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Associations and the Constitution: Four Questions About Four Freedoms

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Associations and the Constitution: Four Questions About *Four Freedoms**

NELSON TEBBE**

When should a constitutional democracy allow private associations to discriminate? That question has become prominent once again, not only in the United States but abroad as well. John Inazu provides a provocative answer in his impressive Article, The Four Freedoms and the Future of Religious Liberty. According to his proposal, “strong pluralism,” associations should have a constitutional right to limit membership on any ground, including race. Strong pluralism articulates only three limits: It does not apply to the government, to commercial entities, or to monopolistic groups. In this Response, I raise four questions about Four Freedoms. First, I ask why exactly strong pluralism should be preferred to the existing settlement between associational interests and equality values. Second, I draw a parallel between strong pluralism and broader sorting theories, and ask about the choice of a level of generality or social organization on which to promote sorting. Third, I interrogate strong pluralism’s three limits, and finally I ask whether extending the theory beyond regulation to government funding can be defended on a liberty theory such as strong pluralism. I conclude by commending Four Freedoms to everyone interested in these pressing questions.

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INTRODUCTION

When should a constitutional democracy exempt groups from antidiscrimination laws? That question has become newly foregrounded in law and politics, not only in America but abroad as well.¹ Conflicts invoking it often feature religious groups, but the debates raise conceptual issues that extend further, to all civic or voluntary associations. How should such groups be treated by constitutional regimes when their convictions conflict with antidiscrimination values?

John Inazu has made a fascinating contribution to the effort to answer this question in his impressive Article, *The Four Freedoms and the Future of Religious Liberty*² (“*Four Freedoms*”). Because his proposal is skillfully defended, and because it diverges from current legal doctrine, it is well worth engaging.³ Here, I put to one side Inazu’s historical account, and I foreground instead his doctrinal recommendation and its normative rationales. In brief, he argues that four basic freedoms rooted in the First Amendment—speech, press, religion, and assembly—should be understood to support “strong pluralism.”⁴ The core of strong pluralism is easy to describe: Government action should not be permitted to burden civic groups in their exercise of the four freedoms, and, in particular, it should not interfere with membership and leadership decisions.⁵ That principle

1. See, e.g., Nelson Tebbe, *Introduction*, in RELIGION AND EQUALITY LAW xx–xxi (Nelson Tebbe ed., 2013) (providing a conceptual overview of religious freedom and equality law from an international perspective); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. (forthcoming) (discussing such conflicts in the United States and France); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE.COM (Nov. 25, 2013, 2:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html.

2. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787 (2014).

3. Strong pluralism has predecessors. Koppelman points out that several prominent scholars have argued for “an absolute right of noncommercial associations to exclude unwanted members.” Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, LAW & CONTEMP. PROBS., Autumn 2004, at 27, 27–28 (including in this group David Bernstein, Dale Carpenter, Richard Epstein, John McGinnis, Michael McConnell, Michael Paulsen, and Nancy Rosenblum).

4. Inazu, *supra* note 2, at 848.

5. *Id.* at 794.

applies not only when the government is acting as regulator, but also when it functions as a funder of general programs.⁶ Furthermore, protection extends not only to membership and leadership decisions, but also to employment determinations⁷ and perhaps more broadly to decisions about whether to serve customers, patients, clients, or students.⁸ And it applies to associational decisions made on any basis, including race.⁹ Only three limitations temper the proposal. It does not apply to government entities, to commercial concerns, or to monopolistic groups.¹⁰ Otherwise, strong pluralism applies categorically. For example, it would protect a golf club that wished to discriminate in membership and even in employment on various grounds, including race and religion, as long as the club was not monopolistic in the relevant sense.¹¹ Both membership and employment could conceivably be limited to, say, men or nonminorities. Strong pluralism's arguments would also support protection for a homeowners' association organized as a nonprofit organization to control housing around the club.

A paradigm case for strong pluralism is *Christian Legal Society v. Martinez*,¹² where the Supreme Court upheld Hastings Law School's "all comers" policy for student groups.¹³ According to the policy, groups were required to welcome all students into their membership and leadership if they wished to qualify for official recognition.¹⁴ The Christian Legal Society ("CLS") applied for recognition despite its policy of excluding students who failed to adhere to its theological beliefs on sexual morality.¹⁵ Hastings denied recognition to CLS

6. *Id.* at 794, 845–46.

7. *See, e.g., id.* at 823 (applying strong pluralism to the employment case of Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012)); *id.* at 825 (considering "whether a Catholic charity can refuse to hire a Muslim social worker").

8. Whether the proposal applies to restrictions on the people a group may serve—customers, patients, students, or clients—is an interesting question not explicitly addressed in *Four Freedoms*. The arguments for strong pluralism would suggest protection for this kind of decision as well, at least in some circumstances.

9. Inazu, *supra* note 2, at 794, 828–29.

10. *Id.* at 828–29, 851 & n.308. The limitation on protection for "monopolistic" groups has been reworded and perhaps expanded in the Article, but it draws on earlier work that uses the term. *See id.* at 851 & n.306 (citing JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 166–75 (2012)). If this limitation is interpreted to be robust, that would substantially narrow the differences between strong pluralism and existing doctrine. However, *Four Freedoms* suggests a fairly circumscribed interpretation. For further discussion, see *infra* notes 101–06 and accompanying text.

11. *See Inazu, supra* note 2, at 851 n.308 (discussing golf clubs).

12. 130 S. Ct. 2971 (2010).

13. *Id.* at 2974.

14. *Id.* at 2979.

15. *Id.* at 2980.

because the group barred students on the basis of religion and sexual orientation.¹⁶ Strong pluralism opposes the holding of *Martinez*.¹⁷ Disallowing CLS from pursuing its expressive and associational policies flattens social diversity, according to the theory, and it thereby harms freedom because it deprives students of robust choices among groups that are truly distinctive.¹⁸

In this Response, I raise four questions about *Four Freedoms*. All of them go to the conceptual underpinnings of the proposal, rather than to the historical argument.

First and most simply, I ask in Part I whether strong pluralism has good reasons to depart from a settlement that arguably has been struck between associational and equality interests in American law and politics. That settlement strikes a provisional balance between the value of group association, on the one hand, and the value of freedom and equality for individual dissenters, on the other. Both of these values enjoy national, constitutional status. When they come into conflict, for instance because groups seek to limit membership in ways recognized as discriminatory, current doctrine officiates between them depending on the social significance of the group. I will describe this arrangement more fully in Part I, but the key points here are that the settlement carries democratic authority, because it reflects and shapes national conversations and conflicts, and that strong pluralism reworks that settlement. If those claims are convincing, then the question becomes whether there is a compelling argument for shifting existing law, so that the terms of the settlement are more favorable to civic associations and less favorable to dissenting individuals.

In Part II, I argue that it is possible to understand strong pluralism as a sorting approach. Theorists in public law recently have argued that both rights and welfare can be supported by allowing diversity of values among associations and localities.¹⁹ As long as exit

16. *Id.* ("CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation."). There is a factual dispute about whether Hastings really required groups to accept everyone at the relevant time, or whether it prohibited discrimination only on certain grounds, including religion and sexual orientation. See *id.* at 2982 (describing the dispute and concluding that the parties would be bound to their stipulation that Hastings in fact had an "all comers" policy). Because strong pluralism opposes both sorts of policies, however, the factual controversy is immaterial here.

17. Inazu, *supra* note 2, at 821–23.

18. See, e.g., *id.* at 796–97 (describing the benefits of genuine diversity among associations); *id.* at 844–45 (arguing for associational diversity in the context of the *Martinez* case).

19. See *infra* notes 55–65.

and choice are preserved, freedom can be promoted by sorting because individuals then may select from a diversity of choices the social or political associations that most closely match their wishes. Preferences are revealed, and groups can become more responsive to them. Strong pluralism has a similar conceptual structure, I argue, and it therefore can profit from sorting approaches. But this analogy also raises a deep question that all such approaches must face: On what level of social organization should American constitutionalism allow sorting among groups, and where should it impose smoothing instead? A choice may well be necessary, because fostering sorting on one level of society or commerce will often entail smoothing on another. Perhaps, for example, the four freedoms would best be vindicated in *Martinez* if diversity were protected on the *university* level, so that students could select the school that best promoted their preferred form of student life. Or perhaps cities and towns should be able to set such policies for schools within their borders. Even state government could conceivably be the right organizational level on which to promote sorting. Depending on how this conceptual issue is resolved, the holding of *Martinez* itself could be compatible with the very same commitments that drive strong pluralism.

In Part III, I raise questions about strong pluralism's three limitations.²⁰ Strong pluralism mostly gives pragmatic reasons for these limits,²¹ but that seems out of step with an ambitious theory that refashions doctrine and downplays practical obstacles to its main proposal. Its strength is its argument from principle, in other words, not its pragmatic appeal. Given that orientation, it seems reasonable to press for a defense of strong pluralism's boundaries that is grounded in legal theory. Why exactly should strong pluralism not extend to commercial entities, to the many private organizations that enjoy substantial social power that falls short of a monopoly, and at least certain government institutions—especially local governments and service providers like public schools, drug treatment centers, and hospitals?

Finally, I ask in Part IV why strong pluralism applies in the same way to generally available funding programs as to regulation. Existing law works quite differently in the two settings.²² Although the doctrine is convoluted, individual liberty generally garners less

20. Recall that Inazu's proposal does not protect commercial entities, the government, or monopolistic groups. See Inazu, *supra* note 2, at 828–29, 851 & n.308 (“Strong pluralism . . . is limited to the voluntary associations of civil society.”).

21. *Id.* at 828–29 (describing these limits as setting out a “pragmatic middle ground”).

22. See *infra* Part IV.

constitutional protection from defunding than from regulation, on the theory that while government must refrain from burdening basic freedoms, it need not subsidize them. That distinction goes to the basic conceptual structure of liberty guarantees, as opposed to equality rights. So even if rights against regulation functioned in the way that the theory proposes, would that mean that government would retain little discretion to fund or otherwise support only those activities that are deemed worthwhile by policymakers operating in ordinary politics?

What unites these four questions is a concern over the proper relationships between individuals, associations, and the government in a constitutional democracy, given the range of choices realistically open to actors operating within contemporary American law, politics, and society. Healthy subnational associations and cultures are crucial for the full formation of individual citizens, but those individuals also deserve full and equal membership in the political community and fair opportunity in the economic realm. Strong pluralism addresses both of those concerns with power and sophistication. Whether its solution is the most principled and pragmatic one available to American constitutional actors is the overarching question I will explore.

I. THE EXISTING SETTLEMENT

An implicit settlement between individual and group rights can be discerned within contemporary law and politics. This Part describes that settlement and uses it as a baseline for comparison with strong pluralism. Although demonstrating it is not possible within the scope of this Response, I believe that the existing arrangement is the product of historical conversation and conflict over the proper balance between competing American values.²³ Citizens have faced off against each other in the context of specific social and political clashes, which have resulted in commitments and compromises that are historically contingent. Because that process is ongoing, the settlement is never fully settled. Yet to the considerable degree that current law on associations is the product of public conversation and conflict, it has democratic force, and to the degree that it involves interpretations of the First and Fourteenth Amendments, the

23. Because my characterization of the settlement here has a historical dimension, my omission of Inazu's own discussion of history is regrettable and perhaps a bit unfair. If I were to support my view of the history, I would obviously have to confront Inazu's elegant account, which is quite different from the one that I believe undergirds the law.

settlement has constitutional valence as well. My assertion then is that the compromise I am describing in this Part has normative authority because of its democratic and constitutional provenance.

I also hold the view that the settlement is *somewhat* supportable by a political morality grounded in a commitment to the value of full and equal citizenship in a free society. A full moral defense (one that I do not have the space to offer here) would map only imperfectly onto the existing arrangement, which to some degree captures only a *modus vivendi* and not a principled arrangement. Nevertheless, my sense is that its basic outlines are defensible in terms of basic political morality.

People who do not share these two intuitions—that the settlement carries democratic and constitutional authority, and that it is somewhat defensible as a matter of moral theory—will find departures from the settlement less troubling.²⁴ But people who are inclined toward these two claims will be careful to note how often and how far strong pluralism takes existing law in a different direction. This Part lays out those departures.

What is the content of this evolving settlement? In order to answer that question, it helps to characterize two principal—and competing—commitments that are implicit in its structure. On the one hand, individual citizens have the right to form associations with one another, and, on the other hand, they have a right to equal public status.²⁵ Conflict between these two commitments arises, paradigmatically although not exclusively, when groups wish to exclude or burden dissenters. Discrimination matters most where the group at issue carries social power, especially in situations where association with the group involves, or can be converted into, economic or political advantages. For example, powerful groups can apportion prestige, offer networking opportunities, or signal desirability to employers or voters. Precise rationales for resolving conflicts between associational and egalitarian interests differ depending on the particular setting—for example, employment discrimination law stresses equality of opportunity while housing law

24. Inazu himself would not be troubled, and here my omission of his historical account has real costs. While he would not disagree that existing legal and constitutional arrangements are contingent, he would find aspects of the current settlement to be unfaithful to the best understanding of American traditions.

25. For specific illustrations of these interests later in this Part, see *infra* text accompanying notes 28–29 (on the right of intimate association), *infra* text accompanying notes 34–37 (on equality rights in employment, public accommodations, and housing). For a classic articulation of the basic tension, see William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 69–70 (1986).

protects against geographic exclusion—but, stepping back, it is possible to identify the general contours of a compromise between the interests of individuals who wish to associate with one another and those who dissent or are excluded. This settlement is partly legal and partly political, it is partly constitutional and partly statutory, and it is partly federal and partly local. Despite that diversity, it has a recognizable shape.

In its implicit conceptual structure, the settlement could be understood to embody a recognition that protection of dissenters becomes more important as the group increases in significance (for social standing, political membership, and economic participation).²⁶ Notice here that interests on both sides of the settlement have liberty and equality dimensions.²⁷ Organizers of large groups have an interest in associational freedom, plainly, but they also have an interest in not being singled out for government approbation based on their views. And individual dissenters not only have apparent equality interests, but they also have an interest in being free to associate with the group.

Three types of groups or associations can be distinguished, although they are better conceptualized along a spectrum than in categories. Intimate associations and small groups, first, enjoy substantial protection.²⁸ Not only is the government not required to protect excluded individuals from discrimination by these groups, but it is often prohibited from doing so. For example, a citizen may choose his or her spouse for reasons that would be strongly prohibited in other settings—he or she may act, for instance, out of racial bias or anti-Semitism.²⁹ Group formation enjoys constitutional protection also in the family, in schooling, and in cohabitation with relatives.³⁰ Constituting such groups has been removed from ordinary

26. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (“Between these poles [of intimate associations and large business enterprises], of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.”).

27. For a discussion of the liberty and equality dimensions of free exercise rights, for instance, see Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1267–68 (2008).

28. See *Roberts*, 468 U.S. at 617–18.

29. See *id.* at 619–20 (noting that the right of intimate association protects “family relationships” and citing marriage cases such as *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

30. See *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (including as protected under the category of intimate associations decisions regarding marriage, having children, raising and educating children, and cohabitating with relatives).

politics, at least as a practical matter, and that understanding is entrenched nationwide.³¹

At the other end of the spectrum, groups that are socially significant are prohibited from discriminating in certain ways that would be permitted in more intimate settings.³² A reasonable inference is that government initiatives, such as civil rights laws, may restrict the ability of large organizations to associate not only because individuals in them are not bound by the same intimate ties, but also because those groups have significant power, such that membership in them can influence social standing, political membership, and economic participation.³³ Organizations like these are impactful allocators of social capital, and they are subject to regulation when they engage in exclusionary practices.³⁴ Most obviously, large employers may not take adverse action against workers on prohibited grounds,³⁵ and public accommodations like restaurants and theaters

31. Protection for small groups can be seen not only or primarily in judicial decisions, but also in statutory design and a range of other government policies. For example, antidiscrimination statutes often exempt small operations and private clubs. *See, e.g.*, 42 U.S.C. § 12111(5)(A), (B) (2006) (providing that the Americans with Disabilities Act does not apply to entities with fewer than fifteen employees and does not apply to “a bona fide private membership club”); *id.* § 2000e(b) (providing that Title VII does not apply to employers with fewer than fifteen employees and does not apply to “a bona fide private membership club”); *id.* § 3607(a) (exempting from the Fair Housing Act “private club[s] not in fact open to the public” under certain circumstances). It would take further work to demonstrate that these statutory exemptions reflect constitutional understandings, but they form part of the existing settlement regardless.

32. *See Roberts*, 468 U.S. at 620 (noting that intimate associations do not include “large business enterprise[s]”).

33. *See id.* at 624 (recognizing the state’s “historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services”); *id.* at 626 (describing the importance of the Jaycees (a private organization) for building leadership skills, extending business contacts, and gaining access to employment opportunities). Although I am not emphasizing it here, the Court also stresses dignitary harm that is independent of equal opportunity. *See id.* at 625 (emphasizing the “deprivation of personal dignity” and “stigmatizing injury” occasioned by discrimination in public accommodations (internal quotation marks omitted)).

34. *See* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 18–24 (2000) (articulating a concept of social capital); *cf.* Simon Szreter & Michael Woolcock, *Health by Association? Social Capital, Social Theory, and the Political Economy of Public Health*, 33 INT’L J. OF EPIDEMIOLOGY 650, 656 (2004) (distinguishing between forms of social capital that cross social hierarchies and those that do not, and setting out a role for the state in building up the former). *See generally* Sidney Tarrow, *Making Social Science Work Across Space and Time: A Critical Reflection on Robert Putnam’s Making Democracy Work*, 90 AM. POL. SCI. REV. 389 (1996) (arguing that social disintegration is due partly to structural inequalities and not simply to a decline of social capital).

35. *See, e.g.*, § 2000e-2(a). The federal statutes referred to in this paragraph are supplemented by important state and local antidiscrimination laws.

may not exclude people for discriminatory reasons.³⁶ Landlords and lenders are subject to similar restrictions,³⁷ and so forth. Across a variety of contexts, groups of substantial social significance are limited in their ability to associate, and individual dissenters are protected. This aspect of the settlement reaches not just commercial entities, but nonprofits as well.³⁸

Some of these large groups are state entities, and against them individuals have rights that are constitutional in a straightforward way. But oftentimes the entities are not affiliated with the government in any strong sense. Even so, they can be prohibited from discriminating by statutory law that may be federal, state, or local.³⁹ Much of this legislation is so basic to American arrangements that we take it to be fixed. That is true, for example, of antidiscrimination statutes in the areas of employment, housing, lending, and the like.⁴⁰ Given the practical entrenchment of antidiscrimination law for socially significant entities, it is not outlandish to say that equality rules on this end of the spectrum are required of the government.

In the middle of these two poles fall groups with respect to which government is neither prohibited nor required to enact antidiscrimination measures. State and local lawmakers have applied antidiscrimination law to such associations in various ways and to various degrees.⁴¹ Prominent examples of organizations that still

36. *Id.* § 2000a(a)–(b) (prohibiting “discrimination or segregation in places of public accommodation”).

37. *Id.* § 3604 (prohibiting discrimination in the sale and rental of residential properties under the Fair Housing Act); *id.* § 3605(a)–(b) (prohibiting discrimination in residential loans).

38. *See, e.g., id.* § 2000e(b) (exempting only “bona fide private membership club[s]” from Title VII’s prohibitions on employment discrimination but not all entities that qualify as nonprofits for tax purposes); *see also* Quijano v. Univ. Fed. Credit Union, 617 F.2d 129, 131–33 (5th Cir. 1980) (holding that the term “bona fide private membership club” is narrower than the category of all nonprofit entities).

39. *See, e.g.,* Roberts v. U.S. Jaycees, 468 U.S. 609, 615 (1984) (considering application of the Minnesota Human Rights Act to the Jaycees, a private organization). Racially restrictive covenants for home ownership are prohibited by constitutional law, even though the primary actors are private, *Shelley v. Kraemer*, 334 U.S. 1, 1 (1948), but that rule is exceptional as a doctrinal matter.

40. Some have concluded that law in this domain actually has a constitutional character, despite its location in statutes, but that argument is not critically important here. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–42 (2001) (construing the Civil Rights Act of 1964, which concerns public accommodations and employment, as a “super-statute”).

41. *See, e.g.,* CAL. CIV. CODE § 51 (West Supp. 2013) (“All persons . . . are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation condition are entitled to the full and equal accommodations, advantages, facilities,

openly discriminate can be found even in jurisdictions that generally have protective civil rights regimes. The Racquet and Tennis Club on Park Avenue in New York City, for example, still excludes women from membership.⁴² Other jurisdictions are even more permissive of such groups, of course, and some are less.⁴³ Underlying the discretion that governments enjoy in this middle range may be an implicit recognition that it can be difficult to balance conflicting commitments to the rights of group members and dissenters when the affected entities fall somewhere between intimate groups and groups that are obviously public accommodations.⁴⁴ Governments have greater leeway on such questions, particularly on the state and local levels.

This overview reconstructs the basic principles implicit in judicial doctrine and statutory law, and it makes it possible to see how that law negotiates basic commitments that are constitutive of American arrangements in this area. Importantly, the settlement I have described can be understood not just as the product of brute political conflict and compromise, though it certainly is that in part, but also the result of a national conversation, conducted in the context of particular historical developments, about the proper balance between associational and equality interests—a conversation that has both political and constitutional dimensions.

Strong pluralism shifts this settlement in favor of associations. Individual dissenters must yield to the group, with less regard for whether the group is socially significant.⁴⁵ (Again, strong pluralism recognizes important exceptions, which are addressed below in Part III.) So, again, golf clubs might well be able to discriminate on the basis of race, religion, or gender—they would be constitutionally

privileges or services in all business establishments of every kind whatsoever.”); CONN. GEN. STAT. ANN. § 52-571d (West Supp. 2012) (prohibiting golf clubs from discriminating even in membership on the grounds of “race, religion, color, national origin, ancestry, sex, gender identity or expression, marital status or sexual orientation,” under certain conditions).

42. See Amy Zimmer, *Men-Only Clubs in NYC: After Augusta National Allows Women, Will Big Apple Clubs Follow Suit?*, HUFFINGTON POST (Aug. 21, 2012, 1:04 PM), http://www.huffingtonpost.com/2012/08/21/augusta-national-now-accepts-women-all-male-nyc-clubs_n_1818998.html; see also N.Y. CITY ADMIN. CODE § 8-102 (1986) (“The term ‘place or provider of public accommodation’ . . . shall not include any club which proves that it is in its nature distinctly private. A club shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business.”).

43. See *supra* note 41 (citing examples of state prohibitions on discrimination).

44. But see *infra* Part II for an alternative explanation based on sorting theory.

45. See Inazu, *supra* note 2, at 794, 828–29 (describing the proposal).

protected from antidiscrimination laws in membership and even employment—as long as they did not exercise monopolistic social power.⁴⁶ Nonprofit hospitals, regardless of their size, would be able to take employment actions on grounds that are today prohibited as discriminatory, as long as the hospitals did not qualify as monopolistic. Conceivably, even bar associations could return to the age of exclusion.⁴⁷

If the settlement I have described deserves any normative force, perhaps as a consequence of its democratic or constitutional character, then departures from it require justification. Putting to one side history as an independent rationale, as I am doing here (with some regret), two main reasons emerge for adopting strong pluralism. First, there is the concern that modern civil rights laws are so widespread and powerful that they will flatten civic diversity so that individuals will be deprived of robust choice.⁴⁸ This is an important theme in *Four Freedoms*, and it rightly emphasizes the importance of civil society to American conceptions of democracy.⁴⁹ The danger, however, is that this concern may discount too steeply the other side of the existing compromise—the interests of dissenting individuals within or excluded by such groups. Harms to such individuals can be serious, according to the settlement's implicit values, especially when the groups control access to important social, political, or economic resources such as professional networking or employment.⁵⁰

Second, there is an argument that civic associations with strong independence from the state are necessary for healthy formation of the identities and beliefs of individual citizens, who are in turn crucial to debate and difference in a democracy.⁵¹ Again, that value is

46. See *supra* note 10 and accompanying text.

47. In another work, Inazu expresses some doubt about whether his theory applies to professional associations, along with political parties and labor unions. See INAZU, *supra* note 10, at 16.

48. See Inazu, *supra* note 2, at 797–98 & n.34 (describing the benefits of genuine diversity among associations and citing Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466 (2000) (“Genuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude.”)); cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”).

49. See Inazu, *supra* note 2, at 788 (describing the four freedoms protection of “a pluralistic civil society that tolerated genuine disagreement”).

50. Inazu makes some room for this concern with his anti-monopolistic principle. See *infra* notes 101–02 and accompanying text.

51. Cf. Inazu, *supra* note 2, at 790 (noting the “culture-forming” function of groups in civil society); see also *Roberts*, 468 U.S. at 619 (“Protecting [intimate] relationships from

critical.⁵² Will formation, however, can and does have multiple inputs, of which voluntary associations form only one. Family and other intimate communities are primary sites for inculcation of norms, and that is part of the reason that they are constitutionally protected against legal flattening.⁵³ Government too can have an influence on will formation, for example, by expressing and inculcating the importance of equal citizenship, among other values. Moreover, official involvement works only within its jurisdiction. As I noted earlier in this Part, subnational governments are given significant latitude over whether and how to implement antidiscrimination norms when it comes to civic associations of moderate size and significance.⁵⁴ That discretion creates diversity of a different sort: local and regional.

Given the multiplicity of inputs into the formation of individual identity and belief, strong pluralism requires a theory for why civic organizations ought to be privileged over intimate associations and political bodies. Why should civil society have a disproportionate—and constitutionally mandated—influence on the social construction of individual citizens?

This second argument, about will formation, raises an issue with additional ramifications, namely how divergent levels of social organization interact in strong pluralism. Given the indisputable value of diversity and choice, how do we fix the level of social organization on which to pursue those values? The next Part pursues that question from the perspective of theories that focus on exit and sorting.

II. STRONG PLURALISM AS A SORTING THEORY

One way to think about strong pluralism is as a pro-sorting principle. This theoretical frame offers a way to think about strong pluralism's benefits using a free market analogy, but it also poses difficulties that require further argument if they are to be overcome. One of these is the challenge of specifying the proper level of analytic

unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

52. See Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 873–76 (2005) (defending a limited right to exclude based on the value of associations for the formation of beliefs).

53. I am putting to one side child raising and public education of minors, which raise complicated questions not addressed directly by *Four Freedoms*. Even among adults, intimate associations acculturate.

54. See *supra* text accompanying notes 41–44.

generalization or social organization on which to implement the proposal.

Sorting theories take their impetus from the work of Charles Tiebout.⁵⁵ He and his followers developed a model that found an early application to local governments, although its implications extended much more broadly. According to the model, it may make sense to allow towns and cities to offer diverse levels and types of taxation and services.⁵⁶ That diversity allows individuals to choose the municipality with the policies that best match their preferences.⁵⁷ Government will be made more responsive to citizens on this model, and overall welfare will be increased. For example, towns might elect to deemphasize education and lower taxes, attracting residents who do not have children or who prefer private schooling. Moreover, policymaking without attention to population migration may not be able to accurately gauge preferences based solely on citizen voting or voice.⁵⁸ Of course, the model relies on robust assumptions: that citizens have full information about the mix of taxation and services that governments are actually offering, that they are fully able and willing to move to a community that best matches their preferred mix of taxation and services, and that a town's decisions in this regard do not impact neighboring jurisdictions.⁵⁹

Law scholars have long appreciated the explanatory power of the Tiebout model in the areas of property and land use, but they have also explored its utility in other areas of public law, such as federalism,⁶⁰ nonestablishment,⁶¹ immigration,⁶² and general

55. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (setting forth a model that "yields a solution for the level of public expenditures for local public goods which reflects the preferences of the population more adequately than they can be reflected at the national level"); see also Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1658–59 (2006) (citing sources developing the Tiebout model). Another important influence on sorting theories is ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

56. See Tiebout, *supra* note 55, at 422.

57. See *id.*

58. See *id.* at 423. Revealing citizen preferences through migration turned out to be "a big selling point for the model." Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 151.

59. See Tiebout, *supra* note 55, at 419.

60. See, e.g., Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 84 (2013).

61. See, e.g., Samaha, *supra* note 58, at 135. For a different approach to local authority over religious freedom, see generally Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

constitutional law.⁶³ This work has applied the model not just in contexts of geographical diversity, where citizens may express their preferences by relocating, but also in broader situations where people face choices among employers, health providers, educational institutions, and so forth.⁶⁴ Governments offer optional benefits in a range of contexts, and they commonly package those programs with costs or conditions. Citizens then may select among combinations of benefits and obligations. In theory, offering a diversity of goods and attendant duties has the potential to better match government action with citizen preferences across a wide range of institutional contexts. Again, this assumes choices that are real, and it assumes good information along with the cognitive and material resources to act on it.⁶⁵

Legal theorists have also explored the dangers of sorting and the places where it consequently should be subject to government regulation. In particular, sorting raises the specter of homogeneity.⁶⁶ In the context of geographic migration, homogeneity can begin to track political boundaries, raising a set of concerns about undesirable forms of self-segregation.⁶⁷ Another challenge is that jurisdictions may adopt policies without reflection or debate, so that responsiveness to policy preferences is apparent only.⁶⁸ Negative externalities and spillover effects also must be policed so that responsiveness in one community does not impose costs on neighboring polities.⁶⁹ Finally, market-based approaches to government policymaking can have unfair distributional effects on

62. See, e.g., Cox & Samaha, *supra* note 60, at 84 (citing sources).

63. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1355–61 (2012).

64. See, e.g., Cox & Samaha, *supra* note 60, at 81–82 (defining sorting broadly).

65. *Id.* at 89.

66. *Id.* at 86; Samaha, *supra* note 58, at 171.

67. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 28–29 (1998) (“Tiebout . . . assumes that a city is similar to a voluntary association, such as a political organization, church, or chat group. People are seen as choosing a city the way they choose a country club: what attracts them is the fact that they share interests in common with others making the same choice. Indeed, this homogeneity is said to promote efficiency . . .”).

68. See Cox & Samaha, *supra* note 60, at 86.

69. Cox and Samaha issue several warnings: (1) sorting should involve choices that are “meaningful and beneficial”; (2) exit rights should be accompanied by entry rights elsewhere for true sorting to be obtained; (3) people can be limited in their ability to exit and sort by poor information, judgment, and resources; (4) coordination problems can yield situations where failure to engage with difference results in anemic choice; and (5) both positive and negative externalities must be managed. *Id.* at 87–90. They also allow for side constraints in the form of universal human rights—interestingly here, including the right to association. *Id.* at 91.

poor and otherwise disadvantaged citizens.⁷⁰ Once these dangers are appreciated, interesting questions arise concerning when pro-sorting measures should be preferred to anti-sorting (or smoothing) measures. Oftentimes the tradeoffs are difficult to evaluate, but they are present regardless.

Work on sorting has long recognized, although it has not often emphasized, that the model also applies to situations of sorting among *private* actors, including associations.⁷¹ When government policy affects such sorting, many similar options are open to officials with analogous benefits and dangers.

On the benefits side, allowing diversity among civic organizations, including in their membership policies, permits associations to express and implement ideas that give them character. In particular, they are not forced to conform to egalitarian notions favored by the state. That then provides individuals greater freedom of choice and enables better matches between personal and group ideologies. Not only do potential members benefit from enhanced pluralism, but so do existing ones who may wish to exercise their option to exit.

Strong pluralism also presents an argument for exit and choice that is not foregrounded in the sorting literature, namely that it fosters groups that have a stronger identity and, therefore, are able to engage in more robust and effective will formation. That, in turn, enriches a democratic polity that now includes a wider and more passionate range of divergent perspectives.

On the cost side, private groups can promote sorting in a much starker way than governmental entities—they can engage in outright exclusion. For example, when a town offers a distinct mix of services and taxes, that decision affects incentives, but it does not involve an outright ban on relocation.⁷² And the point applies more generally, outside of political jurisdictions, to government benefits and

70. See Frug, *supra* note 67, at 31 (arguing that the consumer-oriented vision of city services “has a built in bias in favor of the rich”); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1826 (2003) (critiquing the Tiebout approach to local government, partly because of its effects on “[t]he losers in the interlocal competition for low-cost, high-tax-base homeowners—the urban poor, racial minorities, families in search of affordable housing, [and] the elderly”).

71. In fact, the Tiebout model for local government was partly built on an analogy to voluntary associations. See Frug, *supra* note 67, at 28–29.

72. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (articulating a right to travel in the context of relocation from one state to another by indigent citizens). But see Frug, *supra* note 67, at 27 (discussing exclusionary zoning and “fiscal zoning”); Schragger, *supra* note 70, at 1828 (same).

programs. Although policymakers can place conditions on those programs that impose strenuous incentives, they generally are not permitted to coerce protected choices.⁷³ Private associations, by contrast, may flatly exclude.⁷⁴ Voluntary associations are allowed to *reject* members or deem them ineligible for full membership or leadership positions.

Now of course vigorous sorting can happen even without clear membership rules because groups have other ways of signaling that some people are unwelcome.⁷⁵ Still, sorting by actual exclusion is stronger than what Tiebout enthusiasts usually have in mind when they promote policies that allow people to choose the regimes that best serve their interests and ideas. Exit is voluntary in the Tiebout model, and subsequent choice is not constricted by barriers to entry.⁷⁶

In sum, strong pluralism is strong indeed—it represents a particularly robust form of sorting in at least two ways. First, it does not just allow groups to express ideals and interests in ways that allow individuals to affiliate with groups they favor, but it allows them to erect outright bans. Second, strong pluralism imposes few limits—it is tempered by little in the way of smoothing or anti-sorting. Existing law recognizes dangers in overly aggressive self-selection with respect to non-intimate associations, as I described in Part I, but strong pluralism would permit and even encourage substantial homogeneity within civic associations, including ones that are large or significant, so long as they are not commercial entities and so long as they do not exercise monopoly power, defined in a particular way.⁷⁷

So far, nothing I have said in this Part should be objectionable to proponents of strong pluralism. Yet the comparison to Tiebout suggests that they must face a question that attends all forms of sorting models: On what level of analytic generalization or social organization ought government promote sorting? After all, the

73. See *Shapiro*, 394 U.S. at 631 (“If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.” (alteration in original) (internal quotation marks omitted))).

74. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire Freedom of association therefore plainly presupposes a freedom not to associate.”).

75. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1837, 1850–57 (2006) (describing the role of “exclusionary vibes,” chiefly in the property setting).

76. See Tiebout, *supra* note 55, at 419 (assuming full mobility).

77. For more discussion on these limits see *infra* Part III.

benefits of diversity and individual choice could attach at any number of levels.⁷⁸

To see the difficulty, recall the example of *Christian Legal Society v. Martinez*. Strong pluralism takes this as a paradigm case and argues for allowing CLS to exclude from both membership and leadership positions students who do not agree with the organization's theological principles, including its teachings against homosexual conduct.⁷⁹ It argues that pluralism in civic society would thereby be preserved.⁸⁰

But another possibility would be to work toward those same benefits, only at the level of the university rather than the student club. That way, universities could choose to implement either strong pluralism or a civil rights approach, and students could select the university that best matched their predilections. Those interested in CLS—a nationwide student organization—could choose a campus on which the organization was allowed to restrict its membership, while students who cared more about gay and lesbian rights could choose a school with an “all comers” policy. That would promote pluralism and diversity, only at the university level rather than the level of the student organization.⁸¹ Would not that approach vindicate strong pluralism?

Understanding strong pluralism as a sorting theory thus raises the question of how to choose the relevant level of analytic generality or social organization, and it shows that conclusions about core cases could turn on the answer. Thinking about levels of generality also reveals a feature of strong pluralism that could otherwise be overlooked: while it promotes sorting and pluralism on one level, it imposes smoothing or flattening on others. For example, if strong pluralism were adopted and *Martinez* were reversed, student organizations at Hastings Law School might well become more distinct from one another. But universities would become *less* diverse

78. On the related question of levels of government and the Tiebout model, see Serkin, *supra* note 55, at 1661–67.

79. *Cf. Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2980–81 (2010) (explaining CLS's membership policy and the school's decision to deny it official status because of that policy).

80. See Inazu, *supra* note 2, at 822–23.

81. Spillover effects might increase diversity on the university level. Universities that make no change in their policies—that decline to adopt a new “all comers” policy, for instance—may experience an influx of students who wish to form CLS chapters and other organizations that are not open to everyone. All schools could thereby be affected. Interestingly, diversification at the university level could make exclusionary membership rules by groups like CLS less necessary at any one school.

because none of them could offer an “all comers” policy that would suit egalitarian students.⁸² And, moving the other way on the spectrum of generality, membership *within* student organizations would become less diverse (because that, of course, is the point of exclusionary membership policies). Therefore, strong pluralism may promote pluralism on certain levels of social organization, but it is potentially homogenizing on others.

Now, an objection might be that Hastings is a state school and therefore bound to respect the membership policies of student organizations in a way that a private university is not. Yet a categorical distinction between public and private is difficult to defend using the arguments for strong pluralism, as I will explain more fully in Part III. Drawing the line at public entities is particularly puzzling in the context of sorting theory, since the Tiebout model was specifically formulated with local governments in mind, along with nongovernmental actors.⁸³

In fact, thinking beyond universities suggests broad applications of sorting models to associational life. To continue with the CLS example, it would be possible to promote selection not just among universities, but among the towns or cities whose laws regulate them. College applicants could choose a school in a town whose legal atmosphere promoted the student life they preferred. Perhaps more realistically, a state legislature could seek to dictate antidiscrimination laws for public and private universities within its borders. That could send an even clearer signal to potential students—they would know that all the universities in a particular state featured antidiscrimination rules for student groups, while schools in another state allowed greater leeway for CLS and other groups that wished to limit membership in certain ways.⁸⁴ That possibility is not entirely fanciful. After Vanderbilt University began to enforce an “all comers” rule, the Tennessee legislature passed a bill that would have

82. Cf. Koppelman, *supra* note 3, at 53 (arguing that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), actually “induced uniformity” because states could not thereafter choose whether to allow the Boy Scouts to discriminate on the basis of sexual orientation).

83. See Tiebout, *supra* note 55, at 416 (providing a model under which “market-type” solutions exist for the provision of goods by local governments).

84. But see Serkin, *supra* note 55, at 1662–64 (providing reasons why sorting may not work as effectively on the state level, including the costs of relocating to another state (though Serkin is focused on homeowners rather than students), more intense interest-group dynamics that prevent state legislatures from responding as effectively to the revealed preferences of citizens, and the prevalence at the state level of agency policymaking, which is more insulated from public preferences, compared to legislative action).

protected religious student groups, had it not been vetoed by the governor.⁸⁵ Conceivably, state and local governments could become increasingly interested in determining university policy on such matters.

In sum, selecting the right level of social organization on which to promote ideological diversity is a serious issue for strong pluralism. Even the policy upheld in *Martinez* itself could be supported by the very arguments that the proposal features, if they are located on the level of the university rather than on the level of student organizations. Strong pluralism needs a theory for choosing the level of analytic generality or social organization on which constitutional law should fix the benefits of pluralism and diversity. Without such a theory, the proposal could miss even its central targets.

III. STRONG PLURALISM'S LIMITS

Strong pluralism articulates three limits: it has no application to commercial entities,⁸⁶ to monopolistic groups,⁸⁷ or to the government.⁸⁸ Questions surround each of these, and those questions are united by a concern over whether the limits are grounded in arguments from principle. Pragmatism alone may not be enough to support them, especially given that strong pluralism generally emphasizes principled reasons for its interpretation of the four freedoms and downplays practical barriers.

A. Commercial Entities

When *Four Freedoms* uses the term "commercial groups," it seems to mean profit-seeking businesses.⁸⁹ By excluding only those groups from its scope, strong pluralism suggests that it applies to all nonprofit organizations.⁹⁰ That category includes the student groups,

85. Michael Gryboski, *Tenn. Governor Vetoes Bill Challenging Vanderbilt's All-Comers Policy*, CHRISTIAN POST (May 23, 2012, 5:07 PM), <http://www.christianpost.com/news/tenn-governor-vetoes-bill-challenging-vanderbilts-all-comers-policy-75443/>. I thank Jacob Levy for bringing this example to my attention.

86. Inazu, *supra* note 2, at 794.

87. *See id.* at 828–29, 851 & n.308.

88. *Id.* at 828–29.

89. *See, e.g., id.* (using the term "commercial group").

90. *See id.* at 829 & n.206. A possible reading is that noncommercial does not mean the same thing as nonprofit. But that opens up questions about what it does mean. From the examples given, it seems it cannot exclude all entities that provide employment, or housing, or social services for a fee. For instance, Inazu relies on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* for support, implying that a school run by a religious organization counts as noncommercial for purposes of the theory, even though it charges tuition, employs teachers and a staff, and the like. *Id.* at 824–25 (arguing

churches, and civic associations that are the primary concerns of the proposal. But it also seems to include nonprofit hospitals, social service organizations, universities, labor unions, homeowners' associations, political parties, and perhaps professional organizations.⁹¹ Potentially, the types and numbers of entities are large.

So are the organizations themselves, in many cases. Nonprofit hospitals can have thousands of employees, serve numerous patients, and boast large operating budgets. Much the same is true of universities and labor unions. Conversely, many profit-seeking organizations are rather small endeavors involving only a few people. What justifies drawing the line here for the purposes of strong pluralism?

One possibility, of course, is that the harm to individual customers or employees is potentially much greater when powerful entities are involved. But nonprofit entities can be powerful in some of the same ways. Think first of employees. Workers can be affected in a dramatic way by exclusionary hiring practices, particularly if those practices become widespread in a society, even if an employer does not monopolize the relevant labor market. Health care workers often are employed by nonprofit hospitals and clinics, for example, and teachers customarily work for nonprofit schools and universities. Equality of opportunity is one concern behind the current doctrinal settlement between associational and equality interests that I described in Part I. And opportunity can be dampened by large nonprofit employers, particularly in regions where they comprise a significant part of the local workforce.

Moreover, the power of nonprofit entities extends far beyond employment. Think next of housing, and in particular of homeowners' associations, which are typically set up as nonprofit

that "free exercise and association rights . . . should have protected the church"). In fact, the case concerned employment discrimination specifically. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 694 (2012). Similarly, the school at issue in *Runyon v. McCrary*, 427 U.S. 160 (1976), is noncommercial for purposes of the theory, despite the fact that it charges tuition and employs teachers. Inazu, *supra* note 2, at 838–39 & n.251 (discussing *Runyon*). Golf clubs are noncommercial too, even though they charge for services and employ people. *See id.* at 851 & n.308. What about homeowners' associations that are set up around many golf clubs and are organized as nonprofit corporations? Or associations for lawyers and other professionals? As long as some of these organizations are included, the concerns articulated in this Section have traction.

91. On bar associations, see Inazu, *supra* note 2, at 829 n.207 (expressing doubts).

entities.⁹² Much housing in the United States is organized under such associations,⁹³ and nothing in *Four Freedoms* prohibits them from setting up restrictive policies. Put simply, the harms of strong pluralism grow potentially more concerning as the significance of the association increases, and that is true of for-profit and nonprofit entities alike.

Another possible justification for limiting strong pluralism to nonprofits is that commercial concerns are less apt to be expressive or ideological in nature. Hospitals and universities are organized as nonprofits presumably because they seek objectives other than increasing the wealth of the organization and its constituents. Yet even if this is true in general, it surely is not true in every particular. As we have been reminded from the recent litigation over the Obama Administration's contraception mandate, many profit-seeking corporations have moral objectives as well.⁹⁴ And that is true not just of firms run or owned by religious people, but also of companies dedicated to environmental or social justice concerns such as Ben & Jerry's and Whole Foods.⁹⁵ Conversely, homeowners' associations are not typically ideological, even if they are not concerned with profits.⁹⁶

92. See 26 U.S.C. § 528 (2012) (exempting certain homeowners' associations from taxation); Robert C. Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602, 1604 n.5 (1982) ("[H]omeowners associations are typically nonprofit organizations.").

93. As of 2012, about thirty-one million Americans were estimated to live in homeowners' associations. *Industry Data*, CMTY. ASS'N INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Feb. 25, 2014); see also Evan McKenzie, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POL'Y DEBATE 203, 203-04 (2003) (describing the prevalence and rise of common-interest housing developments, a term that includes homeowners' associations).

94. Cf. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1116 (10th Cir. 2013) (en banc) (holding that corporations are capable of enjoying free exercise rights), *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dept. of Health and Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) (holding that "for-profit, secular corporations cannot engage in religious exercise"), *cert. granted*, 134 S. Ct. 678 (2013) (noting that the cases have been consolidated). For important recent work on the question of whether profit seeking corporations have free exercise rights, see generally James D. Nelson, *Conscience, Incorporated*, MICH. ST. L. REV. (forthcoming 2014); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013).

95. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 54-55 & n.352 (2013) (arguing that many corporations express values and beliefs, and citing the examples of Ben & Jerry's and Whole Foods).

96. Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 224 (2003) (noting in table that homeowners' associations typically "do[] not specialize in production of speech or forums for debate on public concerns" (emphasis in original)).

In other words, centrality of a moral vision does not effectively distinguish commercial from noncommercial entities.⁹⁷

Perhaps considerations like these explain why strong pluralism offers pragmatic rather than principled reasons for separating out commercial concerns.⁹⁸ Not much is said about this, but the pragmatic considerations probably include the political obstacles to implementing a rule that protects associations from civil rights laws all across the American economy.⁹⁹ Yet, as I have noted, strong pluralism would entail shifts in law and politics even within the bounds it sets for itself.¹⁰⁰ Principle, not pragmatism, is strong pluralism's strong suit, in other words. So this turn to practicalities when it comes to commercial entities is curious—and somewhat unsatisfying for a theory that otherwise deemphasizes those considerations. And from a principled perspective, the limit for commercial entities seems both underinclusive and overinclusive.

B. Monopolistic Groups

Strong pluralism similarly does not apply to associations that enjoy monopoly power in a region or market.¹⁰¹ Here too, a kind of balancing seems to be powering the analysis under the hood.¹⁰² Harm to excluded individuals would simply be too great if monopolistic entities were allowed to exclude them from membership, employment, or consumer activity. And, on the other hand, people

97. For other critiques of the distinction between commercial and nonprofit entities in the proposal for strong pluralism, see Richard A. Epstein, *Forgotten No More*, 13 ENGAGE 138, 139 (2012), available at http://www.fed-soc.org/doclib/20120517_EpsteinEngage13.1.pdf (reviewing INAZU, *supra*, note 10); Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1414 (2012) (“If a for-profit corporation dissents from the moral norms embodied in a particular law, and we are confident that the dissent is not solely related to the avoidance of an economic burden, why should we not want to protect its right of assembly?”).

98. See Inazu, *supra* note 2, at 828–29 (“Centering the pluralist vision on civil society to the exclusion of the marketplace requires a pragmatic and imperfect line drawing. . . . It represents a pragmatic middle ground . . .”).

99. See *id.* (arguing that limiting the proposal to nonprofits provides a political compromise between feminists and libertarians); see also John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1451–52 (2012) (arguing that his distinction between commercial and noncommercial groups reflects political realities, and cannot be supported by principle).

100. See *supra* Part I.

101. See Inazu, *supra* note 2, at 828–29, 851 & n.308; see also Inazu, *supra* note 99, at 1453 (elaborating on the “anti-monopolistic test”).

102. See INAZU, *supra* note 10, at 15 (“Sometimes—albeit rarely—the power exerted by peaceable, noncommercial assemblies will overreach to such an extent that the right will give way to the interests of the state.”).

who can procure similar benefits from other associations in the region or market are unlikely to be harmed significantly by the exclusion.

Questions surround these arguments. First of all, associations may affect excluded individuals not just by denying them a particular affiliation, job, or service, but by apportioning status or opportunity.¹⁰³ Imagine, for example, that Harvard University begins denying college admission to applicants who (1) disagreed with its particular brand of Christian theology, including its teachings on reproduction and sexual morality, or (2) disagreed with its progressive stands on the same issues, even if the source of the disagreement is religious. No one would argue that Harvard enjoys a monopoly within the education market. Yet it does function as a significant allocator of social standing, like other elite educational institutions. Why would strong pluralism refuse to allow a bowling club to exclude members of out groups if it were monopolistic, yet exempt Harvard or similar universities simply because less (or other) prestigious alternatives are available? Which exclusion imposes greater harm?¹⁰⁴

Other associations can serve as powerful, if less obvious, distributors of opportunity and social status. In some parts of the country, golf clubs work that way. Even if a local municipality operates a competing public course, the opportunities there for

103. Ashutosh Bhagwat has raised a similar objection to this limitation on strong pluralism, observing that "power does not require monopoly." Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1398 (2012).

104. Strong pluralism sometimes does not seem to apply to entities that allocate prestige. "If membership in the Christian Legal Society at Hastings was a prerequisite to the most desirable legal jobs, then the Christian Legal Society may well lose its constitutional protections." INAZU, *supra* note 10, at 15; Inazu, *supra* note 2, at 851; see also Inazu, *supra* note 2, at 851 n.308 (discussing circumstances that could exclude a golf club from protection, including professional importance and even desirability for playing golf). If the anti-monopolistic principle is construed broadly, then the present objection to strong pluralism becomes weaker. But *Four Freedoms* suggests that monopolistic situations are supposed to be "rare." Inazu, *supra* note 2, at 851; see also INAZU, *supra* note 10, at 15 (arguing that monopolistic groups will be "rare[]"); Inazu, *supra* note 99, at 1453 (noting that "the anti-monopolistic test is set intentionally high—it will capture few groups"). Yet noncommercial entities that apportion social status are commonplace. That suggests that the limitation is narrow. Ambiguities crop up elsewhere as well. On one hand, the theory holds that "[e]quality of opportunity is a crucial part of our constitutional ethos." Inazu, *supra* note 2, at 852. But on the other hand, Inazu argues that "[equality of opportunity] is not self-justifying in all of its applications," *id.*, and that it "ought to focus on genuine access to power and resources," *id.*, suggesting that perhaps Harvard and similar associations would be subject to antidiscrimination law. Again, a great deal turns on how these questions are resolved, and thus on how far the anti-monopolistic limitation on strong pluralism extends.

business networking and status improvement may not be as promising. Many professional organizations are also organized as nonprofits, and many of them are not monopolists in the strict sense.¹⁰⁵ Strong pluralism may well protect discriminatory practices by such professional organizations.¹⁰⁶

In sum, the question is whether focusing on monopolistic groups captures all of the harms to excluded individuals, or whether instead it is underinclusive—a relatively weak proxy for detriments that are better captured by the standard legal model, however imperfectly.

C. Government

Certainly, the public/private distinction is deeply rooted in our constitutional understandings and therefore easier to defend as a limitation on strong pluralism. Yet its conceptual basis is somewhat puzzling, as the vast literature on the distinction has emphasized.¹⁰⁷ Based on its own arguments, strong pluralism might well push for the benefits of diversity and choice in the context of a vast array of public entities. Think, for example, of public universities and the argument offered in Part II that allowing sorting among schools could promote many of the values driving the theory. If the arguments behind strong pluralism are persuasive, why not apply them to all institutions of higher education—in the absence of commercialism or monopoly power—public and private?

My sense is that although limiting application of the theory to nongovernmental actors is familiar, it is not obviously supported by the arguments from legal principle that drive strong pluralism overall.

105. Think for instance of the New York County Lawyers' Association and the New York City Bar Association, which are registered nonprofits and coexist in the same legal market. Compare *About NYCLA: Governance*, N.Y. COUNTY L. ASS'N, http://www.nycla.org/index.cfm?section=About_NYCLA&page=Governance (last visited Feb. 25, 2014) (noting that the NYCLA is a nonprofit organization), with *About the New York City Bar Association*, N.Y. CITY B., <http://www.nycbar.org/about-us/overview-about-us> (last visited Feb. 25, 2014) ("The New York City Bar Association (City Bar), founded in 1870, is a voluntary association of lawyers and law students."). In fact, the NYCLA was founded as an alternative to the only existing bar association in New York City, which discriminated on grounds of race, sex, religion, and ethnicity. See *The Great Democratic Bar Association of the City*, N.Y. COUNTY L. ASS'N, http://www.nycla.org/index.cfm?page=About_NYCLA (last visited Feb. 25, 2014).

106. Again, Inazu expresses some doubts about whether the theory applies to professional associations. See INAZU, *supra* note 10, at 16–17; Inazu, *supra* note 2, at 829 n.207.

107. See, e.g., Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 144 (2004) (noting the persistence of the public-private distinction despite an established literature critiquing it, and citing authorities).

In sum, the question this Part has posed is whether the limitations on strong pluralism are consistent with the rationales driving the theory. If they are not compatible, or are not fully compatible (as seems to be the case), then the puzzle is why pragmatic considerations should be enough to justify the limitations when the core argument supporting strong pluralism would mean important changes to existing constitutional arrangements and therefore seems mainly principled rather than pragmatic.

IV. THE FOUR FREEDOMS AND GOVERNMENT FUNDING

A fascinating aspect of strong pluralism is that it not only would preserve the ability of individuals to form associations that could limit membership in unlimited ways, but it furthermore would protect their ability to do so while retaining all government benefits that they would otherwise receive under general programs.¹⁰⁸ Is this part of the argument consistent with the conceptual framework of strong pluralism, given its emphasis on liberty or autonomy?

Constitutional understandings often cut in the other direction. Government is generally permitted to defund private activities, even when they are protected against government regulation by liberty rights.¹⁰⁹ For example, policymakers may refuse to fund a woman's exercise of her right to terminate a pregnancy, even while they subsidize carrying the pregnancy to term.¹¹⁰ Free exercise also may be selectively defunded.¹¹¹ For example, a state may decline to subsidize students who wish to major in the study of theology from a faith perspective, despite the fact that they have a constitutional right to pursue that course of study.¹¹² Even in the comparatively protective context of free speech, government may elect not to support certain types of speech, so long as it does not discriminate on the basis of viewpoint. It may, for instance, decline to fund lobbying by nonprofit organizations, even when it subsidizes lobbying by veterans' organizations.¹¹³ And where "government speech" is found to be

108. See Inazu, *supra* note 2, at 845–48 (describing the threat to the pluralist vision from "the government's refusal to extend generally available funding and resources to the full range of groups in civil society" (emphasis omitted)).

109. For background on the government's latitude to fund or defund constitutionally protected activity, see Tebbe, *supra* note 27, at 1271–72, 1282–84.

110. See *Maher v. Roe*, 432 U.S. 464, 474 (1977).

111. See Tebbe, *supra* note 27, at 1267 (defending the government's ability to selectively defund religious actors, within limits).

112. See *Locke v. Davey*, 540 U.S. 712, 725 (2004).

113. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550–51 (1983).

involved, tax dollars may be distributed to speakers on a viewpoint-discriminatory basis as well.¹¹⁴ There are important differences in these doctrines concerning funding of privacy, speech, association, and free exercise—and there are contradictions among them.¹¹⁵ But together they provide a significant measure of government discretion concerning support for constitutionally protected freedoms, including freedoms exercised by civic associations.

Unconstitutional conditions analysis is implicated by the argument as well. In the typical scenario, the government conditions a benefit that it is not constitutionally obligated to provide on an individual making a choice that is constitutionally protected and over which the person has some type of control.¹¹⁶ Although it is notoriously difficult to articulate a consistent conceptual framework in this area, government decisions to fund one sort of constitutionally protected activity and not another are not normally thought to amount to unconstitutional conditions. To take the example of reproductive freedom once more, funding childbirth but not abortion does not amount to an unconstitutional condition, even though both activities are protected and even though receipt of support is conditioned on foregoing a constitutional right.¹¹⁷ Conditioning welfare benefits on carrying any pregnancies to term would, however, amount to an unconstitutional condition on this understanding.¹¹⁸

It is therefore a familiar doctrine that government may defund liberties that it could not prohibit through regulation. The same is not true for equality rights, of course. Discrimination on invidious grounds is not permitted even in benefits programs and even if the government had no obligation to provide the benefit in the first

114. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (interpreting *Rust v. Sullivan*, 500 U.S. 173, 203 (1991), as an approval of viewpoint discrimination in government speech, although the government in that case delivered its message through private speakers); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 648–50 (2013) (critiquing the widespread view that government speech is exempted from almost all constitutional restrictions, including the First Amendment rule against viewpoint discrimination).

115. See, e.g., Tebbe, *supra* note 27, at 1266–67 (describing one such contradiction in the doctrine).

116. See *Cox & Samaha*, *supra* note 60, at 66.

117. *Maher v. Roe*, 432 U.S. 464, 474 (1977).

118. For a general statement of this understanding of the rule against unconstitutional conditions, see Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1942 (2006) (“This is what the Court has in practice roughly meant by the ‘unconstitutional conditions’ doctrine: While the government may generally place conditions on the use of benefits that it provides, it generally may not control the use of the recipient’s other assets as a condition of providing the benefit.”).

place.¹¹⁹ A right to equal treatment at the hands of the government applies to all official action, whereas a right to liberty from government does not normally entail a right to government assistance in that activity.¹²⁰

Strong pluralism goes further than commonplace doctrine and political morality surrounding funding or unconstitutional conditions. Two cases seem to drive the theory here. First, again, is *Christian Legal Society v. Martinez*. Several judges and scholars have characterized access to official status as a student organization as a benefit—it entailed advantages that unaffiliated organizations would not have enjoyed, including access to university buildings for meetings, use of electronic resources, participation in the student activities fair, and a small amount of cash.¹²¹ Viewed that way, the university simply decided which sorts of student organizations it wished to fund or support (i.e., ones open to all).¹²² After all, the organization remained free to continue its activities, including its exclusionary practices, after the ruling came down—just without support.¹²³ And in fact, CLS did operate for one academic year on an independent basis while the dispute was ongoing.¹²⁴ When strong pluralism opposes the result in *Martinez*, it therefore demands more than the unconstitutional conditions doctrine, as conventionally understood.

Second, and more important to the argument, is *Bob Jones University v. United States*.¹²⁵ There, the IRS enforced a rule denying

119. *Brown* is the canonical example. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). There, states were prohibited from segregating public schools even though they had no constitutional obligation to provide public education in the first place. *Id.* at 495.

120. For an argument that equal protection applies even to mere expression by the government, see Tebbe, *supra* note 114, at 650.

121. See Inazu, *supra* note 2, at 845 n.280 (citing authors who have made that argument).

122. See *id.* at 844–46 (addressing such arguments).

123. Inazu argues that *Martinez* involved not only denial of support but also regulatory exclusion from a public speech venue, *id.* at 844–45, but his extension of strong pluralism to benefits makes that point immaterial. Even if *Martinez* concerned the provision of benefits, rather than regulation of access to a public forum, it would still violate strong pluralism.

124. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2981 (2010). During this period, Hastings allowed CLS to use law school facilities for its meetings and activities and told the group it would “have access to chalkboards and generally available campus bulletin boards to announce its events.” *Id.*

125. 461 U.S. 574 (1983).

tax-exempt status to organizations engaged in racial discrimination.¹²⁶ Bob Jones University fell afoul of the rule because it prohibited interracial dating among students, for theological reasons.¹²⁷ Strong pluralism would reverse that decision, without disagreeing that tax exemption is a form of government subsidy.¹²⁸ According to strong pluralism, it is constitutionally problematic to deny government support to associations that limit membership on the basis of race and other socially significant characteristics, just as it is unconstitutional to prohibit the exclusion outright.

This is a puzzling sort of claim for a theory grounded in liberty or autonomy to make, at least according to familiar constitutional thinking about the relationship between government funding and constitutional liberties.¹²⁹ Note that the claim by strong pluralism is not that the IRS violated equality principles by excluding an entity from support rather than the offending activity. Rather, it is that Bob Jones exercised its freedom of association or assembly in a particular way—by deciding which students were eligible to attend the school, based on their willingness to abide by school rules—and that conduct was what the government decided not to support.

Where is the stopping point for that line of argument? Inazu is careful to say that his constitutional rule only applies to general funding and benefit schemes, but that limit leaves open the possibility that groups like the Boy Scouts would have a constitutional claim not only when the state prohibited them from barring gay men from membership, but when it defunded their activities for the same reason.¹³⁰ Is the principle restricted to freedom of association and assembly, or does it extend to other constitutional liberties as well? Would Congress now be prohibited from directing funds only to women in childbirth and not to women terminating their pregnancies

126. *Id.* at 579 (setting out the IRS rule that “a [private] school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code” (alteration in original)).

127. *Id.* at 580–81 (recounting that “[t]he sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage” and reproducing the school’s rule that “[s]tudents who date outside of their own race will be expelled”).

128. See Inazu, *supra* note 2, at 846 (“*Bob Jones* is wrongly decided because the government cannot coherently engage in viewpoint discrimination with respect to a generally available benefit.”).

129. See *supra* text accompanying notes 113–22.

130. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). In his book, Inazu questions whether the Boy Scouts should be protected by strong pluralism or whether they are too monopolistic or public. See INAZU, *supra* note 10, at 251 n.36. But the point here is simply that a concededly civic group would not only be protected from anti-discrimination laws but also be able to claim government funding.

before the end of their terms? Although some of the argument is limited to viewpoint discrimination in government creation of public forums, some of its logic would seem to extend to defunding these other liberty-based rights as well. If that is correct, then the ramifications would be significant. Decisions regarding a wide range of welfare-state funding programs could be removed from ordinary politics.¹³¹

Moreover, the precedent it would unsettle goes somewhat further than strong pluralism explains. Government defunding of discriminatory practices has been seen by the Court not only to be constitutionally permitted, as strong pluralism assumes, but sometimes to be constitutionally required. During the Second Reconstruction, the Court decided not only *Runyon v. McCrary*¹³²—which allowed Congress to pass a regulatory ban on racial segregation by private schools¹³³—and *Bob Jones*—which allowed the government to defund private schools engaged in racial discrimination¹³⁴—but also *Norwood v. Harrison*.¹³⁵ In *Norwood*, the Justices held that Mississippi was constitutionally prohibited from supporting private schools that discriminated on the basis of race, as it had been doing through a state program that provided free textbooks to public and private schools alike.¹³⁶ And in another case from the same era, the Court prohibited a local government from providing grants so that students could attend racially discriminatory private schools.¹³⁷ Therefore, when the Court has interfered with ordinary politics in the area of funding, it has sometimes done so in the opposite direction—it has limited the ability of government to support private associations that discriminate in their membership. Admittedly, it is difficult to imagine either of these decisions being handed down today under changed social and political circumstances. Yet they underscore the distance that strong pluralism must move constitutional law in order

131. It could even have implications for government speech, if the same reasons for limiting government decisions on financial support extend also to government decisions about which associations to endorse in its communications. Cf. Tebbe, *supra* note 114, at 650 (arguing that government endorsement is limited by a range of constitutional rules).

132. 427 U.S. 160 (1976).

133. *Id.* at 169; see Inazu, *supra* note 2, at 838–40 (criticizing *Runyon*).

134. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

135. 413 U.S. 455 (1973).

136. *Id.* at 466–67.

137. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 234 (1964). The vouchers were part of a move to close the public schools rather than comply with a desegregation order. *Id.* at 221. All the private schools in the jurisdiction were restricted to whites. *Id.* at 223. So these were admittedly special circumstances.

to limit government discretion over funding decisions concerning the freedom of individuals to associate.

Existing law does set some constitutional limits on the ability of government to defund constitutional freedom. For example, it prohibits animus in the religion area,¹³⁸ viewpoint discrimination with regard to speech,¹³⁹ and unconstitutional conditions.¹⁴⁰ I have argued that inside these limits, government discretion should include the ability to target religious activity for denial of support.¹⁴¹ But even if that argument fails, it is difficult to imagine compelling reasons for constitutional law to limit the discretion of policymakers further without altering the longstanding view that private actors cannot demand government support even for the exercise of constitutional liberties.

CONCLUSION

Four Freedoms takes a fascinating look at issues of profound importance. I have taken this Response as an opportunity to offer four questions that implicate the relationship between individuals and associations in American constitutionalism more generally. Everyone seriously interested in such matters will benefit from reading not only *Four Freedoms*, but the rest of John Inazu's evolving work on these issues.

138. See Tebbe, *supra* note 27, at 1327–31.

139. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–31 (1995).

140. See Tebbe, *supra* note 27, at 1322–27.

141. See *id.* at 1339.