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Global Perspectives on Freedom of Association: United States

Ashutosh Bhagwat

Societās — Exploring the Value of Freedom of Association

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Why Association?

Ashutosh Bhagwat[*]

I. Introduction

In this paper, I want to consider the reasons why the Constitution of the United States has been interpreted to protect a right to freedom of association, and what implications those reasons have for the contours of that right. To understand why this is in fact a difficult and interesting question, however, one must also understand the basic history and background of the association right in the United States.

The starting point for this analysis is that, unusually among national constitutions, the Constitution of the United States does not contain a textual right of association. Instead, the First Amendment to the Constitution, in addition to provisions dealing with religion, protects rights to the freedoms of speech and the press, to peaceable assembly, and to petition the government for a redress of grievances. The question then becomes, how did this text come to be read to protect association as well.

Part 1 will explore the historical roots of the right of association in the US, focusing on a conflict over association in the very early Republic. Part 2 will explain how the modern right of association was developed by the US Supreme Court, and describe in broad terms the current contours of that right. Part 3 will explore the theoretical underpinnings of the association right in the United States, tying its historical origins and purposes to the other political rights protected by the First Amendment to the US Constitution. Part 4 will consider the implications of all of the above for the specific problem of associations that discriminate on the basis of protected characteristics such as race, sex, religion, or sexual orientation in selecting their membership. And Part 5 will examine the issue of whether, and to what extent, US law should and does protect associations whose goals are inconsistent with democratic values.

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II. The Democratic-Republican Societies[1]

As noted in the Introduction, the First Amendment to the US Constitution (which was added to the Constitution on 15 December 1791, about three and a half years after the Constitution itself came into effect) protects rights to free speech, freedom of the press, peaceable assembly, and petition, but it does not explicitly protect association. Whether these provisions - and in particular, the assembly right - also protects a right to form permanent associations was in fact heavily contested in the early American Republic (i.e., in the 1790s). The presidency of the first US President, George Washington, coincided with the Revolution in France. As the French Revolution became increasingly radicalised after the execution of Louis XVI in January of 1793, significant political divisions opened up in the US, with one major source of division being attitudes towards the French Revolution. One of the political groupings, who were generally supportive of the Washington Administration's stance of neutrality in the European wars, eventually coalesced into the Federalist Party under the leadership of Vice President John Adams (who later became the second US President) and Secretary of Treasury Alexander Hamilton. The other grouping, who were more supportive of the French Revolutionaries, eventually formed the core of the Democratic-Republican (or sometimes just Republican) Party led by Thomas Jefferson (the third President) and James Madison (the fourth President). Ironically, this latter party was the forerunner of the modern Democratic Party in the United States; the modern Republican Party was organised in the mid-nineteenth century.

In any event, by the spring of 1793 the Jeffersonians found themselves in open opposition to the Washington Administration's policies (despite the fact that Jefferson himself continued serving as Washington's Secretary of State until the end of 1793). Groups of citizens throughout the country who were supportive of the Jeffersonian position gathered to create organised associations, known as Democratic-Republican societies, to discuss and express support for the French Revolution, as well as opposition to the policies of the Washington Administration. The societies were well-organised, had selective membership and elected leadership, and met regularly (typically once a month). From 1793 to 1795 they were the most vocal, and most organised, opponents of the policies of the Washington Administration, and of the policies of

[1] Detailed accounts of the Democratic-Republican societies can be found in Robert M Chesney, 'Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic' (2004) 82(5) North Carolina Law Review 1525-1579; Jason Mazzone, 'Freedom's Associations' (2002) 77(3) Washington Law Review 639-767, 730-42. The historical account that follows is based on these sources.

Great Britain. And they were fiercely supportive of the French Revolution, holding celebrations on both American Independence Day on July 4, and Bastille Day on July 14.

Unsurprisingly, the Washington Administration opposed these societies. Strikingly, however, this opposition was not just to the substantive positions taken by the societies, but also to their very existence. The position taken by these opponents of the societies, including President Washington, was that permanent, politically active associations of citizens were inconsistent with a republican form of government because such associations claimed a power—the right to speak on behalf of the people—which properly belonged only to elected representatives. In private correspondence Washington went so far as to describe the existence of the societies as 'absurd', 'arrogant', and 'pernicious'.[2]

Underlying the Federalist critique of private associations was a particular view of how representative government should operate. Under this vision, representatives were to be chosen in elections on the basis of their wisdom and ability. Once elected, these representatives should deliberate amongst themselves to identify and implement policies that were best for the nation. The role of citizens was to debate the qualifications of candidates around elections, and outside of elections to occasionally assemble to discuss public issues, or to send petitions to elected officials (though in truth, the Federalists did not show much enthusiasm for even such irregular citizen activism). Permanent associations, however, had no legitimate role in this system, and to the contrary, usurped the role and prestige of elected officials.

Members of the Democratic-Republican societies and Republican public officials of course strongly rejected with this view. They fiercely defended the right of citizens to form private, political associations, and notably for our purposes, regularly invoked the Assembly Clause of the First Amendment as the source of the right to associate.[3] And more fundamentally, they advanced and defended a much more active, oppositional role for ordinary citizens. They saw citizen opposition, and even resistance, to government policies as perfectly legitimate so long as it fell short of violence (though in truth, Jefferson's writings suggest some tolerance even

[2] Chesney (n 1) 1526 (quoting letter from George Washington to Burges Ball, 25 September 1794).
[3] ibid 1565 (see footnote n 203), 1567-69.

for violent resistance[4]). And they saw private associations as legitimate intermediaries between public officials and the people as a whole.

Ultimately, the Democratic-Republican societies voluntarily disbanded, after President Washington gave a speech before Congress in late 1794 sharply criticising them.[5] The impetus for the speech was the Whiskey Rebellion of 1794, during which farmers in western Pennsylvania violently resisted enforcement of a federal tax on distilled alcohol (colloquially known as the "Whiskey tax," it was adopted as part of Secretary Hamilton's famous financial plan). After the Rebellion had been suppressed by a substantial federal army, led personally by President Washington, Washington (unfairly) blamed the rebellion on the Democratic-Republican societies, because they had publicly expressed opposition to the Whiskey tax.

III. The Modern Right of Association

Despite the demise of the Democratic-Republican societies, however, with Jefferson's defeat of John Adams in the 1800 presidential elections, the Jeffersonian position gained ascendancy. Today, no one in the United States seriously argues that private, political associations are inconsistent with representative democracy. And ultimately, in the twentieth century the United States Supreme Court recognised that despite the absence of the word "association," the First Amendment should be interpreted to protect a right to associate. The full story of how the right of association came to be read into the First Amendment, as well as the resulting myriad contours of the protected right, is beyond the scope of this essay. However, it is important to note a significant distortion that has entered into American associational jurisprudence as a result of that process.

As noted in my retelling of the history of the Democratic-Republican societies, in the 1790s, just after the First Amendment was added to the US Constitution, defenders of the right of association rooted it in the Assembly Clause. Indeed, as late as 1927, in the foundational US Supreme Court case *Whitney v California*,[6] both the majority (who upheld Anita Whitney's conviction for membership in the Communist Party) and the two justices who did not share

[4] See *Letter of Thomas Jefferson to James Madison* (30 January 1787), reprinted in James Morton Smith (ed), *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison, 1776-1826 Vol. I (1776-1790)* (New York: WW Norton & Company, 1995) 461 ('I hold it that a little rebellion now and then is a good thing').
[5] ibid 1560-61.
[6] 274 US 357 (1927).

their reasoning (Justice Louis Brandeis, joined by Justice Oliver Wendell Holmes, Jr.) all agreed that a right to join permanent associations was logically rooted in the Assembly Clause of the First Amendment. When, however, in 1958 a majority of the US Supreme Court finally recognised and enforced a First Amendment right of association in *NAACP v Alabama ex rel Patterson*,[7] it tied the right not to the Assembly, but to the Free Speech Clause. The move was a subtle one, because the majority opinion refers to both Assembly and Association. But the key passage later cited as recognising the association right focused primarily on speech. It reads as follows:

> 'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'[8]

Though perhaps not inevitable (since the passage after all does reference assembly), in later cases the Supreme Court has consistently understood this language to treat association not as an independent aspect of the independent right of assembly, but rather as a subsidiary right to free speech. In effect, this passage reduced what had been a free-standing right to form groups, to a narrower right to form groups for expressive purposes. And the Assembly Clause (which the Supreme Court has not cited since 1983!) eventually disappeared from the picture.

The result of this move has been a profound distortion in analysis.[9] In recent years, most of the disputes over the right of association have centered around whether or not private groups have a First Amendment right to exclude individuals from their associations, when that exclusion violates state (or federal) antidiscrimination law. In 1984 the Court rejected a claim that the US Jaycees, a civic organisation founded to advance the interests of young men, had a First Amendment right to exclude women from full membership.[10] In 2000, however, the Court held that the Boy Scouts of America, a very large youth organisation, *did* possess a First Amendment right to exclude a gay assistant scoutmaster from a leadership position in the Scouts, in

[7] 357 US 449 (1958).
[8] ibid 460.
[9] Professor John Inazu nicely ties these doctrinal developments to broader social and intellectual changes in the 1960s, 70s, and 80s: John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale University Press, 2012) chapter 4.
[10] *Roberts v US Jaycees* 468 US 609 (1984).

violation of New Jersey's antidiscrimination laws.[11] The correctness of these decisions, and whether these decisions can be reconciled (other than as motivated by homophobia) remain hotly debated.[12] But the distortion occurred because the Court's analysis in both cases turned on whether inclusion of female members in the Jaycees/a gay assistant scoutmaster in the Boy Scouts would interfere with the organisations' ability to express their desired messages (in the Scout's case, of opposition to homosexuality). Ultimately, in the *Jaycees* case the Court concluded that female members would not distort the Jaycees' expression, but in the *Dale* case, the Court concluded (with essentially no explanation) that the mere presence of a gay scoutmaster would interfere with the Boy Scout's expression of hostility to homosexuality.

IV. Why Association

What can we learn about the underlying purposes of the First Amendment (nontextual) right of association from this brief history? First and foremost, whatever the roots and purposes of rights of association in the rest of the world, in the United States the right of association has always been tied to citizenship and political participation. Even if other jurisdictions understand association as a broad-based natural right or one tied to personality, that is not the nature of the First Amendment right of association specific to the United States. And this in turn has important implications for what the right does, and does not, protect.

This understanding of the associational right as fundamentally tied to democratic citizenship is confirmed by the drafting history of the First Amendment. The original language of the First Amendment Assembly Clause, as proposed by James Madison to the United States Congress in June of 1789, stated that 'The people shall not be restrained from peaceably assembling and consulting for their common good.'[13] This language in turn was based on proposed amendments from various states supporting a right 'peaceably to assemble together to consult

[11] *Boy Scouts of America v Dale* 530 US 640 (2000).

[12] There is a broad literature examining and criticising both the *Jaycees* and *Boy Scouts* decisions. Prominent examples include: Nancy Rosenblum, 'Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion' in Amy Gutman (ed), *Freedom of Association* (Princeton: Princeton University Press, 1998); Aviam Soifer, *Law and the Company We Keep* (Cambridge: Harvard University Press, 1998) 40; Andrew Koppelman and Tobias Barrington Wolff, *A Right to Discriminate?: How the case of Boy Scouts of America v. James Dale Warped the Law of Free Association* (New Haven: Yale University Press, 2009); Erwin Chemerinsky and Catherine Fisk, 'The Expressive Interest of Associations' (2001) 9(3) William & Mary Bill of Rights Journal 595. Most of these critiques, however, accept the Supreme Court's characterisation of the association right as one of expressive association, and contest the Court's reasoning in these cases on the Court's own terms. A notable exception is Jason Mazzone, who argues (as I do in the text) that the Court's fundamental error was to restrict the right of association to expressive purposes. Mazzone (n 1) 674-688.

[13] Neil H Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* (2nd ed, New York: Oxford University Press, 2015) 129.

for the common good.'[14] And while the 'consult for the common good' language was ultimately dropped from final draft of the First Amendment, there is absolutely no indication that this decision was motivated by a desire to change the nature of the right. In other words, the assembly right was a *political* right, of the sovereign people to physically gather and discuss measures needed to advance their collective well-being. And concomitantly, the association right, derived as it properly is from the Assembly Clause, has the same purpose but protects permanent groups rather than sporadic gatherings.

The debates of the 1790s over the Democratic-Republican societies, furthermore, completely confirm this understanding. The dispute between the Federalists and Jeffersonians did not center on theories of natural rights, they turned rather on specific understandings about the role of private associations in representative democracies. And the disagreements were ultimately resolved (in favor of associational rights) when the United States moved to a more populist, activist model of citizenship in the early nineteenth century, beginning with the election of Thomas Jefferson and culminating in the Jacksonian era (the Presidency of Andrew Jackson from 1829 to 1837).

Once one accepts the close tie between the right of association and democratic citizenship, important implications flow. Consider first the nature of the relationship between citizenship and association - or to put it differently, how associations advance democracy. One way in which they do so (the way the US Supreme Court has emphasised) is by enabling more effective participation in public discourse. When individual citizens speak out on matters of public importance, absent great wealth or celebrity their voices are unlikely to be heard, and certainly elected officials are unlikely to pay much notice. When citizens band together in groups dedicated to advocating on specific issues, such as the National Rifle Association (a conservative group that opposes gun control) or the Sierra Club (a left-leaning group that favors environmental protections), their collective voice is enhanced. And, because large groups represent large voting blocs, politicians are forced to take notice. For this reason, even at local level, citizens constantly organise into groups to attract the attention of community and elected leaders. This is why since 1958 the Supreme Court has extended strong constitutional protections to expressive associations.

[14] ibid 139-40.

The Supreme Court's oversight, however, was to assume that enhancing expression was the only way in which associations advance democratic politics. The model of citizenship that the Court's analysis is based on is a distinctly limited one: citizens participate (albeit in groups) in public debate, and then vote in elections for representatives, but do little else - in some respects, this vision has troubling similarities to the Federalist model of the 1790s. But in fact, responsible and effective citizenship is not limited to just engaging with public discourse and then voting. To the contrary, active citizenship involves much more, and associations are essential for all of it. Assembly and protest, for example, are longstanding and critical aspects of American democracy, dating back to the pre-Revolutionary era when protests helped to instigate the revolt against British rule. But such assemblies are rarely spontaneous and require pre-existing associations to plan and man them - a famous example from the run up to the American Revolution being the organisation, by a group called the Sons of Liberty, of the Boston Tea Party of 1773, when proto-revolutionaries dumped tea owned by the British East India Company into Boston Harbor.[15]

Similarly, the First Amendment explicitly protects the right to petition the government. But throughout American history the petition right has been wielded most effectively by groups, submitting joint petitions signed by sometimes huge numbers of people. Antislavery petitions in the period prior to the American Civil War of the 1860s are prime examples, as were later temperance petitions leading to the adoption of Prohibition (a constitutional ban on alcohol which was effective in the United States from 1919 to 1933), and more even recently civil rights petitions seeking to protect the political rights of Black Americans, which led to the United State Congress adopting landmark Civil Rights legislation in the 1960s. In each of these instances, it is hard to imagine petitions signed by individuals having the same social importance and political impact as petition drives organised by large associations.

The need for this sort of ongoing, active citizenship through associations follows naturally from the limits of voting as a form of political participation. Voting is, of course, the most direct way in which citizens can impact policies in a democratic system. But voting is solitary, and so almost definitionally *not* a group activity requiring associational freedoms. And, not unrelatedly, voting has severe limitations as a means of influencing policy. Most obviously,

[15] Britannica, 'Who Were the Sons of Liberty" <https://www.britannica.com/video/226355/who-was-Sons-of-Liberty-American-revolution> accessed 6 January 2024.

because voting is typically for candidates and not on single issues, it is a very poor tool to signal preferences on specific issues (since no single candidate is likely to match any voter's issue preferences across the board). Voting is also sporadic (in the case of the United States Senate, only once every six years), again providing very poor signaling to elected officials, and none at all between elections.

Finally, the franchise is not universal. Even today, minors under the age of 18 cannot vote, and in many US states neither can those convicted of felonies. Historically, of course, the franchise was much more restricted. In the early American Republic, the franchise was restricted to males who owned property. Women were not granted the franchise in the United States until 1920, and even though racial minorities were in principle granted the right to vote in 1870, in practice large numbers of Black voters, especially in the American South, were effectively disenfranchised until the passage of the Voting Rights Act of 1965. But even when disenfranchised, these individuals - minors and some felons today, women and racial minorities historically - were and are citizens and members of the polity (in its infamous 1857 *Dred Scott* decision,[16] the US Supreme Court denied that even free Black Americans were citizens, but this was historical nonsense and in any event reversed soon thereafter by the Fourteenth Amendment in 1868). As such, these individuals had every right - and an obvious desire - to participate in democratic politics. But for the reasons already discussed, the only effective way for them to do so was via membership in engaged associations. And engage they did, through associations such as the National Association for the Advancement of Colored People (NAACP), the premier civil rights organisation in the United States, or the National Woman Suffrage Association (NWSA), the leading organisation in the fight to grant women the vote. In short, while associations are central to all democratic participation, they were and are the *only* way to effectively participate for those who lack the franchise, which through much of the history of most democracies was the vast majority of citizens.

Associations, moreover, are not important only as vehicles for participation in public affairs. They are also the crucial locus within which citizens shape their own and each other's values and beliefs, which in turn determine how they will contribute to public discourse, what substantive positions they will support or oppose, and of course ultimately how they will vote.[17]

[16] *Dred Scott v Sandford* 60 US 393 (1857).
[17] For a more detailed exposition of this idea, see Ashutosh Bhagwat, *Our Democratic First Amendment* (Cambridge: Cambridge University Press, 2020) 56-57; Mazzone (n 1) 697-698.

Modern democratic theory rests heavily on the notion that public opinion, formed through public discourse, is the means by which the sovereign people drive democratic decision-making.[18] But, of course, before individuals can participate in public discourse, individuals must first identify, form, and solidify their own beliefs. This process, however, does not typically happen in splendid isolation, it happens through interactions with others. Some of those interactions, of course, will be within intimate associations such as family and close friendships; but others will inevitably be in groups, whether it be formal organisations such as the Sierra Club, or within informal associations such as book clubs and the like. But either way, associations are a central forum for such values-formation. [19]

Participation in associations also permits individuals, especially those not highly empowered, to develop the habits and skills needed to participate in political life in a democratic society, and eventually even run for office. In this regard, the role of *organised* associations such as the Democratic-Republican societies is central, because such groups provide opportunities to learn skills such as leadership and oratory, which can later naturally be applied in more explicitly political ways. A good historical example of this is the role that Women's Clubs in late Nineteenth and early Twentieth century America played in providing opportunities for women - who at the time were in most other contexts excluded from leadership or politics - to develop crucial organisational and leadership skills. Many of those women then went on to participate in explicitly political movements, including notably the ultimately successful movement for women's suffrage.[20] Black churches provide another example of a form of private association which provided opportunities for individuals disadvantaged and excluded by society to develop crucial skills later deployed for political purposes.

Indeed, associations have been at the center of American democracy throughout its history. The leading modern historian of the American Revolution and early Republic, Gordon S Wood, has argued that associations played a central role in the broader democratisation of American

[18] Hans Kelsen (Anders Wedberg tr.), *A General Theory of Law and State* (Cambridge: Harvard, 1945) 287-88; Robert Post, 'The Unfortunate Consequences of a Misguided Free Speech Principle' (Yale Law School, Public Law Research Paper 2023) 11-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4255938> accessed 6 January 2024. In 1791, James Madison interestingly made much the same argument: James Madison, 'Public Opinion' *National Gazette* (19 December 1791) <https://founders.archives.gov/documents/Madison/01-14-02-0145> accessed 6 January 2024.

[19] Archon Fung, 'Associations and Democracy: Between Theories, Hopes, and Realities' (2003) 29 Annual Review of Sociology 515-539, 524-26.

[20] For a deeper discussion of the role of Women's Clubs in this regard, see Mazzone (n 1) 642-44, 700-701; John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale, 2012) 44-45.

society and politics during the early Nineteenth Century.[21] In the same vein, the most prominent observer of life in the early American Republic, Alexis de Tocqueville, also famously commented on the prolific number of associations in the country in this famous passage:

> 'Americans of all ages, all stations of life, and all types of dispositions are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types.'[22]

Importantly, Tocqueville was not commenting on explicitly political associations as such, but rather on a vast range of civic groups. Which takes us to the crucial question: In light of all that has been said, what types of associations are deserving of constitutional protection in the United States?

As noted earlier, the Supreme Court's answer has been relatively narrow: expressive associations alone deserve protection, because associations are protected only as a means to protect expression. But for the reasons stated above, this narrow view is inconsistent with the history and purposes of the right. If all associations which contribute to citizenship and democracy are to be protected - as they should be, once the origins and nature of the associational right is properly understood - then expressive associations are only one example of protected associations. All groups, formal or informal, which: enable citizens to participate in political life; contribute to citizens developing their values and beliefs; permit them to learn leadership and other skills useful to participation in civic life; and all associations which have the potential to evolve into a vehicle for public engagement, fall within this broad umbrella. The association right, in other words, should be capacious and extend to all manner of political, cultural, and personal groups, not merely expressive ones.

But the associational right also has one important limit - it does not and should not extend to predominantly commercial entities such as for-profit corporations or business partnerships. Unlike unincorporated private groups, formal or informal, and nonprofit corporations, commercial entities' primary role is economic, not social, political, or cultural. Such entities are given many forms of legal protections including, notably, limited liability, in order to

[21] Gordon S Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1991) 328-334.
[22] Alexis de Tocqueville (George Lawrence tr., JP Mayer ed.), *Democracy in America Vol. II* (New York: Anchor Books, 1969) (originally published 1840) 513.

maximise their economic potential. But precisely for that reason, commercial entities have at best a peripheral role to play in the kinds of democracy-enhancing activities that First Amendment associations enable. Put differently, individuals participate in commercial ventures as employees, shareholders, and partners, not as citizens.[23]

V. Discriminatory Associations

To understand why it is essential to limit the association right to noncommercial groups, it is necessary to consider in more detail one highly contested aspect of the associational right, which is the right of associations to select their membership. That such a right must exist seems obvious; after all, if the right to associate was limited to associates of the government's choosing, it is no right at all. If an association is to be able to advance the myriad goals set forth above, from expression to skills development to value formation, some degree of harmony, as well as ideological cohesion, must usually exist among members. And such harmony and cohesion can only be accomplished if members of associations are able to choose one another.

However, there is a dark side to this freedom. The right to choose fellow association members necessarily includes the right to reject some potential members. But, when such rejection occurs based on legally protected characteristics such as race, sex, religion, or sexual orientation, it constitutes potentially illegal discrimination. As noted above, the US Supreme Court has given inconsistent answers to whether the First Amendment protects such discrimination when that discrimination violates the law, rejecting the Jaycees' attempt to exclude women, but upholding the Boy Scouts' right to exclude a gay assistant scoutmaster. In its most recent encounter with this issue, in a case called *Christian Legal Society v Martinez* ('*CLS*'),[24] the Court upheld a public law school's refusal to grant official school recognition to a Christian student group that refused to include gay students as members or officers. The majority held for the law school on relatively narrow grounds, holding only that the school could withhold recognition, not that it could otherwise sanction members of the Christian group, but the case demonstrates that conflicts between antidiscrimination law and the right of association continue to arise to this day.

[23] Furthermore, history strongly suggests that the sorts of leadership and organisational skills relevant to running business corporations do not translate well into the political sphere.

[24] *Christian Legal Society Chapter of the University of California, Hastings College of the Law v Martinez* 561 US 661 (2010). For full disclosure, at the time of this litigation I was a member of the UC Hastings faculty, and was personally acquainted with the litigants on both sides.

Whatever the merits of the specific cases decided by the Court, it should be clear from the discussion above that associations generally *must* have the right to choose its own members, even when exclusion is morally troubling as with the Boy Scouts and CLS. Ideological cohesion is often essential to effective association, and to require groups whose central tenets include hostility to homosexuality, as conservative religiously oriented groups' tenets often do, to admit gay members is to have the state shape the groups' beliefs, utterly undermining the members' associational rights. All of which is to say that even if the *CLS* was right in its narrow holding, it would surely have violated the First Amendment if the law school had actually sanctioned members of CLS for their discriminatory conduct. The *Boy Scouts* case was hard only because there were serious doubts about whether the Boy Scouts as an organisation actually had any coherent views on issues of sexual orientation. If the Court was correct in concluding that the Scouts did embrace hostility to homosexuality as one of their core beliefs, then the result in the case was probably correct. There is, of course, a social, moral, and individual cost to protecting discriminatory behavior, but that is often true of political rights including rights of expression and assembly. This cost is one of the prices of maintaining a vibrant democracy.

This conclusion, however, makes crystal clear why commercial entities must be excluded from the association right. Associational rights are largely meaningless without the right to voluntarily choose one's associations. But to grant such a right to commercial entities would be the end of all modern antidiscrimination law, including notably the prohibitions on employment discrimination contained in Title VII of the US Civil Rights Act of 1964. It would create a rampantly unjust society, one desired only by bigots and a few radical libertarians. And it is utterly unnecessary, given the strong underlying arguments for excluding commercial entities from First Amendment association status. Indeed, in what was probably the most convincing opinion in the *US Jaycees* case, Justice Sandra Day O'Connor argued that ruling against the Jaycees was justified precisely because they were at heart a commercial entity (the majority took a different, less coherent approach).[25]

VI. Subversive Associations

Let us finally consider one further point on the scope of the right to association: To what extent does and should US law protect radical or violent groups? This issue has been enormously

[25] *Roberts* (n 10) 634-40 (O'Connor J concurring in part and concurring in the judgment).

controversial for much of modern US history. When the Supreme Court first confronted it, in the 1920s, the Court flatly rejected any associational protection for radical organisations such as the Communist Party on the grounds that their support for the violent overthrow of the government excluded them from protection (the Court at the time also denied constitutional protection to subversive speech).[26] In 1969, however, the Court reversed itself and extended First Amendment protections to even radical and subversive groups so long as they do not threaten imminent and likely violence.[27] That largely remains the law today, and extends even to what most would consider "hate groups," such as the Nazi Party or the Ku Klux Klan (a virulently racist and sometimes terroristic organisation that arose in the South after the American Civil War for the purpose of suppressing the rights of newly-emancipated Black citizens). On the other hand, I have argued elsewhere that the First Amendment right of association does not extend to groups that actively plan or engage in violence because of the association right's roots in the Assembly Clause, which after all only protects peaceable assembly.[28] In 2010 the Supreme Court did uphold against a freedom of association challenge a prohibition on providing material support to *foreign* terrorist organisations.[29] The larger issue as to the status of violent domestic groups remains, however, legally unresolved.

Why, in contrast to almost every other democracy on the planet, does the United States grant hate groups, including hate groups that advocate violence, constitutional protections? The analogy to US protection for hate speech, also almost unique, is of course obvious. In both cases, it is based on a combination of two factors. The first is political legitimacy. Prohibitions on both particular speech or particular groups interferes with the political participation of the affected individuals. But if in fact the democratic legitimacy of both a legal and political system, and particular laws, is a product of democratic participation by citizens, then excluding citizens undermines that legitimacy.[30] Of course, not all nations agree that political legitimacy requires tolerance of extremist hate groups (indeed, most do not). But given the raucous and highly participatory nature of democracy in the United States, a broader range of protections is unsurprising.

[26] *Whitney* (n 6) 371-72.
[27] *Brandenburg v Ohio* 395 US 444, 449 (see footnote 4) (1969).
[28] Ashutosh Bhagwat, 'Terrorism and Associations' (2014) 63(3) Emory Law Journal 581-638.
[29] *Holder v Humanitarian Law Project* 561 US 1, 39-40 (2010).
[30] See James Weinstein, 'Hate Speech Bans, Democracy and Political Legitimacy' (2017) 32(3) Constitutional Commentary 527-583.

The other driving force behind broader protections is a deep skepticism about state power, also a distinct feature of political culture in the US. Denying constitutional protections to particular extremist groups (or speech) requires one to trust the ability of some state entity, whether it be the legislature or the courts, to competently and in good faith distinguish between the protected and unprotected. But such faith in state power, if it ever existed in the United States, certainly does not today and has not for quite some time. Stating this concern in contemporary terms, the fear on the political left would be that a conservative legislature, or the current extremely conservative Supreme Court, would label Black Lives Matter to be an unprotected, extremist group. On the right, similar concerns would arise regarding groups such as private militias that appear to support violent resistance to state power (under some circumstances). Ultimately, the United States judiciary has chosen (with remarkable unanimity across ideological lines) not to try and draw those lines.