

# Restoring Civil Society

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*Associations do not just enable self-government: They are self-government. This act of self-government through association began with the founding of townships in the 1600s. It shaped the American capacity of self-government which, in turn, shaped the colonial charters, state constitutions, and, eventually, the federal Constitution. It also sustained the Constitution as Americans solved their own problems through associations in the early republic. It did the same through the changes wrought by the Industrial Revolution, knitting again the social fabric in the early 20th century through the establishment of the Rotary Club, the Boy Scouts, and the like. These civil society institutions are essential aspects of the pre-political, pre-economic social realm. Public policy should cultivate an environment in which these institutions thrive.*

Americans often talk as if the political realm is reality and our social groups are ephemeral, a mere product of the political world. But it is precisely the other way around. People are first and foremost social beings, members, literally from the moment of conception, of a social bond.<sup>1</sup> This has been true of human beings long before the advent of the political state. As necessary as the political state is to modern human society, it is not the foundation of society. Social, pre-political relationships are more fundamental to who people are as human beings than is their relationship to the political order. Civil society describes important institutions populating the social realm and shaping social identities.

## Bowling Alone

There is then good reason that during the past few decades many trees have been felled bemoaning the collapse of civil society. Most famously, Robert Putnam described Americans as increasingly “bowling alone.” The recreational and charitable organizations that once held prominent place in the lives of many Americans declined in the latter half of the 20th century. Where once Americans bowled with a local bowling league, now they bowl by themselves.<sup>2</sup> Where once they met nightly with friends to play cards, discuss literature, or play soccer, now they watch TV—often alone. Where once they met weekly at the Rotary Club to organize charitable activities, donating time and money to help their neighbors, now they mail a check to a national organization that pays someone to help those same neighbors. The result of associational decline is a populace increasingly detached from its surrounding society. The implications for American democracy and the individual psyche are profound and dire.

Concern over the decline in social groups in modern America predates Putnam’s famous broadside by a half century. In 1953, the great American sociologist and conservative thinker Robert Nisbet published his classic book, *The Quest for Community*,<sup>3</sup> considered by many to be one of the founding tracts of the postwar conservative intellectual renaissance.<sup>4</sup> In it, he expressed concern that the Western world was experiencing a profound dislocation of social groups. Nisbet noted that the decline in traditional social groups had not resulted in individual liberation, but in anxiety. He writes, “[A] specter is haunting the modern mind, the specter of insecurity.”<sup>5</sup> This same specter of insecurity has been discerned in modern times not only by Putnam,<sup>6</sup> but Timothy Carney,<sup>7</sup> Yuval Levin,<sup>8</sup> and Howard Husock,<sup>9</sup> among others.

Following the great 19th-century observer of American life, Alexis de Tocqueville, Nisbet names the modern political state as the primary cause of alienation. Where others, such as Joseph Schumpeter, fingered capitalism, Nisbet saw in the exercise of political power the disruption of the social order.<sup>10</sup> His thesis is that the modern state had grown in power and reach during the previous four centuries, and by the 20th century had long eclipsed all other institutions, claiming the central place of community in many persons’ lives and minds.<sup>11</sup> Nisbet writes, “Government is the primary force in it all; such government weakens where it strengthens: weakens normal social authority as it strengthens itself through laws, prohibitions, and taxes.”<sup>12</sup>

The state’s astronomical growth had come at the expense of social groups. It justified its expansive power as the liberation of individuals from social authority and, as it did so, it centralized the authority and functions of social

groups. Thus, Nisbet rejected the common dichotomy of state versus individual and instead posited that the real conflict was “between State and social group.”<sup>13</sup>

The state’s intrusion through regulation, co-option of function by increased services, taxes, and the like is a “process of permanent revolution”<sup>14</sup> because for every increase in the state’s function, a traditional social group lost part or all of its concrete social purpose.<sup>15</sup> For example, where education had traditionally been the responsibility of family, with religion and neighborhood aiding in the effort, the state now dominates that sphere through a vast array of its own institutions.<sup>16</sup> In most countries, this change was not violent; yet it was no less revolutionary in its effect upon the social order. As the state took over traditional functions, those groups lost their primary social purpose, their meaningful role in individuals’ lives.

Why does the decline of civil society matter? It matters for a variety of reasons. It is in civil society groups that people receive important components of their identity. The institutions follow the form of family and religion in shaping who they are. Through a vast plethora of civil society groups, people solve many “problems of the commons”—problems of such complexity that they do not lend themselves to solutions of either the market or government. Instead, they require the cooperative effort of people acting for largely non-remunerative reasons to make their lives better and to make each other happier. Since the problems presented are often difficult to understand, a decentralized mechanism of trial and error is often superior to state-run solutions.<sup>17</sup>

The first section of this *First Principles* paper defines civil society and explains the conceptual differences between the political, economic, and social spheres. This includes an overview of the categories and characteristics of all social groups and explains how these groups make civil society groups distinct from political and economic groups. The second section explains Nisbet’s account of how the state tends to take on the tasks and characteristics of social groups and the negative effect that has upon individuals. The third discusses how the U.S. constitutional and legal system provides (or should provide) protections for social groups, despite various missteps by the Supreme Court and Congress. This paper will make a clear distinction between the constitutional protections the Court *has* recognized and those it *should* recognize. Finally, it concludes with some guidelines that could help policymakers understand how to approach the vast array of social groups in American society and specific proposals that may bolster civil society.

## What Is Civil Society?

Society is broadly divided into political, economic, and social spheres. In the political sphere are the activities of political actors and institutions. Most citizens engage in the political sphere through voting and campaign contributions. Some are elected officials. Congress enacts legislation and the President enforces it. The economic sphere includes many employment and educational activities. It is where citizens make fundamental decisions about their livelihoods, including which professions to enter, where to live, and what loans to take on for education, housing, transportation, and the like. The social realm is where Americans live their lives in a primarily social rather than political or economic sense: families, religious organizations, neighborhoods, and the rest of Americans' social groups. Civil society is the collection of associations that compose much of the social sphere. It is where people cooperate through a variety of non-political organizations, institutions, and informal groups to accomplish shared goals.

Families are more fundamental to human development than even civil society institutions. Levin writes, “[The family] resists easy categorization because it is primeval. The family has a legal existence, but it is decidedly pre-legal. It has political significance, but it is pre-political too. It is pre-everything.”<sup>18</sup> Religion, likewise, is a civil society institution. But because of its transcendent aspirations, it, too, is often considered more fundamental than the associations populating civil society.

There is a great deal of overlap between these spheres, and in everyday life they interact in important ways. Sometimes political affiliations affect employment prospects. Today, some civil society groups are associated with progressive causes and would not hire conservatives, and vice versa. Businesses often fund civil society groups as well as political campaigns and lobbyists. The government regulates the economic realm as well as civil society organizations, and civil society organizations advocate for political and economic changes as well as receive funding from political and economic sources.

Education demonstrates how intermingled these realms can be. The government runs public schools and regulates private ones; educational decisions affect economic prospects, and economic associations fund schools and educational programming. Local schools (both private and public) are an essential part of civil society, where families interact in a cooperative endeavor, often in conjunction with local religious institutions or local governments, to educate their children.

The most important overlapping element among these realms is the individual citizen in a plethora of groups in each of these areas. Bruce Sievers writes, “In the economic world, we think and act as producers, consumers, and investors; in the political world, we play the roles of voters, lawmakers, and public administrators. In the world of civil society, we become community members, volunteers, and civic actors.”<sup>19</sup> Individuals are citizens of the political state, employees or employers in the economic realm, and members of civil society institutions all at the same time.

While political and economic institutions receive a great deal of attention, the social realm is arguably the most important of these three because it is more fundamental to individual development than any government or employer.<sup>20</sup> Individuals are salutary and productive political and economic units because of the formative influence groups in the social sphere have upon them. The process of socialization in the family, school, and neighborhood and the continuing sustenance these institutions provide are essential to crafting human beings into the types of people who act in a politically responsible manner as citizens and thrive economically in a free market. But social institutions are not important only for what they do for the political and economic realms. A social institution is important first and foremost for what it does for itself—what it does for its members as *social* beings.

## Characteristics of Social Groups

Every social group can be described in terms of five elements: function, central tenets, prescribed practices, authority, and status.<sup>21</sup> Social groups are remarkably diverse. They may be primary to human existence, as is the family, or ephemeral, something like a chess club; they may be enormous, including billions of members, as is the Catholic Church, or composed of two friends chatting over coffee. But every social group, no matter how banal or exalted, formal or informal, has these five qualities. Describing groups in this way helps to understand in some detail the measure of autonomy each group requires to serve its purpose.

**1. Function.** Every group has a function, the reason it came into existence. Religion comes into existence to reconcile man to the divine. The family exists to bear and socialize children. A corporation has the function of producing and selling goods or services at a profit.

**2. Central Tenets.** The concept of central tenets follows from the function. Central tenets are the principles at the heart of the social group. In general terms, every group has the central tenet of “*something* is good.” Religious groups claim at their core that reconciliation of man to God is

good. More specifically, a Christian group would claim that reconciling man to God through Christ is good. A Muslim group would have as its central tenet that reconciling man to God through the teachings and practices advocated by Muhammed is good. Religious groups further explicate doctrines of faith as their central tenets related to a fundamental tenet. The various catechisms compiled by religious institutions outlining doctrines central to the faith are the prime example.

The family has historically had the central tenet that procreation and socialization of children is good, or at least the procreation and socialization of *these* children in *this* family is good. Even a group less exalted than family and religion, such as a chess club, has a central tenet, namely, that playing chess is good.<sup>22</sup>

Function and central tenets are intimately connected. Look at any group with which one is involved and at its heart is a belief that something is good—and honoring that good through the execution of a function is worth its members' time and attention. Not only does a religious group believe that reconciling man to God is good, but the group undertakes various practices to engage in the process of reconciling man to God. Not only does a soccer club believe that playing soccer is good, but it organizes soccer playing. The execution of the function corresponds to the central tenet of the organization. One might say that function and central tenets are two sides of the same social coin.

**3. Prescribed Practices.** The central tenets and core function of the group require certain practices for their fulfillment. Think of these as traditions with a lower case “t.” These are the means whereby a group carries on its mission in ways that may not be spelled out explicitly but are often implicit in the function and tenets of the group. They arise spontaneously through the interactions of the group's members as they act out their function and work together over time. Nisbet defines “traditions” this way:

[R]eliance upon, in largest possible measure, not formal law, ordinance, or administrative regulation, but use and wont, the uncalculated but effective mechanisms of the social order, custom, folkway, and all the uncountable means of adaptation by which human beings have proved so often to be masters of their destinies in ways governments cannot even comprehend.<sup>23</sup>

**4. Authority.** Authority is the means whereby the leadership of the group directs group members to accomplish the group's function.<sup>24</sup> This implicates a hierarchy of role and function within the institution. In a democratic society, some chafe at the words “authority” and “function,” but every group must exercise authority to fulfill its function.

Consider a religious organization. The leaders go by many names: elder, bishop, pastor, priest, rabbi, and imam, among others. They perform the role of organizing and administering the sacraments, catechizing the faithful, and otherwise performing the essential functions of the religious institution. This includes directing the faithful to follow religious prescriptions, distinguishing between adherents to the faith and those outside it, and between the faithful and the unfaithful within it. Those who have violated the central tenets of the group must be made penitent and reconciled. This process and the standards set depend entirely upon the religious group itself.

The important point is that every group requires the exercise of authority. Someone must do the organizing. Someone must require members to meet certain standards set by the group, no matter how strenuous or lax, for the group to be an association in a meaningful sense. Only through the exercise of authority is a group able to perform its function and honor its central tenets.

**5. Status.** The group offers its members status, which includes but goes beyond mere membership. Fundamentally, status is a sense of belonging in the group, a sense of being a part of something larger than oneself, often perceived as such through participation in the function and practices of the group. Benefits of membership may be tangible—the ability to take sacraments, admission to meetings, voting rights for leadership, a club t-shirt—as well as intangible—the psychological sense of belonging and pride in affiliation. With status is a sense of superiority, a sense that what this group does is more important than what other similarly situated groups do. It is for status—sometimes even more than function—that a member gives allegiance to a group.

**Authority and Allegiance.** The interplay of two primary principles are central to understanding the above dynamics of membership: authority of the group and allegiance of the individual member. The group exercises authority over the individual on behalf of the central tenets of the group to accomplish the function, often through enforcing a variety of prescribed practices. It is precisely through the enforcement of these practices that the individual derives status from the group and meaning by being involved in the execution of the group's function. In return, the member gives the group allegiance to its central tenets and submits to the group's authority in carrying out its function.<sup>25</sup>

Thinking about groups in terms of these qualities helps us to distinguish between political, economic, and social groups. The state's essential function is maintaining order (although it may have others). Its central tenet is that "political order is good." Most use the term power instead of authority

when speaking of politics because of the coercive nature of political power, exercised as it is through a monopoly on violence,<sup>26</sup> although the political order may exercise authority as well.

Authority is inherently related to legitimacy. People obey authority because they consider it legitimate. Think of the respect and legitimacy Americans show the Constitution. In a number of ways, they are not forced to follow its strictures or to obey those elected or appointed under its direction, but they do so because the Constitution has authority for U.S. citizens, legitimacy in their eyes.

States may have other functions and tenets as well. Totalitarian states may have the central tenet that “religion is bad,” and a function of the state is to suppress religion. In America, one might say that the political system considers democracy good, so citizens have procedures whereby they may choose their representatives and as well as protections for voting rights.

## Political, Economic, and Social Groups

Certain practices follow from the particular nature of *political* rather than *economic* or *social* functions, such as the military draft. National security is an essentially political function, and for this purpose the state needs soldiers; it needs a system to pay salaries to servicemen and pensions to veterans and otherwise ensure the armed forces are staffed and funded. Status includes the benefits accorded to citizenship, beginning with protection from external attacks and the benefits of internal order, the peace of the realm.<sup>27</sup> There is also the prestige that may accompany citizenship in a particular country. Many Americans are proud of their constitutional heritage, whether they were born in the U.S. or whether they immigrated. They think of their citizenship, their membership in this particular political community, as a badge of honor.

The primary function of an economic group is to produce a particular widget, and the central tenet is that producing that widget is good, or at least worthwhile. Practices follow from the type of widget produced and the type of work necessary for such production, both of which include particular techniques and services. The company may have a large sales team, legal counsel, or factory staff depending upon what it produces. A corporation must be able to exercise authority over its employees by setting policy on hours and salary and the like, and enforcing them through various measures including termination of employment.

Employees have status in the economic group. They belong to it, and they accrue benefits from it, most obviously financial compensation in the form

of wages and the like. Other benefits attached to status in the economic group may include prestige (as in a big city law firm), profit sharing, access to certain opportunities such as travel, and the like.

Economic associations accomplish even deeper social functions beyond merely profit-making. Through the very act of producing widgets, they provide human beings the fundamental good of work, what the late Pope John Paul II called the “dignity of labor.”<sup>28</sup> Additionally, workplaces become important nodes of sociality, where one makes friends of colleagues, discusses important philosophical or ideological issues, and becomes involved in other’s lives in meaningful ways. There is an important role these nodes have in human flourishing in a social sense.

Other functions and tenets of political and economic groups beyond the merely descriptive functions of maintaining order and producing a profit through meeting consumers’ needs and wants should not obscure these fundamental functions. A political community that does not maintain order cannot also uphold democracy or secure liberty and prosperity, and a business that goes bankrupt cannot long provide a means to the dignity of work or serve as a node of sociality.

The social realm is by far the most diverse of the three. It includes families, religious institutions, social clubs, and recreational and philanthropic organizations. The central tenets and function vary widely among groups in the social realm. Despite differences in function among the spheres, economic, political, and social groups also converge in important ways. One may be employed by a philanthropic organization or a government agency and thus combine the economic and social or political realms in that one area (although such a person will likely have friends, social groups, and family outside of work in a civil society institution).

**Reference Groups.** Essential to this analysis is the concept of reference group. Reference group denotes whether members *refer* to the group in shaping their beliefs and conduct. Reference groups are the social groups that define their members’ essential identity. They are the primary means of “reference” for personal values and identity. They give life meaning by providing it with transcendent values. This concept is a way of understanding the relative importance of groups to particular members.

Religious groups explicitly operate as reference groups, claiming to be the primary identity of their adherents, although, for some members, religious groups may not operate in such a manner. Think of “nominal Catholics,” those who may have been baptized and confirmed in the Catholic Church, but Catholic teaching has little effect on their lifestyles, beliefs, or actions. Instead, they take reference from non-Catholic sources.

The state may operate as a reference group, but ought to do so only in conjunction with other groups. Many Americans point to the constitutional order as a point of reference for political values (limited government, democracy, and the like). The designation of reference group denotes a distinction between a limited state and a total state. A total state insists that it be the primary reference of values and identity for its citizens, while a limited state permits its citizens a great deal of freedom to refer to other groups' values for identity.

**Totalitarian States as Reference Groups.** This is the reason that totalitarian states suppress religious groups. They allow no other source of reference than the state itself. The cluster of rights in the First Amendment to the U.S. Constitution is comprised largely of promises that a variety of religious and other social groups may operate as reference groups for U.S. citizens, sources of identity and values that the state may not usurp.

The conservative movement's perennial concern with the principle of "limited government" is to ensure that governments, with their peculiar characteristics, do not co-opt or take over the characteristics of other groups. The state ought not function as the sole reference group for citizens, but permit, protect, and even promote the thriving of other social groups that operate as reference groups. At its best, civil society is rife with a variety of groups serving as reference points for individuals' values.

The essential point of the characteristics of social groups is the inherent institutional plurality that defines American society. Americans are challenged by their memberships in a variety of groups—social, economic, and political. Some political thinkers in history found the tensions among these groups anathema and sought to develop a political theory that embraced a unitary state. Thomas Hobbes and Jean Jacques Rousseau are the quintessential examples of this way of thinking.<sup>29</sup> But the American model is different. The Founders recognized and embraced the inherent plurality of society. The U.S. constitutional system is what medieval peoples would have called a *communitas communitatum*, a community of communities. This is why the U.S. system is characterized by federalism (both a plurality of political states and a pluralizing of political power between the federal government and state governments); separation of powers (a plurality of institutions holding political power); and bicameralism (a pluralizing of institutions wielding legislative power).<sup>30</sup> Most importantly for the purposes of this essay is a recognition of civil society through a protection of the social realm—especially in the First Amendment.

## Civil Society in the Constitution

The U.S. Constitution recognizes civil society and the social nature of man in a variety of ways, starting with the very first sentence: “We the People of the United States.” “The people” is Americans in their pre-political, social capacities, in the lives they live outside of and apart from their government. Colonial churches and towns were the real shapers of the American individual and the *loci* of his allegiance.<sup>31</sup> The Constitution begins by describing Americans’ collective action to constitute a government to serve the purposes of justice, domestic tranquility, liberty, and the like. The choice to do so was shaped by the sum of Americans’ social interaction with each other taking place in a wide variety of social institutions, families, churches, neighborhoods, and the meeting places where Americans shape each other through personal interaction, beginning with colonial taverns<sup>32</sup> and town meetings.<sup>33</sup>

**The Tenth Amendment.** The Tenth Amendment, ratified in 1791, provides a wonderful bookend to the Constitution’s Preamble by ensuring not only a protection for federalism, for the reserved powers of the states, but also the reserved powers of “the people” apart from their political roles as citizens of the United States and of their several states.<sup>34</sup> The Tenth Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*”<sup>35</sup>

These are not “rights” that are reserved, but “powers” that may be exercised. While the Supreme Court has not understood the Tenth Amendment this way, it is how Americans should. The powers Americans have not granted to their political bodies, they have kept for themselves to exercise through their own social institutions.<sup>36</sup>

**The First Amendment.** The First Amendment provides more specific protection for a variety of civil society institutions.<sup>37</sup> The Establishment Clause is grounded in a recognition of the authority of the states to come up with their own settlements.<sup>38</sup> Many had established state churches of some sort, but all provided some level of tolerance for dissenting religious societies, a model very different from established religions in Europe.<sup>39</sup>

The Free Exercise Clause ensures that, as a rule, the federal government (and later state governments) cannot interfere with religious worship, which is organized generally in the context of religious institutions. This protection includes other activities, described above as “prescribed practices,” associated with religion and religious belief. Growing a beard, sacrificing animals, taking sacraments, and choosing religious instructors are all

protected in the constitutional system because of the necessary sphere of autonomy that must be granted for citizens to live out their religious lives and practices according to various religious traditions.<sup>40</sup> It might be best to follow constitutional scholar Steven Smith in thinking of the religion clauses as preserving the *jurisdiction* of religious groups over religious and moral matters.<sup>41</sup>

**Free Speech.** The Speech Clause protects civil society by protecting the discussions that must take place among members of a free society in order to develop views about what ought to be done in the policy realm, with or without governments. James Madison famously made this argument in his reflection upon the ill-advised Alien and Sedition Acts of 1798.<sup>42</sup> He argued that a government answerable to the people requires a freedom of the people to speak to each other upon all matters.<sup>43</sup> It is a freedom that attaches to individuals interacting not just as citizens, but as members of society. People must decide amongst themselves upon all matters—including what is permissible and impermissible for its government to do. But it is also a means whereby individuals decide amongst themselves what they ought to do together without their governments.

Thus, free speech is not only an individual right, but one that attaches to civil society groups. These groups may associate and speak around their own central tenets as they carry out their functions. This empowers groups to recruit members and to gain credibility for their groups and ideas. It also means that the Speech Clause permits groups to exclude persons who disagree with the group's central tenets. The Supreme Court calls this aspect of freedom of speech the “freedom of expressive association.”<sup>44</sup> It protects not only the ability of individuals to “speak” through groups, but the ability of groups to shape individuals, to exert formative influence upon its members.<sup>45</sup>

**Freedom of the Press.** Similarly, the Press Clause protects the existence and functioning of a particular type of nongovernmental organization, the press.<sup>46</sup> The institutional press pre-dates the Constitution by decades. It arose as an institution free of the government and tasked with the specific role of “watch dog” over the government.<sup>47</sup> The Supreme Court has not recognized the institutional press explicitly, but as an essential civil society institution, it should. Implicitly, the Court has granted professional journalists some breathing space around the treatment of public officials in defamation law as a sort of deference to the judgment of media institutions about whether news is newsworthy.<sup>48</sup>

In practice, an expansion of institutional deference might mean expanding autonomy for the professional press to include more robust protection

for confidentiality of sources.<sup>49</sup> The process of newsgathering for the sake of publication is part of the press's historic role. When it operates in that role, it deserves some sort of categorical deference. As constitutional scholar Paul Horwitz argues, “[W]hen a decision by the press implicates the core institutional functions that make it an important part of our social infrastructure, its institutional autonomy should be triggered.”<sup>50</sup> While freedom of the press has a great deal of overlap with freedom of speech, it is best to think of it as an independent right and one that attaches to a particular set of expressive practices and civil society institutions.<sup>51</sup>

**The Assembly Clause.** Although the Supreme Court has been reticent to recognize the full breadth and civil society ramifications of the Assembly Clause, this constitutional right has operated from the beginning as an essential bulwark for civil society groups.<sup>52</sup> In the House of Representatives debates over the verbiage of the First Amendment in the first Congress, there was disagreement about whether to include the Assembly Clause in the text at all, as it was thought to be implicit in the other rights. How could one freely exercise religion or speak without assembling with others?

However, the defenders of the Assembly Clause argued that as obvious as the freedom to gather with other like-minded people was, those in power frequently violated the right. A case in point were the Quakers who, in the 17th century, were forbidden from gathering to worship in England.<sup>53</sup> After ratification in the 1790s, Democratic Republican groups, then on the outs with the dominant Federalists, appealed to the Assembly Clause to protect their organizations from federal intrusion.<sup>54</sup>

Unfortunately, the Supreme Court has failed to develop associational rights under the Assembly Clause.<sup>55</sup> But Americans should insist that governments recognize the essential civil society protections this Clause requires. The next section provides some guidance about how American public policy can do that.

## Civil Society and Public Policy

Given what is discussed above as the essential social and constitutional basis of social groups, what should be the basic goals of public policy regarding civil society institutions? First, associations should retain their “functional integrity,” the ability to remain true to their central tenets and to accomplish the groups’ core functions for their members by engaging in their prescribed practices.<sup>56</sup> It is particularly important for them to thrive, so they operate as reference groups for their members, formative social influences upon how members think and act.

Second, groups should have the freedom, the versatility, to solve the “problem of the commons,” the perplexing difficulties arising in the social realm that do not seem amenable to solution by market or state. Constricting the functions of social groups drains them of their vitality and renders them inert in the face of these problems.

Third, these ends must be accomplished without co-opting social groups to the purposes of the state. This last point especially implicates the way people talk and think about civil society groups in their interactions with government.

**Group Suppression.** One of the most common ways in which civil society groups are suppressed is by treating them as subject to public accommodations law. The anti-discrimination requirements of these laws serve valid and important purposes when applied to common carriers and economic organizations because they preserve economic opportunity for racial minorities (among other historically under-represented groups).

But they are inappropriate in many cases when applied to civil society groups, which are, as the author has stressed throughout this paper, social groups that exist for their own purposes. In most cases groups should be immune from public accommodations laws for the simple reason that they are not public accommodations.<sup>57</sup> The Supreme Court affirmed this commitment for civil society groups in *Boy Scouts of America v. Dale* and more recently in *Fulton v. City of Philadelphia*.<sup>58</sup>

At the beginning of this paper, the author identified the problem of alienation and its relation to the expansion of state power. Key to this social problem is that it is self-reinforcing. Yuval Levin writes, “Declines in social capital tend to be self-intensifying: as people come to have less in common with their fellow citizens, they find it more difficult to cooperate and identify with one another, which brings a further weakening of the remaining social bonds.”<sup>59</sup>

Reversal of this spiral of alienation requires that public policy revitalize civil society while not coopting it, a difficult proposition. Civil society must develop social vitality of its own accord directed toward building worthwhile communities that operate as reference groups for their members. The very act of developing a public policy of civil society is difficult because the impetus for building civil society must come from civil society itself. Government involvement risks the very centralization that caused the problems of alienation Nisbet details in *The Quest for Community*.

What follows are four principles of policymaking that will help to shape policies toward civil society by shaping the way people think about civil society and by guarding against government cooption of civil society institutions.

## Functional Autonomy

Since the primary goal of public policy *vis-à-vis* civil society is to secure the functional integrity of groups, Americans should make central to policymaking the concept of functional autonomy.<sup>60</sup> This principle requires the widest possible latitude given to various institutions to perform their functions in accordance with their unique central tenets. Nisbet defines functional autonomy as:

the ability of each major function in the social order to work with the maximum possible freedom to achieve its own distinctive ends. What applies to school or university should apply also to economy, to family, to religion, and to each of the other great spheres of society. Everything must be done to avoid intrusion by some one great institution, such as the political state, into the spheres of other institutions.<sup>61</sup>

The first question for any policy related to civil society is, “Does this inhibit the functional autonomy of social groups?”<sup>62</sup>

Supreme Court jurisprudence is severely lacking in recognition of the functional autonomy of groups in its freedom of association jurisprudence, largely ignoring the text, history, and implications of the Assembly Clause.<sup>63</sup> The Court coined the phrase “expressive association” in *Roberts v. Jaycees*, holding that freedom of association applied only to groups whose *expressive* purpose was hindered by government policy.<sup>64</sup>

This line of jurisprudence, while yielding some protection for groups,<sup>65</sup> eventually led to the Court’s disappointing decision in *Christian Legal Society v. Martinez*. The Court held that a religious student group could not use Christian doctrinal and morals standards when choosing leaders and voting members.<sup>66</sup> The Court justified its decision on the grounds that expression for group members was still protected, ignoring entirely that the First Amendment protects the right of peaceable assembly untethered from expression, which indicates protection for non-expressive as well as expressive groups.<sup>67</sup> To put this in terms of functional autonomy, expression is the only function to which the Court will grant autonomy. But the Court has entirely ignored the Assembly Clause and its ramifications, namely, protection for peaceable functions beyond expression.

The Court’s refusal to engage with the Assembly Clause could be corrected through legislation. This author has drafted a Freedom of Association Protection Act (FAPA) to remedy this jurisprudential deficiency.<sup>68</sup> By passing this law, Congress and state legislatures could do for freedom of

association and the functional autonomy of civil society associations what they did for religious organizations through the Religious Freedom Restoration Act (RFRA) in 1993 and subsequent state versions.<sup>69</sup>

**The RFRA.** The RFRA was passed by Congress with nearly unanimous bipartisan support after the Supreme Court dealt a blow to religious liberty in *Employment Division v. Smith* by holding constitutional a neutral and generally applicable law that had the incidental effect of prohibiting a religious practice.<sup>70</sup> The law required that federal courts use strict scrutiny when considering claims of government violation of religious practice rather than the standard of neutrality and general applicability articulated by the *Smith* Court.

In practice, this means that when a regulation infringes upon a religious practice, courts could not simply ask whether that same restriction applied across the board. They had to instead ask whether the government had a compelling interest in the regulation and whether the regulation was narrowly tailored to accomplish that interest. After the Supreme Court forbade the application of the federal RFRA to state governments,<sup>71</sup> over 20 states passed their own RFRA laws to protect religious practice from state and local government infringement.

**The FAPA.** Similar to the various RFRA, the Freedom of Association Protection Act is designed to be enacted by Congress and state legislatures to secure associational freedom for civil society groups by defining freedom of association in terms of “functional autonomy”; requiring federal and state courts, respectively, to apply strict scrutiny to claims of freedom of association; and to recognize the centrality of “central tenets” and “prescribed practices” to the operation of civil society groups. This would protect civil society groups from the inappropriate application of public accommodation laws and restrictions upon associational rights.<sup>72</sup>

**Charitable Choice Laws.** Protection for functional autonomy ought to be a prime consideration even in the distribution of benefits. Charitable Choice laws protect the autonomy of religious organizations to maintain the character of their faith when carrying out secular social services duties at the behest of the government. The government is forbidden from co-opting religious groups, even when state and charity collaborate to serve Americans. These laws correspond to the principle of functional autonomy, and they should be expanded wherever possible.

However, government benefits from the administrative state have developed such that they place constraints upon civil society institutions in ways not adequately recognized, but that undermine the American constitutional structure. This area has received some attention in constitutional law and

political theory, but only recently have scholars begun to appreciate its profound implications for civil society.<sup>73</sup>

**Federal Funding and Private Institutions.** In *Purchasing Submission: Conditions, Power, and Freedom*, distinguished constitutional scholar Philip Hamburger demonstrates in disturbing detail how conditions upon government funding undercut constitutional rights, including free speech and freedom of association, and undermine the constitutional structure of limited government. People often distinguish between conditions on funding and administrative regulation, but “because [conditions on funding] come with government largess and so are not themselves binding, they have thus far been peculiarly effective in defeating constitutional rights.”<sup>74</sup>

In short, federal funding is tied to conditions that would be unconstitutional if they were statutory or regulatory. This opens a vast arena in which the government may interfere with private institutions in ways that are disturbing from the perspective of constitutional structure and the ideal of limited government.<sup>75</sup> This also presents a newly recognized threat to the functional autonomy of civil society institutions—and it deserves serious attention.

## Philanthropy

Philanthropy is an essential element of civil society. Those who are specifically interested in preserving non-economic and pre-political institutions encounter the challenge that these institutions are not generally financially self-supporting. States support themselves through taxes, and economic associations support themselves through profit, but civil society institutions often require voluntary financial support. Tax exemption status is therefore key to supporting these institutions.

Currently, the U.S. tax code provides exemptions for “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes.”<sup>76</sup> The definitions are deliberately broad and vague to provide a great deal of leeway to protect financial support for an expansive array of non-profitmaking activities.<sup>77</sup>

Section 170 of the tax code permits donors to deduct charitable donations from their taxes as long as the organization qualifies for tax exemption under § 501(c)(3).<sup>78</sup> This encourages donations because individuals may avoid some tax obligations by making financial contributions to tax-exempt organizations who carry out various civil society functions. Overall, the tax exemption regime is good, although there are points for improvement,

especially in how to *think* and *talk* about associations when implementing tax exemptions—not as concessions by the state for its own purposes but as means to bolster social entities whose functional autonomy is essential to their role as independent *loci* of authority and allegiance.

**Freedom of Speech and Section 501(c)(3).** First, the 501(c)(3) exemption includes a provision that violates freedom of speech and ought to be changed. The federal tax exemption is limited to organizations “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for office.”<sup>79</sup>

As Philip Hamburger has documented extensively, this caveat was a result of particular Members of Congress desiring to silence criticism by nonprofit groups. It was further made possible by an unhealthy suspicion of civil society groups, especially religious organizations, arising from both liberalism and nativism.<sup>80</sup> Should a group lose its 501(c)(3) status, donors lose much of their incentive to donate. Even if donors choose to contribute anyway, they will have less to give because a portion of their income previously exempt is now taxed. In this way, “section 501(c)(3) has excluded much religion from public life by denying churches and related idealistic associations the ordinary rights of petitioning and political speech.”<sup>81</sup> Congress (and state legislatures) should repeal aspects of tax law that inappropriately restrict the free speech of civil society institutions.

**A “Government Subsidy”?** Second, the Supreme Court and many commentators call the tax exemption a “government subsidy.”<sup>82</sup> This is wrong from the perspective of what is earlier described as the priority of civil society. It is also the cause of free speech restriction described above.

From this perspective, the sections of the tax code noted above result from the government’s decision to “subsidize” nonprofits indirectly through offering tax exemptions and deductions for charitable giving. The government thus understands itself as having some leeway in placing restrictions upon its subsidy. However, it would be better to think of the tax exemption and deduction regime as legislatures’ recognition in law of the priority of civil society institutions. When a legislature enables people to withhold a portion of income from taxes that they give to a civil society institution, it is recognizing the importance of membership in that institution and the authority of that institution to “tax” members in this way before the government does. The government reduces its tax burden, not as an indirect subsidy, but to give priority to membership in these institutions and to the financial obligations such membership requires.

To illustrate: A particular religious organization requires its members to tithe 10 percent of their income. When the tax code, passed by Congress, permits that 10 percent to be deducted from the donor's taxes, it is in effect saying that the church may make a claim upon its member's financial resources that is prior to the claim of the United States government upon that individual's income through taxes. The power of Congress to tax income as granted by the Sixteenth Amendment will only be used to tax individual income *after* the civil society institutions have taken their cut.

This reframing of tax exemption and tax deduction is not what the Supreme Court or many scholars have said, but it is more consistent with an understanding of the priority of the social realm to the political.<sup>83</sup> People should expect their leaders to speak about civil society institutions as primary groups and expect those leaders to recognize the priority of such relationships in the law.

## Decentralization

Decentralization was essential to Nisbet's program for a resuscitation of civil society. He saw no other way in which functional autonomy of social groups of all sorts could thrive outside of "[d]ispersion, division, loosening, and localization of power."<sup>84</sup> Carney aptly summarizes the principle of decentralization as follows:

Which programs can be done better by states than by Washington? Which programs currently administered by state or local governments are more fittingly done by nonprofits, by voluntary groups, and by churches? Can the central government shift to being a safety net for safety nets, letting civil society be the front line in the effort, with government as the auxiliary safety net, or the reinsurance program?<sup>85</sup>

Every effort should be made to decentralize authority and decisionmaking. This is applicable in two senses. First is *downward* decentralization, the transfer of authority and function from the highest levels of government to more local levels, moving much of what is done in Washington to Boston, Sacramento, and Tallahassee. While this is helpful to civil society by particularizing political power, moving it closer to the civil society institutions with which it interacts, a decentralized suppression of civil society is potentially as destructive as a centralized destruction of the same social institutions. Poor policies on civil society coming out of Albany are just as destructive for the people of New York as poor policies coming out of Washington.

Second, and more importantly, *outward* decentralization, moving what is done by political institutions, such as the Department of Health and Human Services, to social authorities, such as churches and charities. The type of authority wielded by government lends itself well to certain functions and poorly to others. It is only with great trepidation that one would let the government take on tasks better performed by more local political entities or private associations.

Even if tasks are better performed by political authorities, there is still reason to leave such initiative in the social realm. Transference of function to the state has ramifications beyond mere efficiency, namely, the preservation of autonomy and initiative for social groups. Consider all the benefits discussed throughout this paper derived from small social groups. A little gain in efficiency may result in greater loss of social capital. This, too, tilts the balance toward outward decentralization.

As a principle guiding public policy, decentralization of authority and function—downward and outward—should be a constant consideration.

## Encouraging Social Inventions and Social Entrepreneurs

Finally, society should encourage what Nisbet called “social entrepreneurs” and “social inventions.” *Outward* decentralization from political to social assumes the presence of social groups capable of taking on the functions and responsibilities that government is ill-designed to carry out. Carney writes:

[T]he biggest thing Washington, D.C., and state governments could do for civil society would be to get out of the way. This would be no cure-all. Even where centralized government has caused the problem by smothering civil society, there’s no guarantee that removing the giant footprint of Big Government will cause a community to pop back up.... Strong communities have to grow up organically, but they don’t spring up automatically.<sup>86</sup>

Carney is describing a culture of social vitality, defined by vibrant, functionally autonomous social groups and the accompanying social initiative of individuals. This social vitality is a prerequisite of strong civil society. Societies can encourage this vitality by encouraging social entrepreneurs, those who find social solutions to social problems, through founding and developing social inventions.

**Social Inventions.** A social invention is a social form that is brought into existence to solve a social problem.<sup>87</sup> The local community was a social

invention that came into existence when men became sedentary during the agricultural revolution. As towns grew and diversified in the early American republic, the voluntary association arose to solve all sorts of problems requiring co-operation of different people for different purposes. The monastery, the guild, the university, the parish, the scientific institute, and the mutual aid society are all historical instantiations of social inventions that served “as means to uniting the creative impulses of individuals in the areas represented.”<sup>88</sup>

**Social Entrepreneurs.** The term social entrepreneur describes the class of social actors who develop social inventions or who reinvigorate already existing social groups through creative acts of social initiative.

Regarding the American penchant for social entrepreneurship and the plethora of social inventions he saw everywhere, Alexis de Tocqueville wrote:

Americans of all ages, of all conditions, of all minds, constantly unite. Not only do they have commercial and industrial associations in which they all take part, but also they have a thousand other kinds: religious, moral, intellectual, serious ones, useless ones, very general and very particular ones, immense and very small ones; Americans associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools. If, finally, it is a matter of bringing a truth to light or of developing a sentiment with the support of a good example, they associate.<sup>89</sup>

Social entrepreneurship and social inventions are the means whereby social forms adapt to meet new circumstances and pressing problems. They are the means whereby human beings can maintain communities in new economic, political, and social circumstances. How might society encourage these people? Programs such as the Manhattan Institute’s Civil Society Awards and The Heritage Foundation’s Innovation Prize are examples of this sort of encouragement. Recognizing and funding social entrepreneurs through Stand Together is another.<sup>90</sup>

## Conclusion: Recovering the Lost Art of Association

In the 1830s, when Alexis de Tocqueville conducted his famous tour of America, the American penchant for association fascinated the French aristocrat. He wrote, “Of all countries in the world, America has taken greatest advantage of association and has applied this powerful means of action to the greatest variety of objectives.”<sup>91</sup> In short, America was full of social

vitality. This means of self-government was quintessentially American. Tocqueville continues, “Wherever, at the head of a new undertaking, you see in France the government, and in England, a great lord, count on seeing in the United States, an association.”<sup>92</sup>

U.S. associations do not just enable self-government: They *are* self-government. This act of self-government through association began with the founding of townships in the 1600s. It shaped the American capacity of self-government which, in turn, shaped the colonial charters, state constitutions, and, eventually, the federal Constitution. It also sustained the Constitution as Americans solved their own problems through associations in the early republic, as Tocqueville observed. It did the same through the drastic changes wrought by the Industrial Revolution, knitting again the social fabric in the early 20th century through the establishment of the Rotary Club, the Boy Scouts, and the like. These civil society institutions are essential aspects of the pre-political, pre-economic social realm.

The centralization of power through the 20th and 21st centuries has sapped this realm and these organizations of their vitality. But as Carney writes, “[I]f you’re not building community, you’re not getting close to fixing what ails us.”<sup>93</sup> Americans have long practiced the art of association, the building of civil society institutions. Let this great American pastime become the great American future.<sup>94</sup>

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## Appendix

### Freedom of Association Protection Act (FAPA)<sup>95</sup>

#### 1. Findings and Declaration of Purpose

##### (a) The Congress finds that —

1) The Framers of the Constitution, recognizing the freedom of association as an essential right, secured its protection in the right “peaceably to assemble” in the First Amendment to the Constitution;

2) History and jurisprudence indicate that the Assembly Clause protects both religious and non-religious associations;

3) Laws or policies “neutral” toward associations may burden the freedom of association just as surely as laws or policies intended to interfere with the freedom of association;

4) The textual restriction on assembly and association—that they be “peaceable”—forbids governments from substantially burdening freedom of association without compelling justification;

5) The limited public forum is an important category of constitutional protection, especially in places that carry out specific types of government activity, such as public universities;

6) In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Supreme Court effectively eliminated the requirement that the government justify burdens on the freedom of association imposed on laws or policies neutral toward the association in a limited public forum; and

7) The compelling-interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between the First Amendment freedom of association and competing government interests.

##### (b) The purposes of this Act are—

1) To require the compelling-interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), be applied in all cases where freedom of assembly or freedom of association is substantially burdened; and

2) To provide a claim or defense to persons or associations whose freedom of association is substantially burdened by government.

#### 2. Freedom of Association Protected

##### (a) In General

Government shall not substantially burden a person’s freedom to associate or assemble with others for any peaceable purpose; nor shall the government substantially burden the functional autonomy of any

association; nor shall it inappropriately interfere with the prescribed practices, or internal norms, of an association.

(b) Exception

Government may burden the exercise of a person's or group's freedom of association only if it demonstrates that the application of the burden to the functional autonomy of the association

- 1) Is substantially interfering with an individual's right of exit; or
- 2) Is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling government interest.

(c) Judicial Relief

A person or an association may assert a violation of freedom of association as a claim or a defense in a judicial proceeding and obtain appropriate relief against the government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

3. Definitions

As used in this Act:

(a) The term "government" includes a branch, department, agency, instrumentality, or official (or other person acting under color of law) of the United States, or of a covered entity;

(b) The term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(c) The term "freedom of association" means both the freedom of a person to associate with others for any lawful and peaceable purpose and the right of an association to establish boundaries of membership according to its own internal articulation of central tenets and prescribed practices that do not threaten the public peace. Freedom of association is a right required by the Assembly Clause of the First Amendment;

(d) The term "central tenets" refers to fundamental beliefs, no matter how profound or mundane, that form an association's founding purpose, and that guide an association toward the end for which it exists; and

(e) The term "prescribed practices" refers to actions or prohibitions from acting required of members by the organization that it asserts are important to its central tenets. It includes the ways and means, written or unwritten, that guide the internal workings of an association for reasons sometimes opaque to outside observers.

4. Applicability

(a) In General

This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the date of its enactment.

(b) Rule of Construction

Federal statutory law adopted after the date of enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Other First Amendment Rights Unaffected

Nothing in this Act shall be construed to affect, interpret, or in any way allow the Federal government to prohibit freedom of speech or infringe upon the free exercise of religion, or otherwise affect rights that adhere to expressive associations and religious organizations, respectively.

## Endnotes

1. Robert Nisbet, *The Social Bond: An Introduction to the Study of Society* (New York: Knopf, 1970; reissued in 1977 by McGraw-Hill, New York, in a new edition co-authored with Robert G. Perrin), p. 45.
2. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000).
3. Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order and Freedom* (New York: Oxford University Press; republished New York: Galaxy Books, 1962, under the title *Community and Power*; reissued in 1969 under original title *The Quest for Community*; reprinted San Francisco: Institute for Contemporary Studies, 1990, with a new preface; and reprinted Wilmington, DE: ISI Books, 2010, with a new introduction). All quotations from latest edition; hereby referred to as *Quest*.
4. Conservatism's greatest historian, George Nash, discusses Nisbet in light of his contribution to postwar conservative thinking right alongside Richard Weaver, Peter Viereck, and Russell Kirk. See George H. Nash, *The Conservative Intellectual Movement in America Since 1945* (Wilmington, DE: ISI Books, 2006; originally published by Basic Books, 1976), pp. xx and 77–78.
5. Nisbet, *Quest*, p. 1.
6. Putnam, *Bowling Alone*, and Robert D. Putnam and Shaylyn Romney Garrett, *The Upswing: How America Came Together a Century Ago and How We Can Do It Again* (New York: Simon & Schuster, 2020).
7. Timothy Carney, *Alienated America: Why Some Places Thrive While Others Collapse* (Harper Collins, 2019).
8. Yuval Levin, *The Fractured Republic: Renewing America's Social Contract in an Age of Individualism* (Basic Books, 2016), and Yuval Levin, *A Time to Build* (Basic Books, 2020).
9. Howard A. Husock, *Who Killed Civil Society? The Rise of Big Government and the Decline of Bourgeois Norms* (Encounter Books, 2019).
10. Nisbet writes in the preface to the first edition of *Quest*, "This book deals with political power—more specifically, with the impact of certain conceptions of political power upon social organization in modern Western society." Nisbet, *Quest*, p. xvii.
11. Nisbet, *Quest*, p. 91.
12. Robert Nisbet, *The Present Age: Progress and Anarchy in Modern America* (Indianapolis, IN: Liberty Fund, 1988), p. 88.
13. Nisbet, *Quest*, p. 100.
14. *Ibid.*, p. 91. Nisbet borrows this term from Otto von Guericke. See Nisbet, *Quest*, p. 308, ch. five, note 1 reference to Edward Jenks, *Law and Politics in the Middle Ages* (New York: 1898), p. 308.
15. Nisbet writes, "[I]f such a group could not be obliterated it must be made, as in the case of the guilds, a part of the official machinery of the State." Nisbet, *Quest*, p. 109.
16. Nisbet, *Quest*, pp. 74–78.
17. See Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990), and Elinor Ostrom, *The Future of the Commons: Beyond Market Failure and Government Regulation* (Institute of Economic Affairs, 2012).
18. Levin, *Time to Build*, pp. 138–142. It might even be more accurate to say that the family is responsible for the shaping of individuals in other civil society institutions, which in turn shape individuals into responsible economic and political actors.
19. Bruce Sievers, *Civil Society, Philanthropy, and the Fate of the Commons* (Tufts University Press, 2010), p. 1.
20. See generally, Husock, *Who Killed Civil Society?*
21. For a longer discussion of the elements of community from which these five are distilled, see Luke C. Sheahan, *Why Associations Matter* (Lawrence, KS: University Press of Kansas, 2020), pp. 45–46 and 131–133, and Robert Nisbet, *The Degradation of the Academic Dogma* (New York: Basic Books, 1971, reprinted Brunswick, NJ: Transaction, 1996, with a new introduction by Gertrude Himmelfarb), pp. 41–46.
22. This is a helpful example of a banal group that nonetheless requires these qualities of associations. See Sheahan, *Why Associations Matter*, pp. 136–140.
23. Robert Nisbet, *Twilight of Authority* (Oxford University Press, 1975; Liberty Fund, 2000), p. 218.
24. See Sheahan, *Why Associations Matter*, pp. 61–68, and Nisbet, *Social Bond*, pp. 113–147.
25. Allegiance and authority are discussed in more detail in Sheahan, *Why Associations Matter*, pp. 132–136.
26. Nisbet, *Social Bond*, pp. 139–147.
27. It is beyond the scope of this paper to distinguish further function and central tenets of various types of political regimes.
28. See generally, Pope John Paul II, *Laborem Exercens* (On the Dignity of Human Labor), 1981, [https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html) (accessed February 24, 2023).
29. Robert Nisbet, *The Social Philosophers: Community and Conflict in Western Thought* (London: Heinemann, 1973), pp. 135–158, and Sheahan, *Why Associations Matter*, pp. 5–6.

30. James Madison forcefully makes this argument in *The Federalist* No. 51, <https://founders.archives.gov/documents/Hamilton/01-04-02-0199> (accessed February 24, 2023).
31. Michael Zuckerman, *Peaceable Kingdoms: New England Towns in the Eighteenth Century* (Alfred A. Knopf, 1970).
32. See John D. Inazu, *Confident Pluralism: Surviving and Thriving Through Deep Difference* (Chicago University Press, 2016), pp. 58–59; Zuckerman, *Peaceable Kingdom*, pp. 173–174; and Baylen J. Linnekin, “‘Tavern Talk’ and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns,” *Hastings Constitutional Law Quarterly*, Vol. 39 (2012), pp. 593–628.
33. Zuckerman, *Peaceable Kingdoms*, p. 8. The town was the “locus of effective authority” in American colonial society.
34. Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press, 1998), pp. 119–121.
35. U.S. Constitution, amendment X (emphasis added).
36. Other than Yale Law School’s Akhil Amar and the author, few understand the Tenth Amendment in this way.
37. See generally, Paul Horwitz, *First Amendment Institutions* (Harvard University Press, 2013).
38. See John Witte, Jr., Joel A. Nichols, and Richard W. Garnett, *Religion and the American Constitutional Experiment*, 5th ed. (Oxford University Press, 2022), pp. 101–104; Amar, *Bill of Rights*, pp. 32–42; and Leonard W. Levy, *Origins of the Bill of Rights* (Yale University Press, 1999), p. 89.
39. Levy, *Origins*, p. 92.
40. See *Holt v. Hobbs*, 574 U.S. 352 (2015); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb; and *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).
41. Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Harvard University Press, 2014), pp. 14–46.
42. James Madison, “The Report of 1800: 7 January, 1800,” <https://founders.archives.gov/documents/Madison/01-17-02-0202> (accessed February 24, 2023).
43. This is often referred to as the “democratic argument for free speech.” See Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965), pp. 19–28, and Thomas I. Emerson, *Toward a General Theory of the First Amendment* (Vintage Books, 1966), pp. 8–11. See also Luke C. Sheahan, ed., *International Comparative Approaches to Free Speech and Open Inquiry* (Palgrave MacMillan, 2022), pp. 7–11.
44. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).
45. Richard W. Garnett, “The Story of Henry Adams’s Soul: Education and the Expression of Associations,” *Minnesota Law Review*, Vol. 85 (2000–2001), p. 1841.
46. Horwitz, *First Amendment Institutions*, pp. 144–151.
47. *Ibid.*, pp. 147–149.
48. *Ibid.*, pp. 152–153.
49. *Ibid.*, p. 153.
50. *Ibid.*, p. 155.
51. *Ibid.*, pp. 154–159.
52. John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012), pp. 20–60.
53. During congressional debates on whether to include the Assembly Clause in the First Amendment, John Page of Virginia alluded to William Penn’s arrest in 1670 for unlawful assembly when he gathered to worship with fellow Quakers. Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* (Oxford University Press, 2015), p. 232, quoting the *Congressional Register*, August 15, 1789, <https://www.consource.org/document/the-congressional-register-1789-8-15/> (accessed February 24, 2023). The point was “equivalent to half an hour of oratory.” Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis, IN: Bobbs-Merrill, 1965), p. 56.
54. Inazu, *Liberty’s Refuge*, pp. 26–29.
55. *Ibid.*, pp. 118–149, and Sheahan, *Why Associations Matter*, pp. 81–130.
56. For a more detailed explanation of the concept of functional integrity, see Sheahan, *Why Associations Matter*, pp. 131–136.
57. Civil society protections benefit from the concept of religious accommodations, the long-standing practice of refusing to force individuals to violate their consciences and religious beliefs. Policy makers should consider how to appropriately expand this concept (as has been done for much of U.S. constitutional history). For the history of the American tendency toward accommodation of dissenters, see Mark David Hall, “Religious Accommodations and the Common Good,” Heritage Foundation *Civil Society Report*, October 26, 2015, <https://www.heritage.org/civil-society/report/religious-accommodations-and-the-common-good>.
58. *Boy Scouts v. Dale*, 530 U.S. 640 (2000), and *Fulton v. City of Philadelphia*, 593 U.S. \_\_\_ (2021). This also applies to small businesses where the expression of religious beliefs of the business owners are implicated. See *Masterpiece Cakeshop v. Colorado*, 584 U.S. \_\_\_ (2018), and *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). The U.S. should consider expanding these accommodations for the type of economic associations that operate as civil society groups.

59. Levin, *Fractured Republic*, p. 76.
60. Nisbet, *Twilight*, p. 215.
61. *Ibid.*, p. 215.
62. Sheahan, *Why Associations Matter*, p. 148.
63. See *ibid.*, pp. 81–130; Luke C. Sheahan, “The First Amendment Dyad and *Christian Legal Society v. Martinez*: Getting Past ‘State’ and ‘Individual’ to Help the Court ‘See’ Associations,” *Kansas Journal of Law & Public Policy*, Vol. XXVII, No. 2 (Spring 2018), pp. 223–260; and Inazu, *Liberty’s Refuge*, pp. 118–149.
64. *Roberts v. Jaycees*, 468 U.S. 609 (1984). The Court actually ruled against the freedom of association for Jaycees, finding the group inadequately expressive to garner First Amendment protection.
65. See *Boy Scouts v. Dale*, 530 U.S. 640 (2000), ruling that that a public accommodations law unconstitutionally infringed on the expressive association of the Boy Scouts.
66. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).
67. Inazu, *Liberty’s Refuge*, pp. 185–186.
68. See Appendix.
69. Luke C. Sheahan, “Protecting Freedom of Association,” *National Affairs*, Vol. 52 (Summer 2022), pp. 41–53, <https://www.nationalaffairs.com/publications/detail/protecting-freedom-of-association> (accessed February 24, 2023), adapted from the author’s original proposal in Sheahan, *Why Associations Matter*, pp. 151–153. Courts could also correct this flawed jurisprudence through an appropriate judicial test, what the author calls the “functional autonomy test.” See Sheahan, *Why Associations Matter*, pp. 146–149.
70. *Employment Division v. Smith*, 494 U.S. 872 (1990).
71. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
72. Read the full text of this proposal in Sheahan, “Protecting Freedom of Association,” pp. 49–51, and the appendix below.
73. See, as examples, Richard A. Epstein, “Unconstitutional Conditions, State Power, and The Limits of Consent,” *Harvard Law Review*, Vol. 102 (1988), and Ruth W. Grant, *Strings Attached: Untangling the Ethics of Incentives* (Princeton University Press, 2014).
74. Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* (Harvard University Press, 2021), p. 17.
75. “Not satisfied with administrative commands, the federal government increasingly goes a step further by purchasing submission—seeking public power, even unconstitutional power, through consent in private transactions. The government thereby creates a new pathway of governance, which evades not only the Constitution’s avenue for lawmaking and adjudication but also the lesser pathways and processes offered by binding administrative power.” *Ibid.*, p. 252.
76. 26 U.S.C. § 501(c)(3).
77. 26 U.S.C. § 501(b) requires that the exemption status apply only to “unrelated business income.”
78. 26 U.S.C. § 170.
79. 26 U.S.C. § 501(c)(3). It should not be surprising the religious and other organizations are grouped together as many of the educational and charitable organizations were first religious in one way or another, either “religiously inspired or influenced, and...often under ecclesiastical or clerical control.” Philip Hamburger, *Liberal Suppression: Section 501(c)(3) and the Taxation of Speech* (University of Chicago Press, 2018), p. 6.
80. See *ibid.*, pp. 26–30, 111–114, and 140–142.
81. *Ibid.*, pp. 18–19.
82. *Rust v. Sullivan*, 500 U.S. 173, 199–200 (1991), and *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).
83. See Telson Tebbe, *Religious Freedom in an Egalitarian Age* (Harvard University Press, 2017), pp. 191–193; Inazu, *Confident Pluralism*, pp. 67–69; and John D. Columbo and Mark A. Hall, *The Charitable Tax Exemption* (Boulder, CO: Westview Press, 1995).
84. Nisbet, *Twilight*, p. 217.
85. Carney, *Alienated America*, p. 287.
86. *Ibid.*, pp. 286–287.
87. Nisbet, *Twilight*, p. 256.
88. *Ibid.*, p. 257.
89. Alexis de Tocqueville, *Democracy in America* (Liberty Fund, 2010), p. 896.
90. See “Civil Society,” Manhattan Institute, <https://www.manhattan-institute.org/civil-society> (accessed February 24, 2023); “Heritage Innovation Prize,” Heritage Foundation, <https://www.heritage.org/innovationprize>; and “Who Is Stand Together?” Stand Together, <https://standtogether.org/vision> (accessed February 24, 2023).

91. Tocqueville, *Democracy*, p. 302.
92. *Ibid.*, p. 896.
93. Carney, *Alienated America*, p. 282.
94. Luke C. Sheahan, "The Lost Art of Association: The 1776 Series," *Real Clear Public Affairs*, December 16, 2020, [https://www.realclearpublicaffairs.com/articles/2020/12/16/the\\_lost\\_art\\_of\\_association\\_653306.html](https://www.realclearpublicaffairs.com/articles/2020/12/16/the_lost_art_of_association_653306.html) (accessed February 24, 2023).
95. See Sheahan, "Protecting Freedom of Association," pp. 49–51.