compassion, cannot quite be seen by

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Associations, Laws,  
Policies, and Political  
Institutions

Tocqueville's Americans as "nonprofits" or purely altruistic associations—even when they perform charitable acts or serve charitable ends. They are, however, compatible with their doctrine of the sovereignty of the people and with democratic self-government. But to this end, free political institutions and the habit of participating in them are needed to show citizens what useful things they can do for themselves by combining their efforts.

For Tocqueville, what we now refer to as "voluntary associations" are an indispensable supplement to government in a democracy. But they are not a substitute for it. He is a critic of "mild despotism"—big government, not all government. In fact, he concedes that "the sovereign must be more uniform, more centralized, more extended, more penetrating, and more powerful" in democracies (*DA* II 4.7). It nonetheless matters very much how this sovereign's power is structured, whether and how it is divided among "secondary powers." A well-structured democratic sovereign can enable and encourage citizens to do more for themselves through associations, while for that reason allowing government to do what it must do more effectively.

Tocqueville appears to distinguish sharply between "civil" and "political" associations. In the first volume of *Democracy*, his distinction refers to effects. The chief political effect of all associations is that they form a bulwark against the tyranny of the majority (*DA* I 2.4). In the second volume, which is supposed to treat their effects on civil life, the distinction between the types is maintained by discussing them in separate chapters (*DA* II 2.5 and 2.7, respectively) and by emphasizing the different ways in which they sustain association. Civil associations teach citizens *how* to associate by getting them in the habit of doing so. Political associations teach the *why* by showing them the importance of associating, and they thereby impart a taste for doing so.

In the end, these distinctions do not amount to much. First, the graver threat to democratic freedoms turns out not to be majoritarian tyranny, but mild despotism. In any case, either is averted as much by civil associations as by political (*DA* II 2.5, 4.5, 4.7). Second, when Tocqueville recommends to governments that they permit as much association as possible even while hoping to limit political associations, he notes that not only does banning the latter hamper the prosperity of the former, but also that citizens often have trouble distinguishing between permissible civil associations and impermissible political ones (*DA* II 2.7). Indeed, Tocqueville himself has this trouble when he includes as examples of the prodigious *political* activity of Americans the building of churches and the creation of temperance societies (*DA* I 2.6), which he elsewhere cites as examples of *civil* associations (*DA* II 2.5). And if civil associations are supposed to teach the habits needed for effective association, the township, surely a political association, does this as well (*DA* I 1.5). Only political associations, however, impress or inspire citizens with the importance of making this effort. Finally, at the core of any association is a determination to promote an idea or sentiment (*DA* I 2.4; II 2.5, 2.6); and ideas—not to mention the habit of formulating and articulating them—often have both political and nonpolitical significance. Thus it is hard to find an essential difference between the two kinds of association. Both are means of democratic self-government. We might surmise that the chief purpose of the apparent sharp distinction is to persuade governments that perceive political associations as threats to their power to permit associations of any sort.

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That civil as well as political associations are means of self-government which supplement or, to some extent, replace government as ordinarily construed can be grasped in thinking through Tocqueville's numerous remarks about intoxication and temperance societies. When democratic citizens associate to make a display of their own abstinence in the hope of encouraging temperance in others, they behave, he notes, as an aristocratic lord once might have done for those who looked up to him (*DA* II 2.5, 2.7, 4.6). In this example, both the association of ordinary, equal democratic citizens and the aristocratic lord rely on an informal mode of governing that is meant to work primarily by shaping mores. This is an alternative to more authoritarian methods of discouraging intemperance found in early American Puritan legislation and in post-Revolutionary American and French bureaucratic regulation (*DA* I 1.2, 2.4, 2.5, 2.6; II 2.5).

The association or "secondary power" Tocqueville discusses in greatest detail is the New England township. Townships (local governments) are unlike other associations insofar as they are "permanent associations created by law" (*DA* I 2.4; see also II 2.6). In this depiction of the township, some participation is said to be obligatory, although it is compensated (*DA* I 1.5). Participation in civil associations and in most other political associations (for example, political parties and "interest" or "pressure" groups) is, in contrast, voluntary, even when the urgency of doing so is manifest. Yet while Tocqueville stresses the dependence of townships on law, he also notes that, of all associations, their formation is the most natural or spontaneous—as if he agreed, at least to this extent, with Aristotle that man is by nature a political animal (I 1253a2, 29). Thus the township represents the extremes of deliberation and compulsion on the one hand and spontaneity on the other, within which other associations will fall.

If politics, in the form of the township, is ubiquitous or all but natural, township *freedom* is "rare and fragile" (*DA* I 1.5). Where it is found, it is here that the force, the spirit, of a nation's freedom resides. This freedom is rare and fragile in part because it owes its existence neither to interest nor to reason. To the contrary, a "civilized society" will be "revolted" at the sight of its often bumbling efforts. Rather, township freedom lives in mores, which in turn are often born of circumstance and require time to take hold. But insofar as these mores can be sustained by laws or at least by legislative forbearance, the township and its freedom do depend on a sort of legislative art.

The "art" with which Americans keep the township vital consists of concentrating and then "scattering" its power (*DA* I 1.5). In Tocqueville's idealized America, the federal Constitution and especially New England state constitutions respect township autonomy to a considerable degree, if not completely. Hence the township retains powers that have a real impact on people's daily lives. It is responsible for schools, for example. Moreover, because the township retains "force and independence" it not only treats matters of interest, it *excites* interest and attracts ambition, thereby becoming home to affection (*DA* I 1.5). Holding local office can be an attractive goal that is within reach of ordinary citizens and hence a suitable objective for generalized ambition. At the same time, offices are numerous and diffuse, so this potentially dangerous political passion becomes at worst harmless and at best beneficial. In the New England township, citizens elect their officers, make common decisions in frequent town meetings, and then execute the decisions through the

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township's many short-term elective offices. For the most part, holding office means performing specific duties mandated by law or executing constituents' will, but office holders can also take personal responsibility to act on their own initiative.

The township is a "primary school" of freedom. While attending it, one acquires the habits of freedom and the taste for its exercise (*DA I 1.5*). The township deliberately confounds the duties of citizenship with the rights of citizenship; one learns through practical experience that rights, duties, and political order are coextensive. In this way, citizens acquire the habit of exercising democratic freedoms as responsibly as they can, even if they cannot always do this with great efficiency or perfect justice (*DA I 1.5*). That township government is inefficient and the source of occasional injustices is neither ignored by Tocqueville nor a reason for him to condemn what it does accomplish. Township freedom gives citizens an *interest* in self-government. And it piques, then moderates ambition. It thus makes both self-government and the township's well-being objects of *pride*, and this, in turn, gives rise to patriotism.

In the United States the native country makes itself felt everywhere. It is an object of solicitude from the village to the entire Union. The inhabitant applies himself to each of the interests of his country as to his very own. He is glorified in the glory of the nation; in the success that it obtains he believes he recognizes his own work, and he is uplifted by it; he rejoices in the general prosperity from which he profits. He has for his native country a sentiment analogous to the one that he feels for his family, and it is still by a sort of selfishness that he takes an interest in the state (*DA I 1.5*).

So here is the doctrine of self-interest well understood, prompted by law, suffused with ambition and pride, and inscribed in habit.

## The Art and Science of Association

*Democracy's* longest, most focused discussion of associations and of the art and science of association is found in the section explicitly devoted to democratic *sentiments* (*DA II 2*). This section is also the one in which the term "art" occurs more often than elsewhere in the book, and the one in which Tocqueville directly lectures democracy's formal and informal authorities. It is here that he elevates the Americans' seemingly fortuitous facility for association to an "art" of association and the shaping of an inclination to it to a "science." He speaks of "laws that rule human societies" (*DA II 2.5*), of a "general theory" of association (*DA II 2.7*); of "relations," even "natural" and "necessary" relations, of "hidden knots" to be discovered (*DA II 2.5, 2.6, 2.7*). He attempts "proofs" and "demonstrations" of his points. So here, to be sure, is grist for the mills of "governments"—for politicians and policymakers, as well as for political and social scientists, ethicists, even philosophers. But given the context—sentiments—we may infer that in this grist is the advice that their political science heed the sentiments of democratic citizens, first to know them and then to inform them.

In fact, Tocqueville suggests that the science of association presupposes the art and that the art is, in turn, discovered in political practice. Only once in *Democracy in America* does Tocqueville specify that an aspect of American democratic practice could not even be conceived of without having been witnessed. That aspect

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is the extraordinary proliferation of local political activity (*DA I 2.6*). The fact that Americans actually know how to associate makes it possible to conceive of an art or science of association; their free, voluntary activity is not its consequence but its presupposition.

In order to sustain and promote this activity, however, Tocqueville has to argue to democracy's public authorities on behalf of associations. All governments, he holds, even popular ones, strive to maintain, if not to enlarge, their spheres of power. Modern governments especially seek ever newer, ever more efficient, more "rational" or "progressive" ways of doing this. And this quest may appear to be facilitated by a sort of political science of which Tocqueville is critical. Yet no government, however rational and efficient, however powerful, could ever hope to substitute itself for civil society and all its activities. So governments must tolerate, and should welcome, "civil" associations. Tocqueville's science purports to demonstrate to governments that they are rarely threatened and usually strengthened by permitting associations of *all* sorts—political as well as civil. Pushing this point further, he suggests that civil associations are best fostered by decentralizing governmental power itself, by fashioning meaningful institutions of local government (*DA II 2.6*).

## Tocqueville's Understanding of Association in His Context

Let us now return to the issue of Tocqueville's seemingly exaggerated rhetoric in speaking of American associations. Were it not for the intellectual context in which Tocqueville writes, his exaggeration would seem even sillier than it does. The America Tocqueville describes and the France he called home did and still do draw from a more or less common fount of political theory. That fount is liberalism.

Tocqueville's politics are liberal. He, no less than other liberals, champions rights, government by consent, and limited government—as might be inferred from his affirmation of the principle of the sovereignty of the people. And he, perhaps even more than others, appreciates the strength and dignity that attach to responsibilities when they are freely and knowingly assumed. He does, however, begin *Democracy in America* by calling for a new political science, and what this means is not perfectly clear. How significant are his departures from liberal theory, what direction do they take, and what, if any, is their practical significance?

Liberalism rests on a contention that human beings are not naturally political. Our natural condition is one in which free and equal individuals have a right to virtually everything and no moral, political, or social responsibilities to or bonds with anyone. (Hence the primacy of self-interest in American and democratic political and moral thought.) However appealing this condition of freedom and equality might at first seem, given human nature, desirous and restive as it is, and given the absence of all limitations on rights, our natural condition would in all likelihood be quite fearful—full of "inconveniences," as John Locke has it (1.13.), and "solitary, poor, nasty, brutish, and short," as Thomas Hobbes more candidly puts it (13). So each individual, making a rational calculation of how best to secure his or her life, liberty, and property, consents to surrender his autonomy to a society and government he himself institutes to provide this security. More to the present point, the theory's initial assumption of natural associability requires that not just society and government,

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but *all* human associations be understood as conscious human constructions. These originate either in law, which is in principle universally consented to, or in voluntary agreements among particular individuals.

Tocqueville, in describing America, never traces the politics of “the New World” to a prepolitical, presocial natural condition of mankind.<sup>2</sup> Instead, he starts his analysis of liberal democracy with its hopeful principle of the sovereignty of the people and looks to its practice. In reflecting on what this practice may become, however, he sees the principle of the sovereignty of the people being transformed into “individualism.” The term describes the thoughts and feelings of human beings who might just as well have learned to conceive of themselves as residents of a state of nature.

In *Democracy in America*, one finds no systematic analysis of the philosophy that underlies liberal politics. In Tocqueville’s study of French political history (*The Old Regime and the Revolution*), however, the principle of individualism is traced to the misguided designs of eighteenth and nineteenth century intellectuals. It was they who drew the political consequences of this philosophy and thereby inspired the Revolution of 1789, the revolutions that followed from it, and the socialism it later spawned (see also *DA* II 1.1).<sup>3</sup>

Here he reveals the real intention of the theory of the state of nature. These later intellectuals articulated to the public the aspiration, first formulated by the philosophers, to rationalize human life. Society was to be vastly simplified and the resources of expertise and power centralized, whether under a monarchy or under an emerging egalitarian order. All traditional institutions and customs that had once sustained social inequalities and had later come to appear arbitrary and unjust were to be abolished. To these ends, the authority of organized religion, the nobility, and local political bodies, of all “secondary powers” or existing associations, was to be sapped or destroyed and replaced by a centralized bureaucratic government. Democratic political freedoms were not the priority. Tocqueville’s overuse of the term “association” in *Democracy* may be understood as a response to liberal theory’s exaggeration of individual autonomy. So, too, his “science” of association may be intended to counter this pseudo-science of governmental centralization.

How, in the end, might one compare Tocqueville’s “science” of association to the political science of his predecessors? I have argued, among other points, that for Tocqueville, the difference between political and civil associations is not as essential as it first seems. As a rule, liberals stress the distinction between political and civil (or non-governmental), between public and private. This they do because they do not wish to acknowledge that there may be *political* goods beyond those of the preservation of a rational legal order in which life, liberty, and material prosperity for each citizen is best secured. They do not insist that there are no other human goods, perhaps even higher goods, which political order may make possible; they observe only that the rank order, even the existence, of these goods are highly controversial and may not admit of rational demonstration. Should there be other or higher goods, liberals say, it is appropriate that governments allow individuals or individuals who constitute themselves as members of *civil* associations to pursue these goods; governments must not pursue them directly on behalf of citizens. For liberals, the political association is a precondition, not an object of human aspirations to anything beyond or above security and freedom. When Tocqueville says that what is distinctive about political

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associations is that their undertakings are “great” (*DA II 2.7*), when he appears to include himself among those “enamored of the genuine greatness of man” (*DA II 1.7*) and among friends of “freedom and human greatness” (*DA II 4.7*), he goes beyond most other liberals in averring politics to be no mere minimal good, but an expression of human dignity and the vehicle for the most ambitious and admirable worldly striving (see *DA II 2.17*). For all his aversion to big government and his fondness for associations, he is in the end a passionate defender and an ardent admirer of political life, *properly structured*. In this connection, we should also recall that Tocqueville and his readers operate in a Christian, as well as a liberal, world, in which religion provides its own ranking of human goods. Tocqueville, though not a believer, also distinguishes himself from most other liberals in almost invariably showing respect for Christian sensibilities. Yet he himself views religious beliefs and institutions, with other associations, as means by which big government can be kept in its place.

Tocqueville expects that politics for the indefinite future will be democratic. His fear is that, liberal theories notwithstanding, political practice will be illiberal—his famous “mild” or “democratic” despotism. He finds the root of this sort of illiberal democracy in the theories of eighteenth and nineteenth century intellectuals and their lovely simple, comprehensive designs for society *as a whole*. Not only are such schemes necessarily abstract, but their very scope makes it difficult to perceive how human affairs might be influenced by individuals exercising political freedom. All such comprehensive views that might capture the popular imagination are likely to be similarly defective, Tocqueville thinks. He deplores democracy’s tendency to excessive reliance on “general ideas” and contends that this faulty and potentially dangerous democratic thinking can be corrected only by practical experience (see especially *DA II 1.3, 4, 7, 20*). Everyone thinks most clearly and fruitfully about what he or she can be made to take an interest and a part in, and therefore come to know well.

Tocqueville wants to extend the sphere of human concerns beyond the small circle fostered by individualism. But what, in the modern world, is the extent that corresponds to the *polis* envisioned by pre-liberal philosophers like Aristotle as the political community in which man has a natural home? Aristotle’s *polis* was larger than Tocqueville’s New England township and smaller than the United States, even in the 1830s. Moreover, one might ask, as does Tocqueville (*DA I 2.5*), whether it is reasonable to expect an average democratic citizen to think about a comprehensive national political good in the way Aristotle hoped that a prudent statesman or a philosopher might. If Aristotle had had this expectation, he too might have been an advocate, not a critic, of democracy. In sum, Tocqueville departs from both his liberal contemporaries and his classical predecessors. He departs from the latter in a way they could have respected.

Tocqueville, as a liberal democrat, conceives of and characterizes associations in a way appropriate to the new democratic world. His political association is distinguished by the greatness, the ambitiousness, and the pridefulness of its undertaking, not by the comprehensiveness of the good it aspires to. An emphasis on greatness, he permits us to infer, is in part necessary to inspire citizens to overcome feelings of impotence and apathy to which their new world disposes them. It is also the case, however, that his own concern for human greatness goes far deeper than mere rhetoric. Whether this concern is premised upon a precise and coherent understanding of the human soul on a par with Aristotle’s, for example, is an inquiry for another day.

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## Tocqueville's Understanding of Association in Our Context

Does Tocqueville's notion of "greatness" entail a proper regard for *bigness*? In what respects might the new world in which his political science is meant to operate no longer be ours? Almost everything about our world now seems bigger in scale, more complex, less amenable to direction by individuals and the associations in which they would exercise democratic freedoms. Associations themselves now often seem beyond the control of their general memberships. Few Americans live in localities governed by town meetings (though to be fair, Tocqueville knew this to be the exception rather than the rule even when he visited in the 1830s [DA I 1.5]). Some, however, are at least on occasion aroused to attend an open meeting of a school board or zoning commission. As of 2002, over 34 million Americans were members of the American Association of Retired Persons (AARP), and for most of them, participation in the association does not go beyond signing a check to renew their membership and keeping track of the discounts this entitles them to. The vast majority do not actively participate and whatever pride in membership they have can be displayed on a bumper sticker. Nor do they appear to regret what may be lost. Yet even AARP was founded by one retired teacher who had an interest and a determination to make her point. That initiating and sustaining associational activity seems to be—and is—more difficult does not mean that it is impossible.

In his own time, Tocqueville insists, governments were becoming more centralized and technocratic, more minute in their regulations, more intrusive in citizens' daily lives, more jealous of other social powers and eager to assume new responsibilities, and consequently, less nurturing of citizens' capacities to hold officials accountable in a meaningful way (DA II 4.5, 4.6). They were ready to supplant, even to supplant, associations of all sizes and sorts: charitable, educational, religious, financial, and industrial (DA II 4.6). He acknowledges that this centralization has to be seen chiefly as a product of the ideas and sentiments of democratic peoples, not of the ambitions of particular governments or of historical circumstances (DA II 4.3). So he would probably not have been surprised if democratic associations too eventually became subject to internal pressures of the same sort.

Tocqueville intends his dire predictions of extreme centralization to instill in democrats a "salutary fear of the future that makes one watchful and combative" (DA II 4.6). What has to be combated, he thinks, is not just the individualism that associations may ameliorate, but the notion that democratic peoples are at the mercy of one or another "insurmountable and unintelligent force" (DA II 4.8). We live in a bigger, more complex world in which it is harder not only to maintain the kind of associations Tocqueville advocates, but even to trace reliably all the forces that impinge on them. Nonetheless, it may still be possible to recall the way in which he analyzes and defends them and to have similar arguments available for use whenever choices, however small, about associations are to be made—by policymakers, policy analysts, political partisans, or individual citizens. Obstacles posed by complexities of scale are not necessarily insurmountable. Laws, tax regulations, association by laws, and public opinion can still be formulated or modified with a view to sustaining and promoting citizens' interest and pride in associational activity. Precisely how this might be done will be a matter of circumstance. But were one to assess

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choices in the spirit of Tocqueville's advice, there might still be much profit to be gained from "nonprofits."

- NOTES
1. Many of my remarks are based on the introduction to the 2000 edition by Harvey C. Mansfield and Delba Winthrop.
  2. Tocqueville does at times characterize the American West as virtually presocial (see, especially, *DAI* 1.3), but more often he stresses the fact that America's settlers brought with them not only their Puritan religion but also an intact moral, political, and social order (*DAI* 1.2). And while he discusses colonial legislation and then state and federal constitutions at some length, he is strikingly silent about the Declaration of Independence, which contains the clearest, most concise statement of America's debt to liberalism's teaching about the origins of legitimate governments.
  3. See, especially, *The Old Regime*, III.3.

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# 5 Nonprofit Organizations and Democratic Theory

## Toward a Theory of Continuing Mediated Consent

F R A N C E S R . H I L L

Groups and  
Democratic Theory

**G**roups are thought to be a distinctive feature of American political life. The First Amendment guarantees the right of association.<sup>1</sup> Yet, there has never been a successful theory of groups in American political life. We have heart-warming narratives of civic activism.<sup>2</sup> We have abstract, formalistic theories of intermediate associations and cross-cutting cleavages and pluralistic accommodation that promise democracy without friction.<sup>3</sup> What we do not have is a theory of groups that begins with individual members and asks how various forms of association make members more effective citizens and make the government more effectively accountable to citizens. This paper explores the role of consent in developing a theory of groups as structures fostering effective citizenship and government accountability. The intended outcome is a framework for thinking about the role of groups that keeps individuals as members and citizens at its core. Taking individuals seriously as members and citizens means taking consent seriously. To this end, this paper explores a theory of continuing mediated consent.

This paper is organized around three questions. What is consent? Why does consent matter? Why would one read political theory enmeshed in the controversies of another era when considering such issues? The paper begins with a somewhat abstract discussion of the dimensions and implications of consent. Consent is not a unitary phenomenon and its implications can be considered in a more nuanced manner if one begins by considering the multiple dimensions of consent. The point of such an exercise in a paper that proposes to consider effective citizenship and meaningful accountability of government is to develop models of the relationships between people as members of associations and citizens of states and the centers of authority in associations and states. The paper then examines the dimensions and implications of consent in the work of Hobbes, Locke and Rousseau.<sup>4</sup> Each of these theorists put consent at the core of his theory, but each emphasized different dimensions and implications of consent and thus came to different conclusions about the relationship between people and their government. The paper concludes with a consideration of the roles of certain advocacy organizations in light of a model of continuing mediated consent.

## Dimensions and Implications of Consent

Reading classic consent theorists suggests at least three dimensions of the concept of consent—incidence, character, and communication. Incidence addresses the frequency of consent. Consent might range from a one-time event to an ongoing process. The character of consent addresses the question of what constitutes consent. Consent might require an affirmative expression or it might be determined contextually. In shorthand form, one might think of express or deemed consent. Communication addresses the means by which consent is conveyed to others, particularly to those in authority. Considered along the communication dimension, consent ranges from direct to mediated.

Groups are structures for mediated consent. If they faithfully convey members' views, groups enhance members' civic effectiveness. Direct consent between citizens and government does not pose a problem of message distortion but may pose the risk of atomizing citizens, rendering them less effective individually than they might be as members of a group.

This paper does not present a full exploration of all of the patterns of consent that could be developed using these three dimensions of consent.<sup>5</sup> Instead, it focuses on nonprofit advocacy as a form of mediated consent. Whether it is one-time or continuing consent and whether it is express or deemed consent depends on the internal operations of the nonprofit associations that communicate the views of their members to the government. The working hypothesis of this paper is that mediated consent facilitates effective citizenship and accountable government to the extent that the mediating associations provide for continuing express direct consent within them.

Why and how does consent matter? Consent matters because it defines the relationships of citizens to political structures, both government structures and mediating associational structures. Understanding consent as a multidimensional concept helps understand associations in terms of relationships between the members or citizens, on the one hand, and the association or government on the other. Both governments and advocacy organizations can be analyzed in terms of the role of consent in the following six relationships: authorization; representation; participation; accountability; obligation; and legitimacy.

*Authorization* is the process of creating authority, and it creates a relationship with an organization and defines the terms of that relationship.<sup>6</sup> The organization is bound to the terms of the authorization created by consent. All three theorists discussed here treated authorization as the fundamental implication of consent. Authority is both created and limited by the terms of authorization. Authorities that act outside the terms of their authorization are acting for their own private interest, not for the public interest of those whose consent created their authority. One might distinguish the members of an organization from the constituencies of an organization by the presence of consent. There can be no affiliation without some form of consent. However, a constituency that shares an interest, or certain elements of an interest, does not consent to the formation or actions of a particular organization. Authorization can arise from any type of consent, whether a one-time event that was expressed in a deemed manner or continuing express consent and whether direct or mediated. A concept of continuing consent means that certain terms in the original authorization can be modified.<sup>7</sup> As we shall see, Hobbes thought consent was a one-time event that was generally express but potentially deemed and that was direct, not

mediated. Locke tended to see consent as an ongoing process that was generally express and direct. Rousseau thought consent was ideally a process but worried about the problem of private interests and false consciousness. He wanted the people to be socialized so that they could consent and could do so in an express and direct manner. Yet, despite these differences, authorization and the limitations imposed by the terms of the authorization was the bedrock implication of consent.

*Representation* is a result of authorization. Consent that authorizes a state or an association and defines the terms of that authorization provides for some form of representation of the consenting party by the state or the organization.<sup>8</sup> If consent is a one-time event, then representation is defined by the terms of the authorization, but the people, having consented, cannot change the terms of the authorization. Deemed consent suggests that those in authority are authorized to interpret the facts and circumstances that constitute consent, either once or on an ongoing basis. Direct consent may give the consent of any one individual little weight, but mediated consent may amplify the implication of consent by demonstrating the strength of a point of view. Hobbes developed an influential theory of representation based on the authorization resulting from one-time express direct consent. Having developed a theory of representation, Hobbes did not develop a theory of participation. Locke linked consent and participation, while Rousseau's ambivalence regarding participation anticipates many of the concerns expressed by leaders of nonprofit associations in our own era.

*Participation* implies a more active continuing role based on continuing consent. It also implies a set of processes and structures through which the individual member or citizen can expect to express consent or non-consent. One would expect that participation would be the predicate of patterns of continuing express consent, whether direct or mediated. A pattern of continuing express mediated consent raises the question of whether the mediating associations must also be participatory structures if they are to enhance effective citizenship and government accountability. Locke developed a theory of participation as part of a theory of representation and his theory of government accountability and legitimacy. Rousseau could never quite embrace the risks that he saw arising from participation. Locke, in consequence, developed a more robust theory of government accountability, although Hobbes, who relied solely on the terms of the original authorization, also saw definite limits to authority.

*Accountability* is the relationship of those in authority to the people who authorized both the structure of authority and the selection of particular individuals to play such roles. One of the many unresolved issues is whether accountability is satisfied at the level of general principles or whether the details of policy implicate norms of accountability. In abstract terms, to what do the people consent and to what do they need to consent on a continuing basis to sustain the continued legitimacy of a government or of the leadership of an association?

Consent creates duties of *obligation* that are coterminous with the scope of the authorization.<sup>9</sup> Continuing consent makes at least certain elements of the obligation contingent. If consent is limited to authorization and representation exists without participation, then the obligation is as absolute as was the authorization. The operational questions are the terms of the consent and the terms of the obligation.

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Consent is the basis of the *legitimacy* of the authorized authority. Hobbes, Locke, and Rousseau all found legitimacy in the consent constituting the initial authorization, but differed on questions of continuing consent. The issue in this paper is whether continuing consent is necessary for continuing legitimacy, whether in the case of a state or an association. Looking specifically at nonprofit advocacy in our own democratic system, the issue is whether structures that mediate consent must themselves operate on the basis of continuing express consent that results in participation that can change the terms of authorization, obligation, and legitimacy, or whether mediating associations can facilitate effective citizenship and accountable government if they operate on the basis of one-time consent that results in authorization and representation without participation.

If understanding our own democratic system is the core question, why should we consider theories of consent developed in Europe in a very different era? Consent and its relationship to the legitimacy of political systems has largely disappeared from political theory in our own time. The legitimacy of the United States political system has, paradoxically, served to blunt theorizing about components of that system. Consent and legitimacy are assumed, which means that both empirical and theoretical work lack an analytical framework. This paper explores the potential usefulness of a framework derived from theorists who took consent seriously as the basis for the legitimacy of the government.

None of the three theorists considered here saw advocacy organizations as structures for mediated consent. This paper engages in a thought experiment by asking what kind of associations would result from the application of each theorist's theory of consent. Many advocacy organizations have no members and no processes for participation. They offer representation without authorization and without participation. The larger question considered here is to what extent such organizations can play a role in a democratic system that takes consent seriously.

## Hobbes' Theory of Consent: Authorization and Representation

Thomas Hobbes rejected monarchs' claims that they ruled by divine right and argued instead that consent of the people was the only basis for legitimate government authority.<sup>10</sup> He wrote his major work, *The Leviathan*, during a time when a monarch literally lost his head in a dispute over the royal power to levy taxes. Governments in Hobbes' era exercised broad powers and claimed even broader authority, but the legitimacy of such claims was the subject of armed dispute.

Hobbes took the then-radical position that governments derived legitimacy from the consent of the governed. This was not an agreement of each subject with the sovereign, but a far more radical idea that each person contracted with every other member of society to be bound by the same principles.<sup>11</sup> The result was a "commonwealth," which Hobbes called the "Leviathan."

Hobbes linked consent to the founding of civil society. Without the social contract, individuals lived in what Hobbes, and many other political theorists after him, called a state of nature in which each individual had complete liberty but lacked se-

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curity, with the result that life was “solitary, poor, nasty, brutish, and short.”<sup>12</sup> The two cardinal virtues in the state of nature were force and fraud. In the state of nature individuals were equal and autonomous and lived in a condition of total liberty, but they did not enjoy the benefits of property or justice. The social contract, created by consent of each individual, was an exchange of liberty and autonomy for justice and property.<sup>13</sup> No individual was permitted to reserve to himself or herself any right that he or she was not content to have others reserve to themselves.<sup>14</sup> The one right that no one could give up by consent was the right of self-preservation since self-preservation was the basis of the social contract.

Each individual consented to becoming a member of the “commonwealth,” or the “Leviathan.” Such consent was generally an express act, but it might in some circumstances be deemed as determined by such factors as living in a particular country. The commonwealth was authorized by these mutual covenants among its members, and the commonwealth existed to achieve the peace and prosperity that define the common interests of the members of the commonwealth.

The sovereign was not a member of the commonwealth and was not a party to the social contract. The sovereign was chosen by a majority of the members of the commonwealth to implement the terms of the social contract.<sup>15</sup> Once so authorized, the sovereign represented every member of the commonwealth. As the representative of each member of the commonwealth, the sovereign was bound to the terms of the social contract and could act only in accordance with the terms of the covenants that created the commonwealth.<sup>16</sup> The sovereign thus could not claim legitimacy apart from the mutual covenants that defined the commonwealth, and the sovereign could not unilaterally alter the terms of its authorization by the commonwealth. The sovereign had no authority to impose obligations on the members of the commonwealth that served private interests, including the private interests of the sovereign.<sup>17</sup> Hobbes saw that the sovereign could have private interests. Hobbes even suggested that individuals could sue the sovereign regarding matters outside the social contract (the exchange of obedience for protection), to the extent that the sovereign conducted activities in the private sphere not defined by the social contract.<sup>18</sup>

Members of the commonwealth had a duty of obligation to each other and to the laws promulgated by the sovereign.<sup>19</sup> But this obligation was not absolute. The obligation was coextensive with the terms of association, with the terms of the mutual covenants that created the commonwealth. No person could give up his or her right of self-defense by contract. In addition, Hobbes saw definite limits to the scope of the sovereign authority and took the position that many liberties “depend on the silence of the law.”<sup>20</sup>

Hobbes treated the initial act of authorization by consent as an authorization of all of the subsequent actions of the authorized representative.<sup>21</sup> Hobbes’ innovation was to emphasize the representative quality of the sovereign created by such consent.<sup>22</sup>

Associations of citizens, which Hobbes called “leagues of subjects,” were at best unnecessary because the sovereign acted as the authorized representative of all the people, and at worst destructive of the commonwealth.<sup>23</sup> For Hobbes, continuing consent was unnecessary because all the people, bound by their act consenting to the authorization of the commonwealth, were represented by it.<sup>24</sup>

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Hobbes' theory of consent can be expressed as a model of one-time consent, preferably through an express affirmation of consent, made directly without any mediating structure. The consequence was a theory of authorization of a commonwealth that in turn authorized a sovereign who represented the members of the commonwealth. There was no participation. The sovereign was accountable to the terms of the social contract that authorized the formation of the commonwealth. Members of the commonwealth were obligated to each other and to the sovereign, but the obligation to the sovereign extended only to the terms of the social contract. The sovereign's authority was legitimate to the extent that he or it effectively implemented the bargain that was the basis of the social contract, namely, the exchange of self-help through force and fraud for peace and prosperity.

Hobbes' concepts of authorization and representation, and the limitations imposed on the sovereign authority by the terms of the authorization, today serve as a fair description of nonprofit organizations that operate on the principle of representation without participation. Contemporary nonprofit organization leaders will no doubt find this suggestion uncomfortable.<sup>25</sup> It suggests that the consent manifest in the act of joining an organization does not convey rights of participation, and that representation by the organization does not automatically equate to participation within the organization. The difficult contemporary issue raised by Hobbes' theory of consent for authorization and representation is whether organizations that operate on a Hobbesian basis of consent as a one-time event creating representation but not participation can nevertheless facilitate participation in the larger arena of government.

## Locke's Theory of Consent: Participation, Accountability, and the Limits of Obligation

John Locke, writing some thirty years after Hobbes, also identified consent as the basis of legitimate authority, but, unlike Hobbes, Locke linked consent to participation and then linked participation to accountability. The result was a theory of continuing consent based on participation of the people through their elected representatives.

Locke posited a state of nature in which all persons were solitary and free and equal.<sup>26</sup> Unlike Hobbes' vivid portrait of the state of nature, Locke's state of nature was based on natural law that exercised some restraint on the predatory actions of individuals but nevertheless left individuals insecure because there were no impartial judges.<sup>27</sup> The state of nature could become a state of war because of the absence of common authority. In this state of arbitrary enforcement of individual claims, no individual could be secure in his property.

The desire for security of property was to Locke the reason that individuals consented to exchange their natural liberty for the protection offered by a community, or commonwealth.<sup>28</sup> Once individuals had formed a community by the consent of each individual, the majority decided on the form and composition of the government.<sup>29</sup>

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The government so formed was a parliamentary government.<sup>30</sup> The authority created by consent was limited by the purposes of entering into the social contract. As Locke observed, “no rational creature can be supposed to change his condition with an intention to be worse.”<sup>31</sup> Consequently, “the power of the society, or legislative constituted by them, can never be supposed to extend further than the common good.”<sup>32</sup> The common good consisted not only in the substantive protections of peace, safety and the security of property that individuals could no longer provide for themselves in the state of nature but also in the process values of good government. As Locke observed, “whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extraordinary decrees; by indifferent and upright judges who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of those laws.”<sup>33</sup> To Locke, legitimate government was not arbitrary but acted through impartial procedures for the common good.

Locke also saw the need for an executive that would attend to public matters when the legislature was not in session. The separation of legislative and executive authority was a fundamental element in Locke’s design of government.<sup>34</sup> This executive was to have certain discretionary authority, but the scope of this discretionary authority was bounded by the authorization of the government by the people united as the commonwealth. Locke understood that discretionary authority was a practical necessity but that it also posed a threat to the people. He astutely remarked that the exercise of discretion in the public interest by a good executive could become a precedent for a successor more interested in his own interests or the private interests of few than in the public interest.<sup>35</sup>

Locke insisted that the people are not bound to a legislative power that breaches the terms of its authorization by the consent of the majority. A legitimate government may not act arbitrarily in the service of private interests. Any government that fails in its duty to the people, that breaches the terms of its creation by the consent of the people, is to be replaced.<sup>36</sup> As Locke observed:

. . . Revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws and all the slips of human frailty will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel that they lie under, and see, wither they are going, is it not to be wondered that they should then rouse themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected. . .<sup>37</sup>

Locke readily admitted that lawful authority has been unlawfully disrupted by “the pride, ambition and turbulency of private men” and that “factions have been fatal to states,”<sup>38</sup> but he left to historians the task of determining whether usurpations of lawful authority by such private interests or “rulers’ insolence and endeavors to get and exercise an arbitrary power over their people” has been more common.<sup>39</sup> In either case, Locke concludes, “he who does it is justly to be esteemed the common

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enemy and pest of mankind, and is to be treated accordingly.”<sup>40</sup> Accountability was a core element of legitimate government.

Locke concluded that governments could not be relied upon to govern in a manner consistent with the terms of the social contract unless the people maintained a right to withdraw their consent. In short, Locke expressed the concept that government must be held accountable and that the processes of representation and participation mattered on an ongoing basis. In this way Locke added a participatory element to Hobbes’ idea that the government could act legitimately only if it acted according to the terms of the social contract. Locke was much more a technician of governance than were Hobbes or Rousseau. Authorization could be withdrawn, but it was preferable to Locke to provide for participation to forestall the need for withdrawing authorization, that is, for revolution against the government.

Locke’s theory of consent for participation and accountability can also be applied to the governance of nonprofit associations, although Locke did not do so. Here, too, the contemporary pattern of organizations without members with a role in governance would be to Locke inconsistent with the need for continuing consent as a way of avoiding the need for revolution. Locke would be interested in the processes of continuing consent within organizations, and the structures through which members participate in the operation of the associations their consent has authorized. Like Hobbes and Rousseau, Locke did not look to associations as structures for mediating continuing consent of citizens in dealing with their government. Locke was not a believer in pluralist democracy without friction, but was rather a theorist of citizen participation for government accountability. The importance Locke placed on participation and continuing consent suggests that Locke would have been puzzled by the claims of non-participatory organizations that they are appropriate structures to enhance citizen participation and government accountability. Locke understood that all processes entail risks, but he generally took the risks arising from participation.

## Rousseau’s Theory of Consent: Authorization, Obligation and Socialization

Rousseau’s theory of consent presents a very contemporary set of paradoxes. Rousseau was less sanguine than Hobbes about the sovereign as a representative but less willing than Locke to take the risks arising from participation. Rousseau wanted authority without the appearance of authority and participation without the disruptions that participation entailed. To reconcile these competing elements of association while preserving individual consent as the basis of the legitimate authority, Rousseau developed a theory under which the people’s consent authorizes a government that reforms the people.<sup>41</sup> The result is a more pervasive concept of government authority than either Hobbes or Locke ever imagined. Rousseau’s modernity arises from this tension between consent and obligation and his resolution of the tension by socialization that creates the appearance of consent.

Rousseau asked how people could live in society without sacrificing their liberty. He began with the paradox that “[m]an is born free, and yet we see him everywhere

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in chains.”<sup>42</sup> Rousseau, like Hobbes and Locke, lived in an era of powerful governments that did not hesitate to use their powers to control and oppress their people. Rousseau’s issue was not the establishment of government but the question of government legitimacy.

Like Hobbes and Locke, Rousseau begins with “a state of nature” that has reached a “crisis when the strength of each individual is insufficient to overcome the resistance of the obstacles to his preservation.”<sup>43</sup> The alternative to extinction is association, the social compact, which Rousseau defines as a series of mutual contracts creating the general will.<sup>44</sup> Through consent to the mutual covenants that formed the general will, individuals give up their natural liberty and acquire civil liberty and property.<sup>45</sup> This exchange, based on consent, transforms the individual who consents. This is not simply a change in a person’s circumstances, but a change in the person himself “from a circumscribed and stupid animal to an intelligent being and a man.”<sup>46</sup> Rousseau described this transformation in lyrical terms:

The passing from the state of nature to the civil state produces in a man a very remarkable change, by substituting justice for instinct in his conduct, and giving to his actions a moral character which they lacked before. It is then only that the voice of duty succeeds to physical impulse, and a sense of what is right to the incitement of appetite. Man, who had till then regarded none but himself, perceives that he must act on other principles.<sup>47</sup>

The social unity arising from these mutual contracts was Rousseau’s “sovereign,” which retained the authority to make laws. The terms of authorization constituted Rousseau’s “general will,” which was the expression of the common interests to which the individual members of the sovereign consented. Like Hobbes and Locke, Rousseau saw the terms of the social contract defining the nature and scope of the authorization as both the basis for legitimate authority and a limit on the exercise of authority.

In Rousseau’s theory of consent, the people who consent *are* the sovereign, and, as such, have the responsibility of making laws. One such law is to establish what Rousseau called the “government,” or the executive, which implemented the laws made the by sovereign.<sup>48</sup> Separation of the legislative and executive powers was to Rousseau an essential check on the authority of government.

One would think that Rousseau would have developed a theory of continuing consent, or at the very least a theory of representation and perhaps even of participation. Whether this is what he did is one of the continuing controversies in political theory. It all depends on what one thinks of his theory of the general will.

The general will is the common interest, the shared interests that made it possible for individuals to agree with each other to relinquish their natural liberty for civil liberty.<sup>49</sup>

But the general will is not the same as the sum of the wills of all of the members of society.<sup>50</sup> Rousseau distinguished the general will from the “deliberations of the people.”<sup>51</sup> The problem was what Marx would later call false consciousness.<sup>52</sup> According to Rousseau:

. . . the general will is always right and tends always to the public advantage; but it does not follow that the deliberations of the people have always the same rectitude. Our will always seeks our own good, but we do not always perceive what it is. The people are never corrupted, but they are often deceived, and only then do they seem to will what is bad.<sup>53</sup>

Rousseau's first response was the promulgation of laws in the general interest and for the public good. He acknowledged that the original social contract did not provide for the operation and preservation of the "body politic."<sup>54</sup> He thus confronted the issue of continuing consent and continuing definition of the general will. He began with a concept of continuing consent:

The laws are properly but the conditions of civil association. The people must submit themselves to the laws, and ought to enjoy the right of making them; it pertains only to those who associate to regulate the terms of society.<sup>55</sup>

But Rousseau immediately focused on the practical difficulties of continuing consent, asking of the people as participants in legislation:

But how do they regulate them? Is it by a common agreement, by a sudden inspiration? Has the body politic an organ for declaring its will? Who gives the body the necessary foresight to form these acts and publish them beforehand? Or how are they declared at the moment of need? How can an unenlightened multitude, which often does not know what it wants, since it so seldom knows what is good for it, execute, of itself, so great, so difficult an enterprise as a system of legislation?<sup>56</sup>

Rousseau then repeats his reservations about the disconnect between the general will and the will of the people and concludes that a legislator, not a legislature, should make laws. He reasoned:

Of themselves the people always will the good, but of themselves they do not always see in what it consists. The general will is always right, but the judgment that guides it is not always enlightened. It is therefore necessary to make the people see things as they are, and sometimes as they ought to appear, to point out to them the right path which they are seeking, to guard them from the seducing voice of private wills, and, helping them to see how times and places are connected, to induce them to balance the attraction of immediate and sensible advantage against the apprehension of unknown and distant evil. Individuals see the good they reject; the public wills the good it does not see. All have equally need for guidance. Some must have their will made conformable to their reason, and others must be taught what it is they will. From this increase of public knowledge would result the union of judgment and will in the social body; from that union comes the harmony of the parties and the highest power of the whole. From thence is born the necessity of a legislator.<sup>57</sup>

Despite beginning with consent and the idea of the people as the sovereign with the right and duty to enact laws, Rousseau came to rely on "the magnanimous spirit

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of the legislator.”<sup>58</sup> This reliance was in tension with elements in his theory that led him to argue that the people had a duty to attend “regular and periodic assemblies” to enact public business consistent with the general will.<sup>59</sup> Rousseau thought that the people themselves should attend these assemblies because representatives, even those who the people elected, were likely to usurp the power of the people as the sovereign and to make laws for their own private interests, not for the common good consistent with the social contract.<sup>60</sup> In short, Rousseau did not trust representatives to act in a manner consistent with the general will. Democracy could not work, according to Rousseau, because the inevitable need to rely on representatives introduced private interests that undermined democracy.

Monarchy was to Rousseau an even worse system than democracy.<sup>61</sup> It united the legislative and executive functions, which Rousseau felt would undermine the limitations on authority inherent in the terms of the social contract. In addition, it would put the private interests of the monarch in the central position that was reserved for the general will. Rousseau found the same infirmities in a hereditary aristocracy.<sup>62</sup>

Rousseau suggested that an “elective aristocracy” was the best form of government because it was government by the “wisest.”<sup>63</sup> Rousseau did not explain why an elected aristocrat was preferable to other elected representatives whom he thought would usurp power.

Rousseau appears to have had little confidence that any form of government would govern in a manner consistent with the general will, which is to say that it would be accountable to the terms of its authorization by the consent of the people. Rousseau even suggested that governments will generally usurp the sovereign authority of the people.<sup>64</sup> The only remedy might be to return to the state of nature, which Rousseau saw as the consequence of the people’s exercising their right to remove a government that had acted contrary to the terms of its authorization.<sup>65</sup>

Given his views on the limits of democracy and the dangers of both representation and the activities of government, it is scarcely surprising that Rousseau wrote at times of limits to obligation. The people owe a duty of obligation only to legitimate authority.<sup>66</sup> Even in this instance, obligation cannot be unconditional.<sup>67</sup>

Ultimately, Rousseau found no stable structure for continuing consent and resorted to three expedients that he asserted would be temporary—the tribuneship, the dictator, and the censor. The “tribuneship” was to be the paradigmatic principle of intermediation that somehow appears when needed to rebalance the relationship between the people and the authority to which they had originally consented and then somehow departs without claiming any continuing role.<sup>68</sup> The role of the tribuneship was to vary with the needs of the moment. Describing the “tribuneship” as “the means of preserving the laws and the legislative power,” Rousseau observed that “[t]hey sometimes guard the Sovereign against the government . . . sometimes the government against the people . . . and sometimes they maintain a proper equilibrium between the parts of the State . . .”<sup>69</sup>

If the needs of the times were such that the operation of political institutions had to be suspended, Rousseau embraced the idea of a “dictatorship.”<sup>70</sup> Rousseau justified this action by a theory of deemed consent, asserting that “the first intention of the people must be that the State should not perish.”<sup>71</sup> The dictator was not to make

laws and was to hold power “just long enough to perform the service for which he was appointed, and had not time to think of performing other projects.”<sup>72</sup> With these words, Rousseau’s consideration of the dictatorship ends without addressing the difficulty of ending a dictatorship.

Rousseau moved directly from his discussion of dictatorship to a discussion of “censorship,” a mechanism for declaring “public opinion.”<sup>73</sup> The censors were not to make independent judgments about public opinion, only to state what opinions the people in fact held. The paradoxes in this formulation are readily apparent. Rousseau’s discussion of censorship suggests that he was willing to give the censors broad discretion. He stated that “[t]he business of the censorship is to preserve morality by preventing the opinions of men from being corrupted, to maintain their integrity by judicious aids, and sometimes even to fix opinions when they waver.”<sup>74</sup> Rousseau thus looked to a temporary “magistrate” to “fix” the people so that their continuing role would be as close as possible to the general will. As an ongoing matter, Rousseau embraced the idea of a “civil religion” to instill good values while dampening sectarian particularisms.<sup>75</sup> While he acknowledged that the sovereign has no jurisdiction in the next world and that individuals should be free to hold their own views of the next world, Rousseau did regard civil religion as the business of the sovereign.<sup>76</sup>

Rousseau’s attention to the tribuneship, the dictator, the censorship, and civil religion are the public face of what he urged the “great legislator” to give his “secret care,” namely “manners and morals, customs, and more than all, opinions.”<sup>77</sup> Rousseau concludes of this “true constitution” of public morals: “[t]o them the great legislator directs his secret care, though he appears to confine his attention to particular laws, which are only the curve of the arch, while manners and morals, slower to form, will become at last the immovable keystone.”<sup>78</sup> Why “secret care” and not public attention? Because the legislator derives authority from the general will and because use of that power to shape the terms of the general will would undermine the concept of consent that Rousseau sought to preserve at the core of his theory of the social contract.

At this point, it is reasonable to ask what remains of consent in Rousseau’s theory. The answer appears to be that socialization reconciles individuals to the general will and renders continuing active consent either superfluous or formalistic. Rousseau uses government authority to engineer acquiescence. By using state-sponsored socialization techniques, Rousseau blunts the hard edges of obligation and in the process makes obligation pervasive. Socialization renders non-consent moot and consent meaningless. Rousseau concluded that those who refused to obey the general will would be compelled to obey the general will, a process that Rousseau described as one that “forces him to be free.”<sup>79</sup> Concerned about the dangers of representation and participation, Rousseau turned to socialization to preserve some role for consent consistent with public order. What is lost is any attention to accountability and legitimacy.

Rousseau, like Hobbes and Locke, saw no useful role for intermediate associations. To Rousseau the existence of private associations was inconsistent with the general will created and defined by consent.<sup>80</sup> Rousseau succinctly and insightfully expressed one of the concerns at the core of any theory of mediated consent, stating:

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. . . when cabals and partial associations are formed at the expense of the general association, the will of each such association, though *general* with respect to its members, is *private* with regard to the State: it can then be said no longer that there are as many voters as men, but only as many as there are associations.<sup>81</sup>

If Rousseau had moved beyond this concern with intermediary associations, he might well have developed a theory of intermediate associations as useful structures for fulfilling the duties of the tribune, the dictator, and the censor. In short, Rousseau's associations might well have been instruments of the general will, but he did not take this path to reconciling continuing consent with preservation of the general will. It is one of the innumerable paradoxes in Rousseau's theory that he was willing to abandon his concerns over accountability and legitimacy and to rob consent of practical meaning rather than to risk participation. In the end, he settled for the appearance of consent and the reality of a pervasive socialization.

## Democracy and Nonprofit Advocacy: Toward a Theory of Continuing Mediated Consent

Hobbes, Locke, and Rousseau put consent at the center of the concept of legitimate authority and, in so doing, challenged the concept of unaccountable government. We of, course, live in a different time, one in which the divine right of kings is no longer a pressing practical concern. But questions of the accountability and legitimacy of authority and issues of authorization, representation, participation, and obligation remain the central concerns of any political theory. One might suggest that the hereditary monarch claiming divine authorization is now represented by a political class of officeholders auctioning public policy to the highest bidder and claiming that their actions are authorized by our secular religion of a First Amendment right to treat money as speech.<sup>82</sup> Neither the hereditary monarch or the political class looks primarily to the people whom they presume to govern for legitimacy. Both are closer to Rousseau than to Locke in their distrust of participation and reliance on socialization to drain consent of practical consequences. Neither hereditary monarchs, claiming to rule by divine right, nor the contemporary political class, claiming the right to monetize participation under the protection of the First Amendment, finds any reason to limit their actions to the terms of their authorization by the consent of the people. Both exemplify the conclusions of all three of these theorists that those invested with authority never entirely put aside their private interests and that such private interests are inimical to the public interests that define the terms of government's authorization and legitimacy.

Our present day failures to take consent seriously and to keep citizens at the center of our political life are exacerbated by our dogma that money is speech, with the result that we have priced ordinary Americans out of the marketplace of ideas.<sup>83</sup> In consequence, the purported marketplace of ideas operates imperfectly due to structural information asymmetries that make the marketplace of ideas a "market for lemons."<sup>84</sup> The result is that consent becomes the equivalent of buying a used car, with willful distortions the accepted practice. What remains of consent in a "market

for lemons”? This is not Rousseau’s problem of false consciousness but a problem that Hobbes would see as a failure by some members of the commonwealth to claim only those rights available to every other member and a failure by the sovereign, in this case the political class, to act only in a manner consistent with the social contract.

Does association provide a counterweight to such usurpation based on information asymmetry? Associations offer a mechanism for structuring continuing consent, but the terms under which associations play this role have yet to be explored in American political theory. The two issues that have never been addressed satisfactorily are the relationship between the member and the organization and the relationship of the organization to government authority. This paper presents the hypothesis that associations serve as structures for continuing mediated consent that provide effective representation and participation only if associations provide for continuing consent within the organization. Without continuing consent within associations, what appear to be structures for participation become mechanisms for socialization that exacerbate the information asymmetries of the marketplace for ideas.

Contemporary theorists have been so busy bowling, or thinking about bowling, or advising the rest of us to join a bowling league, that questions of consent have all but disappeared.<sup>85</sup> What we are offered is a variant on Rousseau in which socialization blunts the hard edges of obligation under conditions of information asymmetry. The consequence is that the terms of the initial authorization of leadership, whether within the group or within the state, are subtly altered, and consent becomes an empty form.

There are, however, traces of a consent-based approach. The Supreme Court has used what was in effect a consent-based analysis in two cases relating to the permissible advocacy activities of nonprofit organizations.<sup>86</sup> In *Federal Election Commission v. Massachusetts Citizens for Life*,<sup>87</sup> the Court held that a nonprofit corporation that was apparently exempt from taxation under Section 501(c)(4) would use its treasury funds for express advocacy because the organization had no other purpose. That being the case, the Court felt it could conclude that the members had consented to the organization’s support for candidates who shared their view on issues of choice. This was a form of deemed consent.<sup>88</sup> In contrast, in *Austin v. Michigan Chamber of Commerce*,<sup>89</sup> the Court held that an association formed for the purpose of enhancing members’ economic interests could not use its treasury funds to support or oppose candidates for public office because this activity was inconsistent with the terms of association. The Court concluded, in effect, that the members had consented in *MCFL* but not in *Austin*.<sup>90</sup> Like the classic social contract theorists, the Supreme Court held that association was based on consent and limited by the terms of that consent. The Court has thus introduced the concept of authorization, albeit indirectly, into consideration of the scope of associational activity. Whether such a consent-based analysis remains a part of the jurisprudence of association and whether the Court extends its analysis of consent remain uncertain.

When one turns from jurisprudence to practice, one finds little evidence that consent theory shapes the operation of nonprofit advocacy organizations. Current examples of the advocacy activities of nonprofit associations suggest that consent and its implications for authorization, representation, participation, accountability, obligation, and legitimacy have little resonance with organization managers. The contem-

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porary association with leaders but no members is a pattern derived from Hobbes' concept that representation could be separated from participation. These are Hobbesian organizations that claim they provide representation in the absence of participation. Weak boards of directors and state nonprofit laws giving boards only a limited role in organizational governance are inconsistent with the insistence by both Locke and Rousseau that the legislative and executive functions be separate and that the legislative be primary. One contemporary observer has remarked that such organizations treat supporters as "consumers with policy preferences," not as "fellow citizens."<sup>91</sup> The following discussions of selected examples of the advocacy activities of contemporary nonprofit associations are by no means a survey of all advocacy organizations, but they do raise issues about consent and participation that are not uncommon and which direct attention to the issues implicit in a theory of continuing mediated consent.

In both the Democratic and Republican presidential primary in 2000, the pro-choice and anti-choice groups both abandoned candidates with the strongest records of support for their position, which is presumably the position that defines the basis of association, the reason that members joined and contributors sent money. The pro-choice forces in the form of the National Abortion and Reproductive Rights Action League (NARAL) endorsed Gore, the candidate in the Democratic primary with the weakest record of support for choice.<sup>92</sup> The NARAL board revealed a public split, with some members of the board who were active in the Bradley campaign urging NARAL members to send their contributions to Planned Parenthood instead of to NARAL. The NARAL endorsement was valuable to Gore, whose early record on choice had been mixed and politically problematic. In committing the organization to Gore at a critical moment, the supreme leader of NARAL obviously hoped to bank political credit with the candidate she thought most likely to become president. In practical terms, the endorsement in the name of the organization had little impact on either the presidential election or on the organization, in part because the Democratic Party primary was not close and because choice was not a decisive issue in the general election.

The Republican Party presidential primary offered a different drama. In this case, the National Right to Life Committee (NRLC) endorsed then-Governor Bush, who had little record at all on their issue, in preference to Senator McCain, who had a long history of supporting anti-choice positions in Congress.<sup>93</sup> Although the NRLC made a tepid argument that Senator McCain's record on abortion was less than perfect, the NRLC leadership made it perfectly clear that the primary basis for their active efforts to defeat him in the presidential primary rested on an entirely different issue, campaign finance reform, which McCain championed and the NRLC opposed.<sup>94</sup>

The NRLC's endorsement of Bush raises the issue of the terms of consent and the limits of obligation. Hobbes, Locke and Rousseau all wrote of a social contract with defined terms. This case raises the question of how an organization can claim to operate as a structure of continuing mediated consent if it acts outside the terms of its authorization. Hobbes is no help here, and the only question arising from Locke is whether this one case would justify replacing the leadership of the anti-choice organizations. One might attempt to find support in Rousseau's belief that ordinary people have to be socialized, to have their false consciousness cured. But, this case raises the novel issue of socialization unrelated to the terms of the authorization.<sup>95</sup>

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The NRLC's opposition to Senator McCain's presidential aspirations on grounds of an issue unrelated to their declared mission of opposition to choice raises another novel issue as well, the issue of the tension between authorization by consent and funding by a special interest. The NRLC received significant funding from the Republican National Committee before the 1996 presidential campaign and the NRLC supported Republican Party candidates that did not have strong anti-abortion records, even in some cases where the Republican was running against an anti-abortion Democrat.<sup>96</sup> Hobbes, Locke, and Rousseau did not address funding issues because they took it for granted that a government would have the power to tax. Their issue was the legitimacy of the exercise of government power. Had they thought about funding issues for private associations, they would have seen a case such as this as evidence that private associations served private interests. The funding issue is central in any meaningful theory of continuing mediated consent. Greater transparency in the funding and operation of advocacy organizations is necessary before this issue can be addressed.

The two previous examples involved actions taken by the leaders of organizations with members. The issues raised are issues of the operation of associations. A third example asks what constitutes an association. In the 2000 campaign two brothers funded pro-Bush and anti-McCain ads in the New York Republican primary. They did not identify themselves as the sponsors of the ads, which appeared under the name Republicans for Clean Air. The only two Republicans involved were the two brothers, who had a history of environmental activism and of support for George Bush in his campaigns for governor of Texas.<sup>97</sup>

The issue here is whether there was an organization or whether the somewhat grandly named Republicans for Clean Air was simply an alter ego of the Wyly brothers. The alter ego served as a pseudonym, shielding the source of funding from disclosure and creating the impression of broader support.<sup>98</sup> Use of a pseudonym did not violate norms of consent for the Wyly brothers. Republicans for Clean Air perfectly represented their position and served as an effective vehicle for their participation. With respect to the Wyly brothers, Republicans for Clean Air was legitimate and demanded no greater obligation than that defined in their terms of authorization. One would expect no less of an alter ego.

The issue here is whether an alter ego serving as a vehicle for pseudonymous speech is consistent with the operation of the democratic system in which it operates. Is it enough to represent the views and interests of the insiders when operating in the public arena of a presidential primary? What information is properly public? How do organizations relate to other organizations, to voters, and to the legitimacy of the government resulting from the election? Did the Wyly brothers as creators of Republicans for Clean Air violate the terms of their roles as citizens or even the terms of their roles as members of the Republican Party? How did their obligations in these larger or different structures relate to their roles in Republicans for Clean Air?

These issues are presented in somewhat different form by "grasstop" structures, an innovation of Washington lobbying firms.<sup>99</sup> A "grasstop" or "astroturf" organization is created by a lobbying firm on behalf of a client interested in creating the illusion of grassroots support for a legislative initiative to enact or forestall enactment of particular legislation. The client is generally a corporation that has no grassroots

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base of satisfied customers or shareholders who are willing or able to support the corporation's position. The standard tactic is to persuade people to send messages to members of Congress supporting or opposing particular legislation. Those sending messages have no relationship with or knowledge of the organization that contacts them. This tactic tends to generate controversy when Congressional contacts are made in a person's name without their authorization or when the names of deceased citizens are used. In one of the more innovative strategies yet seen, a lobby shop created grasstop organizations on each side of an issue for the express purpose of creating deadlock in Congress.<sup>100</sup>

The client funding the lobbying firm has certainly consented to the use of an organization, or the appearance of an organization. The lobbying firm has consented to serve as the client's agent in operating the organization, for a fee. The fee does not come from the organization but from the client. Indeed, the lobbying firm will bill the client for the cost of operating the organization. In this sense, the organization is the alter ego of the client.

The persons whose names appear on the contact message with a member of Congress consent to the use of their name, in the best case scenario. The standard practice is to place a telephone call from a boiler room soliciting such consent. The issue is whether those persons contacted have sufficient knowledge for informed consent. They are not told about the client or the lobbying firm, only about the purported organization. It is unclear how much they are told about the issue. Yet, assuming the persons who agree to have their names used have been contacted, they have been given an opportunity for express consent on a specific issue. They may well feel that the organization represents their views and facilitates their participation in the policy process. The case is a matter of single issue authorization with incomplete information. The scope of the information asymmetry becomes the core of the question surrounding consent. What kind of information is required to consent to support authorization, representation, participation, obligation, accountability and legitimacy? Do grasstop organizations reinforce the importance of citizen participation or do they debase the meaning of participation while increasing the cost of effective participation for actual grassroots organizations?

As in other cases in which a sole or primary contributor is not revealed, grasstop organizations raise questions of disclosure. Do members of Congress have rights to know who is lobbying them? Will they respond differently if they are being lobbied by the corporate client of the lobby firm than if they are being lobbied by their constituents? Do other groups and individuals who are interested in the same issue have the right to know about the corporate client? Is intentionally designed information asymmetry consistent with mediated continuing consent? These brief examples suggest that the nonprofit form is irrelevant to the discussion of continuing mediated consent. They also suggest that mere invocation of the right of association bears little relationship to the issue of putting citizens at the center of democracy. Association unrelated to consent simply puts opaque and unaccountable associations at the center of the policy process where they form a barrier to effective citizenship and accountable government.

Hobbes, Locke, and Rousseau each found consent of the people the only legitimate source of government authority. Each developed a different concept of consent

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and, as a result, each had different concepts of authorization, representation, participation, obligation, accountability, and legitimacy. Their theories of consent point to consent as a missing element in theories about and rationales for many contemporary nonprofit advocacy associations. This paper has suggested a way to begin this enterprise, drawing on the work of some of the founders of democratic theory.

Future work in this area might consider what is at stake, both conceptually and practically. To the extent that contemporary practice accepts the idea of associations without consent, will we also accept governments without consent? Will we move from groups without members to states without citizens? Consent theory can help us understand the difference between the appearance of membership or citizenship and the kind of effective membership or citizenship that sustains legitimacy. A theory of continuing mediated consent is a theory of the role of associations in democracy. It would be paradoxical indeed if nonprofit associations that enjoy the benefits of exemption from taxation serve as vehicles for arguing that consent is unrelated to democracy.

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1. The First Amendment reads in its entirety: "Congress shall make no law respecting the establishment of any religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
  2. E.J. Dionne (ed.). 1998. *Community Works: The Revival of Civil Society in America*. Washington, D.C.: Brookings Institution Press.
  3. David Truman. 1951. *The Governmental Process*. New York: Knopf; Robert Dahl. 1966 (3d ed). *A Preface to Democratic Theory*. Chicago: University of Chicago Press.
  4. These discussions do not present complete analyses of these theorists, but they do underscore the multiple meanings implicit in the concept of consent.
  5. There are at least eight patterns of consent if one treats each of the three dimensions as having only two variants. Thus, direct democracy would be a pattern described as continuing express direct consent. Even the vaunted town meeting form of democracy would not fully satisfy these elements. Representative democracy would be a pattern of continuing (but not continuous) consent with elements of express and of deemed consent and elements of direct as well as of mediated consent. The number of patterns multiplies rapidly if the three dimensions of consent are expressed in terms of a greater number of features. For example, a category of periodic consent could be added to the incidence dimension. This category would capture the nature of elections. The point here is not to attempt to describe actual associations or actual political systems but to use the dimensions of consent to identify abstract models that highlight elements of political structures and consider their implications.
  6. Richard E. Flathman. 1980. *The Practice of Political Authority: Authority and the Authoritative*. Chicago: University of Chicago Press.
  7. The dispute in American law over the original meaning of the Constitution and its continuing authority to circumscribe Constitutional interpretation is a debate over the terms of authorization. See Jack N. Rakove. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Vintage Books.
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8. For a study of the multiple patterns of representation and their implications for systems of government, see Hanna Fenichel Pitkin. 1967. *The Concept of Representation*. Berkeley: University of California Press.
  9. Obligation is itself a multidimensional concept. See Richard E. Flathman. 1977. *Political Obligation*. New York: Atheneum.
  10. Hobbes, *The Leviathan*, Ch. 16. All citations are to chapters to permit readers' use of any edition of *The Leviathan*.
  11. Hobbes, *The Leviathan*, Ch. 17.
  12. Hobbes, *The Leviathan*, Ch. 13.
  13. Hobbes, *The Leviathan*, Ch. 14.
  14. Hobbes, *The Leviathan*, Ch. 15.
  15. Hobbes, *The Leviathan*, Ch. 18.
  16. Hobbes, *The Leviathan*, Ch. 16.
  17. Hobbes, *The Leviathan*, Chs. 22 & 30.
  18. Hobbes, *The Leviathan*, Ch. 21.
  19. Hobbes, *The Leviathan*, Ch. 21.
  20. Hobbes, *The Leviathan*, Ch. 21.
  21. Hobbes, *The Leviathan*, Chs. 17 and 18.
  22. Hobbes, *The Leviathan*, Ch. 18, which states: "A Commonwealth is said to be instituted when a multitude of men do agree and covenant, every one, with every one, that to whatsoever man or assembly of men shall be given by the major part, the right to represent the person of them all (that is to say, be their representative) every one, as well he that voted for it, as he that voted against it, shall authorise all the actions and judgments of that man or assembly of men, in the same manner as if they were his own, to the end to live peaceably among themselves, and be protected against other men."
  23. Hobbes, *The Leviathan*, Ch. 22.
  24. Hobbes, *The Leviathan*, Ch. 18.
  25. It is unlikely that nonprofit organizations will readily abandon their tendency to invoke de Tocqueville and begin to cite Hobbes. Of course, de Tocqueville is cited to make claims about the role of association in the larger system and Hobbes would be invoked, if he were, to make claims that representation does not require participation.
  26. Locke, *Second Treatise of Government*, Ch. 2, 4–6. All citations are to sections to permit readers to use any edition of the *Second Treatise of Government*.
  27. Locke, *Second Treatise of Government*, Chs. 2–3.
  28. Locke, *Second Treatise of Government*, Ch. 8, 95 wrote of the formation of the commonwealth: "Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and put on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it."
  29. Locke, *Second Treatise of Government*, Ch. 8, 96. Locke found majority rule essential to the maintenance of authority. Once the commonwealth had been formed by the consent of each individual, majority rule was essential. Locke noted that "[w]hosoever therefore out of a state of nature unite into a community must be understood to give up the power, necessary to the ends for which they unite into society, to the majority." *Id.* at Ch. 8, 99.
  30. Locke, *Second Treatise of Government*, Ch. 11.
  31. Locke, *Second Treatise of Government*, Ch. 9, 131.
  32. Locke, *Second Treatise of Government*, Ch. 9, 131.
  33. Locke, *Second Treatise of Government*, Ch. 9, 131.
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34. Locke, *Second Treatise of Government*, Chs. 12 & 14.
  35. Locke, *Second Treatise of Government*, Ch. 14, 166.
  36. Locke, *Second Treatise of Government*, Ch. 19.
  37. Locke, *Second Treatise of Government*, Ch. 19, 225.
  38. Locke, *Second Treatise of Government*, Ch. 19, 230.
  39. Locke, *Second Treatise of Government*, Ch. 19, 230.
  40. Locke, *Second Treatise of Government*, Ch. 19, 230.
  41. Rousseau was the first theorist of the variant of civil society theory that ascribes to government a duty to improve the people. This type of theory has remained a potent element in theories as diverse as Marx's theory of false consciousness and theories of modernization, generally applied to people in the less developed nations, which posit that democracy fails not due to the infirmities of leaders but the shortcomings of the people.
  42. Rousseau, *The Social Contract*, Bk. I, Ch. 1. All citations are to books and chapters to permit readers to use any edition of *The Social Contract*.
  43. Rousseau, *The Social Contract*, Bk. I, Ch. 6.
  44. Rousseau, *The Social Contract*, Bk. I, Ch. 6, states of these mutual contracts: "Each of us places in common his person and all his power under the supreme direction of the general will; and as one body we all receive each member as an indivisible part of the whole."
  45. Rousseau, *The Social Contract*, Bk. I, Ch. 8.
  46. Rousseau, *The Social Contract*, Bk. I, Ch. 8.
  47. Rousseau, *The Social Contract*, Bk. I, Ch. 8. Such lyricism recalls the contemporary raptures of the communitarians who also espouse the transformation of the self through immersion in a greater community. See, for example, Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*. New York: Crown Publishers, 1993.
  48. Rousseau, *The Social Contract*, Bk. III, Ch. 1.
  49. Rousseau, *The Social Contract*, Bk. II, Ch. 1 states: "It is what is common in these different interests that forms the social bond; and, if there was not some point in which they are unanimously centered, no society could exist. It is on the basis of this common interest alone that society may be governed."
  50. Rousseau, *The Social Contract*, Bk. II, Ch. 3 states: "There is frequently much difference between the *will of all* and the *general will*. The latter regards only the common interest; the former regards private interest, and is indeed but a sum of private will . . ." Rousseau's ruminations on the problem of determining the general will are precursor to the more systematic efforts of public choice theorists to compute public preferences.
  51. Rousseau, *The Social Contract*, Bk. II, Ch. 3.
  52. In the *Communist Manifesto*, Marx presented his theory of dialectical materialism in Part I, which argued that the working class would necessarily triumph. In Part II, however, Marx worried about the false consciousness of the workers and argued that they must be guided by petite bourgeois intellectuals like Marx himself operating through the Communist Party.
  53. Rousseau, *The Social Contract*, Bk. II, Ch. 3.
  54. Rousseau, *The Social Contract*, Bk. II, Ch. 6.
  55. Rousseau, *The Social Contract*, Bk. II, Ch. 6.
  56. Rousseau, *The Social Contract*, Bk. II, Ch. 6.
  57. Rousseau, *The Social Contract*, Bk. II, Ch. 6.
  58. Rousseau, *The Social Contract*, Bk. II, Ch. 7.
  59. Rousseau, *The Social Contract*, Bk. III, Chs. 12-14.
  60. Rousseau, *The Social Contract*, Bk. III, Ch. 15.
  61. Rousseau, *The Social Contract*, Bk. III, Ch. 6.
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62. Rousseau, *The Social Contract*, Bk. III, Ch. 5.
  63. Rousseau, *The Social Contract*, Bk. III, Ch. 5.
  64. Rousseau, *The Social Contract*, Bk. III, Ch. 18.
  65. Rousseau, *The Social Contract*, Bk. III, Ch. 18. Locke, in contrast, thought that the commonwealth endured even if the people removed a government that had usurped power.
  66. Rousseau, *The Social Contract*, Bk. I, Ch. 3.
  67. Rousseau, *The Social Contract*, Bk. I, Ch. 9.
  68. Rousseau, *The Social Contract*, Bk. IV, Ch. 5.
  69. Rousseau, *The Social Contract*, Bk. IV, Ch. 5.
  70. Rousseau, *The Social Contract*, Bk. IV, Ch. 6.
  71. Rousseau, *The Social Contract*, Bk. IV, Ch. 6.
  72. Rousseau, *The Social Contract*, Bk. IV, Ch. 6.
  73. Rousseau, *The Social Contract*, Bk. IV, Ch. 6.
  74. Rousseau, *The Social Contract*, Bk. IV, Ch. 7.
  75. Rousseau, *The Social Contract*, Bk. IV, Ch. 8.
  76. Rousseau, *The Social Contract*, Bk. IV, Ch. 8, which states: "There is therefore a purely civil profession of faith, the articles of which it is the business of the Sovereign to arrange, not precisely as dogmas of religion, but as sentiments of sociability without which it is impossible to be either a good citizen or a faithful subject. The Sovereign has no power by which it can oblige men to believe them, but it can banish from the State whoever does not believe them; not as an impious person but as an unsociable one, who is incapable of sincerely loving the laws and justice, and of sacrificing, if occasion should require it, his life to his duty as a citizen. But if any one, after he has publicly subscribed to these dogmas, shall conduct himself as if he did not believe them, he is to be punished by death. He has committed the greatest of all crimes: he has lied in the face of the law."
  77. Rousseau, *The Social Contract*, Bk. II, Ch. 12.
  78. Rousseau, *The Social Contract*, Bk. II, Ch. 12.
  79. Rousseau, *The Social Contract*, Bk. I, Ch. 8.
  80. Rousseau, *The Social Contract*, Bk. II, Ch. 3.
  81. Rousseau, *The Social Contract*, Bk. II, Ch. 3.
  82. Economists have long analyzed the behavior of officeholders who require payment for access in terms of the economic theory of rent-seeking. See Fred S. McChesney. 1997. *Money for Nothing: Politicians, Rent Extraction, and Political Extortion*. Cambridge: Harvard University Press.
  83. This pervasive metaphor, which has become part of the First Amendment jurisprudence used as a rationale for the rent-seeking, was introduced by Justice Holmes in a dissent in a case involving the printing and dissemination of anti-war pamphlet during World War I. See *Abrams v. United States*, 250 U.S. 616, 630 (1919). In his dissent, Justice Holmes argued that the activity was protected by the First Amendment, who reasoned that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."
  84. George A. Akerlof. 1970. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* (84): 488.
  85. Robert D. Putnam. 2000. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster.
  86. The Court drew no inference at all from the mere fact that the two organizations were nonprofit and tax exempt. Form did not control. This should serve as a useful perspective to nonprofit organizations that have, of late, appropriated to themselves the role of exemplars of democracy. Nonprofit organizations have no monopoly on democracy simply by virtue of their form and this tax status.
  87. 479 U.S. 238 (1986).
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88. The Court did not examine the implications of a candidate's holding position on a number of issues. Did the members of MCFL support all of the positions taken by candidates who shared their position on choice? A more explicit consideration of choice might have led the Court to such an inquiry.
89. 494 U.S. 652 (1990).
90. These two opinions might be read as the beginnings of a theory of deemed consent and how deemed consent is determined.
91. Theda Skocpol, "Advocates without Members: The Recent Transformation of American Civic Life," in Theda Skocpol and Morris P. Fiorina (eds.). 1999. *Civic Engagement in American Democracy*, Washington, D.C.: Brookings Institution Press, at 461–506.
92. Ceci Connolly, "Early Endorsement of Gore Could Pay Off," *The Washington Post*, March 1, 2000, A07.
93. George Lardner, Jr., "Abortion Foes Spend \$200,000 To Beat McCain," *The Washington Post*, March 7, 2000, A08; Michael Grunwald. "Campaign Finance Issue Divides Abortion Foes," *The Washington Post*, September 14, 1999, A01.
94. Judy Sarasohn, "Wrath of McCain," *The Washington Post*, February 3, 2000, A21. See also, Michael Grunwald. "Campaign Finance Issue Divides Abortion Foes," *The Washington Post*, September 14, 1999, A01.
95. Senator McCain raised the issue by claiming that the leaders of the NRLC had betrayed their mission, claiming that they "have turned their cause into a business, and they are very worried that if I have campaign finance reform, all this uncontrolled, undisclosed contributions may be reduced and it may harm them in their efforts to continue this huge business they've got going in Washington, D.C." Judy Sarasohn, "Wrath of McCain," *The Washington Post*, February 3, 2000, A21.
96. Michael Grunwald, "Campaign Finance Issue Divides Abortion Foes," *The Washington Post*, September 14, 1999, A01.
97. This organization triggered the new disclosure provisions Congress made applicable to such organizations in the summer of 2000. Frances R. Hill, "Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle," *Tax Notes* (86): 387 (January 19, 2000); and *The Exempt Organization Tax Review* (26): 205 (November 1999).
98. For a discussion of the concept of pseudonymous speech that distinguishes it from anonymous speech, see Frances R. Hill. 1997. "Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits," 41 *New York Law School Law Review* 881.
99. David Segal, "The Tale of the Bogus Telegrams," *The Washington Post*, September 28, 1995, A01.
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## Appendix: Additional Discussions

Several participants, including lawyers and nonprofit practitioners, reported that questions similar to those related to the Boy Scouts of America case (e.g., can a group exclude a certain member or class of members for a particular reason?) are an almost constant concern in their work. An attorney at the seminar table expressed a sense of frustration with what he perceived to be the Supreme Court's inconsistent recent rulings on such matters. Others at the table agreed and felt that there was a need for some type of "deductive grid" through which to judge these cases.

Part of the discussion on excluding potential members centered on groups that wanted to prevent people with opinions contrary to the group's from joining the organization in an attempt to change its policies and stances. This discussion raised the following questions: In what ways can a group legally enforce the loyalty of its members? Is expulsion always a legal act? For example, can the NRA legally expel a gun control advocate who joins the organization to subvert them? One participant suggested that examining state laws on nonprofit incorporation (especially statutes related to membership and bylaws) might prove helpful in trying to answer these questions.

A discussion about September 11 raised the point that the government can restrict some rights of citizens to freely associate or speak if it has a compelling interest to do so. For example, a national policy against groups that are perceived to be supporting terrorism may be constitutional based on this compelling interest.

One participant suggested that if the government is subsidizing an organization in any way, it has a legal right to restrict the use of that money for advocacy purposes. Several participants raised concerns over this argument, suggesting that complying with such measures is an administrative nightmare, especially for small organizations. Using a Xerox machine partially paid for with government money for advocacy-related work could be a violation of a "no-advocacy subsidy" provision. However, it was suggested that these distinctions make it clear that a group, not the government, is speaking out on an issue. These stipulations are almost always stated clearly in government contracts, and groups generally know about them before committing to the contract. If they feel that such a contract will interfere with their political work, they have the option of not entering into it. To strike a balance between being a government contractee and an advocate, 501(c)(3) organizations may opt to establish a related 501(c)(4), a relatively common practice among the nation's largest (and usually wealthiest) nonprofits.

Another important distinction was raised between full and partial consent. Groups without strong membership ties may in fact have partial consent of their members, even if they only make an annual financial donation to the group. But this donative act is an indicator of some level of support for an organization and can be used as political leverage in the policy process.

Issues of consent are not always as clear as political/philosophical theory leads us to believe. For example, people are born into certain groups from which they cannot exit, which has implications for association. Changing one's race or sex (and in some cases, religion), in particular, is generally not possible. Further, groups that represent women on general political issues may have very different opinions on an issue such as abortion. How do we map political consent considering these factors? Similarly,

the idea of maintaining “continuing consent” is also a challenge, since no civic prison exists in the United States; citizens are free to leave the country if they so desire. The concept of organizational form—nonprofit or for profit—was also raised within the consent context. One participant believed that form does in fact matter when considering consent and expressive association. Similarly, whether a specific religion was hierarchical or congregational changes the ways in which its political activities are regulated by the courts.

Reinventing the “501(c)” organization of the sector was suggested, with a new emphasis placed on giving different levels of tax breaks to groups based on where they draw the bulk of their support (members, foundations, government, etc.). It was mentioned that current law requires little evidence of public support for a group to be granted tax-exempt status.

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## List of Seminar Attendees

Mesfin Ayenew  
*Ethiopian Center for Public Advocacy*

Liz Baumgarten  
*Charity Lobbying in the Public Interest*

Robert O. Bothwell  
*National Committee for Responsive  
Philanthropy*

James Bopp  
*Bopp, Coleson & Bostrom*

Elizabeth Boris  
*The Urban Institute*

Sheri Brady  
*National Council of Nonprofit Associations*

Evelyn Brody  
*Duke University School of Law*

Kathryn L. Chinnock  
*Center for Civil Society Studies  
The Johns Hopkins University*

Laura Brown Chisolm  
*School of Law  
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Management*

Carmen Delgado Votaw  
*Alliance for Children and Families*

Janne Gallagher  
*Council on Foundations*

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William Galston  
*Institute of Philosophy and Public Policy  
University of Maryland*

Kay Guinane  
*OMB Watch*

Adrienne Hahn  
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Frances R. Hill  
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Jeff Krehely  
*The Urban Institute*

Michael Malbin  
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Thomas Mann  
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Maria Montilla  
*The Urban Institute*

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*Caplin & Drysdale, Chartered*

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Dorothy Ridings  
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Jim Riker  
*The Union Institute*

Mark Rosenman  
*The Union Institute*

Margery Saunders  
*Nonprofit Education Initiative*

Benjamin Shute Jr.  
*Rockefeller Brothers Fund*

Bradley Smith  
*Federal Election Commission*

Nancy Tate  
*League of Women Voters*

Anne Thomason  
*Kettering Foundation*

Mark V. Tushnet  
*Georgetown University Law Center*

Steve Weissman  
*Public Citizen's Congress Watch*

Delba Winthrop  
*Harvard University*



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## About the Editor

**Elizabeth J. Reid**, of the Urban Institute's Center on Nonprofits and Philanthropy, conducts research on nonprofit advocacy and is the project director of the Nonprofit Advocacy Seminar Series. Ms. Reid has 20 years' experience in working with labor and community organizations, grassroots political education, leadership training, and involvement in civic and political affairs. She contributed a chapter on nonprofit advocacy and political participation to *Nonprofits and Government: Collaboration and Conflict* (Urban Institute Press, 1999). She served as national political director for the American Federation of Government Employees throughout the 1980s and taught courses in society and politics at the Corcoran School of Art in Washington, D.C., during the 1990s.



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## About the Contributors

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jects dealing with campaign finance reform, transitions from campaigning to governing, election reform, and governance and political change in Japan and the United States. His published works by the Brookings Institution include *The Permanent Campaign and Its Future*, edited with Norman J. Ornstein (2000); *Vital Statistics on Congress, 1999–2000*, with Norman J. Ornstein and Michael Malbin (1999); and *Campaign Finance Reform: A Sourcebook*, edited with Anthony Corrado, Daniel R. Ortiz, Trevor Potter, and Frank J. Sorauf (1997; revised edition forthcoming).

**Mark Tushnet** is Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center. He clerked for Judge George Edwards and Justice Thurgood Marshall before teaching at the University of Wisconsin Law School in 1973. In 1981 he moved to the Georgetown University Law Center. He has been a visiting professor at the University of Texas, University of Southern California, University of Chicago, and Columbia University law schools. Professor Tushnet is the coauthor of four casebooks, including the most widely used casebook on constitutional law, *Constitutional Law* (with Stone, Seidman, and Sunstein). He has written nine books, including a two-volume work on the life of Justice Thurgood Marshall, and edited three others. He has received fellowships from the Rockefeller Humanities Program, the Woodrow Wilson International Center for Scholars, and the John Simon Guggenheim Memorial Foundation and has written numerous articles on constitutional law and legal history.

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