"TOWARD A GENERALIZED NOTION OF THE RIGHT TO FORM OR JOIN AN ASSOCIATION": AN ESSAY FOR TOM EMERSON

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INTRODUCTION

TOM EMERSON published his famous article, *Toward a General Theory of the First Amendment*[1] twenty-five years ago. That article, and its subsequent elaboration in *The System of Freedom of Expression*,[2] solidified Tom Emerson's position as the leading legal scholar of the first amendment in the post World War II period, perhaps of all time. This well-known story surely merits celebration.

Tom Emerson also published an important, albeit considerably less famous article the year after his *Toward a General Theory* hit the libraries. I want to use that article, *Freedom of Association and Freedom of Expression*[3] as my text. I do so not only because Tom Emerson's treatment of freedom of association is eminently worthy of attention in its own right. Nor is it simply because groping for a plausible constitutional theory for groups is very much in vogue today.[4] Rather, I hope to indicate where Tom's approach does not

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1. 72 YALE L.J. 877 (1963).

2. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

3. 74 YALE L.J. 1 (1964).

4. *See, e.g.*, Cornell, *Two Lectures on the Normative Dimensions of Community in the Law*, 54 TENN. L. REV. 327 (1987); Cover, Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001

only seem to me to reflect fully the functional variety and psychological and sociological importance of associations as amplifiers of different viewpoints and as sources for our individual identities.

Two reasons make it particularly fitting to turn back to Tom's pioneering work on freedom of association. First, Tom Emerson, of all my teachers, is the one who most sincerely encourages and understands dissent. In questioning intellectual fashions as well as government edicts, Tom displays civilized passion. He embodies gentle, yet searching, lawyerly skepticism. My partial disagreement with Tom's customarily lucid, powerful argument about freedom of association is most appropriate in a law review issue honoring a great man. Second, in a sense, Tom Emerson personifies the dilemma I want to address. His own remarkable, unpretentious contribution to the active life of numerous groups is interwoven with his profound commitment to individualism and to privacy.

The appropriate constitutional relationship between associational rights and individual rights is the difficult, important issue Tom addressed in his trail-blazing freedom of association essay. It is impossible to find fault with his customarily meticulous analysis of precedents; the clarity of his discussion of the underlying issues remains unsurpassed. But I do want to take issue with his conclusion that "[q]uestions of associational rights must be framed and decided in terms of other constitutional theories."[5] Indeed, I will try in this essay to meet the direct challenge in Tom's assertion that "it is impossible to construct a meaningful constitutional limitation on government power based upon a generalized notion of the right to form or join an association."[6]

I. AN INTRODUCTORY VIGNETTE

I first encountered a striking personal characteristic of Professor Emerson's when I was an entering law student at Yale in 1969. I found out quickly that Tom Emerson—and no one else—was the person to seek out for advice when I was asked to sign a loyalty oath on a government form for a loan I needed to help pay for law school. This occurred against the backdrop of my 1-A draft status

(1983); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986); Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68 (1987); Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987); Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1987); *Symposium, Law and Community*, 84 MICH. L. REV. 1373-541 (1986).

5. Emerson, *supra* note 3, at 35.

6. *Id.* at 6.

and my longstanding opposition to the Vietnam war. I had no class with Professor Emerson that fall. Indeed, I had never met him. When I suddenly appeared in his office, this very quiet man turned from his work; it immediately became apparent that it was not going to be easy to chat with him, but that he was unusually willing to talk. As I learned, along with numerous others, Tom Emerson is very shy, yet he refuses to erect even the usual barriers. He is also very decent, and so lacking in the aggressive verbal style present in law school dialogue that his great tolerance for human foibles makes commonplace gossip and small-talk virtually impossible. Instead, Tom Emerson listened. This famous law professor listened to me with care. Somehow, Tom Emerson managed to dignify my confusion.

He also provided a model of precise, lawyerly advice, blended with compassionate concern that I should make up my own mind about what I ought to do. Several years later, I had the good fortune to be Tom's teaching assistant in his small group constitutional law course for first semester students. Tom Emerson did similar things for many students, students who actually reflected Yale's goal of geographic, political, and social diversity. He created a remarkable, costless marketplace for ideas, advice, and quiet support. Moreover, when a group of us wanted to become involved with some of the burning issues of the day, we turned to Tom Emerson for practical help.

We relied on Tom for the Political Justice Workshop, for example, which Tom legitimated and advised. Although we never quite figured out what criteria we should use to separate political trials from other trials, his help was invaluable as we lept into the fray to assist activist lawyers. Another context involved our remarkably slow awakening to the legal dimensions of sex discrimination. Tom Emerson was *the* teaching lawyer/law teacher for us. Alone and without fanfare, he was sufficiently tolerant and generous to become deeply involved as we found and fought for causes.

Then, and in the years that followed, Tom Emerson frequently urged caution. He steered people away from putting too much faith in the ninth amendment, for example, despite his triumph in *Griswold v. Connecticut*.[7] He gently reminded law reformers that some women would suffer greatly if Connecticut's divorce reform moved

7. 381 U.S. 479 (1965). The magnitude of Tom Emerson's victory before the Supreme Court in *Griswold* is evident in the record of the Senate Judiciary Hearings on the nomination of Judge Bork to the Supreme Court. *Hearings on the Confirmation of Judge Robert Bork to the United States Supreme Court Before the Senate Judiciary Comm.*, 100th Cong., 1st Sess.

abruptly to a simple divorce-at-will scheme.[8] Yet Tom Emerson always brings a keen freshness and a remarkable open-mindedness to new ideas, new theories, changing realities. And Tom Emerson is at his most impressive when he quietly but deliberately explains something to people not initiated into the mysterious vernacular of legal discourse. In speaking to or writing for groups of non-lawyers, Tom Emerson most vividly displays patience in combination with his extraordinary, quiet passion for justice.

Because he will understand better than anyone else, I want to sketch briefly why I disagree with Tom about first amendment protection for groups. I begin by reviewing what led Tom to write that "as a starting point, an association should be entitled to do whatever an individual can do; conversely, conduct prohibited to an individual by a state can also be prohibited to an association."[9] I then suggest that, while Tom's position is largely accurate as a description of what has been and still is generally said by the Supreme Court, it overlooks the need for important exceptions. This need cries out from the great muddle of recent decisions construing freedom of association.

In the final section, I indicate what these significant exceptions, both in fact and in theory, do to Tom's thesis that, at most, groups merit only the same constitutional protection individuals should receive. Sometimes, these exceptions point in the direction of affording certain groups less constitutional protection than the sum of their individual parts. In other contexts, however, I suggest that some groups should receive more constitutional protection than the sum of the rights of their individual members. Thus, for example, the racial or gender-based exclusionary practices of so-called private clubs should not be permitted even if their individual members, as individuals, would be protected if they decided to exclude on the same basis. On the other hand, the rights of groups—but not of individuals—to parade, to report the news, and sometimes even to express themselves freely should be protected even in circumstances when what the group seeks to do would not be permitted for individuals.

I do not pretend to have met all of Tom's powerful doubts about a generalized notion of the right to form or join an association. In-

(1987). *Griswold* and its theory of certain unenumerated rights apparently represent a constitutional approach now widely accepted by the American people.

8. *See generally* L. WEITZMAN, THE DIVORCE REVOLUTION (1985); *Review Symposium on Weitzman's* Divorce Revolution, 1986 AM. B. FOUND. RES. J. 757-97.

9. Emerson, *supra* note 3, at 4.

stead of "a generalized notion," I am suggesting more of a legal realist's emphasis on a situation sense that provides a contexual continuum about groups. Perhaps a large part of my disagreement with Tom revolves around what one may properly expect of "a generalized notion," and whether such a notion is a necessary prerequisite to legal incorporation of important rights. But I maintain that relegating communities and associations to no more, and sometimes less, than the sum of the rights of their members misses a crucial, structural element of first amendment theory. It also overlooks the fundamental importance of group solidarity to those otherwise nearly without hope and almost entirely without an adequate voice to challenge prevailing presumptions.[10]

In this Article, I will underscore the richness of the pioneering questions about groups Tom Emerson raised decades ago and the ways in which he addressed these profoundly difficult issues with his characteristic open-mindedness, scrupulous scholarship, and unflagging commitment to the use of law to enhance freedom. It is remarkable—and surely worthy of emulation—that Tom Emerson has always done his lawyering, teaching, activism, and scholarly work so unobtrusively. There is no apparent disjunction between his roles. In fact, somehow Tom manages this unusual complementarity despite an environment in which competitive skepticism prevails and rhetorical virtuosity often masks failures of empathy. Tom Emerson is that rare role model who grows in esteem the more you think and know about his world.

II. TOM EMERSON'S *FREEDOM OF ASSOCIATION AND FREEDOM OF EXPRESSION*

Tom Emerson's 1964 article about freedom of association appeared in the context of considerable scholarly attention to the "constitutionally protected right of association," as Justice Harlan described the right in *NAACP v. Alabama ex rel. Patterson*.[11] Tom Emerson celebrated the result in that decision, but he noted that Harlan's majority opinion first used freedom of association as "derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them," but then "elevated freedom of

10. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); T. MORRISON, BELOVED (1987).

11. 357 U.S. 449, 463 (1958). *See, e.g.*, G. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (1961); D. FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION (1963); C. RICE, FREEDOM OF ASSOCIATION (1962); and sources collected at Emerson, *supra* note 3, at 2 n.4.

association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment."[12] Tom perceived Harlan's move to be popular with commentators yet, both in terms of theory and in resolving concrete issues, not really warranted.

It is hardly surprising that Tom Emerson suggested a careful system for thinking about freedom of association issues—he has a great systematizing mind. In his article, he discusses four different contexts for thinking about associational rights: (1) the general power of the government to regulate the affairs of an organization or its membership; (2) the use of governmental power to compel an individual to belong to or otherwise participate in an organization; (3) the rights of an individual member or a minority group vis-a-vis an organization; and (4) the issues posed when government punishes associations, such as associating with criminals or with people of different races.

Tom Emerson elaborated these four models by discussing the Supreme Court's freedom of association decisions that followed the *NAACP v. Alabama* decision. His development of the problematic cases within his first category, for example, might serve as a model for clear and concise scholarly discussion of judicial decisions. He carefully tracked the Court's treatment of the right of association through various inconsistencies and mixed metaphors.[13] Tom indicated why he feared that, in recognizing an independent right of association, the Court would resort to a weak balancing approach when it sought to apply that right.

To Tom, the vague and often inconsistent treatment of freedom of association in the cases in the late 1950s and early 1960s illustrated that the right itself was so broad and undifferentiated as to be "essentially obscurantist."[14] Moreover, he claimed that the balancing involved in construing freedom of association was "even less

12. Emerson, *supra* note 3, at 2.

13. In Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961), for example, the Court placed freedom of association within "the bundle of First Amendment rights" (Douglas, J., for the majority, striking down Louisiana statute requiring principal officer of "benevolent" associations to file list of names and addresses of all officers and members). In Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 568-69 (1963), Justice Douglas combined this bundle image with the idea that freedom of association may be located at "the periphery of the First Amendment" within a single sentence in his concurring opinion.

14. Emerson, *supra* note 3, at 14. Emerson pointed out that, except for silent acquiescence in the Alabama NAACP decisions, Justice Black refused to adopt the doctrine of an independent right of freedom of association. Justice Douglas took what Emerson kindly dubbed "an intermediate position." *Id.* at 15.

confined and less subject to objective application"[15] than the balancing approach he deplored in cases dealing with rights of freedom of speech, press, assembly, or petition.

Tom then traced independent freedom of association analysis through the contexts of forced associations, minority rights issues, and issues of personal associational freedom. Always, he found it of little or no use. In its place, Tom suggested ways to reach similar results through alternative doctrinal approaches. He argued that associational expression should be considered simply an extension of individual expression. Therefore, he claimed, it should be provided with the same protections.[16] It will not surprise anyone that Tom Emerson, who redefined the debate about freedom of expression with his development of a classification system distinguishing "expression" from "action," suggested a similar dichotomy for cases involving associational claims.

It must be emphasized that Tom's system classified a great deal of the conduct of associations as vital to expression. He argued, for example, that public meetings, distribution of literature, solicitation of membership, parades, demonstrations, the use of sound trucks, and even "general organizational activities, including the conduct of schools" were to be "as fully safeguarded as the actual utterance of the words themselves."[17] Tom also recognized that associations are not always properly viewed as simply equal to the sum of their individual members. He observed that "[t]he conduct of an association is likely to acquire unique qualities, to have effects which can originate only with an association rather than an individual."[18] Both this possibility of a qualitative difference between individuals and groups, and the fact that certain conduct such as collusive price-fixing requires more than individual involvement, led Emerson to claim that an association sometimes must be subject to governmental control on a basis different from individual conduct. To Emerson, "any general right of association must be subordinate to the individual right."[19]

To oversimplify Tom's argument by way of a quick summary, he generally regards associations as entitled to receive the same degree of constitutional protection as an individual should receive for

15. *Id.* at 14.

16. To the extent that the cases treated associational and individual rights differently, Emerson argued, those differences merely involved issues of standing. *Id.* at 23.

17. *Id.* at 25.

18. *Id.* at 4.

19. *Id.* at 5.

expression and for conduct surrounding expression. In those respects in which associations are unique, however, he would allow them to be subject to additional governmental regulation. Tom obviously did not have to deal with the morass of doctrine beginning in the mid-1970's that protects the commercial speech of corporations, for example, but his theory would seem to ally him with Victor Brudney's assertion that "[g]roup action . . . is legitimately and traditionally subject to greater regulation by government than is individual action."[20]

Tom Emerson is well aware that freedom of association has been a vital feature of American society for a long time. He also points out the growing importance of associations. So what should we make of Tom's reluctance to grant associations any constitutional protection beyond what their individual members enjoy? Does Emerson's expression/action classificatory approach—despite its significance for individual activity—adequately handle constitutional ramifications in the wildly diverse litigation involving freedom of association claims we now face?

III. ALEXIS DE TOCQUEVILLE AND RALPH WALDO EMERSON

This is not the place for even a quick review of the growing body of historical work about the role of associations in American history. Notions of autonomous individuals banding together to proclaim—perhaps even on occasion to practice—civic virtue seemed to dominate bicentennial celebrations of a version of republicanism embraced as integral to the construction and ratification of the United States Constitution. In recent years, numerous legal and social historians have suggested a comparatively caring, organic golden age of community immediately preceding whatever period their studies considered in depth. Once more we yearn to capture a time before the ravages of what Frederic William Maitland called "the pulverizing and macadamizing tendency of modern history."[21]

The quest for community seems remarkably fashionable today across many academic fields. But in studying community, we seem to display a particular propensity for the fallacy of "the conserva-

20. Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 259 (1981). Tom would not agree with Brudney's extension of this argument to any group action "whether in the form of speech or otherwise." *Id.*

21. *Quoted in* R. NISBET, COMMUNITY AND POWER 109 (1962). Originally published as THE QUEST FOR COMMUNITY (1953), Nisbet's book is a stimulating discussion of rapidly shifting alliances in the debate about the role of associations over several centuries.

tion of historical energy."[22] We organize our thoughts around a notion that there is a clear-cut division between communitarianism and individualism; we theorize as if "any flow of social energy in the direction of one such pole can only take place by way of subtraction from the flow of energy to the opposite pole."[23] The search for transformations within an easy dichotomy of ideal types such as *gemeinschaft* versus *gesellschaft*,[24] for example, or of caring communities that give way over time to possessive individualism, has particular appeal because of our propensity to think in binary terms in American law.

Every few decades we confront judicial reassertions of what Karl Llewellyn called "the vicious heritage of regularly viewing parties . . . as single individuals."[25] Recent examples abound.[26] Yet

22. T. BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 29 (1978) (quoting J. HEXTER, REAPPRAISALS IN HISTORY 42 (1961) in the context of early sociology and historical studies of American communities).

23. J. HEXTER, REAPPRAISALS IN HISTORY 40 (1961).

24. T. BENDER, *supra* note 22, at 17. In 1887, Ferdinand Tönnies proffered the terms *Gemëinschaft* and *Gesellschaft* to depict changes in social relations brought about by capitalism and urbanization. "Tönnies's definition of *Gemeinschaft* corresponds to the historical and popular notion of community; he offered family, kinship groups, friendship networks and neighborhoods as examples of *Gemeinschaft* patterns of group solidarity . . . *Gesellschaft*, which he identified with the city, is . . . characterized by competition and impersonality."

25. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 734 (1931). Carol Weisbrod first brought this statement to my attention in her comment at the 1986 Law & Society annual meeting on Zipporah Wiseman's paper, subsequently published as Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987). For nearly forgotten, earlier explorations of related themes by other eminent legal scholars, see, *e.g.*, Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930) (arguing that "the central idea of our law is relation" and analyzing four policies concerning judicial interference with different types of associations, denominated "the Strangle-hold Policy, the Dismal Swamp Policy, the Hot Potato Policy, and the Living Tree Policy"); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924) (arguing that unincorporated entities ought to be considered parties to legal actions).

26. *See, e.g.*, McKleskey v. Kemp, 107 S. Ct. 1756, 1766-67, *reh'g denied*, 107 S. Ct. 3199 (1987) (defendant challenging imposition of capital punishment failed to prove that "the decision makers in *his* case acted with discriminatory purpose."(emphasis in original)); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (litigant must show, among other factors constituting "an irreducible minimum" for art. III purposes, " 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' " (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979))); Hodel v. Irving, 107 S. Ct. 2076, 2083-84 (1987) (federal Indian Land Act of 1983 invalid as an unconstitutional taking of individual's "right to pass on property," despite concession that "[c]onsolidation of Indian lands in the Tribe benefits the members of the Tribe" and recognition of "little doubt that extreme fractionation of Indian lands is a serious public problem."). Probably the best-known recent example is Justice Powell's deciding opinion in Board of Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978) (emphasizing that equal protection rights are

a number of first-rate studies of markedly diverse legal realms remind us that legal thought about groups has a long, complex, and provocative past.[27]

Most discussion of the role of groups in America seems to begin with Tocqueville's observation that, "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world."[28] Though Tocqueville paid particular attention to political associations, he also noted:

> [A]ssociations are formed to combat exclusively moral troubles: intemperance is fought in common. Public security, trade and industry, and morals and religion all provide the aims for associations in the United States. There is no end which the human will despairs of attaining by the free action of the collective power of individuals.[29]

Tocqueville did not suggest that the "natural right" of association, which he deemed to be "by nature almost as inalienable as individual liberty,"[30] could or should be confined to political associations. Instead, Tocqueville linked freedom of association to freedom of the press. Vince Blasi examined what he calls this "checking value" in terms of freedom of the press but, as Tocqueville noted, there is a vital functional connection between newspapers and associations in America.[31] They share a vital role in checking the abuse of power by public officials. This is a linkage to which I will return in Part VI as I develop the way in which my quest for a theory of groups differs from the theory advanced by Tom Emerson.

Associations educate Americans to look beyond self-interest,

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rights of the individual in the course of invalidating university's special admissions program). *See generally* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

27. *See, e.g.*, S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing groups in litigation from medieval assumption of natural, inevitable role for groups through ambivalence about representation by attribution, to current confusion regarding consent and interest of individual members of the class); Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY (W. Samuels & A.S. Miller eds. 1987) (tracing development of various theories of the corporation prior to triumph of entity theory around 1900). For a wonderful illustration that there may be no such thing as an original idea, see Frederic Maitland's introduction to his own translation of O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1900).

28. A. TOCQUEVILLE, DEMOCRACY IN AMERICA 189 (J. P. Mayer ed. 1969).

29. *Id.* at 189-90.

30. *Id.* at 193.

31. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. *See generally* A. TOCQUEVILLE, *supra* note 28, at 517-20 ("On the Connection Between Associations and Newspapers," in which Tocqueville examines why "[t]here is . . . a necessary connection between associations and newspapers." *Id.* at 518).

Tocqueville observed, and they serve as an incomparable check against tyranny.[32] Indeed, associations help teach us how to define ourselves as individuals.[33] In particular, Tocqueville emphasized, "[n]othing more deserves attention than the intellectual and moral associations in America."[34] Yet, he warned prophetically, "American political and industrial associations easily catch our eyes, but the others tend not to be noticed."[35]

In the course of my disagreement with Tom Emerson, I will return to Tocqueville's emphasis on the importance of differentiating groups by their forms and varying functions. First, however, I want to emphasize a paradox. Joining groups has been and remains as American as celebrating our rugged individualism. Yet our most basic myths tend to follow Ralph Waldo Emerson, Tom's ancestor, whose transcendental faith in the individual left nothing between that individual and the cosmos. Within a decade of the publication of Tocqueville's *Democracy in America*, Ralph Waldo Emerson wrote in his diary, "Concert, men think, is more powerful than isolated effort & think to prove it arithmetically with slate & pencil: but concert is neither better nor worse[,] neither more nor less potent than individual force."[36]

As R. Jackson Wilson put it, "What was most nearly new about the Emersonian assertion and its dozens of echoes in American literature and philosophy was the unqualified claim that society was an obstacle to the alignment of the individual with cosmic order."[37] Even within legal thought, it is easy to perceive a cyclical pattern in

32. A. TOCQUEVILLE, *supra* note 28, at 516.

33. Tocqueville treated the crucial educational role of associations in greatest detail in his chapter, "On the Use which the Americans Make of Associations in Civil Life." He said of civil associations, which he defined as those associations that do not have a political object, "Americans of all ages, all stations in life, and all types of disposition are forever forming associations .... If the inhabitants of democratic countries had neither the right nor the taste for uniting for political objects, their independence would run great risks, but they could keep both their wealth and their knowledge for a long time. But if they did not learn some habits of acting together in the affairs of daily life, civilization itself would be in peril." A. TOCQUEVILLE, *supra* note 28, at 513-14. Tocqueville continued, "Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another." *Id.* at 515.

34. A. TOCQUEVILLE, *supra* note 28, at 517.

35. *Id.*

36. R. EMERSON, 7 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 437-38 (A.W. Plumstead & H. Hayford eds. 1969).

37. R.J. WILSON, IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920, at 5 (1970). Wilson's superb study traces how, to Charles Sanders Peirce, G. Stanley Hall, and other intellectuals of the post-Civil War period, "the idea of community seemed the best response to the disintegrating effects of evolution and industrial capitalism that threatened both their minds and their society." *Id.* at 31.

our enthusiasms for romanticizing either radical individualism or cozy communitarianism. Critical Legal Studies pundits, for example, might be surprised to find themselves sharing with Herbert Hoover the idea that "[v]oluntary associations constitute self-government by the people outside of government."[38] It is also somewhat odd to find members of the Bohemian Club and the Century Club now evoking Proudhon's advice to "[m]ultiply your associations and be free."[39] Surely there is safety and strength in numbers. There is aid and comfort in identifying oneself by distinguishing the groups to which one belongs from groups of other people. On the other hand, guilt by association can never be entirely removed from freedom of association. We *are* known by the company we keep; we do define our friends by identifying common enemies.[40] As Shakespeare put it long ago, "[m]isery acquaints a man with strange bedfellows."[41]

Paradoxically, individuality is defined largely in terms of the multitude of groups with which we simultaneously identify. Our varying concepts of family and religious groups, for example, full of complex psychological and other dimensions, are crucial to who we think we are. Even putting aside these constitutive concepts, our associations, groups, communities, and causes overlap and have great power. They are not neatly confined by time or place.

38. A. SCHLESINGER, PATHS TO THE PRESENT 24 (1949); first published as *Biography of a Nation of Joiners,* 50 AM. HIST. REV. 1 (1944).

39. Proudhon, a radical nineteenth century French social theorist, is quoted in Nisbet, *supra* note 20, at xiii. The Bohemian Club has filed an *amicus* brief along with the Century Club and numerous other private associations to urge the Court to strike down an effort by New York City to force most large clubs in the city either to admit women as full, voting members or to lose their liquor licenses and other benefits. *See* Amicus Brief, New York Club v. City of New York, S. Ct. Doc. No. 86-1836 (arguments heard February 23, 1988).

It is both sobering and somewhat encouraging to discover that enthusiasm for community is a particularly hardy perennial in American intellectual, utopian, and legal history. *See, e.g.,* R. KANTER, COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE (1972) (examining the ideas and values underlying utopian communities and communal living); W. CAREY MCWILLIAMS, THE IDEA OF FRATERNITY IN AMERICA (1973); C. WEISBROD, THE BOUNDARIES OF UTOPIA (1980); R.J. WILSON, *supra* note 37 (a study of some of the intellectuals of 1860-1920 who shared an interest in the idea of community).

40. *See* K. ERIKSON, WAYWARD PURITANS (1966) (discussing and applying Emile Durkheim's theory that deviant behavior draws people together in a common feeling of outrage against "them" in context of analysis of New England Puritans and penology). *See also* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985) (contemporary examination of nostalgia for and diminishing commitment to community identification); Selznick, *The Idea of Communitarian Morality,* 75 CAL. L. REV. 445 (1987) (advocating "morality of the implicated self" and "anchored rationality" within "community of reason").

41. W. SHAKESPEARE, THE TEMPEST, Act 2, scene ii.

Through ideas about our communities, we construct and reconstruct where we belong and who we are, as well as who we are not.[42] It is extremely difficult to sort out how the law should deal with freedom of association claims. But the fact that we know it will be hard to control a concept should not preclude recognizing, even embracing it. We also cannot control the growth of wild flowers and weeds, let alone distinguish each genre from all others, but we still welcome spring.

IV. MISERY AND POLITICS: FREEDOM OF ASSOCIATION AND POLITICAL SPEECH

Just as we have transformed Shakespeare's reference to "misery" and "strange bedfellows" into a cliche about politics, recent Supreme Court decisions tend to limit freedom to associate either to intimate associations or to "the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities."[43] In so describing freedom of association, the Court at first glance seems to be following Tom Emerson's approach. That is, the Justices derive freedom of association from freedom of expression. They then render the two freedoms nearly or completely otiose.

A close look at the cases suggests, however, that the Court at times uses freedom of association to do precisely what Tom Emerson feared. Freedom of association is commingled with freedom of speech in a way that makes it easy to balance away both. Partially, this whipsaw effect occurs because, in the years since Emerson wrote about freedom of association, the Court has begun to protect what was long thought to be unprotected, commerical speech. Even "a private party" such as Consolidated Edison was protected from regulation when it wished to put enclosures in its utility bills.[44]

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42. For a good commentary on recent social anthropology supporting this point, see A. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY (1985).

43. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1945 (1987). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (protection of the freedom to associate in both cases is viewed as a protection of individual liberty).

44. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U. S. 530, 532, 540 (1980). Justice Stevens' concurring opinion described ConEd as "one group of persons" and Justice Powell's majority opinion explained that regulation of the enclosures "strikes at the heart of the freedom to speak." *Id.* at 546, 535. This weird variation on the marketplace-of-ideas theme further stirred the porridge the Court began with the protection of commercial speech in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (voiding a statute which prohibited pharmacists from advertising the prices of prescription drugs). For a demonstration of the Court's lack of harmony in its four-part tests and the like in this realm, an example that rises almost to the level of parody, see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2979 (1986) (greater

Since newspapers that seek profits are protected, the Court reasoned that other profit-seeking corporations also should be.[45] In the context of businesses claiming freedom of association and freedom of expression protection, moreover, the Justices have begun to stretch judicial notice past any realistic breaking-point. For example, they proclaim themselves unconvinced, absent substantial proof, that requiring the Jaycees to admit women and to give them full voting rights actually "will change the content or impact of the organization's speech."[46] Surely the Jaycees will be a different organization. Surely such differences will be felt throughout an intricate web of relationships and distinct voices in immeasurable, but nonetheless significant ways.

Tocqueville observed, "A false but clear and precise idea always has more power in the world than one which is true but complex."[47] Our difficulty centers around artificial attempts to create a neat, dichotomous view of associations. Despite its appealing result, *Jaycees* provides a good illustration of how binary thought may create a doctrine that could become an attractive nuisance. It also suggests why sometimes groups should be entitled to less protection than individuals, despite a group's freedom of association claim.

A. *Less Than Meets the Eye:* Roberts v. United States Jaycees

In reviewing the Jaycees' discriminatory membership policy,

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power to ban gambling completely includes lesser power to ban its advertising in newspapers targeted to local population).

For devastating critiques of the recent expansion of commercial speech protections, see, *e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 52 IOWA L. REV. 1 (1976) (focusing on commercial motive behind speech); Brudney, *supra* note 20; Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979) (suggesting level of scrutiny of regulations depends on whether the commercial speech is serving informational versus contractual function); Patton & Bartlett, *Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (emphasizing the political consequences of corporate speech).

45. First Nat'l Bank v. Bellotti, 435 U.S. 765, 781-83 (1978).

46. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). Justice Brennan's majority opinion suggests that it would be indulging in sexual stereotypes to think any differently. The Court's facile distinction is reminiscent of one of the ways it ducked the freedom of association claim in Runyon v. McCrary, 427 U.S. 160 (1976). In glibly dismissing the freedom of association argument made by a segregated academy, Justice Stewart failed to distinguish the Court's defense of discrimination by a private club in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which a private club denied service to a black guest of a member. Moreover, *Runyon* appears to turn on the nature of the school's commercial solicitation, but its distinction between whom the school would admit and what they would teach is less than convincing.

47. A. TOCQUEVILLE, *supra* note 28, at 164. Tocqueville added, "Generally speaking, it is only simple conceptions which take hold of people's minds." *Id.*

Justice Brennan referred to two types of freedom of association. He discerned: (1) a substantive due process type, entailing "certain intimate human relationships."[48] The Jaycees could not properly claim this constitutional protection, however, because their group was "neither small nor selective."[49] Brennan also spoke of: (2) a first amendment associational element, which protected the Jaycees' expressive activities, although not sufficiently to override Minnesota's effort to attack sexual stereotyping in public accommodations.[50]

Brennan considered the first, intimate type of association to be integral and an end in itself. Curiously, he regarded the second, expressive type of association as instrumental, therefore subject to greater government intrusion. Though Brennan recognized that the two categories of association are not logically exclusive,[51] he adopted a strongly dichotomous view. Since the majority perceived the Jaycees' association claims to be only of the second, instrumental variety (only equal to the sum of their parts), Brennan quickly found Minnesota's interest sufficiently compelling to override the freedom not to associate, considered to be inherent in the freedom of association.[52]

The most persuasive opinion in the *Jaycees* case, perhaps the most cogent of all the recent freedom of association opinions, was Justice O'Connor's concurring opinion.[53] Because she viewed the Jaycees as primarily commercial and therefore subject to extensive government regulation,[54] O'Connor voted to uphold the regulation. Yet O'Connor argued that the same regulation would be invalid if the association were the type of expressive group which enjoys "First Amendment protection of both the content of its message

48. *Roberts*, 468 U.S. at 617-18. Brennan's reference here is to the line of modern decisions beginning with a successful challenge to Connecticut's proscription of birth control in Griswold v. Connecticut, 381 U.S. 479 (1965), which have relied upon a variety of theories of personal privacy—thought to include elements of individual autonomy and secrecy—but have been extended to other family relationships as well. *See generally* M. GLENDON, STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (2d ed. forthcoming); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

49. *Roberts*, 468 U.S. at 621.

50. *Id.* at 622.

51. *Id.* at 618.

52. *Id.* at 618-22.

53. *Id.* at 631. O'Connor concurred in part of Brennan's opinion and in the judgment. Rehnquist concurred only in the judgment, without opinion. There were no dissents, but Burger and Blackmun took no part in the decision.

54. *Id.* at 640.

and the choice of its members."[55] Such an association would approach what she termed "the ideal of complete protection for purely expressive association."[56]

O'Connor therefore urged adoption of a different approach from that favored by Brennan. Commercial associations, in her view, merit little constitutional protection; expressive associations should receive a great deal.[57] Moreover, O'Connor emphasized the constitutional dimension of governmental intrusion regarding group membership beyond the realm of intimate personal relationships. In this regard, without saying so explicitly, O'Connor moved close to the freedom of association doctrine in the decades prior to the Warren Court.[58] She also appeared more consistent with the NAACP decisions involving freedom of association from Harlan's 1958 Alabama opinion through the Court's strange 1982 opinion in *NAACP v. Claiborne Hardware Co.*,[59] which protected a local NAACP chapter from a huge state court fine imposed for organizing and enforcing a lengthy economic boycott of white merchants in Port Gibson, Mississippi. To be sure, O'Connor's rhetoric was hardly as dramatic as was the Court's language in *Claiborne Hardware*. Having begun by describing the concept of group action as "chameleon-like,"[60] Justice Stevens' majority opinion concluded with the following memorable statement: "A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees."[61]

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55. *Id.* at 633.

56. *Id.* at 635.

57. *Id.* at 634.

58. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945); Hague v. CIO, 307 U.S. 496 (1939); De Jonge v. Oregon, 299 U.S. 353 (1937); United States v. Cruikshank, 92 U.S. 542 (1875). For a discussion of these decisions, and of the jurisprudential debate over "communal ghosts" throughout the twentieth century, see my article based on the Sobeloff Lecture delivered at the University of Maryland School of Law, March 21, 1988, forthcoming in 47 MD. L. REV. (1988).

59. NAACP v. Claiborne Hardware Co., 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982). The decision was unanimous, but Justice Rehnquist concurred only in the judgment without opinion. Justice Stevens' opinion for the Court went so far as to state that "The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment." *Id.* at 911. The opinion is surely to be understood, at least in part, as a response to the Court's perception that "the white establishment of Claiborne County" had denied blacks "the basic rights of dignity and equality that this country fought a Civil War to secure." *Id.* at 918. For analysis of similar emphasis by the Supreme Court on the underlying facts in the NAACP decisions in the late 1950s and early 1960s, see H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

60. 458 U.S. at 888.

61. *Id.* at 934.

B. *Toward a Functional Typology:* Federal Election Commission v. Massachusetts Citizens For Life

A recent Supreme Court decision illustrates the wisdom of an approach that considers both the type of association involved and the type of expression, if any, implicated in the particular litigation. In December 1987, the Court decided *Federal Election Commission v. Massachusetts Citizens For Life.*[62] Because this decision is not widely known, and because it illuminates several important themes about the freedom of association, I will describe *Massachusetts Citizens for Life* in some detail.

Read narrowly, *Massachusetts Citizens for Life* invalidated a federal restriction on campaign contributions by a non-profit corporation only because the federal law infringed upon core political speech.[63] Read more broadly, however, *Massachusetts Citizens for Life* determined that the non-profit status of the association was what made a constitutional difference to a majority of the Justices. This broader reading is more than plausible; in my view, it is the only interpretation that makes sense. Since the vote was so close and the variables so numerous, however, it is not yet time to begin popping champagne corks if you favor robust constitutional protection for non-profits. A closer look at *Massachusetts Citizens for Life* will underscore its promise and its puzzles.

The case began when a complaint reached the Federal Election Commission alleging that a 1978 "Special Election Edition" of the Massachusetts Citizens for Life Newsletter constituted an expenditure of corporate funds on behalf of certain political candidates.[64] An expenditure for distribution to the general public would violate section 441(b) of the Federal Election Campaign Act.[65] The lower courts disagreed about whether the Federal Election Campaign Act

62. 107 S. Ct. 616 (1986). In this decision, the Court was sharply divided. Justice Brennan wrote for only three other Justices in one crucial section of his majority opinion and Justice O'Connor concurred separately and discussed her concerns over the disclosure requirements of the Federal Election Campaign Act. Chief Justice Rehnquist's dissent for four members of the Court argued that non-profit corporations should not be treated differently from business corporations. Justice White joined the dissent, but noted separately that he continues to disagree with the string of recent decisions extending first amendment protections to corporations.

63. This interpretation is reinforced by the Court's decision less than a week before in Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986), holding it unconstitutional for Connecticut to condition voting in the Republican Party primary on a registration requirement not desired by the Republicans. Justice Marshall's majority opinion rested on freedom of association for political purposes.

64. *Massachusetts Citizens for Life,* 107 S. Ct. at 617.

65. 2 U.S.C. § 441(b) (1982).

actually covered the newsletter. They agreed, however, that if it did, the statute was an unconstitutional restriction on political expression.[66] The Supreme Court agreed that the statute did cover Massachusetts Citizens for Life's newsletter, but the Justices vehemently disagreed among themselves as to whether the statute thereby infringed first amendment rights.[67] This is hardly surprising. Currently, there is deep confusion surrounding attempts to reconcile vital, competing public interests in regulation of the political process, freedom of expression, and freedom of association.

What does seem clear in the *Massachusetts Citizens for Life* decision, however, was that a majority of the Justices agreed that it makes a *constitutional* difference what kind of group is doing the speaking. The *status* of Massachusetts Citizens for Life as a nonprofit was the key factor. In a crucial section of the majority opinion, moreover, Justice Brennan wrote for a clear majority when he said, "the concerns underlying the regulation of corporate political activity are simply absent with regard to Massachusetts Citizens for Life . . . . Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form."[68] The reason that group status made a constitutional difference, according to the majority, was that spending by either a business corporation or a union "raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."[69]

The basic interpretive problem *Massachusetts Citizens for Life* poses is that it is hard to know how emphatically the majority drew this distinction among corporate forms. Yet there it is: Massachusetts Citizen For Life would have lost but for its status as nonprofit. Still, we must ask, doesn't the *Massachusetts Citizens for Life*

66. 107 S. Ct. at 618.

67. *Id.* at 618-19.

68. *Id.* at 630. Brennan noted that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id.* at 631.

69. *Id.* at 628. At this point, Brennan emphasized the dangers of corruption arising from the fact that resources in a corporate treasury do not indicate the level of public support, but elsewhere in the opinion he conflated for-profit corporations and unions for purposes of his first amendment analysis. *See, e.g., id.* at 630. While clearly relevant, a discussion of labor law matters is beyond the scope of this Article. For a provocative introduction, *see* NLRB v. City Disposal Systems, Inc., 104 S. Ct. 1505 (1984) (individual can engage alone in "concerted activity" protected under section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982)); Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claibourne Hardware *and its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

decision really turn on the *type of expression* involved? *Political speech*, after all, is often defined as the kind of speech most worthy of constitutional solicitude.[70] This is plausible, of course, but the particular type of group involved and its function as a vehicle for group solidarity and amplification help explain *Massachusetts Citizens for Life*. In this sense, then, *Massachusetts Citizens for Life* hints at the role to be played by an independent right of freedom of association.

V. THE NEED FOR AN INDEPENDENT RIGHT: THE TESTS APPLIED IN *CITIZENS AGAINST RENT CONTROL* AND *WIDMAR V. VINCENT*

My goal is modest: I hope to provide a working framework to delimit the "operative facts" in disputes about associations.[71] A problem associations generally pose for legal analysis is that lawyers grow accustomed to thinking in binary terms such as government/individual or group/individual. In the spate of recent decisions vigorously intervening to protect political expenditures by associations, a majority seems willing to use freedom of association in an entirely undifferentiated way. Two cases decided within a week of one another illustrate this troubling phenomenon.

In *Citizens Against Rent Control v. City of Berkeley*, Chief Justice Burger waxed rhapsodic in his majority opinion about the American "tradition of volunteer committees for collective action [that] manifested itself in myriad community and public activities."[72] Somehow, this tradition extended to efforts by corporate managers to communicate their dollars and cents messages to voters.[73] The thrust of Burger's opinion was that Berkeley's limit on election spending offended freedom of association, a right Burger

70. The most famous statement of this approach is to be found in A. MEIKLEJOHN, POLITICAL FREEDOM (1960). A more recent indication of how narrow this approach might actually be is available in Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The Court has often emphasized the "indispensable" and "core" qualities of political speech.

71. Arthur Corbin, whom Karl Llewellyn identified as his "father in the law" and who was in turn a source of inspiration for Grant Gilmore, was known for his attention to an incredible array of what Corbin termed "operative facts" in the contract cases Corbin collected for his treatise. *See* G. GILMORE, THE AGES OF AMERICAN LAW 79-80 (1977).

72. 454 U.S. 290, 294 (1982).

73. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, *reh'g denied*, 438 U.S. 907 (1978). *But see* California Medical Ass'n v. Federal Election Comm., 453 U.S. 182 (1981) (federal limitation on contributions to politically active associations upheld).

found to overlap and blend with freedom of expression[74] and to require "exacting judicial scrutiny."[75] Burger was so taken with the value of collective efforts in the American past that he found it necessary to state explicitly that not all activities that are legal for individuals are also legal for groups.[76]

Less than a week before the Berkeley decision, the Court had explained in *Widmar v. Vincent* that religious worship and discussion "are forms of speech and association protected by the First Amendment."[77] Justice Powell's majority opinion applied a "level of scrutiny appropriate to any form of prior restraint" and struck down the decision by the University of Missouri at Kansas City to deny access to campus facilities sought by an evangelical Christian group for purposes of worship and religious discussion.[78]

The decision in *Widmar* certainly seems right. But it seems so largely because in an important sense "the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee."[79] One of the crucial ways in which the Court recently has bogged down in consideration of freedom of associa-

74. *Citizens Against Rent Control*, 454 U.S. at 298 (noting that freedom of association and freedom of expression are virtually "inseparable" in this context).

75. *Id.* at 294.

76. Burger wrote, "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Id.* at 296. On this point, therefore, Burger implicitly accepted Tom Emerson's general approach to freedom of associations claims, though in the context of the case, the two seem strange bedfellows indeed. Burger also implicitly rejected even the limited claim for an independent freedom of association right made in Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977). Raggi sought recognition of "[t]he basic principle . . . that whatever action a person can pursue as an individual, freedom of association must ensure he can pursue with others." *Id.* at 15. Relying primarily on NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), Raggi used the dictum that an association and its members "are in every practical sense identical,"*id.* at 459, to claim that an association is no more than the sum of its individual members and to assert that this notion "seems essential" in a society in which the individual is the ultimate concern of the social order. Raggi, *supra*, at 12. She thereby somewhat undercut the idea of an independent freedom of association right advanced in her title.

77. 454 U.S. 263, 269 (1981). Justice Stevens concurred in the judgment and Justice White dissented from Justice Powell's majority opinion. One might have thought the free exercise clause of the first amendment more obviously relevant and surely possessed of sufficient clout to provide a basis for the decision in *Widmar v. Vincent*. It is therefore striking that the majority repeatedly invoked freedom of association and employed the extremely protective analogy of a prior restraint test, at least when it could discern free exercise of religion in combination with freedom of expression.

78. *Id.* at 267 n.5 (1981) (quoting Healy v. James, 408 U.S. 169, 181, 184 (1972), which held it unconstitutional for a university to exclude S.D.S. chapter on grounds of freedom of expression and freedom of association).

79. Perry Local Educator's Ass'n v. Hohlt, 652 F. 2d 1286, 1296 (7th Cir. 1981) (Wisdom, J.), *rev'd*, 460 U.S. 37 (1983).

tion claims is that it has lost track of the point Tom Emerson made when he discussed the role of equal protection analysis in the first amendment context. Tom wrote, "Basically, equal protection requirements demand fairness as between relevant interests in the dispensation of governmental support."[80] It is incoherent simply to assume, as the Court now does so readily, that the extremely permissive rational relationship test that is commonplace for equal protection analysis of social and economic classifications is also appropriate when freedom of association rights are at stake. Proof of "bad motive" causation, a prominent necessary precondition in equal protection decisions, actually is entirely misplaced in the sensitive realm of governmental entanglement with the first amendment.

The quest for neutral, general principles about freedom of association is doomed. The protective coloration of what may appear to be clear dichotomies borrowed from the current rubric of equal protection doctrine merely exacerbates unnamed and unaccountable discretion. Neither bureaucrats nor judges need look beyond groups they feel fairly comfortable recognizing or punishing.

Widmar itself begins to suggest how the crucial role of group identity is lost by simply reasoning by analogy to equal protection analysis. *Widmar*, and even more so other "public forum" decisions since, have not considered the importance of affiliation itself for group identity and, ultimately, for individual identity as well. But at least *Widmar* suggests a rigorous constitutional standard, akin to the special scrutiny applied to prior restraints. *Widmar* hints of the extent to which groups such as paraders, journalists, labor activists, and evangelicals need their group identities to construct the powerful first amendment arguments they should have. Unfortunately, *Widmar* has not been followed in its sensitive scrutiny of governmental intrusions on groups. Instead, several wrongheaded approaches to freedom of association, to which I now turn briefly, illustrate some of the mistakes made when equal protection analysis is imported uncritically into the freedom of association context.

80. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 802 (1981). Tom noted that when the government participates in the system of expression directly, however, new difficulties arise that might usefully be approached by distinguishing between macro and micro levels of the government's affirmative first amendment involvement.

VI. When Freedom of Association is Less or Greater than the Sum of its Parts

A. *The Doomed Search for Governmental Neutrality: A Disastrous Trilogy Concerning Non-Profits*

Even after the *Jaycees* and *Rotary Club* decisions, a non-profit association that decides to discriminate in a way that surely would be unconstitutional if perpetrated by a state official might be able to insulate its action from constitutional scrutiny. Nonetheless, under *Bob Jones University v. United States*,[81] such a victory might prove pyrrhic; the non-profit might lose its non-profit tax status. Thus, we must consider whether government neutrality is an adequate or even reasonable constitutional standard for administrators choosing which associations should receive government benefits or burdens.

In *Bob Jones*, on statutory grounds the Court upheld an Internal Revenue Service decision to deny tax-exempt status to private religious schools that practice racial discrimination. Chief Justice Burger's majority opinion did not confront freedom of association explicitly. Moreover, in part because there was some reason to doubt the sincerity of the religious defenses raised by the private schools, the majority slid past the knotty first amendment issues lurking beneath its construction of congressional intent and congressional silence.[82] Instead, with more than a nod to Pangloss, Burger stressed our nation's unquestioned commitment to the eradication of racial discrimination. By definition, according to Burger, such discrimination is inconsistent with statutory requirements to qualify as a non-profit organization under the federal tax laws. The majority upheld IRS discretion to determine tax-exempt status with no more particularity than that the non-profit group be consistent with "the public interest," "the common community conscience" and the "declared position of the whole government."[83] Such a standard makes it difficult to determine who, if anyone, is guarding the guardians.

Each April, we are clearly reminded of how pervasive the IRS often seems, but the Court's manner of deciding *Bob Jones*—

81. 461 U.S. 574 (1983) (upholding authority of Internal Revenue Service to deny § 501 (c)(3) tax-exempt status to schools that discriminated on the basis of race in admissions or school policies, despite claims of a religious basis for such discrimination).

82. For example, though Chief Justice Burger's majority opinion spoke of a mysterious, "unusually strong case of legislative acquiescence" in implicitly ratifying IRS rulings, *id.* at 599, the IRS moved only after years of litigation. Burger argued that, "[n]on-action by Congress is not often a useful guide, but the non-action here is significant." *Id.* at 600.

83. *Id.* at 592.

although I do not attack the result—allows the IRS virtually unreviewable discretion to determine what "common law," "common sense," and "history" tell us about whether a non-profit association is comporting with "deeply and widely accepted views of elementary justice."[84]

To make matters worse, in a subsequent decision based on the convoluted technicalities of "standing," the Court determined in *Allen v. Wright*[85] that taxpayers, even taxpayers who were parents of minority students within districts under desegregation orders, could not sue to compel the IRS actually to enforce the policy upheld in *Bob Jones*. Moreover, in *Regan v. Taxation with Representation of Washington, Inc.*,[86] a case decided the day before *Bob Jones*, the Court unanimously agreed that it was not a denial of either first amendment or equal protection rights to forbid a non-profit to lobby Congress if it wished to retain its § 501(c)(3) tax-exempt status, though other non-profit organizations such as veterans groups were exempt from the lobbying prohibition. *Taxation with Representation*, which has received little attention, is important for two reasons: first, then-Justice Rehnquist's majority opinion viewed tax exemptions as a form of "largesse."[87] He stated, "Both tax exemptions and tax deductions are a form of subsidy that is administered through the tax system . . . [and] has much the same effect as a cash grant."[88] This approach allowed the unanimous Court to emphasize that the Constitution permits great discretion in decisions distributing such largesse.

The second significant point about *Taxation with Representation* is that it illustrates the peculiar application of important principles of neutrality in recent first amendment decisions. Because in *Taxation with Representation* the Court perceived no invidious discrimination against the particular ideas advanced by the particular non-profit association involved, the Court found it quite easy to notice no constitutional violation.[89]

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84. *Id.*

85. 468 U.S. 737 (1984) (denying standing to parents of black school children who claimed that the Internal Revenue Service was not enforcing the *Bob Jones* decision and was failing its statutory duty to deny section 501(c)(3) tax-exempt status to private academies that discriminated on the basis of race).

86. 461 U.S. 540 (1983). Then-Justice Rehnquist wrote the majority opinion and Justice Blackmun, joined by Justices Brennan and Marshall, concurred.

87. *Id.* at 549.

88. *Id.* at 544.

89. Justice Blackmun's concurring opinion stressed that, for three Justices, it was only because, as administered by the IRS, *Taxation with Representation* had a readily available opportunity to create a lobbying affiliate under section 501(c)(4) that they rejected *Taxation*

The Court's uncritical approach to hypothetical neutrality in administrative decisions also helps to explain the anomalous holding in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*[90] In the course of denying a first amendment and equal protection claim of access to an annual charitable campaign in the federal workplace, Justice O'Connor's majority opinion determined rather mechanistically that the federal campaign constituted a "nonpublic forum."[91] Therefore, by a four-three vote, the *Cornelius* decision held that absent proof of impermissible motivation, the administrator's decision as to which non-profit organizations would be included in the combined campaign would prevail so long as it appeared "reasonable."[92]

The central difficulty with this, as with *Massachusetts Citizens for Life* and *Taxation with Representation,* is that government neutrality is entirely elusive in these cases. Their holdings are inconsistent and seem to rest on an unarticulated nexus between the extent to which the Justices value the particular expressive act involved and how they perceive the relative worthiness of the particular association seeking constitutional protection. Non-profit associations that vaguely appear similarly situated may be treated very differently under the constitutional standard suggested by *Bob Jones, Taxation with Representation* and *Cornelius.* In sharp contrast to *Claiborne Hardware* and *Massachusetts Citizens for Life,* this trilogy allows administrators almost unbounded discretion in crucial decisions directly affecting non-profit associations.

B. *What to Do about Freedom of Association?*

The idea that our horror at censorship suggests a "specialized

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with Representation's challenge to the section 501(c)(3) restriction. But the majority's approach was quite different. Applying a standard that "[i]t is . . . not irrational" for Congress to subsidize lobbying by veterans groups, Rehnquist's opinion invoked the abortion funding decisions, Harris v. McRae, 448 U.S. 297 (1980) and Maher v. Roe, 432 U.S. 464 (1977), to support the proposition that so long as government regulations are not affirmatively aimed at suppression, the government is entitled to encourage action it favors. *Id.* at 550.

90. 473 U.S. 788 (1985). Justice O'Connor wrote for four Justices. Justice Blackmun, joined by Justice Brennan, dissented, as did Justice Stevens. Justices Marshall and Powell did not take part in the decision. The case reached the Supreme Court after extensive and somewhat complicated maneuvering in the lower courts and within the executive branch, and the Court remanded for consideration of the issue of whether the administrator could be proved to have acted with a bad motive.

91. *Id.* at 802-06.

92. *Id.* at 800. *See also* Connick v. Myers, 461 U.S. 138, 148 (1983) (discharge of assistant district attorney upheld, since her questionnaire circulated to fellow workers was not "speech on matters of public concern").

equal protection guarantee" indicates why much more exacting scrutiny is warranted. The complete and unquestioning reliance on the presumed neutrality of administrators in the trilogy I just criticized also underscores why the insistence on proof of "but for" discriminatory motivation in equal protection decisions over the past decade is inappropriate when sensitive first amendment rights are at stake. Finally, since the status of the association seems determinative, the nascent typology in decisions such as the *Jaycees* and *Massachusetts Citizens for Life* suggests a useful analogy between non-profit associations, for example, and the "checking value" we celebrate and expect of a robust, free press.

I do not mean to belittle the difficulty in deciding the cases I have discussed. Yet the idea that freedom of association is an independent and important right suggests, at a minimum, that those who seek to regulate non-profit groups should be required to justify their intrusions with reasons far more significant than those the Court accepted unquestioningly, for example, in *Taxation with Representation* and *Cornelius*. Since elimination of the ongoing burden of racism and sexism is a compelling, not to say overwhelming justification in our society, the results in *Bob Jones* and *Jaycees* should be applauded, albeit not for the reasons announced by the Court. Moreover, even though Tom Emerson suggested that "general organizational activities, including the conduct of schools" should be safeguarded as fully "as the actual utterance of the words themselves,"[93] it would not surprise me if he joined me in approving the outcomes in *Bob Jones* and in *Runyon v. McCrary*.[94]

These decisions indicate, however, that the group quality does make a profound difference. How can we get a handle on this analytic morass? We cannot actually achieve a general theory, but perhaps we have begun to work toward a few hard-earned generalizations. We do tend to need a theory to tell us what we see. Surely the status of the association and the type of communicative act involved emerge as critical factors. It is also clear that the Court's recent decisions have allowed administrators to treat similar groups differently on no basis other than a dubious presumption of neutrality. Finally, recognizing that there will be a need for some government oversight and some means to ascertain that non-profit associations actually are bona-fide non-profit associations, I advocate thinking about intrusive governmental regulation of non-profit

93. *See supra* text accompanying note 3.

94. 427 U.S. 160 (1976) (42 U.S.C. § 1981 held to reach and prohibit racial discrimination by private, commercially-operated nonsectarian schools).

associations with some of the ginger concern we are accustomed to affording newspapers.

Whether the press, singled out as it is in the text of the first amendment, can claim any exceptional protection has been hotly debated for years.[95] In fact, however, in numerous ways journalists do enjoy special protection. They get access to the best, sometimes to the only seats in courtrooms, legislative galleries, and executive "press" conferences. Reporters enjoy special, formal privileges in a majority of state statutory codes and more privileged status in numerous other ways as well.[96] Such special protection is sometimes justified on the grounds that reporters serve as surrogates for the rest of us. Yet there hardly can be doubt that government officials, even judges, treat members of the press with special sensitivity and that reporters, editors, and publishers are not democratically accountable to those whom they may represent. Members of the fourth estate are members of a special group. Publishers and media executives strive for profit, yet we defer to the press because it helps check governmental power, as well as mediating, informing, and entertaining. At least in news and editorial functions, groups denominated "the press" are thought to merit particular constitutional protection.

It is not a new idea that at least some associations are closely analogous to the press. To return to where we started our brief historical consideration of associations in America, Tocqueville wrote, "In democratic countries knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others."[97] He noticed "a necessary connection be-

95. *See, e.g.*, Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) and other articles in the same symposium, as well as the symposium articles in 34 U. MIAMI L. REV. 785 (1980). The debate was touched off by Justice Stewart's theoretical discussion in Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

96. By 1974, over half the states had enacted "reporter shield" laws providing various procedures to shield reporters who confronted demands for information by government officials or grand juries. J. GORA, THE RIGHTS OF REPORTERS 243-48 (1974) (summarizing state shield laws). *See also* Eckhardt & McKey, *Reporter's Privilege: An Update*, 12 CONN. L. REV. 435 (1980); Sylvester, *How the States Govern the News Media: A Survey of Selected Jurisdictions*, 16 SW. U.L. REV. 723 (1986). In response to Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (which rejected a constitutional claim that a newspaper should enjoy special protection from a newsroom search), Congress enacted the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-5-7, 11-12 (1982), providing special protection from searches for those engaged in "public communication." *See generally* cases collected and discussed in Soifer, *Freedom of the Press in the United States*, in PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 79, 108-17 (P. Lahav ed. 1986).

97. A. TOCQUEVILLE, *supra* note 28, at 517.

tween associations and newspapers,"[98] and compared and contrasted their relative merits and claims for freedom. It was the necessity of associations as a check and a balance in a democracy that Tocqueville stressed, along with the educational function associations perform for their members. He said, "An association, be it political, industrial, commercial, or even literary or scientific, is an educated and powerful body of citizens which cannot be twisted to any man's will or quietly trodden down, and by defending its private interests against the encroachments of power, it saves the common liberties."[99]

Obviously, much tragic history during this century emphasizes the danger of allowing too much power to groups. As Hannah Arendt pointed out, "Power springs up whenever people get together and act in concert."[100] We also have become more aware of the overwhelming power that corporations and government exert in our lives. Therefore, it seems particularly appropriate to concentrate some of our attention on ways to connect constitutional theory to the reality of our identities as members of myriad associations. I have tried to suggest why some associations, some of the time, do merit sensitive constitutional protection. In particular, those in the voluntary or independent sector may properly be considered a fifth estate, functioning in ways analogous to the fourth estate of the press and to the norm-generating enclaves of religious associations.[101]

CONCLUSION

It is a commonplace of American history in general, and American legal history in particular, that we focus on individualism to the virtual exclusion of all else. If anything, the prodigious impact of law and economics, with its concentration on the autonomous profit-maximizing individual, exacerbates that trend. The misleading either/or choice between government and individual ignores our

98. *Id.* at 518.

99. *Id.* at 697.

100. H. ARENDT, ON VIOLENCE 52 (1969). Arendt is quoted and discussed insightfully in Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1031-35 (1978).

101. For development of definitions for and a defense of activism by the independent sector, see John Simon's *Foundations and Public Controversy: An Affirmative View* and, for a spirited contrary view, see Jeffrey Hart's *Foundations and Social Activism: A Critical View*, both in THE FUTURE OF FOUNDATIONS (F. Heinman ed. 1973). The *locus classicus* for current discussions about norm-generating communities in legal circles is the work of the late Robert Cover, particularly Cover, *supra* note 4.

long tradition of a sense of collective responsibility. We often make an anachronistic translation of Spencerian social theory back into the minds and motives of the Constitution's founding generation.[102]

We tend to forget that one finds countless references to the virtues of associations both in the pre-revolutionary era and throughout our history as a nation. By the mid-1700s, for example, associations formed for local civic purposes enjoyed considerable prominence.[103] In the 1820s, William Ellery Channing regarded associations as the "most powerful springs" of social action and found "the energy with which the principle of combination, or of action by joint forces" to be one of the most remarkable features of his times.[104] It is hardly surprising that James Bryce, the foremost foreign observer of post-Civil War America, echoed antebellum observers when he noted the pervasive American "habit of forming associations" and remarked that "[a]ssociations are created, extended and worked in the United States more quickly and effectively than in any other country."[105]

This recurrent theme is not the entire story, to be sure, nor is

102. *See, e.g.*, C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960); O. HANDLIN & M. HANDLIN, COMMONWEALTH (1947); L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT (1948); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); H. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861 (1969).

103. A. SCHLESINGER, *supra* note 38, at 26.

104. *Id.* at 32-33. The spirit of association was neither limited to joining forces in order to accomplish specific ends, nor to a specific period in American life. Sometimes, of course, Americans sought what Julius Goebel called the "creative magic of mere association" in order to confirm their own identities at the expense of others. *Id.* at 24. But the outburst of collective activity in the 1820s, for example, produced a plethora of new-fangled associative ventures, including Owenite utopian experiments, the spread of asylums, workingmen's associations, pro and anti-Masonic activity, and various forms of Christian communalism. *See generally* A. WALLACE, ROCKDALE 275-92 (1978); C. Weisbrod, *supra* note 39. For a famous early example of protection of association in the labor context, see Commonwealth v. Hunt, 45 Mass. 111 (IV Met.) (1842) (Shaw, C.J.). For the political implications of Masons and anti-Masonic movements, see, *e.g.*, D. LIPSON, FREEMASONRY IN FEDERALIST CONNECTICUT, 1789-1835 (1977). For the social context of the growth of asylums, see D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971). This flourishing of the collective impulse was in part at least both an attempt to revive the spirit of the Revolution and an effort to keep threatening forces of industrialization, materialism, and urbanization at bay.

105. J. BRYCE, 2 THE AMERICAN COMMONWEALTH 239 (1889). Morton Keller makes a similar point about how the Civil War "opened the door to bold experiments in voluntary association for public ends," with such influential groups as the U.S. Sanitary Commission, Union League Clubs, the first national trade associations and a variety of organizations formed to aid the freedmen. M. KELLER, AFFAIRS OF STATE 7 (1977). According to Keller, however, voluntary associations gained even greater importance as the century ended. *Id.* at 517. As Lawrence Friedman put it, "The notion was: organize or die; and it was the theme

historic description synonymous with normative constitutional proposals.[106] Once again, however, Tocqueville's uncanny insight seems particularly pertinent. He stressed the difference between American associations and associations in Europe, where, like newspapers, associations tended to represent well-defined classes and to seek to influence governmental action directly. Echoing Madison, Tocqueville argued that "no countries need associations more—to prevent either despotism of parties or the arbitrary rule of a prince—than those with a democratic social state."[107] Furthermore, "In a country like the United States, where differences of view are only matters of nuance, the right of associations can remain, so to say, without limits."[108]

I do not claim with Tocqueville that the right of associations "can remain . . . without limits," though he was perceptive about the extent to which Americans generally tend to share beliefs in contrast to more vigorously clashing ideologies in European countries. I do not advocate an absolute freedom of association right. Nor do I suggest that, if the right is given independent status, it should always prevail or always carry the same weight. But I do want to emphasize the inconsistency and false rigor in the categorical approach now in vogue in the Supreme Court. It may not be possible to achieve a "philosophically continuous series."[109] Nevertheless, an independent right of freedom of association makes logical, historical, and normative sense.

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of American law, East and West, in the last half of the 19th centrury, in every area and arena of life." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 370 (2d ed. 1985).

106. For a famous negative reaction, see George Washington's Farewell Address, in which Washington expressed his concern about "combinations and associations . . . with the real design to direct, control, counteract, or awe the regular deliberation and action of the constitutional authorities." 1 MESSAGES AND PAPERS OF THE PRESIDENTS 209 (J. Richardson ed. 1896). Of course, Washington's warning was not heeded, but both it and Washington's famous rejection of overtures by the Society of Cincinnatus indicate something of early ambivalence in responses to the proliferation of associations in America.

As Gordon Wood makes abundantly clear in his THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969), the men who wrote the Constitution feared both factions and the power of the governors over the governed. Rather than attempt to eliminate factions, however, or to diminish what they viewed as necessary national governmental power, Madison and his colleagues attempted to employ factions and private associations as necessary counterweights to each other and to government power.

107. A. TOCQUEVILLE, *supra* note 28, at 192.

108. *Id.* at 194. For support for the idea that a tendency toward the middle, and toward the claims of the middle class, is a master fact in American history, see, *e.g.*, L. FRIEDMAN, *supra* note 105, at 210.

109. Grant Gilmore discusses how even Holmes nodded about his ability to accomplish the task he set for himself as a judge, to create a "philosophically continuous series" through his decisions. G. GILMORE, THE AGES OF AMERICAN LAW 53 (1977).

If this essay makes any progress at all, it is fitting that it does so in honor of Tom Emerson. After all, the constitutionalists of two centuries ago explicitly provided protection for those people concerned enough to assemble together. They linked this right directly to other constitutional barriers, similarly erected to serve those who would speak, write, petition, or pray against orthodoxy. They heeded groups of people who, both in the wake of the Revolution and in the years to follow, might convince others to join them against injustice by the power of their arguments and the strength of their commitment.

Tom Emerson has long seemed to me to be exactly the kind of constitutionalist I would wish present whenever I imagine a serious meeting at which constitutional issues of the first order might be discussed and actually decided. Call it a Rawlsian original position, an ideal constitutional convention, or the best kind of education in the highest values of constitutional law, Tom Emerson would be my nominee.

As it happens, Gordon Wood sums up those men who gathered in Philadelphia in the stifling summer of 1787 in a way that may romanticize them, but that actually manages to begin to describe Tom Emerson. Wood writes of "an end of the classical conception of politics and the beginning of what might be called a romantic view of politics."[110] The men who perpetrated this revolution possessed a "more realistic sense of political behavior in the society itself, among the people." They "embodied a new kinetic sense" and "placed a new emphasis on the piecemeal and the concrete in politics at the expense of order and completeness."[111] The key additional quality Tom Emerson would bring to any gathering of serious constitutionalists is a quality he brings to every endeavor. To Tom Emerson, law and justice can be associated inseparably.

110. G. WOOD, *supra* note 105, at 606.
111. *Id.*