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THE GOOD, THE BAD AND THE UGLY: RETHINKING THE VALUE OF ASSOCIATIONS

Robert K. Vischer*

INTRODUCTION

It has been nearly 170 years since Alexis de Tocqueville famously declared that “[i]n no country in the world has the principle of association been more successfully used . . . than in America.”¹ Viewed against the backdrop of today’s newspaper headlines, the statement seems to be showing its age. Anyone who assuredly pronounces associations a “success” for our democracy invites accusations of ignorance when it comes to associations’ role in the social fabric of twenty-first century America. Although associations like Habitat for Humanity still conjure up images of compassionate citizens strengthening their communities by joining together with other like-minded individuals, associations just as frequently garner attention for their socially divisive or destructive activities. Whether it’s the Augusta National Golf Club defiantly holding onto its men-only membership policy,² the Raelians flouting social norms by trumpeting their headlong pursuit of human cloning,³ pedophiles seeking solidarity in the North American Man/Boy Love Association,⁴ Matthew Hale’s World Church of the Creator stoking racial violence through the guise of religion,⁵

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1 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191 (Renaissance ed., Colonial Press 1900) (1835).

2 See John Boyette, *Augusta National Membership: “We Will Not Be Bullied,” Chairman Says*, *AUGUSTA CHRON.*, July 10, 2002, at A1.

3 See Mark Heinzl & Antonio Regalado, *Clonaid’s Claim Raises Doubt, Envy of Rivals*, *WALL ST. J.*, Dec. 30, 2002, at B1.

4 See Don Terry, *A.C.L.U. Will Defend Group that Advocates Legalizing Sex Between Men and Boys*, *N.Y. TIMES*, Sept. 1, 2000, at A14.

5 Hale’s World Church of the Creator, recently renamed the Creativity Movement, has been called “the most dangerous hate group in America” by the Anti-Defamation League. Lynn Arave, *Supremacist Focusing on Salt Lake*, *DESERT NEWS*, Mar. 21

or Operation Rescue challenging a community's standards of decency in the course of battling abortion,⁶ the panoply of groups defying widely held conceptions of the common good or championing polarizing causes under the amorphous auspices of the so-called "culture wars"⁷ would seem to suggest that de Tocqueville's ringing endorsement of voluntary associations is, at a minimum, in need of some serious rethinking.

Approaching the problem from a legal perspective—i.e., exploring the interaction between the law and the social impact of associations—appears, at first blush, to offer limited insight, for voluntary associations fit awkwardly into our traditional conception of public law. We tend to formulate legal interests, rights, and obligations in terms that are easily classified between the individual on one side and the state on the other. Even though associations defy either category, we try to force disputes involving associations into a close approximation of this bipolar framework. As courts wrestle, for example, with the Boy Scouts' exclusion of gays,⁸ a Catholic school's use of public money to educate low-income students,⁹ a Bible club's request to use public school facilities,¹⁰ or Amish parents' refusal to send their children to high school,¹¹ observers gravitate toward one of two perspectives. Generally, those who favor the association's side in a particular controversy frame the dispute as one pitting the freedom-loving association against the oppressive state. By contrast, those who oppose the association frame the dispute as one pitting the equality-seeking individual against the divisive association. Both characterizations have elements of truth, but they give rise to an unnaturally and unhelpfully segmented view of associations.

A deeper understanding of associations is possible if we view associations in their relational context. This requires an exploration, set

2002, at B6. The group leapt to prominence in the wake of a July 1999 spree in which one of its adherents shot several racial minorities, killing two. In January 2003, Hale was indicted for soliciting the murder of a federal judge. Bill Torpy, *Heat Still on Domestic Terror Groups*, ATLANTA J.-CONST., Apr. 19, 2003, at A5.

6 See Cristina C. Breen, *His is a Ministry of Confrontation*, CHARLOTTE OBSERVER, June 22, 2003, at 1A; Stan Finger, *Truck's Graphic Images Take Aim at Abortion*, WICHITA EAGLE, Aug. 19, 2002, at 1.

7 See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42 (1991) ("I define cultural conflict very simply as political and social hostility rooted in different systems of moral understanding. The end to which these hostilities tend is the domination of one cultural and moral ethos over all others.").

8 See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

9 See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

10 See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

11 See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

forth in Part I of this Article, of the divergent individualist and collectivist inclinations of American society and identification of the paths by which associations mediate between these two tendencies. This exercise, in turn, will shed new light on the Supreme Court's handling of various cases involving associations, as it allows us to see the core associational values at stake in a given case and flesh out the individualist-collectivist tensions at play. Set forth in Part II, this aspect of the inquiry is informed by First Amendment principles but not constituted solely by them, as the reasons we value associations transcend the limited reach of constitutional analysis. Viewed in a more holistic light—i.e., engaging the associational interests and values at issue, rather than simply the constitutional doctrine implicated—the resolution of the cases will take on a different gloss, for the disputes are not zero-sum contests between the individual and the association or the association and the state, but rather the association in tension with both.

In this regard, civil society¹² revivalists have been wise to acknowledge the central role of voluntary associations in maintaining the vitality of our democracy, but have been too reflexive in favoring associational interests over individual and state interests. In so doing, they ignore the fact that the value of associations derives, in significant part, from the extent to which associations stand in tension with the individual on one side and the state¹³ on the other. In other words,

12 Although the phrase is often constricted or expanded depending on an author's viewpoint, civil society is helpfully understood as the "sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication." JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* ix (1992). Sara Evans and Harry Boyte offer the related concept of "free spaces," which they define as "settings between private lives and large-scale institutions where ordinary citizens can act with dignity, independence, and vision." SARA M. EVANS & HARRY C. BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA* 17 (1986).

13 By "state," I simply mean the apparatus of government. Given persistent criticism that "it is more fruitful and accurate to view the state (or government) as a loose coalition of more or less independent collectivities," Meir Dan-Cohen, *Between Selves and Collectivities: Towards a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1215 (1994), this Article does not presume a conception of the "state" as some monolithic, unitary sovereign, nor does it purport to demarcate precise boundaries between the state and the association. See, e.g., Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1378 (1994).

The very fact that residential associations can fulfill the goals that we identify with traditional local governments makes us more skeptical of conferring on them the latitude that we grant to other voluntary associations, such as the Boy Scouts, the Rotary Club, the country club, or a law firm partnership.

associations are important relationally, as their relationship with the individual and the state equips them to fulfill a mediating role. This role allows associations to serve as bridges between the individual and the surrounding, impersonal society,¹⁴ but it also injects tension into the association's relationships with the individual and the state. I submit that this mediating tension is a necessary element of the association's foundational role in our society. Indeed, when any single anchor of the association in relationship (individual versus association versus state) is given unfettered authority to pursue its own interests at the expense of the others, the resulting disparity eviscerates the association's mediating values, thereby threatening to negate the very reasons we seek a vibrant associational life in the first place.

This association-centered characterization may seem of limited relevance to the culture wars, the litigation elements of which have been waged primarily through disputes between individuals and the state, with no obvious associational presence. And the apparent zero-sum nature of the cases seems undeniably stark in the culture war context, as the very nature of adjudication seems to preclude the possibility that multiple, contradictory visions of the good could maintain a meaningful mediating influence. Part III of the Article explores these themes in light of the Supreme Court's most recent volley in the culture wars, *Lawrence v. Texas*,¹⁵ a case that underscores the importance of the association's mediating role, even where the role is not facially evident and the potential for such a role seems foreclosed to all but the victor.

The attention paid by scholars to voluntary associations thus far has tended to focus on various aspects of a normative question: what role should associations play in society's efforts to foster the civic virtues and skills necessary to its own survival?¹⁶ The debate usually co-

Id. This Article simply seeks to inject a greater understanding of the association's relational context, at the paradigm level, into the traditional binary view of associational interests.

14 Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1715 (1988):

Intermediate organizations fill the gap between individuals and the state. On the one hand, they are vehicles that reflect and amplify individual members' interests. On the other, they are subnational bases for social integration and the formation of ideals and beliefs. They are both instrumental and formative, both mechanical and organic, both conveyor belts for interests and nurturing grounds for values.

15 123 S. Ct. 2472 (2003) (striking down a statute prohibiting same-sex sodomy).

16 See, e.g., Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1573 (2001):

In sum, if it is right that our liberal democratic constitutional order is to be understood as a shared normative project dedicated to the pursuit of ideal

alesces around familiar liberty (pro-association) versus equality (anti-association) battle lines. While this is certainly a worthwhile and necessary inquiry, a more fundamental question remains: exactly *how* is an association valuable? There has been little comprehensive effort to identify and classify the paths by which individual participants and the democratic state derive value from associations and to explore how those paths are implicated in the adjudication of disputes involving associations.¹⁷

Recognizing the mediating tension of associations is no mere academic exercise, however, for it provides a more nuanced functional justification for the association's robust (but not unfettered) resistance to individualist and collectivist pulls—even where that resistance culminates in the widely polarized, frequently vitriolic associational landscape of the culture wars. This does not negate our concern over the social harm inflicted by certain associations, but it does give us a sense of what is at stake when we seek to remedy that harm by curtailing the free operation of the associational marketplace. If we can construct a suitable framework for categorically determining how associations are valuable, perhaps we can redeem de Tocqueville's initial prognosis, the culture wars' polarizing tendencies¹⁸ notwithstanding.

ends like justice, then the question is: how do our institutions . . . provide or fail to provide for the virtues that facilitate the success of this project?

Id.; Linda C. McClain & James E. Fleming, *Foreward: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 290 (2000) ("Should government attempt to secure congruence between democratic values and the structure and values of voluntary associations, or would such an effort offend commitments to pluralism and diversity?").

17 Jason Mazzone has, however, ably endeavored to expand the constitutional grounding of associational rights from being merely expressive to political, relying in part on arguments that associations are essential to popular sovereignty. See Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 697 (2002) ("In associations, individuals develop skills and undergo experiences that better equip them to take care of themselves, and to solve problems without having to rely on the intervention of the state."). And, of course, other legal scholars have ably explored the legal doctrine underlying associational rights. See, e.g., Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 830–36 (2002). Indeed, in Daniel Farber's words, "[e]xpressive associations have never loomed larger in American constitutional law." Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1483 (2001).

18 See Robert K. Vischer, *Public Opinion and the Culture Wars: The Case of School Vouchers*, 2002 U. ILL. L. REV. 477, 479–81, 487–94 (reviewing TERRY MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC (2001)).

I. THE NATURE OF ASSOCIATIONS

A. *The Individual and the Collective*

American society embodies, to varying degrees, the vast middle ground between individualist and collectivist conceptions of human existence. We pride ourselves on our devotion to individual rights and the rhetoric of individual worth, both of which find traction in an individualist view that portrays society simply as a means of satisfying the preferences of individuals.¹⁹ In this regard, not only are individuals themselves the “ends” that society serves, but they are the reality, in contrast to the abstraction that is society.²⁰ In sharp departure from the myriad obligations and roles forced on humans in earlier ages and more traditional cultures, the individualist view celebrates the “post-aristocratic, unbound self.”²¹ This view of society is steeped in the language of individual rights and consent.²² In realistic terms—as opposed to the “pure” individualism often reflected in our rights-based rhetoric—individualism is

a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others.²³

Notwithstanding the individual's primacy in our thought and language, we are, in fact, “encumbered” by countless human relationships and obligations to the larger community, and not all of these encumbrances arise from an individual's rational cost-benefit analysis. This reality is reflected, to varying degrees, in collectivist (or “organic”) accounts of modern society, which hold that society is real,

19 See Leonard G. Boonin, *Man and Society: An Examination of Three Models*, in VOLUNTARY ASSOCIATIONS 69, 73 (J. Roland Pennock & John W. Chapman eds., 1969). Ervin Laszlo explains individualism as a view of society holding that “man's individual being will tend to determine, or at least to mould, the shape of his social existence. Society being the sum total of the social existences of individual beings, it tends to be determined by individuals, in this view.” ERVIN LASZLO, INDIVIDUALISM, COLLECTIVISM, AND POLITICAL POWER 6 (1963).

20 Boonin, *supra* note 19, at 73 (“What else can be ultimately real besides individuals and their behavior?”).

21 MARK REINHARDT, THE ART OF BEING FREE 39 (1997) (discussing de Tocqueville).

22 Boonin, *supra* note 19, at 73–74 (explaining that “the basis of obligation” between individuals in society “lies in consent”).

23 HARRY C. TRIANDIS, INDIVIDUALISM & COLLECTIVISM 2 (1995).

and that the reality of individuals can be understood only as they relate to the whole of society.²⁴

It is crucial to distinguish the political from the sociological when analyzing the collectivist model, for the former, as reflected in Soviet-style societies, has limited resonance with the American mind. Put simply, collectivism in the sociological sense focuses on the acculturation of a society's members; collectivism in the political sense focuses on the orientation of a society's institutions. Our democracy's emphasis on popular participation may be rooted in collective action, but its individualist orientation is unmistakable. And while most Americans would find little to quibble with in Jean Cohen and Andrew Arato's assertion that "participation in modern societies is ultimately only illusory if there is no small-scale participation in addition to representative parliaments,"²⁵ such participation is understood as the preferred mechanism by which to maintain the vitality of the democratic processes on which individual rights and well being depend. A truly collective political model, on the other hand, generally is understood to subvert the ethical relevance of the individual:

All [political] programmes deal with the individual as with the collectivity, but individualism deduces the criteria of the collectivity from the well-being of the individual, while collectivism deduces criteria for the individual from the organization of the collectivity. The ethical accent lies on individual good in one, and on collective good in the other.²⁶

As a principle of governance, then, collectivism remains a foreign, even offensive, concept to the majority of Americans. Nevertheless, as a description of our sociological reality, collectivism is a relevant counterweight to the idealistic otherworldliness of pure individualism. Modern individuals are defined, in great part, by belonging—to family, workplace, religion, community, nation, etc. At each level of belonging, the individual is subverted, to varying degrees, to the will of the group—not necessarily in a coercive way, but in a way that defies the unadulterated primacy of the individual:

Collectivism may be initially defined as a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily

24 Boonin, *supra* note 19, at 74 ("What is real is society as a whole and the members of society are only real in relation to the whole."). Laszlo identifies collectivism as the view that "social existence is primary and individual being secondary, [so that] the existence of man i.e. his relations to the group, will be determinant of his being. Thus society is seen to mould the individual." LASZLO, *supra* note 19, at 6.

25 COHEN & ARATO, *supra* note 12, at 418.

26 LASZLO, *supra* note 19, at 39.

motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives.²⁷

This view emphasizes that the interaction of individuals creates properties and characteristics that cannot be found in the individuals themselves,²⁸ and that such interaction creates roles and expectations that negate the fiction of the "unbound self."²⁹

While some express fear that our country is proceeding further down the path of collectivism in the political sense,³⁰ it suffices for our purposes to recognize that the symbolic primacy of the individual in our society does not mean that the individual operates unfettered from the concerns or the will of the collective—nor, the skeptic might add, could such be true in any modern society not made up of hermits. At the same time, of course, collectivism in the normative, political (Soviet) sense—as opposed to the descriptive, sociological sense—finds little support in American society.³¹

Judged against the reality of everyday existence in our society, the collectivist and individualist models are, standing alone, unrealistic descriptions of our condition. As Philip Wogaman explains, humans have fully personal and fully social characters; we need to know and

27 TRIANDIS, *supra* note 23, at 2.

28 See *id.*

29 As Michael Sandel observes, "[t]he liberal self-image and the actual organization of modern social and economic life are sharply at odds. Even as we think and act as freely choosing, independent selves, we confront a world governed by impersonal structures of power that defy our understanding and control." MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 323 (1996).

30 See, e.g., Joan Biskupic, *Attention Turns Back to Liberty*, USA TODAY, Nov. 1, 2002, at 17A (reporting that "[i]n public opinion polls, the courts and Congress, there is an emerging resistance to what a growing number of critics say is an extraordinary assault on civil liberties by the Bush administration").

31 Indeed, "pure" collectivism may be as unattainable as "pure" individualism. Ernest Gellner, for example, argues that the extreme brand of collectivism practiced by Marxists had an end result that was undeniably individualistic:

[The Marxist] system led to an atomized, individualized society, where it was barely possible—or literally not possible at all—to found a philatelic club without political supervision. Far from creating a new social man, one freed from egotistic greed, commodity fetishism and competitiveness, which had been the Marxist hope, the system created isolated, amoral, cynical individualists-without-opportunity, skilled at double-talk and trimming within the system, but incapable of effective enterprise. In these circumstances, the very thing which Marxism had proclaimed to be a fraud was suddenly seen to be something that was to be most ardently desired [i.e., civil society].

ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 5 (1994).

be known by each other.³² Cohen and Arato put it slightly differently: humans are neither atomistic nor communal but rather “associated selves,” a reality which dictates that rights do not simply secure negative liberty, but also the “communicative interaction of individuals.”³³ Both the individualist and collective models evidence kernels of truth about society: collectivists are correct to assert that society is real, but they err in portraying it as a substantive concept, rather than a relational concept—i.e., society is a relationship among individuals.³⁴ Individualists, on the other hand, are correct to resist the notion of individuals as means to society’s collective ends, but in doing so they give short shrift to the reality that humans are, to a significant extent, defined and constituted by their social roles and obligations.³⁵ To the extent that collectivism has undermined the legitimacy and moral significance of the individual, and to the extent that individualism “has led to the notion of pure, undetermined choice, free of tradition, obligation, or commitment, as the essence of the self,”³⁶ both models are, in both a normative and empirical sense, found lacking.

B. *The Association at the Center*

At the center of this individualist-collectivist duality lies the association. Associations reflect the fact that the individual’s realization of value is defined, in significant part, in relation to the collective (e.g., glory, power, and liberty are meaningless outside the collective), and the collective’s realization of value is defined, in significant part, in relation to the individual (e.g., socialization, function, and roles arise from the individual’s self-furthering choices). In this regard, the individualist and collectivist models, while politically disparate, are sociologically codependent.

Associational life, then, represents the overlap of the individual and the collective, but, to a significant extent, it is in tension with

32 J. Philip Wogaman, *The Church as Mediating Institution: Theological and Philosophical Perspective*, in DEMOCRACY AND MEDIATING STRUCTURES 69, 70–71 (Michael Novak ed., 1980).

33 COHEN & ARATO, *supra* note 12, at 22.

34 See Boonin, *supra* note 19, at 74 (explaining the organic-holistic, or collective, approach).

35 David Guinn challenges modern liberalism to recognize “that we belong to and identify with our larger society not only as individual members of that society but also as members of smaller communities of identity that are also members of that larger society.” DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT, AND THE THEORY OF DEEP DIVERSITY 17 (2002).

36 ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 152 (1985).

both.³⁷ It is not that the "purer" models of individualism and collectivism seek to negate the existence of associations, but it is a drastically eviscerated associational life that each model tolerates. Collectivists see associations as functioning, if not as agents of the collective will, at least not as forces to undermine the collective will.³⁸ Individualists, on the other hand, see associations as nothing more significant than a collection of individuals—a sum not greater than its parts.³⁹ When afforded their natural vitality and vibrancy, however, associations are the vehicle by which we transcend our individual, atomistic existences and carve out a communal role for ourselves that is distinct from, and often in opposition to, the identity of the state.⁴⁰

This function is sorely needed. In the estimation of Robert Bellah and company, the question is not whether individualism is inherently good or bad, but rather

whether an individualism in which the self has become the main form of reality can readily be sustained. What is at issue is not simply whether self-contained individuals might withdraw from the public sphere to pursue purely private ends, but whether such individuals are capable of sustaining either a public or a private life.⁴¹

The problem, in Bellah's view, is the alienation that has accompanied modern visions of individualism:

The idea that institutions are objective mechanisms that are essentially separate from the lives of the individuals who inhabit them is an ideology that extracts a high moral and political price. . . . By imagining a world in which individuals can be autonomous not only from institutions but from each other, [the classical liberal view] has forgotten that autonomy, valuable as it is in itself, is only one virtue

37 See *id.* at 154 ("[W]e live somewhere between the empty and the constituted self," and this "tension can be invigorating, helping to keep both individual and community vital and self-critical.").

38 In this spirit, Hobbes referred to "corporations" as an "infirmity of a commonwealth . . . which are as it were many lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man." THOMAS HOBBS, *LEVIATHAN* 218 (Michael Oakeshott ed., Basil Blackwell 1946) (1651).

39 As Mill put it, "the liberty of the individual, in things wherein the individual is alone concerned, implies a corresponding liberty in any number of individuals to regulate by mutual agreement such things as regard them jointly, and regard no persons but themselves." JOHN STUART MILL, *ON LIBERTY* 113 (John Gray ed., Oxford Univ. Press 1991) (1859).

40 As Robert Nisbet explains, such "local centers of authority and allegiance are vital not only to human personality and freedom but to any genuine sense of the large community of which they are organically component parts." ROBERT NISBET, *THE SOCIAL PHILOSOPHERS* 414 (1973).

41 BELLAH ET AL., *supra* note 36, at 143.

among others and that without virtues such as responsibility and care, which can be exercised only through institutions, autonomy itself becomes . . . an empty form without substance.⁴²

At the other extreme, collectivism gives rise to the same sense of alienation, for "[t]he tightening of power at the center . . . unbinds the threads of the social fabric,"⁴³ which leads to alienation from one's self, and alienation from "the impersonal institutions of modern society."⁴⁴

It is this alienation—whether viewed as emanating from excessive individualism or collectivism—to which the mediating function of associations responds. Associations can overcome an individual's self-alienation by connecting her with other individuals in a freely chosen community, thereby infusing her with a sense of purpose, place, and meaning. And associations bridge the gap between an individual and the collective by giving her a voice and connecting her to social power. This is the mediating function of associations, a role that has been widely acknowledged.⁴⁵

What has often been overlooked, however, is that this mediating function puts associations in tension with both the individual and the state. On one hand, associations resist the collective pull of the state and its interests and compulsions, however well intentioned; on the other hand, associations flout the perceived primacy of the individual that is expressed in our liberal rights-based regime.⁴⁶ This dual resistance is not some unfortunate byproduct of associations to be challenged or, at best, reluctantly tolerated. Rather, this dual resistance—or mediating tension—is the very core of associational life from which individual participants and the collective derive value.

42 ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 12 (Vintage 1992) (1991).

43 BRAD LOWELL STONE, ROBERT NISBET: COMMUNITARIAN TRADITIONALIST 34 (2000).

44 *Id.* at 35. Stone continues:

In the place of community, there are vast institutions and organizations that fragment the individual into the mechanical roles he is forced to play, none of them touching his innermost self but all of them separating the man from this self, leaving him, so to speak, existentially missing in action.

Id. (internal quotation marks omitted).

45 See, e.g., DEMOCRACY AND MEDIATING STRUCTURES, *supra* note 32 *passim* (presenting essays on the role of associations as mediators between the individual and society); RICHARD JOHN NEUHAUS & PETER BERGER, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* *passim* (1977).

46 As Gianfranco Poggi puts it, the process of association "opposes the atomizing tendencies of democracy and the central government's tendency to overexpand its powers." GIANFRANCO POGGI, *IMAGES OF SOCIETY: ESSAYS ON THE SOCIOLOGICAL THEORIES OF TOCQUEVILLE, MARX, AND DURKHEIM* 58 (1972).

Before we can define the mediating tension of associations, we must lend some clarity to the notion of associations' mediating function—that is, how exactly do associations mediate between the individual and the state, and how does that process, in turn, benefit both the individual and collective aspects of our existence. By way of unpacking this concept, I propose four mediating “values” that allow voluntary associations to serve as bridges between the individual and the state, and that capture the essence of the benefits derived from associations by individual participants and the surrounding collective society. Put simply, the mediating values are *identity*, *expression*, *purpose*, and *meaning*. These values are, in essence, subcategories of the overarching individual-association-state tension, as the mediating process is largely indistinguishable from that tension.

Before exploring these values in depth, a caveat and some context are necessary. First, the caveat: much of my analysis focuses on religious associations, primarily because they are such a crucial component of voluntary associations in this country. Nearly one-half of all associational memberships in this country are church related, one-half of all volunteering occurs in a religious context, and one-half of all personal philanthropy is religious.⁴⁷ Further, there is a significant spillover effect, as churchgoers are substantially more likely to be involved in secular associations.⁴⁸ And because religion is, at its center, about community,⁴⁹ religious associations provide valuable insight into the sense of belonging that is made possible by associational life.

Of course, given that courts' resolution of disputes involving religious associations is usually driven by the Establishment or Free Exercise Clauses, the constitutional principles to be derived from such cases are of limited applicability to nonreligious associations. But as stated above, the purpose of this Article is not simply to expand our understanding of associational prerogatives under the Constitution, but rather to expand our understanding of the reasons we value associations. In this regard, the mediating values displayed by religious associations can be found, to varying degrees, in all associations. Studying the manner in which those values are implicated by the way courts resolve disputes involving associations lends greater clarity to

47 ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 66 (2000).

48 *Id.*

49 See, e.g., NISBET, *supra* note 40, at 162 (“We may commonly think of religion as concerned with the supernatural, and it usually is; but the deepest roots of religion lie in this earth, in man’s experience of the social and moral community that religion has everywhere provided in one shape or other.”).

our understanding of associations' mediating role, regardless of the constitutional doctrine underlying the particular decision.

Finally, some context: a vibrant associational life in the United States has long been looked to as a key foundation of the country's political health. De Tocqueville viewed voluntary associations and other mediating institutions "as our society's distinctive principle."⁵⁰ De Tocqueville famously observed that "[w]herever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association."⁵¹ He viewed American reliance on associations both as a bulwark against tyranny⁵² and as an essential inculcator of democratic values,⁵³ concluding that "[i]f men are to remain civilized, or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased."⁵⁴ Notably, he defined association not just as a noun, but expansively as a verb—"a practice of relating to others."⁵⁵

Nearly two centuries later, associations remain at center stage of the public consciousness, thanks in part to Robert Putnam's bestselling book *Bowling Alone*, in which he traces (and laments) the voluntary association's decline, and which drew widespread attention to,

50 John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 491 (2002) ("Tocqueville observed that the vibrancy, innovation, and beneficence of American society did not come from its rulers but bubbled up from below.").

51 2 DE TOCQUEVILLE, *supra* note 1, at 114.

52 1 *id.* at 195 ("There are no countries in which associations are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted.").

53 2 *id.* at 117:

Feelings and opinions are recruited, the heart is enlarged, and the human mind is developed by no other means than by the reciprocal influence of men upon each other. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations.

54 2 *id.* at 118.

55 REINHARDT, *supra* note 21, at 39. De Tocqueville certainly was no pioneer in extolling the virtues of associational life in his era, as Adam Smith just as staunchly, though less famously, advocated for associations years before across the Atlantic. See generally ADAM SMITH, *THEORY OF MORAL SENTIMENTS* 129 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

Were it possible that a human creature could grow up to manhood in some solitary place . . . he could think no more of his own character . . . than of the beauty of deformity of his own face. . . . Bring him into Society, and he is immediately provided with the mirror which he wanted before.

Id.

and commentary on, our nation's rapidly diminishing social connectedness.⁵⁶ Similarly ground-breaking has been the work of Richard John Neuhaus, who, along with Peter Berger, initially coined the term "mediating structures"⁵⁷ and spawned an entire genre of work aimed at identifying and promoting the conditions in which various institutions can best mediate between the individual and the State.⁵⁸

Not surprisingly, the subject has not escaped the notice of legal academics, as symposia sponsored in recent years by the law schools at Chicago-Kent, Fordham, Chicago, and Minnesota have been devoted to civil society, civic virtue, mediating institutions, and the freedom of expressive association, respectively.⁵⁹ Legal commentators generally have pointed out the importance of voluntary associations to a healthy American democracy or, conversely, have cautioned against deferring to the antidemocratic excesses of associations. Most of this work focuses on the ways in which associational life benefits or harms society at large, particularly on the interaction of associations and the societal ideals of liberty and/or equality.⁶⁰ For the most part, constitutional and normative inquiries have been at the foreground; the mediating role of associations has usually been taken as a given, with little systematic understanding of the pathways by which the association mediates, nor of the extent to which those pathways are implicated in real world disputes involving associations.

II. THE MEDIATING VALUES OF ASSOCIATIONS

In describing the paths by which individual participants and the surrounding collective society derive value from associations, we must, by necessity, paint with a fairly broad brush, for the value will vary widely based on the type of association at issue. Most obvious is the contrast between groups offering a clear and largely undisputed benefit to society (e.g., Habitat for Humanity) and groups having a clear

56 See PUTNAM, *supra* note 47 *passim*.

57 See NEUHAUS & BERGER, *supra* note 45 *passim*.

58 See, e.g., J. Philip Wogaman, *The Church as Mediating Institution: Contemporary American Challenge*, in DEMOCRACY AND MEDIATING STRUCTURES, *supra* note 32, at 85.

59 Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289 (2000); Symposium, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1213 (1994); Symposium, *The Constitution and the Good Society*, 69 FORDHAM L. REV. 1573 (2001); Symposium, *The Freedom of Expressive Association*, 85 MINN. L. REV. 1475 (2001) [hereinafter *Expressive Association*].

60 One method for engaging this inquiry is to view associations through the prism of a particular Supreme Court decision, such as *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See *Expressive Association*, *supra* note 59, at 1515, 1591, 1639, 1669 (focusing on *Dale*).

and largely undisputed negative impact on society (e.g., the Ku Klux Klan). This contrast is a potential stumbling block for any broad endorsement of associational life, and I endeavor to address it in two of the following sections.⁶¹ Even among associations that play an undeniably positive civic role, however, there are wide variations in the impact they have on participants and their surrounding communities. As a general matter, Robert Putnam argues that horizontal ties (e.g., a bowling league) produce more social capital⁶² than vertical ties (e.g., the Catholic Church).⁶³ Distinctions must also be drawn based on the “thickness” of trust and participation called for by associations. A relatively “thin” form of membership—e.g., a club that gathers once a month to watch Humphrey Bogart movies, with little opportunity for interpersonal reliance or relationship building—will not produce as much social capital as a thicker form—e.g., a weekly support group where interpersonal reliance and relationship building are central to the group’s mission. At a certain level, however, exceedingly “thick” groups—David Koresh and his followers, to cite an extreme example—tend to foster a sense of distrust toward outsiders, which diminishes any resulting public social capital.⁶⁴

For the most part, these differences are not material to the analysis set forth below. The four mediating values trace the paths by which associations mediate between the individual and the state; they do not purport to describe the actual function of all associations, for not every association is equally adept at fulfilling its mediating role. To whatever degree an association successfully mediates, however, I submit that it does so through a combination of identity, expression, purpose, and meaning. These values not only help bridge the gap between the individual and the state, but in doing so they place the association in significant tension with both the individual and the state. A fresh look at some of the key Supreme Court association cases underscores this point, shows why the tension is a key component of the mediating function, and helps us identify the principles necessary for the tension’s maintenance.

61 See *infra* Parts II.A, II.D.

62 “[S]ocial capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.” PUTNAM, *supra* note 47, at 19.

63 Carla M. Eastis, *Organizational Diversity and the Production of Social Capital: One of These Groups Is Not Like the Other*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 157, 158 (Bob Edwards et al. eds., 2001) [hereinafter BEYOND TOCQUEVILLE].

64 Kenneth Newton, *Social Capital and Democracy*, in BEYOND TOCQUEVILLE, *supra* note 63, at 225, 228.

The significance of the four values stems from the fact that, in my view, they correspond to the four dimensions in which the mediating relationship occurs: place (identity), voice (expression), power (purpose), and autonomy (meaning). That is, associational identity presumes a sense of place, or a sense of belonging, among its members; expression presumes a common voice—i.e., the means to express; the pursuit of a common purpose presumes that the association has access to sources of social power; and the facilitation of shared meaning presumes that the association has autonomy from state intrusion sufficient to foster members' common priorities and values.

Together, the four mediating values carve out a middle ground between the two alienating extremes of modern existence—i.e., they allow the individual to transcend her own atomistic existence without being swallowed up by an all-encompassing state. For this type of transcendence, the four dimensions must be accounted for. First, the individual must have a sense of place in the world that goes beyond her individual personhood and is distinct from the surrounding collective. In this regard, the individual's identity consists not just of who she is, but who she is in relation to others and to the state. Second, she must have a voice capable of expressing who she is in relation to others and to the state. In our society, an individual's voice is rarely loud enough to be heard on its own. Third, she must have the power to pursue objectives in accordance with her priorities, even if her priorities are not shared by those around her or by the state. Such power often comes through joining with like-minded others in pursuit of a common purpose. Finally, she must have the freedom to construct a life that is meaningful to her. Such meaning often will entail shared experience, devotion, or interests, and will require varying degrees of autonomy from state intrusion. The ability to facilitate shared meaning is distinct from the values of expression, identity, and purpose, however, because meaning is not located exclusively in those outward-looking values—some associations mediate simply by allowing their members to be left alone by the surrounding society.

These four values are simply rough descriptions of the paths by which associations mediate between the individual and the state. By no means are they clean, much less impermeable, categorical distinctions. Indeed, overlap abounds, and the somewhat circular quality of the values is readily apparent. Identity is made up of expressive, purpose-driven and meaning-laden components. Aside from justifying membership decisions based on considerations that are internal to the group (e.g., the comfort of current members), an association's chosen identity itself can be a powerful means of expression, as well as a means of effectuating the realization of a chosen purpose and the

facilitation of shared meaning (e.g., the private, all-white schools that were created in the South in response to desegregation efforts fall under all three categories). Expression, similarly, can serve three functions: pursuing a common purpose and shared meaning, as well as carving out a distinctive identity for the association (e.g., a church issuing an antiwar press release does all three). Purpose breaks the circle to the extent that an association's chosen purpose is neither identity-creating nor expressive (e.g., an association's PAC donating money to a political candidate without the knowledge of its membership or the public defies either category), but certainly both identity and expression underlie much of an association's purpose-driven activity. Meaning is foundational for the other three values: unless an association enjoys sufficient protection from state intervention to allow the pursuit of ventures found meaningful by members, the functions of expression, identity, and purpose would be eviscerated; the association would cease playing a mediating role, and would simply be an arm of the state.

This overlap is not to suggest that the four mediating values are devoid of discernible substance, but rather that the mediating role is not subject to rigid compartmentalization. Associations mediate by linking individuals in ways that make the individual's own existence more significant. The paths by which this process occurs—i.e., the pursuit of identity, expression, purpose, and meaning—flow into each other, inform each other, and must each be accounted for in any exploration of the reasons we value associations.

A. *Identity*

1. The Mediating Dimension of Place

Voluntary associations mediate between an individual and the state by allowing individuals to join together to pursue or maintain a common identity. One key function for all mediating structures is their ability to connect people to people.⁶⁵ In order to fulfill this role, associations must have the freedom to reflect their members' values and views, even when they conflict with the state's. After all, associations are not simply miniature versions of the state, but rather communities based on members' common adherence to a distinct set of beliefs. As a mediating value, the common identity fostered by associations is essential both to participants and to the state.

The common identity that is chosen through the act of associating gives individual members a sense of place in the world. Protecting

65 Wogaman, *supra* note 32, at 70–71.

an association's ability to pursue and maintain its common identity gives greater efficacy to an individual's identity-driven membership decision. Individuals benefit in the sense that they are empowered to carve out, along with like-minded others, a common identity of their own choosing in the face of an anonymous and alienating collective. The resulting sense of place stems not simply from a desire to transcend an individual's limited sense of self, but from the fact that an individual's sense of self is, to a significant extent, determined by her relationship with the surrounding world. In this regard, Cohen and Arato refer to the "fragility of individual identity," which they attribute to "the fact that individuation occurs in complex, intersubjective, communicative processes of interaction."⁶⁶ Humans can embrace or ignore this relational aspect to their identity, but they cannot escape it. In other words, an individual's identity can be influenced by relationship in a manner that fosters a sense of belonging (by affirmatively choosing to associate with others in ways that one finds meaningful) or a sense of alienation (by interacting with others as a necessary condition of life in modern society, but nothing more). Voluntary associations are a primary vehicle for choosing the former over the latter, and thus are essential to any effort aimed at furthering or maintaining individual identity:

Moral provisions for the protection of individual identity cannot safeguard the integrity of individual persons without at the same time safeguarding the vitally necessary web of relationships of mutual recognition in which individuals can stabilize their fragile identities only mutually and simultaneously with the identity of their group.⁶⁷

As personal as the sense of place afforded by associations to their members might be, an association's ability to foster a common identity has clear benefit for the collective in that it socializes an increasingly isolated and atomized citizenry.⁶⁸ Associating with other individuals as a function of free choice, rather than by government fiat, is essential to this common identity. In other words, if X, Y, and Z choose to associate themselves for whatever reason—in full recognition and toleration (if not embrace) of their individual identities as X, Y, and Z—the resulting association fosters a qualitatively different sense of identity than if the government requires X, Y, and Z to associate themselves irrespective of their individual identities.

66 COHEN & ARATO, *supra* note 12, at 398–99.

67 *Id.* at 378.

68 Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in BEYOND TOCQUEVILLE, *supra* note 63, at 1, 5–6 (describing the socialization function).

There are two positive aspects of this freely chosen, rather than government imposed, socialization. First, as individuals associate themselves among the seemingly infinite number and type of groups, the variety of resulting loyalties—some agreeable to the state, some disagreeable to the state—itself is a boon to the collective. Cohen and Arato have noted that “[o]n the pluralist analysis, a highly articulated civil society with cross-cutting cleavages, overlapping memberships of groups, and social mobility is the presupposition for a stable democratic polity, a guarantee against permanent domination by any one group and against the emergence of fundamentalist mass movements and antidemocratic ideologies.”⁶⁹ Put another way, associations “are wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge.”⁷⁰

Second is the “social capital” outgrowth of associational life. Relating to one another in a freely chosen common forum increases levels of cooperation and trust among members, enabling the collective purposes of the group to be achieved more easily,⁷¹ especially relative to a group constructed according to government mandates on membership. Further, many would argue that participation in an association increases attitudes of trust and cooperation toward citizens in general, making participants more inclined to participate in broader societal projects.⁷² In the absence of such attitudes, collective action is imposed from the government megastructures, rather than

69 COHEN & ARATO, *supra* note 12, at 18; see also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 37 (1994) (“Like other intermediate institutions, religions that command the devotion of their members actually promote freedom and reduce the likelihood of democratic tyranny by splitting the allegiance of citizens and pressing on their members points of view that are often radically different from the preferences of the state.”); cf. MILL, *supra* note 39, at 82 (urging the public “to see that it is good there should be differences, even though not for the better, even though, as it may appear to them, some should be for the worse”).

70 Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1853 (2001).

71 Groups, associations, and social networks nurture cooperation by bringing individuals into repeated interaction. In a society with thick networks of groups and associations individuals will have many opportunities to offer to cooperate with others, and to accept or spurn offers of cooperation. Their confederates will likewise have many opportunities to witness or hear about these transactions. Reputations can be built up or made to suffer, and where social networks are dense, information spreads more easily and widely, providing individuals with an incentive to exhibit qualities that make them eligible for future cooperative endeavors. Macedo, *supra* note 16, at 1578–79.

72 See Dietlind Stolle & Thomas R. Rochon, *Are All Associations Alike?: Member Diversity, Associational Type, and the Creation of Social Capital*, in BEYOND TOCQUEVILLE, *supra* note 63, at 143, 145.

as a result of associated individuals, in a mediating role, taking collective responsibility for their communities.⁷³

The identity fostered by associations enriches participants' sense of who they are and where they belong and, in doing so, empowers them. As Robert Bellah explains, a self "that is not empty" is

constituted rather than unencumbered, one . . . whose encumbrances make connection to others easier and more natural. Just as the empty self makes sense in a particular institutional context—that of the upward mobility of the middle-class individual who must leave home and church in order to succeed in an impersonal world of nationality and competition—so a constituted self makes sense in terms of another institutional context, what we would call, in the full sense of the word, community.⁷⁴

The nagging problem with all of this, of course, is that even for those of us who favor, as a general proposition, a thriving associational life, the "identity" of many real world associations that we see on the evening news is not as noble nor social-minded as the theoreticians' lofty language suggests.⁷⁵ Indeed, it seems that some of the groups that are most obsessed with their chosen identities are the most corrosive of widely accepted social values and norms. In particular, groups whose identity is based, at least in part, on the categorical exclusion of certain segments of the population call into question the social capital component of the purported benefit, as such groups are unlikely to foster trust or cooperation between those inside the group and those

73 See DAVID KNOKE, ORGANIZING FOR COLLECTIVE ACTION 11 (1990) ("When social bonds weaken, people lose their grip upon their social identities and the norms that govern their behaviors. Social control in the pluralist sense of self-regulation by social groups disappears, to be replaced by repressive social control from central authorities.").

74 BELLAH ET AL., *supra* note 36, at 152–53. This is not to suggest that every voluntary association, standing alone, qualifies as a community. Philip Selznick helpfully defines "community" as follows: "A group is a community *insofar as* it embraces a wide range of interests and activities; *insofar as* it takes account of whole persons, not just specialized contributions or roles; and *insofar as* bonds of commitment and culture are shared." PHILIP SELZNICK, THE COMMUNITARIAN PERSUASION 20 (2002).

75 As noted by Dale Carpenter:

Of the liberties guaranteed by the First Amendment, the freedom of association may be the most distrusted. To some it is an excrescence of the First Amendment, its frightful right-wing stepchild. . . . It is principally useful, in this view, only to protect the prerogatives of people in white hoods, of sexist old-boys networks, and of homophobes.

Dale Carpenter, *Expressive Association and Antidiscrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1516 (2001).

who are excluded, or with other members of society who oppose the exclusion.⁷⁶

Exclusionary groups, at least when viewed in isolation, would seem to evidence the need for a greater state role in the regulation of associational identity. To the extent we give associations latitude in carving out their identities in order to cultivate their mediating functions, that justification seems ill suited to certain groups. After all, why should we value the ability of the Ku Klux Klan to give white supremacists a greater sense of place in society? And how exactly does such a group bring people together in pursuit of a constructive collective purpose? The easy policy justifications are inapt, and a deeper look is necessary, for far from disproving the mediating value of associations, the identities of exclusionary groups underscore the mediating tension that makes a chosen identity meaningful and a vibrant associational life worth pursuing in the first place.

By way of background, the primary tool by which voluntary associations seek legal protection of their identities is the freedom of association embodied in the First Amendment. Associational identity gains constitutional protection as an outgrowth of associational expression. Specifically, courts protect the ability of associations to establish and maintain their unique identities when they show deference to associations' stated objectives and expressions of identity; courts should be hesitant to second-guess the sincerity of such expressions.⁷⁷ In this regard, obviously, there is significant overlap between identity and expression:

If it is legitimate to accord "the freedom" of "speech" to *collective* expression (and I think it plainly is: the text does not limit the freedom to those who speak alone, and the amendment elsewhere contemplates group expressive activity), the freedom must include the right of a group of "speakers" both to choose and to express the content of that group's messages, without abridgment by government (subject only to the same implied-of-necessity or categorical exceptions as would be justified with respect to speech by individuals). That logically entails a freedom of autonomous message formation and delivery by the group, including the right of the group to define itself—to define who will constitute the group that forms the message and the speakers who will express it on behalf of the group—and, finally, to exclude competing messages from being intermingled with the group's chosen expression. . . . Put simply, if

76 Stolle & Rochon, *supra* note 72, at 144.

77 Under a deferential approach, "[t]he only question should be whether the organization's interpretation of its beliefs is offered in good faith." Carpenter, *supra* note 75, at 1539.

the freedom of speech can be a group freedom, that group freedom means that *the group* gets to decide *what* messages the group wishes to express, *who* is in the group that is deciding what the group “says” as a group, *how* the group will operate to decide these things, and *how* and *through whom* it will communicate the messages it chooses.⁷⁸

These notions are reflected most famously in the much-commented-on case *Boy Scouts of America v. Dale*,⁷⁹ in which the Supreme Court held, by a five to four vote, that applying New Jersey’s antidiscrimination law to require the Boy Scouts to allow openly gay scout leaders would violate the group’s right of association.

Two aspects of the *Dale* majority’s analysis are essential to an association’s pursuit of a unique identity. First, the Court recognized that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”⁸⁰ Rather, the Court gave deference to the Boy Scouts’ expression of its beliefs/values.⁸¹ Second, the Court held that “[a]s we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”⁸² These twin aspects of deference allowed the Boy Scouts to maintain its mediating tension. By refraining from second-guessing the sincerity or legitimacy of the group’s exclusionary policy, the Court effectively upholds the tension between the Boy Scouts and the state—i.e., the policy pitted against New Jersey’s collective judgment that excluding gays is impermissible.

And, by accepting at face value the Boy Scouts’ contention that allowing Dale to serve as an openly gay leader would impede their efforts to rear “morally straight” young people, the Court is upholding the tension between the Boy Scouts and the individual—i.e., the particular decision to terminate Dale as a scout leader pitted against Dale’s interest in remaining as a leader. This association-individual

78 Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1922 (2001); see also McGinnis, *supra* note 50, at 528 (“The power to define who may deliver messages logically includes the power to exclude those parties whose identity is incompatible with the message.”); Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1672 (2001) (“In addition to the affirmative right of association, the right of non-association should be seen as an outgrowth of a completely different aspect of the First Amendment: the line of cases recognizing a First Amendment right not to be forced to speak.”).

79 530 U.S. 640 (2000).

80 *Id.* at 651.

81 See *id.* (“We accept the Boy Scouts’ assertion.”).

82 *Id.* at 653.

tension will virtually always be present to some degree when it comes to an association's identity, for the ability to pursue a common identity entails the ability to exclude individuals who fall outside the defined traits of that common identity. There is nothing inherently nefarious about this aspect of the tension, for even exclusions that are based on an individual's willful choices (a pro-life group excluding a member who advocates abortion on demand), rather than his status (a country club excluding an African-American), potentially subvert the desires of the individual to the will of the association.

In *Dale*, these twin forms of deference together allow interested parents to associate themselves—albeit through the participation of their children—for the pursuit of various skill- and character-building activities without the influence of openly gay leaders. The mediating value to participants is clear: in a world that appears increasingly antagonistic to their conception of a “morally straight” upbringing, like-minded parents have at least one forum in which their views hold sway, giving them an unmistakable sense of place and connection to others. The mediating value to the collective is less obvious, as the further marginalization of gays—especially when institutionalized by groups charged with the development of young people—hardly befits our common self-conception as an egalitarian democracy devoted to fostering respect for the dignity and worth of all people. Nevertheless, the alternative to the mediating tension of the Boy Scouts is the triumph of the individual and/or the state; as shown by Justice Stevens's dissent, it is a remedy that is worse than the ailment.

Justice Stevens's dissent would significantly diminish the Boy Scouts' mediating tension, effectively giving both the individual (Dale) and the state a judicial trump over the Scouts' efforts to maintain its chosen identity. Justice Stevens challenged the sincerity of the Boy Scouts' stated policy on gays, concluding that “there is no evidence that this [anti-homosexual] view was part of any collective effort to foster beliefs about homosexuality.”⁸³ In terms of an association's ability to maintain its chosen identity, even the presumed relevance of this assertion is problematic. To be entitled to constitutional protection, why must the association show that it is engaged in efforts to “foster” certain beliefs—why is it not enough simply to hold those beliefs and express them through the makeup of its membership?⁸⁴

83 *Id.* at 675 (Stevens, J., dissenting).

84 See Carpenter, *supra* note 75, at 1542 (observing that “membership itself says something about the group to both its internal and external audiences”); see also McGinnis, *supra* note 50, at 534:

BSA was not a relentless public advocate against homosexuality. But the advantage of having a full range of civil associations lies in society's enjoyment

Skepticism pervades Justice Stevens's analysis. Not only does he fail to show any deference to the Boy Scouts' stated belief regarding gays, but he goes so far as to criticize the underlying motivation for that policy, opining that the "harm [resulting from anti-gay discrimination] can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."⁸⁵ This progression of reasoning—casting doubt on the sincerity of an association's stated beliefs, then making value judgments about the beliefs themselves⁸⁶—suggests that, in the absence of deference to an association's stated beliefs, the state's values fill the void. As Dale Carpenter observes, this approach "would likely be systematically unfavorable to unpopular groups, including gay civil rights groups," as it would put such groups "at the mercy of legislative majorities who have their own, often hostile, conception of the good life."⁸⁷

Questions of associational identity generally arise from state efforts to forbid certain grounds for excluding members and/or an individual's utilization of those legislative efforts in his own quest for inclusion. As such, where a court invalidates the association's identity-based defense to the state/individual challenge, it is the state/individual's expressed values taking the place of the association's expressed identity. Participants lose their distinct sense of place,⁸⁸ occupying in-

of a range and intensity of views on an issue pressed from different perspectives. An alternative constitutional world, which provides special solicitude only for the autonomy of groups with an express political agenda and neglects that of civil associations, is one where contentious political advocacy alone supplements the norms encouraged by the government.

85 *Dale*, 530 U.S. at 700 (Stevens, J., dissenting). Justice Stevens offered the broadside that "[u]nfavorable opinions about homosexuals," like "equally atavistic opinions about certain racial groups," have "been nourished by sectarian doctrine." *Id.* at 699. Such statements help explain why the *Dale* dissent has been called "stunningly bigoted" and "one of the most intolerant-of-religion opinions ever to appear in the U.S. Reports." Paulsen, *supra* note 78, at 1917.

86 In this regard, Nan Hunter's assertion that the *Dale* majority "impliedly finds that almost any openly gay or lesbian person is radioactive" suffers from the same flaw as Justice Stevens's reasoning. See Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1608 (2001). Regardless of whether the Boy Scouts can be faulted for finding openly gay scout leaders to be "radioactive"—i.e., finding that their presence in the organization's leadership compromises the Boy Scouts' expressed identity—the *Dale* majority made no such finding, but merely deferred to the Boy Scouts' decision on the issue. As argued above, this decision was the Boy Scouts' to make, not the Court's.

87 Carpenter, *supra* note 75, at 1517–18.

88 Critics of *Dale* would challenge, as a factual matter, the notion that parents of Boy Scouts really derive a sense of place from the organization's exclusion of gays. Indeed, it is doubtful that many parents placed much weight on the exclusion of gays as a factor contributing to their decision to involve their children in scouting. The

stead a state sanctioned space that connects them only to society's general notions of acceptability, rather than the personal convictions, beliefs, or priorities of fellow participants.⁸⁹ And the state, despite its short-term vindication of its inclusiveness norm, may lose the long-term benefits of a citizenry connected in wildly divergent—but meaningful—ways.

2. Limiting Principles

This is not the end of the inquiry, however, for the maintenance of mediating “tension” presumes that there is resistance on both sides—i.e., associations cannot enjoy an automatic trump over individual and state interests. Showing deference to an association's expressions of identity allows the association to maintain its mediating role—in tension with the individual to be excluded and the state whose collective values and norms are flouted—but it does not mean that associations are thereby given license to run roughshod over all individual rights and collectively held values.⁹⁰

Two factors limit the potentially tension-negating impact of such deference. First, allowing an association to invoke its right to association—i.e., taking its allegations of protected associational activity at face value—does not preclude judicial regulation of its conduct. While a court should not second-guess an association's stated reason for being, whether that reason for being trumps the governmental interest at issue is another question. Thus, judicial deference to an association's expressions of identity does not preclude the application of antidiscrimination statutes to all associations. Where the association excludes certain segments of society from economic or political participation in the community, the statute may still be enforceable.

The call for courts to show deference to an association should not be equated with the call for courts to abdicate their role in monitoring the exclusionary impulses of the majority. The difference is not easily encapsulated into categorical legal principles, but there is line-draw-

point, however, is not whether such a policy is a central priority of members, but rather who is in a better position to determine the centrality of such a policy—the organization itself, or the judiciary.

89 See Sullivan, *supra* note 14, at 1719 (“The partiality of voluntary associations is not meant to wither away, even if it could; such groups are irreducibly partial, by definition. None embraces, or could embrace, everyone in the polity without losing its identity.”).

90 “The challenge,” as Dale Carpenter puts it, “is to draw a line between [freedom of association and the reach of antidiscrimination law] that will preserve a large realm for group expression and organization while allowing the state to promote its equality objectives in the most compelling contexts.” Carpenter, *supra* note 75, at 1517.

ing to be done.⁹¹ One example of appropriate line-drawing is shown by contrasting *Dale* with a case like *Roberts v. United States Jaycees*,⁹² in which the Jaycees were held subject to state antidiscrimination law, and effectively forced to admit women to their previously male-only ranks. The majority held that the Jaycees did not establish that their message or purpose would be significantly burdened by admitting women.⁹³ Without a doubt, the Jaycees' explanation on this point was woefully unconvincing given that women could already join as nonvoting members. However, a firmer foundation for the Court's holding is found in Justice O'Connor's concurrence. She argues that the inquiry turns not on the Jaycees' evidentiary showing, but on the different levels of constitutional protection afforded to commercial associations and expressive associations.⁹⁴

Justice O'Connor's approach takes into account the need to balance an association's interest in maintaining its chosen identity against the state's interest in ensuring an individual's access to the building blocks of American life.⁹⁵ One area where state and individual resistance to an association's ability to maintain its chosen identity must be accounted for, then, is where the association provides economic opportunities to citizens. In our free market system, where the government depends on private companies to provide individuals with the means to support themselves, we cannot afford to shut out entire classes of individuals from securing those means.⁹⁶ Because, as

91 David Cole has lamented the fact that an "[a]ssociation that is neither expressive nor intimate . . . is categorically excluded from constitutional protection." David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 204. Cole argues that the inquiry should focus instead on whether the government regulation at issue is targeted at the associational character of the conduct at issue; if it is, Cole contends, it should be subject to heightened scrutiny. *Id.* at 206. Whether or not we are inclined to agree with Cole, we need not go that far in order to protect associations and their unique identities. In my view, there is a more pressing need for deference.

92 468 U.S. 609 (1984).

93 *Id.* at 621

94 *Id.* at 632-34 (O'Connor, J., concurring).

95 Dale Carpenter also looks to Justice O'Connor's commercial/expressive distinction as a basis for determining the legitimacy of applying antidiscrimination statutes to associations. Carpenter adds a third category for quasi-expressive groups—i.e., groups with substantial commercial and expressive components. Under his proposal, the commercial components would not get broad protection from antidiscrimination laws, but the expressive components would. Carpenter, *supra* note 75, at 1517-18.

96 Other commentators have focused on the incompatibility of exclusionary expression with a profit-oriented business. See, e.g., Neal Troom, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 682 (2002) (arguing that a commercial enterprise "is in the

the Court found, the Jaycees functioned essentially as a male-only business network, the government had a strong interest in regulating the Jaycees in order to promote women's access to economic opportunity.⁹⁷ The fundamental need for such access is also why the right of association should not be extended to allow corporations to avoid antidiscrimination laws, even where the corporations have an expressive component at the core of their corporate function.⁹⁸

Similar reasoning justifies regulating the membership of political parties, which, as has been widely documented and theorized on elsewhere,⁹⁹ play essential roles in citizens' ability to participate in the political life of their communities.¹⁰⁰ Again, associations must be al-

'inclusion' business of attracting customers, incompatible with a claim of intrinsically expressive exclusion"). Of course, the exclusion of certain members of society may be entirely compatible with the business's bottom line, depending on the community in which the business operates. Presumably, under this view, exclusion would be more justified when it is ideology-driven rather than market-driven—i.e., a white-owned restaurant excluding blacks because its regular customers demanded it would be entitled to less protection than the same restaurant excluding blacks because its owners operated the restaurant in order to attract members to a white supremacist organization—but that line of distinction could be very difficult to police to the extent that an entity's ideology is a product of its members' or clientele's views.

97 "Simply put, holding a job is more important to most people than learning morals from a scoutmaster while tying a knot in front of a campfire." Carpenter, *supra* note 75, at 1585–86; see also Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1665 (2001) ("The state has far less interest in imposing antidiscrimination requirements where people assert a 'right' to take part in others' collective efforts to promote common values and goals, as is often the case in the noncommercial sector.").

98 In addition to their obvious profit motives, companies like Nike, Benetton, and Playboy arguably exist in order to promote a particular viewpoint. See Cole, *supra* note 91, at 214.

99 See, e.g., Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493, 521 (2000) (arguing that parties should be strengthened "as participatory, voluntary associations" because they "contribute to democratic education and political culture").

100 Admittedly, distinguishing groups that engage in political conduct from groups that control access to political participation would be no simple task, as avenues of political participation are obviously not limited to political parties. For example, findings show that "[i]n an era in which so many political communications are delivered electronically, it nonetheless seems that personal connections among acquaintances, friends, and relatives—often mediated through mutual institutional affiliations—are still crucial for political recruitment." SIDNEY VERBA ET AL., *VOICE AND EQUALITY* 17 (1995). Further, associations not only provide exposure to political cues and recruitment networks, but even "activity that has nothing to do with politics or public issues can develop organizational and communication skills that are relevant for politics and thus can facilitate political activity." *Id.* at 17–18. I do not purport to solve this problem here, but suffice to say that access to the expressly political groups

lowed to maintain their chosen identities in order to connect individuals to one another, and to the surrounding society, in a meaningful way, but this mediating function must not be allowed to preclude excluded individuals from accessing the tools on which participation in society is based.

The schooling of our children is a thornier example: on one hand, the education of a child is inexorably linked to economic and political participation as an adult; on the other hand, educational choices are undeniably expressive, and often central to a family's view of themselves and the broader world.¹⁰¹ Provided that exclusionary private schools do not take on a *de facto* public identity¹⁰² or crowd out viable nonexclusionary schooling alternatives in a particular community, however, a government mandate of equal access to all private schools is too steep a price to pay in terms of an association's identity. These examples are not meant to define the absolute limits of courts' application of public norms to associational identity, but simply to point out that recognizing the mediating tension of associations does not negate all regulation; indeed, in certain limited contexts, the tension demands regulation.

The second factor making deference to an association's expressed identity more palatable is the realization that associations are equipped to serve as countervailing forces against messages emanating from other associations. Where an association has chosen to pursue an identity that conflicts with one's deeply held conception of the social good, there are effective and enriching responses short of trumping, as a matter of law, its ability to engage in such pursuits. In this regard, judicial oversight is not the only—or even necessarily the

comprising the arena of electoral politics would seem to be more essential than access to groups that happen to engage political advocacy or facilitate political awareness.

101 See William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 874 (1999) ("The appeal to the requisites of civic education is powerful, but not always dispositive when opposed by claims based on the authority of parents or the liberties of individuals and associations."); Garnett, *supra* note 70, at 1843, 1846 (observing that "education is best thought of as a process of formation, not merely of data delivery," because "we think it matters [not just] what facts and figures our children and our fellow citizens know" but "what they value . . . in what they believe . . . [and] to and for what they aspire"); Paulsen, *supra* note 78, at 1953 ("Private schools are expressive associations formed for the purposes of offering and implementing the choices that parents make concerning the communicative messages to be transmitted to their children through the process of education, not simple commercial enterprises.").

102 Cf. *Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976) (holding in part that freedom of association does not protect the "practice of excluding racial minorities from private schools").

most effective—means of countering the detrimental impact of associations whose identities are rooted in the exclusion and marginalization of other segments of society. Pursuant to their mediating function, voluntary associations provide a tool for members' collective views and values to influence the broader society—including other associations. For those who are members of the association with which they take issue, the most obvious path is leaving the association.¹⁰³ Others may join with similarly-minded individuals to engage in private forms of collective actions (such as boycotts, picketing, meetings, or publicity campaigns). Not only will these often prove effective in countering the harmful message, but they avoid the association-squelching fallout that often accompanies judicial or legislative pronouncements.¹⁰⁴ In fact, collective countervailing action often leads to, as Abner Greene puts it, "the bonding among the challengers and the increased confidence in their ability to affect the conditions of their lives."¹⁰⁵ Often, the best weapon against the corrosive mediating function of one association is the mediating function of another association. Where associational identity has been degraded in pursuit of

103 *Newsweek* reported that membership in the Boy Scouts fell 4.5% in the year following *Dale*. Brody, *supra* note 17, at 864–65; see also McGinnis, *supra* note 50, at 535 ("The real world aftermath of the *Dale* decision suggests that if one private association's norms are not persuasive, other organizations that engage in activities similar to scouting but that admit homosexuals will gain in popularity."); cf. Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 509 (2002) (calling for statutory disclosure requirements because associations should not "be permitted to invoke First Amendment rights to facilitate the extraction of time, energy, and financial support from members who, if fully informed of the organization's discriminatory policies, would have chosen to devote those resources elsewhere").

104 John Stuart Mill expressed a similar sentiment in cautioning against government prohibition of offensive or unhealthful conduct, but at the same time urging citizens to employ all the powers of persuasion at their disposal in discouraging such conduct:

Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. They should be for ever stimulating each other to increased exercise of their higher faculties, and increased direction of their feelings and aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations. But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it.

MILL, *supra* note 39, at 84.

105 Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 482 (2000).

individual or state interests, a pressing danger is the absence of such counterweights.¹⁰⁶

B. *Expression*

1. The Mediating Dimension of Voice

Associations give individuals a voice in the world by expressing their members' views and values. Much of an association's day-to-day value for its members derives from its ability to disseminate the members' views to the broader, impersonal world. By providing a collective voice to sentiments that likely would go unheard if left to be expressed by an individual standing alone, associations serve as a megaphone for members' most deeply held beliefs and opinions. The value derived by individuals from associational expression goes beyond the tangible member benefits realized through the association's communications (e.g., lobbying), as the act of collective communication itself gives members a sense that they and their views matter. Bringing individuals together to produce a common voice¹⁰⁷ is a mediating function in its purest form.

The value that associational expression holds for the collective stems from the representative and contestatory functions of such expression.¹⁰⁸ This expression facilitates the reflection of a group's views in the state's decisionmaking apparatus, but also allows for the pluralist accommodation of views that are not embodied, and may even defy, the ends chosen via that decisionmaking. In this regard:

Voluntary associations serve as a principal means in modern society for the articulation and protection of differences, as did the non-conforming congregation. They provide an instrumentality for the freedom of the individual to associate with others in the promotion

106 See generally Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 457 (2000) ("On the whole, even if some subgroups are not liberal, a pluralistic society seems more likely to live harmoniously if it extends freedom of speech, association, and religion to seemingly illiberal subgroups than if it attempts to weed out dangerous voices.").

107 An association's ability to communicate goes beyond the sum of its members' individual communications. As Richard Garnett explains, "[t]he freedom of expressive association, then, is not only the freedom enjoyed by individuals of expressing themselves through their associations, but also the freedom of associations to serve and speak as rival sources of values and loyalties." Garnett, *supra* note 70, at 1882.

108 See Edwards & Foley, *supra* note 68, at 5-6.

of forms of consensus which are not shared by the total community.¹⁰⁹

It is this function that is key to the collective value derived from the expressive component of associations' mediating role. Through expression, associations mediate between the views of their members and the views of the surrounding society—especially when the two sets of views are in direct opposition. The result in our expression-focused society is a cacophony of divergent, sometimes unintelligible views on any given issue. This is a foreseeable and eminently desirable product of civil society, "which prevents the establishment of monopoly of power and truth, and counterbalances those central institutions which, though necessary, might otherwise acquire such monopoly."¹¹⁰

This contestatory function reflects two distinct aspects of associations' mediating role. First, in a negative sense, associations act as bulwarks against government encroachment—i.e., they mediate by resisting state intervention into the affairs of private citizens and groups. Second, in a positive sense, associations act as forces for affirmative change in society—i.e., they mediate by seeking to align the surrounding society more closely with the views and values of the association's members.¹¹¹ As Meir Dan-Cohen explains:

The mediation, as commonly understood, has a negative and a positive side. Negative mediation consists in protecting individuals from the state. Protection is needed because of the state's oppressive propensity on the one hand and individuals' vulnerability on the other. Mediating institutions provide individuals with at least partial shelters from the state's power and with a fulcrum for resistance. Positive mediation remedies a different problem. People derive indispensable spiritual and moral sustenance from collective life, but the state is ill-equipped to provide it. It is too large, remote, bureaucratic, and homogenous to be able to satisfy diverse individual needs. While serving as protective buffers, mediating institutions also create habitats within which individuals can flourish.¹¹²

109 James D. Hunt, *Voluntary Associations as a Key to History*, in *VOLUNTARY ASSOCIATIONS: A STUDY OF GROUPS IN FREE SOCIETIES* 359, 370 (D.B. Robertson ed., 1966) [hereinafter *GROUPS IN FREE SOCIETIES*].

110 GELLNER, *supra* note 31, at 3–4. According to Cohen and Arato, there are two sets of rights that are most fundamental to a fully developed civil society: those that secure the integrity, autonomy, and personality of the person, and those having to do with communication. COHEN & ARATO, *supra* note 12, at 403.

111 For a more detailed discussion of the negative-positive aspects of the role of mediating structures in society, see Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103, 117–19 (2001).

112 Dan-Cohen, *supra* note 13, at 1214.

Evans and Boyte capture the underlying distinction as they seek to recast “the role of voluntary associations—considered, for example, in current neoconservative thought to be the main barrier against an all-encompassing modern state—from that of defensive refuge to active source of change.”¹¹³ To the extent that civil society functions as “spheres of positive freedom”—as opposed to the government guaranteed negative liberty—it can reduce the tension between rights-oriented liberalism and democratically-oriented communitarianism,¹¹⁴ a political tension roughly corresponding to our individual-collective duality.

In facilitating the mediating value of expression, courts must ensure that associations have the freedom to communicate their members’ messages to the public—in particular, courts must ensure associations’ access to any public forum established by the government. A primary way to do so is to ensure that the viewpoint discrimination inquiry focuses on the subject addressed, not the manner in which it is addressed. Maintaining access for the messages of all associations recognizes the tension inherent in the mediating value of expression. First, access exerts tension on the relationship between the association and the individual, especially where the individual also occupies the space to which access is granted, as the individual often will find the association’s message to be disagreeable, offensive, or contrary to her most deeply held values. Second, access exerts tension on the relationship between the association and the state, as the association’s message often will conflict with the state’s judgment over the proper use of the facilities to which access is sought.

The mediating tension that arises from a court’s proper understanding of the viewpoint discrimination inquiry is most readily apparent in the Supreme Court’s analysis in *Good News Club v. Milford Central School*,¹¹⁵ in which the Supreme Court required a public school that had opened itself to after-hours meetings held by various civic groups to allow a religious club for children to use the school’s facilities as well.¹¹⁶ Writing for the five to four majority, Justice Thomas noted that groups devoted to discussing morals and standards of behavior were allowed to meet at the school. He then concluded that the Good News Club simply wanted to discuss morals and standards

113 EVANS & BOYTE, *supra* note 12, at 25.

114 COHEN & ARATO, *supra* note 12, at 23.

115 533 U.S. 98 (2001).

116 *Id.* at 100.

from a religious viewpoint, and thus the club's exclusion amounted to unconstitutional viewpoint discrimination by the school.¹¹⁷

Justice Souter, writing in dissent, took issue with the majority's broad reading of "viewpoint." He reasoned that the Good News Club did not simply seek to discuss an otherwise permissible topic from a religious point of view, but rather it sought to conduct an "evangelical service of worship calling children to commit themselves in an act of Christian conversion."¹¹⁸ Writing separately, Justice Stevens argued that the school's decision to allow discussions of morals did not require opening the school to "worship" or "proselytizing."¹¹⁹

The dissenting Justices' approach to viewpoint discrimination effectively allows the state's judgments about appropriate messages to trump the association's interest in accessing an otherwise available public forum. This trump negates the mediating tension inherent in associational expression. Further, the substance of the dissent's analysis bodes ill for the vitality of associational life, as its analysis hinges not on the subject addressed at the Good News Club's meetings, but on the means chosen by the club to address an otherwise permissible subject. Because the particular means objected to—worship and proselytizing—are by definition utilized only by religious groups, the dissent would deny access on grounds that impact only religious associations. No nonreligious groups would be barred under the worship/proselytizing prohibition. And, given the overbreadth of the terminology, religious groups would likely be barred even where they attempt a permissible debate or discussion of an issue. By way of illustration, what if a church group held an open meeting at the school to discuss parenting from a religious perspective, but at the end asked if people wanted to join the church—does that qualify as impermissible proselytizing? Or, what about a Catholic discussion group that closed its meeting with a prayer—does that qualify as an impermissible worship service?

The carve-out of worship and proselytizing as materially different from other, more acceptable forms of expression on a given subject not only singles out religion for exclusion, but its open-endedness threatens a whole range of otherwise permissible religious activities. As a practical matter, this approach imposes a heavier burden on individuals who seek a collective voice for their religious views than on those who seek a voice for nonreligious views. This disparity in burdens not only runs counter to the First Amendment, but it hinders the

117 *Id.* at 107.

118 *Id.* at 138 (Souter, J., dissenting).

119 *Id.* at 132 (Stevens, J., dissenting).

mediating function of religious associations. Once the government establishes a public forum for activities and discussions on a range of subject areas, it must give access to all groups who wish to express a message on those subjects—whether the form of their expression is lecture, debate, worship, or witnessing to boys and girls.

2. Limiting Principles

Admittedly, *Good News Club* is a factually sympathetic case, for most Americans take little offense from the prospect of boys and girls engaged in Christian worship or instruction. More troubling is the specter of a white supremacist group, such as Matthew Hale's brand of religion-tinged racism, using the protection of viewpoint neutrality to avail themselves of public school facilities. Obviously, if exceptions to this call for equal access were to be carved out for groups with unsavory social agendas, the mediating value of associational expression to both individuals and the state would be rendered largely meaningless, as the messages would simply function as outgrowths of sentiment acceptable to the majority. And the alternative—public schools filled with after-school Matthew Hale membership rallies—may not be as dire as it would seem. First, judicial prohibitions on viewpoint discrimination do not preclude the enforcement of broadly applicable criminal laws,¹²⁰ and thus, to the extent groups use their right to access as a means to effectuate aims that are punishable by the state, access need not translate into unfettered discretion to realize the association's objectives. Second, as discussed above,¹²¹ one of the essential attributes of a vibrant associational life is competition for the hearts and minds of potential adherents. The government may not be in a position to block Hale from using public facilities, but that does not mean that other associations need stand idly by while he pursues his corrosive agenda.¹²²

120 However, see *infra* Section II.D, for a discussion of the problems raised by the criminal prohibition of associational conduct where the conduct does not threaten harm external to the association or to nonconsenting members.

121 See *supra* notes 103–12 and accompanying text.

122 Michael McConnell notes:

There are certain built-in structural tendencies that incline civil society toward the inculcation of public virtue rather than public vice. . . . If a group wants to flourish, it needs to appeal to a broad audience, which discourages narrow sectarianism; and if a group needs to find allies, it must engage in compromise and cooperation with others. The social structure in which various groups operate thus creates incentives for social harmony, without any need for direct intervention in their belief systems.

This once again reflects the broader notion that mediating *tension* presumes resistance on both sides of the relationship. An association does not have absolute authority to express its message in any way it sees fit. There are limiting principles to the notion of access that avoid an associational trump over individual and state interests. Most obviously, if a public space has not been designated (implicitly or expressly) as a public forum, access need not be granted. Even in the public forum context, however, individuals and the state have the tools to resist an association's message, even if they do not have the capacity to preclude access altogether.

Further, an association's message is not allowed to hold sway completely over an individual's conflicting values and views, given that the association does not enjoy a monopoly over the public forum—i.e., the association's access is never exclusive. This may be an obvious proposition from the standpoint of free speech doctrine, but its impact is not limited to that context. A meaningful application of the Establishment Clause also demands that government controlled spaces not be captured by any single religious message or messenger. To do so eviscerates the mediating function of religious associations by giving a single messenger (whether an individual or group) a state trump over competing messengers, negating the tension that is key to their mediating role.

First, though, some background: access to an otherwise available public forum need not be denied simply because an association is religious. This notion is highlighted not only in *Good News Club*, discussed previously, but also in *Rosenberger v. University of Virginia*,¹²³ in which the Supreme Court held that the Establishment Clause could not justify a public university's exclusion of a student religious group from the use of funds made available to other student groups, and in *Lamb's Chapel v. Center Moriches Union Free School District*,¹²⁴ in which the Supreme Court held that a school district violated the Free Speech Clause by refusing a church permission to use school facilities to show a film addressing childrearing from a religious perspective. All three cases underscore the fundamental distinction between government speech endorsing religion and private speech endorsing religion that occurs in a government forum. The former poses Establishment Clause problems; the latter does not.

McConnell, *supra* note 106, at 457. Jerry Falwell's Moral Majority is an example of a narrow, exclusionary message contributing to a group's eventual demise.

123 515 U.S. 819 (1995).

124 508 U.S. 384, 395 (1993).

This distinction is crucial to protecting the mediating function of religious associations. The worldview embodied by a particular association of individuals dedicated to a like-minded conception of ultimate meaning is at the center of those individuals' very beings.¹²⁵ For the government to exclude such associations from an otherwise available public forum based on the religious nature of their messages unnecessarily alienates the members—for whom access conditioned on the expression of a nonreligious message lacks any value—and marginalizes religiously motivated expression relative to other forms.

Of course, this does not mean that any message endorsed by religious associations can or should be expressed in all public settings. Too often, those who lament religion's supposed banishment from the "public square"¹²⁶ reflexively object to any limitation on the public expression of religious sentiment. Even apart from the constitutional pitfalls to such a strategy, an unfettered right to express religious devotion or belief in all situations is by no means helpful to religious associations themselves. Under some circumstances, such expressions can actually impede the mediating function of such groups.

In *Santa Fe Independent School District v. Doe*,¹²⁷ for example, the Supreme Court held unconstitutional a Texas high school's practice of allowing a student chosen by the student body to offer a prayer over the public address system before football games. Even apart from the constitutional inquiry,¹²⁸ this holding was proper as viewed from the

125 See, e.g., HUSTON SMITH, *WHY RELIGION MATTERS: THE FATE OF THE HUMAN SPIRIT IN AN AGE OF DISBELIEF* 26 (2001):

[M]inds require eco-niches as much as organisms do, and the mind's eco-niche is its worldview, its sense of the whole of things (however much or little that sense is articulated). Short of madness, there is *some* fit between the two, and we constantly try to improve that fit. Signs of a poor fit are the sense of meaninglessness, alienation, and anxiety that the twentieth century knew so well. The proof of a good fit is that life and the world make sense. When the fit feels perfect, the energies of the cosmos pour into the believer and empower her to a startling degree. She knows that she belongs. The Ultimate supports her, and the knowledge that it does that produces a wholeness that is solid for fitting as a piece of a jigsaw puzzle into the wholeness of the All.

126 See generally RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 82 (2d ed. 1986) (arguing that banishment of religion from the public sphere distorts and discredits democracy).

127 530 U.S. 290 (2000).

128 As Steven Gey puts it, the Establishment Clause "requires the government to prevent private religious behavior that has the effect of capturing the public entity or forum for use in a religious manner." Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885, 1891 (2001). Some "restriction on ostensibly private religious expression undertaken in

interest of voluntary associations. This case was not about a group seeking access to a public forum, but was an example of the government, by virtue of its decision to grant access to a single religious message, effectively becoming the vehicle for the expression of a particular religious message into a forum that was not open to other religious (or nonreligious) messages. Allowing the government to co-opt a message that could otherwise be expressed in other ways by religious groups does not enhance the vitality or viability of associations. If anything, it diminishes associations. This diminishment takes two forms. First, the government sanctioned expression renders moot the mediating function of some associations to the extent their message is already communicated in the government controlled forum. Second, it negates the mediating function of other associations to the extent their message is trumped by the government's adoption of a competing message. For the well being of religious associations themselves—not to mention the doctrinal demands of the Establishment Clause—religious messages should not be given access to a forum that is closed to competing messages. Especially in the context of religious messages, mediating tension demands that dissenting individuals have the opportunity to resist the associational expression of religious sentiment through their own religious or nonreligious expression.

While courts' recognition of the nonexclusive nature of the access enjoyed by associations helps maintain the mediating tension between the individual and the association, tension between the association and the state is maintained when courts recognize the distinction between government provided access and government promotion. That is, the government must ensure that associations have access to a public forum, but the government is not required to join in the promotion of that message. This avoids giving the association a trump where the government's own legitimate interests run counter to the association's message. The aftermath of the Supreme Court's ruling in *Dale v. Boy Scouts of America*¹²⁹ provides a good example of the access/promotion distinction. With *Dale* bringing publicity to the Boy Scouts' ban on gay scout leaders, a school board in Florida barred the Boy Scouts from using school facilities because the ban on gays violated the school district's antidiscrimination policy.¹³⁰ The district court judge ruled that this violated the Boy Scouts' right of expressive association because several gender- and race-specific groups were also

conjunction with the government" is needed to "foreclose the capture of the government by the dominant religious group in a community." *Id.* at 1892.

129 530 U.S. 640 (2000); see *supra* Part II.A.

130 *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1297 (S.D. Fla. 2001).

in violation of the antidiscrimination policy, but the school board had made no attempt to prohibit their use of school facilities.¹³¹ Accordingly, the school board had to allow the Boy Scouts to use the facilities to the same extent as other groups.¹³²

However, the court ruled that the school board could terminate a partnership agreement it had entered into with the Boy Scouts, under which the district's schools, including teachers, were obligated to make special efforts to promote scouting. The court ruled that the Boy Scouts' discriminatory policy was good cause for the agreement's termination.¹³³ The court seems to have struck a good balance. The school board had an interest in its own antidiscrimination message, and so could not be required to promote the Boy Scouts' contrary message; at the same time, though, the board could not deny the Boy Scouts otherwise available access simply because the board disagreed with the Scouts' message.

Voluntary associations require access—they do not require promotion of their message by the government. Such promotion not only poses constitutional problems in some contexts, but it threatens the mediating tension between the association and the state. Blurring the line between associational and governmental interests not only makes it more difficult for the government to pursue its own proper interests, but, as will be discussed more fully in the following section, ultimately eviscerates the mediating role of the association by turning it into an arm of the state.

C. Purpose

1. The Mediating Dimension of Power

Associations attract and keep individual members by allowing them to join together in pursuit of a common purpose. The ability of many associations to serve their chosen purposes can be significantly enhanced or stifled by the government's approach to social policy. This is especially true of religious associations, which traditionally have been subject to much greater restrictions than secular associations when it comes to accessing government resources used to advance an association's chosen purpose. My focus here is on religious associations that bring members together, at least in part, to address a problem of broader public concern—essentially any area that is a legitimate subject for direct government action.

131 See *id.* at 1303–04.

132 See *id.* at 1311.

133 See *id.* at 1308.

An association's pursuit of its chosen purpose benefits the state when it leads the association to perform a function valued by the state¹³⁴—i.e., when the apparatus of government has endeavored to pursue the same purpose as the association, or at least has expressed the desirability of obtaining an objective embodied in the association's chosen purpose.¹³⁵ Obviously, this overlap is not present where the association is dedicated to a purpose that is not valued by the state (e.g., collecting stamps¹³⁶) or where the purpose is antagonistic to the state's expressed values (e.g., establishing the racial superiority of white people). But in a wide array of contexts—such as education, substance abuse, or poverty—the overlap is unmistakable.

In a broader sense, however, the collective society derives benefits even when an association's chosen purpose does not readily correlate with an identifiable state-valued function. When individuals work together toward one common purpose, it facilitates future cooperation toward other common purposes. In this regard, the pursuit and the attainment of an association's purpose is circular: the pursuit of a common purpose gives rise to associations, and the associations, in turn, make the pursuit of common purposes in a community more feasible in the future. As Robert Putnam explains, “[n]orms of generalized reciprocity and networks of civic engagement encourage social trust and cooperation because they reduce incentives to defect, reduce uncertainty, and provide models for future cooperation.”¹³⁷

Individual members benefit from an association's pursuit of a common purpose to the extent that they are empowered to realize that purpose and to bring about (or resist) change to a degree that would have been impossible for any individual member standing

134 See Edwards & Foley, *supra* note 68, at 5–6.

135 Martha Minow has identified four categories of benefits arising from the state's privatized provision of social services: quality and effectiveness, competition and incentives for improvement, pluralism, and new knowledge and infrastructure. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1242–46 (2003).

136 Purpose is not always present in the sense that there may be no end result sought, but rather participants simply value the process of being together to pursue a shared interest. See Lon L. Fuller, *Two Principles of Human Association*, in VOLUNTARY ASSOCIATIONS, *supra* note 19, at 3, 6.

137 ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 177 (1993); see also Robert I. Rotberg, *Social Capital and Political Culture in Africa, America, Australasia, and Europe*, in PATTERNS OF SOCIAL CAPITAL 1 (R. Rotberg ed., 2001) (“Societies work best, and have always worked best, where citizens trust their fellow citizens, work cooperatively with them for common goals, and thus share a civic culture. . . . Vibrant networks and norms of civic engagement are essential for such a community.”).

alone. In other words, associations mediate by connecting individuals to social power. The tendency is to focus on small, inward-looking associations in a sentimental way, but "humanizing also requires a sense of participation in ultimate social power."¹³⁸ If people are alienated from social power, the relief found in group life is akin to Marx's opiate of the masses.¹³⁹ Despite perceptions that associational life generally maintains the social status quo,¹⁴⁰ individuals may also be motivated to join an association to effectuate affirmative change. In either capacity, individuals seek the mediating function of associations as a means to impact the world.

An association's ability to mediate by bringing individuals together to tackle a given social problem is tied to government policy not simply because associations want as much government money as possible (although naturally many do), but also because the government's domination of the social service arena makes it more difficult for an association to attract members to the pursuit of an objective that is increasingly seen as a government function.¹⁴¹ This is reflected in the transformation of America's associational landscape over the past thirty years. Robert Putnam found that, in contrast with a generation ago, today's thriving associations "are professionally staffed advocacy organizations, not member-centered, locally based associations."¹⁴² These groups "focus on expressing policy views in the national political debate, not on providing regular connection

138 Wogaman, *supra* note 32, at 71.

139 *Id.*; see also EVANS & BOYTE, *supra* note 12, at 158 (observing that associations, as part of popular democratic movements, change social power relations).

140 Evans and Boyte argue that both the left and the right tend to see voluntary associations as undergirding the status quo; the right sees associations as defensive and static—a perspective which "offers no model of collective action to regain control over massive economic dislocations, from plant closings to toxic waste dumps, nor any notion of how different communities might join together to pursue a common good." EVANS & BOYTE, *supra* note 12, at 186. In contrast, "the left tends to see the delegitimization of such associations as the necessary prerequisite for progressive action" in that mass action of autonomous individuals is needed. *Id.* at 186–87.

141 See Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1408 (2003) ("[R]eligious flourishing depends not only upon the autonomy of religious institutions and their negative freedom from government interference, but also upon their affirmative freedom to participate in the expanded public sphere, which now encompasses a great range of activities once provided by religious institutions."); see also Ira C. Lupu & Robert Tuttle, Lecture, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 39 (2002) ("Where religious organizations once occupied much of the public square—as principle sites of education, charity and moral formation—the activist, post-New Deal state now dominates.").

142 PUTNAM, *supra* note 47, at 51.

among individual members at the grass roots.”¹⁴³ In other words, the government is seen as the organ by which we collectively meet needs, and associations simply influence the priorities reflected in government action. Even under this constrained vision of associations, their purposes are being pursued by fewer and fewer individuals. Except for a few mammoth lobbying groups like the Association for the Advancement of Retired Persons and the National Rifle Association, membership in both religious and secular groups is down,¹⁴⁴ even though much of that membership consists simply of writing a check, not connecting with others in a common endeavor.

This landscape is by no means static, and the Bush Administration has consistently advocated for the government to become more of a partner in helping associations—especially religious associations—fulfill their chosen purposes. As has been widely commented on in the context of the Charitable Choice and school voucher debates, this partnership is seen to threaten one important element of the traditional church-state framework: the prohibition on government funding of religion. These concerns, though well founded, need not trump the motivations of those who seek a greater role for religious associations. As long as certain fundamental principles are recognized and enforced as a component of any funding program, government neutrality toward religion can coexist—as both a theoretical proposition and an everyday reality—with government funding of religious entities.

My reference to “neutrality” certainly encompasses the constitutional sense of that term, but is more than that—i.e., I submit that, in funding the provision of publicly valued social services by private associations, the government’s funding decisions should reflect, to the extent possible, the preferences of the individual consumers of the given social service among the available range of effective and lawful providers of such service. This is not to suggest that funds should be available on an equal basis with no regard whatsoever for the character or practices of the recipient group, but rather that such considerations must be directly linked to substantial public purposes.¹⁴⁵ In particular, the funding decision should not turn on the religious or

143 *Id.*

144 *Id.* at 63.

145 For example, if a white supremacist group dissuaded suburban teenagers from using drugs based on an appeal to the purported nobility of the white race, such a group would properly be barred from receiving government funds, regardless of the effectiveness or legality of the approach. See, e.g., Macedo, *supra* note 16, at 1592 (“As a matter of principle it is important that the strings that come attached to public dollars flowing to religious nonprofits are voluntarily accepted, and justified in terms

nonreligious character of the provider. This neutrality is essential not just from a constitutional standpoint, but also for the continued vitality and independence of the religious associations themselves.

2. Limiting Principles

The availability of government funds by no means suggests that the prudent association will accept such funds. Proponents of neutrality often overlook the corrosive effect government funds may have on the mediating function of religious associations. Unlike the values of expression and identity, the mediating tension inherent in an association's pursuit of its chosen purpose is threatened not by an overly intrusive state, but by an overreaching association—i.e., an association that unwittingly eviscerates its own mediating function by becoming reliant on government largesse. Thus, my focus here is on the principles that must limit the extent to which religious associations, in the exercise of their discretion, avail themselves of the government's increasingly neutral approach to the funding of religious versus nonreligious associations.

When an association mediates by allowing individuals to join together in pursuit of a common purpose, that pursuit places the association in tension with nonmember individuals and with the state to the extent that neither place the same value on the realization of that purpose as the association does. This tension is inherent in the mediating function, for if nonmember individuals and the state valued the purpose to the same degree as the association, there would be no need for an association devoted to such a purpose—i.e., the motivation to join together as a subset of society would be absent where society as a whole shares the same objective. Where government funds are made available to an association for the pursuit of its common purpose, the association-individual tension can become more pronounced, for now the individual, given the involvement of her tax dollars, sees herself as having a stake in the association's pursuit. To a certain extent, this tension is present whenever the government engages in activities with which individual taxpayers disagree, but another dimension to the tension arises when the association receiving the funds has a religious orientation. Given that a state decision to fund an association's activities presumably connotes a judgment that the state values the activities, the association-individual tension is not a basis for prohibiting such funding arrangements if we are serious about making such decisions under a framework of neutrality.

of valid and important public purposes, such as equity, fairness, and the promotion of broad forms of social cooperation among citizens.”).

The reasons underlying this conclusion may become clearer after setting out the limitations on neutrality, but before doing so, we must address the association-state component of the mediating tension, for it is this aspect that reveals the potential pitfalls of neutrality. An association's access to government funds threatens the mediating function of the association because such funds are only available at the behest of the collective. In other words, when an association becomes reliant on government funds, the state-association relationship is skewed in favor of the state, and the mediating tension between them slackens.

To gain specific insight into the simultaneously empowering and eviscerating dynamics of neutrality, we must look at two contexts: Charitable Choice (direct funding) and school vouchers (indirect funding).

a. Charitable Choice (Direct Funding)

First, neutrality means that where the government funds a religious association directly, as in the Charitable Choice¹⁴⁶ context, the funding must be limited to the nonreligious elements of the association's program. This not only avoids the unconstitutional advancement of religion,¹⁴⁷ but it also protects the unique mediating function of religious associations by shielding them from government regulation and ensuring that they continue to embody the purposes and priorities of their members, rather than the purposes and priorities of the government. The Bush Administration's proposed expansion of Charitable Choice has not yet been litigated or even legislated,¹⁴⁸ but

146 "Charitable Choice" refers to a series of laws enacted between 1996 and 2000 designed to give consumers of federally funded social service programs greater discretion in selecting providers, including religious providers. The affected programs include Temporary Assistance to Needy Families (TANF), the Community Services Block Grant (CSBG), Welfare-to-Work, and programs for substance abuse and mental health. White House Office of Faith-Based and Community Initiatives, *Charitable Choice: The Facts*, at <http://www.whitehouse.gov/government/fbci/guidance/charitable.html> (last visited Feb. 24, 2004).

147 The absence of an intervening private choice in the direct funding context renders the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), discussed *infra*, unhelpful to those who favor direct funding of religious elements of a social service program. See *id.* at 652:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

148 Thus far, the expansion has consisted of several executive orders which banned discrimination on the basis of an organization's religious identity in the ad-

it is nevertheless important to sketch some potential pressure points on associations, as this promises to be an area of increasing importance.

In its broader constitutional formulations, neutrality simply mandates government openness to religiously affiliated or motivated social service providers.¹⁴⁹ As David Cole puts it, “[i]f religion is a central mediating institution in civil society, it may provide benefits to the democracy as a whole that warrant its support, or at least argue against excluding religious institutions from equal eligibility for support otherwise available to similarly situated secular organizations.”¹⁵⁰ Besides furthering constitutional visions of the church-state framework, neutrality allows religious providers to meet needs that are otherwise beyond their limitations. Such limitations may be financial, or in terms of membership, to the extent that potential members perceive that the government is already monopolizing the association’s chosen purpose. Allowing these associations to partner with the government to the same extent that secular service providers do gives them a significant boost, and, given that religious associations make up such a large and vital¹⁵¹ portion of all voluntary associations, enhances the vitality of associational life in general.

Under a neutral vision of social service funding, a religious association, even a church, should be eligible to receive funding directly

ministration or distribution of federal financial assistance under social service programs; made faith-based organizations eligible to receive federal disaster assistance to the same extent as other social service organizations damaged or destroyed by natural disasters; and established Centers for Faith-Based and Community Initiatives at several federal agencies. In his 2003 State of the Union address, the President also proposed providing vouchers to individuals needing treatment for drug addiction, which would be redeemable at faith-based (and non-faith-based) treatment centers. Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 111 (Jan. 28, 2003) (proposing a \$600 million program to “help an additional 300,000 Americans receive treatment over the next three years”).

149 Carl Esbeck contends that

[s]o long as the welfare program has as its object the public purpose of society’s betterment—that is, help for the poor and needy—and so long as the program is equally open to all providers, religious and secular, then the First Amendment requirement that the law be neutral as to religion is fully satisfied.

Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 40 (1997).

150 David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 574 (2002).

151 See, e.g., *id.* at 562 (“Religious institutions are an integral element of a vital civic society and have an independent normative authority that may permit them to succeed where secular institutions have not.”).

from the government on the same basis as nonreligiously affiliated social service providers.¹⁵² Parting company from many proponents of such funding, however, it is essential, in my view, that the funds be strictly segregated from the religious aspects of the organization's operations. My focus is not on the potential Establishment Clause problems posed by such funding, but on the problems it creates for the mediating function of the providers themselves.

Neutrally administered government funding is certainly a tool of empowerment for associations, but it is important to recognize its tendency to erode associations' independence and autonomy. As mediating structures, religious associations serve their purposes "sometimes by obstructing, rather than co-operating with, the government's projects; they compete with, and do not merely echo or amplify, the state's voice in the formation of persons."¹⁵³ This role was already called into question in the widely reported disputes over the "strings" that would accompany the Charitable Choice funding urged by the Bush Administration, especially in the area of hiring decisions.¹⁵⁴

Even where religious associations are not playing their historical prophetic role by standing in opposition to the current political regime, the religious aspects of the associations' social services must be shielded from government influence in order for the association to maintain the integrity of its religious identity. Once the associations' religious operations become funded by the government, the need for member funding is correspondingly reduced. Without a need for

152 The need for a further "level[ing of the] playing field," as the Bush Administration puts it, begs the question whether the playing field is already level, especially in the wake of the Charitable Choice provisions enacted under the Clinton Administration. See Press Release, White House Office of Faith-Based and Community Initiatives, Fact Sheet: White House Office of Faith-Based and Community Initiatives (Sept. 22, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030922-1.html> (announcing that the Dep't of Housing and Urban Development (HUD) "finalized regulations that apply to eight HUD programs and will make faith-based groups eligible to compete for \$8 billion in HUD grants") While much of the Bush Administration's proffered evidence of discrimination against religious providers is anecdotal, taken together, the anecdotes suggest a persistent, if not widespread, problem. See, e.g., Press Release, *supra*; see also Editorial, *Straying from Faith*, WASH. POST, Jan. 25, 2003, at A20.

153 Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 800 (2001).

154 See, e.g., Mike Allen & Alan Cooperman, *Bush Backs Religious Charities on Hiring*, WASH. POST, June 25, 2003, at A1 (noting Democratic "plans to introduce legislation . . . that would nullify regulatory decisions by the Bush administration that permit employment discrimination by some religious organizations" receiving federal funds); Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays*, WASH. POST, July 10, 2001, at A1.

member funding, there is less of a need to make the provision of services—especially the religious aspects of those services—reflective of the members' priorities and values. If only government money is needed to maintain the operation, the tendency will be to focus on whether the government, rather than the previously contributing membership, is satisfied with the provision of services. By essentially becoming an arm of the government, the association forsakes its mediating function.

An even more dramatic danger arises from the possibility of government regulation. For example, suppose a homeless shelter required residents to attend a nightly Bible study aimed at healing them from the evils of substance abuse. If the Bible study leader's salary was paid by government funds, it is likely that the position would become regulated, at least to some degree, by the government.¹⁵⁵ Even if the hiring of the leader were left entirely within the association's discretion,¹⁵⁶ it is highly questionable whether the conduct of the Bible study would be free of any government imposed limitation. Congress may not stand idly by if a government funded employee were to teach the recipients of government funded services that women must submit to men or that homosexuality is an "abomination"—both of which are conceivable in the course of a theologically conservative Bible study. At a minimum, the provider would undoubtedly be required to offer shelter residents the option not to attend the Bible study—an option that would make the provider's religious objectives much more difficult to pursue. Even if Congress were to grant a blanket shield of noninterference in the funding program, that shield would exist only at the whim of Congress, and could be removed once political pressure warranted. Once providers become dependent on the funds, the choice between maintaining their original vision of religiously inspired social services and adopting the government's watered-down version may be no choice at all.

Of course this process could occur in relation to the nonreligious aspects of the provider's services, but that does not pose the same danger to the mediating function of the association, as it does not strike at the heart of the association's identity in the same way.¹⁵⁷ Presumably,

155 At a minimum, there would be regulations intended to make the association accountable for its results. Often this accountability in itself leads to the professionalization of associations and to a correspondingly diminished mediating function. See RICHARD A. COUTO, MAKING DEMOCRACY WORK BETTER: MEDIATING STRUCTURES, SOCIAL CAPITAL, AND THE DEMOCRATIC PROSPECT 63 (1999).

156 A dubious proposition in itself. See *supra* notes 113–17 and accompanying text.

157 This is underscored by comparing the nature and degree of the mediating impact that would result from the regulations restricting the substance of the Bible

the core religious purpose of the association has value for members who have chosen to participate in the association's provision of social services instead of joining a nonreligious provider. It is imperative that the religious practices of the association reflect the religious beliefs and values of the members, rather than the policy judgments of the government.¹⁵⁸ This can be accomplished, in large measure, by requiring the segregation of government funds from any funds used for expressly and intentionally¹⁵⁹ religious activities.¹⁶⁰

b. School Vouchers (Indirect Funding)

Where individual beneficiaries of government programs are allowed to choose where to direct government funds, neutrality demands that the fact that there might be more religious providers to choose from does not impermissibly advance religion. As long as beneficiaries have some viable choice between religious and nonreligious providers, the supply of providers should be allowed to reflect individuals' demand for religious providers.

The Supreme Court has been tending toward a view of the Establishment Clause that recognizes, in Michael McConnell's words, that "[a] governmental policy that gives free rein to individual decisions (secular *and* religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices."¹⁶¹

study with the impact of a regulation requiring the homeless shelter not to discriminate in terms of who may stay at the shelter. Many individuals would join an association based, at least in part, on its use of religious teachings to overcome a given social problem; significantly fewer are likely to join an association because it promises to exclude certain segments of society from its provision of services that are widely available elsewhere.

158 See Sullivan, *supra* note 141, at 1401 (noting that "conscripting of private associations, including religious associations, into common norms and public values defeats their very purpose").

159 These qualifications are aimed at distinguishing the myriad instances where the provision of social services is religiously inspired or motivated, or where providers and/or beneficiaries find religious meaning or inspiration in the course of the activity—e.g., a substance abuse support group run by a church would be eligible for funding, even if participants were allowed to share experiences that were religious in nature.

160 Given that money is fungible, of course, government funds would still free up the association's own money to be used for religious activities. This is true of any funding situation—e.g., government funding of Catholic Charities allows the Catholic Church to direct more of its funds to other endeavors, including proselytizing—and, given the lack of government oversight and regulation, does not create the same threat to the association's mediating function.

161 Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 175 (1992).

For the viability of voluntary associations, this is a good thing. It has not been universally accepted in our courts, however, but there is reason to believe that the Supreme Court largely, though not conclusively, settled the issue last year.

In *Zelman v. Simmons-Harris*,¹⁶² the Supreme Court held five to four that Cleveland's school voucher program did not violate the Establishment Clause. In so ruling, the Court reversed the Sixth Circuit, which had invalidated the program in light of the fact that 86% of the participating schools (forty-six of fifty-six) were religious and 96% of students using vouchers enrolled in religious schools.¹⁶³ In the Sixth Circuit's view, the statistical predominance of religious schools precluded students from having a "meaningful" choice between religious and secular schools, and thus the program impermissibly advanced religion. The Sixth Circuit relied in part on its belief that nonreligious schools were dissuaded from participating because the program placed caps on the amount of tuition chargeable to voucher students—thereby forcing the school to bear any per-student costs in excess of the caps—but that religious schools were not similarly dissuaded because the sponsoring church could pick up the tab for any tuition shortfall.

The Supreme Court disagreed, finding that: (1) nonreligious private schools, like their religious counterparts, received substantial third-party contributions supporting their operation; (2) all ten secular private schools operating within the school district at the time of the program's implementation had chosen to participate, and continue to do so; and (3) while no religious schools had yet been created in response to the financial incentives offered by the voucher program, several nonreligious schools had been created.¹⁶⁴ Because these facts showed that the structure of the program did not favor the participation of religious over nonreligious schools, and given the lack of evidence that "any voucher-eligible student was turned away from a nonreligious private school in the voucher program,"¹⁶⁵ the fact "[t]hat 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause."¹⁶⁶ Similarly unconvincing was the fact that 96% of participating students chose religious schools, as it was "irrelevant

162 536 U.S. 639 (2002).

163 *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000).

164 *Zelman*, 536 U.S. at 656 n.4.

165 *Id.* at 671 (O'Connor, J., concurring).

166 *Id.* at 655.

even to the constitutionality of a *direct* aid program that a vast majority of program benefits went to religious schools.”¹⁶⁷

If every student in the Cleveland voucher program who wanted to attend a private secular school was able to do so, the Sixth Circuit—and the four-Justice Supreme Court dissent¹⁶⁸—are hard-pressed to assert that the students lacked a meaningful choice between religious and nonreligious educational alternatives. It would be another matter, of course, if the lack of choice derived from a significant disparity in academic quality between the participating nonreligious schools and participating religious schools. This was not a factor in *Zelman*, however. Rather, the judges finding an Establishment Clause violation seem to have inferred an advancement of religion simply because, in their view, too many religious schools, and not enough nonreligious schools, elected to accept voucher students,¹⁶⁹ and that too many students chose to use their vouchers to attend those religious schools.

This mindset unnecessarily hinders the ability of religious associations to pursue their chosen purposes to the extent that such pursuit hinges on their ability to compete with the operators of public schools (i.e., the government) and nonreligious private schools (i.e., mainly nonprofit and for-profit corporations, along with some nonreligious civic associations). In effect, this approach places a heavier burden on religious associations relative to their nonreligious competitors: in order for religious schools to participate in a facially unobjectionable voucher program, they would have to hope that a sufficient number of nonreligious schools choose to participate, and that a sufficient number of students choose to use vouchers to attend the nonreligious schools; obviously, the participation of nonreligious schools in a voucher program does not similarly turn on the participation rates of their religious counterparts. Provided that public resources are made available without either explicit or implicit regard to religion, and that individual beneficiaries (i.e., the voucher recipients) are able to

167 *Id.* at 658 (emphasis added).

168 The three dissenting opinions—by Justices Stewart, Breyer, and Souter—raised additional points of contention with the majority’s analysis. For purposes of the present inquiry, however, the relevant dispute is over whether an Establishment Clause problem arises simply because individual private choices result in an unmistakable collective preference for religious over nonreligious entities.

169 As the majority observed, “Cleveland’s preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities.” *Zelman*, 536 U.S. at 656–57 (noting also that 81% of private schools in Ohio are religious schools).

choose from at least one legitimate nonreligious entity,¹⁷⁰ the nonreligious versus religious composition of entities that have chosen to utilize public resources is immaterial. In this regard, the Sixth Circuit and the Supreme Court dissenters did not exhibit neutrality in weighing the participation of religious schools against the participation of nonreligious schools.¹⁷¹ Meaningful choice is not precluded simply because there are more opportunities to choose religious schools; such a notion is attractive only to a court looking for ways to preclude the utilization of public resources by religious entities. Such predispositions are unnecessary from a constitutional standpoint, and distinctly unhelpful to the purpose-driven mediating efforts of religious associations.

This is not to suggest that any association holding itself out as a school has unfettered discretion to tap into voucher money. As in the Charitable Choice context, the provider must be able to fulfill the objectives for which the government funds are made available. Certainly, a school must be able to educate students effectively in order to be eligible to receive vouchers. And because government funds are involved, the government should have reasonable discretion to inject its own view of effectiveness into those requirements.¹⁷² While it is patently unreasonable to conclude that all religious schools are incapable of educating students effectively, it is not so unreasonable to conclude that effective education in our day precludes the categorical exclusion of students from a school based, for example, on their religious beliefs. In this regard, the government may require voucher schools to adopt a more inclusive admission policy than the school would choose absent such funding. The fact that an association's mediating role demands freedom to pursue its own identity does not give it a blanket license to maintain the same degree of freedom when it chases government funds in pursuit of its chosen purpose. In other

170 Note that this element of the required choice only flows in one direction. Despite the rhetoric from some quarters, individual beneficiaries do not have a right to have at least one religious entity among the available providers.

171 The neutral approach is better reflected in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), in which the Wisconsin Supreme Court upheld Milwaukee's voucher program. The court held that the program's inclusion of religious schools did not advance religion, but merely added religious schools to the range of options for Milwaukee students. Because students received the same share of public aid regardless of the school they chose to attend, there was no incentive to choose religious schools, and the participation of both secular and religious schools in the program ensured a meaningful choice for voucher students.

172 I invoke the notion of reasonableness not as a judicial standard—after all, private schools do not have a constitutional right to receive voucher money—but simply in recognition of the (hopefully) common sense basis of future voucher legislation.

words, the combination of *Dale* and *Zelman* does not create the specter of students using voucher money to attend exclusionary private schools. Whether or not such schools have the right to exist, they do not have the right to government funds.¹⁷³ The mediating tension that underlies the values of identity and purpose demands as much.

This gives further emphasis to a point discussed above: the fact that a government funding program based on neutrality better enables religious associations to meet needs does not mean that every religious association should pursue such funding. Even if the scope of the associations' operations expands, the outside influence that accompanies the funding—whether through government regulation, public pressure or otherwise—may actually hinder the groups' pursuit of their original purposes, alienating core constituencies in the process.¹⁷⁴ In this regard, the concerns expressed by Justices Souter and Breyer in their *Zelman* dissents do not support their finding of an Establishment Clause violation, but they do warrant serious consideration by religious entities tempted to feed at the government trough.¹⁷⁵ A cautionary note is also reflected, perhaps unintentionally, in an observation by Martha Minow, who suggests that urban Catholic schools have embraced public values—which to her means dropping specific religious instruction and focusing instead on tolerance and civic virtue—without jeopardizing their missions.¹⁷⁶ Regardless of whether one supports or opposes the mission of Catholic schools, it seems far-

173 See also *supra* note 160.

174 For example,

government support of religion may paradoxically undermine some of the qualities that make religious services an attractive investment in the first place. Religion's commitment to charitable work, for example, might be eroded if religious institutions come to expect government funding. The normative and legitimating authority that religion can provide because of its independence from the state may be threatened if religion becomes too closely aligned with the state through government funding. The Nation of Islam brought to you by the White House Office of Faith-Based and Community Initiatives would not be the same Nation of Islam, for better or worse. And to the extent that public funding brings with it restrictions on religious activity, the funding may rob faith-based programs of their most effective tool.

Cole, *supra* note 150, at 577–78.

175 See *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (Souter, J., dissenting) (“When government aid goes up, so does reliance on it; the only thing likely to go down is independence.”); *id.* at 723–26 (Breyer, J., dissenting) (forecasting problems arising from state regulation of schools accepting voucher money).

176 Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1092–93 (2000).

fetches to suggest that the omission of religious instruction does not jeopardize their mission. Other examples abound in the literature, especially in the debate over school vouchers.¹⁷⁷

There is a balance that must be struck by associations on a case-by-case basis. Government funds may allow groups to meet more needs, increasing their viability and attracting new members to a collective endeavor that previously may have seemed ineffectual or, at a minimum, peripheral to the government's dominant social service role. But, too much outside influence may negate the attributes that make groups valuable in the first place. By foregoing its core mission or watering down its identity, a previously unique association could be turned into, in essence, an arm of the government.¹⁷⁸ Such a shift would not only make the association less attractive to potential members, but would necessarily preclude any mediating function—i.e., as allegiance to the government as a funding source increases, the association's ability to serve as a mediating force between individuals and the government necessarily declines. The point of this analysis is not to gloss over or minimize the risks an association faces when it utilizes public resources, but to show that the choice whether or not to tap into public resources despite the corresponding risks should lie with the associations themselves, and not with an overly aggressive judiciary.

D. Meaning

1. The Mediating Dimension of Autonomy

In order to serve their mediating functions effectively, associations require as much autonomy as possible to pursue their members' chosen priorities and values—i.e., allowing their members to construct lives that they find meaningful. To the extent that shared meaning is a product of associational autonomy, meaning is a value that cuts across the categories of identity, expression, and purpose.

177 See, e.g., James G. Dwyer, *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963, 965 (2001) (observing that "vouchers create the likelihood of unprecedented state control over activities of religious organizations, precisely because the recipients of the service that the state is supporting are children rather than adults" and concluding that "in the case of children's schooling, the state's entrance into the religious arena is, on the whole, a good thing").

178 This echoes Hobbes's fear that, because associations exist only by concession of the state, they are not a device for protection within a free society, but rather an arm of the state for limiting group rights and activities—i.e., a means of control within an absolutist state. D.B. Robertson, *Hobbes's Theory of Associations in the Seventeenth-Century Milieu*, in *GROUPS IN FREE SOCIETIES*, *supra* note 109, at 109, 121.

Steffen Johnson, for example, argues that *Dale* is not just about acts of expressive association, but about the organizational and structural autonomy of associations.¹⁷⁹ In the context of religious associations, this principle is reflected in cases like *Serbian Eastern Orthodox Diocese v. Milivojevic*,¹⁸⁰ in which the Supreme Court reversed a state court's ruling that certain church disciplinary proceedings were procedurally and substantively defective under the church's internal regulations, and were therefore arbitrary and invalid. The Court held that the state court violated the First and Fourteenth Amendments simply by inquiring into the validity of the church's internal proceedings. As Kent Greenawalt puts it, the Court has taken a "Hands Off" approach to such cases.¹⁸¹ Besides the specter of government entanglement with religious questions, this approach is justified on a functional basis given that, for most of the world's religions, some sort of communal identity and existence among adherents is fundamental.¹⁸² As Justice Brennan observed, "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."¹⁸³ The constitutional grounds for protecting associational autonomy may become murkier in the absence of the Free Exercise Clause, but they are just as vital, as nonreligious associations play a similarly central role in their members' lives.¹⁸⁴

179 Johnson, *supra* note 97, at 1641 ("The right of expressive association necessarily presupposes not only the right to express views, but the right to select the means of deciding what views should be expressed, how they should be ordered in relation to the other values of the organization, and who should express them.").

180 426 U.S. 696 (1976).

181 Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

182 Mary Ann Glendon believes that the Supreme Court's free exercise analysis has too often viewed religion as solely a matter of individual experience, and fails to consider "the free exercise interests of members of religions to which the idea of a worshipping community is central." Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 679 (1992); see also Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800, 1800-01 (1994) (contending that free exercise is not just about individual rights, but about "the ability of religious groups to command the loyalty of their adherents through a system of beliefs and practices").

183 *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Justice Brennan noted: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Id.* at 341-42.

184 See Johnson, *supra* note 97, at 1653 ("[T]he primary rationales for granting churches wide autonomy over matters of polity and administration apply with substantial force to nonreligious associations.").

From the perspective of individual participants, the need for associational autonomy derives from the fact that much of an association's mediating function is the connection of individuals to sources of meaning.¹⁸⁵ Linda McClain and James Fleming suggest that "civil society is at least as important for securing what we call 'deliberative autonomy'—enabling people to decide how to live their own lives—as for promoting 'deliberative democracy'—preparing them for participation in democratic life."¹⁸⁶ Philip Wogaman makes the point by analogizing a group's cultural perspective to a drinking cup. The cultural perspective is what holds our life's experience; when the cup is shattered, experience loses its coherence.¹⁸⁷ Autonomy allows an association to maintain its unique cultural perspective with minimal intrusion from the state.

The benefits to the collective derive from the fact that, without the autonomy to foster shared meaning among members, voluntary associations as we know them would not exist; they would function simply as arms of the state. Whether a group's shared meaning is found in devotion to Jesus Christ, opposition to nuclear energy, the joys of poker, the purported supremacy of a particular race, or the simplicity of an agrarian lifestyle, the autonomy necessary for shared meaning is the nonnegotiable building block without which the mediating values of identity, expression and purpose would be meaningless. Certainly some groups—the Amish, for instance—are prime examples of the shared meaning flowing from associational autonomy, yet they offer no immediately discernible benefit to the collective—i.e., they do not seek a state valued objective, they do not seek to express their views or priorities to the broader public, and they do not socialize individuals in a way that facilitates future societal cooperation outside the boundaries of their group. In fact, such associations often aim to separate themselves and their members from society entirely, becoming a self-sufficient, isolated community of like-minded individuals. In this regard, the association secures its shared meaning, in significant part, simply by being left alone by the rest of the world. This underscores the foundational nature of the value shared meaning has to the collective; the collective will not directly benefit from every association's ability to facilitate shared meaning, but absent the autonomy underlying shared meaning, the collective would see none of the benefits offered by associations.

185 Wogaman, *supra* note 32, at 71.

186 McClain & Fleming, *supra* note 16, at 292.

187 Wogaman, *supra* note 58, at 89.

2. Limiting Principles

As with identity, expression, and purpose, the mediating value of meaning gives rise to tension between the individual and the association, and between the association and the state. As for the individual-association tension, the treatment of individual members by some associations seems to suggest that state intrusion may not always be such a bad idea, even if it does threaten to limit a particular group's freedom in facilitating shared meaning. The virtues of associational life are, in some contexts, muted by the reality of association imposed limitations on liberty—in particular, an association's ability to sanction members and ignore democratic processes.¹⁸⁸ Even strong proponents of associational life do not take for granted the nature or quality of member participation. Cohen and Arato, for example, caution that "without *active* participation on the part of citizens in *egalitarian* institutions and civil associations . . . there will be no way to maintain the democratic character of the political culture or of social and political institutions."¹⁸⁹ Although associations, by their nature, mediate between the individual and the state, it is beyond dispute that certain associations can stifle freedom as much or more than the overarching political community.¹⁹⁰

Concerns regarding the nature of participation in associations reflect the broader mediating tension that is inherent in associational autonomy at the association-individual level. This tension arises from the fact that, by joining an association, the individual is, to varying degrees, subordinating herself to the will and interests of the group.¹⁹¹ That tension is essential if the group is to have any substantive identity apart from the individual identities of its members, but is not without limits. Significantly, however, the limiting principle does not entail the replication of due process norms throughout associational life. Indeed, we should be reluctant to enforce traditional notions of due process on the internal governance of associations, for, as Lon Fuller recognized, when an association becomes dominated by the legal principle, shared commitment shrinks.¹⁹² Shared commit-

188 See Grant McConnell, *The Public Values of the Private Association*, in VOLUNTARY ASSOCIATIONS, *supra* note 19, at 147, 158–59.

189 COHEN & ARATO, *supra* note 12, at 19.

190 See GELLNER, *supra* note 31, at 100.

191 After all, "one aspect of associational freedom is the freedom to decide who decides. People drawn together by shared values are entitled to elect or appoint spokespersons, and to establish procedures for determining the organization's collective positions." Johnson, *supra* note 97, at 1649.

192 Fuller, *supra* note 136, at 11.

ment, it goes almost without saying, is essential not only to the mediating function of associations but to their very existence.

Rather than looking to due process norms imposed by the state, the safeguard against antidemocratic associational life lies within the essence of voluntary associations themselves—namely, the voluntary nature of membership and the corresponding exit ability of individual members. When judges resist the temptation to pry into the inner workings of an association, they are not sacrificing the interests of dissenting members in favor of an unchecked majority.¹⁹³ As Evelyn Brody points out:

To put a twist on Madison's solution to the dangers of faction—let a thousand factions bloom—individuals' narrow identification with specific associational interests is saved by their potential impermanence. The Supreme Court's laissez-faire attitude towards freedom of contracting and internal governance similarly requires that the association and speech be consensual. Accordingly, being able to change one's mind about belonging—exit—is the point.¹⁹⁴

As in our discussion of socially corrosive associations, the danger posed by internally oppressive associations is mitigated significantly by the element of choice among associations.¹⁹⁵ To the extent an association restricts an individual's liberty and that individual's involvement in the association cannot be considered voluntary, state intervention may be appropriate.¹⁹⁶ Of course, the voluntariness of membership will not always be an obvious inquiry.¹⁹⁷ This is exemplified by the line of cases restricting the ability of employees' exclusive bargaining representative from collecting fees for activities not directly related to the collective bargaining agreement.¹⁹⁸ The other significant limitation arises where a voluntary association plays a central role in a public function, the most obvious example being political parties.¹⁹⁹

193 See Dan-Cohen, *supra* note 13, at 1214 (“[M]ediating institutions can themselves develop oppressive tendencies, leaving individuals trapped and suffocated.”).

194 Brody, *supra* note 17, at 865–66.

195 Cf. Karl Hertz, *The Nature of Voluntary Associations*, in *GROUPS IN FREE SOCIETIES*, *supra* note 109, at 17, 32. (“[U]nless free movement from one religious community to another is possible—a free movement resting on more adequate communications—and unless such movement represents a genuine choice among religious alternatives and not just a move in the status game, religious pluralism does not have much meaning.”).

196 See GUINN, *supra* note 35, at 111.

197 The minority-age children of consenting participants present a different case, for obvious reasons, that is beyond the scope of this Article.

198 See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

199 Nancy Rosenblum contends that political parties are the most important voluntary associations because they are the “voluntary associations principally committed to

But for truly voluntary associations, membership is not only a choice to be exercised in opposition to an oppressive or unresponsive state, but also in response to an association that does not embrace the views or voices of the individuals who comprise it. In this regard, Ernest Gellner's thoughts on the "modularity of man" are apt:

It is *this* which makes Civil Society: the forging of links which are effective even though they are flexible, specific, instrumental Society is still a structure, it is not atomized, helpless and supine, and yet the structure is readily adjustable and responds to rational criteria of improvement. [It is the] modularity of man [that] is the main answer to the question: how can there be countervailing institutions or associations which at the same time are not also stifling?²⁰⁰

Certainly the associational interest does not trump the interests of those who have not chosen to associate themselves, but it must be remembered that the association is often the only means for certain individuals to secure their interests. In the situations where the desires of individual members are not reflected or honored at the associational level, allowing the free operation of the market of associations is usually a more prudent remedial mechanism than curtailing associational autonomy through government intervention. Protecting associational autonomy in this manner does not diminish the individual, but rather recognizes that many individuals attain their highest personal goals and give substance to their most deeply held ideals only by joining with like-minded others. Associational interests cannot be slighted as those of some monolithic, impersonal entity—in contrast to the vulnerable individual seeking the law's protection—but are more accurately viewed as the bundled interests of individuals who have sought to pursue their objectives more effectively and meaningfully in the company of one another.

In regard to the association-state relationship, tension arises from the fact that an association left to its own devices may find meaning in pursuits that are anathema to the surrounding society. If the association was free only to engage in conduct approved by the collective, the association would be operating by permission, not under a presumption of autonomy. The association mediates between individuals and the state by allowing individuals to join together to seek meaning from

making democracy work." Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000).

200 GELLNER, *supra* note 31, at 100; *see also id.* at 102 ("It is only modern modular man who is both individualistic and egalitarian, while nevertheless capable both of effective cohesion against the state and of performing an amazing, indeed bewildering, diversity of tasks.").

sources and in ways that society finds unworthy, or even abhorrent. The limiting principle is that associational autonomy granted by the surrounding society cannot be converted into a license to cause harm to the surrounding society or to nonconsenting members.²⁰¹

"No harm to others" is hardly a recent or especially imaginative limiting principle, being expressed, perhaps most notably, by John Stuart Mill:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.²⁰²

The principle is not as starkly narrow as it may seem, for Mill himself acknowledged society's interest where self-inflicted harm also breaches a person's duty to those close to him—e.g., the state has an interest in preventing the father of young children from gambling all his money away.²⁰³ Further, because practical considerations may preclude an individualized determination as to whether a particular course of conduct threatens harm, some blanket prohibitions of potentially harmful conduct may be unavoidable, even if they also squelch particular courses of conduct that would not inflict harm.²⁰⁴

201 For the most significant types of harm (death, most notably), state intervention is defensible under this approach regardless of expressed consent by members, on the ground that such consent under the circumstances is presumptively irrational. As such, mass suicide by an association's members (e.g., the Jim Jones cult) is subject to prohibition even where members are not shirking their duties to dependents by committing suicide. In a society built on a collective notion that human life is valuable, such a restriction is practically unavoidable and theoretically defensible.

202 MILL, *supra* note 39, at 14.

203 *Id.* at 90. It also bears noting that, on some issues, Mill's notions of autonomy would place him on the radical fringe of government interventionists. *See id.* at 120 (arguing that laws forbidding marriage until engaged couple can prove means of supporting a family "do not exceed the legitimate powers of the State" and "are not objectionable as violations of liberty" in that they are aimed at minimizing harm to children).

204 For example, because the use of certain drugs causes significant societal harm (in terms of family disruption, lost worker productivity, medical expenses, et cetera), and because an individualized evaluation of the likelihood of external drug-related harm for each prospective user of such drug (or association devoted to the use of such drug) is impractical, a blanket prohibition on the use or possession of a demonstrably harmful drug is theoretically defensible, even under a harm-based limitation. (As a matter of constitutional doctrine, however, a more particularized showing may be necessary where the drug is used in a religious exercise. *See infra* notes 215–19 and accompanying text.)

In any event, the precise contours of the limitation are far beyond the scope of this Article,²⁰⁵ for my purpose here is simply to point out that a harm-based limitation is consistent with associations' mediating tension to the extent that it maintains meaningful associational autonomy without holding the legitimate interests of the collective hostage to an association's every whim.

Mill's thoughts on polygamy underscore the utility of a harm-based limitation in our context. He personally disapproved of polygamy because "far from being in any way countenanced by the principle of liberty, it is a direct infraction of that principle, being a mere riveting of the chains of one-half of the community, and an emancipation of the other from reciprocity of obligation towards them."²⁰⁶ Mill thus found no problem with sending missionaries to Mormon communities to persuade them not to engage in polygamy, or to seek to convince other segments of society not to follow the Mormons' lead with respect to polygamy. But, as long as the practice was voluntary on the parts of each spouse entering into the arrangement, Mill saw no basis for outlawing it.²⁰⁷ Mill's approach to polygamy reflects a theme of this Article: for a society that values a vibrant associational life, checking the perceived excesses of certain associations is a course better left to the marketplace of associations (and individuals acting outside associations) rather than the trump of government dictates. Limiting government intervention to instances where an association

205 Concededly, significant questions would need to be answered before embarking on a harm-based inquiry, especially where harm threatens a group member. Presumably, some forms of harm are subject to prohibition because the gravity of the harm calls into question the rationality of the consent to harm, *see supra* note 201, but other forms of member harm could be consentable (e.g., we would allow group members to willingly fast even where the fasting threatens their health). In this regard, even a harm-based inquiry would require some analysis of the association's internal operation, in particular to verify the voluntariness of a member's involvement in the transaction threatening harm. Where an association's activities threaten harm to nonmembers, the inquiry hinges not on consent, but on the level of external harm we are willing to tolerate (e.g., an association devoted to kidnapping infants warrants different treatment than an association devoted to playing loud music in a relatively rural environment).

206 MILL, *supra* note 39, at 102.

207 Opponents of polygamy certainly may dispute the notion that the practice is harmless, especially to the extent that polygamous relationships produce children. Mill's larger point, however, remains valid: the inquiry underlying the legal prohibition of polygamy should center on the question of harm (e.g., are children worse off when their father's devotion and attention are divided among multiple wives with many offspring) rather than the majority's reflexive disapproval (e.g., polygamy defies social convention).

threatens harm to nonmembers or nonconsenting members is one such avenue.

This analysis does not purport to suggest that a harm-based limitation can be extracted from the constitutional freedom of association.²⁰⁸ It would be up to policymakers to pursue such a course. Absent such a limitation, both courts and policymakers must recognize the fact that, to the extent they allow government intrusions into the operation of an association where harm is not threatened, the mediating tension of associations is called into question. This is seen most clearly in cases where the autonomy afforded an association becomes a function of the group's judicially perceived nobility or social acceptance. Where judicial views of an association's values and conduct color the court's treatment of the association's interests, the association's ability to mediate via its pursuit of a chosen way of life is threatened.

In the past, courts have protected associational autonomy where the association in question is distinct, well established, and respected. The most glaring example is the Amish community in *Wisconsin v. Yoder*,²⁰⁹ in which the Supreme Court exempted the Amish, on free exercise grounds, from the State of Wisconsin's compulsory high school attendance law. What is noteworthy at the outset of the *Yoder* Court's opinion is the admiration with which the majority describes the Amish. The Court notes their three hundred year history as a group

who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life.²¹⁰

208 However, under a reasonable reading of the majority's analysis in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), notions of substantive due process may suggest such a harm-based limitation when it comes to the regulation of intimate associations. See *id.* at 2484 (noting that the case "does not involve minors," nor does it "involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused").

209 406 U.S. 205, 234 (1972).

210 *Id.* at 210.

The Court even draws comparisons with familiar religious rites, as if to make the reader more comfortable with the Amish traditions: "Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community."²¹¹

In light of this buildup, it not surprising that the Court ultimately rules that by requiring Amish children to attend high school, the state of Wisconsin is violating their free exercise rights. In the process, the Court seems to elevate the Amish way of life as vastly preferable to the route represented by public education:

The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.²¹²

Forcing the Amish to subject their children to such an environment violates the First Amendment, according to the Court. In my view, this holding is correct because the state did not have a sufficiently compelling interest to justify such a significant intrusion on the Amish's autonomy. But the holding would have been justified under the Free Exercise Clause even if the Court did not ascribe such a laudatory heritage and lifestyle to the Amish.²¹³ By appearing to predicate the Amish's entitlement to autonomy on the perceived nobility of the values fostered by the Amish, the Court weakens the standing of associations in general. After all, "the most important characteristic of civil society is that it draws no difference among voluntary associations with regard to the substantive values that are fostered by these associations."²¹⁴

211 *Id.*

212 *Id.* at 211.

213 Justice Douglas's dissent in *Yoder* is, standing alone, fertile ground for the voluntary association inquiry. He makes the hopelessly overbroad statement that "[r]eligion is an individual experience," and uses that assertion as a springboard for his argument that each Amish child should have been given the option to attend high school, regardless of their parents' wishes. *Id.* at 243 (Douglas, J., dissenting). This represents the extreme of the individual versus state fallacy, allowing no room for groups.

214 Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHL.-KENT L. REV. 355, 369 (2000) (emphasis omitted). This is not to suggest that there are no relevant distinctions to be drawn among voluntary associations:

For our purposes, however, of much greater interest than *Yoder* are the hard cases where a court is confronted with a conflict between the surrounding society and a religious group that is not as well established or widely admired as the Amish. Autonomy is not held quite as high where a group's identity is less obvious or dramatic, and the activity less noble. One example is *Employment Division v. Smith*,²¹⁵ in which the Supreme Court held that Oregon's prohibition on peyote possession could be applied to Native Americans' religious use of the drug without running afoul of the Free Exercise Clause. The most glaring aspect of *Smith* is what is omitted from the majority opinion. In contrast to *Yoder's* extensive discussion of the history, traditions, and lifestyle of the Amish, the *Smith* Court provides no background on the Native American Church or its sacramental use of peyote. Justice Scalia, writing for the majority, explains only that the respondents were fired "because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members."²¹⁶

Justice Scalia recognizes that the Court's ruling forces religious groups to rely on the political process to avoid laws of general applicability that might nevertheless infringe on the practice of their religions. He even recognizes the distinct danger posed to "those religious practices that are not widely engaged in," but calls this an "unavoidable consequence of democratic government."²¹⁷ As shown by *Yoder*, this is not an unavoidable consequence—at least it is not unavoidable where the Court finds socially redeeming qualities in the group threatened by the law at issue.²¹⁸ From the perspective of relig-

Certainly champions of civil society do recognize some differences among voluntary associations, but these are limited to their functions as elements of the civil society rather than to their normative content. For instance, voluntary associations that are more effective in developing citizenship skills are preferred over those that are less so. But the actual values to which people involved in these groups apply their skills are not under review, nor are there other substantive values that such associations embody.

Id. at 369–70.

215 494 U.S. 872 (1990).

216 *Id.* at 874.

217 *Id.* at 890.

218 Nor would it have been unavoidable if the Court had undertaken any sort of harm-based inquiry as to the nature of the state's interest in prohibiting the sacramental use of peyote. *Cf. id.* at 911–12 (Blackmun, J., dissenting) ("The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.").

ious associations, *Yoder* was right, but for the wrong reasons, and *Smith* was wrong, period.²¹⁹ Where the autonomy granted an association to foster a shared meaning depends on a court's affirmation of that meaning, the autonomy is, for purposes of the association's mediating role, an illusion.²²⁰ Just as the freedom to stake out an identity in opposition to the surrounding society lies at the heart of an association's mediating function, so too does the freedom to pursue sources of meaning that are not held in esteem by the collective's judiciary.

III. THE MEDIATING ROLE'S WIDER RELEVANCE

Judging by Part II's factual framing of the four mediating values, one could reasonably conclude that the association in relationship is primarily linear—i.e., that individual versus association versus state is the only relevant relational axis when it comes to understanding the mediating function of associations. For disputes that arise between the individual and the association, the association and the state, or the association and both, this is generally true. *Dale*, for example, can best be understood by focusing on the mediating tension between the individual, the Boy Scouts, and the state, with the Boy Scouts resisting the individual's and the state's conceptions of the good. But most disputes in our society are not so easily characterized. In particular, disputes that implicate some of the most deeply held values in our society often arise between the individual and the state, with no obvious mediating role for associations. Further, such disputes often appear to be winner-take-all contests between mutually exclusive visions of the good. Where one vision wins and one vision loses, it seems more accurate to speak of zero-sum advocacy rather than a pluralist model of mediating sources of influence.

219 Most of the withering attacks on *Smith* have "rested on the powerful proposition that [the decision] drains the Free Exercise Clause of independent meaning and renders it entirely redundant of equal protection concerns." Lupu & Tuttle, *supra* note 141, at 71. As a nonlawyer observed, it seemed that in *Smith*, "the U.S. Supreme Court singled out for oppressive action the weakest, most oppressed and demoralized segment of our society . . . first we take away their land, and then we turn on their final refuge and take away their religion as well" SMITH, *supra* note 125, at 126.

220 John McGinnis asserts that *Smith*, while seemingly "unsympathetic to religious associations, is nevertheless consonant with a jurisprudence where the government simply provides a neutral framework in which social norms generated by civil associations, regardless of the presence of religious affiliations or lack thereof, can compete on an equal basis." McGinnis, *supra* note 50, at 494. Under the *Smith* Court's constrained reading of the Free Exercise Clause, however, it is by no means clear that religious associations lacking the political power to protect their chosen practices can truly "compete on an equal basis."

Last term, for example, the Supreme Court struck down state same-sex sodomy laws in *Lawrence v. Texas*.²²¹ Obviously, the question of gay rights is one of the primary culture war battlefields and spawns a vast array of associational activity in this country, corresponding to the four mediating values discussed above: a group may seek to define its identity in terms of gender preference (e.g., the Boy Scouts), express a message in the debate over gay rights, engage in broader social projects consistent with their vision of sexuality ("family values" or "inclusiveness/diversity," depending on the group's perspective), or simply persist in a chosen way of life regardless of any consensus reached by the surrounding society on the issue of gay rights.

But *Lawrence* was a seemingly straightforward contest between the individual and the state. John Geddes Lawrence was arrested in his home with co-plaintiff Tyron Garner, and both were convicted for engaging in same-sex sodomy.²²² They brought suit, as individuals, against the state of Texas for violating their constitutional rights. In an area of the law that is of such pressing importance to so many associations, what do associations have to do with this case? More particularly, how does the model of the association in relationship fit a case like *Lawrence*? Perhaps even more glaring, even assuming associational involvement, where is the capacity for mediating influence in such a case?

For those Americans whose involvement with an association is motivated by, or intertwined with, a belief that the common good of our society is threatened by the legitimization of homosexual conduct, *Lawrence* seems to short-circuit the association versus state mediating tension by negating any possibility that a community's laws will reflect such a belief.²²³ But, if the case had come out the other way, and same-sex sodomy laws were held constitutional, a competing vision of the good would have been trumped. Many Americans, of course, are involved in associations based on a vision of the good that would allow gays to participate openly and fully in our society without even the threat of targeted criminal sanction. One vision or the other was destined to be negated. Under such circumstances, what mediating value do associations have to offer?

These two problems—the absence of associations from most disputes that are essential to associations, and the apparent zero-sum na-

221 123 S. Ct. 2472, 2484 (2003).

222 *Id.* at 2475–76.

223 See, e.g., Pete Winn, *Court Strikes Down Texas Sodomy Law*, CITIZEN LINK, June 26, 2003, at <http://www.family.org/cforum/feature/a0026643.cfm> ("Pro-family leaders decried the ruling as another example of an activist judiciary attempting to legislate its values by judicial decree.").

ture of courts' adjudications of contests over the good—are best addressed by recognizing that the association in relationship is not strictly linear. First, associations mediate not simply within a particular dispute, but also in the background against which a dispute is adjudicated. In *Lawrence*, for example, the Court struck down same-gender sodomy statutes based, in part, on its observation that, over the past half-century, this nation's "laws and traditions" reflect "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."²²⁴ In other words, according to the Court, the Framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"; as such, "the Constitution endures" because "persons in every generation can invoke its principles in their own search for greater freedom."²²⁵

As this language suggests, *Lawrence's* dispute with the state of Texas was not adjudicated in a timeless, placeless vacuum. Rather, his claimed liberty to engage in same-gender sodomy was analyzed against the prevailing conceptions of liberty in twenty-first century America (or at least the Court's perception of those prevailing conceptions of liberty). This brings into play the broader tableau of American social reality—a reality constructed, in significant part, by the mediating influences of associations. Whether it's a gay-rights advocacy group (e.g., Lambda), a group espousing an antigay worldview (e.g., Focus on the Family), a group reflecting—by its very existence—the integration of openly gay individuals into mainstream society (e.g., Log Cabin Republicans), or a group whose institutional life resists such integration (e.g., the Catholic Church), countless associations informed the background against which *Lawrence* was decided long before the police arrested Lawrence for sodomy.

A microcosm of this phenomenon can be seen in the *Lawrence* litigation itself. Before the Supreme Court, various groups filed amicus briefs on either side of the issue. Two briefs are especially illustrative. The National Organization of Women (NOW) attacked the Texas sodomy statute not simply as an affront to gays and lesbians, but as a violation of the gender equality that the group had fought for on behalf of its own members. NOW argued that the norms embodied in the statute

include[d] the idea that sexual intimacy between two men is a sign of femininity and is debased; that women are to be sexually available

224 *Lawrence*, 123 S. Ct. at 2480.

225 *Id.* at 2484.

to men and are not to express their own sexuality outside of an interaction with a man; and that transgression of gender norms is not merely unorthodox, but criminal.²²⁶

This argument was met by the Texas Eagle Forum, a nonprofit group that "believes that rights of women are best defended and strengthened by a robust concept of sexual complementarity, rather than androgyny or sexual dominance"; by the Daughters of Liberty Republican Women, a group that "support[s] legislation that protects and promotes values basic to the American heritage"; and by the Spirit of Freedom Women's Club, a group that "actively supports the Founding Fathers' vision of a just and moral society."²²⁷ These groups argued that public health considerations²²⁸ provided a rational basis for the sodomy statute, and discounted NOW's gender argument as having disregarded "the physiological reality of sexual difference, the historical reality of respect for women's talents and abilities in Texas, and the lack of any logical connection between a belief that the state may constitutionally prohibit homosexual acts and a belief in male sexual dominance."²²⁹ The expression of these diametrically opposed views of gender and public policy, presumably reflective of the groups' memberships, is a paradigmatic mediating function.

But even if these groups had decided not to file amicus briefs, their mediating functions would not be in doubt. Both groups embody worldviews that correlate with the deeply held values of their respective audiences. Even when such groups do not expressly advocate for their worldview before the state (embodied, in this case, by the U.S. Supreme Court), they bring coherence to their members' understandings of the world. In the aftermath of *Lawrence*, this will be a coherence of difference for Texas Eagle Forum—that is, the group gives its members a clearer understanding of why and how their values and conceptions of truth are different than those reflected in the governing elite. It may, in some cases, lead to a coherence of resistance, as seen in the aftermaths of *Brown v. Board of Education*²³⁰ and *Roe v. Wade*.²³¹ Whatever the substance rendered coherent by the association, the point is that associations mediate even when they are not

226 Brief of Amici Curiae NOW Legal Defense and Education Fund at 16, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

227 Brief of Amici Curiae Texas Eagle Forum et al. at 2, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

228 The groups argued that greater health risks accompany anal sodomy versus vaginal intercourse. *Id.* at 9.

229 *Id.*

230 347 U.S. 483 (1954).

231 410 U.S. 113 (1973).

directly involved in the state's resolution of society's fundamental disputes. Cases like *Lawrence* do not diminish the importance of recognizing the mediating relationship. And, the fact that many (perhaps most) of the relevant associations' mediating identities, expressions, purposes, and meanings were rejected, at least in part, by *Lawrence's* holding does not somehow shut down those mediating values—if anything, it makes them more essential.

This allows a response to the second problem—the notion that, to the extent that the judiciary determines the victors in the culture wars, the disputes are winner-take-all contests, and the mediating functions of associations on the side that loses a culture war battle are thereby rendered irrelevant. Specifically, cases like *Lawrence* are perceived to have short-circuited the association versus state component of the mediating relationship. If the state has rejected your view of the good, what mediation is there to be done? The response comes with the realization that the mediating relationship often spills beyond the individual-association-state troika. In cases like *Dale*, the mediating tension is most meaningful (and most acute) at the point of associational resistance to state intrusion. But, in cases like *Lawrence*, the mediating tension is most meaningful in the more diffuse associational marketplace, where associations' contrasting visions of sexuality and individual rights compete, and where the government simply provides broad, background rules of engagement.²³²

Seen in this light, the holding of *Lawrence* was entirely proper from the perspective of those who value the mediating roles of associations. The Court allowed gays and lesbians (and the groups to which they belong) to participate freely in the communal life of America, including the ongoing debate over homosexuality. As the Court recognized, condemnation of homosexuality, for many people, arises from “profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”²³³ But the centrality of such convictions to many citizens' worldviews (and those of the groups to which they belong) does not determine the validity of the state's prohibition of homosexual conduct; the relevant issue “is whether the majority may use the power of the State to enforce these views on the whole society through opera-

232 See Galston, *supra* note 101, at 883–84 (observing that, given our free society's “multiplicity of individual and associational beliefs, practices that give expression to these beliefs inevitably will come into conflict,” and therefore, “[s]tate power legitimately can regulate the terms of the relationship among social agents, provided that the public structure is as fair as possible to all and allows ample opportunities for expressive liberty”).

233 *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

tion of the criminal law.”²³⁴ From the perspective of associations, when the state prohibits homosexual conduct, the state unduly narrows any mediating influence an association might have on the issue. Such laws preclude groups from shaping an identity based on openly acknowledged homosexual conduct, limit the relevance of pro-gay messages to the political arena (i.e., asking the legislature to rescind the law) or judiciary (i.e., asking the courts to strike down the law), rather than the marketplace of ideas and moral suasion, and block the pursuit of communal meaning to the extent such meaning entails reliance on the ability to engage in homosexual conduct without threat of criminal sanction.

On the other side of the debate, the Court did not foreclose the mediating messages, identities, purposes, or meanings of groups that resist our society’s acceptance of homosexual conduct—it simply shifted the focus of their efforts. Focus on the Family and similarly inclined groups are free to persuade their fellow citizens that homosexual conduct is immoral and must be rejected. They are just not free to foreclose their fellow citizens from reaching a different conclusion on the issue. As such, *Lawrence* stands for one of the fundamental rules of engagement for a society that values a vibrant associational life: by facilitating pluralism, courts empower the mediating function of associations. Usually pluralism—in both a political and moral²³⁵ sense—will warrant judicial restraint, allowing local political bodies to reflect the array of viewpoints and values in the body politic. But when an entire segment of society is declared illegitimate by the majority of a political jurisdiction, pluralism demands judicial action, even at the national level.²³⁶ Maimon Schwarzschild’s pluralist defense of judicial activism in the civil rights era is instructive:

[E]qual protection decisions against racial segregation and discrimination helped to relieve America’s gravest and longest-running failure of pluralism. . . . Segregation suppressed interest group pluralism—an entire race was effectively disenfranchised—and

234 *Id.*

235 See generally, e.g., William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 245 (1998) (“[T]he claim that one good should enjoy an absolute or lexical priority over others is typically hard to sustain in a deliberative political context.”).

236 This principle is reflected even more directly in *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck down an amendment to Colorado’s state constitution forbidding any state or local government action designed to protect individuals based on their homosexual status, conduct, or relationships. The Court observed that “[t]he resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.” *Id.* at 633.

value pluralism as well: even quiet opposition to segregation could promote violence and sometimes lynching. The great civil rights decisions made it possible for large numbers of people who had been excluded to participate more freely in public life (and to suffer less indignity in private life). This made possible, among other things, a far broader range of political outcomes.²³⁷

The oppression of gays and lesbians is not nearly on par with the oppression of African-Americans in this nation's history, but the same basic point applies. When the state decides that homosexuals can and should be arrested for engaging in the very conduct that makes them homosexuals, even if the conduct takes place in the privacy of their own home, the state has precluded an entire class of individuals from building meaningful bridges between themselves and the surrounding society. While gays and lesbians still have had the capacity to seek solidarity by associating with one another, it has been a solidarity of the underground, and the sphere of meaningful mediation was drastically circumscribed by the state's intrusion into the heart of homosexual identity. Without question, the quest to repeal or invalidate sodomy statutes, by galvanizing the gay rights movement, has facilitated a narrowly focused mediating role for some groups. But through such statutes, the state trumped much of the broader mediating function that pro-gay associations could potentially serve by essentially defining gays and lesbians themselves as illegal.

In cases like *Lawrence*, where the majority's conception of the good has foreclosed all competing conceptions, courts must keep in mind that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."²³⁸ This is not an open-ended license for anarchy, as the *Lawrence* Court sensibly recognized that the absence of harm weighed heavily in its approach to the statute.²³⁹ *Lawrence* does not, under this approach, lead inexorably to the conclusion that gay adoption is a constitutional imperative. It does, however, suggest that the focus of that impending battle should be on the reasonableness of feared harm to children, not on the majority's moral disapproval of the practice.

In the individual-state contests that make up much of the culture wars jurisprudence, the mediating role of associations is still very much in play. Some groups will take on an adversarial role, some will

237 Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 Nw. U. L. REV. 961, 967 (2001).

238 *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

239 *Id.* at 2484; see also *supra* Part II.D.

engage in the ongoing public conversation over the issue, some will seek to maximize their members' preferences by lobbying the state, and some will simply bear witness to their conception of the good by virtue of their very existence. Whatever the particular role, the mediating function of associations is best served when courts refrain from attempting to shut down the culture war debates by conclusively adopting and enforcing one vision of the good over a competing vision.²⁴⁰ This is seen most clearly in the preemptive mistake of *Roe v. Wade*, which was "hoisted like a sudden flag over armies still at war."²⁴¹ Under limited circumstances, though, judicial action is needed to widen the circle of participants in the mediating institutions of our society. Identifying such circumstances will, of course, spark much heated debate between those already inclined toward a rights-based approach versus those who urge deference to the political sphere. Whether action or restraint is warranted, from the perspective of associations, will generally turn on whichever course best maintains a meaningful mediating tension between and among individuals, the associations to which they belong, and the state. Mediating tension often is most meaningful not when the state chooses one vision of the good and precludes competing visions, but when the state fosters an environment where the good can be chosen and pursued individual by individual, association by association.

CONCLUSION

In extolling the virtues of associations, de Tocqueville was by no means deluded into thinking that such groups would limit themselves to uncontroversial community functions like barn raisings and church potlucks. Even at the time of his American journey, voluntary associations were already staking out combative positions on slavery and other divisive issues. Our national history is replete with instances of individuals banding together to pursue priorities that unmistakably heightened social tensions, and in many cases tore at the very fabric of society itself.²⁴²

Of course, past disruption does not tell us much about whether the current disruptions are justified, or even necessary. The damage

240 This may be, of course, "compelling reason[]" for the political system to prefer some [visions of the good] to others," such as when a "particular understanding of the good, though not intrinsically preferable to others, functionally is preferable, perhaps even essential to the preservation of the institutions that protect expressive liberty." Galston, *supra* note 101, at 887.

241 ROGER ROSENBLATT, *LIFE ITSELF: ABORTION IN THE AMERICAN MIND* 35 (1992).

242 The Ku Klux Klan, for example, was born barely thirty years after de Tocqueville published *Democracy in America*.

inflicted by associations may stand out more starkly today than in earlier eras because of our society's growing commitment to inclusive values like equality and tolerance. And as our increasingly pluralist society spawns ever more social cleavages, causes, and fringes to which individuals and groups are drawn to plant their respective ideological flags, perhaps this country's association-friendly legal and political climate has finally outlived its utility. Perhaps we must finally rid ourselves of the quaint notion that associations invariably contribute to the common good, and face the reality that associations often preclude the realization of widely shared objectives and place further strain on our already fragmented society, almost to the breaking point.

This Article has sought to address these concerns by expanding our understanding of associations—in particular, by identifying the relational context that makes associations so valuable to modern American society. Specifically, I contend that associations allow us to chart a middle path between the alienating extremes of excessive individualism and collectivism. This path brings the association into conflict with both the individual and the state, creating a tension that is central to the association's mediating role and readily discernible in the Supreme Court's adjudication of disputes involving associations. Rather than forcing such cases into a simplistic pro-association or anti-association classification based on whether the association's litigation position was vindicated, we should view the case in light of the particular mediating tensions at play.

The need to maintain the association's mediating tension does not easily translate into doctrinal prescriptions or bright-line pronouncements, but it should inform the way we approach the problems that arise from the frequently polarizing excesses of associational life. Judges, policymakers, practitioners, and theoreticians must keep in mind several core truths about the mediating role of associations.

First, associations are uniquely capable of carving out a shared identity that is valued by the individual. This identity is defined, in significant part, in relation to others and to the state, and places the association in tension with both. Tension presumes resistance in both directions; in the case of the exclusionary association, this means that associations must have the latitude to define themselves, but it does not mean that the resulting definition trumps all conflicting state interests.

Second, associations provide a voice to individuals who, absent collective expression, would not be heard above the din of modern America. The mediating tension arising from the exercise of this shared voice requires the maintenance of resistance on all three fronts of the association in relationship: the association must be ensured ac-

cess to the public forum on an equal basis with other speakers; the dissenting individual must be assured that the access is not exclusive to any particular association; and the state must be permitted to identify and maintain the crucial distinction between access and promotion.

Third, associations empower individuals to pursue common objectives that would otherwise be beyond their reach, and that may not be shared by those around them or by the state. The importance of purpose demands that religious associations be allowed to compete for state funds on an equal basis with nonreligious associations, but the potentially corrosive effect of such funding on the association-state tension demands caution, if not resistance, on the association's part.

Fourth, any mediating role played by associations presupposes a degree of autonomy that is sufficient to allow the association to facilitate shared meaning among its members. The degree of autonomy is not boundless, as it is properly subject to the tension of the association in relationship. For the well being of individual participants in an association that flouts traditional norms of due process and democracy, the degree of autonomy afforded must be a function of the voluntariness of participation. For the well being of the state, autonomy cannot extend to all circumstances where the state has a pressing interest, such as where an association threatens significant harm to those outside the association or to nonconsenting participants.

Together, these association-provided pathways allow the individual to transcend herself, to shape an existence that is bigger than her own yet substantively distinct from the conforming and alienating pressures of the state. Significantly, though, this function demands that associations operate within limits, for allowing associations to operate with unfettered discretion not only threatens important individual and state interests, but also threatens the tension on which the association's mediating role is based. As bridges between the individual and the state, associations are, by their very nature, informed and comprised by both the individualist and collectivist aspects of our existence. And to a more limited extent, they may be held accountable to both.

In my view, this accountability is best expressed as an effort to maintain the mediating tension by acknowledging as legitimate the dual pressures exerted on associations by the individual and the state, and giving those pressures the force of law in those limited instances where an association has gone beyond its proper mediating role. This is consistent with the notion of limited sovereignty as a deliberately circumscribed area in which associational life proceeds largely unin-

hibited by our rights-based regime or collective mandates.²⁴³ The precise contours of that circumscription are not obvious, but they are essential.

The mediating value of associations, then, is in large part a function of the associational marketplace—i.e., the extent to which society creates and protects a common space in which associations can pursue their chosen identities, expressions, purposes and meanings. It is essential to recognize that the space cannot be cultivated on an association-by-association basis. To the extent we seek to squelch associations that embrace social agenda contrary to generally accepted conceptions of the common good, we threaten to replace the associational marketplace with the will of the collective.

The continued vibrancy of Operation Rescue's aggressively confrontational approach to the anti-abortion cause, for example, in an era when the mechanisms of state power and virtually all cultural elites decry such tactics suggests that the associational marketplace still holds meaning in America. De Tocqueville's seemingly naive pronouncement of this country's unparalleled "success" with associations thereby takes on a new emphasis. This notion of success does not mean that every association must produce undisputed, tangible benefit to our society. Success depends not on the eradication of unsavory associations, but on individual Americans' continued willingness to join together with like-minded others in pursuit of the good, however unpopular their conception of the good might be. It is not inconceivable that individuals and the associations to which they belong would give up that struggle, instead ceding to the state the sole power to construe and construct a common good. In this regard, it is the *absence* of Operation Rescue or the World Church of the Creator or the Raelians from the associational landscape that would cast the continued accuracy of de Tocqueville's observations into doubt. Such groups show that individuals continue to connect themselves in meaningful, efficacious and wildly unpopular ways, and that, 170 years later, associations remain at the center of the national story because they are a primary means by which Americans define themselves and the world in which they live.

243 As Karl Hertz explains, a doctrine of limited sovereignty is a doctrine holding that "state, church, corporation, and so on are associations within the community, not identical with it." Hertz, *supra* note 195, at 18.

