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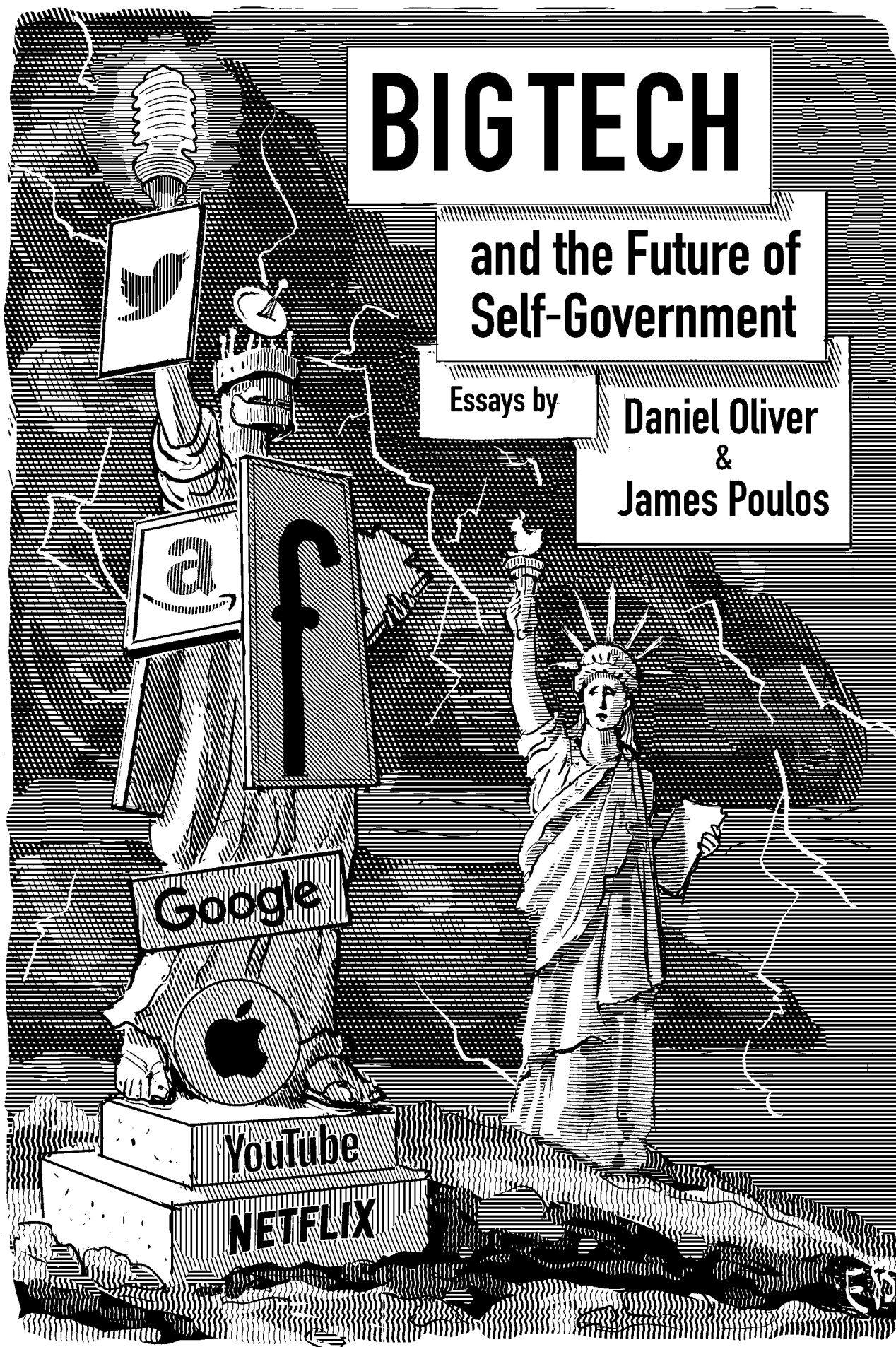
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## GATED COMMUNITIES

*Why Associations Matter: The Case for First Amendment Pluralism*, by Luke C. Sheahan.  
University Press of Kansas, 240 pages, \$34.95

THE FIRST COMMANDMENT OF LEVIATHAN is: "Thou shalt have no gods before me." As Thomas Hobbes foresaw, modernity offers a Faustian bargain: total submission to government authority in return for order and prosperity. Yet the modern state does not necessarily deliver even these low but solid goods. Robert Nisbet, one of the most important American thinkers of the 20th century, showed that the central obstacle to human flourishing in the modern age is the centralizing tendency of the liberal state. In the world of Leviathan, political affirmation supersedes community allegiance. Disconnected from their fellow men and denied apolitical means of moral formation, individuals can no longer form meaningful communities of their own.

Among conservatives, these sociological observations often provoke mere lamentation. But might they get us somewhere, practically speaking? Duquesne University political theorist Luke Sheahan answers this question with a resounding "yes." His ambitious and important new book, *Why Associations Matter: The Case for First Amendment Pluralism*, applies Nisbet's theory to argue that freedom of association is the forgotten First Amendment right. It has been swallowed up by freedom of speech, or the right to "expressive association." This process culminated in a 2010 Supreme Court case, *Christian Legal Society v. Martinez*. The Court upheld a public university's policy that a religious group had to admit all students, including those who did not share the group's beliefs or practices. Even the dissenting Justices did not base their argument on associational rights. Instead, they claimed the group's expressive rights would be compromised by an open admissions policy. As a result, writes Sheahan, "A public forum, governed by the First Amendment and created by a public university for the express purpose of allowing groups to form, was not required by the Supreme Court to protect the freedom of association for groups that formed there."

The Court operates on the basis of what Sheahan calls the First Amendment Dichotomy, taking account only of individual and state prerogatives. But textualists, argues Sheahan, ought to see that association *qua* association is expressly defended by the First Amendment: "Congress shall make no law...abridging...the right of the people to peaceably assemble." In *Martinez* the Court effectively protected an

individual's desire to join a group, but not the group itself. Thus the association becomes thoroughly politicized, protected only insofar as it upholds the values of the state: "Associations must be the larger political community 'writ small,'" explains Sheahan. But real associations can't be limited to pursuing only state-approved ends. Their whole purpose is to offer members a way of life that goes beyond what the state can provide. Associations furnish "values, dogmas, and functions that render each of them a potential reference point for individual identity."

FOLLOWING NISBET, SHEAHAN INSISTS the right to associate cannot be limited to associations whose goal is expressive activity. If it is, then associations which perform vital but fundamentally non-expressive human functions will not enjoy legal protection. Even freedom of expression itself requires communities to defend it: "The First Amendment presupposes associations." The problem is especially pressing in the case of religious associations: individual religious freedom is never guaranteed unless the communities that nurture and transmit the faith are protected. Sheahan maintains that the same holds good for freedom of association in general.

If individuals are to act corporately—as they must if any other rights are to be preserved—associations must have full authority over their membership. In a free society, the right of exit is an individual right—but not the right of entry. In Nisbet's terms, the quest for community in the modern world hinges on free association, which creates sources of authority beyond the grasp of Leviathan. Nisbet delineated four characteristics of associations: functional autonomy, lack of centralized control, hierarchical structure, and tradition. The associations exercise genuine, albeit limited, authority over the individuals who comprise them. Multiple associations lead to better-formed, more productive individuals. Nisbet envisioned a "laissez-faire of groups," which would require American law and constitutional jurisprudence to allow citizens choice among a wide array of associations. Both Nisbet and Sheahan quote with approval the 19th-century French anarchist Pierre-Joseph Proudhon: "Multiply your associations and be free."

Sheahan seeks to provide practical guidance for judges "to conceive of a third entity

in political and social reality, the association, as an independent subject of judicial analysis." Adding to established constitutional doctrines, Sheahan proposes a "functional autonomy" test built on Nisbet's four principles of pluralism: courts must strike down any government action which inhibits an organization's functional autonomy, inappropriately centralizes power, undermines the association's legitimate authority, or erodes its traditions. For legislators, Sheahan suggests a "Freedom of Association Protection Act" to require that government not "substantially burden a person's freedom to associate or assemble with others for any peaceable purpose."

SOME CAVEATS ARE IN ORDER. SHEAHAN sometimes moves back and forth too frequently between theory and practice, or dives too deeply into waters that would best be skimmed. This can obscure his most important points. And despite his support for "strong pluralism," he allows for the possibility of a race discrimination exception in public forums—though he forthrightly and evenhandedly considers charges of inconsistency that might be leveled against him as a result. More worrisomely, he does not say how the Supreme Court will be persuaded to develop a functional autonomy test: as he concedes, the Court disregards associations because it is itself a "representation of the political state." It is hard to imagine how such a body might become willing directly to challenge Leviathan—and with it, the Court's own power.

Nevertheless, Sheahan offers hope for all those concerned about the future of community, providing a roadmap for moving beyond lamentation and into action. He carefully examines individual legal questions while keeping in mind the social and political whole—something our poorly educated legal profession seems congenitally incapable of doing. They would do well to read Sheahan's important work—and teach it to those who would become judges.

Bradley C.S. Watson is professor of politics at Saint Vincent College, where he holds the Philip M. McKenna Chair in American and Western Political Thought, and the author, most recently, of *Progressivism: The Strange History of a Radical Idea* (University of Notre Dame Press).



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