

Freedoms Like a Fox: The Constitutional Community and First Amendment Rights

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First Amendment rights are often defended as essential to American democracy, but such a defense misses the fundamental point that such rights are not about preserving political power, but shielding social groups from political interference. To understand this dynamic, one must think like a fox, not a hedgehog. Dr. Luke C. Sheahan is Assistant Professor in the Department of Political Science at Duquesne University and a non-resident scholar at PRRUCS. He is author of Why Associations Matter: The Case for First Amendment Pluralism.

“The fox knows many things, but the hedgehog knows one big thing.” Archilochus, Greek Poet

Isaiah Berlin opens his essay on Tolstoy’s view of history with a meditation upon this ancient aphorism. Berlin writes:

[T]aken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general. For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal, organizing principle in terms of which alone all that they are and say has significance—and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way, for some psychological or physiological cause, related to no moral or aesthetic principle...The first kind of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes.

This distinction between two basic orientations of intellectual personality may help us think about many things, including the nature of community in general and the nature of our constitutional order in particular. Here I won’t attempt to interrogate Tolstoy or Berlin himself on whether either is a fox or a hedgehog. I would turn instead to inquire what it might mean for the First

Amendment specifically to be a fox or a hedgehog, to contemplate one principle or many.

Berlin’s basic distinction between two types of thinking bears a resemblance to that made by the American sociologist Robert Nisbet between two basic tendencies in political thought. Nisbet described these basic dispositions by the terms “monist” and “pluralist”² which correspond to Berlin’s hedgehog and fox. Nisbet believed that the political ideologies of the modern world as we normally describe them, conservatism, liberalism, and radicalism, are not the primary philosophical fissures of our time. Monism and pluralism refer to a more fundamental philosophical orientation that determines how one’s political ideology plays out in a way more consequential to practical considerations than is the ideological orientation taken by itself. So it is better to think not in terms of three political ideologies, but of six: conservative, liberal, and radical pluralisms on one side and conservative, liberal, and radical monisms on the other. Nisbet contends that the fundamental philosophical orientation of the political ideologies creates an underlying unity between the ideologies that is more indicative of how one behaves in the policy realm than is the purported divide between ideologies.³ I contend that this fundamental philosophical orientation is related specifically to how one understands the fundamental nature of the constitutional order, which in turn determines how one reads particular constitutional clauses.

¹ Isaiah Berlin, “The Hedgehog and the Fox: An Essay on Tolstoy’s View of History,” in *The Proper Study of Mankind: An Anthology of Essays* (Farrar, Straus and Giroux, 1997), 436-7.

² Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order and Freedom* (Oxford University Press, 1953. Reprinted by ISI Books, Wilmington, DE, with a new introduction in 2010. All citations to latest edition.), 230-1.

³ Robert Nisbet, *Twilight of Authority* (Liberty Fund Books, 1975), 41-45.

The political ideologies are still substantive divisions between citizens' political viewpoints and interests. But the varied policy goals they pursue are determined at a more fundamental level by whether the actors are of a monist or pluralist orientation. Pluralists will seek immunities for social groups from political power, making a distinction between political authorities and social authorities. Which groups get the immunities and to what extent will be determined by the ideology. Conservative pluralists will prioritize traditional institutions, especially those associated with family and religion. Liberal pluralists, who value individual liberty, will seek immunities for voluntary associations. And radical pluralists will pursue protection for new forms of association to replace the old. The ideological differences are real, but all strains of pluralists are united in a fundamental theoretical orientation that values immunities for social authorities from the intrusion of political power.

In contrast, monists seek not immunity from political power, but political power itself to achieve their aims. They promise constituents the proper use of power on the campaign trail and employ it to their own ideological ends when in office. The use of political power will differ between the ideologies. Conservative monists will pursue state support for traditional values and groups. Liberal monists will instantiate state programs intended to liberate the individual from social ties. And radical monists will use state power to overturn the established order, even that of the state itself.

Note that whether monist or pluralist, the conservative remains conservative in his aims and rhetoric, the liberal liberal, and the radical ineradicably radical. But there is an underlying unity between adherents of the three ideologies in each philosophical category. The pluralists (of whatever ideological stripe) have many aims and the monists just one. The pluralists are foxes and the monists, hedgehogs.

The pluralists' many aims center on securing immunity from state power for a variety of groups, which entails enabling a plethora of social authorities to remain fundamentally distinct from political power. The character of these social authorities and their final purposes differ depending upon the ideological variation of the pluralist, but protection for the autonomy of social groups is the underlying goal of all of them, no matter the variation. The

pluralists conceive of society as composed of a variety of purposes pursued by a diversity of social groups, each with its own ends and each with some measure of immunity from the authority of the others. The structure of a plural society will allow for the pursuit of many ends through the work of many social authorities. In this sense pluralists have many aims, at least as many as the plural society has groups. In contrast, the monists have just one aim: the capture of political power for a single purpose, the institution of their own ideological goals. The purposes to which political power will be put differs between the ideologies. But the fundamental structure of a monist society, or a society where monist ideologies compete, is the same. All have one aim. For the monist, the important things can only be accomplished through the exercise of political power.

Nisbet's typology is vulnerable to Berlin's characterization of his own dichotomy between the fox and the hedgehog. Berlin writes:

*Of course, like all over-simple classifications of this type, the dichotomy becomes, if pressed, artificial, scholastic and ultimately absurd. But if it is not an aid to serious criticism, neither should it be rejected as being merely superficial or frivolous; like all distinctions which embody any degree of truth, it offers a point of view from which to look and compare, a starting-point for genuine investigation.*⁴

This is precisely what Nisbet's description provides: a point of view, a starting-point for genuine investigation of a variety of issues related to political order.

Here I will use Nisbet's dichotomy between monist and pluralist as a "starting-point for genuine investigation" upon how we view the American constitutional community as it relates to our understanding of the First Amendment. Do we see our constitutional order as preserving a realm of autonomy for a variety of groups, each with its own end, or is the preservation of these groups justified only by their relation to our political order? Do we

⁴ Berlin, 437. His application of this idea to Tolstoy was apparently lighthearted, but nonetheless enlightening. Jahanbegloo, Ramin, *Conversations with Isaiah Berlin* (Halban, 2000), 188. "I never meant it very seriously. I meant it as a kind of enjoyable intellectual game, but it was taken seriously. Every classification throws light on something."

conceive our constitutional order as having a variety of purposes, or does every clause and article serve one unitary principle? The fundamental approach to the constitutional community, whether one is conservative, liberal, or radical, will be largely guided by whether one's political thought is essentially monist or pluralist. I will take this point further to say that how one sees First Amendment rights, will be determined by how one understands the purpose of those rights: whether they are unitary or plural, whether there is one purpose or many purposes, whether they exist only to augment political power or whether they serve to protect the social realm in all its plurality from the intrusions of political power.

The Political Community

In *The Social Philosophers*, Nisbet describes in detail the intellectual genealogy of the monist and pluralist ways of thinking.⁵ There he casts each of these as different approaches to community, describing the monist view as the "political community" and the pluralist as the "plural community." Nisbet locates the origins of political monism in the political thought of Plato, who believed the highest good was found in the unity of the polis. He described Plato's political philosophy as "a blend of rigorous social nihilism and political affirmation"⁶ by which he meant that Plato annihilates the social order, including the order of the family, and affirms the absolute authority of the political order as the highest good toward which all lower associations must be oriented. Rather than crushing the individual, Plato's theory emancipates the individual from the stresses and factions of social life, where a variety of social groups assert conflicting authorities over the individual, thus providing the individual with an absolute community, one that ostensibly enables him to achieve his highest potential. Nisbet writes, "The mission of the political community is for Plato no more and no less than the means whereby all the native powers and excellences of the individual are brought to fruition."⁷ Education is designed to help the individual be no more and no less than a proper member of the political

community. For the guardian class, there is to be no family and no social attachment whatsoever other than that of the polis. In the end the individual achieves the highest form of freedom by being joined with his fellow citizens in the oneness of the political community. Nisbet writes, "Such was the power of [Plato's] portrait of the political community that it has remained for some twenty-five hundred years the major inspiration for all other portraits of this form of community."⁸

Plato's influence upon Western political thought results in a tendency to glorify political power, casting it as necessary not only for stability but for justice, not only to secure *political* order but *moral* order as well. As the highest form of moral order, the political order has not only coercive authority, but *moral* authority over all other social authorities contained within it that justifies its absolute coercive authority. These authorities of the social realm are valuable insofar as they enhance the power of the state and advance its prerogatives. This way of thinking is reflected in Roman law, with its concepts of sovereignty, concession, and contract. Sovereignty is the central principle of the political community, with the political order claiming a monopoly on legitimate force and presiding over other social authorities. The principle of concession flows directly from this idea of sovereignty. Associations and groups exist only because the political power concedes their existence. They do not exist of their own accord for their own purposes. Only through the principle of contract do individuals interact with each other in associations. The primary relationship of all persons is between themselves as citizens and the sovereign. Nothing is allowed to intervene in that relationship or challenge its supremacy. All other relationships are merely contractual, dissolved at the whim of the individual parties.⁹

Nisbet sees the primacy attributed to the relationship between sovereign and citizen instantiated in the political community and the accompanying suspicion and hostility to groups in the work of Machiavelli, Jean Bodin, Thomas Hobbes, and especially Jean Jacques Rousseau. Machiavelli and Bodin wrote at the beginning of the modern period and both are insistent upon the supremacy of political power over social authorities. Bodin does provide for absolute immunity for the family from the

⁵ I also discuss Nisbet's intellectual genealogy of the political community in Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* (University Press of Kansas, 2020), 4-6.

⁶ Robert Nisbet, *The Social Philosophers: Community and Conflict in Western Thought* (Heinemann, 1973).

⁷ Nisbet, *Social Philosophers*, 112.

⁸ Nisbet, *Social Philosophers*, 117.

⁹ Nisbet, *Social Philosophers*, 122-3.

state, but he finds little else that may guard against the supremacy of the prince. Thomas Hobbes likewise advocates the supremacy of the political sovereign as the source of order, imbuing political power with a salvific quality. The sovereign saves his subjects from social disorder, from the claims of family and religion which are the source of so much social strife. Like Plato, Hobbes and the rest advocate “rigorous social nihilism and political affirmation,” they affirm political power while suppressing social authorities.¹⁰

Rousseau is Nisbet’s greatest exemplar of the political community because more than anyone else Rousseau conceives political power as the source of *moral* order. He is “the first to justify absolute power in the name of virtue, equality, and freedom.”¹¹

Like Plato, Rousseau posits in the political community the highest form of *social* liberation for the individual combined with total *political* subordination. By joining the political community, the individual is freed from the partial allegiances of other social authorities, especially the family. Children must be freed from the “prejudices of the fathers” so that they can be united to others as equal citizens in the political state. Recalcitrant individuals can be forced to join the political community which is not suppression of individuality, but, in Rousseau’s words, merely individuals being “compelled to be free.”¹² Rather than an imposition on moral autonomy, for Rousseau this conception of the political community liberates the individual from what Marx called “false consciousness” instilled by the authority of family and other private associations. On this logic, religion too must be subordinated to the state, existing only as civil religion, valuable only insofar as it bolsters state power by encouraging individual allegiance to the state.¹³

Consonant with the political community is a fundamental way of thinking that focuses upon unity and oneness. The philosophers of the political community know one thing: political order. All apparent social diversity is either merely manifestation of the fundamental oneness of the political community or a threat to the ultimate unity of the political community and therefore necessarily suppressed.

The Plural Community

Nisbet juxtaposes this pattern of relations between the individual and the sovereign in the political community, one characterized by “rigorous social nihilism and political affirmation,” to that between individuals and a plethora of social authorities in what he calls the “plural community.” Thinkers in this vein begin with Aristotle who saw not unity in the polis, but some level of irreducible diversity.¹⁴ Every society will have at least the rich and the poor. And there will always be a variety of occupations and a range of financial and social interests. All of these must be accommodated in some way.

The pluralist structure of society and its consonant way of thinking about community is key to understanding the medieval political and social order. Nisbet sees in medieval history a variety of groups making claims of authority upon individuals. The church, of course, but also kings, aristocrats, free towns, village communities, guilds, and the like. These authorities clashed and sometimes made conflicting claims upon their members. But in the process they permitted remarkable social and economic diversity and, while not emphasized by contemporaries at the time or modern commentators, they permitted a great deal of freedom because no particular authority could make an absolute claim upon an individual without clashing with competing claims of other authorities.

A defense of the plural community appears at the very beginning of the modern period in the work of Johannes Althusius, just as the great defenses of the central authority of the modern state are being made by Bodin, Machiavelli, and the first modern philosophers of the political community. Writing in the early seventeenth century, Althusius advocates an essentially medieval form of political community, one characterized by decentralization, respect for social hierarchy, and the like.¹⁵ But his work was contrary to the spirit of the times and thus largely ignored. It was not until the end of the next century that the plural community would find its most articulate and influential defense in the work of the British statesman Edmund Burke.¹⁶ Burke argued that the British constitutional order was characterized not by unity, but by diversity, with every person

¹⁰ Nisbet, *Social Philosophers*, 129-145.

¹¹ Nisbet, *Social Philosophers*, 153.

¹² Quoted in Nisbet, *Social Philosophers*, 150.

¹³ Nisbet, *Social Philosophers*, 153-5.

¹⁴ Nisbet, *Social Philosophers*, 393.

¹⁵ Nisbet, *Social Philosophers*, 396-407.

¹⁶ Nisbet, *Social Philosophers*, 407-414.

ensconced in a variety of “little platoons” throughout civil society.¹⁷ These small associations are essential to individual wellbeing. To the extent that we can relate to the larger political order we only do so effectively through these associations. Burke writes, “We begin our public affections in our families. No cold relation is a zealous citizen. We pass on to our neighbourhoods, and our habitual provincial connections. These are inns and resting places.”¹⁸

Althusius and others may have predated Burke, but it is to Burke, Nisbet contends, that conservatives, liberals, and radicals in the pluralist mode have taken their inspiration. Nisbet sees conservative pluralism in the thought of Friedrich Hegel and Louis de Bonald,¹⁹ liberal pluralism in the works of Robert de Lamennais and Alexis de Tocqueville,²⁰ and radical pluralism in the work of Peter Kropotkin and Joseph Proudhon.²¹ While each of these political orientations differs in political aims, conservatives wishing to preserve traditional social institutions, liberals seeking to secure the freedom of the individual, and radicals aiming to found a new society upon new social organizations—all accomplish their goals through support for a variety of associations rather than through the assertion of political power.

Constitutional Community and the First Amendment

Applying Nisbet’s typology we can see the way that it hedges the understanding of what First Amendment rights entail and even which First Amendment rights we may have. Each yields a very different vision of what the constitutional community looks like and how First Amendment rights function to uphold that constitutional community. Partisans of the political constitutional community see First Amendment rights as facilitating the interaction between individual and sovereign. Partisans of the

plural constitutional community see First Amendment rights as providing immunity from sovereign political power for social groups of different types within that community, not for the purpose of facilitating political power, no matter how democratic it may be, but for the purpose of protecting groups as groups.

A number of prominent scholars of the First Amendment adopt a fundamental orientation of the American constitutional order akin to that of the philosophers of the political community but with an explicitly democratic veneer. Like Plato, they hold that sovereign political power is the highest good, but it is the highest good for democratic reasons, because it is a reflection of the will of the people. First Amendment rights are means to ensure that the will of the people is instantiated. This tends toward a prejudice for freedom of speech and of the press over the freedoms of religion and assembly because of their obvious role in democratic discourse. While it is beyond the scope of this essay to survey all prominent First Amendment scholars of which I speak, we can briefly examine this dynamic in the work of Alexander Meiklejohn, Robert Post, and Supreme Court Justice Stephen Breyer.

Alexander Meiklejohn famously argued in his 1948 Walgreen Lectures²² at the University of Chicago that free speech is fundamentally a democratic right because free speech is essential to democratic government. Therefore, protection for free speech regarding political matters is absolute under the First Amendment. According to this view, freedom of speech resides in the hearer. To make informed decisions, democratic citizens must have available to them the best possible arguments. For Meiklejohn this means an absolute freedom to hear, which entails first a freedom to speak.

Many First Amendment scholars agree with this assessment of the democratic purpose of First Amendment rights even if they disagree with the details of Meiklejohn’s argument. Yale Law School’s Robert Post argues that Meiklejohn is right to insist that free speech only protects political speech because free speech is fundamentally a democratic right, but the locus of the right is the speaker and not in the hearer. The First Amendment right to free speech is the right to influence one’s fellow citizens,

¹⁷ Edmund Burke, *Reflections on the Revolution in France*, ed. By J.G.A. Pocock (Hackett Publishing, 1987), 41.

¹⁸ Burke, *Reflections*, 173.

¹⁹ Nisbet, *Social Philosophers*, 414-8.

²⁰ Nisbet, *Social Philosophers*, 418-29.

²¹ Nisbet, *Social Philosophers*, 429-32. For a discussion of these thinkers as pluralists in the mode of Burke, see Luke C. Sheahan, “Conservative, Pluralist, Sociologist: Robert Nisbet’s Burke,” *Studies in Burke and His Time*, Vol. 28 (2019), 49-56.

²² Published as Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Row, 1948).

to participate in democracy.²³ This “participatory democracy” paradigm limits Post’s vision of what First Amendment rights might be.

Supreme Court Justice Stephen Breyer argues in his book *Active Liberty: Interpreting our Democratic Constitution* that the principle of democracy underlies much of our constitutional system, thus the principle of democracy is the lens through which we should interpret the Constitution.²⁴ Breyer demonstrates his argument through a number of constitutional provisions. When he comes to his discussion of the First Amendment he argues that it exists to protect freedom of speech for the purpose of democratic government.²⁵ Several points follow from this premise. First, there is no protection for economic speech, such as advertisements, on the grounds that such are not democratic speech.²⁶ He further is willing to regulate speech when the regulations will better preserve democracy, such as the regulation of campaign finance.²⁷ These may be important exceptions to the constitutional right of free speech, but the specifics of Breyer’s points are not at issue here. I am pointing to the fact that he makes these exceptions on the basis of his singular devotion to the fundamental value of democracy as the sole interpretive lens for the First Amendment. More egregiously, this is the same reason he gives little attention to First Amendment rights other than freedom of speech. The point of Breyer’s First Amendment is to facilitate conversation among citizens so they are informed in the electoral process.

The defense of free speech advanced by Meiklejohn, Post, and Breyer implies that freedom of speech is limited to matters that are to be decided by the democratic polity. There is little room for a “social” rather than “political” theory of free speech or for a discussion of the purpose of the other rights protected in the First Amendment, which do not so easily fit into a “participatory democracy” paradigm or cannot be easily described as “expressive.” To put

it another way, the purpose of the freedom of speech is itself plural. Speech certainly is necessary for democratic government. If the people are truly to rule then they need their own equivalent of the Speech and Debate Clause that shields their opinions from government interference.²⁸ But a democratic purpose to freedom of speech need not exhaust the purposes of the First Amendment. It is not that these scholars are inaccurately describing the right to freedom of speech and the press, it is that they are unnecessarily circumscribing the extent of First Amendment freedoms according to this fundamental focus upon the role of First Amendment rights in bolstering democratic political power. To the extent that they recognize these rights as immunities from that power, they still see those immunities as deriving from their ability to bolster democratic the democratic political regime. In this way, monist First Amendment thinkers contemplate only one thing in the First Amendment. They are hedgehogs, not foxes.

In juxtaposition to this way of thinking are the pluralist First Amendment scholars. These emphasize the role of the First Amendment in protecting social groups from the intrusion of political power. These groups may facilitate the participation in democracy through their expressive activities and they may shape citizens’ worldviews, affecting public policy in a roundabout way. But that is not the purpose of these groups for pluralists. The purpose of these groups is the ends for which the groups were established, and those purposes are likely to differ greatly between groups and between each particular group and the state. The purpose of religious organizations, for example, is to coordinate and facilitate worship of the divine and consonant activity. This may mean different things to different groups. But to defend First Amendment protection for religious activity in democratic terms is to miss dreadfully the point of those protections. The point of First Amendment protection for religious activity is a fundamentally pluralist one: immunity from political power for the sake of achieving the ends for which the religious organization came into existence. The same is true for expressive associations and other peaceable assemblies. Their existence and activities are protected for at least as many reasons as there are groups. We can see this concern reflected in the work of Richard Garnett, Steven D. Smith, and John Inazu.

²³ Robert Post, “Participatory Democracy and Free Speech,” *Virginia Law Review*, Vol. 97, No. 3 (2011) and Robert Post, “Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse,” *University of Colorado Law Review*, Vol. 64:1109 (1993).

²⁴ Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Vintage Books, 2005).

²⁵ Breyer, *Active Liberty*, 40.

²⁶ Breyer, *Active Liberty*, 50-55.

²⁷ Breyer, *Active Liberty*, 43-50.

²⁸ US Constitution, Article 1, Section 6. “Senators and Representatives...for any Speech or Debate in either House...shall not be questioned in any other Place.”

Richard Garnett has written about the importance of religious institutions and the “educational” role of social groups more broadly.²⁹ Drawing from work on the “infrastructure” of First Amendment rights, Garnett sees in the First Amendment Religion Clauses protection for religious institutions, such as churches. He writes, “Institutions matter, in a special way, to the First Amendment and to the enterprise of enforcing and interpreting it.”³⁰ While he is clear that the focus upon institutions in no way interferes with the rights of individuals or subtracts from individual exercise of First Amendment rights, it is also clear that for Garnett the presence and protection of institutions is essential to the proper scope and exercise of religious freedom. “[T]he values and goods that the First Amendment’s Religion Clauses are today understood to embody and protect...are well served by a civil-society landscape that is thick with churches (and other religious institutions and associations), and by legal rules that acknowledge and capture their importance.”³¹ It is in such institutions that individuals may live out the dictates of their consciences in a way impossible without them.

Like Garnett, Steven Smith argues in *The Rise and Decline of American Religious Freedom* that the purpose of the Religion Clauses was to resuscitate an ancient ideal of religious freedom that emphasized jurisdictional boundaries between church and state. Our modern idea of religious freedom is predicated upon a more ancient medieval idea of *libertas ecclesia*, the freedom of the church.³² Refusing to establish a state church, the Framers of the First Amendment were recognizing that religious matters were not under the authority of the political state, but under the authority of religious institutions.

²⁹ Richard W. Garnett, “The Story of Henry Adams’s Soul: Education and the Expression of Associations,” *Minnesota Law Review*, Vol. 85: 1841 (2001). Garnett argues that not only do individuals speak through associations, but they are spoken to by associations.

³⁰ Richard W. Garnett, “Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses,” *Villanova Law Review*, Vol. 53, No. 2 (2008), 293.

³¹ Garnett, “Do Churches Matter?”, 294.

³² Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Harvard University Press, 2014), 70. I discuss Smith’s work in a little more detail in Sheahan, *Associations*, 21-24.

When it came to matters of religious doctrine and practice, the church has jurisdiction and the state does not.

John Inazu is perhaps the most insightful First Amendment scholar writing today and one of the most dedicated pluralists, titling one of his books *Confident Pluralism: Surviving and Thriving through Deep Difference* and arguing there that we should seek a minimum of agreement to “live together in our ‘many-ness.’”³³ He argues in *Liberty’s Refuge: The Forgotten Freedom of Assembly* that the Assembly Clause is significantly understudied and underappreciated in First Amendment scholarship and jurisprudence. Scholars and jurists routinely ignore the right of Assembly, seeing it as but an addendum to the expressive rights enshrined in the Speech and Press Clauses, as if the only constitutionally protected reason to assemble is to speak. But Inazu points out that looking at the right of assembly through a democratic lens misses the important point that the Assembly Clause was not intended to protect “democratic” groups, or groups that associate for democratic purposes. In fact, the Framers cut a “common good” condition upon the right out of the Clause altogether. The Framers’ intent with the Assembly Clause was to protect groups dissenting from what the majority considers the “common good.”³⁴ While speech is important, each right shields distinct practices for distinct purposes. A lot is lost when the autonomy of a vast array of groups is compromised. For starters, we lose protection for difference, for those who dissent from “state-enforced majoritarianism.”³⁵ In short, we lose the plural constitutional community.

Each of these thinkers focuses upon the way in which First Amendment rights protect a plural social order, shielding institutions and assemblies from the intrusion of political power. By focusing upon a variety of social authorities and expanding the horizon of First Amendment inquiry toward clauses other than speech and press and toward functions other than promotion of democratic government, these scholars demonstrate how the First Amendment has anti-majoritarian aspects, protecting a variety of

³³ John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (University of Chicago Press, 2016), 6.

³⁴ John Inazu, *Freedom’s Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012), 21-3.

³⁵ Inazu, *Liberty’s Refuge*, 186.

dissenting actions and traditions. This manner of conceiving First Amendment rights reveals a means to deeper democratic governance, one where every single voice is sheltered from censorship and every single community receives associational protection, no matter how outside the mainstream they are. Plurality of voices, viewpoint, and ways of life are essential to the plural constitutional order as protected by the pluralists' First Amendment. In this way, pluralist First Amendment thinkers contemplate many things in the First Amendment. They are foxes, not hedgehogs.

There is much more to say on the precise contours of how First Amendment rights reflect a variety of values or facilitate a variety of social interactions. I barely scratched the surface of what First Amendment scholarship has said on these matters. My point here is to show how the fundamental difference between conceptions of constitutional community makes for a stark contrast when examining First Amendment rights and their fundamental functions. Do the rights of religion, speech, press, assembly, and petition exist only to enable democratic deliberation and thereby democratic sovereignty? Or do they exist to protect a sphere of social action and existence for a variety of social groups that is largely immune from the intrusion of political power? Does the First Amendment exist only to give us a way to facilitate democratic action so that our political ideology can be instantiated in political office? Or does it protect a variety of groups so that we can live together in our "many-ness" in the same constitutional community? In short, is the First Amendment a hedgehog or is it a fox?