

THE CONSTITUTIONAL RIGHTS OF PRIVATE GOVERNMENTS

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*Private organizations enjoy constitutional rights that allow them to coerce their members. Such rights pose a puzzle for theories maintaining that the purpose of rights is to protect individuals from coercion. This Article proposes a solution to the puzzle by arguing that such theories of rights—which the Article terms “anticoercion theories”—are misguided. The purpose of rights is not to protect individuals from coercion but rather to insure that individuals are coerced by the right sort of institution. The Article defends this “institutional” theory of rights as more normatively attractive than the anticoercion theory. The institutional theory is also better capable of explaining the U.S. Supreme Court’s doctrine of associational autonomy in *Boy Scouts of America v. Dale* and *Troxel v. Granville*.*

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I

INTRODUCTION

The currently dominant “theory of rights,” which I call the “anticoercion” theory, maintains that rights exist to protect individuals from an improperly coercive kind of pressure. A key problem with anticoercion theory is that it defines improper pressure (“coercion”) without reference to the nature of the institution imposing the pressure. What makes wrongful pressure wrong or “coercive,” according to anticoercion theories, is not the source of the pressure but rather the effects of the pressure on the individual or the purpose of the pressure to stigmatize the individual. The anticoercion theory, therefore, cannot make sense of limits on constitutional rights such as the “state action” requirement that rest entirely on the source of the action allegedly burdening those rights. The anticoercion theory also cannot explain why private organizations that impose coercive pressure on individuals ought to enjoy constitutional rights to impose such pressure. Under the anticoercion theory, private governments should never enjoy constitutional rights. Indeed, anticoercion theory has led scholars and courts to refuse to enforce rights on behalf of private governments.

This Article argues that the anticoercion theory is misguided both descriptively and normatively: It does not explain constitutional doctrine nor does it provide a coherent or attractive theory of rights. Constitutional law and scholarship would be improved by discarding the anticoercion theory and replacing it with what I call the “institutional” theory of rights. By enforcing constitutional rights to protect private organizations—“private governments,” in my phrase—courts are actually often performing the same function that they perform when they enforce “structural” rules such as federalism and separation of powers. They are dividing governmental jurisdiction between different types of institutions based on the institutions’ relative competence at performing social functions. In particular, judicial enforcement of individual rights is often best understood as enforcement of

an individual's entitlement to be coerced by a particular sort of decisionmaking structure—a university, family, trade union, church, etc.—and not an entitlement to freedom from “coercion” as such.

Therefore, in determining whether a private government (say, the Boy Scouts of America (BSA)) should control some issue (such as criteria for admission to their organization), courts should engage in a structural inquiry familiar from analysis of federalism, judicial review, or presidential powers: They should consider whether the private government, in light of its structure, is well-suited to govern the issues or decisions assigned to it by the constitutional right. The institutional theory of rights allows us to have a coherent concept of associational liberty that would better explain the Court's recent decision concerning parental rights in *Troxel v. Granville*¹ or the associational rights of the BSA in *Boy Scouts of America v. Dale*.²

This article also has a larger ambition: To question the distinction between “structure” and “rights” in American constitutional law.³ This distinction is uncritically embedded in the law school curriculum, course books, and modes of thinking about “rights” (including the habit of distinguishing them from “powers”).⁴ Yet it rests on a misleading view of the public-private distinction—a view that was not exorcized by the legal realists but haunts us still in the notion that liberty is a simple thing involving “private” individuals, protected with ringing catalogues of “rights” loosely derived from abstractions like “dig-

¹ 530 U.S. 57 (2000).

² 530 U.S. 640 (2000).

³ For an earlier attempt to attack the distinction, see Roderick M. Hills, Jr., *Back to the Future: How the Bill of Rights Might Be About Government Structure After All*, 93 Nw. U. L. Rev. 977 (1999) (reviewing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998)). My approach to private entitlements as jurisdictional markers has been influenced by, and is similar to, Laurence H. Tribe's acute article, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 10-14 (1973). For an analytically sharp piece with a similar agenda, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857 (1999).

⁴ For a description of the importance of the distinction to the Court's jurisprudence since the New Deal as well as a brief defense of the distinction, see Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 5, 122-28 (2001). Like many other scholars, see, for example, Jesse Choper, *Judicial Review and the National Political Process*, 176-80, 206-07 (1980), Professor Kramer argues that defining the powers of governmental units raises greater practical difficulties than defining the rights of individuals. As I shall argue in Part IV, the argument is unsuccessful because individuals' rights include the right to particular governing arrangements, including rights to autonomous families, juries, private associations, churches, newspapers, and unions. Defining the autonomy of the AFL-CIO or the Presbyterian Church raises structural issues identical in empirical complexity to defining the autonomy of the State of Minnesota: If the latter cannot be protected through judicial review because of “practical difficulties,” then it is difficult to see how the former can be.

nity," "self-respect," or "equal concern," while structure is a messy, complex, policy-laden thing best left to political science and kept out of courts. This Article is an initial effort to show that human autonomy requires institutions as much as rhetoric and cannot be walled off from the problem of collective self-governance by the dichotomies between the public and private, policy and principle, or structure and rights.

After defining some preliminary terms in Part II, I set forth the anticoercion theory in Part III, showing that it tends to support the view that private governments should have no constitutional rights. In Part IV, I set forth a rival "institutional theory" of constitutional rights. I argue there that this theory makes much better sense of private organizations' constitutional status by explaining what would otherwise be knotty paradoxes in decisions that protect private organizations' associational liberties. The institutional theory also makes better normative sense because it does not rely on unconvincing arguments that individual autonomy can somehow be distinguished from collective governance. In Part V, I look at *Troxel v. Granville* (involving parental rights) and *Boy Scouts of America v. Dale* (involving nonprofit recreational clubs' rights)—in which the Court paid some heed (although the Justices should have paid more) to institutional considerations.

II

SOME PRELIMINARY DEFINITIONS: WHAT ARE "PRIVATE GOVERNMENTS"? WHAT ARE "RIGHTS"?

Before plunging into the argument, it is important to avoid misunderstanding by defining two critical terms: "private governments" and "rights."

A. What Are "Private Governments"?

"Private government" is a phrase that would have been regarded as an oxymoron a century ago. Today, it approaches a realist truism. In the decade between the publication of Morris Cohen's essay, *Property and Sovereignty*,⁵ in 1927 and Louis Jaffe's *Law Making by Private Groups*,⁶ it became widely accepted that private organizations exercise governing powers over their members, serving much the same purpose as more obviously state-controlled organizations like

⁵ 13 Cornell L.Q. 8 (1927).

⁶ 51 Harv. L. Rev. 201 (1937). On the legal realists' development of the idea that private law rested on a basis of state power, see generally Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

legislatures, cities, or regulatory agencies. For instance, it is a familiar point that homeowners' associations regulate the land and activities of their residents in ways fundamentally similar to cities.⁷ Likewise, joint-stock corporations and nonprofit organizations frequently act as regulatory agencies, carrying out general policies imposed by the legislature.⁸

In referring to "private governments," I do nothing more than acknowledge this now-conventional view of private organizations. Specifically, I use the term "private government" to refer to any private group that possesses a legal structure and decisionmaking processes that allow its members, officers, or agents to pursue common goals concerning the property, employees, members, or other constituents of the organization. As examples, consider churches, trade unions, for-profit corporations, charitable trusts, political advocacy groups, and (more controversially) households and families.⁹ Such organizations are "governments" in the obvious sense that they govern some part of the world—land, intellectual property like trademarks or copyrighted documents, bank accounts, buildings, machinery

⁷ Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. Pa. L. Rev. 1519, 1519-21, 1580 (1982).

⁸ On some ways in which private economic enterprises perform regulatory functions in obeying various regulatory mandates, see Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 Nw. U. L. Rev. 351, 355-72 (1999). For three different perspectives on how private organizations exercise governmental power, see Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 Hastings Const. L.Q. 165, 169-74 (1989) (analyzing three categories of private exercise of public power according to formality of relationship with government and proposing five-step constitutional analysis); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000) (conceiving of governance as set of negotiated relationships between public and private actors); David M. Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 694-95 (1986) (proposing due process-centered analysis of public delegations of power). All of these articles examine private organizations primarily when they are exercising powers on behalf of the state and federal governments—as contractors, for instance. None consider the possibility that private organizations' power over their members is itself a form of government.

⁹ What counts as a "family" is greatly contested in various arenas. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). For the purpose of this Article, I consider a family to be any group of people that mutually identify themselves as such. As Lee Teitelbaum points out, families do not actually have any legal structure, although some doctrines of vicarious liability and legal rules for pooling resources such as tenancy in the entirety might imply a crude sort of legal unity. Lee E. Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1174-80. As Teitelbaum notes, U.S. Supreme Court decisions which protect familial autonomy "allocate[] power to one family member or reserves it to the state" rather than allocate power to a familial entity. *Id.* at 1175. I shall treat both households and families as a type of private government, however, on the theory that shared social norms concerning joint responsibility and control that govern most households suffice to supply the corporate identity of the unit. See Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1394-1397 (1993) (describing decisionmaking, efficiency, and resource allocation advantages of multimember households).

like printing presses or computers, etc. But they are governments in the sharper sense that, because they control these resources, they have the power to influence or, if you prefer a question-begging term, “coerce” individuals by withholding the resources that they control. Private organizations have power: They fire, expel, boycott, strike, and enforce contracts obtained through threats to do the same. Moreover, they can call upon state and federal executive officials to carry out their regulations and orders in much the same way as courts and legislatures can.¹⁰

¹⁰ One need only briefly rehearse the familiar arguments to see why the conventional criteria for drawing sweeping distinctions between governmental and private organizations are unpersuasive. There is an assumption common among European lawyers that governmental entities must engage in other-regarding behavior while private ones may engage in purely self-regarding behavior. See, e.g., Michael Taggart, *The Province of Administrative Law Determined?*, in *The Province of Administrative Law* 1, 4-5 (Michael Taggart ed., 1997) (“The starting point of private law, put crudely, is the primacy of self-regarding behaviour.”). But the assumption will not stand much examination. Nonprofit organizations and charitable trusts pursue other-regarding ends, while states and municipalities generally advance their residents’ welfare at the expense of outsiders. Moreover, the boards of even for-profit corporations must indisputably pursue other-regarding interests in the narrow sense that they must advance the interests of their constituents and not their own self-interest, Robert C. Clark, *Corporate Law* §§ 4.1-4.2.2.2, at 141-58 (1986) (discussing concepts of fraud, conflict of interest, and self-dealing by board and officers of for-profit corporation). More controversially, for-profit corporations arguably have some more general duty to serve the public interest beyond the interests of their constituents. *Id.* § 16.2, at 677-96.

The commonly expressed view that state officials are governed by some higher duty to pursue other-regarding ends may arise from the tradition of political theory that idealizes civil servants as a “universal class” rising above partiality to any particular class’s interests. See Georg Friedrich Wilhelm Hegel, *Hegel’s Philosophy of Right*, para. 296, at 193 (T.M. Knox trans., 1967) (“In those who are busy with the important questions arising in a great state, these subjective interests automatically disappear, and the habit is generated of adopting universal interests, points of view, and activities.”); see also Max Weber, *Legal Authority with a Bureaucratic Administrative Staff in Economy and Society* 217, 225 (Guenther Roth & Claus Wittich eds., 1968) (describing bureaucratic ideal of ruling in “spirit of formalistic impersonality . . . without hatred and passion . . . without regard to personal considerations”). But plenty of private actors—priests, professors, public interest advocates—have a similar sense of self-abnegation to a transcendent methodology or cause. There is a long-standing tradition in political theory that assigns to “the State” a sort of sovereign jurisdiction to determine the jurisdiction of every other institution in society. See Carl Schmitt, *The Concept of the Political* 39-44 (George Schwab trans., Rutgers Univ. Press 1976). But in a nonunitary state where state, federal, and municipal governments each have powers and immunities that can defeat the claims of the others to power, the fragmentation of “the State” makes nonsense out of such claims of sovereignty. One also cannot distinguish between the State and private entities on the ground that only the former has a monopoly on violence. Putting aside the question of private self-help, the fact that private organizations cannot themselves bring violence to bear on their subjects does not distinguish them from many organs of the State—courts, legislatures, and high-level executive officials—which must call upon other lower-level (and armed) executive officials to carry out their orders.

There is nothing new in this vintage 1930s realist sentiment.¹¹ But what makes “private governments” private? Here, one could answer either “nothing” or “lots of things too difficult to enumerate quickly.” The former answer is the response of one strain of Critical Legal Studies, which maintains that the distinction between public and private power is a mirage toward which liberal constitutional theory is repeatedly drawn only to perish from the unsatisfying contradictions that are revealed by closer examination.¹² In this Article, I take the latter view. Private organizations can be usefully distinguished from public organizations by a variety of complex structural considerations. These considerations include the rules for their formation and enlargement, the typical range of issues they decide, the size of the territory they rule, the sanctions they are permitted to use, the permissible factors they consider in making decisions, the ways in which their officers are selected and the incentives that influence their officers’ discretion, the ease with which persons can escape their jurisdiction, and so forth.¹³

For instance, municipal corporations usually have involuntary citizens when they are first incorporated or enlarged through annexation, and their customers and constituents (who are largely but not entirely the same group of persons) cannot escape municipal jurisdiction without changing their place of residence. By contrast, private corporations cannot be formed without the unanimous consent of their investors, and their customers and other constituents (employees, contractors, suppliers, shareholders, etc.) can escape the corporation’s power without changing their residence by doing business with, or investing in, a rival firm. These facts (and many others) cause mu-

¹¹ The arguments outlined above that private associations function as governments for their members are also made in Sanford A. Lakoff, *Private Government in the Managed Society*, in *Nomos XI: Voluntary Associations* (J. Rolland Pennock & John W. Chapman eds., 1969).

¹² For a good statement of this view, see Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 70-71 (1996), which argues that the concept of individual rights depends on a dichotomous public-private distinction. This Article can be taken to be an attack on or support for this premise, depending on what is meant by “individual rights.” If individual rights are conceived to be rights justified under what I call an anticoercion theory, I agree with Seidman’s and Tushnet’s argument.

¹³ My view of the public-private distinction, therefore, is that there is not one, but several, distinctions loosely united by a certain family resemblance. For a similar view, see Raymond Geuss, *Public Goods, Private Goods* 5-11, 106 (2001) (“When one begins to look at it carefully, the purported distinction between public and private begins to dissolve into a number of issues that have little to do with one another.”). The novelty of this observation, of course, is not profound: At an abstract level, it can be embraced by scholars who otherwise seem inclined to draw a relatively stark contrast between the public and private realms. See, e.g., Taggart, *supra* note 10, at 4 (“Although as a shorthand expression we refer to the public/private distinction, there is not one distinction but many.”).

nicipal and private for-profit corporations to have different patterns of governing and contracting costs, organizational cultures, levels of corruption, etc.¹⁴ Any theory laying out the criteria for classifying public and private entities would take all of these considerations into account. But these same factors also can and should be used to distinguish “governmental” organizations from each other.¹⁵

Likewise, private organizations can differ more from each other than they do from governmental organizations. For instance, an investor-owned electrical utility can be distinguished from a city water utility as “more private” by its insulation from democratic processes and access to equity markets. The same investor-owned utility could be regarded as “more public” than an investor-owned bicycle factory in that the utility is less vulnerable to competition from rival suppliers and more prone to using rational bureaucratic criteria for setting prices. Families and social clubs such as fraternities, in turn, can be regarded as “more private” than bicycle factories in that their members have a more all-encompassing relationship with each other which precludes the sort of “civil inattention” with which people regard each other in more public settings.¹⁶

¹⁴ On the definition of, and relationship between, governing costs and contracting costs, see Henry Hansmann, *The Ownership of Enterprise* (1996), especially chapters two and three. Briefly, contracting costs are the transaction costs arising out of ordinary contracts between a firm and one of its “patrons”—that is, employees, lenders, suppliers, etc. These include the costs of monitoring the contracting partner, strategic behavior as the partners become dependent on each other, tendencies to conceal information, and foregone transactions that potential parties to a contract avoid foreseeing the likelihood of such behavior. *Id.* at 24-25. “Governing costs” are the costs that a group of owners faces in trying to manage a firm that they own, including the costs of monitoring each other, taking concerted action together, and monitoring managers. *Id.* at 35-37. Hansmann argues that patterns of ownership are best explained by the need to choose a class of owners who will minimize the sum of these two costs compared to any other class of owners. *Id.* at 21. Municipal corporations can be regarded as a species of nonprofit corporation under Hansmann’s analysis, as they lack owners who have a right to the residual value of the organization. *Id.* at 17.

¹⁵ See David A. Strauss, *State Action After the Civil Rights Era*, 10 *Const. Comment.* 409, 416 (1993) (“[T]o the extent that a government entity is subject to the market, its actions, while nominally governmental, have much in common with private action.”).

¹⁶ On the idea of civil inattention, see Erving Goffman, *Behavior in Public Places: Notes on the Social Organization of Gatherings* 83-88 (1963). Goffman uses the term to refer to the attention normally accorded to persons mutually present but not involved in focused interaction—for instance, pedestrians sharing a sidewalk. The courtesy of civil inattention consists generally of “enough visual notice to demonstrate that one appreciates that the other is present . . . while at the next moment withdrawing one’s attention from him so as to express that he does not constitute a target of special curiosity or design.” *Id.* at 84. Specifically, civil inattention involves avoidance of all but momentary eye contact, perfunctory greeting (the raised eyebrows or closed-mouth smile), and physical distance. Civil inattention is the mark of the most “public” settings—shared elevators, airplane rows, sidewalks, malls—but co-workers sharing an office can extend similar etiquette to each

“Private governments,” therefore, denotes a category of governments in the same way that the phrases “municipal governments,” “county governments,” “state governments,” or “the federal government” all denote categories of governments. Moreover, the distinction between “private governments” and “public governments” (meaning governments traditionally regarded as “governmental”) is not necessarily a more important or significant conceptual cleavage than the distinction between different types of public governments—say, the distinction between state governments and local governments. For many regulatory purposes, it might make more sense to categorize organizations by their subject-matter jurisdiction rather than whether they are public or private. For instance, private universities might properly be regulated in precisely the same way as state universities. Likewise, municipal and investor-owned utilities might share more in common with each other than either does with other municipal or private organizations. This does not make the distinction between public and private power incoherent. After all, one might also ignore other structural distinctions—say, between state and federal agencies—in favor of more salient functional characteristics. For instance, one might treat West Point (a federal university) as functionally identical to the University of Michigan (a state university) for the purpose of determining whether tenure files are discoverable in an employment discrimination lawsuit. That a structural distinction (state-federal or public-private) might not be important in a particular context hardly makes this distinction incoherent for other purposes.

In sum, the public-private distinction is a loose generalization about governmental structure basically analogous to the state-local or federal-state distinction. As with the local-state distinction or state-federal distinction, private organizations exercise powers not different in principle from the powers of public institutions, but they exercise these powers in different ways and with different procedures, incentives, and structures. The distinction between public and private power need not be any more pretentious than this to be useful.

B. What Are “Rights”?

Like the idea of private government, the idea of “rights” has produced a voluminous literature either defending or attacking the notion that the concept has any useful determinate content. Indeed, the controversy over the public-private distinction and the controversy over the meaning of “rights” (or “individual rights”) are related to each

other to permit mutual immersion in work, free from the taxing requirements of either focused sociability or studied mutual indifference. *Id.* at 62-63.

other. As Seidman and Tushnet have argued, one conventional account of "individual rights" depends on a simple, dichotomous, and largely pretheoretical notion of the public-private distinction.¹⁷ As with the concept of "private government," I will rely on a modest definition of "rights" that largely takes for granted the criticism of "rights skeptics" but salvages a fragment of useable content from a concept that is often deployed in overblown and question-begging ways. By "rights," I mean nothing more than rules that (1) peremptorily privilege the claims of rights-holders over rival claimants and (2) are enforceable by rights-holders themselves through self-help or litigation. Both prongs of this definition are, I believe, rooted in popular usage of the term "rights" and require only a brief commentary.

First, when I stipulate that rights privilege rights-holders' claims "peremptorily," I mean that the recognition of the right preempts full consideration of rival interests. This does not mean that rights must be Dworkinian "trumps" in some absolutely nondefeasible sense.¹⁸ A right may be recognized to exist in a particular case and yet not be enforced in light of rival values or peculiar circumstances. Instead, I mean only that by recognizing that an interest is protected by a right, the court (or other legal actor) will give special weight to that interest in a way that precludes "all-things-considered" balancing of every other interest. The right creates some sort of categorical presumption that the right-holder is entitled to prevail over rival interests, absent a showing of some special circumstances (for instance, the existence of a rival right).¹⁹ This assumes, of course, that not every interest can be protected by a right.

Second, I stipulate that rights can be enforced by rights-holders. I believe that this stipulation is consistent with both popular and judicial usage. We would not normally say of a person that he or she has any right to anything—housing, free speech, enforcement of a contract, etc.—unless that person had some power to enforce his or her entitlement at least some of the time in some forum. Likewise, courts often assume that the inquiry into whether a person has a private cause of action to enforce an entitlement and whether they have a

¹⁷ See Seidman & Tushnet, *supra* note 12, at 70-71.

¹⁸ For a similar understanding of Dworkin's theory of rights, see Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, in Ronald Dworkin and *Contemporary Jurisprudence* 119, 120-24 (Marshall Cohen ed., 1983).

¹⁹ The definition of "rights" offered here thus is similar to the definition offered by Richard A. Primus, *The American Language of Rights* 40-42 (1999). Like Primus's "aspects of claiming a right," my definition is rooted in the consideration that it is roughly consistent with the social usage of the term and capacious enough to capture all of the usage that I wish to examine.

right to the entitlement are essentially similar inquiries.²⁰ Moreover, the fact that rights-holders can enforce their own rights through their own litigation is an extremely productive premise from which can be derived several important characteristics of systems of rights, including a decentralized system of litigation.

Aside from these two stipulations, I intend to be catholic about the nature of the rules that can be recognized as rights, avoiding the overly finicky definitions urged by some theorists. For instance, I assume that what Wesley Hohfeld would call “immunities,” “privileges,” and “powers” can be comfortably included under the rubric of “rights.”²¹ Likewise, I wish to sidestep entirely the debate between scholars sometimes denoted “option theorists” and “benefit theorists.”²² For the purposes of this Article, it is irrelevant whether one regards protection of individual autonomy as inherently valuable or whether one protects individual choices with rights only for the sake of other benefits. My arguments in favor of private governments’ constitutional rights are consistent with either “benefits” or “options” theories.²³ Finally, I do not assume that rights protect only the interests of the rights-holder: It might be that rights-holders act as private attorneys general, litigating to rid the law codes of improper or illegitimate rules.²⁴

²⁰ See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (stating that cause of action under 28 U.S.C. § 1983 to enforce federal statute requires “plaintiff [to] assert the violation of a federal *right*, not merely a violation of federal *law*”).

²¹ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1939). In this respect, my definition of “rights” is similar once again to the working definition offered by Primus, *supra* note 19, at 34-38.

²² For accounts of option theories of rights, see Michael Freeden, *Rights* 43-49 (1991), and see generally Richard Tuck, *Natural Rights Theories* (1979).

²³ In particular, it is essential that the reader accept at the outset that I do not somehow believe that individual rights lead to too much “individualism” or that rights need to be construed to protect “community.” Cf. Mary Ann Glendon, *Rights Talk: The Impoverishment of Public Discourse* (1990) (arguing that rights rhetoric fails to take into account relationships among competing rights of individuals in community). I generally believe that the dichotomy between “individualism” and “communitarianism” is less useful or even coherent than many scholars seem to think. However, this particular debate is entirely distinct from the issues discussed in this Article.

²⁴ For one such theory of rights, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 *Mich. L. Rev.* 1 (1998) (advocating “Derivative Account” of constitutional rights that calls for courts to repeal or amend rules found to fail moral tests).

III

THE ANTICOERCION THEORY OF RIGHTS AND HOW IT
UNDERMINES PRIVATE GOVERNMENT

To understand the anomalous constitutional position of private government, it is useful to contrast two different and competing conceptions of constitutional rights. For the sake of abbreviation, I will call these conceptions the “anticoercion” and the “institutional” theories. I will provide a definition of the essential aspects of anticoercion theories in this Part of the Article, saving a discussion of institutional theories for Part IV. As I shall try to explain below, it is extremely difficult—perhaps impossible—to accommodate rights of private government within the anticoercion theory.

A. An Outline of the Anticoercion Theory of Constitutional Rights

Anticoercion theories of constitutional rights maintain that the interest protected by rights is simply the individual’s interest in being free from “coercive” pressure imposed by institutions for collective self-governance. This capacious definition encompasses many possible theories of rights but has several important implications.

First, under this theory, the interest protected by rights is a *private* rather than a *collective* good: An individual can “consume” the good of being free from coercion individually, by not being subject to certain sorts of undesirable pressure. Even if every other person were subject to such pressures, the anticoercion theorist would maintain that the individual who was free from them would be free from the evil that rights are designed to prevent. In this sense, rights protect excludable goods in the economic sense of the term: Government could protect the rights of some individuals in a society without protecting any other persons simply by blocking “coercive” measures from being enforced against the protected individuals.²⁵

Second, because rights protect this sort of simple private good, rights are *remedially simple* entitlements. By “remedially simple,” I mean that rights can, in principle, be adequately vindicated by relatively straightforward remedies. A paradigmatic remedy would be a negative injunction limiting the power of some institution for collective self-government. In particular, one can vindicate rights without setting up complex institutions for self-government because the pur-

²⁵ For an example of a theorist who defines rights to exclude such collective goods, see D.N. MacCormick, Rights in Legislation, in *Law, Morality, and Society* 189, 204-05 (P.M.S. Hacker & Joseph Raz eds., 1977). For a more general discussion of what it means for rights to protect public goods, see Jeremy Waldron, Can Communal Goods Be Human Rights?, in *Liberal Rights: Collected Papers 1981-1991*, at 339, 344-54 (1993).

pose of rights is not to create some sort of common good that requires collective management. Instead, rights merely limit collective government in order to create a space for individual discretion.

Third, anticoercion theories are *jurisdictionally indifferent* theories. Anticoercion theories do not make the definition of impermissible "coercion" depend on the identity of the allegedly coercive jurisdiction. For instance, if a professor has a right not to be fired for the content or viewpoint of her writings, anticoercion theories would be indifferent to whether the state's governor, the professor's colleagues, the board of trustees, or the municipal chief of police exercised dismissal power over the professor. The injury would be either the effect on the professor's speech (say, the proverbial "chilling" effect) or the stigmatic purpose to which the professor was subjected (say, content- or viewpoint-based discrimination).²⁶ But neither purpose nor effect would turn on the identity of the allegedly coercive actor. For this reason, anticoercion theorists cannot easily justify the "state action" limit on most constitutional rights and frequently call for its abolition.²⁷

It follows from these three characteristics that rights are not entitlements to any particular institutions for collective self-governance. Institutions for collective self-governance tend to be collective and nonexcludable goods, not private goods. For instance, one cannot enjoy a right to jury trial without simultaneously bestowing the benefits of juries on the person against whom one is litigating. Likewise, no one can be excluded from the benefits of openness and predictability that flow from having a legislature that publishes its debates and conducts itself in an open and public manner. Jurisdictionally indifferent rights cannot be entitlements to be governed by a particular kind of institution because such entitlements are not jurisdictionally indifferent: They make the existence of impermissible coercion depend on the identity of the allegedly coercive institution.

As a particularly influential and straightforward example of anticoercion theory, consider one version of Ronald Dworkin's theory of rights.²⁸ Dworkin places "the individual at the center" of his theory of

²⁶ For a summary of Ronald Dworkin's theory as a purpose-based theory, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* 18-25 (1996). John Rawls's theory seems to root rights more in the effects of rights-violating actions by defining rights as entitlements to make one's own decisions about especially important or "fundamental" issues. John Rawls, *Political Liberalism* 134-40 (Columbia Univ. Press 1996) (1993).

²⁷ For such a view, see generally Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985).

²⁸ Dworkin's theory presents a moving target, as Dworkin seems to have shifted his views in important ways, and efforts to restate these ambiguities can land one in trouble with his students. For one such controversy, compare Jeremy Waldron, *Pildes on Dworkin*

rights²⁹ by making rights “trumps” over collective interests that might otherwise seem, in some sort of utilitarian calculus, to outweigh the individual interest protected by the right.³⁰ The reason for giving extra weight to the decisions protected by such trumps is that they are especially important to the personality or dignity of the individual. To fail to give rights such extra weight would be to deny an individual’s “equal concern and respect.”³¹ Dworkin maintains that these “trumps” prohibit the government from invoking certain sorts of reasons to justify its laws—in particular “external preferences” (that is, views about the worthiness of other people’s preferences).³² Such laws denigrate the equal concern and respect owed by the state to its citizens because they imply that some conceptions of the good life are more worthy or valuable than others.³³ The notion of equal concern and respect, in other words, is a sort of prohibition on governmental *lèsé majesté* against the citizenry.

Dworkin’s right to “equal concern and respect” is a jurisdictionally indifferent and remedially simple entitlement to a set of private goods—at bottom, simply an entitlement to be left alone. For instance, a policeman could extend equal concern and respect (or equal unconcern and neglect) to a wino by gingerly stepping over him as he lay sprawled on the sidewalk, for this noninterference would avoid any “external preferences”—that is, imputation that the wino’s devotion to the bottle was morally unworthy. Likewise, Dworkin’s theory of rights is “remedially simple” because, for Dworkin, collective government is always a qualification of, and not an embodiment of, the individual’s right to equal concern and respect. Collective governance always allows the possibility that an individual’s decision would be overridden by the majority. Under Dworkin’s definition of rights as trumps, however, when rights protect individual interests, then those interests must be protected “without regard to whether a majority of . . . fellow citizens joined in the demand.”³⁴ This consideration has

kin’s Theory of Rights, 29 J. Legal Stud. 301 (2000) (arguing that Pildes mischaracterizes Dworkin’s account of individual rights in his article, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. Legal Stud. 725 (1998)), with Richard H. Pildes, *Dworkin’s Two Conceptions of Rights*, 29 J. Legal Stud. 309 (2000) (defending his position that Dworkin’s theories on individual rights have evolved over course of his career).

²⁹ Ronald Dworkin, *Taking Rights Seriously* 172 (1977).

³⁰ *Id.* passim.

³¹ *Id.* at 275.

³² *Id.* at 276-77.

³³ *Id.*

³⁴ *Id.* at 194.

led Dworkin to deny that collective self-government can be deemed a matter of “principle” subject to the protection of rights.³⁵

There may be other theories that are less self-consciously individualistic and might meet the criteria of being an anticoercion theory outlined above.³⁶ Dworkin’s theory, however, is unusually influential.

B. The Incompatibility of Anticoercion Theories and Private Government

Despite the U.S. Supreme Court’s repeated recognition that private organizations enjoy constitutional rights,³⁷ anticoercion theories cannot adequately explain how or why such rights should be enforced³⁸ or how private governments can have constitutional rights. In one sense, anticoercion theory *must* deny the existence of private governments’ constitutional rights. If rights protect only the entitlement to be free from coercion, then how can rights protect *any* sort of

³⁵ Id. Jeremy Waldron has observed that this characteristic of Dworkin’s “rights-as-trumps” theory is “more idiosyncratic than the popularity of the ‘trumps’ image might suggest.” Waldron, *supra* note 25, at 365. As Waldron explains, there is no intuitively obvious reason why “rights” must be defined in opposition to social or collective interests. See *id.* at 354-59.

³⁶ John Rawls’s theory of fundamental rights might constitute an anticoercion theory under the definition suggested here. Rawls’s theory derives “basic rights” from the premise that individuals possess two “moral powers”—the power to apply concepts of justice and the power to pursue a conception of the good. Rawls, *supra* note 26, at 134. The power to apply the concepts of justice might very well be an interest in something more than simply being free from coercion. In particular, it might be an interest in participating in institutions for collective self-government. *Id.* at 320-23. Rawls does not offer much discussion of the precise nature of this interest, however, beyond noting that it is an interest in securing “just and effective legislation,” by which Rawls seems to mean adherence to his difference principle. *Id.* at 336-37. If political participation merely secures some sort of entitlement to basic social goods consistent with the Difference Principle, then it might constitute a version of anticoercion theory, as the interest is a jurisdictionally indifferent and remedially simple private good—an entitlement to some share of social goods plus an interest in being left alone. In theory, such entitlements could be satisfied in a benevolent bureaucratic despotism with lots of public hearings, a merit-based civil service, and stringently enforced freedom for solitary free-lance journalists, soap-box orators, etc. The abstract requirement of equal political participation can be guaranteed just as easily by abolishing elective office equally as by giving everyone an equal right to vote for such offices. Given that Rawls leaves most specific institutional questions to later stages of his “four stages” of analysis, which he himself does not discuss, it is probably best to be agnostic about what precisely Rawls’s theory implies. The only specific institution that Rawls discusses is the institution of an impartial judiciary with expert training in his theory of rights. *Id.* at 80.

³⁷ See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding that First Amendment protects corporate speech); *Gulf, Cal., & S.F. Ry. v. Ellis*, 165 U.S. 150, 154 (1897) (declaring that corporations are “persons” protected by Fourteenth Amendment).

³⁸ I will defer a normative defense of private government’s constitutional rights until Part III and instead simply note that such rights are, in fact, recognized by the Court despite the paucity of theory to explain their scope or existence.

government, public or private? Government, after all, is the source of coercion and thus the source of rights *violations*. Guided by this intuition, commentators and courts routinely assume that governments cannot be protected by constitutional rights—at least not rights that bear any relation to individual rights—because the purpose of rights is to limit government, not to protect government.³⁹ This tendency is especially pronounced in European legal cultures where the distinction between public and private law is such a foundational organizing principle of legal academia.⁴⁰ Therefore, anticoercion theories tend to assume incorrectly that government's constitutional entitlements must be fundamentally different in their purpose from individual entitlements.⁴¹

But there is another, rival intuition repeatedly enforced by the U.S. Supreme Court⁴² that at least *private* governments must enjoy some constitutional liberties because such organizations are the fora in which individual liberties are typically exercised. Newspapers, churches, universities, unions, political parties, and advocacy groups like Common Cause or the National Rifle Association are all sites for individuals' exercise of core constitutional liberties such as the rights to petition government and to speak freely. To say that such organizations have no constitutional rights or that such rights have nothing to do with individual rights seems odd, even though anticoercion theory seems to suggest such a conclusion.

³⁹ See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 93, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the government."); *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (suggesting that governmental speech is not protected by First Amendment).

⁴⁰ See *supra* note 10.

⁴¹ For instance, Christoph Engel argues that the German Grundgesetz protects private associations as regulators only for the purpose of promoting "egalitarian autonomy" as opposed to "individualistic freedom." See Christoph Engel, A Constitutional Framework for Private Governance, Preprints aus der Max-Planck-Projektgruppe: Recht der Gemeinschaftsgüter 9-10 (2001). Starting from the assumption that private associations do not protect individualistic freedom, Engel further infers that governmental regulation of such associations in the interests of the organizations' members is not a conflict "between hierarchy and autonomy but between autonomy [of the association] and liberty [of the individual member], because the government is protecting the individual member from private power." *Id.* at 12. But Engel's characterization of the conflict begs the question: The private association may be itself acting on behalf of the individual liberty of other members. Consider, for instance, a homeowner association's effort to prevent an individual member from playing her stereo too loud, to protect the quiet enjoyment of an individual neighbor. The conflict described by Engel, therefore, is better described as a conflict between two different hierarchies, public and private, each of which seeks to promote interests of some individuals over others, neither of which must necessarily be acting for "egalitarian" as opposed to "individualistic" purposes.

⁴² See *supra* note 37 and accompanying text.

Thus, anticoercion theorists have attempted to come up with some reconciliation between their theories and the reality of private organizations' constitutional rights. In particular, anticoercion theories tend to rely on one of three different arguments to deal with private organizations' power: They argue that such power is legitimized by individual members' consent; they argue that such power is legitimate when the organization is a close-knit community resembling an individual in the intensity of its members' commitment to the group; or they deny that organizations deserve constitutional rights. In this Section, I explore and debunk each of these three approaches in turn. Understanding that anticoercion theory has such weird and untenable implications is the first step on the road I recommend to getting rid of the theory altogether.

1. Can Individuals' Consent Legitimate Private Organizational Power?

Under one view, the power of organizations to govern their members raises no interesting question at all because individual members consent to this exercise of power. The evidence of such consent is that members can always exit the organization if they wish. Consent and exit, therefore, go together to legitimize the power of private organizations.

As an example of such exit-based justifications for private government, consider Rawls's very brief discussion of conflicts between religious associations and their members. Rawls recognizes that religious associations might be essential for freedom of conscience,⁴³ but he has very little to say about the sorts of organizations or institutions that might be necessary or proper for this exercise of our powers. He briefly acknowledges that the interests of individuals might conflict with the right of religious associations to enforce their doctrines against their members, but he seems to think that these conflicts have no importance for his theory, and he dispenses rights on both associations and individuals without elaborating on what to do when these rights conflict.⁴⁴

Why this indifference to private governmental structure? For Rawls, the individual's formal power to exit cures all danger that basic rights will be invaded:

In the case of ecclesiastical power, since apostasy and heresy are not legal offenses, those who are no longer able to recognize a church's authority may cease being members without running afoul of state

⁴³ Rawls, *supra* note 26, at 313-14.

⁴⁴ *Id.* at 221 & n.8.

power. . . . By contrast, the government's authority cannot be evaded except by leaving the territory over which it governs, and not always then. . . . For normally leaving one's country is a grave step⁴⁵

The church's power to control its doctrines is legitimate because the individual can always leave the church.

It is not difficult to see that this theory of exit has problems as a device to legitimize private power. If one's church plays an important role in one's spiritual, moral, or social life, then exit might not be such an easy option. If most of one's friends or family are members of the church, then the church might have the practical power to ostracize apostates. If one's employers or contractors are church members, one might even face the prospect of unemployment or boycott by exercising one's formal exit option. Moreover, it is not obvious why the power of the individual to exit the church distinguishes church power from state power: At least in the United States, one can also exit cities and counties if one disagrees with their policies,⁴⁶ and it is not obvious that it is psychologically or economically easier to tear oneself away from one's faith than one's suburb (of which there might be dozens in a single commutershed).

Rawls avoids all of these issues of private power by assuming that the only level of government is the national government and by assuming that our "prior loyalties and commitments, attachments, and affections" are not relevant to our political autonomy.⁴⁷ The power to "emigrate" from one's church is, thus, not so much the basis for a serious argument as a formal stipulation that the private sphere cannot violate one's autonomy because one has formally consented to it.⁴⁸ Such arguments based on implied consent are not substantive arguments in favor of political authority until one says a great deal more about the social practices that give meaning to decisions to leave a church, club, or association.⁴⁹ Absent such an account, Rawls's invo-

⁴⁵ *Id.* at 221-22.

⁴⁶ The canonical citation for the proposition that the capacity of local governments to exist blurs the distinction between cities and private firms is, of course, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 421-23 (1956).

⁴⁷ Rawls, *supra* note 26, at 222.

⁴⁸ One could compare it to Locke's equally formal assertion that the legitimacy of governmental coercion of citizens is guaranteed by the citizens' implicit consent to those laws by their decision to remain within the community. See John Locke, *The Second Treatise of Government* §§ 119-20 (Thomas P. Peardon ed., Macmillan 1952) (1690).

⁴⁹ For instance, one would need to ask whether one inherits one's membership in the organization as a practical matter; whether there are other opportunities for association available; whether entry into those alternative associations is just as free as exit; whether the criteria for excluding members from one association reinforces or cuts across other distinctions—class, race, social pedigree, educational status, etc.—that are unlikely to yield

cation of the power to exit is less a justification of private government than a decision to remove the issue from the agenda of his political theory.

One might, of course, come up with a thicker account of how the power to exit might protect individuals from “excessive” coercion by private organizations. But there is a deep conceptual problem with such exit-based efforts to legitimize private government. While easy exit protects the freedom of the individual dissenter from the organization, it also burdens the interest of the individual conformist in maintaining an organization. If it is easy for dissidents to back away from these organizational allegiances, then individuals who want to maintain a viable organization will find that their ability to do so will become more limited.

Therefore, one cannot invoke the idea of individual freedom to determine the “right” level of exit: *Any* level of exit will burden some individuals and benefit others.⁵⁰ In other words, the idea of exit cannot define organizational authority; instead, a theory of organizational authority is necessary to determine the right level of exit. This problem with exit-based theories for legitimizing private government can be restated as a problem of alienability of constitutional entitlements.⁵¹ If one chooses to make such entitlements easily alienable, one will protect the interests of conformists—that is, persons who wish to maintain private organizations and enforce (against dissenters) such organization’s rules, which the dissenters can be deemed to

to the association consumer’s efforts to shop around. For a description of the social context informing “tacit consent” arguments in the seventeenth century, see Don Herzog, *Happy Slaves: A Critique of Consent Theory* 182-214 (1989).

⁵⁰ For one valiant effort at developing the opt-out theory, see Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 Va. L. Rev. 1053, 1091-1101 (1998). Professor Rosen purports to derive a theory of community self-governance from Rawlsian principles, arguing that the level of appropriate exit will depend on the hypothetical decision of the parties behind the veil of ignorance, who do not know whether they will be a perfectionist (i.e., who will want to live in a community that enforces a particular conception of the good) or a nonperfectionist (i.e., who will not). *Id.* at 1097-99. After acknowledging that the original position “cannot on its own definitively identify” the “appropriate contours” of such exit rights, Rosen maintains that the proper level of exit rights under Rawls’s theory depends on “how risk averse [the parties behind the veil of ignorance] are.” *Id.* at 1099. However, this statement (which Rosen asserts but does not further explain or defend) is incorrect. Risk aversion determines nothing because every level of exit rights creates exactly the same risk that either perfectionist or nonperfectionist individuals will be frustrated in their pursuit of their own conception of the good life.

⁵¹ The issue of alienability of constitutional entitlements arises with state and federal government as a specific instance of the doctrine of unconstitutional conditions. See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (upholding former CIA employee’s agreement to relinquish some First Amendment rights and obtain CIA approval before publishing any information, even unclassified, relating to CIA).

have implicitly accepted by joining the organization. If one impedes or forbids the alienation of such entitlements, then one will protect the interests of dissenters—those who wish to exit organizations. But nothing in the idea of consent or exit can determine how one will draw this “alienability” line.

There is a tendency among consent theorists to assume that the idea of self-ownership can somehow resolve the impasse between the conformist and the dissenter. The dissenter owns his or her own body; therefore, the argument goes, the conformist’s liberty cannot include the right to force the dissenter to remain within the private organization with which the dissenter disagrees.⁵² But the idea of self-government resolves nothing, for it presupposes that one’s entitlement to self-ownership is inalienable—precisely the question in dispute. The conformist does not claim to have an entitlement to coerce the dissenter independent of the dissenter’s own agreement to join the organization. The conformist seeks only to hold the dissenter to his or her implicit bargain.

There is, of course, a deeply rooted doctrine in American law under which one cannot obtain the remedy of specific performance to enforce contracts for services. But this doctrine is not rooted in any abstract principle of anticoercion theory. Rather, it derived from the specific American experience with indentured servitude, debt peonage, and slavery⁵³ which led to the Thirteenth Amendment prohibition on injunctions or criminal sanctions to enforce labor contracts.⁵⁴ Moreover, the doctrine against “forced labor” (and the libertarian intuition underlying it) is so controversial and highly qualified that it is a flimsy foundation for any liberal theory of organizational exit. Even in the *Lochner* era, courts would uphold states’ power to forbid certain strikes and, in effect, interfere with the “inalienable” right to withhold labor.⁵⁵ Short of imposing criminal sanctions on members who leave an organization, there are many other ways in which a dissenter’s right of exit can be constrained—for instance, loss of pension

⁵² I am indebted to Barbara Fried for pointing out this argument.

⁵³ See Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* 254 (2001).

⁵⁴ See *Bailey v. Alabama*, 219 U.S. 219, 259 (1911).

⁵⁵ Compare *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 569 (1925) (invalidating Industrial Court Act’s “system of compulsory arbitration,” including power to fix hours), and *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) (upholding criminal prosecutions for strike), with *State ex rel. Hopkins v. Howat*, 198 P. 686, 703-05 (Kan. 1921) (upholding Kansas Industrial Court Act). The political and social controversy over whether labor activists should support an “inalienable” right to strike is nicely recounted in James Pope, *Labor’s Constitution of Freedom*, 106 *Yale L.J.* 941, 996-1002 (1997) (describing conflict between John L. Lewis and Samuel Gompers over whether right to strike should be alienated through binding labor agreements).

rights under “golden handcuffs” provisions⁵⁶ or loss of property contributed to the organization. Neither American constitutional traditions nor the abstractions deployed by consent theory—self-ownership, exit, agreement behind some hypothetical veil of ignorance, etc.—resolve controversies about the permissibility of such tactics to retain members.

None of these criticisms of consent theory as an account of private law is new. As Zechariah Chafee argued seventy-one years ago, all consent-based theories for legitimizing private governmental power founder on the realist insight that private law is not rooted in an uncontroversial concept of consent.⁵⁷ As Chafee observed, “[T]he member’s ‘contract,’ like his ‘property interest,’ is often a legal fiction which prevents the courts from considering attentively the genuine reasons for and against relief.”⁵⁸ Instead, Chafee argued that the scope of the private government’s powers is best explained by the “function of the particular group in the community.”⁵⁹ I extend Chafee’s realist observation only by noting that anticoercion theory cannot accommodate the real basis for organizational rights—the “function of the particular group in the community”—because anticoercion theories are steadfastly focused on preventing the evil of “coercion” regardless of the source of that alleged evil and therefore have no resources for developing a theory of jurisdictional differentiation. If anticoercion theory is to develop any theory of organizational rights, it will have to look beyond any pre-theoretical notion of consent and exit.

2. *Should Tightly Knit Communities Receive More Constitutional Protection Than Other Organizations?*

One might attempt to provide a more satisfactory theory of private government by classifying private organizations according to how closely their decisions reflect the wishes of their members. Unlike the exit-based theories described above, these theories are not vacuous.

⁵⁶ “Golden handcuff” pensions are defined-benefit pensions that give employees a financial incentive to remain with a firm until they are eligible for retirement. See Jonathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 *Law Rev. Mich. St. U. Det. C.L.* 187, 196.

⁵⁷ Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 *Harv. L. Rev.* 993, 1004-07 (1930). The point is also made by Michael Walzer, *Liberalism and the Art of Separation*, 12 *Pol. Theory* 315, 325 (1984).

⁵⁸ Chafee, *supra* note 57, at 1007. The idea of contract itself is far more complex than the bland generalities of political theorists allow. P.S. Atiyah, *Promises, Morals, and Law* 108, 138-39 (1981) (criticizing promise-keeping concepts of contract as ignoring details of contract law that illustrate complex and controversial aspects of “consent”).

⁵⁹ Chafee, *supra* note 57, at 1005.

Instead, they are perverse. Their implication that the most illiberal and oppressive private organizations deserve the greatest degree of constitutional protection is so intuitively undesirable that this is reason enough for rejecting the theory.

To see how anticoercion theory leads to perversely communitarian doctrine, consider Professor Meir Dan-Cohen's theory of organizational speech.⁶⁰ Dan-Cohen adopts an anticoercion theory of rights, under which rights to autonomy are rooted in the need to protect persons' own sincere choices from coercion that expresses disrespect for such choices. For the premise that autonomy rights serve only to protect individual dignity and respect, Dan-Cohen cites Dworkin, whom he apparently takes (without explanation) to represent the views of all "proponents of the autonomy paradigm."⁶¹

Consistent with my discussion above, Dan-Cohen infers that such an anticoercion theory of rights would deny any original autonomy rights to organizations because organizations are not living persons whose choices are protected by the anticoercion theory.⁶² While individual agents of an organization—its attorneys, officers, agents, and employees—take actions or make statements on behalf of those organizations, they often are not "expressing their own personal convictions or beliefs." For instance, when an AT&T operator says "have a nice day" to a patron, or a spokesperson for R.J. Reynolds Tobacco Company defends the corporation's marketing of cigarettes, they are not necessarily expressing their own personal convictions but are instead playing a social role—doing their job—from which they can detach themselves and which need not represent their own personal wants and desires.⁶³ Dan-Cohen calls this "detached speech" because the speaker can psychologically distance himself or herself from the role that he or she is called upon to play.⁶⁴ Because the speaker is merely performing a role that is insincere and is "cut off from the speaker's own identity and psychological state," the speech on behalf of the organization is not an expression of the speaker's own preferences or choices.⁶⁵ Therefore, protecting such detached organizational speech from government regulation is not necessary to protect *individual* speakers' autonomy.

⁶⁰ Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communication by Organizations, Communities, and the State*, 79 Cal. L. Rev. 1229 (1991).

⁶¹ Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* 14, 66 (1986).

⁶² See *id.* at 21-25. According to Dan-Cohen's colorful metaphor, organizations are merely machines that serve the interests of individual persons. See *id.* at 49.

⁶³ *Id.* at 1237-39.

⁶⁴ Dan-Cohen, *supra* note 60, at 1241.

⁶⁵ *Id.*

How, then, can Dan-Cohen salvage a theory of organizational rights from his endorsement of anticoercion theory? The essence of Dan-Cohen's theory is that organizations should be afforded deference for their decisions only to the extent that they represent the individual preferences of their individual members in that (1) their actions directly advance the expressive interests of their individual members, or (2) their members are emotionally and deeply committed to the goals of the organization. In the former case, Dan-Cohen says that the organization is an "expressive organization" with "derivative autonomy rights."⁶⁶ In the latter case, Dan-Cohen labels the organization a "community."⁶⁷ An example of an organization with derivative autonomy rights would be Princeton University because Princeton frequently takes actions that advance the First Amendment interests of its individual constituents—say, by funding research or protesting laws restricting free speech.⁶⁸ An example of a "community" would be the family because of the close emotional link between the association and its members.⁶⁹ Family-like communities might also include the Old Order Amish or some other close-knit group because, in such emotionally intense groups, there is "an effacement of the distinction between the collective production and individual self-expression."⁷⁰ The group really does speak for its members because, unlike the AT&T operator, the group's members do not experience their membership as a "detached role."

Dan-Cohen's taxonomy of organizational rights tends to privilege the rights of communities over expressive associations because the speech of the latter is protected only when they "meticulously optimiz[e] the single goal of protecting the relevant original right."⁷¹ For instance, a university that expelled a student for engaging in a demonstration would, according to Dan-Cohen, not be entitled to the protection of constitutional rights safeguarding individual autonomy because it is pursuing a mission other than maximizing the autonomy of its members.⁷² Thus, expressive organizations do not receive any deference from the courts in their decisions about expression. Unless they optimize protection of speech, they lack any autonomy rights as expressive organizations.

⁶⁶ *Id.* at 1252.

⁶⁷ *Id.* at 1254-55.

⁶⁸ *Id.* at 1251.

⁶⁹ *Id.* at 1257.

⁷⁰ *Id.*

⁷¹ *Id.* at 1253.

⁷² *Id.*

This view of expressive organizations would seem to lead to perverse consequences for institutional autonomy. Suppose that a university enacted a "hate speech" code on the theory that certain sorts of derogatory speech tended to poison the environment for some speakers, making it less likely that they would speak freely because of intimidation from verbal racial or sexual harassment. Under Dan-Cohen's theory, this institutional decision should be accorded no special deference because it does not optimize speech in any "meticulous[]" way.⁷³ In other words, there is no place in Dan-Cohen's theory for giving expressive organizations special discretion to resolve tough conflicts between different sorts of speakers, for one can always make the argument in such contexts that the organization is diminishing rather than protecting free speech.

Switch now to communities. Here, the organization has original autonomy rights because the members of the organization have close and emotional ties to the organization. When the community's leadership speaks, there is at least a presumption that they represent the voices of their close-knit constituents because the members are single-mindedly devoted to the welfare of the organization, lacking cross-cutting loyalties to other organizations. But this single-minded devotion is not merely an exogenous fact that the leadership of the organization reflects: It is a condition that the leadership can cultivate by insisting that members sever ties to rival groups. To create the whole-hearted commitment to membership, communities will tend to be "unitary democracies" in Jane Mansbridge's sense of the term⁷⁴—groups where homogeneity of interest, excommunication, and self-suppression of dissent or conflict diminish opportunities for wide-ranging debate.

Thus, Dan-Cohen's theory has this counterintuitive implication. If an organization cultivates a heterogeneous membership, promotes the free exchange of ideas in its meetings and forums, allows its members to join other organizations with different views, and does not require ideological homogeneity from its members, then it will get less First Amendment protection. If the organization ruthlessly suppresses debate, excommunicates dissenters, and enforces rigid ideological homogeneity on its members, then it will gain the prized status of a community whose speech is protected by the First Amendment because, unsurprisingly, its individual members agree with the leadership. Having only derivative autonomy rights, Princeton and Stanford

⁷³ *Id.*

⁷⁴ Jane J. Mansbridge, *Beyond Adversary Democracy* 149-62 (1983) (describing mechanisms for suppressing dissent in face-to-face democracies that govern close-knit groups like crisis centers).

get no deference when they engage in policymaking. David Koresh, as a leader of a tight-knit community, will get substantial deference. To paraphrase George Orwell, a theory with these sorts of counterintuitive implications is a theory that only an intellectual could believe.

Or one would hope. Unfortunately, some courts have moved in the direction of Dan-Cohen's theory, penalizing organizations precisely because they maintain an open and tolerant environment. Consider, for instance, the decision of the New Jersey Supreme Court in *State v. Schmid*.⁷⁵ Chris Schmid had been convicted of trespass for distributing campaign literature supporting the United States Labor Party, a LaRouche organization, on the campus of Princeton University. Had Schmid been invited by any organization of students, faculty, or staff, he would not have needed to obtain permission, as University regulations specified that "the campus is open to speakers whom students, faculty, or staff wish to hear"⁷⁶ Princeton's barrier was a fairly minimal restriction, applying only to those without any connections or allies among any of the Princeton community.

The New Jersey Supreme Court nevertheless struck down Schmid's trespass conviction on the ground that it violated the New Jersey Constitution⁷⁷ because it burdened Schmid's rights of political expression. The court held that, unlike the First Amendment to the U.S. Constitution, the New Jersey Constitution's protections for free speech were enforceable against certain types of private actors. In particular, the court held that, in light of "the 'normal' use" of Princeton's property and "the extent and nature of the public's invitation to use that property," Princeton had to accommodate Schmid's distribution of literature on its campus.⁷⁸ Princeton's problem, it seemed, was that Princeton had been too generous in its accommodation of "this grand ideal" of free speech: Because "Princeton University has . . . invited such public uses of its resources in fulfillment of its broader educational ideals and objectives," it had no substantial interest in excluding Schmid from a similar use.⁷⁹

Julian Eule and Jonathan Varat have noted the irony of using Princeton's faithful adherence to free speech norms as a reason to de-

⁷⁵ 423 A.2d 615 (N.J. 1980).

⁷⁶ *Id.* at 617 (quoting University regulations).

⁷⁷ Article I, paragraph 6 provides that "[e]very person may freely speak, write and publish his sentiments on all subjects," while paragraph 18 provides that "[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." *Id.* at 632; see N.J. Const. art. I, paras. 6, 18.

⁷⁸ *Schmid*, 423 A.2d at 630-31.

⁷⁹ *Id.* at 631.

prive them of the power to define speech on campus.⁸⁰ They argue that *Schmid* ignores the possibility that "a university might embrace free speech but give it a different cast," a "process of definition that might itself be protected by the First Amendment."⁸¹ There are, indeed, plausible arguments in favor of deferring to Princeton's judgment. The power of the university's constituents to invite anyone they please to speak on campus insures that the inhabitants of universities will not be reduced to the status of employees in a "company town."⁸² The high level of information possessed by these constituents, their intense contentiousness, and their intellectual diversity make it likely that their invitees will promote a debate of high quality. The scarcity of campus space and the administrative headache of separating bona fide political speakers from mere advertisers and hustlers⁸³ might suggest that the cause of vigorous debate would not be greatly enhanced by granting open access to speakers like Schmid. Finally, one might reasonably believe that Princeton's trustees and administrators have an obvious interest in maintaining Princeton's reputation as a highly regarded liberal arts campus where there is a lively and free exchange of ideas. The officers are typically academics imbued with a professional culture that shuns censorship, and the trustees are alumni with a keen interest in insuring that their alma mater does not earn a reputation as a site for anti-intellectual suppression of dissent.

Of course, one might disagree with these assumptions about universities. The important point is that the merits of Princeton's policy rest on questions about fine-grained factual issues. To resolve these empirical questions, one needs some theory of the comparative advantage of different institutions for resolving such empirical disputes: Which institution—the state legislature and courts or the university board of trustees and officers (composed of alumni and academics)—

⁸⁰ Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 *UCLA L. Rev.* 1537, 1576 (1998).

⁸¹ *Id.* at 1577-78.

⁸² Professor Sanford Levinson, who represented Schmid, makes this analogy. Sanford Levinson, *Princeton Versus Free Speech: A Post Mortem*, in *Regulating the Intellectuals: Perspectives on Academic Freedom in the 1980s*, at 189, 191-92 (Craig Kaplan & Ellen Schrecker eds., 1983). The analogy, however, seems to ignore the myriad of institutional differences between the decisionmaking structure, official incentives, and professional culture at a university and in a for-profit corporation. It also seems merely facetious in light of the fact that Princeton's policy did not extend to Nassau Street, where Princeton students routinely throng the sidewalks, giving Schmid an apparently adequate forum for leafletting.

⁸³ For an example of a judicial effort to distinguish between "commercial" salespeople and other speakers on a college campus, see *Bd. of Trs. of SUNY v. Fox*, 492 U.S. 469 (1989).

is most likely to be interested in maximizing the value of free expression on campus?

But neither Dan-Cohen nor Sanford Levinson nor their critics, Professors Eule and Varat, have, or even see any need for, such an institutional theory. The reason, I suggest, is that they are all committed to some form of anticoercion theory under which rights protect individual choices with remedially simple, jurisdictionally indifferent remedies like injunctions against coercion of individuals. Anticoercion theory has no room for the idea that individuals might have a constitutional entitlement to a particular sort of decisionmaking structure—say, a university—to provide a collective good more complex than simple freedom from coercion. Organizations like universities can obtain little comfort from anticoercion theories because they rest their claims to expressive autonomy on their institutional expertise in resolving tough disputes about the expressive use of scarce resources—noise in dorms, classrooms, sidewalk space, newsprint, etc. The hallmark of anticoercion theories is anxiety about all such instrumental considerations about empirical issues because such considerations allegedly do not “take rights seriously.”⁸⁴

As a result, anticoercion theory cannot take organizational rights seriously. Only when such organizations seem to act like individuals—that is, indivisible entities with unanimous membership—can anticoercion theories analogize them to individuals engaged in personal self-expression. Thus, anticoercion theory leads to the paradox that the most illiberal organizations get the greatest autonomy.

3. *Should One Deny That Private Governments Have Rights at All?: The Case of Parental Rights to Govern Children*

The third and final attitude of the anticoercion liberal towards associational rights is simply to deny that such things can exist at all. This view is best illustrated by academic attacks on the status of parental rights to control the education and upbringing of children.⁸⁵

Since this right was first recognized as a protected interest under the Fourteenth Amendment in *Pierce v. Society of Sisters*⁸⁶ and *Meyer v. Nebraska*,⁸⁷ it has had a tenuous and shadowy existence in judicial

⁸⁴ See, e.g., Engel, *supra* note 41, at 18 (observing that giving instrumental considerations status of constitutional rights “destroy the illusions that are necessary for the proper functioning of the legal system”).

⁸⁵ Parental rights are a good example. As this Section shows, parental power is more necessary, say, than corporate power. After all, children hardly have autonomy interests that adult employees have.

⁸⁶ 268 U.S. 510, 534-35 (1925).

⁸⁷ 262 U.S. 390, 400 (1923).

decisions. Although parents' rights are frequently mentioned by courts, the right is usually coupled with some other right—freedom of contract,⁸⁸ free exercise of religion,⁸⁹ free speech,⁹⁰ procedural due process⁹¹—such that the rhetoric about parents' rights seems more makeweight than independent reason. For instance, courts rarely enforce the right of parents to control their children's education even when the right appears as a "hybrid" right, coupled with some more textually respectable right (for instance, the right to free exercise of religion).⁹² *Troxel* is a rare and recent exception to this judicial indifference to the parental control over their children—an exception that I will explore below when I evaluate the explanatory power of anticoercion theories of parental rights.⁹³

Much more clearly than the judicial opinions, scholarly skepticism about the constitutional status of parental rights is rooted in an anticoercion theory of rights. Parental rights to control children's ed-

⁸⁸ *Id.* at 399-400 (analyzing freedom to raise children and freedom of contract as equally within liberty protected by Fourteenth Amendment).

⁸⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) ("*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.>").

⁹⁰ Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 *Tex. L. Rev.* 863, 888-91 (1979).

⁹¹ Thus, several U.S. Supreme Court precedents hold that parents have a liberty interest in maintaining custody over their children entitling them to procedural due process. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Although these precedents state that this entitlement is "fundamental," *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"), the procedural due process holdings of these cases require only that the liberty interest be recognized under state law.

⁹² See, e.g., *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 491 (8th Cir. 1987) (refusing to exempt Baptist schools and parents from Iowa's compulsory education laws despite their First Amendment arguments); William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 *Notre Dame L. Rev.* 211, 229-35 (1998) (summarizing recent cases in which state and federal courts have rejected parental right to educate and religious freedom hybrid claims). Occasionally, courts will hold that parents can resist state education regulations when they burden the parents' religious beliefs about education, on the theory that the state bears a higher burden of justification when it burdens the "hybrid" right of parental control and religious free exercise. See *People v. DeJonge*, 501 N.W.2d 127, 134-35 (Mich. 1993) (finding hybrid right and applying strict scrutiny to reverse convictions of Christian parents who insisted on home-schooling their children). The Michigan Supreme Court, however, refused to enforce the right of secular parents to educate their children at home in *Bennett* because the parental interest was not reinforced by the right to free exercise of religion. *People v. Bennett*, 501 N.W.2d 106, 115 (Mich. 1993).

The U.S. Supreme Court invented the notion of a "hybrid" right in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 881 n.1 (1990), in an effort to distinguish *Wisconsin v. Yoder* from other cases involving laws with a secular purpose. See *Yoder*, 406 U.S. at 232-33 (1972) (ruling for parents based on combination of parental rights and free exercise rights).

⁹³ See *infra* Part V.

ucation and upbringing, however, cannot be fitted easily into the anticoercion model. But scholars are so captured by this model that they jettison the right without considering whether there are other conceptions of rights within which parental rights might have a more secure place.

To illustrate this scholarly obsession with the anticoercion model and the consequent hostility to parental rights, consider Professor James Dwyer's article "debunking" the concept of parental rights to control the upbringing of children.⁹⁴ Professor Dwyer argues that the very idea of parental rights "is inconsistent with principles deeply embedded in our law and morality"⁹⁵—in particular, the principle that rights protect only "a right-holder's personal autonomy and self-determination."⁹⁶ According to Professor Dwyer, "[t]his limitation on legal rights embodies the moral precept that no individual is *entitled* to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person's temporal interests."⁹⁷

As I shall argue below, Professor Dwyer's premise that rights serve only the rights-holders' interest in personal autonomy and self-determination is false.⁹⁸ No such principle is "deeply embedded in our law and morality," for the principle itself is simply incoherent: Part of the way in which we express our authentic personality and pursue our "temporal interests" is by subjecting ourselves and others to the constraints of various social roles. At most, such a principle is deeply embedded in recent moral theory, of which Dworkin's and Rawls's theories are examples. But I will delay discussion of this issue until Part IV. For now, it is important only to recognize that Professor

⁹⁴ James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 Cal. L. Rev. 1371 (1994). For another typical example, see Richard J. Arneson, *Democratic Rights at National and Workplace Levels in The Idea of Democracy* 118 (David Copp et al. eds., 1993). Arneson announces in a conclusory manner:

No one has rights to placement in social roles that allow one to exercise power over other human beings without first obtaining their consent unless such exercise of power best promotes fulfillment of the fundamental rights of the people over whom power is exercised together with one's own fundamental rights.

Id. at 120: The statement ignores the reality that all rights give rights-holders powers to enforce duties on others—duties that are always exercises of power over those duty-bound persons. My right to free speech is your duty to endure that speech and its consequences, a duty that can be extremely onerous when you are crossing a picket line or enduring the racist taunts of a Klan rally. The notion that there are noncoercive rights is pre-realist naivete. Like Dwyer, Arneson regards parental rights as illegitimately coercive, without ever offering a coherent account of "coercion."

⁹⁵ Dwyer, *supra* note 94, at 1373.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *infra* Part IV.

Dwyer's inference seems valid, even if his premise is false. *If* the function of rights is to protect the rights-holders' personal autonomy understood as mere freedom from coercion, then parental rights to control children would not fit easily into our model of rights. The power of parents to control their children, after all, is not rooted in the interests of the parents in autonomy or self-expression, for one would not seem to have an entitlement to use another human as a tool with which to express oneself.⁹⁹ If we were to treat parental rights as individual autonomy rights to self-regarding actions, then they would indeed resemble a perverse form of child enslavement, with the child reduced to the status of a pet for parental recreation or profit. For instance, under such a view, courts evaluating the constitutionality of child labor laws should balance the parents' interest in their children's wages against the child's interest in an education. This model of rights has led scholars other than Professor Dwyer to express skepticism about such rights¹⁰⁰—skepticism that seems amply justified by the sickening results that follow when courts or commentators actually treat parents' rights to control "their" children as rights protecting the interests of the rights-holders.¹⁰¹

There is a different view of parental rights that lacks the perverse implication that, in Justice Stevens' words, "children are so much chattel."¹⁰² Parents constitute a form of private government, an institution that coerces persons subject to its jurisdiction for the purpose of securing those persons' welfare. Therefore, the rights that parents have to control their children must be justified in the same way that one would justify the rights that states have to regulate their citizens, that juries have to control fact-finding in the criminal justice system, or

⁹⁹ But see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1012-20 (1996) (suggesting that parental educational rights stem from First Amendment speech protection of parents' rights of expression). As my argument indicates, I regard such explanations of parental rights as unpersuasive.

¹⁰⁰ See, e.g., Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 997 (1992).

¹⁰¹ Professor Woodhouse notes that lawyer William Guthrie, who argued the *Meyer* case before the U.S. Supreme Court, also avidly resisted laws barring child labor. *Id.* at 1070, 1075. For an instance of a judicial decision that arguably treated parental rights as rights serving the interest of parental autonomy, consider *Phillip B. v. Warren B.*, 156 Cal. Rptr. 48 (Ct. App. 1979), in which the appellate court sustained the trial court's refusal to order that a child suffering from Down's syndrome be made a dependent child of the court for the purpose of ordering the child to receive heart surgery to which the child's parents refused to consent. The appellate court cited the parents' entitlement under *Pierce* and *Meyer* as reasons not to overrule the trial court, noting that "[i]nherent in the preference for parental autonomy is a commitment to diverse lifestyles." *Id.* at 50-51. That the parents' decision may have been motivated by a desire to avoid the difficulty of raising a child with Down's syndrome did not enter into the court's discussion.

¹⁰² *Troxel v. Granville*, 530 U.S. 57, 89 (2000) (Stevens, J., dissenting).

that Presidents have to veto legislation. These are all prerogatives that the rights-holder exercises on behalf of a larger system of social organization, powers that may not be exercised on behalf of the rights-holders' personal interests.

Unfortunately, none of these rights fit comfortably into an anticoercion model. The anticoercion theory maintains that rights protect some remedially simple, jurisdictionally indifferent individual interest in being free from coercion, not an interest in being subject to a jurisdictionally appropriate government. The sorts of interests that parental power protects are real, but the anticoercion model is blind to them. We must remove our anticoercion blinders if we are to understand when and why such interests ought to be enforced as constitutional rights.

IV

THE INSTITUTIONAL THEORY OF RIGHTS AND HOW IT JUSTIFIES CONSTITUTIONAL RIGHTS FOR PRIVATE GOVERNMENT

If the Fourteenth Amendment did not codify Herbert Spencer's *Social Statics*, it equally did not codify Professor Ronald Dworkin's anticoercion theory of rights. In what follows, I will lay out an alternative account of rights as protections for institutions (including but not limited to the institution of the "unaffiliated individual"¹⁰³). My claim is simply that rights should not be understood as the anticoercion theory understands them—as jurisdictionally indifferent, remedially simple entitlements to the private good of being free from coercion. Instead, I will argue that rights ought to be understood as

¹⁰³ Although it may seem awkward to describe "unaffiliated individuals" as "institutions," I suggest that a complex web of social mores, expectations, and practices defines and protects the place of actors often casually regarded as outside social institutions. The usual cast of characters that fall in the category of "unaffiliated individuals" include the Hyde Park Soap Box Orator, the Civilly Disobedient Demonstrator, the Street Performer, the Zany Sidewalk Eccentric in Odd Clothes, the Panhandler, etc. They all follow predictable scripts and inspire predictable reactions from onlookers. Indeed, these scripts and reactions are what protect their physical safety and the psychological security of the onlookers. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *Yale L.J.* 1165, 1194-1201 (1996) (describing internalized norms of street etiquette, pedestrians' self-help defenses, and actors that police streets as sources of street order); Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 *Ind. L. Rev.* 295, 336-37 (1993) (discussing panhandlers' reliance on shopkeepers and police in New Haven, Connecticut). Individuals who cannot obey the rules on eye contact, physical distance from others, deportment, etc., are stipulated by social practice to be more or less insane or criminal and are either confined or carefully monitored because their behavior is dangerously unpredictable. For a description of such norms, see Goffman, *supra* note 16 (analyzing behavior of mental patients identified by psychiatrists as indicators of illness in framework of broader social norms).

rules giving powers to institutions based on their likelihood of making decisions appropriate to the social sphere in which they operate. In Part IV.A, I offer an argument that the anticoercion theory is incoherent because it cannot provide a plausible definition of "coercion" that accounts for the importance of organizations in constituting individual autonomy. In Part IV.B, I lay out a definition and defense of institutional theories of rights. In Part IV.C, I use Joseph Raz's theory of authority to explain how the institutional theory provides a superior account of how rights act as "trumps" to protect individual autonomy.

It is important to emphasize at the outset that my argument against anticoercion theory is consistent with the view that rights exist solely to protect individual autonomy. Even if such an "individualist" conception of rights were correct, I argue that individual autonomy is partially constituted by *institutional* autonomy. An account of individual rights that leaves out institutional autonomy, therefore, cannot vindicate the value of individual autonomy which anticoercion theory seeks to protect.

A. *In Praise of Organization Man: How Organizations Advance Individual Autonomy in Ways That Anticoercion Theory Cannot Explain*

Anticoercion theory requires a definition of "coercion"—that is, actions that are invasions of, rather than embodiments of, individual liberty. But anticoercion theory cannot provide a persuasive definition of "coercion" that accounts for the kinds of individual autonomy that organizations protect. The theory should, therefore, be discarded.

The pre-realist definition of "coercion" relied on a formal public-private distinction. Actions by the government invaded liberty, whereas private actions were expressions of liberty. The essence of the realist's now familiar argument against this definition of "coercion" is that both private and governmental actions rested ultimately on governmental power. For instance, when a private landowner enforces trespass law to protect private property, he must call the sheriff. There was no reason, beyond sheer formal stipulation, to believe that governmental actions that enforce such common law entitlements were always liberating whereas other governmental actions were always oppressive.

Today, a new formalism stalks the law reviews, suggesting a new and equally unsound dichotomy—the dichotomy between authentic individual action that is unconstrained by any organizational role and inauthentic individual action that is constrained by the rules and roles

of organizations. Like the public-private distinction, this organization-individual dichotomy is used to give content to the idea of “coercion”: Organizations “coerce” individuals by imposing limits on their action that they would not observe were they not playing a role within the organization. Such organizational pressure on individuals is “coercive” because it is an “external” constraint on what individuals “really” want to do. The purpose of rights is to minimize such coercion and thus preserve some space for individual discretion.

I maintain in this Part that such an organizational-individual distinction confronts an immediate problem analogous to the problems confronted by the public-private distinction. “Organizations” are composed of individuals—officers, employees, members, agents, etc. When these individuals enforce organizational rules against recalcitrant members or potential members (by expelling or excluding dissenters, for instance), why are their actions not expressions of individual freedom? Anticoercion theory has some answers to this question, but none of these answers are persuasive because they ignore the ways in which individuals acting within organizations advance individual autonomy as much or more than persons acting free of such roles.

1. *The Authentic Individual Versus the Organization Man*

One argument of the anticoercion theorist against organizational power is simply to rely on a certain small-is-beautiful sentimentality. Unorganized individuals are stipulated to be more liberated or authentic than individuals playing some organizational role. Typical of such efforts is Charles Reich’s pleas on behalf of the “individual sector,” a space that he defines as outside all organizations—“the unorganized area, the individual’s traditional space.”¹⁰⁴ Reich declares that individual freedom is threatened “within the organized sector, inside a corporation, government agency, or institution” because “within an organization individuals must obey higher authority.”¹⁰⁵ The purpose of constitutional rights is to “creat[e] a zone of freedom in a society in which most people live their lives within, or in relationship to, large bureaucratic organizations that are authoritarian, hierarchical, and dominating.”¹⁰⁶

Reich’s manifesto in favor of unorganized individualism has a certain 1970s romanticism reminiscent of *The Greening of America*.¹⁰⁷

¹⁰⁴ Charles A. Reich, *The Individual Sector*, 100 Yale L.J. 1409, 1413 (1991).

¹⁰⁵ Id.

¹⁰⁶ Id. at 1416.

¹⁰⁷ Charles A. Reich, *The Greening of America* (1971) (predicting transcendental revolution of American consciousness in response to modern powerlessness).

But other scholars have relied on a more sophisticated species of the same organization-individual distinction. The essence of the idea is that organizational life is constrained, inauthentic, and insincere, whereas unorganized life is spontaneous and liberated. As noted above, Professor Dan-Cohen relies on a version of this distinction between authentic individual action and organizational demands that compromises such authenticity: His theory depends on the idea that organizational power is illegitimate unless the members cannot easily detach themselves from their organizational role.¹⁰⁸ Professor Kenneth Karst argues that the right of associational privacy should protect primarily those organizations that elicit no dissent from their members—small, intimate groups like families or, better yet, couples.¹⁰⁹ Outside the legal academy, Sam Fleischaker argues that only “small” communities characterized by “face-to-face” or “direct” interaction produce genuine self-knowledge because larger, more impersonal organizations have “governing structures” that impose “compromises” on the freely chosen decisions of the individual.¹¹⁰ All of these are species of Professor Reich’s celebration of the “unorganized” state, which requires no compromise of one’s values or beliefs.

2. *The Authenticity of Organizational Role*

I argue below, however, that this distinction between the “authentic” individual and the “constraining” organization ignores four important ways in which organizations provide individuals with opportunities for creative action—that is, individual autonomy—that they would lack absent a role in the organization. Individuals’ compliance with institutional norms is not inconsistent with individual autonomy. Rather, it makes individual autonomy possible.

a. Individual Autonomy, Institutional Diversity, and Choosing One’s Ends

First, individual autonomy understood as the practical power to choose one’s ends requires a wide array of different institutions from which persons can choose their form of life. Joseph Raz makes this point by observing that an autonomous person’s “[l]ife is, in part, of

¹⁰⁸ Dan-Cohen, *supra* note 61, at 1257 (arguing that community speech is protected because “each [member] fully identifies with his or her role, and, through it, with the collectivity . . . within which the role is performed,” such that “the result . . . is an effacement of the distinction between the collective production and individual self-expression”).

¹⁰⁹ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *Yale L.J.* 624, 637-38 (1980). Like Dwyer, Professor Karst worries that parental control over children violates the idea that associational rights protect only purely voluntary organizations. *Id.* at 642-47.

¹¹⁰ Sam Fleischaker, *Insignificant Communities*, in *Freedom of Association* 273, 277, 285-86 (Amy Gutmann ed., 1998).

his own making [because] he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options."¹¹¹

It follows that an essential requirement for autonomous life is a society in which there are many different institutions from which to choose.¹¹² One cannot be a trial lawyer without organized bars, trials, courts, rules of evidence, etc.; or an orchestra musician without an orchestra, symphony halls, paying audiences, music critics, etc.; or a graduate student without graduate schools, disciplines, norms of research, etc. Indeed, almost all interesting and worthwhile ends—being a law professor, an orchestra conductor, a poet, a politician, an athlete, etc.—require the cooperation of others within well-defined institutional roles. Thus, choosing one's ends does not mean having a solitary realm of absolutely unfettered discretion in which one can pursue some solitary fantasy. Instead, choosing one's ends, as a practical matter, means choosing the set of social institutions *along with their constraints* within which one wishes to live one's life.¹¹³

Such life choices are possible only because a heterogeneous set of institutions exists from which one can choose. This institutional heterogeneity is sustained by complex norms about organizational role and duty enforced by the officers of the institutions. When a law school dean forces a professor to serve on a boring committee or an orchestra conductor forces the bass player to enter on cue, they need not be suppressing individual autonomy (although, depending on the social context, they *could* be): They might be sustaining it by sustaining the institutions that make it possible for individuals to choose life within such institutions. To the extent that the anticoercion theory privileges the unorganized individual over organizations without attention to the need to maintain an ecology of diverse institutions from which individuals can choose, the theory endangers rather than protects individual autonomy.

b. Individual Autonomy and Detachment from Social Role

The existence of multiple institutions governed by different norms is essential to obtaining individual autonomy in a second sense.

¹¹¹ Joseph Raz, *The Morality of Freedom* 204 (1986).

¹¹² *Id.* at 205-07; see also Walzer, *supra* note 57, at 326 (arguing that autonomy of individual is defined by individual's "liv[ing] within autonomous institutions").

¹¹³ This argument is set forth by Stephen Holmes in his study of Benjamin Constant. See Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* 65 (1984) (positing that "liberal freedom" depends on "the presence of possibilities" which "are creatures of social institutions" not opinions "generated out of the prodigality of the individual soul").

They protect autonomy as a kind of detachment from any particular social role. Our autonomy in this sense is our consciousness of the capacity to “change hats” and play different social roles in different contexts, an ability that liberates us from the tyranny of playing a single role in every context and gives the “experience of pluralism” to a single individual.¹¹⁴ As Georg Simmel observed, when individuals participate in multiple groups, they necessarily must distance themselves from the goals and social roles required by any one of the groups or suffer “psychological tensions or even a schizophrenic break.”¹¹⁵ Such tensions “strengthen the individual and re-enforce the integration of his personality,” because the individual at the intersection of multiple social circles becomes “more clearly conscious of this unity [of his choosing personality], the more he is confronted with the task of reconciling within himself a diversity of group interests.”¹¹⁶ A person must detach himself from each social role in order to act simultaneously as a member of the school board, a father of children, a member of the law faculty who helps govern the law school by speaking at faculty meetings, and a lawyer performing pro bono legal service. The professor must “forget” the fact that he is a father when acting as a school board member (by avoiding nepotism, for instance, in school budgeting) and he must “forget” that he is a school board member when acting as a father (by showing partiality toward his own children when helping them with homework, etc.). A similar account of role distance can be told about the different social roles of representing clients in courtrooms and representing the interests of the law school in faculty meetings.

The anticoercion theory’s distinction between the unorganized individual and the organization undermines this sense of individual autonomy by stipulating (without argument or explanation) that individuals who perform organizational roles from which they can detach themselves are not acting authentically. Dan-Cohen relies heav-

¹¹⁴ Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* 349-50 (1998). Rosenblum analyzes several different types of private associations, ranging from churches and civic organizations to homeowners’ associations, militias, and white separatist groups, concluding that the most satisfying way to justify their autonomy is the theory of what she calls associational pluralism. *Id.* at 5. Such role-shifting also provides entrepreneurial individuals with the possibility of selectively attempting to import norms or values from one context into another, a form of arbitrage that is an important aspect of political debate and argumentative creativity. For examples of how values in one social sphere can constrain activity in another sphere, see Don Herzog, *Poisoning the Minds of the Lower Orders* 219-26 (1998) (describing tension between conservative theories of social hierarchy and Christian rhetoric of egalitarianism).

¹¹⁵ Georg Simmel, *The Web of Group-Affiliations*, in “Conflict” and “The Web of Group Affiliations” 125, 141 (Reinhard Bendix trans., The Free Press 1955) (1922).

¹¹⁶ *Id.* at 142.

ily on this notion that an agent's speech on behalf of an organization is "detached speech . . . avowedly cut off from the speaker's own identity and psychological state" and therefore has no value as "self-expression and autonomy."¹¹⁷ This is a more sophisticated version of Reich's premise that somehow "unorganized" individuals are more authentic or creative than individuals playing an organizational role. But, like Reich, Dan-Cohen offers an inadequate defense of his implausible position.¹¹⁸ An actress who plays Ophelia in *Hamlet* without having any personal desire to commit suicide is uttering "insincere" speech in a role from which she can detach herself, but it would be bizarre to maintain that the speech has no value as an expression of the actress's autonomy. The same can be said for the attorney making a closing argument on behalf of a client that she dislikes or the politician who can denounce a bill in righteous indignation and yet trade friendly quips with the bill's sponsor over a beer after the end of the session. All such speech is unambiguously protected by constitutional rights of free speech,¹¹⁹ and the insincerity of the speech or the fact that the speakers play a role from which they can detach themselves is flatly immaterial to the question of whether the speech has value as an expression of the speaker's identity or autonomy.

Our autonomy is importantly constituted by our capacity to play different roles with craft and zeal in different contexts. It is this art of separation that defines what it means to live in a liberal society.¹²⁰ Dan-Cohen's devaluation of individual speech that carries out an organizational role tends to undermine this art by stripping "detached"

¹¹⁷ Dan-Cohen, *supra* note 61, at 1241.

¹¹⁸ To establish the view that speech from a detached role is speech without value as self-expression, Dan-Cohen offers the example of a telephone operator who says "Thank you for using [our service,] have a nice day" to patrons as part of his job. *Id.* at 1239. Such "impersonal" speech, Dan-Cohen urges, has no value as self-expression: The operator, after all, does not care whether the patron has a nice day. *Id.* Therefore, the organization of which the individual agent is a part cannot claim the need to protect such speech as a matter of constitutional right. But Dan-Cohen's example stacks the deck against speech based on organizational role. The operator's speech lacks value as self-expression not because he is speaking from a detached role as the agent of the telephone company but rather because the particular speech is uninteresting and trivial. Perfectly sincere speech uttered on one's own behalf would be equally lacking in value as "self-expression and autonomy" if it were equally perfunctory. My offhand "good morning!" to a colleague in the hallway, for instance, is personal speech devoid of value as expression of my autonomy.

¹¹⁹ On attorneys' speech as protected by the First Amendment, see, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that prohibition against legal representation paid for by recipients of Legal Services Corporation's funds where representation involved attempt to amend or otherwise challenge existing welfare law violated First Amendment). Legislative speech is protected not only by the First Amendment but also by the more stringent protections afforded by the Speech and Debate clause of Article I.

¹²⁰ See Walzer, *supra* note 57, at 315.

speech of constitutional protection. The monomaniacal fanatic who identifies completely with a single role in every setting is apparently Dan-Cohen's ideal paradigm of the autonomous human—but probably no one else's.

c. Individual Autonomy and the Exercise of Power

Organizations advance individual autonomy in a third sense. They provide individuals with the opportunity to exercise power over some share of the world, an opportunity that individuals lack in an unorganized state. Since Tocqueville's famous discussion of the role of private associations in American democracy,¹²¹ it has been commonplace to observe that such associations provide opportunities for individuals to acquire the skills and habits necessary for a well-functioning democracy—skills such as public speaking, diplomacy in lobbying for votes, mastery of rules and norms for group decisionmaking, and the broader mindset of tolerance that allows one to listen to views with which one disagrees.¹²² Private sites for politics, in short, are just as valuable and much more abundant than public sites. The anticoercion theory views such private regulatory power with alarm because it enables some members of organizations to “coerce” others.¹²³ But the realist response is that all rights give and *ought* to give some persons the power to control others. In Jaffe's words, individual rights that destroy group self-government also eliminate an individual's “channel for the creative and moral impulses” that satisfy the individual's “craving for self-expression [and] power.”¹²⁴

The anticoercion theorist is inclined to dismiss this right of self-government as unrelated to any legitimate individual right. Some theorists do so by sheer *ipse dixit*, simply declaring that group self-government cannot be a right.¹²⁵ More sophisticated theorists argue that the important, autonomy-expressing aspect of self-government does

¹²¹ 2 Alexis de Tocqueville, *Democracy in America* 106-10 (Henry Reeve trans., Francis Bowen ed., Vintage Books 1990) (1835).

¹²² The literature here is voluminous and increasingly empirical and historical. For some contributions, see generally Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (1993); *Civic Engagement in American Democracy* (Theda Skocpol & Morris P. Fiorina eds., 1999).

¹²³ See *supra* Part III.

¹²⁴ See Jaffe, *supra* note 6, at 211-12. Stephen Holmes argues that Benjamin Constant offered a similar analysis of individual autonomy:

Constant was careful to refer to participation in sovereignty as a form of liberty. . . . Constant's decision to deviate from those who had defined liberty by contrasting it with the exercise of sovereignty was not casual. He insisted from the start that the influence of citizens on legislation was a form of freedom.

Holmes, *supra* note 113, at 44.

¹²⁵ See Dworkin, *supra* note 29, at 194.

not require any regulatory power but rather only deliberative speech. For instance, Sam Fleischaker argues that the benefits of deliberative democracy can best be realized in “insignificant communities,” meaning small seminar-like discussion groups or “exemplary and conversational anarch[ies].”¹²⁶ Such participation in discussion allows us to “correct the ends we already happen to have in conversation with our friends” and learn from our friends’ example.¹²⁷ Noncoercive chat, not governing power, is what constitutes truly autonomous deliberation.

A difficulty with this view is that talk is cheap. As anyone who has ever run a seminar can testify, conversation without consequences does not necessarily encourage serious deliberation. When nothing is at stake, people can talk for good or bad reasons—to curry favor, attract a mate, overcome sheer boredom, make a scene, etc. Participants also can conceal their preferences with impunity, knowing that their failure to take unpopular positions will have no consequences.¹²⁸ In short, democratic deliberation might be what Jon Elster calls a state that is essentially a “by-product” of true decisionmaking.¹²⁹ If there is nothing of consequence to decide, then the conversation easily trails off into embarrassed silence or trivialities.

Organizations often can only cultivate a disposition to engage in serious deliberation if those organizations can affect their members’ lives in nonconversational ways.¹³⁰ Consider, for instance, the debate within the Presbyterian Church (U.S.A.)¹³¹ over the ordination of gay and lesbian ministers. The issue has excited enormous controversy

¹²⁶ Fleischaker, *supra* note 110, at 278, 285-86.

¹²⁷ *Id.* at 274.

¹²⁸ On preference falsification, see Timur Kuran, *Private Truth, Public Lies: The Social Consequences of Preference Falsification* 177-78 (1995).

¹²⁹ See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 91-100 (1983); Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in *Foundations of Social Choice Theory* 103, 120-27 (Jon Elster & Aanund Hylland eds., 1986) (noting that “the satisfaction one derives from *political* discussion is parasitic on decision-making” such that political debate cannot produce beneficial side effects such as self-respect, civic energy, etc., unless these benefits are perceived by actors as side effects of pursuit of political decisions).

¹³⁰ This is not to say that the threat of coercion is *necessary* to spark serious discussion. I argue only that such a threat can help.

¹³¹ The Presbyterian Church (PCUSA) is a large organization with 2.6 million members, but it is only one of several Presbyterian churches. See, e.g., The Evangelical Presbyterian Church, <http://www.epc.org> (last visited Mar. 3, 2003); Presbyterian Church, <http://www.pcusa.org> (last visited Mar. 3, 2003). The Evangelical Presbyterian Church seceded from the Presbyterian Church (U.S.A.) in part over the sense that the latter was too liberal in its interpretation of scripture on issues such as gay and lesbian ordination.

within the Church, provoking the formation of rival factions¹³² and an effort to amend the Church's "Constitution" (or Book of Order)¹³³ at a General Session meeting in June of 1999.¹³⁴ It failed because, after intense debate, the Session agreed to table the motion for a "cooling off" period.¹³⁵ In 2001, the General Assembly adopted a rule allowing congregations and presbyteries to decide the question for themselves, further enlarging the forums for debates.¹³⁶ But this issue is on the Church's agenda only because the Church has the power *not* to ordain gay and lesbian ministers. There is little doubt that, if the Church could have avoided a discussion of the issue at all, it would have done so. The power actually to make practically effective decisions concerning personnel was just as necessary to motivate debate at the level of private government as simple freedom to stage an academic discussion.

d. Individual Freedom as a Collective Good.

Organizations protect individual autonomy in a fourth way, by managing common-pool resources in ways sensitive to the value of individual liberty. As explained in Part III.A, anticoercion theories treat liberty as a remedially simple private good—the individual's entitlement to be free from certain sorts of pressure—whereas individual freedom frequently requires more than negative injunctions on "coercive" pressure. Instead, individual autonomy can only be protected by managing common-pool resources to protect pursuit of the organizational end in an autonomous manner.¹³⁷ Anticoercion theory has no

¹³² On the development of conservative and liberal factions within the Church, see Editorial, *Reforming Sex by Rolodex*, *Christianity Today*, Mar. 6, 2000, at 37 (complaining about interdenominational statement on religion and sexuality by Reform Jews, Unitarians, and other clergy, on ground that doctrine should be settled by scripture and not "by opinion poll[s]"); Gayle White, *Peachtree Presbyterian Chooses a New Minister*, *Atlanta J. & Atlanta Const.*, May 8, 2000, at C1 (describing Presbyterians for Renewal, conservative faction within Church that is opposed to gay and lesbian ordination).

¹³³ The relevant provision of The Book of Order was section G-6.0106(b), which requires pastors "to live either in fidelity within the covenant of marriage between a man and a woman, or chastity in singleness." *Book of Order: The Constitution of the Presbyterian Church (U.S.A.)* § G-6.0106(b) (2001-2002).

¹³⁴ See PCUSA's newsletter, which can be found at <http://www.pcusa.org/ga213/news/ga01151.htm> (describing 213th General Assembly).

¹³⁵ *Id.*

¹³⁶ Ann Rodgers-Melnick, *Gay Ordination Debate Expected to Split Local Presbyteries*, *Pittsburgh Post-Gazette*, June 19, 2001, at <http://www.post-gazette.com>.

¹³⁷ A similar point is made by Joseph Raz when he argues that individual autonomy is a collective good, in that it depends on social conditions that are nonexcludable, jointly consumed states of affairs. Joseph Raz, *Rights and Individual Well-Being*, in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 29, 38 (1994). Thus, Raz maintains that it would be better to live in a society that generally protected free expression even if one's own right to speak and hear were suppressed than to enjoy a personal privi-

place for such managerial values, and so its account of individual autonomy is radically incomplete.

Consider, for instance, the value of academic freedom. Scholars have occasionally attempted to define “academic freedom” as an individual scholar’s entitlement to be free from “coercive” pressure when performing research. The American Association of University Professors’ Committee on Academic Freedom, for instance, issued its seminal 1915 report advocating “complete and unlimited freedom to pursue inquiry and publish its results” as “the first condition of progress.”¹³⁸ Likewise, William Van Alstyne argued that “the principle of academic freedom clearly condemns any act of institutional censure in respect to the professional endeavors of its faculty,” qualified only by the academic’s obligation to adhere to a “fiduciary standard of professional care.”¹³⁹ Several scholars have argued that this individual entitlement should limit the power of universities to fire or otherwise discipline academics because of what they publish or fail to publish.¹⁴⁰

It is not difficult to see, however, that “academic freedom” cannot possibly be an individual professor’s entitlement to publish what he or she pleases. Universities routinely do what individualistic “academic freedom” literally forbids. They enforce rules of disciplinary orthodoxy against individual scholars. Short of handing out tenure on the basis of trivial “content-neutral” criteria like spelling and penmanship, university departments *must* make content-based judgments about their faculty’s publications. These judgments are not merely a matter of enforcing rules of “professional integrity,” as Professor Van Alstyne apparently assumes.¹⁴¹ Even scholars who obey all of the canons of professional integrity—avoidance of sins like plagiarism or falsification of sources, for instance—might still be denied tenure (that is, fired) because the faculty deems their work to be uninteresting,

lege of free expression in a society where the right were generally repressed. *Id.* at 39. The purpose of the right is not to protect individuals from the loss of some private good—freedom from “coercion”—but to preserve some more general social atmosphere or practices. *Id.* at 40.

¹³⁸ AAUP Comm. on Academic Freedom & Academic Tenure, General Declaration of Principles, 1915, in 2 *American Higher Education: A Documentary History* 867 (Richard Hofstadter & Wilson Smith eds., 1961).

¹³⁹ William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *The Concept of Academic Freedom* 59, 72, 80 (Edmund L. Pincoffs ed., 1972).

¹⁴⁰ See, e.g., Mark G. Yudof, *Three Faces of Academic Freedom*, 32 *Loy. L. Rev.* 831, 838-44 (1987). Compare Matthew W. Finkin, *On ‘Institutional’ Academic Freedom*, 61 *Tex. L. Rev.* 817, 818, 845-57 (1983) (distinguishing academic freedom from institutional autonomy).

¹⁴¹ See Van Alstyne, *supra* note 139, at 75 (noting focus of peer review procedures on matters of pure professional integrity).

unimportant, peripheral, etc. These are sins that cannot be reduced to any algorithmic rules of scientific method; they are evaluative standards of the mushiest sort. In sum, universities routinely "coerce" individual faculty members by demanding that, subject to the penalty of loss of employment, the academics' writings measure up to some vague and entirely content-based standard administered by the relevant faculty.

If academic freedom cannot be reduced to an individual entitlement to be free from coercion, then how else can the entitlement be understood? I suggest that academic freedom entitles the faculty member to a particular sort of decisionmaking institution and process: peer review by members of his or her faculty applying the discipline's standards as they are understood by the larger community of scholars within the relevant discipline. This entitlement cannot be understood as a jurisdictionally indifferent entitlement to a space free from external pressure: Scholars feel intense pressure to publish (and to publish "well," according to the amorphous standards of their discipline) or perish. Instead, the essence of the entitlement is a right to a particular decisionmaker. The right of academic freedom is analogous to the right to a jury trial—an entitlement to have one's peers judge one's cause. Under principles of academic freedom, the relevant faculty's decision to deny tenure to a colleague might be perfectly appropriate where the identical decision by the governor of the state or chief of municipal police would be wholly inappropriate—even if the police chief or governor honestly adhered to the relevant standards of the discipline and even if they reached the same decision as the relevant faculty.

Such an entitlement cannot be enforced through the jurisdictionally indifferent and remedially simple injunctions provided by anticoercion theory. Put simply, courts could never enforce "academic freedom" by evaluating each decision by a university to see if it is coercive. Instead, courts can protect the individual freedom of faculty members to publish free from "inappropriate" pressure only by protecting the autonomy of the "proper" institution—the faculty operating within the bureaucratic context of university-wide tenure decisions. As Peter Byrne has argued, "[c]ourts are ill-equipped to find their way among the labyrinths of academic decision-making" where the meaning of "academic grounds" is "shrouded and disputed."¹⁴² Instead, "judgment according to academic standards" has to be understood as incorporating a jurisdictional component. The

¹⁴² J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 *Yale L.J.* 251, 305 (1989).

term refers to whatever a particular decisionmaking body decides, when that body is properly constituted and honestly plays a particular social role.

The idea of academic freedom is not the only value that best can be advanced only as an entitlement to an institution's expert judgment rather than as a prohibition on specifically defined sorts of "coercion." Similar considerations explain why courts give deference to the decisions of K-12 public school principals,¹⁴³ orchestra conductors,¹⁴⁴ and state-owned radio stations,¹⁴⁵ even when such institutions make decisions that "coerce" individuals. Such decisions are frequently attacked on the ground that individual rights do not protect governmental institutions. But such anticoercion rhetoric entirely misses the point: The institutional prerogative to "coerce" individuals is part and parcel of the institutional management of common-pool resources for the maximization of individual creativity within the institution. Only by protecting that managerial prerogative can courts ensure that the collective resources are managed with an eye to the protection of the appropriate sort of individual creativity.

To summarize, the four ways in which organizations advance individual autonomy are that they provide (1) an opportunity for individuals in a complex society to choose among numerous conflicting groups; (2) the protection of role detachment through membership in overlapping organizations with cross-cutting purposes; (3) the lively debates that erupt when organizations are forced to decide issues on

¹⁴³ As Professor Bruce Hafen has acutely explained, a court cannot define what constitutes an "educational purpose" independent of what school authorities say is an educational purpose. Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 Duke L.J. 685, 685-86. According to Hafen, both case law and common sense suggest that courts will defer substantially to the school authorities' definition of "educational purpose" so long as the school district seems to be pursuing ends broadly within the scope of schools' authority. See generally *id.* For this reason, Hafen deems K-12 schools to be "First Amendment institutions"—that is, institutions with an important responsibility to determine how First Amendment free speech norms apply in a particular context. *Id.* at 685-86.

¹⁴⁴ See, e.g., *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 911-12 (1st Cir. 1988), in which the First Circuit refused to enforce the Massachusetts Civil Rights Act against the Boston Symphony Orchestra (BSO). The BSO had canceled a contract with actress Vanessa Redgrave in order to avoid disruptive demonstrations by protestors hostile to Ms. Redgrave's support of the Palestine Liberation Organization and her views on Israel. *Id.* at 890-91. Ms. Redgrave sued under the Massachusetts Civil Rights Act of 1979, Mass. Gen. Laws ch. 12, §§ 11H-11I (1994), which bars interference "by threats, intimidation, or coercion" with the exercise of free speech rights. *Id.* at 891. The First Circuit strongly suggested—but did not expressly hold—that application of the state law to prevent the Orchestra from canceling the contract would violate the First Amendment. *Id.* at 904-06.

¹⁴⁵ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 683 (1998) (holding that broadcaster's exclusion of independent candidate from its debate was constitutional).

their agenda because the public law leaves them undecided; and (4) the management of common-pool resources consistent with principles of individual autonomy. One could think of other structural advantages (and disadvantages) of private government; this list is merely exemplary, not exhaustive. The important point is that all of these advantages can be produced only by cultivating the right sorts of institutions, not by protecting individuals from "coercion." Therefore, the anticoercion justifications of rights have very little to say about such uses of organizational independence.

To sharpen the point, the anticoercion theory is simply incoherent—rather than insufficiently capacious—because it cannot supply any determinate definition of "coercion." "Coercion" cannot plausibly mean any sort of organizational power that is used to pressure individuals because such power is frequently the *sine qua non* of individual autonomy—the value that anticoercion theories purport to protect. "Coercion," instead, would have to mean "wrongful organizational pressure." But such a definition requires a theory of which sorts of institutions should exercise what sort of powers. The jurisdictionally indifferent and remedially simple tenets of anticoercion theory cannot supply such jurisdictional principles. The theory therefore is bankrupt. Anticoercion theory is a source of misleading rhetoric rather than intelligible rights.

B. Definition and Defense of Institutional Theories of Rights

I propose a different and, I argue, more plausible account of rights, which I call the "institutional" theory of rights. Institutional theories define rights as rules that allocate preemptive jurisdiction to institutions—including, but not limited to, the institution of the "unaffiliated individual"¹⁴⁶—based on that institution's likelihood of making decisions appropriate to the social sphere in which it operates.¹⁴⁷ The institutional theory is more plausible, in part, because it more closely matches how courts actually define rights. I will explain what I mean by "decisions appropriate to a social sphere" in Part IV.B.1 below; I will define "preemptive jurisdiction" in Part IV.B.2 where I ar-

¹⁴⁶ See *supra* note 103.

¹⁴⁷ In a general sense, institutional theories are consequentialist theories because they defend rights as instrumentally valuable for reaching proper decisions. Such consequentialism need not be utilitarian; the desired end-state could be virtuous decisions, for instance. For such a consequentialist theory of rights, see John H. Garvey, *What Are Freedoms For?* (1996) (arguing that rights exist to enable actors to make good moral choices, and also impose moral duties on government that match moral judgments about human action).

gue how it best explains the way in which rights plausibly can operate as “trumps.”

1. *Are Rights Entitlements to Pursue Appropriate Ends?*

Institutional theories of organizational rights require an assessment about whether an institution makes decisions appropriate to its social sphere. This language will tend to raise hackles among liberal theorists accustomed to arguing that the scope of rights cannot depend on the ends that rights-holders pursue.¹⁴⁸ It is commonplace for such theorists to define the liberal state as one that does not pursue a particular conception of the good but instead enforces a neutral framework within which each private person can pursue his or her own ends without interfering with each other. I will refer to this view of the state as the “antiperfectionist theory” of the state.¹⁴⁹

The institutional theory offends antiperfectionist theories because the scope of private organizations’ constitutional rights depends on whether the organizations are pursuing their “proper” ends. Is the incompatibility of institutional theories and antiperfectionist liberalism a good reason to reject the former?

I think not. Whatever their merits as ways to define the power of the state, antiperfectionist theories are useless for defining the power of private government. Private organizations are expected to pursue a particular conception of the good. Such pursuit of particular ends is built into the very definition of private organizations. No one expects churches to be neutral about religion or political parties to be neutral about politics or universities to be neutral about knowledge; all such private organizations are expected to seek certain ends and reject others. Antiperfectionist liberalism, therefore, is simply incoherent as a way of defining the proper jurisdiction of private government, even if it is a viable principle with which to define the sphere of state, federal, or local government.

Institutional theories, by contrast, insist only that private governments pursue the right *kind* of end—the end that is appropriate for the social sphere governed by the private government. Elaborate social norms define the ends that different institutions are entitled to pursue. Institutional theories insist that constitutional rights incorporate these norms. For instance, parents are entitled to pursue the best interest of the child; universities are entitled to preserve and extend knowledge according to the canons of recognized disciplines; political

¹⁴⁸ See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 10-17 (1980) (defending “neutrality” on conception of good as necessary condition of liberal state).

¹⁴⁹ For a discussion of “antiperfectionism,” see Raz, *supra* note 111, at 107-62.

parties are entitled to advance the political power of people who adhere to the party platform; and churches are entitled to advance their religious beliefs and ceremonies. Such governing institutions can be given constitutional rights to pursue these ends because the ends are appropriate to the spheres in which the institutions operate. But the same institutions have no right to pursue different ends that are outside their proper jurisdiction. For instance, under the institutional theory, parents might have the constitutional entitlement to discipline their children to ensure that children can become properly socialized adults, but the same parents would have no constitutional entitlement to impose the identical discipline for a different end—say, as part of a controlled psychological experiment about the effects of different punishments on children's behavior.

Such a theory assumes that we can achieve some degree of consensus about the sorts of ends that institutions ought to pursue in different social contexts. Antiperfectionist liberals might be skeptical about the possibility of such consensus on the theory that we radically disagree about ends and cannot reasonably resolve our disagreement. For this brand of liberalism, rights-holders allocate decisionmaking power precisely because of what Rawls calls "the burdens of argument":¹⁵⁰ We respect each others' rights to pursue different ends out of our own mutual fear that otherwise they will impose their ends on us. Institutional theories reject this "liberalism of fear,"¹⁵¹ instead maintaining that an enormous consensus exists about the ends appropriate to different social contexts.

This Article is not the appropriate forum for resolving such a conflict between rival brands of liberal theory. Instead, I intend to make the much more modest point that the constitutional jurisprudence of the United States is just as consistent with the institutional theory as the antiperfectionist theory of rights. Much of the work of parsing court decisions has already been done by others, and I will not rehash their analysis here. For instance, Daniel Halberstam has argued that First Amendment doctrine tolerates regulation of commercial and professional speech to the extent that such regulation is consistent with "governing background norms" about the proper ends of such speech—norms about which courts recognize there is "fundamental agreement."¹⁵² Likewise, Fred Schauer maintains that the U.S. Supreme Court, of necessity, distinguishes between different types of in-

¹⁵⁰ Rawls, *supra* note 26.

¹⁵¹ The phrase is from Judith N. Sklar, *The Liberalism of Fear*, in *Liberalism and the Moral Life* 21-38 (Nancy L. Rosenblum ed. 1989).

¹⁵² Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 857 (1999).

stitutions, giving certain ones (for instance, journalists working at a government-owned radio station) greater latitude than other institutions to make content-based decisions concerning issues about which they have some expertise.¹⁵³ The demand that government be neutral as to the content of speech is simply unworkable in certain contexts; only institutional reasoning can be used to cabin government power. At a more general level of analysis, Rick Pildes has shown that a large number of rights are best understood as efforts to ensure that particular institutions pursue ends proper to their social sphere.¹⁵⁴ Finally, John Garvey has persuasively asserted that numerous constitutional doctrines are incompatible with the idea that rights are neutral about the ends that rights-holders should pursue.¹⁵⁵

In short, institutional theories reject the notion that government must be neutral about the ends that private organizations must pursue. But so does most constitutional doctrine. If a theory of liberalism requires such radical neutrality by the state, one can write that theory off as practically irrelevant for explaining the constitutional rights that we actually have.

2. *Can Rights Be “Trumps” Under an Institutional Theory?*

One difficulty with institutional theories is that they seem too messy to be satisfactory explanations of rights. I already defined rights as “preemptory” entitlements in that they are supposed to settle disputes in favor of rights-holders without recourse to all-things-considered balancing.¹⁵⁶ How can rights have this preemptory flavor under an institutional theory? Institutional theories seem to require a complex empirical inquiry into the capacities of different institutions to see if they are well-suited for pursuing certain social ends. But the whole point of rights, one might argue, is to pronounce a winner irrespective of case-by-case balancing of all considerations. In short, how can rights be trumps if they are rooted in messy, empirical questions of institutional competence?¹⁵⁷

¹⁵³ Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 114 (1998).

¹⁵⁴ Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. Legal Stud. 725, 734 (1998). Pildes notes that, in First Amendment free speech cases, Establishment Clause cases, voting rights cases, and race discrimination cases, courts seem less interested in preventing coercion of individuals and more interested in ensuring that government acts consistently with the principles governing the relevant social sphere—a concern that would be impossible in a setting where there was no consensus about how different spheres ought to be governed. *Id.* at 750-54.

¹⁵⁵ Garvey, *supra* note 147, at 2.

¹⁵⁶ See *supra* Part II.B.

¹⁵⁷ The point is nicely put by Frederick Schauer, *supra* note 153, at 112-13.

The answer is that one institution's rights to decide an issue can operate as "trumps" on reconsideration of that issue by other institutions in a different sense from that of deontological theories.

As an example of such an institutional right, suppose that parents have the presumptive right to determine what is in the best interest of the child and preempt the state's reconsideration of the issue. In its purest form, this claim to jurisdiction over the issue of the child's best interest would allow the parent to make any decision that she pleased so long as the best interest of the child was her actual goal and not a pretext for some other justification. If the parent had the proper purpose, then her decision would oust the state from further jurisdiction—even if the parent's idea of the child's interest departed radically from the state's view. Under a weaker version of the parent's institutional authority, the parent's view would be entitled to great deference, but the state could override that judgment if it were clearly in error.

Bracketing for now the substantial difficulties with deciding how the "purpose" of a parent's judgment should be defined and discerned,¹⁵⁸ consider how such a power might be justified. One argument for giving the parent this sort of preemptive jurisdiction is that it represents a rational division of labor in the project of making difficult decisions. Suppose we have reason to believe that parents are systematically better than other actors—courts, social service agencies, grandparents, etc.—at determining their child's interests because of the incentives and structure of parental status.¹⁵⁹ One might infer from these sorts of considerations that parents generally make more accurate judgments about their child's welfare than government offi-

¹⁵⁸ This is, of course, a venerable topic in constitutional law. "Purpose" might refer to the subjective intent of the parent—whether she was "sincere"—or the social meaning of her decision that a reasonable observer would infer, or the best justification that the decision could rationally bear, or (finally) it could refer to the likely effects of her action—what her decision was "plainly adapted" to accomplish, in the words of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Rather than canvass the literature and considerations relevant to this question, I refer the reader to Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of the Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1514-27 (2000).

¹⁵⁹ Perhaps we believe this because parents specialize in getting to know only a few children to whom they typically have been closely attached from a young age. Likewise, parents live with their children and have more opportunity to observe them than state officials who only visit the children periodically. Parents also have both biological, social, and legal incentives for caring about their children's welfare: The natural incentive to care about one's children is obvious enough, but it is also worth mentioning that parents bear some legal responsibility to support their children, and they also will bear social stigma if the children are perceived as poorly raised or abused or uncared for. The fact of cohabitation also ensures that parents will be affected by the decisions that they make concerning their children in a way that officials who live elsewhere will not.

cials—even those with expert training that the parent lacks. If this inference is correct, then it might also be the case that the relevant state decisionmaker may achieve more accurate determinations of what is in the best interest of the child if the judge defers to the parents' judgment concerning the child's interest than if the judge attempts to balance the relevant considerations for himself or herself. If deference will improve the judge's (or other decisionmaker's) rate of accuracy in enforcing the rule appropriate to a social context, then it is rational to defer to the parent and ignore his or her own independent consideration of the issue. This is not abdication of responsibility but fulfillment of it, for the responsibility is not to exercise independent judgment but to see that the correct decisions are made. Of course, parents may err. But judges may err, too. The question is whether independent judicial judgment or deference to parents will yield fewer errors. If the latter is true, then deference is justified.

This argument for deference is, in summary form, an application of Joseph Raz's argument for political authority.¹⁶⁰ When I say that the rights of private organizations are justified by an "institutional theory," I mean that they possess authority in Raz's sense of the term: They are entitled to deference from state officials because state officials will have greater likelihood of deciding the matter appropriately¹⁶¹ if they defer to the private organization's decision than if they tried to make an independent judgment based on their own investigation. But why does this sort of authority function like a trump? To answer this question, it is useful to look more carefully at Raz's argument.

Raz's theory of authority depends on three theses. First, Raz lays out the "dependence thesis": Authoritative commands are those commands that are based on considerations that are independently binding on the subject of authority (meaning the commanded person).¹⁶² For instance, in *Troxel v. Granville*,¹⁶³ the mother's command that the grandparents' visitation rights should be limited to one visit per month is presumptively based on the consideration that this arrangement is in the best interest of her two daughters, and this consideration is already independently binding on the state judge by the visitation statute. Therefore, the criterion "best interest of the child" is a "dependent reason" in Raz's phrase.¹⁶⁴

¹⁶⁰ See Raz, *supra* note 111, at 38-69.

¹⁶¹ I am agnostic here about whether the measure of propriety is the process by which the decision is reached, the outcome of the decision, or some combination of the two.

¹⁶² Raz, *supra* note 111, at 47.

¹⁶³ 530 U.S. 57 (2000).

¹⁶⁴ Raz, *supra* note 111, at 47.

Second, Raz bases authority on what he calls the “normal justification thesis”—that is, the thesis that subjects of authority will better comply with the reasons that they ought to obey by foregoing independent judgment and deferring to the authoritative decisionmaker.¹⁶⁵ For instance, the normal justification of parental authority would be the structural insight (if it is true) that judges will better respect the best interest of the child by following parents’ views.

The “trumping” aspect of Raz’s theory of authority derives from his third thesis of authority, the “preemptive thesis.” The preemptive thesis is the theory that an authoritative judgment substitutes for consideration of the criteria covered by the “dependence thesis” and is therefore not balanced against those criteria or added to them as an additional reason.¹⁶⁶ The basis for the preemptive thesis is intuitively obvious. If the authoritative decisionmaker has already considered the criteria that would otherwise bind the subject of authority (the “dependence thesis”), and if that subject of authority would do his or her duty more completely if he or she deferred to the authoritative decisionmaker (the “normal justification thesis”), then the subject of authority ought not to reconsider those criteria that the authoritative decisionmaker has already used as the basis for the authoritative judgment.¹⁶⁷ Those reasons are already subsumed within the judgment issued by the authority, which displaces the subject’s independent consideration of those reasons by virtue of the “normal justification thesis.”¹⁶⁸ Preemptive authority, in short, has the flavor of *res judicata*.

Raz’s preemptive thesis makes claims of authority operate in a way at least superficially similar to Dworkin’s “rights as trumps.” Preemptive authority “trumps” policy arguments whenever those policies are “dependent reasons”—that is, whenever they have already been used as the basis for the authoritative judgment. For instance, if parents have preemptive authority over the issue of the best interest of the child, then their judgment “trumps” state officials’ reconsideration of that policy issue. The interests of the child cannot be weighed against the parental judgment because they have already been subsumed within that judgment. In this way, preemptive authority defeats policy arguments by nonauthoritative institutions for resisting the authority even when those arguments are proper for the preemptive authority to consider.

¹⁶⁵ Id. at 53.

¹⁶⁶ Id. at 59.

¹⁶⁷ Id.

¹⁶⁸ Id. at 57-62.

The institutional rights of private organizations are simply private organizations' claims of preemptive authority. Claiming such authority on behalf of private organizations may seem counterintuitive because it involves a strange reversal of the roles assigned by Raz. Raz's theory provides the basis for the authority of states over private citizens. Institutional rights make the *private* institution (in *Troxel*, the parent) into the authoritative decisionmaker over state officials (such as the state judge in *Troxel*). But this role reversal does not affect the application of Raz's theory in any important way, and it underscores the central thesis of this Article that *institutional rights give governing authority to private institutions*. This is no more odd than any other theory of divided sovereignty under which an entity that is normally subordinate to another institution concerning one set of issues can be the superior decisionmaker over another set of issues.¹⁶⁹ If parents have preemptive authority—in my terms, an institutional right to determine the best interests of their children—then they are the governing institution concerning those interests.

How great of a “trump” can an institutional right bestow on a private government? One inherent limit of such authority is that it applies only to those cases where following the authority will improve decisions. There may be situations where this is not the case. In cases where the authority is what Raz calls “clearly wrong,” there does not seem to be any reason for deference to a decisionmaker who is otherwise authoritative (although Raz remains agnostic on the question).¹⁷⁰ For instance, if a parent insisted that her child's welfare would be served by remaining illiterate on the ground that reading breeds sloth and pride, this would be such an obvious error that the decisionmaker should suspend deference. But mere disagreement about an authority's decision is no grounds to ignore it, even if the consequences would be serious if the decision were incorrect.¹⁷¹ As Raz notes,

¹⁶⁹ For such a view of federalism, see Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*, 94 Mich. L. Rev. 554, 610 (1995).

¹⁷⁰ Raz, *supra* note 111, at 62. For the reasons offered by Regan, I believe that “clear errors” of authorities are not entitled to deference but “significant errors” are. See Donald H. Regan, Authority and Value: Reflections on Raz's Morality of Freedom, 62 S. Cal. L. Rev. 995, 1030 (1989). Regan treats Raz's argument for obeying authorities as only one for an “indicator rule”—something akin to a rule of thumb that helps one find the right reasons for action but is not itself binding as a justification for action. *Id.* at 1003-18. I tend to think that his argument is persuasive. This makes Razian authority a good deal less preemptory than Raz himself makes it out to be.

¹⁷¹ For instance, a parent may think that training her child to be a mountain climber will be spiritually and physically uplifting despite the risk of death from the sport. If the risks of the child's death in mountain climbing are no greater than the risks to the parent who accompanies the child, and the parent reasonably incurs these risks on her own behalf,

“there is no point to having authorities unless their determinations are binding even if mistaken.”¹⁷²

In contrast to anticoercion theories, which are jurisdictionally indifferent, under Raz’s theory, authorities are limited by jurisdiction. An authority is entitled to deference only on those questions where deference to the authority’s views will improve the consistency of the decision with the appropriate social norm. Pronouncements by an authority on issues outside the scope of its competence are not entitled to deference. The reasons that an authority offers for its judgment determine whether the authority is acting *ultra vires*. And according to the dependence thesis, reconsideration is preempted only if jurisdictionally appropriate reasons form the basis for the judgment.¹⁷³ Therefore, a decision is *ultra vires* and entitled to no deference if the decisionmaker based the decision on the inappropriate reasons. An example of an *ultra vires* decision would be a parent’s decision to restrict her child’s grandparents’ access to her child in order to extort money from them. Such a decision would not be entitled to deference, even if the child was utterly indifferent to the grandparents and suffered no harm from the decision.

Razian authority, in other words, is critically connected to the *justifications* for decisions rather than the *acts or consequences* that result from the decision. Since the institutional rights of private government that I defend are a species of Razian authority, they depend on reasons as well. Thus, private organizations have rights to make decisions if their justifications are the proper ones for the sphere in which those organizations have jurisdiction. This creates a certain symmetry between rights of private organizations and powers of government: Both are invalid if they are based on improper reasons.¹⁷⁴ Such symmetry should hardly be surprising. Under my theory, the institutional rights of private organizations are, as a matter of principle, indistinguishable from the powers of the state. Both are simply instruments of self-government.

then there is no reason to disregard the parent’s decision on behalf of the child just because the judge might think less of the benefits of mountain climbing and the “downside” (literally) is significant.

¹⁷² Raz, *supra* note 111, at 47.

¹⁷³ *Id.*

¹⁷⁴ Given the extraordinary deference shown by courts to prison officials, it is perhaps surprising how frequently courts will strike down prison regulations that usurp parental authority to determine whether the child’s presence serves the best interest of the child. See, e.g., *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002) (indicating that determination of whether children’s visiting prison will harm children “is for parents to make, not prison officials. Prison officials do not stand in loco parentis for visiting children”); see also *Valentine v. Engelhardt*, 474 F. Supp. 294, 302 (D.N.J. 1979) (“It simply does not lie with jail officials to determine what is in the best interest of the inmates’ children.”).

V

USING THE INSTITUTIONAL THEORY TO EXPLAIN
PARENTAL RIGHTS IN *TROXEL V. GRANVILLE*

There is indication that the U.S. Supreme Court employs institutional reasoning in defining individual rights. I shall use the context of parental rights, as recently expounded by the Court in *Troxel v. Granville*,¹⁷⁵ as an illustration of judicially approved institutional reasoning.

Tommie Granville was the single mother of two daughters. Her boyfriend, who was the father of the daughters, had committed suicide after he and Granville separated.¹⁷⁶ The Troxels, the deceased boyfriend's parents, wanted to maintain a relationship with their grandchildren through regular visits.¹⁷⁷ Unfortunately, Granville and the Troxels disagreed about the amount of visitation: Granville wanted the grandparents to visit only once per month while the Troxels wanted two weekends of overnight visitation per month and two weeks every summer.¹⁷⁸ The Troxels, therefore, filed a petition in state superior court under Washington's visitation statute, which provided that "[a]ny person" may petition for visitation rights and authorizes the court to grant such rights whenever "visitation may serve the best interest of the child."¹⁷⁹ The statute contained no express provision that the trial court should defer to the parent's views in determining what would serve the best interest of the child.¹⁸⁰ Apparently, the trial court paid no such deference to the views of Granville, instead issuing the solomonic judgment that the Troxels should get one weekend per month, one week during the summer, and four hours of visitation on each of the grandparents' birthdays.¹⁸¹

Consider two ways in which the Washington statute could have been viewed as burdening parental rights. First, the statute as applied to Tommie Granville deprived Granville of the right to make a decision concerning her child. The injury to Granville was the substantive decision to give the Troxels visitation rights that Granville, for whatever reason, did not want them to have. Second, the statute arguably did not require the trial court to accord any deference to Granville's judgment about what served the best interest of her daughters.

¹⁷⁵ 530 U.S. 57 (2000).

¹⁷⁶ *Id.* at 60.

¹⁷⁷ *Id.* at 60-61.

¹⁷⁸ *Id.* at 61.

¹⁷⁹ *Id.* at 60 (quoting Wash. Rev. Code § 26.10.160(3) (2002)).

¹⁸⁰ See Wash. Rev. Code § 26.10.160(3) (2002) ("Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.").

¹⁸¹ *Troxel*, 530 U.S. at 61.

(As we shall see, this is a close call because the statute was silent concerning deference to the parents, and it is possible that the “best interest of the child” standard itself implicitly incorporates deference to parental decisions.) If the statute afforded no deference to parental judgments of their children’s interest, then Granville bore a burden that would not have been eliminated by an outcome favorable to her. The very process of having to undergo a hearing in which her views on her children’s welfare would not be given heavy weight constituted an invasion of her jurisdiction to decide what was in her children’s interests.¹⁸²

The substantive and deferential interests just described are instances of an anticoercion and an institutional right respectively. The right to a favorable outcome is simply a right to get one’s way, irrespective of the reasons for one’s desire. Such a right fits my description of an anticoercion autonomy right—a right to self-expression without reference to one’s reasons or any social institutions. The right to deference for one’s judgment is a right to act as an expert authority on a particular question—what will serve the best interest of the child—and have the state accept one’s judgment on the issue as decisive or, at least, entitled to great weight. Thus, the parent claiming the institutional right does not claim any right to exercise of her will; she is instead claiming a right to exercise her judgment, applying the socially and legally established criteria to the decision and preempting the state’s own independent consideration of the criteria. Note that the rhetoric of balancing the child’s interest against the parent’s right, invoked by Justice Stevens in dissent,¹⁸³ is itself an attack on the institutional right because the parent’s claim of authority is that her child’s interest is best served by deferring to her superior judgment concerning that interest. It is as if, in deciding whether to strip the U.S. Supreme Court of jurisdiction over some category of constitutional cases, the Congress balanced the Court’s “interest” to decide what the Constitution means against society’s interest in correct adjudication of constitutional cases. To state the question in this way is to ignore the claim of institutional authority.

In striking down the state visitation statute, the Washington Supreme Court seemed to justify Granville’s right as an anticoercion entitlement. It held that the state could not interfere with Tommie Granville’s decision concerning whom her daughters should visit un-

¹⁸² See *supra* note 159.

¹⁸³ *Id.* at 88 (Stevens, J., dissenting) (“[I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”).

less that decision threatened to do some mental or physical “harm” to the children.¹⁸⁴ The use of the term “harm” evokes a baseline of entitlement under which the parent can make any decision that he or she pleases just so long as the welfare of the child does not decline below a certain objective level (perhaps the level of the average child in the state?). The parent’s reasons for the decision are thus irrelevant. If the parent withheld visitation rights from her daughters’ paternal grandparents simply because she wanted to extort money from them for the privilege, this motive would not defeat the assertion of the parental right if the refusal to allow visits did not upset the children.

Such a concept of parental entitlement disturbed even some of the amici who favored the result,¹⁸⁵ and for obvious reasons. It seemed to reduce children to chattel, as Justice Stevens complained in his dissent and as Professor Dwyer argued in his article.¹⁸⁶ Not surprisingly, the U.S. Supreme Court upheld the state court, but on different grounds.

Did the Court use institutional reasoning to support the result? There was no single majority opinion, and the four-vote plurality opinion by Justice O’Connor contains deep ambiguities. The difficulty with the plurality opinion centers on the basic question of whether the Court was striking down the statute on its face or only as applied to Granville.¹⁸⁷ This question goes to the heart of whether the entitlement is an institutional or anticoercion entitlement: If the flaw in the statute is that it affords no deference to parents’ judgment, then presumably it ought to be facially invalid, for the injury is not the result in a particular case but rather the process that ignores the parents’ preemptive authority.

Justice O’Connor’s plurality opinion seems confused on this issue. It repeatedly states that the Court is holding the statute invalid only as applied to Granville, yet the opinion also seems to find that the injury arises from the fact that the statute is “breathhtakingly broad” in that the statute “contains no requirement that a court accord the parent’s decision any presumption of validity or any weight whatsoever.”¹⁸⁸ Thus, the constitutional injury seems to be that “a parent’s decision

¹⁸⁴ *In re Custody of Smith v. Stillwell-Smith*, 969 P.2d 21, 30 (1998), *aff’d* by *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁸⁵ See, e.g., Brief of Amicus Curiae Lambda Legal Defense & Education Fund at 5-6, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138) (agreeing that petitioners “properly object to the state court’s reasoning”).

¹⁸⁶ *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting); Dwyer, *supra* note 94, at 1413 (quoting Akhil R. Amar & Daniel Widawsky, Comment, Child Abuse as Slavery: A Thirteenth Amendment Response to *Deshaney*, 105 Harv. L. Rev. 1359, 1364 (1992)).

¹⁸⁷ See *Troxel*, 530 U.S. at 57 (O’Connor, J.).

¹⁸⁸ *Id.* at 67.

that visitation would not be in the child's best interest is accorded no deference [by Washington's visitation statute]."¹⁸⁹ "The problem here," the plurality states, "is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughter's best interest."¹⁹⁰ The Court offered an argument for parental preemptive authority rooted in the recognition "that natural bonds of affection lead parents to act in the best interest of their children," creating a "traditional presumption" that the superior court "directly contravened."¹⁹¹

So far, the plurality opinion seems to indicate that the parental right is purely an institutional right to receive deference concerning their judgments about their child's welfare. This conclusion is reinforced by the Court's refusal to remand the case to the state courts for further proceedings, as recommended by Justice Stevens in his dissent.¹⁹² According to the Court, the constitutional injury was not the outcome but the process by which the outcome was reached. Quoting Justice Kennedy's dissent, the plurality states that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'"¹⁹³ Since the right is an entitlement to make determinations, "additional litigation [under a system that afforded those determinations no weight] would further burden Granville's parental right."¹⁹⁴

It would be hard for a judicial opinion to come closer to describing parental rights as institutional rights to make decisions applying appropriate reasons. The institutional nature of the right being invoked, however, should logically make this a facial challenge to the statute because the statute itself affords no deference to parental decisions. Yet the plurality insists that it strikes down only "the application of [the statute] to Granville and her family."¹⁹⁵ Nonetheless, the plurality also considers relevant the specific facts of Granville's case—the fact that Granville was never deemed to be an unfit parent and the fact that Granville did not "ever . . . cut off visitation entirely."¹⁹⁶ According to the plurality, these factors also suggest that "the visita-

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 69.

¹⁹¹ *Id.* at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)), 69.

¹⁹² Compare *id.* at 75 with *id.* at 84-85 (Stevens, J., dissenting).

¹⁹³ *Id.* at 75.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 71.

tion order in this case was an unconstitutional infringement on Granville's fundamental right."¹⁹⁷ At first glance, these statements seem to be themselves violating Granville's institutional authority by judging whether Granville's decision for one visit per month was itself "reasonable."¹⁹⁸ Moreover, they seem to define the injury to Granville as the outcome rather than the process—the loss of power over the child when no great harm to the child would ensue from the exercise of the power because the children had received "reasonable" visitation from grandpa and grandma.¹⁹⁹

Is the plurality opinion then a hopeless muddle of institutional and anticoercion elements? I think not. The plurality is invoking the specific facts of Granville's visitation proceeding to fix the meaning of the statute, not to determine whether Granville respected the interests of her child. The Court faced the difficulty that neither the Washington legislature nor the Washington Supreme Court issued any clear statement about the deference due to parental decisions.²⁰⁰ The statute simply states that trial courts must make decisions that serve the best interest of the child.²⁰¹ But a trial court might very well defer to parental authority on the theory that such deference was required to serve the child's best interest. Although the plurality tried to use the Washington Supreme Court's opinion to support the view that the state law gave no deference to parental decisions, all the plurality could invoke was the state court's silence: "The Washington Supreme Court had the opportunity to give [the statute] a narrower reading, but it declined to do so."²⁰² This is a bit tenuous. The state court did not shed light on the issue of whether the "best interest" standard incorporated deference to parents' judgment because it gave an anticoercion reading to the parental right. It found that *any* application of the "best interest" standard was unconstitutional because the parent had authority to rule over the child absent proof of "harm" to the child. Justice Stevens, therefore, was certainly correct when he asserted that "the state court gave no content to the phrase 'best interest of the child.'"²⁰³

Lacking either a legislative or state supreme court clarification of the statute, the plurality had to look elsewhere to determine what the statute meant. The superior court's opinion provided this clarification.

¹⁹⁷ Id. at 72.

¹⁹⁸ See id. at 71. Note that "reasonable" is my term, not the Court's.

¹⁹⁹ See id. at 67.

²⁰⁰ See id.

²⁰¹ Wash. Rev. Code § 26.10.160(3) (2002); see *Troxel*, 530 U.S. at 67.

²⁰² *Troxel*, 530 U.S. at 67.

²⁰³ Id. at 83 (Stevens, J., dissenting).

tion.²⁰⁴ It was relevant that the state superior court conceded that Granville was a fit parent;²⁰⁵ this eliminated the possibility that the trial court was suspending deference to her decision because of her failure to meet the institutional requirements of a fit parent. It was relevant that Granville had not tried to cut off visitation entirely;²⁰⁶ This fact made it unlikely that the trial court could have found that Granville had acted *ultra vires* out of spite rather than out of a good faith desire to pursue her children's "best interest." Such a fact is directly responsive to Justice Stevens's complaint that states should be allowed to curb parental power "that is not in fact *motivated* by an interest in the welfare of the child."²⁰⁷

In sum, the two grounds for suspending deference to parental authority were missing: The person asserting the authority met the state's own criteria for being a "fit parent," and the parent was acting for the proper motive—pursuit of her child's best interest—and therefore was within her jurisdiction. Yet the trial court ignored the parent's decision. The silence of the Washington Supreme Court in light of this broad reading of judicial power was sufficient grounds for the plurality to find that the statute did not respect the parent's institutional right.

Justice Stevens in dissent did not disagree with any of this analysis in principle. He, too, read "the substantive due process case law" to "include[] a strong presumption that a parent will act in the best interest of her child."²⁰⁸ He simply disagreed about "whether the trial court's assessment of the 'best interest of the child' incorporated that presumption."²⁰⁹ He stated that "the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child"²¹⁰—an odd assertion because nothing in the plurality disagrees with this proposition. I suspect that the Washington Supreme Court's anticoercion reading of parental rights seemed so perverse to him that he wanted the Court to denounce it expressly by reversing the decision and remanding the case.

Justice Souter also interpreted the parental right at stake as an institutional right to respect the judgment of the parent. He con-

²⁰⁴ Id. at 69.

²⁰⁵ Id. at 68.

²⁰⁶ Id. at 71.

²⁰⁷ Id. at 89 (Stevens, J., dissenting) (emphasis added).

²⁰⁸ Id. at 89-90.

²⁰⁹ Id. at 90.

²¹⁰ Id. at 91.

curred separately only because he believed that, in light of the Washington Supreme Court's decision, the statute was facially invalid because it "plac[ed] hardly any limit on a court's discretion to award visitation rights," allowing the judge to override a parental decision "merely because the judge might think himself more enlightened than the child's parent."²¹¹ As noted above, this is a tendentious reading of the state court decision, but this does not affect the institutional nature of Justice Souter's understanding of the right.

In short, there are at least five votes in *Troxel* that give parental rights an institutional reading and reject the anticoercion view of the state supreme court. As I have suggested above in Part II.B.3, I think that this is the only understanding of parental rights that can make sense of them without reducing children to property. Moreover, the structure of such rights mirrors Raz's concept of governmental authority so exactly that I believe they can be fairly characterized as rights of a private government.²¹²

²¹¹ Id. at 77, 79 (Souter, J., concurring).

²¹² A similar structural analogy is proposed by Ira C. Lupu in *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. Rev. 971, 976-77 (1987), and *Separation of Powers and the Protection of Children*, 61 U. Chi. L. Rev. 1317 (1994). Although I applaud the methodology and admire the articles, I disagree with Professor Lupu's specific application of the concept of separation of powers, which relies on Professor Amy Gutmann's idea that a single group should not have ultimate control over the upbringing of children. See Amy Gutmann, *Democratic Education* 22-29, 41-46 (1999). Professor Lupu infers from this alleged imperative to avoid undivided control that parents should not be able to home educate their children, as this deprives "professional educators" of the right to influence children. See Lupu, *The Separation of Powers and the Protection of Children*, supra, at 1353-59; see also Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, supra, at 982. As I explain below, I regard such unified control as necessary rather than pernicious. Professor Lupu's mistake, I argue, comes from misapplication of the concept of separated powers. The idea of separated powers is that the legislative and executive functions should be distinct from each other, not that executive control must somehow be divided among multiple decisionmakers. This suggests that somebody other than parents ought to have control over general standards for education—say, the curriculum—while parents should have the power to carry out that curriculum in the manner they see fit—say, through home education rather than the public or private schools. Some courts, indeed, have suggested that legislatures should only be able to impose "performance standards" (e.g., performance on standardized tests) rather than "input standards" on home educators. See, e.g., *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182, 1186-87 (Mass. 1998) (barring school district from requiring parents to submit to "home visits" by school officials as condition for engaging in home education). This seems to me to be a more apt application of the analogy to separation of powers to the family context than Professor Lupu's argument, if only because children might seem to benefit from single-minded parenting rather than gridlock that pure diffusion of power might produce. But I leave this issue for another article.

VI

USING THE INSTITUTIONAL THEORY TO EXPLAIN BSA'S
RIGHTS IN *BOY SCOUTS V. DALE*

Parental rights are not the only associational liberties that could be clarified by thinking about them institutionally and abandoning anticoercion dogma. Consider, for instance, the First Amendment freedom of expressive association, recently discussed by the Court in *Boy Scouts of America v. Dale*.²¹³ In what follows, I will offer some reasons to believe that institutional thinking might clarify the idea of expressive association analyzed in *Dale*. Because the argument that follows is detailed and perhaps unfamiliar, a summary of the crucial points is in order.

As I explain in Part VI.A, an organization's claim of a right to expressive association is essentially an institutional claim—that is, an assertion of preemptive authority concerning how best to express and deliberate about the membership's shared beliefs. Just as the parent asserts preemptive authority to determine what serves the best interest of the child, so too, organizations like the BSA assert preemptive authority to determine what structure best serves the values of scouting. To determine whether an organization like the BSA deserves such preemptive authority, one must ask the same question that one asks with parents: Is a court more likely to reach a correct decision if it defers to the organization's decision about how to advance its members' shared beliefs and values than if it defers to the state legislature regulating the organization?

There are some good reasons to believe that courts and legislatures are not as well-suited as at least certain categories of private organizations at deciding what the organizations' members "really" believe or how such beliefs ought to be advanced. The difficulty is that the members' interest in organizations' expression is not the remedially simple, jurisdictionally indifferent private good described by anticoercion theory. Members do not simply want organizations to act as a megaphone to trumpet their individual views to the world external to the organization. Instead, members often want organizations to perform a more institutionally complex function of promoting internal debate on a limited range of topics about which the membership with similar but not identical views has not yet reached a consensus. Creating such a forum is a delicate matter of collective governance requiring institutional choices about membership, voting rules, and topics that are either foreclosed or up for grabs. Courts and

²¹³ 530 U.S. 640 (2000).

legislatures are not necessarily as competent to make these decisions as the private organizations themselves.

Consider, for example, the following institutional issues. Some members of an organization may make nominal commitments to an organization by sending a check for the newsletter, while others may make massive commitments of time and money: Should their “votes” count equally? What sorts of rules for registering members’ beliefs will both reflect the consensus among the rank-and-file yet still preserve the leadership role necessary to attract the die-hards who sustain the organization with their volunteer work? How can the organization maintain a heterogeneous membership by avoiding schism and secession while still maintaining enough “brand recognition” to attract new members and retain the loyalty of the “alumni”? What sorts of debate, election, or decentralization mechanisms will provide the satisfaction of a fair fight without excessive partisan rancor? All of these are critical questions of institutional design that courts would have to answer if they were to follow the suggestion and try to decide what an organization “really” stands for.²¹⁴ I will suggest in Part VI.A that the *Dale* majority was correct to hold that these questions are beyond the competence of the Court.

On the other hand, Justice Stevens was correct to chide the *Dale* majority about the boundless scope of their definition of “expressive association.”²¹⁵ I argue in Part VI.B that the Court should use a less sweeping method than the *Dale* majority’s doctrine for assessing organizational claims of expressive association. My institutional theory requires the Court to ask two questions. First, the Court should ask whether, in light of its structure and incentives, the organization is institutionally better suited for promoting expression of, deliberation of, and debate about the membership’s values than the state or federal legislature from which the organization seeks constitutional immunity. Organizations that are well-suited for promoting such debate about their memberships’ values should be regarded as “expressive associations” entitled to deference from the state or federal government (including state and federal courts) concerning how best to express the views of their members. Other organizations should not receive such deference. Second, the Court should determine whether the purpose

²¹⁴ Justice Stevens responds to BSA’s contention that it teaches homosexuality is immoral by requiring an analysis “to look at what, exactly, are the values that BSA actually teaches.” *Id.* at 665 (Stevens, J., dissenting).

²¹⁵ See *id.* at 685-88. Justice Stevens describes the majority’s definition as “an astounding view of the law” that the “analysis of the scope of a constitutional right [should be] determined by looking at what a litigant asserts in his or her brief and inquiring no further.” *Id.* at 686.

of state or federal law is to interfere with the expressive decisions of an expressive association's leadership. If state or federal law has such a purpose, then the Court should hold that the law violates the organization's entitlement to preemptive authority over issues of expression. If the law has a different purpose, then the organization's expertise in promoting internal debate and expression is simply beside the point. The Court should uphold the law because the law addresses an entirely different concern.

Whether the incentives or structure of BSA or similar recreational clubs entitle them to such preemptive authority is a difficult question I explore below in Part VI.C. I am inclined to think that *Dale* was correct to regard the BSA as an expressive association. The more difficult question is whether the New Jersey state legislature's antidiscrimination statute should be regarded as usurping the Boy Scouts' constitutional authority to structure internal debates concerning the moral status of homosexuality. I argue that this issue turns on whether the purpose of New Jersey's statute was to "send a message" that the Boy Scouts' attempt to stigmatize homosexuality as immoral was improper. On this issue, the record in *Dale* is so hopelessly ambiguous that it is impossible to reach any firm conclusion concerning the merits of the case.²¹⁶ However, the more important mission of this Article is to ask the correct question. The issue is not whether the BSA's leadership "really" disapproves of homosexuality or whether the BSA's various documents proclaim such a goal with sufficient clarity. The critical issues instead ought to be (1) whether the BSA is so well-suited for representing its members' values that it ought to receive deference from New Jersey's government concerning their expression of these values and (2) whether New Jersey's antidiscrimination law actually sought to alter the message sent by the BSA's discriminatory actions.

A. *The Complexity of Private Governance: Why Courts Can't Know What Members "Really" Want*

Can a court figure out what the members of an organization "really" believe? This is the question raised not only by Justice Stevens's dissent in *Dale*²¹⁷ but also by some recent scholarship on associational freedom and the First Amendment.²¹⁸ Justice Stevens lays out what I

²¹⁶ See *infra* Part VI.C.

²¹⁷ See *supra* note 214.

²¹⁸ See, e.g., Madhavi Sunder, *Cultural Dissent*, 54 *Stan. L. Rev.* 495 (2001). Sunder argues that the *Dale* Court mistakenly accepted the BSA's leadership's image of scouting as a culturally conservative and heterosexual practice. *Id.* at 558-59. She urges courts to recognize that there might be dissenting groups within an organization who reject the lead-

will call the “megaphone” theory of First Amendment expressive liberties. The basic (although unarticulated) premise of Justice Stevens’s theory is that the First Amendment merely protects associations’ role of amplifying the members’ voices so that they can express their own individual opinions but at a louder volume. The job of courts in assessing First Amendment expressive association claims under the “megaphone” theory is to examine the association’s documents to figure out if the members of the association “really” intend to express an opinion. As I explain below, I think that such judicial efforts to psychoanalyze associations are misguided because they miss the institutional complexity of associations’ representation of their members. Institutions are not only amplifiers of their members’ beliefs but also fora for members’ internal debate. Because creating and managing such fora is often a task beyond the ken of courts and legislatures, First Amendment doctrine bars courts and legislatures from interfering with private associations’ forum-creating decisions.

1. Why Justice Stevens’s Anticoercion Theory Does Not Adequately Account for the Expressive Functions of Organizations

The issue in *Dale* was whether New Jersey could forbid the Monmouth Council of the Boy Scouts of America from firing a scoutmaster, James Dale, because he was gay.²¹⁹ A New Jersey statute prohibited a “public accommodation” from discriminating on the basis of sexual orientation,²²⁰ and the New Jersey Supreme Court gave the term “public accommodation” an extremely capacious interpretation to cover the Monmouth Council’s scouting activities.²²¹ The BSA argued before the U.S. Supreme Court that this prohibition on discrimination interfered with their freedom of expressive association, in violation of the First Amendment’s free speech clause, because it forced the BSA to retain a scoutmaster whose conduct and opinions contradicted the BSA’s policy that homosexual relationships and acts

ership’s portrayal of the organization’s values. *Id.* at 555-57. However, Sunder’s argument implicitly accepts the premise of both the majority and dissents in *Dale*—that it is desirable for courts and legislatures, rather than private organizations, to determine what an organization’s members “really” believe. Sunder ignores completely the possibility that the structure of nonprofit, federated societies like the BSA might provide opportunities for dissenters to challenge the leadership through voice and exit.

²¹⁹ *Dale*, 530 U.S. at 644.

²²⁰ N.J. Stat. Ann. § 10:5-51 (West 2003).

²²¹ *Dale*, 530 U.S. at 646. The New Jersey Supreme Court stated that “public accommodations” were defined by three characteristics: They “engage[d] in broad public solicitation,” “maintain[ed] close relationships with the government or other public accommodations,” and were “similar to enumerated or other previously recognized public accommodations.” *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1210 (N.J. 1999).

were immoral.²²² The Court agreed, holding that the BSA was an “expressive organization”²²³ and, as such, could not be forced “to accept members where such acceptance would derogate from the organization’s expressive message.”²²⁴

In analyzing whether the BSA is an expressive association, Justice Stevens’s dissent painstakingly analyzed various mission statements, letters, and handbooks of the BSA in an effort to show that “BSA never took any clear and unequivocal position on homosexuality.”²²⁵ Justice Stevens argued that this inquiry was constitutionally relevant because it cast doubt on “the credibility of BSA’s claim to a shared goal that homosexuality is incompatible with Scouting.”²²⁶ Absent more evidence showing “how [BSA’s] exclusivity was connected to its expression,”²²⁷ he found no basis for protecting the exclusivity under the First Amendment. Justice Stevens asserted,

[N]othing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State’s antidiscrimination law does not impose a “serious burden” or a “substantial restraint” upon the group’s “shared goals” if the group itself is unable to identify its own stance with any clarity.²²⁸

Instead, the First Amendment protects associational action that helps foster associational speech only if the association can “show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.”²²⁹

Why require that associations speak with unequivocal clarity? Such a requirement seems simultaneously too protective and not protective enough. Suppose that Acme, Inc. (the proverbial widget manufacturer) plastered the unequivocally clear message “Down with Unions!” on invoices, cocktail napkins, company stationery, company uniforms, and the CEO’s tie. Does this mean that they can, despite the National Labor Relations Act,²³⁰ fire employees who try to organize a collective bargaining unit? Surely not, but Justice Stevens’s proposed test would seem to suggest otherwise. On the other hand, Justice Stevens’s position would also deny protection where common

²²² *Dale*, 530 U.S. at 653.

²²³ *Id.* at 650.

²²⁴ *Id.* at 661.

²²⁵ *Id.* at 676 (Stevens, J. dissenting).

²²⁶ *Id.* at 677.

²²⁷ *Id.*

²²⁸ *Id.* at 685.

²²⁹ *Id.* at 687.

²³⁰ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

sense suggests that protection should be extended.²³¹ Why should the First Amendment bestow more protection on organizations that have “unequivocal” views? Is there some First Amendment policy favoring strident and uncompromising organizations? Suppose that the *Wall Street Journal*’s written policies say nothing specific about employment of editors who believe in the free market, but the publisher decides that he wants to hire someone with free-market tendencies and therefore rejects a socialist candidate. If New York’s laws prohibited discrimination on the basis of political belief (as several states do), then would the *Wall Street Journal* have no First Amendment interest in resisting New York’s antidiscrimination law simply because its expressive interest is executed in an ad hoc rather than “unequivocal” way?

I do not mean to suggest that Justice Stevens’s theory is senseless. There is a logic to his view—albeit the flawed logic of anticoercion theories. His insistence that an organization’s views be “unequivocal” makes eminent sense if one believes that the First Amendment protects only the association’s function of amplifying the members’ voices so that they can express their preassociational opinions effectively to the world outside the association. Under this view, it makes sense that the First Amendment would not protect the ambiguous, equivocal organizational views; such views cannot be easily attributed to the members themselves. One can assume that an association’s members will be aware of, and thus endorse, only those few policies that an association expresses loudly, unequivocally, and repeatedly. Equivocal expression cannot be protected expression, under this view, because it is *ultra vires* expression—unauthorized by the delegation of authority from members to the organization’s leadership.

Professors Erwin Chemerinsky and Catherine Fisk outline such a view of associational liberties when they argue that “the focus [for the doctrine of expressive association] should be on the association’s members’ interests, and not simply those of the group as a group.

²³¹ Justice Stevens’s view also seems inconsistent with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Court held that the South Boston Allied War Veterans Council was constitutionally entitled to exclude a gay and lesbian organization from the St. Patrick’s Day parade that it organized. There was no indication in *Hurley* that the South Boston Allied War Veterans Council had consistently taken “unequivocal” positions on homosexuality before they barred marchers from their parade. Justice Stevens distinguishes *Hurley* on the ground that a parade is a more overt form of expression than a Boy Scout troop and that the Irish-American Gay, Lesbian, and Bisexual Group of Boston was more overt about its political position than *James Dale*. *Dale*, 530 U.S. at 693-95. But the overtness of the expression should be irrelevant if only an association’s “unequivocal” expression is protected by the First Amendment’s doctrine of expressive association.

From this perspective, the inquiry should include, and be primarily about, what the individual members of the organization understand to be its associational message.”²³² The BSA could show a burden on their First Amendment right of expression on this view only if they could “prove that its members see the group as being about disapproval of homosexuals as expressed through their exclusion”—a proof that Chemerinsky and Fisk believe would be difficult, given that “[t]he Boy Scouts do not award badges for sexuality.”²³³

Justice Stevens’s and Chemerinsky’s and Fisk’s “megaphone” theory of associations is a cramped and overly narrow view of the expressive functions that associations perform. But before exploring the inadequacies of the Stevens-Chemerinsky-Fisk theory, it is useful to note how it is a species of anticoercion theory. Recall the definition of anticoercion theories in Part II.A: They conceive of rights as jurisdictionally indifferent, remedially simple entitlements to private goods. Likewise, the “megaphone” theory also regards the right of expressive association as an entitlement to a private good—the benefit of having one’s own opinions publicized more widely. There is no entitlement to some collective good such as a forum for debate that other people will also enjoy and which must necessarily be produced and managed collectively. Moreover, Chemerinsky and Fisk conceive of this right as remedially simple: It is vindicated simply by ensuring that associations say what (most of) their members want them to say. A court can figure this out simply by taking a poll of the membership or scrutinizing a few of the association’s documents that reflect membership opinion. The court need not think about complex matters such as (for instance) how best to foster internal debate while preventing schism in the organization’s ranks. Finally, the “megaphone” theory is a jurisdictionally indifferent theory. The source of the burden on the individual’s expression—whether the burden comes from the association, the state legislature, or the court—simply does not matter because the individual’s only interest is in expressing his or her own opinions more loudly, not in participating in a particular kind of deliberative structure. If the association does not express the individual’s own preassociational opinions, then the individual no longer has any interest in the association’s expression.

The inadequacies of the “megaphone” view of expressive association are a good example of the inadequacies of anticoercion theory more generally. As explained earlier in Part IV.A, anticoercion the-

²³² Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 Wm. & Mary Bill Rts. J. 595, 607 (2001).

²³³ *Id.* at 608.

ory cannot explain how organizations contribute to individual autonomy—how organizations preserve individuals' power to make meaningful choices regarding their social role, deliberate about their ends, exercise power in the world, and participate in systems of collective governance that advance their ends, including their interest in expression. Likewise, the "megaphone" theory of expressive association does not account for the ways in which associations advance members' expression in ways more complex than simply amplifying it. The members' interest in an autonomous organization is, in short, not the remedially simple, jurisdictionally indifferent entitlement to private goods portrayed by anticoercion theorists like Chemerinsky and Fisk.

Consider, first, how the BSA might try to be not only a megaphone but also a forum in which people with widely different political and cultural backgrounds can gingerly discuss delicate issues concerning childrearing. Once one confronts this possibility, one will recognize—as Chemerinsky and Fisk do not—that promoting speech on controversial public matters is a difficult institutional task that sometimes can only be accomplished through indirection and compromise. The difficulty is that many people (at least nonacademics) find eristic speech on controversial matters unpleasant both to utter and to hear. As Nina Eliasoph has documented, people frequently fear that they will appear to be self-important windbags if they declaim on issues outside their immediate private concern.²³⁴ This fear often leads people to frame their arguments in terms of personal self-interest simply to avoid the accusation of grandstanding.²³⁵ Public speakers also run the risk of offending their audience with unpopular views, giving them an incentive to falsify their views or simply remain silent.²³⁶ Public listening as well as public speaking is costly. The experience of listening to speakers who differ with one's own views is psychologically disagreeable for many, perhaps most, people.²³⁷

Therefore, to foster a forum for discussion of public affairs, the association's leadership must somehow overcome the natural reti-

²³⁴ Nina Eliasoph, *Avoiding Politics: How Americans Produce Apathy in Everyday Life* (1998). Eliasoph's study is based on her observation and interview of members of various groups—activists, social clubs like the Buffaloes, volunteer groups, and country-western dancers. Eliasoph uses the term "mandatory Momism" to describe this reluctance to express any view that transcends one's narrow, familial interests. Momism tends to avoid any discussion of difficult policy issues and instead reduces policy making to saccharine civic bromides such as "We've got to do it for the kids!"

²³⁵ *Id.*

²³⁶ Kuran, *supra* note 128, at 177-78.

²³⁷ See Robert E. Lane, *The Joyless Polity: Contributions of Democratic Processes to Ill-Being*, in *Citizen Competence and Democratic Institutions* 329, 351-52 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

cence of the members to provoke controversy. On top of this difficulty is a further problem: Associations cannot provide a forum for debate unless they manage to retain a heterogeneous membership with significant political and cultural diversity. An organization composed entirely of left-of-center professionals with a declared loyalty to, say, the principle of gay equality is not likely to experience much interesting internal debate on the question of whether homosexuality is immoral. If one's mission is to create a forum where people unfamiliar with this view will interact with people who hold such a position, then one must somehow retain very different constituencies within the same organization. Maintaining this heterogeneity is no easy task. It is a familiar point that there is a tendency for the membership of organizations to become more polarized and less heterogeneous over time, as members of one faction or another press for the organization to take stands that offend the moderate members, leading them to depart and thereby further polarizing the organization.²³⁸ As organizations "unravel" in this way, they become echo chambers, where the remaining members' viewpoints are further polarized simply by their continued interaction only with the like-minded.²³⁹ Thus, organizations with unequivocal views can cease to be true debating fora because all of the members share too many beliefs to disagree in any important way.

Faced with these difficulties, an organization might create a forum for deliberation by *abstaining* from prematurely taking strong positions on controversial issues.²⁴⁰ This apparent paradox disappears if one assumes that members will take controversy only in small doses. In order to prevent the group from unraveling, as moderates flee an organization that appears to be captured by die-hards, the organization might suppress or exclude the die-hards. It must also emphasize nonideological benefits of pure socializing as bait to retain members who will be aggravated by the inevitable controversial decisionmaking that the organization's members must confront.²⁴¹ Keeping its "platform" larded with vague civic bromides, providing lots of opportunities for social events and field trips, and only occasionally plunging into controversial policymaking—usually in order to differentiate it-

²³⁸ Paul Edward Johnson, *Unraveling in Democratically Governed Groups*, 2 *Rationality & Soc'y* 4, 9-11 (1990).

²³⁹ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 85-86 (2000).

²⁴⁰ As David Truman famously observed fifty years ago, groups will moderate their views to insure that their members are not forced to confront conflicts created by their multiple affiliation. David B. Truman, *The Governmental Process* 157-58 (1951).

²⁴¹ See Sidney Verba et al., *Voice and Equality* 124-25 (1995).

self from other organizations and to prevent one or another faction from seceding in disgust with the organization's lack of any discernible viewpoint—might be understood as tactics organizations employ in order to remain viable. Broad-based political parties and mainstream civic groups adopt this approach for dealing with controversy.²⁴² Arguably, civic clubs like the BSA do the same thing. This does not mean that the members of such clubs and groups never engage in controversial speech but only that they do so in small doses to avoid schism and secession.

Because they regard associations as nothing more complex than a megaphone, Chemerinsky, Fisk, and Stevens naturally cannot regard such associations as expressive organizations. To quote Justice Stevens, they “speak[] out of both sides of [their] mouth[s]” and are “unable to identify [their] own stance with any clarity” because they avoid clear-cut positions.²⁴³ How can such an organization claim the protection of the First Amendment's freedom of expression, when it is not amplifying any clear-cut expression? But associations might maintain mealy-mouthed platforms precisely because they are trying to preserve themselves as internal forums for micro-debates—small-scale, day-to-day interaction and discussion of low-level disagreements by people with very different social and political backgrounds. They sacrifice clarity in their external pronouncements for the sake of a more diverse internal membership.

Justice Stevens and his scholarly allies are free to stipulate that such organizations cannot be expressive organizations because small-scale quotidian internal debate is not itself speech worth protecting. However, purely civic organizations have traditionally performed an important role in providing a forum for debate on matters of public concern. As Theda Skocpol documents, groups that lack sharply de-

²⁴² A voluminous literature exists on the nonprogrammatic nature of American political parties. See, e.g., Paul Kleppner, *Critical Realignment and Electoral Systems*, in *The Evolution of American Electoral Systems* 3, 3-4 (Paul Kleppner ed., 1981); Theodore J. Lowi, *Party, Policy, and Constitution*, in *The American Party Systems: Stages of Political Development* 238, 259 (William Nisbet Chambers & Walter Dean Burnham eds., 1975). On civic groups' unwillingness to adopt controversial stances, see Eliasoph, *supra* note 234, at ch. 9; Mansbridge, *supra* note 74, at 160-62 (discussing volunteer crisis center's fear of simultaneous belief in open discussion and frequent resort to backdoor negotiating). For a detailed empirical examination of how a broad-based civic organization's leadership responds to the beliefs of rank-and-file members to avoid losing those members, see Lawrence S. Rothenberg, *Linking Citizens to Government: Interest Group Politics at Common Cause* 187-89 (1992). For discussions on churches, see generally Robert Wuthnow, *The Small-Group Movement in the Context of American Religion*, in “I Come Away Stronger”: How Small Groups Are Shaping American Religion 344 (Robert Wuthnow ed., 1994).

²⁴³ *Boy Scouts of America v. Dale*, 530 U.S. 640, 685 (2000) (Stevens, J., dissenting).

financed public positions (e.g., the Freemasons, the VFW, Oddfellows, Rotarians) were a critical forum in the nineteenth and twentieth centuries for citizens to gain experience in public rituals; drafting and application of bylaws, constitutions, rules, and procedures; and public speaking.²⁴⁴ The direct participation provided by such clubs also has fostered a visceral sense of democratic equality—the “democracy of everyday life,” in Judith Shklar’s phrase²⁴⁵—necessary to sustain actual belief in one’s equal entitlement to govern society.²⁴⁶ The federated, decentralized structure of private fraternal organizations like the BSA makes them the single most important arenas for recruiting Americans into politics, beating the workplace, neighborhood, and mass mailings in significance,²⁴⁷ perhaps because they mix politics with solidaristic gratifications—rituals, picnics, pure socializing—that help to overcome “free rider” problems which otherwise thwart political organizing.²⁴⁸

Should these sorts of organizations be able to claim that their membership policies and other decisions are immune from state regulation under the First Amendment? The answer depends on (1) whether one thinks that the fine-grained discussion that they promote is “speech” worthy of First Amendment protection and (2) whether one believes that state regulations that interfere with the organizations’ autonomy are a substantial threat to such organizations’ efforts to promote such speech. I address these questions below in Part VI.B. However, Justice Stevens and Professors Chemerinsky and Fisk cannot even ask—let alone answer—these questions because they cannot imagine an expressive role for organizations that is more institutionally complicated than an amplifier.

²⁴⁴ See Theda Skocpol, *How Americans Became Civic*, in *Civic Engagement in American Democracy* 27, 65-70 (Theda Skocpol & Morris P. Fiorina eds., 1999).

²⁴⁵ Judith N. Shklar, *Ordinary Vices* 77 (1984).

²⁴⁶ See Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* 73-74 (1995) (noting how lodge leaders “were made and unmade by their brothers, and all parties in the process assumed an underlying equality”). Judith Shklar’s idea is that democracy is critically sustained by the habits inculcated by everyday life—in particular, a certain easy-goingness about one’s own dignity and a sense of equality with other citizens. For a discussion of this concept, see Nancy L. Rosenblum, *Navigating Pluralism: The Democracy of Everyday Life (and Where It Is Learned)*, in *Citizen Competence and Democratic Institutions* 67, 76-78 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (arguing that people gain political competence in small group associations, in which they learn to treat people equally and speak against injustice).

²⁴⁷ Verba et al., *supra* note 241, at 144-45, 378.

²⁴⁸ *Id.* at 124-25.

2. *Dale's Failure to Set Limits to the Concept of Expressive Association*

If Justice Stevens understates the expressive role of private associations, the *Dale* majority seems to place no meaningful limits on the definition of "expressive associations." According to *Dale*, the Court will "give deference to an association's assertions regarding the nature of its expression" as well as "an association's view of what would impair its expression."²⁴⁹ But there must be some limit to this deference if *Dale* is not to gut the nation's antidiscrimination laws. If Exxon declares that its shareholders' anti-union views will be impaired by complying with the Wagner Act, does this assertion give Exxon immunity from laws protecting collective bargaining? One assumes not, but one looks in vain to *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations.

Dale offers essentially two reasons to believe that the BSA is an expressive association. First, *Dale* notes that the BSA's mission is to instill values in children: "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."²⁵⁰ But this assertion cannot be as "indisputable" as the Court argues, given that the Court itself implicitly disputed it in *Runyon v. McCrary* when it held that a racist private school had no First Amendment entitlement to exclude black children from its student body.²⁵¹ Undoubtedly, Bobbe's School and the Fairfax-Brewster School (the defendants in *Runyon*) sought to transmit (racist) values. *Runyon*, however, perfunctorily rejected their First Amendment claim by relying on the lower court's determination that "there is no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."²⁵² Why is the BSA more threatened by New Jersey's antidiscrimination law?²⁵³

²⁴⁹ 530 U.S. 640, 653 (2000).

²⁵⁰ *Id.* at 650.

²⁵¹ 427 U.S. 160, 175-76 (1976).

²⁵² *Id.* at 176 (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)).

²⁵³ David Bernstein has suggested that *Runyon* can be distinguished from *Dale* on the ground that it "involved a for-profit, commercially-operated school." David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 Wm. & Mary Bill Rts. J. 619, 626 (2001). But this reasoning is inadequate on two grounds. First, contrary to Professor Bernstein's assertion, there is no indication in *Runyon* that Bobbe's School was a "for-profit" school: The Court simply said that it was "commercially operated," meaning presumably that it charged tuition. *Runyon*, 427 U.S. at 168. Second, and more important, neither Bernstein nor the Court can explain why an organization's charging of money for its services should affect the analysis of its First

Second, *Dale* notes that the BSA has made many bland statements endorsing civic values, quoting from the BSA oath (“[o]n my honor I will do my best [t]o do my duty to God and my country”);²⁵⁴ mission statements about how the BSA seeks to “instill values in young people”;²⁵⁵ Executive Committee position statements about how the BSA does not wish to retain gay scoutmasters;²⁵⁶ and similar statements in the BSA’s briefs filed with the Court.²⁵⁷ But this labor simply establishes the obvious—namely, that the BSA’s official policy of firing gay scoutmasters is intended to express moral disapproval of homosexuality, so, as part of this policy, the BSA fired James Dale. As Justice Stevens notes, there is nothing in this record to distinguish the BSA from the Jaycees, the social and civic association for aspiring businessmen,²⁵⁸ the regulation of which was upheld in *Roberts v. United States Jaycees*.²⁵⁹ Like the BSA, the Jaycees had bylaws indicating a mission to promulgate vague civic uplift such as “a spirit of genuine Americanism and civic interest” as well as “true friendship and understanding among young men of all nations.”²⁶⁰ These phrases are vague, but so are the mission statements of the BSA, which refer only to generally promoting “clean” living and “morally straight” behavior.²⁶¹ The BSA’s officers sincerely believed that the BSA should discriminate against gay and lesbian persons as part of their moral mission, but there is little doubt that the Jaycees’ officers also believed that exclusion of women would foster *their* mission of establishing an atmosphere of male camaraderie.²⁶²

Against both the majority and the dissent in *Dale*, Justice O’Connor has expounded a third theory in her concurring opinion in *Roberts*—the view that commercial organizations enjoy minimal rights of association under the First Amendment simply because they are “commercial.”²⁶³ According to Justice O’Connor,

Amendment rights. Does the *Wall Street Journal* cease to be an expressive association because you have to pay for it?

²⁵⁴ *Dale*, 530 U.S. at 649.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 651-52.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 684-85 (Stevens, J., dissenting).

²⁵⁹ 468 U.S. 609 (1984) (holding that application of Minnesota antidiscrimination law to compel Jaycees to accept women as members does not abridge male members’ First Amendment rights).

²⁶⁰ *Id.* at 612-13.

²⁶¹ *Dale*, 530 U.S. at 650.

²⁶² Erwin Chemerinsky and Catherine Fisk make a similar argument that the majority’s reasoning seems to give unlimited immunity from antidiscrimination laws to any organization with a sincere aversion to a group protected by those laws. See Chemerinsky & Fisk, *supra* note 232, at 599-600.

²⁶³ *Roberts*, 468 U.S. at 632-38 (O’Connor, J., concurring in judgment).

[A]n organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities. While the Court has acknowledged a First Amendment right to engage in nondeceptive commercial advertising, governmental regulation of the commercial recruitment of new members, stockholders, customers, or employees is valid if rationally related to the government's ends.²⁶⁴

The difficulty with Justice O'Connor's theory, however, is that it places unsupportable weight on the distinction between commercial and noncommercial organizations.²⁶⁵ Theaters, newspapers, and bookstores are frequently for-profit commercial enterprises, but it defies common sense to believe that the Court would use a "rational basis" test to evaluate state laws that restricted such organizations' personnel decisions. For instance, suppose that a theater wished to produce *Porgy and Bess* with a largely black cast. Does Justice O'Connor really believe that the enforcement of state or federal antidiscrimination law to prevent such an artistic decision would raise no substantial First Amendment issue? Or suppose that a magazine with a Left-Liberal ideological bent—say, *Mother Jones* or *The Nation*—were to refuse to hire a prospective editor because he or she were a member of the Republican Party. Is Justice O'Connor really insisting that the First Amendment would pose "minimal" barriers to a state's interference with this editorial hiring decision? Such a position seems so absurd that to state the conclusion is to cast doubt on the premise from which it springs.²⁶⁶

In short, the *Dale* Court and Justice O'Connor's "commerce" theory both grope toward a theory of expressive association. But their reasoning seems completely inadequate to explain and cabin the doctrine. Is there any way that the institutional considerations outlined in Part IV.B might help?

²⁶⁴ Id. at 635.

²⁶⁵ For a concise and astute analysis of the misplaced weight that the Court places on the commerce-noncommerce distinction in First Amendment and Commerce Clause jurisprudence, see Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *Fordham L. Rev.* 2161 (2001).

²⁶⁶ Justice O'Connor might respond that for-profit newspapers, theaters, and other organizations that sell speech are somehow not "commercial" organizations. As a literal interpretation of the term "commerce," this seems thin, given that newspapers and theaters sell goods and services. See *Associated Press v. NLRB*, 301 U.S. 103 (1937) (holding *Associated Press* to be engaged in interstate commerce within meaning of National Labor Relations Act and Commerce Clause of Constitution).

B. An Institutional Theory of Expressive Association

The institutional theory of the First Amendment that I propose is similar to Bruce Hafen's theory of "First Amendment institutions," which he lays out to explain the special deference that public schools receive when they regulate speech to advance an academic mission.²⁶⁷ Hafen argues that public schools' disciplinary policies that seem, at least in the short run, to suppress student speech can actually *facilitate* the First Amendment by promoting values necessary to sustain a system of free speech.²⁶⁸ I will broaden Hafen's insight to apply to public and private organizations generally: *Many* organizations may (because of their incentives, structure, etc.) be better suited for advancing First Amendment values than the federal, state, and local governments themselves. It is this special "expertise" (for lack of a better word) that entitles them to preempt other governments' regulation, not the members' desire, however sincere, to express themselves. I argued in Part III.B.3 and Part V that parental rights to control the upbringing of their children cannot rest on the importance of such rights to parents. Likewise, both the majority and the dissent in *Dale* make the mistake of thinking that organizational rights to expressive association rest on whether the organization really, truly, sincerely wants to send a message on some topic.²⁶⁹ But sincerity or kindred notions are—or should be—irrelevant to the question. As with parents, so too with BSA and other clubs and groups, the issue of immunity from public government's law is jurisdictional—whether the right government is controlling the right issue. If the governing structure of the BSA, the Rotarians, the *New York Times*, or Mom and Dad make these private governments better suited for promoting speech, then the regulations of these private governments should preempt contrary state, federal, and local regulations. Otherwise, they should have no preemptive authority, regardless of whether they have been unequivocally clear that they really want to send a message on some issue.

As outlined in Part IV.B, an institutional theory of expressive association would ask two questions. First, the theory would ask whether some private association was more likely to advance the constitutionally relevant values than either judges or legislatures. In the context of the First Amendment's protection of expression, for instance, one would ask whether some sorts of associations are better

²⁶⁷ Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structure*, 48 Ohio St. L.J. 663, 720-22 (1987).

²⁶⁸ *Id.* at 666, *passim*.

²⁶⁹ See *Dale*, 530 U.S. at 651 (Rehnquist, J.) (delving into written record to prove "the sincerity of [BSA's] professed beliefs"); 530 U.S. at 665 (Stevens, J., dissenting) (asking, also, "what, exactly, are the values that BSA teaches").

suited for promoting debate on matters of public concern than legislatures or judges. Second, one would ask whether the law contradicts the private organization's judgment on an issue about which the organization has superior expertise. If the answer to both of these questions is "yes," then the law violates the organization's First Amendment right of expressive association.

1. Three Criteria for Defining "Expressive Associations"

The first prong of the institutional test for expressive association rights is to ask whether the private association asserting such rights is especially well-suited to promote speech. Consider three characteristics of private organizations that might be relevant to whether they are well-suited for the promotion of speech on public concerns: (1) specialization in controversial speech on public matters; (2) maintenance of a socially or culturally heterogeneous membership; and (3) maintenance of a membership with lateral connections to each other. I shall discuss each of these criteria in turn.

a. Organizations That Specialize in the Production of Speech

First and most obviously, some private associations specialize in the sale of controversial speech (or forums for speech) and thus have some expertise in drawing and holding the attention of a crowd. Newspapers, comedy clubs, theaters, radio and television stations, and coffee houses staging poetry readings are all examples of organizations that are in the business of entertaining their customers with controversial speech and, therefore, have incentives to produce speech of some reasonably high quality, public interest, and unpredictability. Note that this category of "speech-selling" organizations cuts across the commercial-noncommercial distinction invoked by Justice O'Connor:²⁷⁰ All of the organizations listed above are for-profit enterprises dedicated to money-making from the sale of newsprint, tickets, etc. They are expressive associations nonetheless because they have special expertise in promoting controversial debate.

Why is it relevant that an organization specializes in the sale of controversial speech? From an institutional perspective, organizations that claim a First Amendment associational liberty are essentially claiming that they are entitled to deference from courts and legislatures concerning how best to stage a debate on matters of public interest. In evaluating such a claim for deference, it would seem to be relevant to ask whether the structure and incentives of such organizations make them more likely to protect the values underlying the First

²⁷⁰ See *supra* notes 263-266.

Amendment than the legislatures against which the organizations seek some immunity. One can make a respectable case that organizations specializing in the production of controversial speech have such structure and incentives.

Consider, for instance, newspapers. Journalists are influenced by a professional culture that values exposure of news—"the scoop"—and attraction of public attention through combative op-eds and staged editorial debates. Because they sell speech itself as their primary product, newspapers are under market pressure to engage in lively discussion; the consumer is often paying for the sheer entertainment of watching a brawl, and there is some incentive for the management to stage a good fight. Thus, we expect even partisan newspapers to seek out effective op-ed writers who will try to make novel and interesting arguments.

To be sure, it is not self-evident whether an organization can be said to specialize in the production of controversial speech. For instance, television news broadcasters would seem, at first glance, to be organizations dedicated to promoting controversial speech on public affairs. However, one can make a plausible case that television journalists systematically *avoid* controversy rather than promote it.²⁷¹ Likewise, even organizations that sell products other than speech—say, beer—might promote controversial debate to attract consumers for their other products.²⁷² In short, there is no institutional algorithm capable of mechanically determining whether an organization is a

²⁷¹ There is both informal theory and more substantial empirical evidence that television journalism in particular tends to suppress unconventional, difficult, or disruptive viewpoints and instead "revere[] the existing social order." Shanto Iyengar & Donald R. Kinder, *News That Matters: Television and American Opinion* 132 (1987) ("Television news glorifies democracy, especially the romantic town hall variety; condemns demagogues, bureaucracies, political machines, and movements of the extreme left or right; celebrates capitalism and individualism; and reveres the existing social order."). Iyengar and Kinder fault television journalists in particular for adopting a bland authoritative tone that suppresses original or critical thinking. *Id.* at 126-27. For a less empirically rooted attack on television journalism as a source of conventional moralizing and avoidance of controversy, see Pierre Bourdieu, *On Television* (Priscilla Parkhurst Ferguson trans., The New Press 1998) (1996). I suspect that Bourdieu's attack on TV journalism owes at least something to the French intellectuals' traditional contempt for mass opinion and mass taste. See, e.g., *id.* at 44-48. Bourdieu struggles with this accusation, see *id.* at 64-67, arguing that serious research is necessarily esoteric but that sociologists have a duty to "de-esoterize" such research. Despite these flaws, even the most maligned of the mass media, TV news, seems to produce benefits for the viewing public in terms of increased political knowledge and increased willingness to participate in the political process. Pippa Norris, *A Virtuous Circle: Political Communications in Postindustrial Societies* 116-19 (2000).

²⁷² My favorite example is the practice of Irish alehouses in the early nineteenth century of hiring a "regular Patriot, who goes about the publicans talking violent politics & so helps to sell beer." Don Herzog, *Poisoning the Minds of the Lower Orders* 145 (1998).

“speech specialist” deserving deference concerning its decisions about how to promote debate.

However, one can gain some purchase on the question by considering organizations that sell some product other than speech or forums for speech in a competitive market. Such organizations are usually not reliable promoters of public debate because they are constrained by consumer exit from promoting serious debate about values or policies.²⁷³ Thus, in highly competitive markets, firms that sell services other than controversy itself are unlikely to court controversy. They might very well publicize sentiments that their customers are likely to endorse, just to drum up business. (For instance, Benetton will promote sappy messages of racial harmony in their sweater ads.) They may also cater to the prejudices of their dominant patrons—employees, suppliers, consumers, etc.—and enforce those prejudices to win those patrons’ approval.²⁷⁴ But the constraints of consumer or employee exit insure that they will not challenge their customers or employees to think more deeply about these views. Instead, organizations that sell goods or services other than speech tend to be relentless pursuers of social peace, either by suppressing all ideological expression or by conforming to whatever values are dominant among their most important class of patrons.²⁷⁵

If such “commercial” (meaning non-speech-selling) organizations are not institutionally well-suited for promoting serious debate, then what are they good at? The commercial organization has strong incentives to preserve an atmosphere of social peace in which heterogeneous social groups can mix freely without regard to their differing values or beliefs. Borrowing from eighteenth-century sociology, Albert Hirschman calls this capacity for commercial intercourse “*douceur*,” meaning something like polish, urbanity, or polite gentleness.²⁷⁶

²⁷³ The argument that member “exit” undermines “voice” by destroying organizations before they can respond to members’ voices is famously laid out in Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 43, passim (1970). I briefly lay out a theory of antidiscrimination law based on Hirschman’s insight in Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 Mich. L. Rev. 1588, 1614-35 (1997).

²⁷⁴ See George Akerlof, *The Economics of Caste and of the Rat Race and Other Woe-ful Tales*, 90 Q.J. Econ. 599 (1976) (explaining how indicators of social origins direct economy into low-level equilibrium trap).

²⁷⁵ As Gary Becker has famously argued, the system of market exchange can take into account the external preferences—the malice, patriotism, racial pride, etc.—of buyers and sellers, insuring that the “taste” of customers and employers for discrimination is efficiently reflected in the prices for goods and services. Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971).

²⁷⁶ Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. Econ. Lit. 1463, 1464-66 (1982).

People who buy and sell from strangers in settings where large numbers of people are searching for bargains must learn to tolerate differences that, in other social settings, they might find intolerable. Merchants, employees, mall shoppers, etc., are by necessity cosmopolitan; they must detach the person with whom they are dealing commercially from traits irrelevant to the deal and see only the trader. This habit of detaching people from those traits that would otherwise be an occasion for pride, contempt, outrage, disgust, etc., has a *softening* and *equalizing* effect on morals.²⁷⁷

In sum, certain organizations tend to be ill-equipped to promote contentious debate but well-equipped to promote social peace among a diverse group of employees or consumers. Roughly speaking, these organizations will tend to be business enterprises that sell goods or services other than speech in a competitive market. From an institutional perspective, there is no reason to give such organizations deference when they attempt to stage a debate.

b. Organizations That Seek Out Heterogeneous Members

Second, some associations deliberately seek out heterogeneous memberships, whereas others specialize in assembling socially or culturally homogeneous groups. In the latter category, consider country clubs, co-ops, and homeowners associations that peddle membership as a signal of high income or social status. In the former category, one could place that dying breed, the federated fraternal society, a category that includes a vast array of past and present organizations such as the Oddfellows, Elks, Lions, Rotarians, Shriners, and Freemasons. Such groups measure their success by their rate of growth, aggressively establishing new chapters and indiscriminately seeking out new members without high up-front fees or screening for ideological conformity. As a result, they achieve a remarkable degree of socioeconomic (although much less racial) diversity.²⁷⁸

Why do some groups seek out a heterogeneous membership? The reasons surely vary for different sorts of groups. Broad-based political parties, for instance, do so in order to survive in a system of “first past the post” plurality electoral districts.²⁷⁹ Federated fraternal societies do so because membership is intended to signal adherence to widely accepted (and, therefore, vaguely defined) civic and social values—patriotism, fellowship, democracy, public service, etc. Joining such a group is a good way to signal that one was a “regular fellow,” a

²⁷⁷ See *id.*

²⁷⁸ Skocpol, *supra* note 244, at 66-68.

²⁷⁹ See Kleppner, *supra* note 242, at 3-4; Lowi, *supra* note 242, at 239.

good Babbitt, a trustworthy individual; and the value of the signal depended critically on the group being large enough to be a recognizable brand name.

Whatever the reason, however, some groups seek out large size and heterogeneous membership, and some shun these characteristics. We might believe that the former might have some special expertise in overcoming the problem of “unraveling” and polarization that frequently plague private associations. One might wish to resist this tendency toward ideological homogeneity for the sake of promoting meaningful internal debate, which requires an audience with sufficient heterogeneity to allow for disagreement.

c. Organizations That Foster Lateral Connections Among Their Members

Finally, some private associations foster members who have lateral connections with each other, while others have members who are mutual strangers. Staff-led national advocacy groups that do not have local chapters fall into the latter category: The “members” of groups like the National Rifle Association or NARAL Pro-Choice America (formerly the National Abortion Rights Action League) do little more than cut a check to the organization. Chapter-based advocacy groups like the ACLU or the Sierra Club whose local chapters meet regularly and control the agenda of the national organization fall into the former category. We have reason to care about this type of organization because there are some sorts of debates that simply cannot be staged without an audience that has some permanent connection to each other as well as the organization. For instance, members are unlikely to master procedural rules for public speaking and norms for the give and take of debate unless they have some experience together as an organized decisionmaking body. Such mastery might be critical not merely for the management of some common enterprise but also to build up a reservoir of political maturity and sophistication necessary to give citizens a sense of confidence in their own voice as well as respect for the voice of others.²⁸⁰ Staff-led advocacy groups whose members “participate” by writing a thirty-dollar check for member-

²⁸⁰ For evidence that political knowledge increases people's willingness to participate, capacity to process political information, and trust for political institutions, see Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in *Citizen Competence*, *supra* note 246, at 117. Popkin and Dimock report that people with more knowledge participate more and tend to embrace conspiracy theories or accuse politicians of corruption less frequently than do people with less political knowledge. *Id.* at 125. Further, people with more political knowledge can interpret political debates more easily and can incorporate the information gleaned from such debates into their continuing evaluations of candidates. *Id.* at 133.

ship annually arguably do not produce these collateral benefits of participation.²⁸¹

These three characteristics—specialization in the promotion of contentious speech; expertise in sustaining heterogeneous membership; and expertise in sustaining a membership with lateral connections—are all relevant to deciding whether an organization ought to have preemptive authority to decide personnel issues to the exclusion of state or federal law. Put another way, these characteristics are critical for determining whether an organization can be trusted to advance free speech on matters of public interest or not. The matrix included below arranges various associations according to these three criteria.

| | | Organization specializes in production of speech or forums for debate on public concerns | Organization does <i>not</i> specialize in production of speech or forums for debate on public concerns |
|--|----------------------------------|---|---|
| Organization aspires to homogenous membership | Members are mutual strangers | 1. Staff-led mass-mail advocacy organization (e.g., the National Rifle Association) | 5. Subscribers to “prestigious” dating services that screen members for education, wealth, etc. |
| | Members have lateral connections | 2. Chapter-based organization controlled by dues-paying members (e.g., ACLU or Sierra Club) | 6. Members of country club or homeowners’ association |
| Organization aspires to heterogeneous membership | Members are mutual strangers | 3. Patrons of newspapers, comedy clubs, theaters, and bookstores | 7. Shoppers at shopping mall |
| | Members have lateral connections | 4. Broad-based political parties, churches, universities | 8. Employees at shopping mall (or other workplace not specializing in the production of speech) |

On the institutional view, the ideal “speech organization” would fall within Box 4. It would be a debating society of some sort that

²⁸¹ On the diminished level of participation engendered by such groups, see Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in *Civic Engagement in American Democracy* 461, 499-504 (Theda Skocpol & Morris P. Fiorina eds., 1999). Easy initial membership, however, has its benefits. As Lawrence Rothenberg has argued, such easy membership allows the member to gain information about the group’s position and efficacy through “experiential search” (i.e., paying thirty dollars to get a newsletter) and use this information to make an informed judgment about whether to make a further commitment to the group through extended activism. Lawrence S. Rothenberg, *Linking Citizens to Government: Interest Group Politics at Common Cause* 21-24 (1992). As Rothenberg notes, associations like Common Cause that have lots of minimally committed dues-paying members also rely heavily on much more seriously invested members who perform the lion’s share of the work necessary to make the organization run. *Id.* at 43. Not surprisingly, the organization’s positions tend to reflect the views of the latter more than the former. *Id.* at 187-89.

aspired to foster a national and heterogeneous membership which regularly attended local chapter meetings to debate issues of general public interest. Such an organization might occasionally take steps that, to the untrained eye, would seem to restrict members' free speech rights. It might, for instance, bar hate speech or prohibit political extremists from joining the association. If state law attempted to interfere with these decisions, then the question would arise whether such private decisions should be protected under the First Amendment's doctrine of associational liberty. The institutional theory of associational liberty would maintain that the organization ought to have preemptive authority to decide how best to promote debate, given that its structure incentives make it a reliable decisionmaker on this score and given the practical difficulty of figuring out how best to advance such a goal.

2. Which Laws Usurp Private Governments' Jurisdiction?

Once one identifies an organization as especially well-suited for promoting speech and debate, then the next institutional question is whether the regulation being challenged by the organization actually usurps the organization's authority. Recall the argument in Part IV.B concerning Joseph Raz's preemption thesis: The institutional argument is rooted in an idea roughly similar to Raz's thesis—i.e., the idea that a private government's judgment concerning policies within its area of expertise substitutes for "another" institution's independent consideration of those policies.²⁸² State, federal, or local government officials should not regulate private organizations to advance policies that are better pursued by the private governments. Instead, they can most effectively advance those policies simply by deferring to the private government's own judgment. Thus, in *Troxel v. Granville*, the state court judge will most reliably protect the best interest of the child if he does *not* independently assess whether grandparents' visitation serves the child's best interest.²⁸³ Instead, the court should simply defer to Tommie Granville's judgment on this issue, reviewing her decision only for abuse of discretion. The parent's judgment is a better guide for the court on the question of the child's best interest because parents are more proficient experts in their child's interests than the court.

The purpose of the state, local, or federal government's regulation of private government, therefore, is critical for determining whether the public government is usurping the authority of the private

²⁸² See *supra* Part IV.B.2.

²⁸³ 530 U.S. 57 (2000).

government. If the law is pursuing some end that is not committed to the private organization's expertise, then the private organization's expertise is simply irrelevant to the constitutionality of the law. For instance, compare two different regulations that bar parents from bringing their children to visit relatives who are incarcerated in prison. The first law forbids parents from bringing children to visit the prison because, in the judgment of the prison warden, children's welfare would be endangered by exposure to the prison environment. The second law prohibits these visits because, in the judgment of the prison warden, children tend to be disruptive in prison waiting rooms, disturbing other visitors and destroying prison property through rowdy behavior. Parental authority to decide what serves the best interest of the child would preempt the first law.²⁸⁴ However, the parents' authority concerning their child's welfare would be irrelevant to the second law because the warden is seeking to advance a policy (protection of prison property) that is not properly committed to parental authority.

An analogous analysis applies to a private organization's First Amendment rights of expressive association. If the state is legislating for the purpose of making policy on an issue in which the organization has greater expertise, then the legislation is preempted by the private organization's contrary judgment. On the other hand, if the state is legislating for a different purpose, then the private organization's expertise is irrelevant.

For instance, suppose that the state legislature enacts a law to promote free expression on university campuses which prohibits universities from expelling or disciplining students for expression that would be constitutionally protected if uttered off campus. The purpose of the law is to advance the First Amendment value of free expression on campus. The university, however, is quintessentially an expressive association according to the criteria outlined in Part VI.B.1 above: It specializes in the promotion of controversial speech, it serves heterogeneous constituencies, and its members have multiple overlapping connections. Less abstractly, universities are governed by multiple heterogeneous constituencies, all of which have strong professional norms inducing them to protect free speech—alumni with their eye on the university's long-term reputation, administrators with their eyes on admissions and alumni dollars, vocal students from a multitude of backgrounds, professors with a professional culture supporting unconventional speech. There is no reason to believe that state legislative judgment on how best to regulate speech on campus

²⁸⁴ See *supra* note 174.

should supplant the judgment of universities, given the governance structure of the latter.

By contrast, consider the enforcement of Title VII of the 1964 Civil Rights Act²⁸⁵ against universities. The objective purpose of the statute (whatever the intention of its legislators)²⁸⁶ is to guarantee that racial minorities have equal access to economic and professional opportunities. Should a university be constitutionally immune from court orders demanding that the university open its tenure files to the inspection of courts or juries in the course of Title VII litigation? The U.S. Supreme Court has denied such immunity to universities in *University of Pennsylvania v. EEOC*, stating that the University of Pennsylvania “does not allege that the Commission’s subpoenas *are intended to* or will in fact direct the content of university discourse toward or away from particular subjects or points of view.”²⁸⁷ The purpose of the federal regulation, in short, had nothing to do with the university’s area of expertise. The federal government was not attempting to second-guess the university on how best to promote free academic inquiry; rather the federal government was pursuing an entirely different end unrelated to the university’s expertise. The university’s expertise in expression, therefore, is not automatically a reason to preempt the federal regulation.

Consider a different example. Suppose that Congress enacts an antidiscrimination law barring private companies from firing employees who try to organize a collective bargaining unit at the workplace. Such a law would diminish a private newspaper’s capacity to choose its employees, some of whom (e.g., reporters and editors) will be engaged in speech activities. If the purpose of such a federal statute were to influence the newspaper’s editorial policy by, say, preventing newspaper publishers from firing editors who write pro-union op-eds, then one might, on institutional grounds, have grave doubts about the constitutionality of such a measure. Newspapers, not Congress, are experts with jurisdiction over the question of how best to promote debate on controversial topics. But if such a federal law has an en-

²⁸⁵ 42 U.S.C. § 2000e (2000).

²⁸⁶ In assessing the purpose of a federal law, my assumption is that one does not look to the framer’s subjective intentions but rather to the end for which the law is, in Chief Justice John Marshall’s term, “plainly adapted”—its objective purpose, social meaning, or likely interpretation by reasonable members of the relevant community. See *supra* note 119.

²⁸⁷ 493 U.S. 182, 198 (1990) (emphasis added). The holding of *University of Pennsylvania* is muddled by the Court’s statement that the University of Pennsylvania does not allege that such discovery “will in fact” affect university discourse. *Id.* at 198. However, it is hard to believe that the Court seriously questions whether publishing tenure letters would affect their content. To anyone who has ever written such a letter, the answer is obvious: Of course, civil discovery affects the content of tenure files.

tirely different purpose (for instance, the purpose of protecting employees' capacity to bargain effectively over terms and conditions of employment), then there is no institutional reason to forbid the regulation.²⁸⁸ The newspaper has no special expertise or trustworthiness on the issue of labor relations, and its decisions, therefore, are entitled to no deference on how best to accomplish this end.

Legislative purpose is institutionally relevant because, under an institutional theory of rights, certain institutions have jurisdiction to pursue certain purposes to the exclusion of other institutions. Newspapers, for instance, have jurisdiction to determine the truth or falsity of their employees' journalism, not the sheriff or the civil service commission. But the Equal Employment Opportunity Commission and the National Labor Relations Board have jurisdiction over other objects, such as protection of employees' working conditions. The division of responsibility between these institutions is analogous to other jurisdictional divisions of labor based on purpose, such as the U.S. Constitution's division of jurisdiction between the state and federal governments based on the "objects" that each is entitled to pursue.²⁸⁹ The First Amendment doctrine that comes closest to expressing this institutional emphasis on legislative purpose is the doctrine that "generally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on [expression]."²⁹⁰ This doctrine is institutional because it uses legislative purpose to define whether or not laws are "generally applicable" (or, to use equivalent jargon, "content-neutral"). The laws do not offend the First Amendment because, whatever their "incidental" effects, they are not *aimed* at deterring expression.²⁹¹

As I shall explain in greater detail below using the BSA as an example, the question of statutory purpose is one of the most over-

²⁸⁸ The Court upheld such a regulation against a First Amendment challenge in *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937). In upholding the application of a "general law" to the news organization, the Court used institutional reasoning by emphasizing the purpose of the wire service and purpose of the federal government's enforcement of the Wagner Act. According to the Court, the wire service did not dismiss the editor with the aim of controlling the employee's editorial positions, and "[t]he regulation here in question has no relation whatever to the impartial distribution of news." *Id.*

²⁸⁹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 358 (1819) (discussing United States's sovereignty as to certain specific objects).

²⁹⁰ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

²⁹¹ Thus, newspapers can be required to respond to a grand jury subpoena, even though such a requirement might discourage people from speaking to reporters for fear that their identities could be disclosed in grand jury proceedings, *Branzburg v. Hayes*, 408 U.S. 665, 682-85 (1972), because the purpose of the grand jury investigation is not to deter confidential sources or journalistic use of them. The result would clearly be different if such investigations were simply a method for harassing journalists or deterring persons from acting as confidential sources.

looked issues in First Amendment expressive association cases. Rather than asking whether some private organization is “really” interested in expressing ideas, it is much more profitable to ask whether the government is interested in suppressing them. If the government is pursuing some end altogether outside the scope of the private government’s jurisdiction, then institutional considerations would suggest that the private government’s expertise in expression is beside the point and that the regulation ought to stand.

*C. Applying the Institutional Framework to the BSA
(and Other Civic-Social Clubs)*

Where should the BSA fit under the institutional theory that I am suggesting? Although the question is difficult, there is a powerful institutional argument that the holding of *Dale* is correct. I do not mean that the case is free from doubt. The greatest difficulty arises from the question that the *Dale* Court essentially ignored: Is the purpose of the New Jersey antidiscrimination statute unrelated to the internal debate and expression that the BSA are experts in promoting? I explore the case of the BSA not so much to resolve this issue as to illuminate how institutional reasoning should apply in a specific context.

1. Is the BSA an Expressive Association?

Should the BSA be regarded as an expressive association with preemptory authority (in Raz’s sense of the phrase) to displace governmental decisions regarding the promulgation of speech? According to criteria outlined above in Part VI.B.1, there is a substantial case for such a position. The BSA, of course, does not specialize in speech in the same sense as a newspaper or theater. Like other civic-social clubs, however, the BSA peddles public expression as its primary product. It essentially acts as a publicity agent that certifies to the public that its local chapters stand for certain widely accepted civic values. The BSA’s only “product” is its assurance to potential members that local chapters bearing its widely recognized “trademarks” (badges, songs, pledges, uniforms, etc.) will toe a particular line on conventional values. In this respect, the BSA resembles the Shriners, Elks, Oddfellows, Freemasons, and other federated clubs where the attractiveness of the local chapter as a site for socializing and solidarity is based on the organization’s reputation for adhering to mainstream civic values. The pledges and funny hats are simply signals that the organization’s members can reap the pleasures of small-scale sociability in an atmosphere of Main Street values.

In addition to being concerned primarily with promulgating messages about their members, the BSA has the advantage of being a heterogeneous organization with members who cultivate strong lateral connections. This makes the BSA a powerful site for internal debate whenever the organization is forced to confront divisive questions like the moral relevance of homosexuality. Unlike a shopping mall, where the patrons have neither interest nor ability to talk to each other, the BSA's meetings force members to confront each other as well as the national and regional umbrella organization. A shopping mall owner or office manager tends to exclude divisive speech on the ground that any general ideological debate by its workers or customers detracts from the organization's overriding purpose of selling nonspeech goods and services. The BSA obviously cannot take such a stance: Its *raison d'être* is the promulgation of an identifiable package of values, so debate about the general propriety of such values obviously cannot be ruled out as *ultra vires*. The BSA cannot maintain the integrity of this product unless it takes seriously its proclaimed mission of carefully evaluating particular ideological positions to see if they are consistent with the organization's image and values. One would predict, therefore, that First Amendment autonomy of the BSA would result in vigorous intraorganizational debate.²⁹²

There is a temptation to exclude the BSA from the ranks of expressive associations because it does not often issue specific, unequivocal ideological declarations. However, this fact does not distinguish it from broad-based political parties or mainstream religious denominations, which are both unquestionably expressive associations. As explained above in Part VI.A.1, the reluctance of the BSA and similar organizations to speak unambiguously on specific controversies is a function of the delicate balancing act that such organizations must

²⁹² Some scholarship assumes that the BSA's leadership can easily suppress dissenters from the leadership's interpretation of scouting. See, e.g., Sunder, *supra* note 218, at 547-48 (observing that national leadership of BSA has expelled dissenters who challenge BSA's antigay policies). However, the evidence suggests that *Dale* has sparked an intense intraorganizational debate within the BSA in which dissenters' opinions have prominent place. Consider, for instance, the numerous local councils who adopt unwritten nondiscrimination policies to obtain United Way funding, as reported in news articles collected at <http://www.advocate.com/html/news/newssubjects/scouts.asp>. Within the Scouts' membership, rival organizations such as "Scouting For All" have formed to challenge the BSA's leadership. See <http://www.scoutingforall.org> (last visited Jan. 30, 2003). Local councils' resistance to BSA antigay policies have been so effective that conservative supporters of those policies have complained that the national leadership has caved in to local councils' opposition to antigay discrimination. See Candi Cushman, *Who's Selling Out the Scouts?*, *Citizen Magazine*, Apr. 2002, <http://www.family.org/cforum/citizenmag/coverstory/a0020113.htm>. The vigorous debate within the BSA suggests that, contrary to Sunder, the BSA's commitment to ideological issues combined with its federated structures makes it well-suited for the expression of cultural dissent.

perform to retain a diverse membership. To make such inarticulateness a disqualification for First Amendment protection is to insure that the First Amendment will protect only those homogeneous organizations where internal debate is impossible because the members do not disagree about anything important. Homogenous organizations like the National Rifle Association or NARAL Pro-Choice America undoubtedly are experts in promoting external debate by issuing unanimous and clear—even shrill—points of view into the national forum. But there is more to debate than the clash of such fusillades from mutually uncompromising organizations of unanimous ideologues. There is the different kind of *internal* debate fostered by organizations with more heterogeneous members who must talk to each other in civil tones at face-to-face meetings, knowing that they will not agree in advance about contentious matters. The BSA and similar civic-social clubs are experts in sustaining such organizations. One suggestion of this Article is that such organizations provide the important First Amendment function of supplying forums for tentative intraorganizational debate even though they do not contribute much to the more strident clash of interorganizational debate.

2. *Do Antidiscrimination Laws Usurp the BSA's Role as an Expressive Organization?*

Even if one regards the BSA as an expressive organization entitled to deference from state and federal governments on the issue of how best to promote speech and the ideology of the organization, such deference is irrelevant if the law is pursuing an entirely different object. To decide whether antidiscrimination laws usurp the BSA's authority, one must determine the purpose of antidiscrimination law. Are such laws efforts to regulate private associations' expression or are they directed toward some other end?

Professors Chemerinsky and Fisk maintain that such laws are content-neutral, generally applicable regulations of employers' conduct, not regulations directed at the expressive impact of associations' membership decisions.²⁹³ According to Chemerinsky and Fisk, "the New Jersey law is neutral in the sense that it was not motivated by a desire to restrict speech; it is entirely about ending invidious discrimination."²⁹⁴ But this statement presents a false dichotomy. The law might be directed at *both* ending discrimination *and* restricting

²⁹³ Chemerinsky & Fisk, *supra* note 232, at 612 ("[A]ntidiscrimination laws are neutral laws of general applicability with which, the current Court has held, individuals and groups must comply even when the laws impinge on protected First Amendment speech or conduct.").

²⁹⁴ *Id.* at 613.

speech. Indeed, the law might be an effort to end discrimination by restricting speech. Antidiscrimination law, after all, frequently has a well-understood objective social meaning to the reasonable observer: to fight stigma with stigma—to stigmatize the discriminating party as a bigoted boor.²⁹⁵ Antidiscrimination law could send such a message by deliberately undermining rival messages of organizations that embrace the sort of discrimination that the law rejects. For instance, enemies of an organization's message could use antidiscrimination law to gain admission to the organization and then denounce, or if they could get enough votes, repeal the message. Alternatively, plaintiffs could file lawsuits under the relevant antidiscrimination law against associations that promote messages that stigmatize groups protected by the law, claiming that those messages constitute a form of harassment or constructive discharge forbidden by the law.²⁹⁶

If the purpose of antidiscrimination laws were to undermine associations' discriminatory messages, then it seems unconvincing to say that the law is a "neutral" regulation of conduct. In upholding the enforcement of federal antidiscrimination laws against private schools teaching racist ideas, *Runyon* emphasized that the purpose of the litigation was not to suppress the schools' expression of ideas. The cases did not "involve a challenge to the subject matter which is taught at any private school," and the racist schools "remain presumptively free to inculcate whatever values and standards they deem desirable."²⁹⁷ Suppose that the facts were different and the record indicated that the purpose of the lawsuit was to deter the private school's speech by placing a student in the classrooms whose parents could then challenge the teachers' racist or segregationist messages. The strong implication of such dicta in *Runyon* is that such regulation would at least raise a serious question under the First Amendment.

Do any antidiscrimination statutes (including New Jersey's antidiscrimination statute at issue in *Dale*) have such a purpose? Recall that the institutional theory relies not on the subjective intentions

²⁹⁵ Andrew Koppelman provides an extended and articulate defense of such a role for antidiscrimination law. See Koppelman, *supra* note 26. For an argument that rights are premised on human dignity, see Robert E. Goodin, *Political Theory and Public Policy* 73-94 (1982). I have criticized Koppelman's argument in Hills, *supra* note 273.

²⁹⁶ For an analysis of how harassment lawsuits under Title VII of the 1964 Civil Rights Act constitute regulation of speech implicating First Amendment values, see Eugene Volokh, *How Harrassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563 (1994). I discuss Volokh's argument in *infra* note 307 and accompanying text.

²⁹⁷ *Runyon v. McCrary*, 427 U.S. 160, 177 (1976). *Runyon* also emphasized the effect as well as the purpose of the lawsuits: "[T]here is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." *Id.* at 176.

whirling through the brain of the busy legislator but rather on the “objective” purpose of law, the purpose for which the law is plainly adopted in that a reasonable social observer would infer such a purpose from the law’s text and enforcement. It is hardly a frivolous position to regard such antidiscrimination laws, at least when applied to the BSA, as deliberate efforts to subvert associational expression. The reason for such suspicion is that, when applied to economically insignificant organizations like the BSA, the law does not seem to serve any other, nonexpressive purpose.

Consider Justice Brennan’s defense of antidiscrimination laws in *Roberts v. Jaycees*, in which the Court emphasized that the purpose of Minnesota’s statute, when applied to the Jaycees’ restaurants, was to provide “equal access to publicly available goods and services.”²⁹⁸ *Roberts* emphasized that the purpose of such litigation “is unrelated to the suppression of expression.”²⁹⁹ It is a little more difficult to attribute such a nonexpressive economic purpose to James Dale’s enforcement of New Jersey’s statute against the BSA. The BSA’s weenie roasts are not power lunches. No business cards are exchanged or business connections cultivated around the campfire. The office of scoutmaster carries no salary or other compensation; it provides no pathways to power or influence; and it involves no access to any services of monetary value. In light of these facts, it is hard to regard James Dale’s lawsuit as an effort to protect Dale’s access to the market economy or his economic equality. Instead, one might argue that the only intelligible purpose of the litigation is expressive—to send the message that Dale is qualified to be a scoutmaster because being gay is unrelated to the values of scouting. But the institutional theory of rights places definition of an expressive association’s ideology squarely within the jurisdiction of the expressive association. There is no reason to believe that the New Jersey legislature or courts are more competent at defining scouting’s purpose and ideology than the BSA.³⁰⁰

²⁹⁸ 468 U.S. 609, 624 (1984).

²⁹⁹ *Id.* (

Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization’s ability to express its views. Instead, as the Minnesota Supreme Court explained, the Act reflects the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.)

(internal citation omitted).

³⁰⁰ One might argue in response that the New Jersey antidiscrimination statute could be regarded as an effort to protect the recreational opportunities of gay persons by prohibiting their exclusion from large-scale recreational clubs. Such an interpretation of the law is

Chemerinsky and Fisk worry that *Dale*'s First Amendment argument would undermine *all* antidiscrimination law because it would treat all discrimination as expressive activity insulated from regulation. "[I]f discrimination is inherently expressive such that antidiscrimination laws are necessarily targeted toward silencing that expression," they write, "then all antidiscrimination laws are constitutionally suspect."³⁰¹ Thus, "the Court's reasoning casts constitutional doubt on all antidiscrimination laws."³⁰²

The fear that *Dale* will undermine all antidiscrimination law is not a frivolous worry. As noted above in Part VI.A.2, *Dale* does nothing to placate such a fear. But there are at least two arguments that might allay Chemerinsky's and Fisk's worries.

First, Chemerinsky and Fisk misunderstand what it means for a regulation to be "neutral" concerning expression. They seem to assume that if discrimination is regarded as expressive activity, then somehow it will be beyond the government's power to regulate. But this is a non sequitur. The issue is not whether an action is "expressive," but whether the purpose (or objective social meaning) of the regulation is to suppress expression. All action, after all, is expressive of the actor's intentions—this is what makes it action rather than behavior. The state, however, can regulate or forbid expressive action if the purpose of the regulation is unrelated to the expressive intentions of the actor. Thus, a state law forbidding graffiti on public buildings raises no substantial First Amendment question even though it prohibits expressive activity, because the purpose of the law is to suppress vandalism, not to suppress any message.

The only reason that enforcement of antidiscrimination law against the BSA raises a more substantial First Amendment issue is that such enforcement has a different social meaning when enforced against the BSA than when it is enforced against Exxon or Pricewaterhouse Coopers. This is not because the BSA's discrimination is somehow more expressive than discrimination by business firms; rather, it is because the law's purpose in forbidding discrimination by for-profit businesses may be entirely different from the law's purpose in forbidding discrimination by nonprofit social clubs. The former

plausible to the extent that clubs like the BSA have some monopolistic control over venues for recreation, such as camping trips and classes in outdoor skills. Given the salience of the BSA, this is a nontrivial possibility: Organizing alternative associations might simply be too time-consuming for parents. If the purpose of New Jersey's statute were to preserve such practical access to recreation, then the statute would have a nonexpressive purpose and should be upheld under the analysis offered in this Article.

³⁰¹ Chemerinsky & Fisk, *supra* note 232, at 614.

³⁰² *Id.*

sort of prohibition serves the purpose of preventing economic power from being used to settle disputed social questions.³⁰³ By contrast, antidiscrimination laws directed against nonprofit social clubs like the BSA seem directed not against *economic* power but *moral* or *symbolic* power. The BSA has influence only because of what its slogans, songs, uniforms, and pledges *symbolize*, and Dale's litigation may seem like an effort to change such symbolism. This is an expressive purpose that falls outside the scope of the state's power.

There is a second response to Chemerinsky's and Fisk's worry that *Dale* is too expansive. *Dale* affords deference to the BSA's definition of its expressive purpose only because *Dale* deems it to be an expressive association. As noted above in Part VI.A.2, *Dale* provides an entirely confused account of which organizations are "expressive associations." However, Part VI.B.1 provides some criteria for defining "expressive associations" that are consistent with the holding of *Dale* and yet narrowly cabin the category. In particular, as noted in Part VI.B.1, associations that sell goods and services other than speech or forums for speech may deserve no deference from government concerning how best to express controversial messages because they have no special expertise in this topic. We might not want private firms that sell products other than speech to promote controversial debate. Such debate undermines the *douceur* among a heterogeneous workforce that softens manners and provides a strife-free realm for nonideological interaction.³⁰⁴ Moreover, there is no danger that by forbidding workplaces from becoming ideological debating arenas, the law will undermine such interaction of heterogeneous individuals. The heterogeneity of the workplace is guaranteed by the labor market and division of labor in an industrialized society. The BSA might well splinter if forced to tolerate unlimited ideological diversity. It is unlikely that Exxon will do so, given the strong bonds of economic self-interest that tie its constituent patrons together.

Therefore, so far as the institutional theory of expressive association is concerned, New Jersey may be entitled to forbid anti-gay discrimination at Acme, Inc. (the proverbial widget manufacturer) *even for the expressive purpose of undermining the stigmatic message that Acme would otherwise like to send*. Such a law might not be content-neutral, but neither First Amendment doctrine nor the institutional theory requires that the government always adhere to the principle of

³⁰³ See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding prohibition against corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office).

³⁰⁴ See *supra* notes 276-277 and accompanying text.

content-neutrality.³⁰⁵ Although the Court has not yet resolved the question, it may be that the Court will eventually hold that the government can suppress divisive speech at certain sites for market interaction—offices, factories, workplaces, and shopping centers. As Professor Eugene Volokh has persuasively argued, the Court's *Meritor Bank*³⁰⁶ doctrine barring sexual harassment has the effect and even the purpose of suppressing certain sorts of speech in commercial contexts.³⁰⁷ Professor Volokh assumes that such suppression of speech raises grave First Amendment questions because it is not content-neutral. But an alternative and more institutionally sensitive view is that content-neutrality is not required for every sort of government regulation—that, in some times and places, the government *can* suppress speech for the sake of social peace. From an institutional point of view, the same rules need not apply to newspapers and street corners as factory floors and accountants' offices.

In sum, institutional considerations can provide an account for how *Dale* can be both justified and limited. Peculiar institutional circumstances of the BSA arguably justify the *Dale* Court's holding—in particular, the enforcement of antidiscrimination law against an organization specializing in the promulgation of certain values through educational activities and socializing. *Dale* does not analyze these institutional considerations with great care because *Dale*, like its critics, is focused on anticoercion rhetoric—in particular, the question of whether the *true* meaning of scouting (or the *real* preference of the BSA's members) requires the BSA to discriminate against gay scoutmasters. There is, however, a logically prior question that the Court and its critics ignore: Which institution is in the best position to determine how best to define the meaning of scouting or the preference of BSA's members—the New Jersey legislature or the BSA? Rights to expressive association *ought* to be regarded as jurisdictionally sensitive, remedially complex entitlements to a governing structure, not jurisdictionally indifferent, remedially simple entitlements to be free from some ill-defined “coercion.” The interests at stake require such

³⁰⁵ For instance, when the state or federal government is regulating its own property and own speech, it need not always be content-neutral. In limited public forums, government can discriminate in favor of topics for which the forum is reserved. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). In regulating its own speech, the government has even wider discretion to discriminate in favor of the viewpoint that it wishes to promulgate. *Id.* at 833 (“When government appropriates public funds to promote a particular of its own it is entitled to say what it wishes.”).

³⁰⁶ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

³⁰⁷ See Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009, 1019 (1996); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 Geo. L.J. 627, 648 (1997).

an institutionally sensitive theory of rights. Persons join organizations not just to band together to form a giant megaphone, but also to govern themselves, and sustaining this governing process is an important part of protecting free expression.

In any case, it is less important for my purposes that the reader be convinced that *Dale* is rightly decided. The larger mission of this Article is to persuade the reader that First Amendment associational liberties ought to turn on the institutional considerations outlined above. The issue cannot simply turn on whether the members of the group benefit from their own group's autonomy. Instead, the focus becomes how those groups provide the social structures necessary to sustain their rights throughout society. Such a focus would allow state regulation that preserved the advantages of private governments' structure while still barring regulations that undermine such advantages.³⁰⁸

CONCLUSION

Private organizations govern their members through coercive sanctions. They cannot enjoy constitutional rights to do so unless such rights include entitlements to govern individuals. A long, honorable, but ultimately misguided, tradition of rights understands constitutional rights as protections of purely individual freedom from all organizational coercion. This view, which I call the "anticoercion theory" of rights, necessarily must deny that organizations have rights to coerce their members. Yet the tradition is misguided. Organizational

³⁰⁸ For instance, consider state regulations that require private organizations to maintain a federal structure. Such a state law could exempt local chapters of a private association from antidiscrimination rules if the officers of the local chapter itself decided to restrict their membership in ways that would normally be illegal under state law. However, such a state law might also provide that the national or state organization of which the local chapter is part cannot force the local chapter to maintain discriminatory membership rules if the local chapter decides to forego such discrimination. Under an institutional theory of constitutional rights, such a law might be sustained even if a law barring all discrimination by both local chapter and national organizations might be struck down as a violation of the First Amendment, on the theory that state laws that preserve the autonomy of local chapters intrude less on the institutional advantages of private government, one of which is decentralized decisionmaking.

Note that such a doctrine would preserve the result in *Roberts v. Jaycees* because the Jaycees were attempting to force local Jaycee chapters to exclude women even though those chapters wanted to admit them. If this sort of state law or First Amendment doctrine seems strange or implausible, it might be that we wear anticoercion blinders when we think of constitutional rights. For what it is worth, Michigan adopted precisely such a statute to regulate teachers' unions, providing that the state organization could not veto a collective bargaining agreement to which a local bargaining unit of the organization and a local school board agreed. *Mich. AFL-CIO v. Employment Relations Comm'n*, 551 N.W.2d 165, 168 (Mich. 1996). The Michigan Supreme Court sustained this compulsory federalism against the union's claim that it violated the union's First Amendment freedom of association. *Id.* at 170.

coercion is often essential for, not antithetical to, individual autonomy. Any theory of rights that bars organizations from having rights to govern their members is an attack on individual autonomy, not a fulfillment of it. Exorcising the anticoercion theory of rights from our constitutional jurisprudence should be an important mission of scholars and judges. This Article is an effort to help in that exorcism.