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Sheahan on Court and Community: Penetrating Analysis and an Abundance of Caution

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Why Associations Matter: The Case for First Amendment Pluralism
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Luke Sheahan's well-crafted book provides exhaustive analysis of an important thinker (Robert Nisbet) and his work on a crucial aspect of life (association) currently under attack. It provides detailed analysis of a Supreme Court decision (*Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)) that essentially destroyed constitutional protection for the crucial, deeply ingrained right of Americans to govern themselves freely within their natural and self-chosen communities. Finally, it offers substantive, detailed proposals, including a draft test or judicial doctrine that would reintroduce into court decisions and into the reasoning of federal legislators concern for the right to associate.

It might be too much to ask that a book that accomplishes so much would do more. Still, this reviewer would have liked to see Sheahan extend his analysis of the anti-associational bias in current court decisions to include the juridical and regulatory regime it upholds. That structure renders Sheahan's practical advice both unlikely to be accepted and, if accepted, unlikely to bring change beyond an occasional victory for an insular association that has no substantive public presence. Sheahan shows the importance of associations to human liberty and flourishing. Unfortunately, his refusal to confront the internal contradictions of current law leaves

his book a somewhat frustrating hybrid of penetrating conceptual critique and modest (and, one fears, easily ignored) practical proposals. What is needed is fundamental reconsideration of the regime itself on account of its reliance on the kind of lightly camouflaged judicial legislating embodied in many judicial doctrines and its intrinsic hostility, not just to associations, but to the person as an integrated, social being who can become fully human only within a variety of local communities.

Roots of the Problem

One of Alexis de Tocqueville's most important observations about antebellum American democracy concerned the semi-aristocratic class of lawyers. These professionals served an essential, conservative function by tying America's restless, democratic people to their traditions and communities. Steeped in the common law method, American lawyers had an ingrained habit of looking to the past for guidance in establishing justice in the legal system as the vindication of the reasonable expectations of the parties to any dispute. Custom ruled in the law, not out of any pseudo religious worship of the past but because rules of action were established by looking to expectations rooted in experience regarding, for example, what constitutes a sufficient excuse for harming another person (e.g., self-defense). Judges and lawyers in the Anglo-American tradition looked to what and how things had been done to determine what people had a right to expect from one another and their government.

Sheahan is not the first to point out that a shift in perspective changed legal practice and the shape of American democracy itself. During the late nineteenth century, an influential set of lawyers set about refashioning American public life on the "pragmatic" grounds of utility and a crabbed understanding of individual liberty. Convinced that custom and local communities were irrational and oppressive obstacles to efficiency and individual rights, judges in particular set about smashing barriers to "national markets" and the unfettered rule of narrowly conceived contract rights in private as well as commercial life. They succeeded in significant measure by rejecting customary relations and the social nature of the person.

As Sheahan points out, this "laissez-faire" ideology was much less friendly toward ordered liberty, especially within a democratic polity, than its proponents claimed. Indeed, it was rooted in a conception of society as a collection of isolated individuals exposed to faceless markets and, behind those markets, a powerful, sovereign state. Such individuals, stripped of the protections traditionally provided by intermediary institutions, had nowhere to turn when faced with demands from crowds or an ever-growing, centralizing tutelary state. That the government's goal was safety, justice, and overall well-being only made the temptations and effects of atomization and administrative centralization more potentially despotic.

The twentieth century abounded with examples of how a national community infantilizes and too often brutalizes its subjects. Assuming responsibility for every subject's well-being, the state becomes an object of reverence, an encapsulation of political and even personal meaning. Yet the United States, which has escaped the most overt forms of despotism, struggles under a persistent form of judicially driven atomization. Progressivism was the motive force. This ideology, according to which democracy requires a technocratic elite's guidance to shape and put into effect its understanding of the common good, was crucial to the formation of our administrative state. Progressives have taken up the pragmatists' attitude toward custom and intermediary institutions, but for their own purposes, replacing laissez-faire with a determination to extend the reach of government into every aspect of people's lives. As a result, the federal government has become the protector of individuals from one another and from their own associations, including the most seemingly private and noncontroversial (except of course Phi Beta Kappa and Skull & Bones). Judicial edicts rooted in an ethic of individual autonomy and freedom from all forms of public and private discrimination have infused both public and private life. In this way government and its standards of (nondiscriminatory) behavior have crowded out social life and obliterated our understanding that life lived within various associations is essential to liberty and development of the human personality.

The movement toward administrative centralization has weakened democratic self-government and replaced it with a form of "soft" despotism unique to democratic society, a form of despotism observers like Bertrand de Jouvenel see as even more dangerous than older, monarchic and aristocratic despotisms. It has a legitimacy they lacked and a reach they could not hope to gain thanks to its claim to "be" the people. The politicization of society is a special problem for democracy because of the claim that here, the people rule. Thus, the separation of public from private and political from social realms is as fragile in democratic societies as it is important in preventing the rise of totalitarianism.

The American Tradition of Associating

Traditionally, American democracy and liberty were both defined by and embodied in a plethora of competing and conflicting self-governing associations. As Sheahan, following Tocqueville, puts it, "Associations in a democracy are not a means to self-government; they are self-government. They are not one option for the ordering of human life; they are the order of human life."

One may, of course, exist without association. As Nisbet pointed out, persons bereft of community will not suddenly disappear. Rather, they will desperately seek some form of association to fill a void at the center of their being. Since the state "is" the people, they reach for its ersatz community. This tells us that associations serve two vital functions: they safeguard liberty, and they make us fully human beings capable of exercising self-government.

Nisbet points out that "major groups which fall in between the individual and the sovereign state become intermediating influences between citizen and sovereign. They are at once buffers against too arbitrary a political power and reinforcements to the individual's conception of himself and his own power."[1] Associations cabin political power by shielding individual persons from its direct impact and giving them the means to organize and defend their accustomed relationships and rights. In addition, they show individual persons that they are not alone; they are a part, not merely of the great, undifferentiated mass of national citizens, but of a

family, a church, a township, and a variety of local associations in which their individual voices matter, and whose collective voices themselves matter in the rough and tumble of public life.

Such associations are natural in the sense that they arise more or less spontaneously to meet a given need, be it for a new church building, a way for local musicians to develop and show their talents, or a way for neighbors to protect their children from speeding cars. Sheahan points out that it is associations' very functionality—their devotion to pursuing some common good for members and their broader communities—that enables them to teach individuals their own importance and protect their interests. But as Sheahan argues in some detail (following Nisbet), associations can fulfill their functions only if they are allowed to govern themselves.

Much of this book is taken up with a careful rendering of Nisbet's theory of association. Best known for his *Quest for Community*, Nisbet also wrote on the problems with a post-association society as atomized individuals seek community without true authority and become wards of the state. Less well known to students of political science is Nisbet's work specifically on the nature and internal functioning of associations. Sheahan provides a comprehensive summary rooted in Nisbet's understanding that associations pursue their ends only when and to the extent they are allowed to maintain their internal integrity. Associations become real through a set of shared beliefs and goal-oriented actions that give rise to common norms of behavior. These in turn require common recognition of stated values and an internal authority capable of maintaining discipline. Such discipline is limited, provisional, and subject to the right to exit should a member cease sharing the association's values. But the elements of self-governance are as important as the existence of a common purpose if the association is to serve either its particular goal or the more general end of helping shape its members into full, socially integrated persons.

Assault on "the social"

As Sheahan notes, the rise of a simplistic vision of the state as sovereign over "its" society has led to an emphasis on national cohesion

and a subordination of natural associations to political structures and goals. State actors increasingly see themselves as the masters of associations, entitled to order and reorder them to fit national designs and ideological goals like autonomy and various blueprints for a New Freedom within a Great Society. Americans outright rejected the doctrine of absolute sovereignty put forward by the English Parliament at the Revolution. But the vision of the state as a national community responsible for the health, well-being, and egalitarian virtue of its constituent members has infected public discourse over time. It has, among other things, led to the conviction that groups cannot themselves have rights. (This despite the fact that the development of legally recognized rights in the Anglo-American tradition literally began with battles over the rights of groups, including the Church as well as various municipalities and classes.) It also undergirds programs of transformation such as Lyndon Johnson's Great Society, with its goal of liberating the individual "from the enslaving forces of his environment." Such freedom means, of course, exposure before the mob and the state, without means of recourse or the confidence and self-discipline to resist.

Sheahan's discussion of this history is rather brief. He spends much more time rehearsing shifts in Supreme Court doctrines dealing with associations. His reporting is mostly accurate here. He notes that early to mid-twentieth-century decisions addressing the right to associate focused on the nature of the group involved. Those deemed to support the functioning of a broadly consensual democratic polity were protected, while those deemed dangerous to such functioning (e.g., communist organizations) were not. The problem here is not that Sheahan is wrong to ascribe judicial decision-making to an ideology that subordinates associations to the state, deeming them good or bad according to their value to "democracy." So much clearly is true. But even during this time period courts' focus tended to be on the individual whose right to join a communist organization (or a civil rights one, for that matter) might be used against him, not on the rights of the organization itself. It was individualistic even then. More important, it was during the early "laissez-faire" period that courts began in earnest

to arrogate to themselves a power (initiated with Chief Justice Roger Taney's *Dred Scott* decision) to strike down laws at will for failing to comply with their own conceptions of what is right and just, as opposed to their traditional role in enforcing properly promulgated laws in accordance with traditional standards of meaning and within the background of American statutory and common law. The constitutional doctrines within which so much of law is now trapped, and which provide judges with such great leeway in imposing their policy preferences, have their origins in this era. Their grip on the legal mind and malleability at the hands of ideological lawyers make moderate proposals for reform insufficient. Unfortunately, in pursuit of practical relevance, Sheahan largely ignores this fundamental aspect of the problem we face.

The Contemporary Issue

Sheahan correctly notes that the central change in Court treatment of associations came about during the twentieth century with the rise of a doctrine of "expressive association," by which is meant the association as a means by which individuals express their own opinions and choices. Though he does not wholly endorse the theory, Sheahan points to John Inazu's important work showing the right to associate's deep roots in the Constitution and especially in the right to assemble. British refusal to acknowledge colonists' right to freely assemble served as a major catalyst for the Revolution. Assemblies come together for countless reasons as part of the general pattern of human association and community formation, yet courts increasingly have seen such rights as purely political, with associations important only when and to the extent they further the goal of maintaining a democratic polity. Thus, the right to associate came to be treated as a subcategory of the right to free speech or, today, freedom of "expression." Unfortunately, an association that exists purely as a means by which its members express themselves has no integrity, no rights, no grounds for self-defense and self-maintenance, no real reason for existence in and of itself.

Sheahan focuses in particular on the bombshell decision in *Christian Legal Society v. Martinez*. Widely recognized by

conservatives as a disaster for freedom of association and dismissed by those on the left as essentially old-hat, this case was the natural outgrowth of decades of court movement away from any recognition of man's social nature and the importance of social relations to American constitutionalism. In this case the Supreme Court upheld a public university's decision in essence to ban a Christian student association from campus. The justification offered for the move was The Christian Legal Society (CLS) policy of requiring people seeking to vote or run for office in its organization to agree to abide by its statement of faith. That statement affirms traditional Christian values, including the duty to engage in sexual activity only within the context of traditional, opposite-sex marriage. The University of California, Hastings law school claimed that CLS's policy regarding its statement discriminated against homosexuals, thereby undermining the school's goal of maintaining an "inclusive" learning environment.

Sheahan does yeoman's work going through the intricacies of relevant judicial doctrines. In particular he reviews cases dealing with a public university as a "limited public forum" subject to (varying levels of) Court "scrutiny." In such cases the Court decides whether the public entity's actions burdened the group too much when balanced against the "good" they produce. Those actions and the policies underlying them also would be judged for their reasonableness. Such supposedly neutral criteria for vindicating constitutional rights are, of course, riddled with a variety of prejudices imported into the analysis by the judges and subject to changes in elite opinion, especially, as Sheahan recognizes in this narrow context, the current ignorance of associations' importance.

As Sheahan notes, the Supreme Court in *CLS v. Martinez* failed even to recognize the burden the university had imposed on CLS by denying its right to recruit and meet on campus. Instead, the majority handed down the rather bizarre edict that associations are constitutionally allowed to express discriminatory views (e.g., disapproval of sex outside traditional family units) but may not limit membership rights "on the basis of belief or conduct arising from belief." Groups, then, can be required to allow those who openly

oppose their very reason for existing to become members, vote, and hold office in their associations.

CLS v. Martinez effectively killed the right to association. In court, there is now only the individual and the state, in all its various guises and institutional arrangements. Whether dealing with the federal government, a state government, or a publicly funded entity such as a public university, associations now must abide by the rules and accept the often very intrusive (indeed, for the CLS chapter at Hastings, fatal) regulations imposed on them if they want to be allowed to use "subsidized" facilities. Effectively, then, self-governance within the communities that once constituted American democracy exists solely at the sufferance and according to the whims and goals of the government. Moreover, the heckler's veto has been put at the center of associational life. No longer must disagreements within a group be settled according to customary rules, with losers at some point needing to choose between acceptance or exit. Now the disgruntled and even those openly opposed to the association's very existence may simply go to court to bankrupt it or have it declared discriminatory. Both association and the rule of law are thus rendered ephemeral, for there will be no known customs or rules here, only the sufferance of those willing to sue and those empowered to destroy.

Reforming with Tact

Sheahan's book culminates in proposals aimed at providing at least partial solutions to the problems he elucidates. Those solutions come in the form of draft legislation requiring greater administrative respect for associational interests and a "functional autonomy test" he argues courts should adopt in examining state actions affecting associations. The legislation, akin to other legislative directives aimed at swaying judicial and administrative conduct, is well intentioned but not likely to have great impact on its own. The test seeks to directly influence the outcome of lawsuits dealing with associations, reestablishing social organizations as among those whose interests (in addition to the state and the individual) deserve notice and consideration by courts. Under this test, courts would

seek to determine whether a state action (e.g., banning a religious student group like CLS from a public university campus) interferes with the functional autonomy of the group, inappropriately centralizes power, inhibits the association's exercise of its proper authority over its members, or interferes with the association's traditions.

Sheahan's test shares the fatal flaw of most judicially formulated tests. The intention is to "balance" the public interests served by some state (or, increasingly, semipublic) action against the burden placed on private (and, for Sheahan, associational) rights. But the test itself is highly susceptible to, indeed invites and even requires, manipulation. How much is too much centralization? How much associational authority is enough? The determination is left to judges who believe themselves to be applying neutral principles when in fact they are merely enforcing contemporary juridical ideology, namely, a mix of Rawlsian rights talk and elite opinion. At best, the judge may seek to temper such inevitable considerations with an emphasis on historical practice.

The issue, then, is not one of how well crafted a particular test may be but of whether the rule of law can survive over time when judges eschew adjudication under law for the balancing of values and interests. Yet, Sheahan's entire project is predicated on the continuation of this system. He is not seeking a return to a constitutional order in which the federal government acts on recognition of its limited powers and its duty to mediate among rather than command and reorder more fundamental associations. Rather, he seeks to reinsert associations into the current dynamic of state and individual, empowering courts to balance all three interests, rather than the two currently subject to their doctrinal pronouncements.

The Limited Utility of a Practical Mindset

Sheahan takes a measured, moderate approach seeking to fit his proposals into the current structure of regulation and jurisprudence. Even his choice of examples of associations (a fictional account from Harry Potter and a quaint one from the long-defunct celibate sect of Shakers) evinces a desire to avoid unnecessary controversy. He seeks to work within today's "rights talk" in courts

and Congress, using its language to restate the basic principles of social understanding. This means he would leave intact the basic structures of various court doctrines regarding religious establishment, free speech, discrimination, the "right to privacy," and so on. Courts would continue to enforce what they deem the right of various individuals to be free from private as well as public decisions that might affect them unequally according to their status (race, sex, ethnicity, sexual orientation, etc.). Added to this would be a new (or resuscitated) right of associations to autonomy and internal integrity enforced by judges who often understand and respect neither. Judges would have yet another interest to "balance" according to yet another test, application of which would, as always, vary greatly according to the prejudices of said judges.

Sheahan states his support for Nisbet's idea of a "laissez-faire" for associations—a renewed commitment to liberty and the true diversity that comes with a determined government policy of "hands off." Unfortunately, the culture wars of the past several generations have rendered such proposals suspect in the eyes of those who believe that the federal government is all that stands between us and a return to race-based violence enforcing an apartheid regime denying individuals equal dignity and equality before the law on account of their race, sex, or sexual orientation. Sheahan is careful to point out that nothing he proposes would have any effect on current law and policy dealing with discrimination in public or commercial life. He goes further by allowing for limitations on his own proposals where race arguably is a factor.

Sheahan presents three options for dealing with discrimination in associations. Supporters of the first option present it as allowing associational discrimination, but like the *CLS* doctrine, they make an exception for "status-based" discrimination. He correctly points out that this exception swallows the whole, leaving, for example, associations based on sexual orientation open to the same sanctions as CLS itself. His second option is a seeming middle ground in which "race is different." As in some early civil rights decisions, race would be treated as a special factor, with racial minorities being protected from group exclusion on account of past injustices

and continuing prejudice. The question, Sheahan notes, is why, logically, exceptions would stop here. Indeed, experience shows that the logic by which racial discrimination justifies special protections cannot be cabined; it will naturally spread, through judicial edict if not legislation, to other status categories on the grounds of past injustice and continuing prejudice.

Third is the option Inazu calls "confident pluralism." Under this option associations would be left free to make their own determinations as to membership, including by discriminating according to whatever criteria they see fit. The logic is simple: associations must be free to chart their own course if they are to fulfill their wider functions. Those few groups that choose to discriminate in invidious fashion or for invidious reasons will not undermine the vast good produced by renewed social freedom. The counter assumption—that if left free to choose, millions of nonminority individuals will associate for nefarious purposes—is a declaration that we are no longer fit for freedom, that social suasion means nothing, and that equal enforcement of equal laws is essentially useless.

Confidence would be rewarded with true variety and renewed vigor in the social sphere—a sphere within which discriminatory associations will find themselves shunned and their members disadvantaged in terms of reputation. Nothing proposed here would roll back protections of minorities' constitutional rights, but associations would be recognized as non-state actors with true, justiciable rights to internal integrity. Yet, a return to the social requires confidence that social sanctions as well as rewards are sufficient to maintain a decent public life once state action is cabined within constitutional structures and constitutional rights are guaranteed to all, regardless of race or other status.

Sheahan expresses reservations about confident pluralism, especially within any public forum. Such reservations, while understandable, are problematic, given his own recognition that our expansive government has turned wide swaths of formerly private or social life into kinds of public forum. In effect, Sheahan is asking judges, most of whom are either ignorant of or hostile to voluntary

associations not subservient to the state, to adopt and fairly apply a test seeking to protect associations from an overweening state and its many sub-actors.

A more hopeful reviewer might find in Sheahan's book a clever attempt to reintroduce the radically traditional understanding that persons are by nature social beings who require community in order to become fully human and to stave off potentially tyrannical democratic politics. Unfortunately, Sheahan's proposals are so meticulously designed to work within our current administrative state as to highlight the intrusive and socially destructive nature of that state. Yet he never questions the nature and extent of the state itself as currently constituted. He has done a great service by calling our attention to the importance of associations and the impact judicial ignorance and hostility have had on the right to associate. Sadly, the measured reform he proposes is insufficient to address the problems he points out.

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First Amendment Pluralism Meets Occam's Razor

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Why Associations Matter: The Case for First Amendment Pluralism
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Professor Sheahan proposes a First Amendment revolution. Not explicitly, but he is advocating a very fundamental change to First Amendment law applying not only to freedom of association, the focus of this book, but also to the "rights of religion, speech, press, assembly, and petition" (178). His audacious and original thesis is supported by a well-marshaled argument, detailed analyses of cases and the scholarly literature, a keen eye for problematic aspects of the argument, and the confidence to admit some of the limitations in the theory and argument. So, for anyone interested in the First Amendment—especially freedom of association—this is a must-read. You could fill a review just with plaudits and praise. But I leave that to others.

Instead, I shall explain the core of his argument and wield Occam's razor to challenge it. In his 1964 analysis of freedom of association, the preeminent First Amendment scholar Thomas Emerson argued that "while associational rights are fundamental in the legal structure of a democratic society, their protection through creation in doctrinal form of a general 'right of association' does not carry us very far in the solution of concrete issues. Rather, current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines."[2] True in 1964; true in 2020. There are good reasons (just a few are covered here) to believe we should stick with the "First Amendment

Dichotomy" of individuals and the state rather than adopt Sheahan's "First Amendment Pluralism" inserting social wholes into the already complex constitutional equation.

Sheahan's Argument

Premise 1. Chapter 1 provides the usual introduction to the book's motivations, major claims, and arguments. It also previews the sociology of Robert Nisbet that forms the basis of Sheahan's argument. In doing so, Sheahan implicitly endorses social holism without delving into its metaphysical or methodological variants or complexities.[3] Metaphysical social holism, generally speaking, is the view that social groups irreducibly exist above and beyond the aggregate of individuals who compose the group and their relationships. Methodological social holism, generally speaking, is the logically distinct view that social groups must be treated as irreducible wholes to provide a full explanation of some social phenomenon whether or not they have metaphysical status independent of the aggregate of individuals that form the group and their relationships.

Professor Sheahan makes claims that fit with both metaphysical and methodological holism insofar as he maintains associations are more than the sum of their individual parts in a metaphysical ("reality") sense and are methodologically necessary to a proper understanding of freedom of association First Amendment law (and probably other areas of law too, given their existence and value). A few examples will have to suffice. Associations are not merely a means to self-government; they *are* self-government (10). Associations are not merely a way of organizing life. They *are* human life (15). Associations are "more than the sum of their parts" (35), and they must be "treated as intrinsically valuable, as existing in their own right, because they do" (15). Associations are the primary reality of the First Amendment landscape (15). Sheahan claims this does not require rights of associations to have philosophical or constitutional preference to individual rights; rather, rights of associations as social wholes and individual rights exist "side-by-side." However, he does not clarify this further and later acknowledges it is an open question how his

(revolutionary) theory would be applied in practice. It might be lopsided in favor of associations. One wonders because elsewhere he has argued freedom of association (i.e., substantive rights of associations as social wholes independent of other First Amendment rights) is our "first freedom."[4] He justifies this omission by emphasizing his focus is on revolutionizing judicial reasoning, not necessarily judicial holdings.

Sheahan expands on his sociological foundation in chapter 2 through a Nisbet-inspired account of associations in their many forms. To put it briefly, the claim is that our associations are the primary causal factors in the development of individual belief and behavior and in a healthy society serve as effective intermediaries between individuals and the state. At the core of all associations are function and dogma (34). He limits his argument in subsequent chapters to voluntary associations such as the Christian Legal Society (CLS) involved in the notorious 2010 Supreme Court case,[5] and the reader learns in chapter 4 that it is not meant to apply "in the commercial context or to educational institutions' tax-exempt status or to quasigovernmental groups" (161).

Premise 2. Current First Amendment reasoning by the Supreme Court fails to recognize the reality and value of associations as social wholes independent of the individuals that compose them and independent of the explicit First Amendment rights to freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and petition. Chapter 3 supports this claim through a detailed discussion of the trajectory of freedom of association in Supreme Court cases. Sheahan notes there was an invocation of freedom of association as a substantive independent First Amendment right in its landmark case *NAACP v. Alabama* (1958), but even in that decision freedom of association was initially derived from freedom of speech and assembly (87). In subsequent decisions the court continued to reduce freedom of association to an individual right to expressive association until freedom of association as an independent substantive right was effectively obliterated in *Christian Legal Society v. Martinez* (2010).

Sheahan calls the court's reduction of free association and other First Amendment law to the two analytic categories of individual and the state the "First Amendment Dichotomy," in contrast to his preferred "First Amendment Pluralism" that gives associations substantive First Amendment rights independent of and irreducible to rights of individuals and the state. The supremacy of the dichotomy in Supreme Court reasoning is highlighted, Sheahan argues, in the fact that both the majority and dissenting opinions reduced the rights of the CLS to individual rights of expressive association serving as a means to "bolster the democratic state" while ignoring the rights of the CLS as an association (113).

Premise 3: Chapter 4 presents Sheahan's solution to the dichotomy: the Functional Autonomy Test (hereafter, FAT) (148–49). He also offers a legislative solution modeled on the Religious Freedom Restoration Act he calls the Freedom of Association Restoration Act (151–53). FAT applies the First Amendment judicial standard of "strict scrutiny through the 'compelling interest test' to any restriction on freedom of association, even restrictions taking place within a limited public forum" (148). The test has four components:

1. Does the policy inhibit the functional autonomy of the group?
2. Does the policy inappropriately centralize power?
3. Does the policy improperly inhibit exercise of the association's rightful authority to uphold the association's central tenets and prescribed tactics?
4. Does the policy inappropriately interfere with the tradition of the group?

It is clear from Sheahan's extensive discussion of the *Martinez* case in chapter 3 that the law school's policy would in his view fail all four components. Requiring the CLS to accept as leaders and voting members of the organization students who do not accept or abide by its central tenets and prescribed tactics impairs their functional autonomy, improperly centralizes power in the university, violates the association's rightful authority, and wrongfully impairs its traditions. Indeed, the *Martinez* decision upholding the

"all-comer's policy" makes possible a "hostile takeover" of the association and, by extension, any and every such association.

Sheahan completes his argument describing how his solution to the lack of autonomous associational rights is amenable to or better than other proposed solutions by legal scholars, including John Inazu,[6] Erica Goldberg,[7] Jack Willems,[8] David Brown,[9] Kyle Cummins,[10] and Rene Reyes.[11] His conclusion? First Amendment Pluralism and FAT are necessary to properly recognize and protect freedom of association (as well as freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and the right to petition).

Occam's Razor

There is considerable food for thought in the book, and a review must have a focus. My brief remarks in this section question whether Sheahan's First Amendment revolution is necessary or even desirable to protect freedom of association, much less the other First Amendment rights. I frame the problems in terms of Occam's razor, that is, the preference for a simpler explanation to a more complex one unless there are compelling reasons to accept the greater complexity.[12] In Latin, *Numquam ponenda est pluralitas sine necessitate*; in English, "Plurality must never be posited without necessity." Perhaps this is especially true in the law. A revolution that rests on dubious assumptions and has unclear applications creates more problems than it solves.

First, the right decision in the *Martinez* case (striking down the law school's "all-comers" policy) could have been reached within the framework of the First Amendment Dichotomy. This is evidenced by the dissenting opinion, scholarly analyses, and Sheahan's own discussion of the numerous problems in the decision. Moreover, although he lists a series of Supreme Court decisions he finds faulty (16), Sheahan does not go on to demonstrate that freedom of association as an independent First Amendment right of associations as social wholes would have yielded the "right" decision in them *and* that freedom of association as an individual right of expressive association could not yield the "right" answer.

Finally, his proposed solution, FAT, necessarily contains crucial normative terms subject to widespread disagreement—such as "inhibits," "inappropriate," "improperly," "rightful." Without additional doctrine to inform their application, FAT invites new additional controversy about what constitutes a "compelling state interest" and the balancing of state, individual, and associational rights. As Thomas Emerson pointed out in his 1964 article, "[T]he 'right of association' concept is so broad, and so undifferentiated, that its use effectively precludes any other approach. And the balancing test here is even less confined. And less subject to objective application, than where specific rights of free speech, press, assembly or petition are subjected to that treatment."[13] Associational expression should receive the same protection as individual expression, since it is merely aggregate individual expression; furthermore, there was ample precedent available to strike down the law school's overreaching policy using existing First Amendment doctrines and rights without introducing a new, undefined category composed of association rights of social wholes independent of the explicit First Amendment rights to freedom of religion, free speech, free press, free assembly, and petition.

Second, legal reasoning based on any form of social holism should invite considerable skepticism. In chapter 1 Sheahan briefly addresses the lack of enthusiasm for associations (social wholes) in Anglo-American political philosophy but does not address any arguments against social wholes. His claim that associations have an irreducible existence beyond their individual members and relationships is widely disputed in the philosophy of social science, along with his contention that the full explanation of a social (specifically, legal) phenomenon must include an irreducible social whole. His claim that associations have intrinsic value is troubling, too. Sheahan notes that associations exist for the benefit of and to serve the purposes of the individual members (69); he further notes that in voluntary ones, individuals have an absolute right to exit when an association no longer serves the individual's purposes (70). That looks a lot like extrinsic value. But he provides no analysis of intrinsic or extrinsic value. What entities (humans? rational

beings? sentient animals? gods?) or properties (pleasure? happiness? a good will? reason?) or states of affairs (existence? friendship? duty?) have intrinsic value is a matter of intense debate in ethics.

Sheahan also does not address the most important reason why social holism has been resisted in Western political philosophy: social holism is closely tied to fascist, authoritarian, totalitarian, and ultranationalist philosophies, political regimes, and associations.[14] The state is an association too, so Sheahan's analysis of associations should also apply to it. And since the state is the ultimate association politically and legally, it is no wonder those who see politics and law in terms of irreducible social wholes are attracted to an all-encompassing state, given it would exist above and beyond its citizens and their relationships, have its own intrinsic value separate from theirs, and so forth. Of course, Professor Sheahan opposes fascist, authoritarian, totalitarian, and ultranationalist states and rightly believes non-state associations serve as important checks on state power, but historically, individual rights have proved the best protection against the overreach of both the state *and* non-state associations.

Finally, constitutional interpretation needs ties to the text and/or history of the Constitution. Freedom of association is absent from the text, so the Supreme Court in deciding *NAACP v. Alabama* in 1958 and in subsequent decisions had to tie it to something. That the Court over time has tied it to free speech (expressive association) was a reasonable choice. Since the nation's founding, freedom of speech has been "the people's darling privilege,"[15] our "first freedom."[16] It was the first in the Bill of Rights to be incorporated against state action.[17] It is the most doctrinally sophisticated First Amendment right. To be sure, association may have non-expressive purposes, but legitimate non-expressive purposes beyond the Free Speech Clause can be constitutionally protected by the free exercise of religion, free press, free assembly, and right to petition.[18] Not every associational purpose deserves constitutional protection, much less specifically First Amendment protection.

Conclusion

Professor Sheahan hits many targets. Freedom of association is critical to a healthy democracy. Associations can be effective political and social intermediaries between individuals and the state. The Supreme Court should have rejected the *Martinez* "all-comers" policy. And much more. But when we apply Occam's razor to the face of "First Amendment Pluralism," it shaves off any substantive and independent First Amendment right of social wholes separate from individual rights to freedom of religion, freedom of speech, freedom of assembly, and petition. Adding social wholes with independent rights, rights untethered from free exercise, free speech, free press, free assembly, and petition introduces more questions and problems than it answers or solves. Again, I quote Thomas Emerson: "As a basic principle of a democratic society, freedom of association is fundamental. But the new constitutional doctrine has proved of limited value at best, and indeed has tended to obscure the real issue. Questions of associational rights must be framed and decided in terms of other constitutional doctrines."[19] Of course, having read his sophisticated book, I am eager to hear Professor Sheahan's response.

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Burning Down the House: Third-Order Association Rights and Antidiscrimination Law

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Why Associations Matter: The Case for First Amendment Pluralism
By Luke C. Sheahan. University Press of Kansas. 2020. Pp. 240. $34.95

In his book *Why Associations Matter*, Luke Sheahan calls on us to adopt a new, extremely expansive conception of rights of association. To get there, his argument moves through three stages: a discussion of association as essential to human flourishing; a critical review of existing First Amendment rights of association doctrine; a proposal for what Sheahan calls "First Amendment Pluralism." My main focus will be on Professor Sheahan's own proposal, but a few comments about the initial stages of the argument are in order. In general, I find that Sheahan identifies some valid criticisms of current First Amendment doctrine, but he offers a solution that is too extreme to be considered.

Association and Human Flourishing

Sheahan draws on the work of conservative political thinker and sociological theorist Robert Nisbet. Writing in the 1950s, Nisbet worried that modernity had pushed aside certain very particular kinds of associations that are important for human flourishing and replaced them with merely voluntary, interest-driven groups. The kinds of association Nisbet had in mind were characterized by seven terms that included "hierarchy" and "dogma."[20] In Sheahan's terms, these are the kinds of associations that matter. "The dogma

is the central tenets, the locus of shared beliefs that was the impetus for forming the group in the first place. Along with central tenets are the group's prescribed practices. . . . This is the core of any community worth of the name" (132).

What is unclear is what work this rather lengthy analysis does for Sheahan's project. For one thing, it is not the case that "essential to human flourishing" translates to a constitutional argument. Many things are essential to human flourishing: food, shelter, access to medical care, education. None of these is constitutionally guaranteed in the US Constitution.[21] It is also not at all the case that everyone agrees with Nisbet's theories. One is reminded of Holmes's famous comment that the Constitution "is made for people of fundamentally differing views" (*Lochner v. New York*, 198 U.S. 45, 6 (1905)). The Constitution may be said to contain commitments to legal and political principles, but since the 1930s the reliance on economic and social theories to define "rights" has been regarded with skepticism.

Moreover, Sheahan does not suggest that only the kinds of associations Nisbet describes should be constitutionally protected; on the contrary, one of his key and most radical moves is to insist that all associations should be treated equally, a point to which I will return later. (He also makes a halfhearted attempt to argue that a chess club actually displays Nisbet's characteristics. In response I can say only that Professor Sheahan and I must have experienced very different chess clubs in our lives.)

First Amendment Doctrine

In the second part of the argument Sheahan presents his critique of current First Amendment doctrine. To appreciate the implications of Sheahan's proposal it is necessary to reconstruct this discussion to some extent. Even more than other areas of constitutional jurisprudence, First Amendment law is complicated, characterized by categories and subcategories, each with rules and exceptions, and the right of association is no exception.

First there is the right to associate without government interference, what might be called a first-order right of association. This

right was discovered in the context of efforts by state governments to suppress communist and civil rights organizations (which sometimes overlapped) (*NAACP v. Alabama*, 357 U.S. 449 (1958)). As later developed, the right that was established in this context was the right to engage in either "intimate" or "expressive association," rights that derive respectively from concepts of privacy and free speech. "Intimacy" is a sliding scale: at one extreme there is the family; at another, General Motors, with everything else in between differentiated as a matter of degree, as argued in *Roberts v. Jaycees*, at 620. Where an association is neither expressive nor intimate, there is no constitutionally protected right at stake (*Dallas v. Stanglin* 490 U.S. 19 (1989)).

Once an association is found to be protected, a second-order right kicks in, the right to be immune from the operation of antidiscrimination statutes. Antidiscrimination law is the background to the entire discussion, yet Sheahan never mentions it. Various state laws prohibit discrimination on various grounds in laws addressed to "public accommodations." Early on, however, states discovered that "public accommodations" could not easily be cabined off from private associations. What is the status of a whites-only golf club at which business deals and hiring decisions are made? If a corporation's board of directors meets at a men-only club, is that a purely social association? When antidiscrimination laws were adopted by states, starting in 1964, numerous businesses and social associations suddenly repurposed themselves as "private clubs." In response, states argued and courts affirmed that apparently private entities might qualify as "public accommodations" if they met certain criteria, such as nonselective membership (*New York State Club Ass'm v. City of New* York, 487 U.S. 1 (1988)). The key cases that Sheahan discusses—*Roberts*, *Hurley*, and *Dale*—all involved the application of antidiscrimination statutes on the grounds that the associations constitute public accommodations.

But associations that are treated as public accommodations are *nonetheless* immune from the effects of antidiscrimination laws if compelling them to accept members from the designated group interferes with their expressive purpose. This is the second prong

of rights of exclusion: expressive as well as intimate associations are shielded from the reach of antidiscrimination laws. It was on this theory that the Boy Scouts was able to exclude an openly gay member; the leadership of the organization insisted that homosexuality was contrary to the Scouts' value of "cleanliness." Sheahan writes of the Court, "[I]ts theoretical lens only permits recognition of individuals as speakers and expressive associations as groups of individuals speaking in unison" (20). That, however, is simply incorrect. In *Dale* it did not matter that many individual Scouts disagreed with this conclusion, that evidence of prior efforts to exclude openly gay Scouts was slim, or that the record showed no evidence that the recitation of the values of Scouting had been historically understood to exclude homosexuality. The right of expressive association is held by the association, which is entitled to exclude potential members in accordance with the views of the present leadership. "[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be expressive association. The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes" (*Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000)).

These first- and second-order association rights are not Sheahan's primary concern. Instead, his main focus concerns the assertion of a new, third-order right of association in the form of a right to government funding. Explaining this claim requires maneuvering among some additional concepts from free speech law.

In general, where the government provides funding, it is free to distinguish among viewpoints. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles[,] . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism," C. J. Rehnquist argued in *Rust v. Sullivan*, 500 U.S. 173, 195 (1991). In *Rust* the Court upheld a ban on provision of abortion counseling by staffs of clinics receiving federal funds. The theory is that by accepting the funds, the recipients become government speakers. (Perplexingly,

Sheahan never mentions *Rust*, even though this government speech principle is central to his critique.)

The exception to the *Rust* principle occurs when a government funding program creates a "limited forum." A limited forum is usually a physical space opened up by the government to allow private individuals to express themselves. It can be limited as to topic but not as to viewpoint: a city council session may be opened to the public for commentary on a zoning proposal, for example, but not only for commentary in support of the proposal. In 1995, the Supreme Court ruled that a pool of funding that was available to pay expenses for student groups at the University of Virginia constituted a "metaphysical" version of a limited forum; as a result, the determination of which groups received funding had to be viewpoint neutral (*Rosenberger v. Rectors of Univ. of Virginia* 515 U.S. 819 (1995)).

For Sheahan, the key case is *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). The Christian Legal Society (CLS) is a student group at Hastings University Law School that does not allow (known) gay members. A university rule provided that to be eligible for funding, all student groups must be open to all students (a similar rule was in place at the University of Virginia in *Rosenberger*). CLS argued that compelling its organization to accept a gay member would interfere with its expressive purposes, a standard second-order association claim. The twist was that CLS further argued it could not be required to permit gay members as a condition of receiving funding, since that would constitute viewpoint discrimination and the funding system constituted a limited public forum. Thus, CLS created a third-order association right to public funding by combining a claim of a limited forum with a second-order right of exclusion. A majority of the Court rejected the argument, ruling that the appropriate analysis was to treat the funding system as a limited forum and distinguishing between viewpoint and membership requirements (i.e., antidiscrimination rules). As a result, Hastings was permitted to apply a rule that required groups to accept all students as members as a condition of receiving funding.

In Sheahan's telling, the failure of the Court to accept CLS's assertion of a new right constituted the complete destruction of associational rights. "Of course, voluntary associations may continue to function as this sort of community throughout American society in spite of the *Martinez* ruling. . . . However, the important point is that *they now lack the constitutional right to do so*" (31; emphasis in original). This is a remarkable description of a decision that did nothing to diminish either first- or second-order association rights. But Sheahan goes further: not only the lack of taxpayer support but even a denial of tax-exempt status is sufficient to completely destroy the right of association; he describes a private university that was denied a tax exemption as having been "shut down . . . through brute force" (171), despite the fact that the institution in question, Bob Jones University, remains in operation to this day. This equation of a third-order right to taxpayer funding and tax-exempt status with first-order rights to form associations and second-order rights to exclude unwanted members forms the analytical basis for Sheahan's proposed solutions.

Sheahan's Proposal: "First Amendment Pluralism"

The key to Sheahan's proposal for "First Amendment Pluralism" is a statement of a general rule: "Government shall not substantially burden a person's freedom to associate or assemble with others for any peaceable purpose; nor shall the government substantially burden the functional autonomy of any association" (152).[22] A number of elements of this rule need explication.

First, as a result of treating a denial of taxpayer funding as equivalent to suppression, Sheahan concludes that it is necessary to abandon the *Rust* government speech principle. *All* government funding should be regarded as constituting a limited forum and thus require viewpoint neutrality as a matter of first-order association rights. (He does not explain how this principle will accommodate the restrictions of the Establishment Clause.)

In addition, despite the earlier discussion of Nisbet's theories, Sheahan's proposed rules would apply to all associations. "The term 'freedom of association' means both the freedom of a person to

associate with others for any lawful and peaceable purpose and the right of an association to establish boundaries of membership" (154). Both large and small, *Geselleschaft* and *Gemeinschaft* associations are covered. This is a remarkable expansion beyond expressive and intimate associations. *Geselleschaft* associations include business corporations, political parties, businesses, and sports leagues. Their activities include commerce, politics, and entertainment.

Putting these elements together leads to some startling results. Among first-order association rights is a newly discovered constitutional right to form corporations, and any restrictions on that process are constitutionally suspect. Whole areas of ordinary commercial regulations are suddenly called into question: can state law, for example, require elements of corporate governance that contradict the CEO's statement of a company's dogma? Almost all public disclosure laws are presumptively invalid; if Alabama could not require an association (the NAACP) to reveal its membership, corporations cannot be required to disclose their shareholders. As a result, rules concerning foreign ownership (e.g., in relation to campaign finance) would be presumptively invalid. Corporations exist only as creations of state law; if there is a right to form corporations, what does that do to the state laws that impose restrictions on governance and operations? (It is noteworthy that John Inazu's arguments exclude "commercial" associations; Sheahan, however, insists that the right to form commercial associations is constitutionally protected.) None of this is hinted at in Sheahan's book; one has the impression that these issues were never considered.

But it is the dramatic expansion of second-order rights of exclusion that is most telling. Suddenly a right of exclusion with respect to "membership" includes relations of employment, business transactions, political participation, and ownership. These rights are expanded to the point where they swallow the entire concept of antidiscrimination law. Consider laws prohibiting discrimination in employment. These laws are rendered unconstitutional as applied if an employer asserts that complying with the law would offend its dogma and traditions.[23] Private associations employ enormous

numbers of people who would effectively be stripped of all protections against discriminations on all bases. All "associations," under Sheahan's theory, are entitled to engage in discrimination as part of their right of association; the idea of "public accommodations" is effectively discarded.

Sheahan would most likely respond that his standard requires only that strict scrutiny should be applied, a standard familiar from earlier generations of Free Exercise jurisprudence (*Sherbert v. Verner*, 374 U.S. 398 (1963))? But the context is entirely different. *Sherbert* involved excusing individuals from complying with state laws that imposed burdens on their religious practice. Here the parties being exempted from compliance with the law are individuals, partnerships, or multinational corporations who are permitted to discriminate on any basis—age, disability, religion, nationality, creed, gender, or race—in employing tens of thousands of people. Furthermore, Sheahan is insistent that courts show the same deference to associations' leaders that was shown to the Boy Scouts in *Dale*. Neither the sincerity nor the centrality of the asserted dogma is subject to external evaluation. "[T]he precise nature of dogma and function can sometimes be determined only from inside the association. . . . The goods of association can only be realized and judged as adequate from inside the association itself. . . . A group's protections shouldn't turn on whether its purposes or activities are sincere or wholesome from an outsider's perspective" (160). Thus a business constitutionally protected to discriminate is limited only by what its corporate officer is willing to say in court. Application of strict scrutiny at that point is truly "fatal in fact" in all but the rarest of situations.

And employment is only the beginning. Consider again the subject of public accommodations. The Civil Rights Act of 1964 was enacted pursuant to Congress's Commerce Clause powers. But those powers cannot be exercised in ways that violate First Amendment rights. The application of Sheahan's approach means that unlike the ordinary operation of Commerce Clause powers, in the antidiscrimination field *each instance* of the law's application would have to satisfy strict scrutiny in order to

overcome the assertion that serving mixed-race customers violates the "association's" principles.

The consequence of combining a universal theory of funding as a limited forum with an unlimited effective right of exclusion is to create the third-order right that was denied in *Martinez*. In the specific context of education, uniquely, Sheahan is willing to consider the possibility that funding should be conditioned on not engaging in racial discrimination, but outside that context all forms of discrimination are protected by the new right of association (167).

One question is whether the implosion of antidiscrimination law and the radical revision of economic and business regulations is what Sheahan had in mind all along, and the focus on student groups and social associations is a smokescreen? Or is it simply that Sheahan starts with a particular case, *Martinez*, crafts a set of principles around the very narrow circumstances in which it arose, and then applies those principles to the universe of possible cases. I am inclined to accept the latter explanation. But in response to valid concerns about current First Amendment doctrine, Sheahan has devised a solution that obliterates the logic of antidiscrimination law and swaths of other areas of law in their entirety. This, in the words of Justice Frankfurter, is "burning down the house to roast the pig" (*Butler v. Michigan*, 352 U.S. 380 (1957)).

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Response to Critics

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I have the honor of responding to critiques of my book from three distinguished scholars, each of whom approaches my book from a unique ideological and professional perspective. The primary benefit of this symposium is obvious: a comprehensive critique that leaves few rocks unturned in my argument. The downside is the flipside: it is difficult to respond adequately to such a broad range of critiques. Professor Frohnen calls my proposals too moderate and practical, while Professors Shiell and Schweber argue that they are too radical and far-reaching. Professor Frohnen contends that my proposals leave the administrative state untouched, but Professor Schweber accuses me of trying to upend the regulatory state. Professor Shiell argues that I am revolutionizing the legal understanding of rights, and Professor Frohnen laments that I am failing to do so.

Scholars of their stature do not inquire idly. Many concerns over my thesis expressed here deserve an article or even book-long treatment, which I am unable to execute in this venue. I will avoid allowing my response to stop at a claim that the concern is beyond the scope of my book, even if I think that it is. Where I do not simply defend my thesis, I will attempt to explain how my argument may account for, or be expanded to account for, their concerns while defending the book as it is. This presents an additional problem, given the diversity of critics, just as I work to alleviate the concerns of one I will create more for another.

Professor Frohnen: Too Little, Too Late

Professor Frohnen opens his review summarizing and largely agreeing with my discussion of Robert Nisbet's explanation and defense of community and the application of that analysis to what

we think of as freedom of association. The problem he sees is that my emphasis on the communal nature of the person and the importance of communities is not borne out in my proposals for reform. First, I do little to challenge the regime itself, which is inherently anti-associational. Second, my remedy depends on enforcement by a judiciary that has long ago abandoned its role to uphold the rule of law for an unconstitutional role in advancing the values of its judges and justices, which have long been anti-associational.

Like Nisbet, Frohnen agrees that the modern administrative state has grown at the expense of more local associations of all sorts that used to provide the services the administrative state now provides. In the process of absorbing the functions of these groups, the state has also impinged on their authority. The sort of danger of this understanding of the state is that it conceives itself not as ruling society but as society itself, claiming to "be" the people. Therefore, its claim over society and those associations has no theoretical limit. Members of these smaller associations, who are essentially communal beings, are left with the state as their only community, which is too big and too diffuse to provide the meaningful sense of belonging found in other associations.

He writes, "[T]he development of legally recognized rights in the Anglo-American tradition literally began with battles over the rights of groups, including the Church as well as various municipalities and classes." So he criticizes my rehearsal of the Court's treatment of freedom of association since the 1950s as a sort of "golden age" of associational jurisprudence, when the Court was too individualistic even then. I think he is overstating my praise of the jurisprudence. The Court was more appropriately nuanced in its treatment of associations in the NAACP cases, not yet linking their right explicitly and solely with speech as it does later. So in that way, the Court's individualism is at least more nuanced than in what comes with *Roberts v. Jaycees* and the explicit connection between the individual right of expression and the right of association, which, as I explain, is really a collapsing of the right of association for expressive and non-expressive reasons into the right of

"expressive association." This is the development I am critiquing and not the entirety of the Court's treatment of associations per se. But it doesn't mean I'm happy with the Court's articulations in the 1950s and before. I title my sample legislation the "Freedom of Association *Protection* Act" and not the "Freedom of Association *Restoration* Act" for precisely this reason. I think the Court could have (and should have) done better (150–51). I also point out that the Court should have been more explicit in simply protecting the associational rights of the NAACP by grounding them exclusively in the Assembly Clause.

More important is the role of the judiciary that instituted an understanding of rights that precludes or downplays the association. The jurisprudence I criticize is itself a result of the judiciary's changing role, which predates the problematic associational jurisprudence by more than a half-century and is the background that made the jurisprudence I dislike possible in the first place. It is also, Frohnen contends, the reason my remedies won't work. A new judicial test that purportedly recognizes groups will be applied by a judiciary that is ideologically disinclined to recognize groups and that is accustomed to exercising power it was never meant to have to suppress associations. My remedy is predicated on the idea that if we give the inhabitants of the monkey cage adequately clear instructions, they can competently run the zoo.

Thus Frohnen finds the premise of my solution dubious. He writes, "[T]he [functional judicial] test itself is highly susceptible to, indeed invites and even requires, manipulation. How much is too much centralization? How much associational authority is enough? The determination is left to judges who believe themselves to be applying neutral principles when in fact they are merely enforcing contemporary juridical ideology." He further writes, "The issue, then, is not one of how well crafted a particular test may be but of whether the rule of law can survive over time when judges eschew adjudication under law for the balancing of values and interests. Yet, Sheahan's entire project is predicated on the continuation of this system." The very judges I want to use the test are themselves beholden to the "First Amendment Dichotomy"

paradigm that I criticize, with an inflated view of their own power. Furthermore, the administrative state remains entirely intact, as does the constitutional presence of the state/individual dichotomy.

Frohnen is right that I do not challenge the existence of the administrative state as such in this book, although I do suggest that what I have to say about associations does call into question much of how we think about political power in the West (33). My guiding principle in this book is that "politics is the art of the possible." And the question I am seeking to answer is, what can we do *now* to protect associations? The sort of large-scale reform of the administrative state Frohnen believes necessary to restore the proper constitutional protection for groups will take a long time. More important is that it depends on a changed way of thinking about associations altogether. I am advocating reforms we can do now in our present circumstances to begin a restoration of proper constitutional thinking about associations.

I grant that the federal government should not have the power it does; but while it has arrogated that power to itself, it would behoove those of us who value associations and value the Constitution to retain what constitutional freedoms we can while articulating an alternative vision. My focus in this book is to protect the voluntary association in our current circumstances, which includes an active judiciary and a jurisprudence that makes a great deal of use out of balancing tests. In the process—and this is key—we give our judiciary, our citizens, and our politicians practice in refocusing on associational autonomy, on seeing citizenship in associations as the center of a meaningful and active life in a place where they are accustomed to think in terms of citizenship in the state. While the ramifications of First Amendment Pluralism and the associational autonomy it recognizes in the Assembly Clause go beyond voluntary associations, I think it is reasonable to begin here.

The judicial test I devise does rely on judicial enforcement. While I grant that a number of justices and judges may act improperly, some will not. But by bringing attention to associational autonomy, judges who rule against associations will need to do so without hiding behind an atomized conception of freedom of

speech to discuss associations, as the *Martinez* Court did. A federal court will have to articulate precisely why it is acceptable for the state to intrude on the functional autonomy of a group, and it will further need to explain why the state's interests meet the standards of strict scrutiny, as it does for other rights. While my test is a balancing test, as Frohnen criticizes, the standard of strict scrutiny is strict in theory but often fatal in fact. The Court could find, on balance, that the autonomy of associations should fail, but it will have to explain why the state's goals trump the association's functional autonomy rather than brushing aside the concern altogether as it did in *Martinez*.

In addition, following John Inazu, I root my functional autonomy test and my conceptions of associations in the Assembly Clause. By doing so, I give the Court the opportunity to bypass much of its problematic jurisprudence and to root a right of assembly in the earlier conceptions that Frohnen praises.[24] The federal courts, of course, could demur. By crafting sample legislation, I am encouraging legislatures and citizens to think about the functional autonomy of associations. Even if it were true that the judiciary would ultimately manipulate the prongs of the functional autonomy test to effectively leave the problematic treatment of associations as it is, the salutary effect on citizens and legislators would remain. In other words, my proposals have an educative value by bringing attention to the sorts of associations that Frohnen and I agree should thrive and by accustoming the American people to think in terms of associations.

An important element in Frohnen's critique is that I am too narrowly focused on protecting voluntary associations. There are all sorts of associations, as I describe in chapter 2, so why is it that only voluntary associations as I describe them get protection under the Assembly Clause and my functional autonomy test? While I think the autonomy of voluntary associations is essential to understanding the protections of the Assembly Clause, I do not think it exhausts those protections. Voluntary associations are often local, but their location is not important to their nature. But what if locality itself is an important element of the social group, as Frohnen

claims? With some small adjustments, I think my analysis can extend to the very concerns Frohnen expresses.

We might consider, as Nisbet does, that "locality" is an important aspect of peaceable assembly. People often spend time with others in their community, and "functional autonomy" ought to apply to local communities as well as voluntary groups. We generally think of municipalities as a third level of government, with all the powers and restrictions that go with it. But what if we could think of the establishment of a municipality as a "local assembly," the exercise of peaceable assembly with a geographical component? We might require the judiciary to ask, "Does the policy inhibit the functional autonomy of the local community?"

Immediately, all sorts of objections leap to mind. Would this allow discrimination in housing? Would this allow a private police force to have the monopoly on violence of our normal police forces without judicial or legislative oversight? But just as we nuance our analysis of the application of associational rights, we might nuance our application of what is protected by the Assembly Clause in terms of a principle of "localism."

My remedies, while moderate, have the advantage of being immediately actionable to enliven a concrete constitutional clause while at the same time helping us to think in broader pluralist terms. Elsewhere I have suggested that the plural conception of First Amendment rights I advance in my book is reflective of a plural conception of the American Constitution more broadly.[25] What this means is that the American Constitution does not establish a strictly political constitutional community around the centralized direction of the American national government. It does establish the American national government, of course, and provide it with supreme power in particular areas, but it also preserves the authority of the states. Through common law and other mechanisms (such as the state constitutions, which the federal constitution takes for granted), local communities retain their authority. First Amendment Pluralism is a reflection of this more fundamental constitutional pluralism or, following Nisbet, what I call the Plural Constitutional Community, but one that

specifically protects social authorities in terms of religious groups, expressive associations, press outlets, and voluntary associations.

Thinking in terms of First Amendment Pluralism is valuable in the short term for what it does for thinking about associations. In the long term, First Amendment Pluralism may help citizens, legislators, and judges to think in terms of a deeper constitutional pluralism. First Amendment Pluralism is valuable in its own right for what it does to properly illuminate the protections of the Assembly Clause especially, but it has the additional advantage of helping us to think in plural constitutional terms more broadly, which is a way of thinking more in line with Frohnen's own constitutional vision.[26]

Professor Shiell: State, Individual, and Social Wholes

Professor Shiell has written extensively on the value of free speech and the First Amendment, and this scholarship informs his perspective on my book. He challenges three premises that he perceives in my argument: the reality of social wholes, the Supreme Court's failure to take social wholes into account, and the contention that a recognition of social wholes is necessary to remedy the Court's deficit. The latter two challenges follow from the first. He then applies Occam's razor to argue that my remedy needlessly complicates First Amendment jurisprudence and that we should stick with the simplest explanation necessary to vindicate constitutional rights and, further, that the Court has already done so.

Social Wholes

Shiell points out that my appeal to associations as an independent point of analysis calls into play the social holism versus individualism debate in the social sciences. He points to several uses of "holistic" language to describe groups, even though I do not use the term "social wholes." The reason I avoided spending more time on this debate is that I think the language of the debate obscures overlapping areas between its partisans. In this case, it may obscure how the Assembly Clause preserves social space where individuals exercise the right to associate, to create social structures of

authority over themselves. Social holists see the social structures, and individualists see the aggregate of individuals. But they are, I contend, the same thing.

Whenever individuals interrelate, they form social structures of authority. It is this relational aspect, especially as social structures of authority emerge from that interaction, that I think is protected by the Assembly Clause. Consider the very language of the Assembly Clause, the right "peaceably to assemble," which is fundamentally relational. Inazu writes, "One can speak alone; one cannot assemble alone."[27] It is relationships between individuals in the association that the Assembly Clause shields from state intervention. The only textual caveat is that the relationships and activities of the assemblies be peaceable. These relationships can be accurately described as social groups, from intimate dyads to large organizations (48–50).

Now whether in some final philosophical sense the social structures formed under the Assembly Clause are the result of individual rights or of social wholes is something I will leave to the philosophers to decide. But the best way to protect these structures is to recognize a category of constitutional protection for these groups as a cluster of individual relationships apart from the individuals who enter and leave them. We can call this methodological social holism, or we can call it freedom of association protected in the right to peaceable assembly.

My goal in articulating the social foundation of protections for the Assembly Clause was to appeal to both individualists and social holists because I think partisans of each side in this debate could appreciate my remedy for the deficiency in the Court's jurisprudence, whether one thinks the ultimate philosophical justification is individual rights or social wholes. I do use what could be described as social holist language to describe these social structures, writing that they are "more than the sum of their parts," and so on, because I want to emphasize the associational aspect protected under the Assembly Clause, which emerges not from individuals as a *statistical* aggregate but from individuals as a *social* aggregate, individuals in social relation to each other who each see

the other as part of the same enterprise (45). I have in mind specifically individuals' *interactions* that create a *nomos* for a particular collection of individuals, binding them together in a social way.[28] The Assembly Clause is protecting, not interactions with oneself, but interactions *between* individuals in the creation of social structure of authority and mutual obligation, the contours of which I spend dozens of pages unpacking. I use the discussion of social relations rather than the language of social wholes to get to the dynamism of the interaction between individual *and* the social unit and between individuals *in* the social unit. This dynamism in concrete social reality is lost in the debate, which I think reifies concepts of individual and group and therefore obscures an accurate representation of the dynamic social reality protected from state intrusion by the Assembly Clause.

So my objection is not to individual rights per se but to what Frohnen describes in his response as a "crabbed understanding of individual liberty," an individual liberty that does not recognize the relational aspect of associational freedom protected by the Assembly Clause, which is the individual right to act corporately. I write, "[I]ndividual rights *as the Court has conceived them* are inadequate as a theoretical point to fully account for the breadth of constitutional rights, which means that they are inadequate from a jurisprudential perspective because they fail to protect the full scope of rights guaranteed by the First Amendment" (16; emphasis added). I am trying to get both individualists and social holists to follow me in seeing the need for a practical constitutional protection for this interaction between individuals in the text of the Assembly Clause and to see the necessity of describing this protection in terms of associational autonomy.

Here's an example that may illustrate the nuance of social group and individual rights parsed above and in the book. The right of association is often described colloquially as the right to join any group one wants and the government may not forbid individuals from joining any group. But this is not quite right. The right of association is the right to join a group *that will have you*. The government may not prohibit you from joining, and it may not force

the group to accept you. How does the group reject you? Through the decision-making process and by the authority established in its social structure, which is composed of individual members interacting in social complexity around which consensus emerges and is brought to bear by a social hierarchy within the group.

Having individual rights explains how individuals may form groups and pursue these relations, but it is unclear how a conception of individual rights protects the authority structure of these groups when they act corporately. Having individual rights explains how individuals may willingly submit to these groups but not how these groups may internally structure themselves and decide what is legitimate in terms of central tenets and prescribed practices. This introduces a social dimension to the question of associational freedom that implicates group autonomy.[29]

Supreme Court Fails to Recognize Groups

The Court has failed to protect this relational dimension that is embedded in the Assembly Clause and that most people would describe as associational freedom. The Court's use of "expressive association" to describe this right is inadequate to get to the fullness of what this right should protect. Shiell points out that *Martinez* was a 5:4 decision, meaning that the expressive association argument of the dissent could have prevailed with Justice Kennedy or his successor going the other way. Thus my argument focuses on a superfluous anomaly in the Court's jurisprudence. For Shiell, the law has already given us an adequate account of freedom of association in its expressive association jurisprudence. The Court just needs to make appropriate use of it, as the dissent did.

The problem is that I do not think that expressive association exhausts the First Amendment's protections for associational freedom. I think non-expressive association should find independent protection in the Assembly Clause. My deconstruction of *Martinez* demonstrates the Court's inability to think in terms other than expression. Maybe a particular case would have gone the other way, but there are plenty of instances where the resources brought to bear by the entire Court, majority and dissent, in *Martinez* would

be inadequate to protect non-expressive groups, which should have constitutional protection under the Assembly Clause, some of which are discussed in what follows.

Complicated Remedy

Shiell points to Thomas Emerson's claim in his famous article on freedom of association that the introduction of a new and expansive category of First Amendment jurisprudence is unhelpful and possibly even damaging to the traditional First Amendment categories. Emerson writes, "Questions of associational rights must be framed and decided in terms of other constitutional doctrines."[30] He was referring to the Court's coining of freedom of association as a nontextual, implied right in the First Amendment. Shiell argues that my remedy of First Amendment Pluralism ignores Emerson's sage advice, needlessly complicating First Amendment jurisprudence by introducing a dubious concept of independent protection for associational autonomy not bound to traditional constitutional categories.

But what I argue (following Inazu) is that the Assembly Clause is the location of associational freedom, and I am trying to unpack what such a right might entail. I reject the claim that associational freedom is an additional right, and I am critical of the claim that it is a right that emerges from the interaction of the other rights, as the Court articulated in *NAACP v. Alabama* (1958). Rather, I think freedom of association is a right embedded in the Assembly Clause. As I write in the book, the development of associational freedom becomes unlinked to the Assembly Clause precisely by the articulation of the right of association as the exercise of speech *and* assembly, of individuals assembling to speak. The Court should have recognized the associational right being exercised by the NAACP as residing in the Assembly Clause alone. I differ from Inazu in that I am not bothered by calling this right "association" any more than I am bothered by calling the rights protected by the Speech and Press Clauses expressive freedoms, even though the term "expression" does not appear in the text of the First Amendment. The right of association is to the Assembly Clause what "expression" is

to the Speech Clause: a way of conveying the depth and contours of the particular textual First Amendment right.

This recognition is significant because First Amendment rights are often if not always practiced in an institutional or social context.[31] The relations between individuals in structures of social authority are essential to much that passes as the "Free Exercise of Religion." Freedom of the press implicates institutions and corporations that engage in the press. There was debate in the First Congress over whether the Assembly Clause was necessary. One Congressman made the point that other freedoms could be crushed in a roundabout way by refusing to recognize freedom of assembly. To illustrate, he made a veiled reference to the violation of William Penn's religious liberty, which took the form of his arrest for unlawful assembly.[32] What my analysis is trying to do is help the Court to see when there is a social context that is not reducible to an individual right to free speech but requires independent judicial concepts attaching to an independent constitutional clause.

Perhaps the Christian Legal Society (CLS) could have prevailed in *Martinez* with a more robust form of expressive association. But the framework in *Martinez* prevents protection for associations elsewhere. It failed to protect a men's networking group, communist groups, fraternities and sororities, prayer or meditation groups, and some foreign charities (16).[33]

Shiell argues that the Court has done the most doctrinal work on the freedom of speech and therefore it makes the Speech Clause a reasonable location for that right. The Court has done tremendous work on the Speech Clause, which everyone knows. But I don't think that is an excuse to ignore the Assembly Clause. I agree that as a right "cognate to . . . free speech and free press, . . . [it] is equally fundamental,"[34] and thus it deserves the same doctrinal sophistication. I do not reject the Court's expansion of the Speech Clause. Rather, I want it to do the same thing with respect to the Assembly Clause, unpack the potential that resides there and generate doctrines that differentiate various aspects and applications of the right, including its limits. The Court incorporated the Speech Clause in 1925,[35] and it then proceeded to elaborate on the

compact understanding of speech as embedded in that clause. The Court incorporated the Assembly Clause in 1937,[36] but it then largely failed to elaborate. The Court's move to put association into Speech cut short the process that could have given the Assembly Clause the doctrinal sophistication of the Speech Clause. My book follows on Inazu's as a call for an elaboration, for an unpacking of the Assembly Clause, articulating the contours and limits of the right. The Court has done a good job unpacking the meaning of our expressive freedoms. Now let it appropriately unpack the meaning of our associational freedoms.

State as Social Whole

I don't use the term "social holism" because I think it reifies the concept, but as Shiell's response indicates, my conceptual apparatus could be read that way. So Shiell delicately brings up the main objection to social holism among social scientists, which is its relationship to "fascist, authoritarian, totalitarian, and ultranationalist philosophies, political regimes, and associations." Two points need to be made in response. First, each of Shiell's examples of pernicious social wholism is a monistic social holism, an explicit rejection of the social pluralism of which I am speaking, the defense of social relationships that are separate from the state, that shield individual memberships from state interference. Second, the First Amendment Dichotomy the Court has implemented is a form of monistic social holism.

Shiell opposes the pluralism I bring to bear, quoting the Latin dictum at the heart of Occam's razor: *Numquam ponenda est pluralitas sine necessitate*. "Plurality must never be posited without necessity." As I have discussed here, the Assembly Clause assumes relationship, social structure, and it shields that social structure from state interference. To put it another way, the Assembly Clause necessitates the positing of social authority in something like a First Amendment Pluralism. If I am right that these authorities are in the First Amendment, then whatever Occam might say about it, we need to recognize them in our jurisprudence or we fail to protect fully the right residing there. As explained, a plain reading of the

Assembly Clause is the protection of peaceable relationships, which implicates structures of social authority in what we may call associations. This plurality of social authority not only cuts against the monistic social holism of fascism but is completely opposed to it.

This is related to the second point. Shiell posits that if I am going the "social whole" route, I would have to recognize that the state too is some sort of social whole. That conception has a very sordid history, as he points out. But my point is that is precisely what the Court has done in its expressive association jurisprudence. My critique of the First Amendment Dichotomy is that I think it is a form of social holism, with the democratic state as the exclusive claim to be a social whole against the social wholes of a variety of social groups. This is much closer to the fascist paradigm than is the plural social holism Shiell uses to describe my position.

I had considered bringing to bear on the First Amendment Dichotomy Jacob Talmon's famous critique of totalitarian democracy,[37] but I thought it would be unfair to my opponents. All the partisans of the First Amendment Dichotomy I have read reject fascism and in fact see their position as opposed to the fascist political society, even though it follows a similar pattern of political order. Underlying the First Amendment Dichotomy is the notion that the only legitimate moral community is that of the democratic state. Individuals have rights to the extent that we do not undermine the state. We have quite expansive First Amendment rights to the extent that we are participating in the democratic state in a broad sense. This is why I think the Speech Clause gets such expansive treatment from the Court (96–97, 112–13). I agree with much of that jurisprudence and believe the Court was right to unpack the meaning of the Speech Clause to protect expressive freedom in its fullness and variety.

Where I disagree is when the Court exclusively linked the right of association with speech in the doctrine of expressive association. I see this doctrine as a demonstration of the Court's democratic social holism. The Court will protect associational freedom only when it can link that freedom to the practice of individual rights in the service of the democratic state (112–28).

We need expressive freedom because our political society is a democracy and in a democracy citizens must be free to influence each other. We can all be thankful that the Court has broadly interpreted this right to protect a vast swath of expressive freedom, but the fundamental orientation is toward a social whole, even if it is one that is democratic and protects individual rights. Again, there are benefits to this order, but there are also deficiencies, as I outline in the book, the most salient point of which is that it has led the Court to ignore an explicit constitutional clause in the First Amendment that ought to protect a variety of nonexpressive associations.

The defenders of social holism who are attracted to the social holism of the state do so precisely through a rejection of pluralism. They want one authority in which we can be embedded, I want many. Authority of some sort is inevitable, as the rise and defense of the First Amendment Dichotomy makes clear. We cannot have a First Amendment "Monochotomy," focusing only on the individual. As Shiell notes, we need an entity to assert and defend the rights of the individual and to determine their limits. The state does that in the First Amendment Dichotomy, and it does so for its own purposes. The state will protect associations from unwanted members only if it finds them adequately expressive, if it finds them suitably participating in democratic government.

Against the First Amendment Dichotomy, First Amendment Pluralism "denies ontological primacy to the state," to use Inazu's phrase.[38] I think the First Amendment carves out social space for social authorities that are religious, expressive, and merely associational, and it does this explicitly through the Assembly Clause. First Amendment Pluralism would recognize the exercise of authority by these groups, these clusters of individual social relationships, as legitimate, indeed, essential to limiting the conception of the state as social whole. The Court has been open to this sort of pluralism in some of its religious liberty jurisprudence, and I think that jurisprudence should extend to the other clauses, especially as it implicates the Assembly Clause, which requires protection for relations between persons.[39]

In sum, Shiell writes, "Adding social wholes with independent rights, rights untethered from free exercise, free speech, free press, free assembly, and petition introduces more questions and problems than it answers or solves." As I have explained, I am not introducing social wholes with independent rights untethered from the rights of the First Amendment. The Court's articulation of freedom of expressive association is deficient and has rendered the Assembly Clause dormant. What other constitutional doctrines may we appeal to? I think we should be able to appeal to the Assembly Clause, and I am elaborating on what that provision should mean.

The Court was willing to expand its doctrinal toolkit regarding the Speech Clause. I want it to do the same for the Assembly Clause, where associations should be protected when acting as I describe them. My argument is an invitation to meditate on the meaning of the Assembly Clause, an invitation to courts and scholars to give the Assembly Clause the Speech Clause treatment, and to elaborate on its meanings, which includes a discovery of its limits.

Professor Schweber: A Right to Funding

Professor Schweber has a variety of critiques of my argument, some minor quibbles about wording and others major conceptual disagreements. Like Shiell, he is primarily concerned that my proposal is too far-reaching, revolutionizing our understanding of what the right of association protects, so much so that the right of association becomes an all-consuming concept, annihilating settled law in a variety of areas. Two aspects of my argument are especially concerning to Schweber: my rendering of a right to government funding and what he fears is the application of my theory of associations to corporations. Some of what Schweber has to say depends on subtle alterations or even outright mischaracterizations of my arguments that render them implausible. My corrections demonstrate that they are not so easily dismissed. I will begin by addressing some preliminary issues he has with my argument.

Schweber argues that by drawing on Nisbet, I am imposing a social theory on the Constitution, which violates Justice Oliver Wendell Holmes's widely accepted dictum that the Constitution "is

made for people of fundamentally differing views."[40] Given this prudent adage, how can I expect the Court to adopt a particular social view?

While this sounds persnickety, I am not exactly arguing for a social theory, but a theory of the social. As I argue in the book, the Court has a theory, a way of seeing, that determines what it sees whether it admits it or not. (34–36). My critique of the Court centers on the First Amendment Dichotomy, its social theory that excludes associations from consideration. The "theory of the social" is a viewpoint, a theory, which brings back into focus what I, Inazu, and others see as the clear meaning of the Assembly Clause. I am not asking the Court to do something it does not already do: have a theory, a way of seeing. I am asking only that its way of seeing, its theory, account for the Assembly Clause and the associations that are protected there.

Schweber also objects to my extended discussion of the importance of associations to human flourishing, not because he disagrees per se, but because mere importance to human life does not constitute a category of constitutional protection. All sorts of things are important to human life but are not constitutionally required (food, water, etc.). This is true, but this clearly isn't my point. The constitutional justification for associations is not their importance for human flourishing but the explicit textual provision that the Court has ignored. My emphasis on the importance of associations to human flourishing is to demonstrate the significance of my inquiry and to highlight what we lose when we ignore this particular constitutional provision, which shields from state power a category of institutions that are essential to human flourishing.

Right to Funding

Schweber argues that one of my most radical moves, and one essential to my book, is to insist that there is a right to government funding. He characterizes my argument this way: "*All* government funding should be regarded as constituting a limited public forum and thus require viewpoint neutrality as a matter of first-order association rights" (emphasis in original). As Schweber explains,

the government may distinguish between viewpoints in government funding except when there is a limited public forum.

I am clear that I do not think *all* government funding is in the category of a limited public forum. I make the same distinction Schweber does between government contracts and the limited public forum (116–20, 164–65). Instead, I insist that government funding is not *exclusively* in the category of government-subsidized speech. I don't have a problem with the government speech principle per se. I have a problem with the application of the government speech principle to *all* government funding even when that funding implicates First Amendment rights, as it did in *Martinez*.

In *Rosenberger v. University of Virginia*, the Court ruled that the distribution of funds to student groups had to be viewpoint neutral. A student group was entitled to the funding if it was a recognized student group that met otherwise neutral criteria. Similarly, tax exemption status— which the court has repeatedly called a "subsidy'[41]—is also generally neutral in who receives the exemption. The point that emerges in these cases is that the government may not discriminate on the basis of viewpoint in the distribution of some government benefits, including, according to the Court, government funds such as student fees and tax exemptions. My defense of this understanding is drawing heavily from a point made by Inazu that when First Amendment rights are at stake and the government has made available resources for general use, it must distribute those resources in a manner that does not violate First Amendment values. I argue throughout the book that freedom of association is a First Amendment right rooted in the Assembly Clause and that membership requirements are essential to the exercise of this right.

It follows, then, that the government would not be able to make distinctions in conferring benefits to associations based on their associational makeup because that would be a violation of the protections of the Assembly Clause, just as refusing those benefits to groups or persons based on their expression is a violation of the Speech Clause. The *Martinez* Court insisted that the university's regulations are not a violation of the students' First Amendment

rights because they are not a violation of the individual right to free speech. This avoids the real First Amendment issue: whether a state institution can create a First Amendment forum for groups to form and then determine the associational requirements of the groups that form there. I argue that the Assembly Clause forbids such an action.

I don't understand why the government should be able to offer a subsidy in the context of First Amendment rights and thus convert the exercise of those rights into government speech. Such an understanding would permit an outrageous outcome. For example, it is well established that public parks are traditional public forums open to protesters and the government may not distinguish between speakers. Could a city require a small subsidy of, say, $300 to be given to protesters to facilitate protests and then refuse to permit access to the public park to speakers with whom it disagrees, given that it is offering funding to speakers and therefore all protesters in the park are government speakers? Surely that would be impermissible. The city could not deny access to the park, nor could it use a regulation that attached money to the exercise of First Amendment rights as a means to exclude from the forum persons who try to exercise those rights.

Further, I would argue that if the $300 funding were presented as generally available funds to facilitate protests, then there would be a First Amendment issue in denying the funds at all. The government could, of course, cut the funding program with no First Amendment issue. Just as the university could cut student fee funding or abolish the student organization program altogether. What it cannot do is offer funding as part of the student organization forum, which the Court continues to insist is protected by the First Amendment, and then use the fact of its funding to claim no First Amendment violation when it impinges on freedom of association. As I explain in the book, the right to determine membership is essential to freedom of association, which is grounded in the Assembly Clause. For reasons I argue there, in these matters it needs to be treated as on par with viewpoint discrimination. It makes no sense to say that the government can create a forum,

offer some paltry sum to groups in that forum, and then insist that because funding is implicated it may exclude groups from the forum entirely. The primary issue in *Martinez* is not funding but access to the forum. CLS was not just denied funding; the group was denied student organization status.

As I write in the book, the Court had three other options (120–22). First, it could have ruled for CLS, recognizing the right of association is the primary right at issue. I prefer this outcome. Second, it could have distinguished between forum and funding, recognizing the right of association to form a group in the forum while allowing the student fee funding to be a matter of university discretion. This would cause problems with the Court's opinion in *Southworth*, where it held that student fee funding for student groups was not compelled speech because distribution is viewpoint neutral, since distribution would in fact be government speech. It would also overturn *Rosenberger*. Third, the Court could have held the student organization forum a nonpublic forum and allowed the university to impose whatever regulations it liked on the forum. This would cut against decades of precedent, but at least it would not have been an explicit ruling that government regulation of membership requirements in a limited public forum does not violate the First Amendment.

The reason I think *Martinez* is so dangerous is that the Court recognizes the student organization forum at a public university as a place where First Amendment rights are practiced. But the formation of groups, the primary purpose for the forum, is not protected by the Court in its essential form, which requires the exclusion of nonconforming members.

In short, I do not argue that all government funding should be regarded as limited public forum. I argue for making the important distinction between when the government is speaking through its funding and when it is funding the practice of First Amendment rights through generally available funds and benefits. I write, "We want to avoid a situation where the mere presence of government funding implies government endorsement or government speech, where all government funding is considered discretionary spending.

This is dangerous if for no other reason than that in the modern administrative state, government funding is everywhere, including in the public forum" (165). This is hardly radical. Inazu says the same thing, and I cite his work repeatedly in my discussion of this issue.[42]

Freedom of Economic *Association?*

The second major objection is that my conception of freedom of association is so broad as to include associational protection for business corporations. Schweber writes, "Sheahan insists that the right to form commercial associations is constitutionally protected." While I nowhere say that commercial associations are constitutionally protected, he gets to this idea through my assertion that the right of association protects all sorts of associations, large and small, *Gemeinschaft* and *Gessellschaft*, which he reads as having broad implications for economic associations. Schweber continues,

> Whole areas of ordinary commercial regulations are suddenly called into question: can state law, for example, require elements of corporate governance that contradict the CEO's statement of a company's dogma? Almost all public disclosure laws are presumptively invalid; if Alabama could not require an association (the NAACP) to reveal its membership, corporations cannot be required to disclose their shareholders. . . . Suddenly a right of exclusion with respect to "membership" includes relations of employment, business transactions, political participation, and ownership. These rights are expanded to the point where they swallow the entire concept of antidiscrimination law.

These are indeed alarming implications. Perhaps made more egregious by the fact that Schweber contends that "[n]one of this is hinted at in Sheahan's book; one has the impression that these issues were never considered."

Schweber is simply wrong in every particular. I do not argue for a right to form corporations, and I explicitly consider the application of my argument to corporations and explicitly reject it.

There is a long-standing distinction between how the law treats commercial and noncommercial associations. If I thought that distinction should be removed, I would need to make that explicit. Otherwise few would think my arguments apply to corporations even if I wanted them to. The protection of freedom of association for voluntary associations, the language I use throughout the book, does not generally bring to mind businesses or economic entities. I open the book with three examples of associations that do not garner First Amendment protection under the Supreme Court's current jurisprudence: a sorority, an LGBTQ social club, and a Catholic gay group. The cases I discuss deal with a student group, the Boy Scouts, a parade, and a networking association, among others.[43] The last is the only one that potentially implicates economic issues, and the Court fails entirely to provide any concrete evidence that the exclusive practices of the association is actually detrimental to the economic prospects of women.[44] Like Inazu, I remain open to the possibility that that case was rightly decided, although certainly not for the reasons the Court gave.

Furthermore, I explicitly consider whether my argument applies to corporations, and I conclude that it does not. I write,

> In this book I am discussing voluntary associations such as CLS. My argument would not apply in the commercial context[;] . . . the functional autonomy test or FAPA need not permit businesses to discriminate on the basis of race. . . . International corporations, hotels, restaurants, and the like would not be able to claim the functional autonomy test as constitutional protection for rejecting patrons or refusing to hire employees on the basis of race (or any other protected status). (161)

Since I make a distinction between commercial and noncommercial groups, Schweber's critique falls flat. I am neither intentionally nor unintentionally exempting corporations from antidiscrimination laws. Inazu, as Schweber points out, endorses this difference, and so do I.[45]

As Schweber notes, my reasons for permitting more government oversight in the arena of education is its effect on individuals' economic prospects, following the Court's similar concerns. It would make little sense to then give full and unmitigated protection to businesses to discriminate on bases I refuse to allow to student groups. Even if I had not explicitly rejected the application of my theory to commercial enterprises (which I did), the logic of what I have to say is well within the bounds of the traditional demarcation between commercial and noncommercial associations. No judge or politician considering my proposed reforms would suddenly realize that he or she must destroy all of antidiscrimination law or else fail to implement the right of assembly.

Nonetheless, we might distill out of Schweber's critique here a more fundamental concern also expressed by Shiell: what is the limiting principle? As Shiell writes, "Not every associational purpose deserves constitutional protection, much less specifically First Amendment protection." I argue that the current limiting principle is inadequate and that the Assembly Clause provides protection for a variety of non-expressive groups. That's fine, but then where does the right of association stop? How can the Court know how to apply my judicial test in a way that does not annihilate all sorts of other lawful principles, such as antidiscrimination?

At the risk of sounding facetious, why don't we get some cases before the Court and find out? Inazu calls for litigation under the Assembly Clause, and I provide a means for the Court to consider what application of those protections might mean.[46] We cannot expect the protections of the Assembly Clause to appear fully formed even out of the mind of a more perceptive scholar than I.[47] That certainly was not the case for the Speech Clause. Expressive protections accrued over decades as the Court explored the expansive principle that the government "shall make no law . . . abridging freedom of speech," which included developing doctrines about its application and limits. The Court rightly recognized that an important expressive principle was incorporated against the states and that that principle was very broad. But it took many cases to work out the contours of that protection.

My proposals are an attempt to give federal courts guidance in pursuing this inquiry. What I aim for is "a balancing . . . between the prerogatives of state, individual, and association" (163), not an obliteration of individual rights or state prerogatives. I am not calling for absolute associational rights any more than most free speech advocates call for absolute free speech rights. But, the right of peaceable assembly protects the relationship between individuals, an associational right. The Court owes us an explication of what this right protects. The text of the First Amendment compels it. Concerns as to how this right might apply to commercial associations or handwringing over what it might do to unsettle current law are not adequate objections to the pursuit of the inquiry. If the Court wants to forego this inquiry, then it owes us an explanation for why the Assembly Clause should be ignored and why whatever associational rights we would otherwise have there do not deserve protection on par with our other First Amendment rights.

Notes

1. Robert Nisbet, *Making of Modern Society* (Liverpool: Wheatsheaf Books, 1986), 25.
2. Thomas I. Emerson, "Freedom of Association and Freedom of Expression," 74 *Yale Law Journal* 1, no. 3 (November 1964).
3. Three useful discussions of individualism and holism in social science include Joseph Samson Murphy, *Political Theory: A Conceptual Analysis* (Homewood, IL: Dorsey Press, 1968), 112ff.; Laird Addis, *The Logic of Society: A Philosophical Study* (Minneapolis: University of Minnesota Press, 1975), chaps. 4 and 5; and Julie Zahle and Finn Colin, eds., *Rethinking the Individualism-Holism Debate: Essays in the Philosophy of Social Science* (New York: Springer, 2014).
4. E.g., in his Constitution Day 2019 address at the University of Wisconsin–Stout. Luke C. Sheahan, "Freedom of Association: The First Liberty?"
5. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). In a 5:4 decision, the Court upheld the Hastings College of Law at the University of California, Berkeley policy requiring recognized student groups make membership and leadership open to "all- comers," even those who opposed the function and dogma of the group they are joining.
6. John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven, CT: Yale University Press, 2012).

7. Erica Goldberg, "Amending *Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Forum," 16 *Texas Journal on Civil Liberties & Civil Rights* 158 ((2011).
8. Jack Willems, "The Loss of Freedom of Association in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2020)," 34 *Harvard Journal of Law & Public Policy* 818 (Spring 2011).
9. David Brown, "Hey! Universities! Leave Them Kids Alone!: *Christian Legal Society v. Martinez* and Conditioning Equal Access to a University's Student-Organization Forum," 116 *Penn State Law Review* 163 (January 2011).
10. Kyle Cummins, "The Intersection of CLS and Hosanna-Tabor: The Ministerial Exception Applied to Religious Student Organizations," 44 *University of Memphis Law Review* 177 (2013).
11. Rene Reyes, "The Fading Free Exercise Clause," 19 *William & Mary Bill of Rights Journal* 725 (March 2011).
12. The principle is attributed to William of Occam (or Ockham) even though he did not originate it (it also appears, for example, in work by Aristotle and Ptolemy) and the phrase "Occam's razor" did not appear until centuries after his death. For a brief popular discussion, see Susan Borowski, "The Origin and Popular Use of Occam's Razor," AAAS (American Association for the Advancement of Science), June 12, 2012, https://www.aaas.org/origin-and-popular-use-occams-razor. For a more rigorous discussion, see Paul Vincent Spade, ed., *The Cambridge Companion to Ockham* (Cambridge: Cambridge University Press, 1999).
13. Emerson, "Freedom of Association," 14.
14. E.g., the "organicist" basis of Benito Mussolini's fascism. For one influential defense of an individualist basis, see Karl R. Popper, *The Open Society and Its Enemies: New One-Volume Edition* (Princeton, NJ: Princeton University Press, 2013).
15. Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000).
16. Nat Hentoff, *The First Freedom: A Tumultuous History of Free Speech in America* (New York: Delacorte Press, 1980).
17. *Gitlow v. New York*, 268 U.S. 652 (1925).
18. Perhaps even the right to privacy (intimate association).
19. Emerson, "Freedom of Association," 35.
20. The classic examples of what Nisbet is describing are the Catholic Church and the US Army. "Robert Nisbet and the Idea of Community," Russell Kirk Center (RKC), *Best of the Bookman*, July 31, 2011, https://kirkcenter.org/best/robert-nisbet-and-the-idea-of-community/.

21. But see *Gary B. v. Whitmer* Nos. 18-1855/1871 (6th Cir. 2020) holding that the Fourteenth Amendment guarantees a minimum level of education.
22. Sheahan's proposal is laid out in the form of four guides to judicial reasoning and a model statute. Space does not permit careful parsing of the elements of either.
23. This is not hypothetical; in May 2020 religious groups appeared at the Supreme Court arguing that they should be exempted from all laws prohibiting employment discrimination (specifically on the bases of age and disability) as an expansion of an existing rule that exempts religious organizations to discriminate in employment with respect to "ministerial" functions, a category that mimics the "expressive purpose" idea in many ways. See *St. James School v. Biel*, Sup. Ct. docket no. 19-348, argued May 11, 2020.
24. John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven, CT: Yale University Press, 2012), 186.
25. Luke C. Sheahan, "Freedoms like a Fox: The Constitutional Community and First Amendment Rights," in symposium "Should Groups Matter? Religion, Freedom, and Contemporary Civil Society," *Program for Research on Religion and Urban Civil Society* 1 (Spring 2020): 23–30.
26. See generally "Conclusion: The Plural Structure of Society and the Limits of Law," in Bruce P. Frohnen and George W. Carey, *Constitutional Morality and the Rise of Quasi-Law* (Cambridge, MA: Harvard University Press, 2016).
27. John D. Inazu, "The First Amendment's Public Forum," *William & Mary Law Review* 56, no. 4 (2015): 1169.
28. Robert Cover, "The Supreme Court, 1982 Term—Forward: *Nomos* and Narrative," *Harvard Law Review* 97 (1983): 4–68.
29. Nisbet is helpful here. He writes, "We do not really see 'individuals' in the sense of discrete, elemental human particles in the world around us. We no more see 'individuals' in this sense than we see the smallest elements of matter with which physicists work. We do indeed see human beings. In fact, that is all we see. . . . But it is equally true that we see human beings only in the roles, statuses, and modes of social interaction which are the stuff of human society." Robert A. Nisbet, *The Social Bond: An Introduction to the Study of Society* (New York: Alfred A. Knoff, 1970), 45–46. Much of this "stuff of human society," I contend, is what the First Amendment protects in the right of assembly. But notice Nisbet's balancing of what might be considered individualism, looking at the person, with a consideration of the social context, which

contextualizes our perception of the person. He is trying to bring together these perspectives.

30. Thomas I. Emerson, "Freedom of Association and Freedom of Expression," 74 *Yale Law Journal* 1, 35 (November 1964).
31. See generally Paul Horwitz, *First Amendment Institutions* (Cambridge, MA: Harvard University Press, 2013).
32. See "Recounted," in Inazu, *Liberty's Refuge*, 24–25.
33. See *Roberts v. Jaycees*, 468 U.S. 609 (1984); *Uphaus v. Myman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Communist Party v. Subversive Activities Control Board* (SACB), 367 U.S. 1 (1961); *Scales v. United States*, 367, U.S. 203 (1961); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2007); *Truth v. Kent, Sch. Dist*. 542 F.3d. 634 (9th Cir. 2008); and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).
34. *DeJonge v. Oregon*, 299 U.S. 353, 364, 365 (1937).
35. *Gitlow v. New York*, 268 U.S. 652 (1925).
36. *DeJonge*, 299 U.S. 353.
37. J.L. Talmon, *The Origins of Totalitarian Democracy* (New York: W. W. Norton, 1970).
38. John D. Inazu,"The Four Freedoms and the Future of Religious Liberty," *North Carolina Law Review* 92 (2014): 795.
39. E.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).
40. *Lochner v. New York*, 198 U.S. 45, 6 (1945).
41. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983). "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." Also see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989).
42. See generally John D. Inazu, *Confident Pluralism: Surviving and Thriving Through Deep Difference* (Chicago: University of Chicago Press, 2016), chap. 4.
43. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995); and *Roberts*, 468 U.S. 609 (1984).
44. A point Inazu makes. See Inazu, *Liberty's Refuge*, 16, 172–73.
45. Inazu, *Liberty's Refuge*, 166–68.
46. See Inazu, *Liberty's Refuge*, 186.
47. Inazu has some uncertainty and reservations over the application of his theory of assembly. See Inazu, *Liberty's Refuge*, 16–17.