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Freedom's Associations

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FREEDOM'S ASSOCIATIONS

Jason Mazzone*

This Article offers a new approach to the protection of associations under the Constitution. Although the modern Supreme Court's doctrine of freedom of association is based on expression, in the early Republic associations were understood not in terms of free speech, but in terms of freedom of assembly and popular sovereignty. On this account, associations are constitutionally significant because they allow for self-government. Popular sovereignty also offers a more useful basis for understanding freedom of association today. This Article therefore provides tools for assessing the proper scope of constitutional protections for associations once they are understood in terms of popular sovereignty, and for evaluating governmental regulations of associational life. This Article shows that associations merit constitutional protection if they directly engage in political activities, or if they equip their members with politically relevant skills. This Article sorts out different kinds of associations and evaluates the proper scope of their associational freedom. With respect to the contentious issue of whether associations should be exempt from anti-discrimination laws, the popular sovereignty approach suggests that only small, member-intensive associations should be free to select their members without governmental interference. While mass-membership organizations like the Boy Scouts or even political parties may merit some constitutional protection, their significance to popular sovereignty does not depend on their exemption from laws prohibiting discrimination.

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PROLOGUE

Traveling to the Massachusetts Bay Colony in 1635, Anne Hutchinson gathered together other women passengers to discuss the weekly sermons they heard aboard their ship.¹ Once arrived in Boston, Hutchinson continued the tradition by opening her home twice a week to women friends for discussion.² She was promptly criticized by the Puritan establishment for “maintaining a meeting and an assembly in [her] house that hath been condemned by the general assembly as a thing not tolerable nor comely in the sight of God nor fitting for [her] sex.”³ During the next two hundred years or so, the Puritan church oversaw women’s groups, organizing them as sewing circles with readings and discussion of religious texts.⁴ By the 1800s the sewing had become secondary to study and discussion; still, these women’s groups were careful to avoid any hint that they were engaged in education or politics.⁵ Margaret Fuller, for instance, in the late 1840s, held “Conversations on Literature and Culture” in Elizabeth Peabody’s bookstore in Boston.⁶ Addressing an audience of mostly women, Fuller remained seated during her talks so as not to be considered a public lecturer.⁷

In the late 1860s, women’s study groups spread across the United States, increasing in number through the 1890s and into the early part of the twentieth century.⁸ Historians explain that during the social and economic upheaval in the period immediately following the Civil War, women turned to each other for community and stability.⁹ Excluded from public life, women used clubs as a way to explore their role in society and to examine that role against the egalitarian promise of the War.¹⁰ By 1906, the General Federation of Women’s Clubs reported five thousand organizational members; all told, there were probably ten to twenty times that number of

1. See THEODORA PENNY MARTIN, *THE SOUND OF OUR OWN VOICES: WOMEN’S STUDY CLUBS, 1860–1910*, at 6 (1987).

2. See *id.*

3. *Id.*

4. See *id.* at 8.

5. See *id.* at 8–9.

6. See *id.* at 9.

7. See *id.*

8. See KAREN J. BLAIR, *THE CLUBWOMAN AS FEMINIST: TRUE WOMANHOOD REDEFINED, 1868–1914*, at 63 (1980); MARTIN, *supra* note 1, at 14.

9. See MARTIN, *supra* note 1, at 14–30.

10. See *id.* at 15–30.

clubs in existence at the time.¹¹ These small, local groups of middle-aged women met in each other's homes to study art, music, geography and literature.¹² Typically, the clubs had written constitutions and followed parliamentary procedure in organizing discussion; many clubs had club songs, pledges at the start of meetings, and club mottoes.¹³ The clubs had a tremendous influence on their participants. Clubwomen were intensely loyal, remaining members year after year.¹⁴ The clubs taught women confidence and solidarity.¹⁵ In clubs women learned, often for the first time, to evaluate and criticize ideas; they also learned that despite differences of opinion there could still be lasting friendship and connection.¹⁶ A common theme at the time was that "one joins a club not so much to acquire information, because that can be done at home, but rather to learn to express oneself readily and intelligently."¹⁷

Some of the early study groups continue to exist today. The Claremont Book Club, for instance, whose original purpose was "to keep abreast of current literature and to aid the war effort by knitting for the Red Cross," has been meeting in California since 1917.¹⁸ In 1991, the group provided comfort and support to members who lost their homes in the Oakland fires.¹⁹ Beginning in the 1890s many women's study clubs changed their focus, becoming less engaged in study, and more socially and politically active.²⁰ The club members began to see their study as too insular and, equipped with skills and confidence through their club experience, they looked to make reforms in broader society.²¹ One club president's comments summed up the mood: "Ladies, you have chosen me as your leader. Well, I have an important piece of news for you. Dante is dead. He has been dead for several centuries, and I think it is time we dropped the study of his inferno and

11. *See id.* at 3.

12. *See id.* at 66–69.

13. *See id.*

14. *See* BLAIR, *supra* note 8, at 60–63.

15. *See id.* at 130–31.

16. *See id.*

17. *See* MARTIN, *supra* note 1, at 94.

18. *See* ELLEN SLEZAK, *THE BOOK GROUP BOOK* 46–49 (1993).

19. *See id.* at 47–49.

20. *See* BLAIR, *supra* note 8, at 93–98.

21. *See id.* at 93.

turned our attention to our own.”²² Of particular focus were promoting libraries and advocating increased educational opportunities for women.²³

By the first decades of the twentieth century, many clubwomen turned their energies away from study altogether, taking what they had learned in the clubs to aid political causes such as the suffrage movement.²⁴ Although the study clubs declined in number as a result, the participation of these women in political life was born out of their early association with other members on the basis of shared interests and a search for solidarity.²⁵

This Article is about that kind of association.

I. INTRODUCTION

Freedom of association is not among the specific protections of the Constitution, but the United States Supreme Court has recognized such a right under the First Amendment.²⁶ In early cases involving freedom of association, the Court found that government interference with membership in associations undermined the ability of individuals to engage in political advocacy.²⁷ In recent years, groups have asserted freedom of association as a defense to the application of state laws prohibiting them from discriminating in their selection of members.²⁸ In considering those claims, the Court has characterized the right at issue as the “freedom of expressive association” and therefore focused on whether the inclusion of a particular individual would impair the message the organization seeks to impart.²⁹ In its most recent decision in this line of cases, the Court upheld the right of the Boy Scouts of America to discharge James Dale, a gay Eagle Scout.³⁰ The Court held that the Boy Scouts enjoy freedom of association because they engage in expressive activity.³¹ Since the presence of a gay scout would significantly impair the Scouts’ ability to impart their views—which, the Court found, include disapproval of homosexuality—the Court held the First Amendment

22. *Id.* at 172.

23. *See id.* at 93–100.

24. *See id.* at 111–12.

25. *See id.*

26. *See, e.g.,* *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984).

27. *See, e.g.,* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

28. *See infra* Part II.E & F.

29. *See id.*

30. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

31. *See id.* at 649–50.

exempts the Scouts from New Jersey's law against sexual orientation discrimination.³²

The analysis of freedom of association in the Supreme Court's recent opinions and in the discussion by commentators³³ is deficient in many respects. It is at once insufficiently protective of the associational interests at stake and insensitive to the government's interest in regulating certain types of associational activity. Much legal writing on freedom of association lacks any firm theoretical understanding of why the Constitution protects freedom of association and what exactly is at stake in safeguarding this right. Little effort has so far been made to understand in a detailed and serious manner what it is about associating that warrants constitutional protection. As a result, existing approaches prove unsatisfactory for identifying legitimate claims to freedom of association and the proper scope of such claims, as well as for determining the permissible reach of governmental regulations of associational life.

For reasons I discuss further below, the modern notion of "expression" is a dubious peg on which to hang a constitutional right of free association.³⁴ Despite a series of judicial decisions (and much academic writing), the concept of "expressive association"—which is of course not mentioned in the Constitution—remains quite vague. Some associations, for example commercial entities, receive little or no protection on this basis even though they might be highly expressive. Therefore, expression cannot be the only criterion motivating the present analysis. But few attempts have been made to articulate the full range of relevant considerations in analyzing claims to associational freedom.

32. *See id.* at 656.

33. There is a large amount of literature on freedom of association. *See generally* Victor Brudney, *Association, Advocacy and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001); David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203; Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Association*, 85 MINN. L. REV. 1841 (2001); Katherine A. Moerke & David W. Selden, *Associations Are People Too*, 85 MINN. L. REV. 1475 (2001); Martin H. Redish & Christopher R. McFadden, *HUAC, The Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669 (2001); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986).

34. *See infra* Part III.

The proper scope of freedom of expressive association also remains hard to discern. It requires judges to engage in the uncertain enterprise of determining, on an ad hoc basis, whether a particular organization's specific message is undermined by a particular governmental regulation. This approach, as widespread surprise with the Court's *Dale* decision demonstrates, gives us few tools to determine or predict what types of governmental regulations of what kinds of associations unduly infringe constitutional interests. More generally, expressive association has shifted the focus away from associating and to the more familiar First Amendment territory of speech, messages, and the like. The end result is a discussion of associational expression rather than a careful constitutional analysis of association itself.

Perhaps most strikingly, contemporary analysis of freedom of association proceeds in a piece-meal fashion that is oddly removed from broader issues and implications. The doctrine of freedom of association has emerged from a very narrow discussion of a few specific types of organizations, in particular advocacy groups (such as the NAACP) and so-called voluntary associations like Rotary, the Jaycees, and the Scouts. There are, of course, many other instances of citizens "associating" together: in commercial organizations, churches, schools, parades, and theaters to name a few. But these associations (and others) are routinely excluded from modern accounts of freedom of association. They are either defined away as unconnected to the analysis at hand or else they are just ignored (and discussed under different doctrines entirely). The failure to explain adequately what associational freedom is, why it matters, and how we can identify where it exists leaves aside a host of seemingly relevant forms of associating.

This Article seeks to enrich the legal understanding of freedom of association by offering an account that is more attentive to the purposes for protecting freedom of association under the Constitution and more sociological in considering the nature of associational life. Rather than relying on general notions of "expressive association" and the like (which seem to me more like slogans than tools for constitutional analysis), I take a fresh look at association and its proper scope of constitutional protection. Why, in other words, does the Constitution safeguard the ability of citizens to come together? In answering this question, one that has so far received very little attention, I argue that instead of developing a new doctrine of "expressive association," there is a much firmer constitutional basis for protecting the rights of citizens to come together in collective activities: the First Amendment right of freedom of assembly and petition. While the assembly and petition clause is today largely ignored in First Amendment

analysis, the rights to assemble and petition were historically core political values (to which freedom of speech was often quite secondary).³⁵

In analyzing claims of freedom of association, rather than working backwards from expression, we should begin instead with the reasons for and the proper scope of constitutional protections for free assembly and petition. This approach is preferable because in the early Republic it was against the right of assembly and petition that associations were understood.³⁶ On that score, consistent with the assembly and petition clause, freedom of association is protected under the First Amendment because associations represent instances of popular sovereignty.

Freedom of association at its core is a political right, a right of self-governance. Associations empower citizens to exert political influence and to keep government in check. It is in this sense that citizen groups are—as I call them in my title—freedom's associations. They are a form of popular sovereignty in democratic government. This understanding is sounder as a matter of constitutional interpretation and historical experience than is today's prevailing account of freedom of association as a right of expression.

The remainder of this Article identifies the circumstances under which courts should recognize and protect a claim of freedom of association once it is conceived as protecting popular sovereignty.³⁷ In taking up this issue, I argue that freedom of association is properly understood to apply to organizations that seek to influence political outcomes. The popular sovereignty account therefore provides a firm rationale for distinguishing political associations from associations involved in economic or social activity. At the same time, many non-political associations teach their members to develop shared programs, to coordinate their actions, and to undertake collective projects. They provide their members with political opportunities by connecting them with other citizens, raising their awareness and knowledge of political issues, and alerting them to political events and organizations. These features make many kinds of non-political associations important to popular sovereignty. In the early years of the twentieth century, women's sewing and study circles taught their members skills and values they could later bring to political and social causes.³⁸ Similarly, many associations are significant training grounds for political engagement, even if

35. See *infra* Part V.D.

36. See *id.*

37. See *infra* Part VI.

38. See *supra* Prologue.

politics is not their stated purpose. We should, therefore, understand freedom of association to protect both politically active associations as well as associations that politicize their members.³⁹

In protecting both of these varieties of associations we need also to be attentive to the proper scope of the constitutional right in each instance.⁴⁰ Political associations do not require the same kinds of protections as the non-political associations significant to popular sovereignty because they provide their members with skills and experiences useful for participating in politics. In particular, I show that freedom of association should not be construed to exempt an association from anti-discrimination law just because the association itself is involved in political activities. Only politicizing associations, those that are protected because they prepare their members for politics, need relief from anti-discrimination law and similar forms of governmental interference with the selection of members.

Accordingly, while organizations like the women's clubs of the nineteenth century should be exempt from anti-discrimination law, freedom of association does not require granting the same exemption to mass-membership organizations like political parties or the Boy Scouts. The reason the Court's decision in *Dale* was incorrect, therefore, is not that the Boy Scouts merit no constitutional protection. Rather, recognizing that the organization may contribute to political life in a manner contemplated by the assembly and petition clause, those contributions do not depend on the Scouts' ability to discriminate against gay members.⁴¹

Part II provides an overview of the Supreme Court's freedom of association jurisprudence. Part III identifies the shortcomings in the Court's analysis and related academic commentary. Part IV draws on theoretical and empirical work in the social sciences to identify the features of associations that are relevant to their protection under the First Amendment. Part V develops an account of freedom of association as protecting popular sovereignty. Part VI offers a methodology for distinguishing among different kinds of associations and for evaluating the proper scope of their constitutional protection and applies this methodology to revisit recent cases. Part VII offers concluding thoughts.

39. See *infra* Part VI.B.

40. See *infra* Part VI.C.

41. See *infra* Part VI.D.

II. THE SUPREME COURT'S FREEDOM OF ASSOCIATION CASE LAW

A. *Speech: Patterson*

Freedom of association is not among the Constitution's explicit protections.⁴² The United States Supreme Court first recognized a right of "freedom to engage in association for the advancement of beliefs and ideas" in 1958 in *NAACP v. Alabama ex rel. Patterson*.⁴³ In *Patterson*, the Court held that a state court order requiring the NAACP to divulge its membership lists constituted "a substantial restraint upon the exercise by [the NAACP's] members of their right to freedom of association"⁴⁴ and that the order was therefore unconstitutional.⁴⁵ The freedom of association recognized in *Patterson* fell squarely within the First Amendment. The Court explained:

42. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The association of people is not mentioned in the Constitution nor in the Bill of Rights.")

43. 357 U.S. 449, 460 (1958). In earlier cases, the Court had hinted at a right of free association. See *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 245, 250–51 (1957); *Watkins v. United States*, 354 U.S. 178, 197–99 (1957); *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246 (1957); *Am. Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 392–93, 402–04 (1950).

44. *Patterson*, 357 U.S. at 462.

45. *Id.* The Court in *Patterson* did not discuss an earlier case, *N.Y. ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), which upheld a statute requiring associations with twenty or more members to file a copy of their constitution and rules along with a membership list and made it a misdemeanor to become a member of an association which failed to comply with these requirements. See *id.* at 72. In *Zimmerman*, a Ku Klux Klan member challenged the statute as "depriv[ing] him of liberty in that it prevent[ed] him from exercising his right of membership in the association." *Id.* The Supreme Court disagreed, stating that "[t]here can be no doubt that under that [police] power the state may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare." *Id.* Describing the Klan's activities as entailing "a crusade against Catholics, Jews, and negroes, and stimulating hurtful religious and race prejudices," *id.* at 76, and observing that the Klan "was striving for political power, and assuming a sort of guardianship over the administration of local, state, and national affairs," *id.*, the *Zimmerman* Court justified the disclosure statute "as an effective . . . deterrent from the violations of public and private right to which the association might be tempted." *Id.* at 72.

The Court in *Zimmerman* did not make clear whether it viewed freedom of association as a First Amendment right. However, it is difficult to see *Patterson* as representing an evolution in the Court's First Amendment jurisprudence. Shortly after *Patterson*, the Court upheld a federal order requiring the Communist Party to disclose its membership list as justified by the government's interest in protecting the nation against the "world Communist movement . . . whose purposes it is by whatever means necessary to establish Communist totalitarian dictatorship." *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 93 (1961).

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. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.⁴⁶

On this view, freedom of association is a necessary precondition to free speech. It is therefore protected in order to safeguard First Amendment speech interests.⁴⁷

One way to understand *Zimmerman* and *Communist Party of the United States*, especially in light of *Patterson*, is that while the Court protected associations with political viewpoints, it was unwilling to protect associations engaged in violence. On this understanding, little justification is required to regulate an association organized to overthrow the existing government. See *Communist Party of the United States*, 367 U.S. at 96–97 (“When existing government is menaced by a . . . movement which employs every combination of possible means, peaceful and violent . . . to destroy the government itself . . . the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods.”).

46. *Patterson*, 357 U.S. at 460–61 (citations omitted).

47. Since *Patterson*, the Court has suggested that the Constitution may protect associational freedom independently of its role in furthering speech. In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), the Court held that a city ordinance limiting to \$250 contributions to committees formed to support or oppose ballot measures was unconstitutional. See *id.* at 292. Citing *Patterson* and *Buckley v. Valeo*, 424 U.S. 1 (1976) (which struck down provisions of the Federal Election Campaign Act limiting expenditures by individuals, see 424 U.S. at 44–45), the *Berkeley* Court invoked the “freedom of association in guaranteeing the right of people to make their voices heard on public issues.” 454 U.S. at 295. The Court’s particular concern was that the ordinance worked an inequity between associations and individuals: it allowed individuals on their own to spend unlimited amounts to advocate a view on a ballot measure, but it imposed restrictions on spending by people working together. See *id.* at 296. The decision also contains language suggesting that associational interests may be protected not just for the ends that they serve but as an independent right. See *id.* at 300. (“The restraint . . . plainly contravenes both the right of association and the speech guarantees of the First Amendment.”). It is nonetheless difficult to treat *Berkeley* as standing for a firm proposition that associational rights may be infringed independently of any additional constitutional interest which such rights further. The *Berkeley* Court specified that association is “virtually inseparable” from speech; given that the Court made clear that the spending limits imposed by the ordinance would be unconstitutional even if they *also* applied to individuals, see *id.* at 297–99, it is not certain that the Court would reach the same result if associations were *merely* treated differently than individuals.

B. *Burdens on Speech*

In a series of cases applying the speech rationale of *Patterson*, the Court has identified various ways in which government action may infringe freedom of association. The first is by imposing burdens on certain associations. A case in point is *Healey v. James*,⁴⁸ in which the Court ruled that the Central Connecticut State College could not deny recognition and the use of campus facilities to a local chapter of Students for a Democratic Society (SDS).⁴⁹ The Court found that withholding these privileges without sufficient justification abridged the students' First Amendment rights to freedom of association.⁵⁰

A second way government action may infringe associational freedom is by burdening individuals or denying them benefits because of their associational ties, thereby increasing the costs associated with membership.⁵¹ In *Shelton v. Tucker*,⁵² for example, the Court held unconstitutional an Arkansas statute that required teachers employed in a state-supported school

Other cases also contain language suggesting that associational freedom may be an independent right, not just an accessory to First Amendment expression. *See, e.g., Evans v. Newton*, 382 U.S. 296, 298–99 (1966) (describing “the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses,” and noting that “[a] private golf club . . . restricted to either Negro or white membership is one expression of freedom of association.”); *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (“Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.”).

48. 408 U.S. 169 (1972).

49. *See id.* at 194.

50. *See id.* at 181–82. The Court observed: “Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.” *Id.* at 181.

51. *See, e.g., Healy*, 408 U.S. at 185–86 (“[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen’s association with an unpopular organization . . . [G]uilt by association alone, without establishing that an individual’s association poses the threat feared by the Government is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.”) (quotation, citations, and alteration omitted) (collecting cases); *United States v. Brown*, 381 U.S. 437, 460–62 (1965) (holding that a federal statute making it a crime for a member of the Communist Party to serve as officer or employee of labor union is an unconstitutional bill of attainder); *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 246–47 (1957) (holding that the state may not refuse bar admission solely on the basis of past membership in the Communist Party).

52. 364 U.S. 479 (1960).

or college to file an annual affidavit listing every organization to which the teacher belonged or contributed during the preceding five years.⁵³ The Court distinguished the disclosure statute from the statute at issue in *Patterson* on the ground that a school has a legitimate interest in screening teachers.⁵⁴ Nonetheless, the Court found that the disclosure requirement in *Shelton* unduly impaired the teachers' freedom of association because it required revealing membership in associations that did not bear on a teacher's fitness to teach.⁵⁵ In so holding, the Court stated that the "right of free association [is] a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."⁵⁶ Echoing *Patterson*, the *Shelton* Court placed particular emphasis on the risk that a disclosure requirement undermines participation. Observing that the statute did not specify that information disclosed would remain confidential,⁵⁷ the Court noted that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."⁵⁸

A third way the government may infringe associational freedom is by requiring membership in an association in order to receive a governmental benefit. Not all such schemes are impermissible. The Court has, for instance, upheld against freedom of association challenges integrated bars in which a license to practice law is conditioned on bar association membership and payment of membership fees.⁵⁹ The Court has been less willing to sanction compelled membership that implicates political interests. In *Elrod v. Burns*,⁶⁰ the Court held unconstitutional the actions of a sheriff who discharged public employees such as security officers because they were not Democrats.⁶¹ The *Elrod* Court held that the discharges violated the employees' rights of "political belief and association [which] constitute the core of those activities protected by the First Amendment."⁶² The Court found that the state's asserted interest in political loyalty only extended to employees in policy-making positions and did not reach the lower-level

53. *See id.* at 480.

54. *See id.* at 485.

55. *See id.* at 488.

56. *Id.* at 486.

57. *See id.*

58. *Id.*

59. *See, e.g., Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961).

60. 427 U.S. 347 (1976).

61. *See id.* at 351.

62. *Id.* at 357.

employees the sheriff had fired.⁶³ Similarly in *Branti v. Finkel*⁶⁴ the Court reiterated the holding of *Elrod* and found unconstitutional the actions of a county public defender in discharging assistant public defenders because they were Republicans.⁶⁵ The Court explained how “party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency.”⁶⁶ Nevertheless, the Court found that the work of assistant public defenders has “no bearing whatsoever on partisan political concerns,”⁶⁷ and concluded that, under the First Amendment, they could not be discharged on the basis of their political affiliation.⁶⁸

C. Unions and Bar Associations

Freedom of association has also arisen in cases involving unions.⁶⁹ In early cases, courts viewed associations among co-workers as unlawful conspiracies.⁷⁰ In addition to criminal penalties, labor organizers risked

63. *See id.* at 367.

64. 445 U.S. 507 (1980).

65. *See id.* at 517–19.

66. *Id.* at 517.

67. *Id.* at 519.

68. *See id.* at 519–20.

69. Early labor organizers “detached themselves from economic theories that explicitly justified the use of collective action to control or govern the marketplace. Instead, they placed their faith in a looser tradition of individual ‘rights’ that linked their interests and freedom of maneuver to those of the citizenry at large.” Leon Fink, *Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order*, 74 J. AM. HIST. 904, 908 (1987). By the end of the nineteenth century, unions invoked the First Amendment assembly clause to justify their collective activities. *See id.* at 915.

70. The earliest case on point is the 1806 Philadelphia-Cordwainers Case (*Commonwealth v. Pullis*), in which a jury found a group of several cordwainers in the shoe industry guilty of combining to raise their wages. *See* 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 113 (John R. Commons & Eugene A. Gilmore eds., 1910). *See generally* 1 JOHN R. COLLINS ET AL., HISTORY OF LABOR IN THE UNITED STATES 138–52 (1918); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 101–219 (1985); MARJORIE S. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW, A REINTERPRETATION (1967); MORRIS D. FORKOSCH, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 922–24 (1988); Wythe Holt, *Labor Conspiracy Cases in the United States, 1805–1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOOD HALL L.J. 591 (1984); Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931); Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

liability to employers in tort.⁷¹ In 1898, Congress passed the Erdman Act⁷² to prohibit so-called “yellow-dog” contracts (in which employers conditioned employment on the employee’s agreement not to join a union) but ten years later the Supreme Court held that the Act was an improper exercise of Congress’ commerce power.⁷³ The Court also invalidated similar state efforts to protect union activities as violating individual rights of contract under the Fourteenth Amendment.⁷⁴

Since the passage of the National Labor Relations Act in 1935⁷⁵ federal statutory law has safeguarded the rights of employees to associate in unions and to engage in collective bargaining with their employers.⁷⁶ Employees can be required, pursuant to union-shop provisions, to join a union as a condition of employment, to finance activities of the union, and to be bound by agreements the union reaches with an employer.⁷⁷ The Court has upheld these aspects of federal law while recognizing they implicate First Amendment interests.⁷⁸

Employees cannot, however, be forced to support a union’s political speech.⁷⁹ In the case *Abood v. Detroit Board of Education*,⁸⁰ the Supreme court held that non-union teachers in a public school could not be required, under an agency-shop provision of a collective bargain agreement between the union and the employer school board, to finance the expressive activities

71. See, e.g., *Vegeahn v. Gunter*, 44 N.E. 1077, 1080 (Mass. 1896)

[W]hen a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force.

(Holmes, J., dissenting).

72. 30 Stat. 424 (1898).

73. See *Adair v. United States*, 208 U.S. 161, 180 (1908). In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941), the Court recognized that *Adair* and similar holdings had been “sapped of their authority” by subsequent cases.

74. See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

75. 29 U.S.C. § 151 (2000)

76. See *id.* In *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 36–43 (1937), the Court upheld the constitutionality of the Act.

77. See 45 U.S.C. § 152 (1994) (the “Railway Labor Act” or “RLA”).

78. See *Ellis v. Bhd. of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 448 (1984); *Ry. Employees v. Hanson*, 351 U.S. 225, 236–38 (1956).

79. See *Ellis*, 466 U.S. at 455–56 (recognizing First Amendment limits on the uses to which unions can put funds obtained from dissenting employees); *Int’l Assoc. of Machinists v. Street*, 367 U.S. 740, 749–71 (1961) (construing the RLA not to authorize expenditure for political causes).

80. 431 U.S. 209 (1977).

of the union.⁸¹ Writing that “[o]ur decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments,”⁸² and that “[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights,”⁸³ the *Abood* Court held that “the Constitution requires . . . that [the] expenditures be financed from charges, dues, or assessments paid by those employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”⁸⁴

A similar principle applies to bar associations. In *Keller v. State Bar of California*,⁸⁵ the Court held that although a bar association may use collected dues to fund activities “germane” to “regulating the legal profession and improving the quality of legal services,”⁸⁶ where bar membership is required to practice law, the association may not use dues to fund more ideological activities.⁸⁷ Bar members cannot, for example, be required to finance literature on the bar association’s position on gun control laws.⁸⁸

A fourth way, then, that the government may infringe associational freedom is by co-opting association: by using an association of citizens to advance the government’s own expression. In *Abood* and *Keller*, the government could not use existing associational ties to further its own expressive ends.⁸⁹

81. *See id.* at 235–36.

82. *Id.* at 233.

83. *Id.* at 234.

84. *Id.* at 235–36.

85. 496 U.S. 1 (1990).

86. *Id.* at 13.

87. *See id.* at 14.

88. *See id.* at 16.

89. *See Abood*, 431 U.S. at 235–36; *Keller*, 496 U.S. at 14–16. *But see* Bd. of Regents v. Southworth, 529 U.S. 217, 233–34 (2000) (upholding mandatory student fee program under which collected fees were allocated to student groups in a viewpoint neutral manner).

D. *Political Parties*

Freedom of association has also arisen in cases involving political parties.⁹⁰ In a series of cases addressing the procedures for selecting party delegates, the Court has underscored the associational rights of political parties and their members. In *Kusper v. Pontikes*,⁹¹ the Court explained that the “freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments”⁹² and that “[t]he right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.”⁹³ Consequently, the Court struck down an Illinois statute prohibiting a voter from voting in the primary of one party within twenty-three months of voting in another party’s primary.⁹⁴ Similarly, in *Cousins v. Wigoda*,⁹⁵ the Court held that a state court injunction prohibiting a rival set of delegates from attending the 1972 Democratic National Convention violated the associational freedom of the enjoined delegates and of the National Democratic Party.⁹⁶ In several subsequent cases, the Court also invalidated, on freedom of association grounds, legislative interference with the selection of convention delegates.⁹⁷ In one typical case, the Court explained the problem in the following terms:

Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the

90. For useful commentary on these cases, see Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191 (1982); and Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993).

91. 414 U.S. 51 (1973).

92. *Id.* at 56–57.

93. *Id.* at 57.

94. *See id.* at 61.

95. 419 U.S. 477 (1975).

96. *See id.* at 487.

97. *See California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (invalidating “blanket” primary election system in which all registered voters, regardless of party membership, could vote for any candidate, regardless of party); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (invalidating state law prohibiting parties from endorsing candidates in a primary election); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (affirming right of party to hold open primary against state rules requiring closed primary); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 120–26 (1981) (similar).

association, and to select a standard bearer who best represents the party's ideologies and preferences.⁹⁸

The Court has also invoked associational freedom in the context of state impediments to the formation of new political parties. In *Norman v. Reed*,⁹⁹ the Court limited the ability of states to require a candidate from a new party to demonstrate public support before being placed on election ballots.¹⁰⁰ Under Illinois law, a new party was required to collect nominating signatures from twenty-five thousand voters before fielding candidates for statewide office.¹⁰¹ Candidates running for office solely within a large political subdivision also needed the signatures of twenty-five thousand voters.¹⁰² But if the subdivision comprised separate districts from which officials were elected, a candidate had to collect twenty-five thousand signatures from each individual district.¹⁰³ The Court held that this scheme violated the associational freedom of new party candidates because it was not sufficiently tailored to the state's interest in ensuring new parties had sufficient public support.¹⁰⁴ In so holding, the Court explained the constitutional right at issue as the right of "citizens to create and develop new political parties," a right that "derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences."¹⁰⁵

Political parties have at times excluded individuals seeking to join, raising the issue of the extent of a party's freedom to choose its members. In a series of cases beginning in 1927, the Court invalidated efforts by the Texas Democratic Party to exclude African-Americans from voting in the state Democratic primary elections.¹⁰⁶ However, in these so-called White Primary

98. *Eu*, 489 U.S. at 224 (quotations and citations omitted).

99. 502 U.S. 279 (1992).

100. *See id.* at 292–94.

101. *See id.* at 282–83.

102. *See id.*

103. *See id.*

104. *See id.* at 292–94.

105. *Id.* at 289 (footnote omitted).

106. The sequence of the holdings is as follows: In *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court invalidated a Texas statute prohibiting African-Americans from voting in the primary elections. *See id.* at 540–41. In *Nixon v. Condon*, 286 U.S. 73 (1932), the Court invalidated as unconstitutional state action a resolution excluding African-Americans from voting in the primary passed by the Democratic Executive Committee pursuant to a state statute. *See id.* at 88. In *Grovey v. Townsend*, 295 U.S. 45 (1935), the Court

Cases, the Court characterized a party's regulation of a primary election that is "integral" to the general election process as a state action.¹⁰⁷ The Court therefore avoided determining whether the associational freedom of political parties extends to race-based discrimination in membership.¹⁰⁸

E. Membership and Expression: Roberts and its Progeny

An association's freedom to select its members was central to two cases in the 1980s involving the ability of the Jaycees¹⁰⁹ and Rotary¹¹⁰ to deny membership to women, and to a third case involving discrimination by a contingency of New York social clubs.¹¹¹

1. The Jaycees

In *Roberts v. United States Jaycees*,¹¹² the all-male Jaycees sued Minnesota officials claiming that the application of the state's Human Rights Act, which prohibited discrimination on the basis of sex in "places of public accommodation," violated the organization's freedom of association.¹¹³ The Supreme Court disagreed and held that Minnesota could require the Jaycees to admit women as full members of the organization.¹¹⁴

In an opinion by Justice Brennan, the Court described two distinct types of associational freedoms protected by the Constitution: "freedom of intimate association" and "freedom of expressive association."¹¹⁵ Intimate association, according to *Roberts*, is itself a "fundamental . . . liberty," and is protected as such.¹¹⁶ Expressive association, on the other hand, is protected

upheld against a state action challenge a similar resolution adopted at the state party convention. *See id.* at 55. In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court overruled *Grove* and held that the regulation of a primary election integral to the general election is state action. *See id.* at 664. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court also invalidated a scheme by which white party members gathered to select a candidate before the actual primary. *See id.* at 463.

107. *See Allwright*, 321 U.S. at 664.

108. *See id.*

109. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

110. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

111. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

112. 468 U.S. 609 (1984).

113. *See id.* at 615.

114. *See id.* at 624-27.

115. *Id.* at 618.

116. *Id.* at 617.

because it is “indispensable . . . [to] preserving”¹¹⁷ freedom of speech. Thus, whereas intimate association is intrinsically protected, expressive association is protected for its instrumental value.¹¹⁸

2. *Intimate Association*

In describing “freedom of intimate association,” the *Roberts* Court invoked case law protecting a constitutional “zone of privacy.”¹¹⁹ The Court explained that “the Bill of Rights . . . afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”¹²⁰ The *Roberts* Court identifies two considerations underlying this freedom of intimate association. First, “certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.”¹²¹ Second, protection of intimate association “reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”¹²²

117. *Id.* at 618.

118. *See id.* The Court in *Roberts* recognized that these two forms of associational freedom may overlap: “The intrinsic and instrumental features of constitutionally protected association may, of course, coincide. In particular, when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated.” *Id.*

119. *See id.* at 618–19 (citing *inter alia* *Zablocki v. Redhair*, 434 U.S. 374 (1978); *Moore v. E. Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

120. *Roberts*, 468 U.S. at 618.

121. *Id.* at 618–19.

122. *Id.* The Court’s description suggests that intimate association is also, in some sense, instrumental: intimate association facilitates ideals and beliefs, which are also First Amendment values. Intimate association might, then, be viewed as promoting *personal* beliefs; expressive association as promoting more *publicly* formed and expressed ideas. But the Court suggests that more is at stake in intimate association than the possible ways in which such association may serve First Amendment interests. *See id.* The Court attaches importance to the notion that there is something *inherently* valuable about personal ties. *See id.* They create a space, a “critical buffer[] between the individual and the power of the State,” *id.* at 619, providing individuals with “emotional enrichment,” *id.*, and “the ability to independently define one’s identity,” *id.* By contrast, expressive associations are formed specifically for purposes that are protected by the First Amendment. *See id.* at 622. The distinction therefore seems to be that whereas individuals may often develop and share ideas through intimate associations, they are not necessarily

The freedom of intimate association recognized in *Roberts* is quite limited. The Court observed that “the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage; the raising and education of children; and cohabitation with one’s relatives.”¹²³ These “[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹²⁴ Each of these types of relationships, according to the Court, “are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”¹²⁵ The Court contrasted associations exhibiting these features with “a large business enterprise,”¹²⁶ which could not make a supportable claim to freedom of intimate association.¹²⁷ “Between these poles,” the Court observed, “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.”¹²⁸ The Court explained that “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.”¹²⁹ However, the *Roberts* Court declined to “mark the potentially significant points on this terrain with any precision,”¹³⁰ and instead simply noted that, in determining whether an association is sufficiently intimate, “factors that may be relevant include size,

formed for that purpose. Indeed, an intimate association (such as a family) is protected without regard to its value in promoting and transmitting ideas as such. *See, e.g., Griswold*, 381 U.S. at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”). Expressive association, on the other hand, requires a closer nexus between association and protected expression.

123. *Roberts*, 468 U.S. at 619 (citations omitted).

124. *Id.* at 619–20.

125. *Id.* at 620.

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.*

purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.”¹³¹ The *Roberts* Court saw any further explanation unnecessary because, applying these characteristics, it had no doubt that the Jaycees—a large national organization with fairly unselective (except for gender) membership policies—fell outside the reach of intimate association.¹³² Therefore, while *Roberts* left open the possibility of intimate association extending beyond the family, the Court gave no indication of any association it viewed as sufficiently intimate to have a valid claim to constitutional protection on this basis.

3. *Expressive Association*

Turning to expressive association, the *Roberts* Court found this right “plainly implicated”¹³³ in light of the Jaycees’ expressive activities:

[A] not insubstantial part of the Jaycees’ activities constitutes protected expression on political, economic, cultural, and social affairs. Over the years, the national and local levels of the organization have taken public positions on a number of diverse issues and members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment.¹³⁴

The Court observed that the government may infringe rights of expressive association by “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group,”¹³⁵ or by “requir[ing] disclosure of the fact of membership in a group seeking anonymity,”¹³⁶ or by, as here, “interfer[ing] with the internal organization or affairs of the group.”¹³⁷ In that regard, the Court stated that

[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the

131. *Id.*

132. *Id.* at 620–21.

133. *Id.* at 622.

134. *Id.* at 626–27 (quotations and citations omitted).

135. *Id.* at 622.

136. *Id.* at 622–23.

137. *Id.* at 623.

group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.¹³⁸

Applying strict scrutiny analysis,¹³⁹ the Court concluded that Minnesota's statute could, nonetheless, be constitutionally applied to the Jaycees because the statute served the compelling state interest of eliminating gender discrimination,¹⁴⁰ the statute did not aim to suppress speech,¹⁴¹ and the statute advanced the state's interest by the least restrictive means.¹⁴²

That the anti-discrimination statute did not unduly burden the Jaycees' right of expressive association turned on the Court's conclusion that the presence of women would not alter the message the Jaycees' sought to communicate.¹⁴³ "There is . . . no basis in the record," the Court wrote, "for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected [expressive] activities or to disseminate its preferred views."¹⁴⁴ The Minnesota statute "require[d] no change in the Jaycees' creed of promoting the interests of young men, and it impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."¹⁴⁵ Any assumption that the mere presence of women would alter the Jaycees' expression was, in the Court's view, based on unwarranted stereotyping: "[i]n claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not a purely young men's association, the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women."¹⁴⁶ In sum, there was no evidence that application of the anti-discrimination law would alter the Jaycees' voice, and

138. *Id.*

139. *See id.* ("Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

140. *Id.* at 623–25.

141. *Id.* at 624.

142. *Id.* at 626.

143. *Id.* at 627.

144. *Id.*

145. *Id.*

146. *Id.* at 627–28 (quotation and citation omitted).

to conclude otherwise required reliance on impermissible assumptions about the opinions of women.

4. *Justice O'Connor's Concurrence*

In a concurring opinion in *Roberts*, Justice O'Connor chided the Court majority for "adopt[ing] a test that . . . casts doubt on the power of the State to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities . . . [and] that accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment."¹⁴⁷ Justice O'Connor found misguided the inquiry into whether a state regulation alters an association's message.¹⁴⁸ In her view, "[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."¹⁴⁹ She viewed this inquiry as "rais[ing] the possibility that certain commercial associations, by engaging in . . . certain kinds of expressive activities, might improperly gain protection for discrimination."¹⁵⁰

For Justice O'Connor, the appropriate analysis determines at the outset whether "the Jaycees is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations."¹⁵¹ In particular, the relevant distinction is between "expressive" associations—that may choose their members however they like—and "commercial" associations—that have no constitutional right to discriminate in selecting their members.¹⁵² Whereas regulation of an expressive association's membership is subject to strict scrutiny,¹⁵³ the state may freely regulate membership in commercial associations so long as such regulation is rationally related to the state's legitimate ends.¹⁵⁴

147. *Id.* at 632 (O'Connor, J., concurring).

148. *Id.* at 633.

149. *Id.*

150. *Id.* at 632.

151. *Id.* at 633.

152. *See id.* at 633–34.

153. *See id.* at 634.

154. *See id.* at 635.

Justice O'Connor saw the Jaycees as a "relatively easy case for application of the expressive-commercial dichotomy,"¹⁵⁵ because although "[a] good deal of what the [Jaycees] does indisputably comes within the right of association . . . in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances,"¹⁵⁶ the association is "first and foremost, an organization that . . . promotes and practices the art of solicitation and management."¹⁵⁷ The organization is, therefore, predominantly commercial, and the First Amendment does not allow it to discriminate against women in selecting members.¹⁵⁸

5. *Rotary*

In a subsequent case, *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁵⁹ the Court applied the test it had developed in *Roberts* to hold that Rotary had no First Amendment right to exclude women in violation of the California Unruh Act.¹⁶⁰ The *Rotary* Court concluded that the Act did not violate Rotary's First Amendment interests because there was nothing about the inclusion of women that would affect the organization's expression: "[T]he Unruh Act does not require the clubs to . . . abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."¹⁶¹ The Court also denied any claim to intimate association in light of Rotary's large size, open membership policies, community involvement, and public activities.¹⁶²

155. *Id.* at 638.

156. *Id.* at 639 (citation omitted, alterations in original).

157. *Id.*

158. *See id.* at 640.

159. 481 U.S. 537 (1987).

160. *See id.*

161. *Id.* at 548–49 (citation and footnote omitted). *City of Dallas v. Sanglin*, 490 U.S. 19 (1989), decided shortly after *Roberts*, makes clear that expressive association must be tied to an identifiable First Amendment interest. *Id.* at 24–25. In *Sanglin*, the plaintiff claimed that a local ordinance restricting access to a dance hall to individuals aged 14–18 violated their rights to associate with others who were older than 18. *Id.* at 22. The Court had little difficulty concluding that no right of expressive association was at stake. *See id.* at 24–25.

162. *See Rotary*, 481 U.S. at 546–47. *Rotary's* discussion of intimate association is, perhaps, most remarkable for the case it does not mention: *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld Georgia's sodomy statute and rejected under the *Griswold* line of cases the notion that there is, as the Court put it, "a fundamental right to engage in homosexual sodomy." *Id.* at 191. There is plainly something amiss when the Court takes seriously (as it did in *Rotary*) the idea that a service club made up of a group of men *might* have some claim to intimate association yet (as in *Hardwick*) the Court can also easily conclude that consensual intimacy between two same-sex adults within a private home entails a "right . . . [with] no support in the text of the Constitution." *Id.* at 195 (emphasis added).

6. *New York State Club Association*

Following *Rotary*, in *New York State Club Ass'n v. City of New York*,¹⁶³ the Court rejected a claim that New York City's ordinance prohibiting discrimination by private clubs with more than four hundred members was facially unconstitutional.¹⁶⁴ The plaintiffs in the case—a consortium of 125 social clubs—challenged the ordinance on the ground that it violated their freedoms of intimate and expressive association.¹⁶⁵ With respect to the claim of intimate association, the Court denied the facial challenge because, under *Roberts* and *Rotary*, some of the clubs were not sufficiently intimate to warrant protection.¹⁶⁶ Similarly, because some of the clubs would not have a valid claim to infringement of expressive association, the statute was not facially unconstitutional on this basis.¹⁶⁷

The importance of the case lies in the Court's discussion of expressive association. *New York State Club Ass'n* makes clear that for an association to prevail on a claim that its right of expressive association has been violated, the association must show that it was “organized for *specific expressive purposes* and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.”¹⁶⁸ The Court explains that unless the association can make this showing, so long as it remains free to “exclude individuals who do not share the views that the club's members wish to promote,”¹⁶⁹ it is subject to anti-discrimination laws.¹⁷⁰

163. 487 U.S. 1 (1988).

164. *See id.* at 10–14.

165. *See id.* at 11.

166. *See id.* at 11–12. The Court acknowledged in passing that some of the individual clubs might be sufficiently intimate. *See id.* at 12 (“there may be clubs that would be entitled to constitutional protection”); *id.* at 14 (“appellant has not identified those clubs for whom the antidiscrimination provisions will impair their ability to associate together”); *id.* at 15 (“[the] opportunities for individual associations to contest the constitutionality of the [ordinance] as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts”). *See also id.* at 19 (O'Connor, J., concurring) (“in such a large city [as New York] a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence”).

167. *See id.* at 13–14.

168. *Id.* at 13 (emphasis added).

169. *Id.*

170. *See id.* *See also id.* at 19 (O'Connor, J., concurring) (observing that “there may well be organizations whose expressive purposes would be substantially undermined if they were unable to

The suggestion is plainly that few groups will succeed in claiming exemption from anti-discrimination statutes on the basis of a right of expressive association. If, as in *Roberts*, associations may not assume that individuals hold a certain view because of their sex (or race or religion, for instance), and if wholesale exclusion may only be justified because inclusion will undermine the specific expressive purpose for which the association exists, only groups organized for a discriminatory purpose appear to have a supportable claim to expressive association. On this view, a group advocating racial separatism, for example, would likely succeed in claiming it must be free to discriminate on the basis of race in selecting its members, or else its message will be undermined. However, other, less overtly hostile, groups would seem to be out of luck. Against this background, the Court took up the issue of gay Scouts.

F. Membership and Expression: The Boy Scouts

In 1990, James Dale, an Eagle Scout, was expelled as a member of the Boy Scouts of America (BSA) and as Assistant Scoutmaster of Monmouth Council, New Jersey, because he is gay.¹⁷¹ Monmouth Council officials learned of Dale's sexual orientation when they read in a newspaper about his role as co-president of the Rutgers University Lesbian/Gay Alliance.¹⁷² Dale sued in state court claiming, among other things, the BSA had violated New Jersey's Law Against Discrimination (LAD), which prohibits in places of public accommodation discrimination on the basis of "affectional or sexual orientation."¹⁷³

1. The State Court Decisions

At the trial level, the New Jersey Superior Court, Chancery Division, granted summary judgment in favor of the Boy Scouts.¹⁷⁴ The court held that the Scouts were not a "public accommodation" under the New Jersey statute,¹⁷⁵ and that the organization was, in any event, exempt because it was

confine their membership to those of the same sex, race, religion, or ethnic background The associational rights of such organizations must be respected.").

171. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000).

172. See *id.* at 645-46.

173. See N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (2000)

174. See *Dale*, 530 U.S. at 645. The trial court's decision, *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995), is unpublished.

175. See N.J. STAT. ANN. § 10:5-5(1) (2000).

a “distinctly private” group.¹⁷⁶ The court also held that in view of the BSA’s opposition to homosexuality, it had a First Amendment right of expressive association that prevented the state from requiring the organization to accept Dale as a scoutmaster.¹⁷⁷

On appeal, the New Jersey Superior Court’s Appellate Division reversed, holding that the BSA and its local councils are places of public accommodation under New Jersey law because they are unselective in their membership practices and have close relationships with public entities and public service organizations.¹⁷⁸ The Appellate Division also rejected the BSA’s argument that freedom of association sheltered it from the application of the anti-discrimination law.¹⁷⁹ Applying *Roberts*, the Appellate Division held that the BSA was too large to claim freedom of intimate association.¹⁸⁰

As to freedom of expressive association, the Appellate Division held that the BSA bore the “substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice” because “any lesser showing invites scuttling of the state’s anti-discrimination laws based on pretextual expressive claims.”¹⁸¹ The Appellate Division framed the inquiry thus: “Will New Jersey’s compelling interest in eradicating discrimination by enforcement of the LAD significantly impair the BSA’s ability to express its fundamental tenets and to carry out its social, educational and civic activities?”¹⁸² The Appellate Division determined that admitting James Dale would not violate the BSA’s freedom of expressive association.¹⁸³ It explained that there was no dispute that “the BSA’s collective ‘expressive purpose’ is not to condemn homosexuality. Its reason to be is not to provide a public forum for its members to espouse the benefits of heterosexuality and the ‘evils’ of the homosexual lifestyle.”¹⁸⁴ Rather, the BSA’s purpose is “to promote . . . the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them

176. See *Dale*, 530 U.S. at 645.

177. See *id.*

178. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 282–83 (N.J. Super. Ct. App. Div. 1998).

179. See *id.* at 285–86.

180. See *id.* at 286.

181. *Id.* at 287.

182. *Id.*

183. *Id.* at 288.

184. *Id.*

patriotism, courage, self-reliance, and kindred virtues.”¹⁸⁵ The Appellate Division reasoned that the anti-discrimination law did not interfere with these goals,¹⁸⁶ and that to conclude otherwise would be to engage in impermissible stereotyping about gay members.¹⁸⁷

The Appellate Division also rejected the BSA’s argument that its rights were comparable to those of the organizers of the St. Patrick’s Day Parade in Boston who, the United States Supreme Court held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,¹⁸⁸ had a First Amendment right to exclude a contingency of gay marchers.¹⁸⁹ The Appellate Division reasoned that *Hurley* was not a freedom of association case, but “a First Amendment speech case . . . involv[ing] the choice of a speaker . . . not to propound a particular point of view.”¹⁹⁰ Finally, the Appellate Division rejected “the proposition that . . . [Dale’s] public declaration that he is gay in and of itself constitutes ‘expressive activity’ sufficient to forfeit his entitlement to membership in the BSA.”¹⁹¹

The Supreme Court of New Jersey affirmed the judgment of the Appellate Division.¹⁹² Citing the BSA’s extensive public solicitation activities and its close relationships with public entities, the court agreed that the BSA was a public accommodation under New Jersey law.¹⁹³ The court also held that the First Amendment did not exempt the BSA from the anti-discrimination statute.¹⁹⁴ With between fifteen and thirty participants in each troop, the Scouts were too large to claim a right of intimate association.¹⁹⁵ Moreover, the Court observed that the troops are unselective in their members and on occasion allow non-members to attend their meetings.¹⁹⁶

With respect to the BSA’s rights of expressive association, the court agreed with the Appellate Division that BSA members do not associate in

185. *Id.* (quotation omitted).

186. *See id.*

187. *See id.* at 289.

188. 515 U.S. 557 (1995).

189. *See id.* at 575.

190. *Dale*, 706 A.2d at 292 (quotations omitted).

191. *Id.*

192. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200 (N.J. 1999).

193. *See id.* at 1210–13.

194. *See id.* at 1225.

195. *See id.* at 1220. The court considered the right of intimate association a First Amendment right. *See id.*

196. *See id.* at 1222.

order to promulgate the view that homosexuality is immoral.¹⁹⁷ Accordingly, “Dale’s expulsion constituted discrimination based solely on his status as an openly gay man.”¹⁹⁸ The court held that the First Amendment does not protect this kind of discrimination.¹⁹⁹

The court also rejected the BSA’s argument that Dale’s presence in the BSA was akin to the forced inclusion in a parade found unconstitutional in *Hurley*. “Unlike a marcher in a parade,” the court explained, “Dale does not participate in the Boy Scouts ‘to make a point’ about sexuality, but rather because of his respect for and belief in the organization. And unlike a parade, where the speech itself is the public accommodation, permitting Dale to remain in a leadership position in no way prevents Boy Scouts from invoking its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.”²⁰⁰ The court “reject[ed] the notion that Dale’s presence in the organization would be symbolic of the Boy Scouts’ endorsement of homosexuality.”²⁰¹ The court therefore held that the BSA could not expel Dale because he was gay.²⁰²

2. *The Supreme Court’s Majority Opinion*

The United States Supreme Court granted certiorari and, holding that the application of the New Jersey public accommodation statute violated the BSA’s right of expressive association, reversed.²⁰³ The *Dale* Court described expressive association as “crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”²⁰⁴ In the Court’s view, “[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express,” and constitutes a violation of expressive

197. *See id.* at 1224–25.

198. *Id.* at 1225.

199. *See id.* (explaining that “[t]he United States Supreme Court has not hesitated to uphold the enforcement of a state’s antidiscrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members’ shared expressive purpose.”).

200. *Id.* at 1229 (quotations and alterations omitted).

201. *Id.*

202. *See id.* at 1230. In a separate concurring opinion in *Dale*, Judge Handler emphasized the interdependency of “status” and “expression” with respect to sexual orientation. *See id.* at 1236–45 (Handler, J., concurring).

203. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

204. *Id.* at 647–48. Freedom of intimate association was not before the Court.

association “if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”²⁰⁵

In order to determine whether a group is protected by the First Amendment, the Court observed that the initial question is “whether the group engages in ‘expressive association.’”²⁰⁶ The Court explained that while “[t]he First Amendment’s protection of expressive association is not reserved for advocacy groups[,] . . . to come within its ambit, a group must engage in some form of expression, whether it be public or private.”²⁰⁷ The Boy Scouts met the test: the organization engages in expressive activity by instilling certain values in its members.²⁰⁸

The Court then turned its attention to whether the inclusion of James Dale would significantly affect the BSA’s “ability to advocate public or private viewpoints,”²⁰⁹ an inquiry that, the Court stated, “require[d it] first to explore, to a limited extent, the nature of the Boy Scouts’ view of homosexuality.”²¹⁰ That view, according to the BSA, was reflected in the Scout Oath²¹¹ and Law,²¹² particularly in their requirements that a Scout remain “morally straight,” and “clean.”²¹³ Although the Court noted that neither the Scout Oath nor the Scout Law expressly mention sexuality or sexual orientation, it accepted the BSA’s assertion that its organization teaches that homosexual conduct is not “morally straight,” and that it does

205. *Id.* at 648.

206. *Id.*

207. *Id.*

208. *See id.* at 649–50.

209. *Id.* at 650.

210. *Id.*

211. On my honor I will do my best

To do my duty to God and my country and to obey the Scout law;

To help others at all times;

To keep myself physically strong, mentally awake, and morally straight.

Id. at 649.

212. A Scout is:

Trustworthy Obedient

Loyal Cheerful

Helpful Thrifty

Friendly Brave

Courteous Clean

Kind Reverent.

Id.

213. *See id.* at 650.

not want to promote the view that homosexuality is “legitimate behavior.”²¹⁴ The Court therefore saw no need to “inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality.”²¹⁵

The only remaining question, then, was “whether Dale’s presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not promote homosexuality as a legitimate form of behavior.”²¹⁶ In reaching that issue, the Court also deferred to the BSA: “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”²¹⁷ The Court therefore concluded, “Dale’s presence would at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”²¹⁸ The Court compared Dale’s presence in the BSA to the unwanted marchers in the parade in *Hurley*: “As the presence of [the gay and lesbian marchers] in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.”²¹⁹

The *Dale* Court rejected the view of the New Jersey Supreme Court that, because the BSA did not associate for the purpose of disseminating the belief that homosexuality is wrong, Dale’s presence would not affect the BSA’s expression.²²⁰ Instead, the *Dale* Court held that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired

214. *Id.* at 650–51.

215. *Id.* at 651. The Court did, however, also refer to other evidence in the record as to the BSA’s position on homosexuality “as instructive, if only on the question of the sincerity of the professed beliefs.” *Id.* That evidence comprised a 1978 internal position statement that homosexuality is incompatible with Scout leadership, a second position paper adopted in 1991 after Dale was expelled, and the BSA’s position asserted in litigation in California. *See id.* at 651–52. In view of this evidence, the Court found the BSA’s professed views on homosexuality to be sincere. *See id.*

216. *Id.* at 653 (quotation omitted).

217. *Id.*

218. *Id.* at 653.

219. *Id.* at 654.

220. *Id.* at 654–55.

in order to be entitled to protection."²²¹ The Court also found it irrelevant that some members of the BSA do not share the BSA's official position on homosexuality and that the BSA does not expel heterosexual leaders who openly disagree with the organization's position on gay scouts.²²² In the Court's view, the First Amendment does not require that "every member of a group agree on every issue,"²²³ and "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."²²⁴

Concluding that New Jersey's interests in ending discrimination did not justify "such a severe intrusion on the Boy Scout's rights to freedom of association,"²²⁵ the Court held that the BSA could not be required to accept Dale as a member.²²⁶

3. *Justice Stevens' Dissent*

In a dissenting opinion, Justice Stevens²²⁷ argued that the majority "pretermits [the] entire analysis."²²⁸ In his view,

[t]he relevant question is whether the mere inclusion of the person at issue would impose any serious burden, affect in any significant way, or be a substantial restraint upon the organization's shared goals, basic goals, or collective effort to foster beliefs. Accordingly, it is necessary to examine what, exactly, are [the] BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.²²⁹

Examining the record, Justice Stevens found it "exceptionally clear that [the] BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality."²³⁰ Therefore,

221. *Id.* at 655.

222. *Id.*

223. *Id.*

224. *Id.* at 656.

225. *Id.* at 659.

226. *See id.*

227. Justices Souter, Ginsburg, and Breyer joined Justice Stevens' dissent. Justice Souter also wrote a separate dissent. *See id.* at 700-02. (Souter, J., dissenting).

228. *Id.* at 685 (Stevens, J., dissenting).

229. *Id.* at 683-84 (quotations omitted).

230. *Id.* at 684.

there was no infringement of the BSA's First Amendment rights.²³¹ Justice Stevens viewed the majority's deference to the BSA as "astounding" in light of the Court's duty to examine whether the BSA in fact held the professed views.²³² "[U]nless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws," he wrote, "an independent inquiry is a necessity."²³³ Justice Stevens also viewed Dale's inclusion in the Boy Scouts as nothing like *Hurley*. In contrast to marching in a parade, he reasoned, membership in the Boy Scouts is simply not speech: "[Dale's] participation sends no cognizable message to the Scouts or to the world . . . Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message."²³⁴ Accordingly, in view of the Court's prior decisions in *Roberts* and *Rotary*, Justice Stevens took the view that

[t]he only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes.²³⁵

G. Summary

Associations have a right to be free from government regulation of their membership if such regulation unduly infringes their First Amendment right of expressive association. After *Dale*, to claim a right of expressive association, an organization must engage in some form of public or private expression. An organization does not have to associate for the purpose of disseminating a certain message in order to be entitled to First Amendment protection. The organization must merely engage in expressive activity that could be impaired. The First Amendment prohibits application of an anti-discrimination statute to compel an association to admit an individual as a member if the presence of that individual would significantly affect the association's ability to advocate its public or private viewpoints. In making

231. *Id.* at 688.

232. *Id.* at 686.

233. *Id.* at 688.

234. *Id.* at 694–95.

235. *Id.* at 696.

that determination, deference is given to the association as to the nature of its expression and as to what would impair that expression. In addition to government regulations compelling an association to admit members, associational freedom may be infringed by government action imposing burdens on associations or their members, or by enlisting an association to serve the government's own ends. Even if an association is highly expressive, its associational interests become irrelevant if the activities in question—for example, the election of candidates in a party primary—are sufficiently integral to the activities of the state to constitute state action.

III. THE TROUBLE WITH EXPRESSION

This section sets out the principle problems with the Supreme Court's doctrine of freedom of expressive association. I argue that the right of expressive association is not defined with sufficient precision and, in analyzing an association's message, the Court focuses on the wrong constitutional issue. The doctrine of expressive association is also isolated from and in tension with other doctrines, notably public accommodation law, and the doctrine is superfluous in view of other First Amendment doctrines. Further, an association's expression is often indeterminate, and inquiry into expression risks distorting an association's message. This inquiry also unduly intrudes on associations. Finally, the expressive association doctrine gives insufficient weight to the government's interests in regulating certain associational practices.

A. *The Vagueness Problem*

To begin, the Court does not identify with sufficient clarity the precise right at stake. In *Dale*, the Court describes the right of expressive association as the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,”²³⁶ that belongs to groups engaged in “public” or “private” expression,²³⁷ and is “implicit in the right to engage in activities protected by the First Amendment.”²³⁸

However, this definition tells us very little. Most citizen groups involve association with others in pursuit of political, social, economic, educational, religious, or cultural ends. Most groups engage in public or private

236. *Id.* at 647.

237. *See id.* at 648.

238. *Id.* at 647 (quotation omitted).

expression of some nature. Indeed, expression is often what makes a group a group, as opposed to a set of unconnected individuals. Pursuing a particular end (be it political, social, economic, educational, religious, or cultural) is what distinguishes one group of citizens from another. If these are the criteria for expressive association, it becomes difficult to see what kind of groups would not qualify.

People lined up to purchase movie tickets, for instance, are pursuing a collective cultural end (seeing the movie), and they often engage in private expression with each other while they wait (about current events, movie reviews, or the weather). A law firm is a collection of highly expressive individuals pursuing shared economic (and sometimes political) ends. A parade is a group seeking political and social ends through public expression. A church involves private (and sometimes quite public) expression for religious ends. Yet labeling all of these quite different entities "expressive associations" does not seem very helpful for meaningful constitutional analysis.

In sum, the Court's description of the right of expressive association is more like a slogan than a workable definition with a supporting rationale. It accomplishes very little in the way of describing the interests at stake, the reasons for protecting freedom of association, or how to identify and analyze a claim to constitutional protection.

B. The Problem of Focus

Even if it were to explain more precisely what it means by expressive association, the Supreme Court focuses on the wrong issue. The Constitution does not mention "expression" or "association," much less "expressive association."²³⁹ It is reasonable to wonder, therefore, why "expressive association" is the relevant right when dealing with constitutional protections accorded to groups of citizens.

As the cases play out, the Court is concerned more with expression than with association.²⁴⁰ Rather than develop, in light of the expressive value of associations, an account of the nature and significance of individuals

239. The First Amendment does protect "the freedom of speech," U.S. CONST. amend I, but, as Frank Morrow usefully reminds us, speech is not the same thing as expression, and in beginning with expression, "the likelihood is increased that the discussion will mislead or go astray." Frank A. Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235, 237 (1975).

240. See *supra* Part II.E, F.

associating, or of the differences among different kinds of associations, the Court focuses instead on the particular messages of associations.²⁴¹ The trouble with this quite unusual inquiry (aside from the practical difficulties I discuss below) is that it is far from clear why the association's message should matter so much.

Let us accept for the moment that the importance of freedom of association lies in the constitutional significance of expression. On this view, the Constitution protects freedom of association because the ability to join together with others is an important condition for realizing First Amendment values like speech and the development and exchange of ideas. That is, if I cannot associate with others, being able to speak out means very little. The proper scope of freedom of association therefore must, on this account, reflect its origins in expression. One could then develop a detailed account of constitutional protections for association in light of the goal of expression. Such an account would identify, for instance, which kinds of associations most likely entail expressive values, what the conditions are for those associations to engage in expression, what kinds of governmental regulations are consistent with the underlying value of expression, and so on.

However, the Court does not do that. Instead, after linking association to expression, the Court's next step is to conclude that the scope of the right of expressive association therefore depends on the specific message an association seeks to impart.²⁴² Under the Court's approach, two otherwise identical associations receive very different treatment depending on what they have happened to say. The task of the judge becomes to sift through meeting minutes, correspondence, public pronouncements and the like in order to determine whether the association's expressed views fit with (or would be unduly impaired by) a particular governmental regulation.

This seems fundamentally misguided. If the point of protecting associations is to safeguard expression, it is difficult to see that the relevant issue is whether an association's views are compatible with the consequences of governmental regulations. As Justice O'Connor explains in her concurring opinion in *Roberts*, this inquiry is likely to over-protect associations with traditionally little First Amendment value, and under-protect associations with traditionally strong First Amendment interests.²⁴³

241. See *Dale*, 530 U.S. at 659.

242. The step is an example of what Frank Easterbrook terms the "constitutional rumor chain, in which the conclusions bear no resemblance to the original rules." Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 99 (1987).

243. See *Roberts v. United States Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring).

At the same time, the Court's approach also seems destined to deny protection to some associations that are very similar to protected associations. Where there is insufficient proof of an association's expression to demonstrate an incompatibility with a governmental regulation, the association's claim will fail.²⁴⁴ Accordingly, even a group organized for traditionally core First Amendment expressive activities—advocacy for instance—risks losing protection under the Court's approach. The Court's focus is therefore wrong because there needs to be some attention in the analysis to the type of association claiming constitutional protection, and to the type of activity the association undertakes.

Moreover, the expressive association doctrine is viewpoint based. The Jaycees and Rotary were prohibited from denying admission to women because those organizations were not—as a matter of their established purposes and expressed beliefs—opposed to women.²⁴⁵ On the other hand, the Boy Scouts had a First Amendment right to deny admission to James Dale because the Court accepted that the organization is opposed to homosexuality.²⁴⁶ It is not, then, sufficient under the Court's analysis for an association merely to engage in expression to enjoy the protections of expressive association. Nor is it sufficient for an association to express views on subjects germane to a governmental regulation. Rather, the views the association holds and has expressed must themselves be incompatible with, contrary to, the governmental regulation at issue.

First Amendment analysis does not normally entail this kind of particularistic scrutiny of a speaker's viewpoint. Indeed, in most contexts we become alarmed when governmental officials condition rights or benefits on what we say.²⁴⁷ Why should we be any less concerned when the particular

244. Consider, for example, two fraternal organizations: each has four-dozen members, a clubhouse, a secret handshake, and weekly meetings. Neither organization admits Catholics. One of the two organizations can produce records containing past anti-Catholic statements by its members. In the other, although everybody knows Catholics are not welcome, there are no such records. Following the Court's approach, the first of these two organizations is likely to enjoy a right of expressive association that prevents the state from requiring it to admit Catholic members. The second organization is likely to fail if it raises a constitutional claim because the organization has been insufficiently expressive about its biases.

245. See *supra* Part II.E.

246. See *supra* Part II.F.

247. Hence, according to the doctrine of unconstitutional conditions:

even though a person has a "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

governmental officials making this determination are judges? If freedom of association serves First Amendment ends of expression, it is odd to narrow the right to mean the protection of certain views, and then ask whether an association professes those views. We might properly inquire whether an association entails the kinds of activities that serve the First Amendment values we seek to protect and promote. But to go further and ask what the association's opinions are before deciding whether the government can regulate such matters as who joins the association, or even whether the association can exist, seems a dubious and dangerous enterprise. The end result of this problematic focus is to protect not association because of expressive values, but rather associations with a particular message.

Put differently, the Court purports to be analyzing freedom of association when it is really analyzing freedom of expression. The Court seems to understand associations like the Jaycees or the Boy Scouts as just like any other speaker with a message. The Court treats government regulation of membership as raising a constitutional problem only when the regulation interferes with the association's message, that is, where the presence of some individual interrupts what would otherwise be said. Freedom of expressive association is therefore reduced, in the Court's analysis, to the freedom of an association to speak.

This is an exceedingly cramped vision of the value of association and its protection under the Constitution. It does not take very much to see that there may be something quite special about associations, distinguished from individual speakers. For example, through associations individuals come together, develop shared ideas and programs, and engage in collective activities. All of these things might be quite different from what these individuals do or are able to accomplish on their own. Of course, the fact that an association has certain distinct features does not necessarily mean that those features are constitutionally protected. But by moving instead to the topic of expression, the Court short-circuits any analysis of what it is about associations that may merit special protection.

Because the Court narrows freedom of association to mean simply the expression of a message, the Court fails to appreciate exactly why government regulation of membership might be problematic. The Court

For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result that it could not command directly.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quotation and alteration omitted).

makes no serious effort to examine the problems regulation of membership may raise, for example, by undermining bonds of solidarity within an association, or altering the conditions for openness and candor among members. Instead, the Court simply asks whether the regulation of membership interferes with the association's actual message. In the Court's approach, association is simply a noun: associations are entities that speak. The possible values, in particular the possible First Amendment values, of associating are all but ignored.²⁴⁸

A related difficulty is that the Court appears to have only a very superficial and detached understanding of what an association is. In speaking of associations, the Court fails to offer any coherent account of what it understands the term to encompass, and the most basic features of associations are missing from the Court's discussion. The Court offers no recognition, for instance, of the number or types of associations in the United States, or the extent of citizen involvement in associational life. There is no apparent understanding of what associations do, why people join them, or what participation means to their members. The Court makes little attempt to consider the conditions associations require to exist and thrive or to understand the contributions or difficulties associations may represent in a constitutional democracy.

Under the Court's analysis, diverse groups—the NAACP, the Boy Scouts, service organizations like Rotary and the Jaycees, and at times even families—are all lumped together as “associations.” Beyond drawing a broad distinction between “intimate” and “expressive” association, the Court undertakes no serious effort to consider variations in associations, and how groups might differ in form or function, much less how such distinctions may be relevant to a First Amendment analysis.

This perhaps explains why the Court's analysis is unusually context dependent. Rather than providing a series of rules and standards that could be applied to various kinds of associations, the cases are confined to particular associations—the Jaycees and then Rotary and then the Boy Scouts, for instance—and outcomes turn on the Court's understanding of those particular organizations. This kind of ad hoc inquiry seems largely

248. Some academic commentators make a similar error. Jed Rubenfeld, for instance, argues that just as under the First Amendment a driver cannot speed in order to make a point, an expressive association should not be able to engage in unlawful discrimination. See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 808–09 (2001). This overlooks how choice is more significant to associating than driving fast is to getting across an opinion. See *infra* Part VI.C.

useless for guiding lower court judges, legislatures, or even associations themselves seeking to understand appropriate standards and constitutional requirements. It is one thing to illustrate a rule by example. As the doctrine of freedom of association has developed the examples are all the rules we have.

C. *The Isolation Problem*

A further difficulty with the Court's approach to expressive association is that it is strangely disconnected from other seemingly relevant doctrines. In particular, the Court offers no persuasive account of how the expressive association doctrine relates to the long-standing rule that public accommodations like hotels, schools, and restaurants do not have a First Amendment exemption from anti-discrimination law,²⁴⁹ regardless of their views or the content of their expression.²⁵⁰

Is it that an "expressive association" is categorically different from public accommodations? If so, what is the difference? Or does the emerging doctrine of freedom of expressive association portend new limitations on the ability of government to regulate these traditionally public accommodations?²⁵¹ If there are ways to reconcile expressive association with public accommodation doctrine, the Court does not tell us what they are.

D. *The Superfluous Doctrine Problem*

Because it focuses on expression, the Court's doctrine of freedom of association is also largely superfluous. If the only relevant inquiry is whether and how a governmental regulation impairs an association's expression, that

249. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260–61 (1964) (holding that a federal public accommodation statute is constitutional as applied to a motel). See generally Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1613–36 (2001); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1665–68 (2001).

250. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (“[P]arents have a First Amendment right to send their children to [private] educational institutions that promote the belief that racial segregation is desirable, and . . . the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.”) (citations omitted). See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (explaining that “integration forces an association upon those for whom it is unpleasant or repugnant”).

251. See Hunter, *supra* note 249, at 1591.

inquiry could be conducted using existing First Amendment rules and tools, without the need for a special doctrine of expressive association and special criteria for determining the legitimate reach of regulation.

For instance, governmental regulation aimed at the content of a group's speech falls within the well-crafted First Amendment rules that Laurence Tribe labels "track one" analysis.²⁵² Unless a content-based regulation pertains to expression that falls outside of First Amendment protections (such as obscenity²⁵³ or defamation²⁵⁴ or fighting words²⁵⁵), the regulation is subject to strict scrutiny and the government bears the burden of demonstrating that its regulation is necessary to serve a compelling state interest and is narrowly tailored to that end.²⁵⁶ So, for example, if the government prohibits a group from meeting or marching because of the group's expression, we would ask whether the regulation satisfies strict scrutiny. Many cases have involved exactly this inquiry—without the need for a special doctrine of expressive association—when the government seeks to regulate a group whose views it opposes.²⁵⁷

On the other hand, many regulations of group activities are not specifically (or obviously) directed at the content of a group's expression. Again, though, there are well-worn constitutional tests we can employ. A governmental regulation that is not aimed at the content of a group's expression but nonetheless has an impact on its public speech—what Professor Tribe calls "track two" cases²⁵⁸—must be content-neutral and narrowly tailored to serve a significant governmental interest, and in the case of prohibitions on speech, allow adequate alternative channels for communication.²⁵⁹ If expression is the relevant consideration in cases involving associations, this very standard could usefully be applied to assess the validity of many kinds of governmental regulations. Consider, for instance, a law that reads: "Gatherings of more than four unrelated citizens between the hours of 6 p.m. and 8 a.m. are hereby prohibited." In analyzing

252. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (2d ed. 1988).

253. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957).

254. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–48 (1974).

255. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

256. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

257. See, e.g., *Abrams v. United States*, 250 U.S. 616, 627–31 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 51–53 (1919).

258. See TRIBE, *supra* note 252, at 792.

259. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

this law, we would ask whether it is narrowly tailored to achieve a significant governmental interest and whether there are adequate alternative channels for groups that would otherwise meet during these hours to express whatever it is they express. We do not need special rules about expressive association to determine whether the law is constitutional.

The Supreme Court's recent decision in *Good News Club v. Milford Central School*²⁶⁰ demonstrates the point. In that case, the Court held that a public school's refusal to allow a Christian children's club from meeting after hours, as part of the school's general program of opening its facilities to various social, recreational, and educational groups, entailed viewpoint discrimination in violation of the First Amendment.²⁶¹ The Court reached this result using traditional rules of freedom of speech.²⁶² Freedom of association is not even mentioned in the Court's decision.²⁶³

Of course, there is always an issue as to whether (and how much) a particular regulation infringes upon a group's expression. But this alone does not warrant a distinct set of rules of "expressive association." The Court already accepts, without much analysis, that many types of governmental regulations seemingly unconnected to speech—such as noise restrictions²⁶⁴ or litter controls²⁶⁵ or limits on the use of parks, streets, and other public places²⁶⁶—have an impact on communication. To the extent that other varieties of regulation may pertain specifically to groups, similar presumptions about communicative impact could be made. Thus, for instance, we could assume (as indeed the Court itself does)²⁶⁷ that regulating membership criteria has an impact on expression. We would then ask whether such a regulation is narrowly tailored to a significant governmental interest, an inquiry that would look to such things as the reasons for the membership regulation and the types of groups to which it applies. There would be little need for a more particularized investigation of a group's message.

260. 533 U.S. 98 (2001).

261. *See id.* at 112.

262. *See id.* at 106–07.

263. *But see id.* at 121 (Scalia, J., concurring) (invoking freedom of association cases in discussing establishment clause issue).

264. *See, e.g.,* *Kovacs v. Cooper*, 336 U.S. 77, 81–82 (1949).

265. *See, e.g.,* *Schneider v. State*, 308 U.S. 147, 160–61 (1939).

266. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 790–93 (1989); *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 49–51 (1986).

267. *See, e.g.,* *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

E. The Distortion Problem

Framing the relevant inquiry as whether a government regulation significantly impairs the association's private or public expression also presupposes that an association's message or purpose can be reliably investigated and understood. In practice, this will often prove unrealistic. Associations with a clear, publicly stated message are likely to be relatively rare. Many associations tend to have unstated or ambiguous views. Further, associations are comprised of individuals who naturally have different opinions on various issues; the association itself may lack a coherent stance on any specific question, or it may not have expressed the views of the group in any easily identifiable manner. Indeed, an association may have said different things, or said one thing but done another. An association's expression might also change over time, as new issues arise, the views of members evolve, or different members arrive and assume different roles. The apparent expression of an association might also be the result of historical accident: today's members may not share the positions and policies formulated when the association was founded, and yet there may not have been an occasion or reason to amend those original views in any official or public manner.

The Court's investigation into an association's message is also hard to square with one obvious fact. That an association is engaged in litigation in opposition to a government regulation suggests rather strongly that the association opposes what the government is seeking to do. What could be a more certain expression of the group's views than defending itself in court? That the association may not have clearly announced this opposition in the past, or that it may only recently have developed the opposition evidenced by its litigation activities, are of uncertain relevance. The association bringing or defending a lawsuit plainly opposes the regulation at that point: going forward, at the very least, applying the regulation would be inconsistent with the association's expression.

In this regard, the expressive association doctrine is especially problematic with respect to anti-discrimination law. The Court's test in this context—whether the admission of a certain individual would significantly impair the group's expression—is, in a way, meaningless. Who, after all, can really say whether and how an individual will alter or impair a group's expression? People affect their social environments in varied and unpredictable ways. A group opposing the admission of an individual has plainly been affected in some manner—otherwise, there would be no opposition. Inquiring further, to seek to ascertain what the presence of a

certain person will actually mean for a group's expression, appears a dubious exercise and an uncertain basis for determining the proper scope of a constitutional right.

The problem is exemplified by the Court's analysis in the cases already discussed. In *Roberts* and *Rotary*, the Court determined that women would not alter the expression of the service organizations, and that to conclude otherwise would be to engage in gender stereotyping. In *Dale*, the presence of James Dale would, according to the Court, undermine the Boy Scouts' expression because he would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²⁶⁸ The outcomes are hard to square. Indeed, trying to reconcile them suggests that the Court's analysis in *Roberts* and *Rotary* amounts, at the end of the day, to a type of judicial censorship. In holding that women will not alter the associations in question because they are no different from men, the Court precluded the possibility that in fact the members of the Jaycees and of Rotary quite genuinely believe that women are different from men, at least different enough for purposes of their membership policies. Somebody must have held this view: the organizations defended their exclusionary policies all the way to the Supreme Court. Such a view was of no moment because it was simply impermissible stereotyping. On the other hand, that James Dale would affect the expression of the Scouts was a permissible viewpoint.

The end result is that the Court's approach seems likely to distort a group's message. *Dale* proves a striking example. In analyzing the impact of the anti-discrimination law on the Scouts' expression, the *Dale* Court essentially recasts the organization as a bunch of bigots. The most reasonable conclusion is that the record in *Dale* was at best ambiguous: despite its litigation postures, there was no very clear prior statement by the Boy Scouts that it was in fact anti-gay, indeed opposition to homosexuality was not clearly one of the central features of Scouting.²⁶⁹ However, the Court, in focusing on expression, was required to play up the documentation containing the Scouts' most anti-homosexual statements.

As a result, the Court portrayed the Scouts as so hostile to homosexuality that the mere presence of a gay Scout would force the group to send a

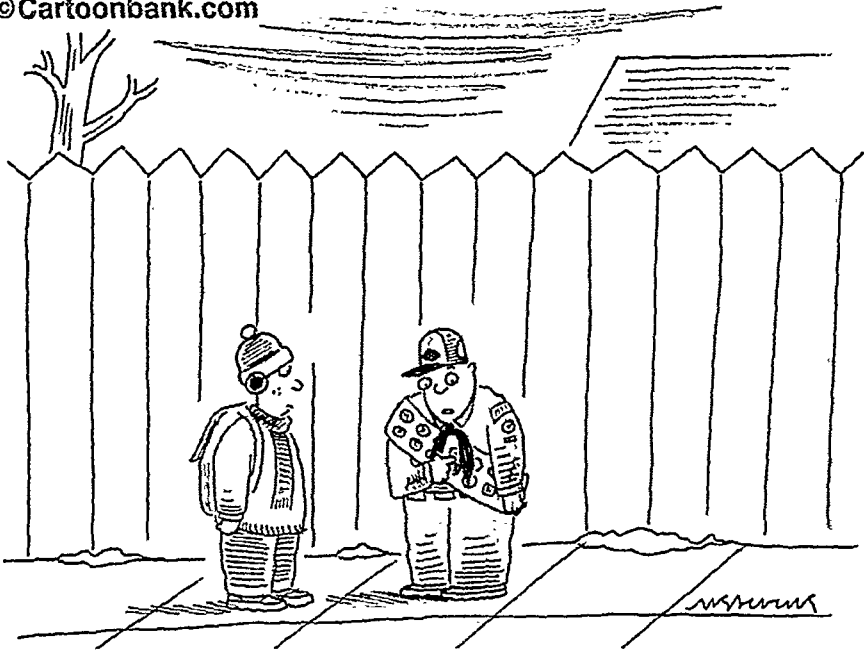
268. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

269. See David France, *Scouts Divided*, NEWSWEEK, Aug. 6, 2001, at 44 (discussing conflicts within the BSA with respect to gay Scouts); Chuck Sudetic, *The Struggle for the Soul of the Boy Scouts*, ROLLING STONE, July 6, 2000, at 101 (describing the "cultural wars" within the BSA over the issue of homosexuality).

message it rejected. Hence, in a concluding statement, the Court (citing cases involving the rights of groups like the Ku Klux Klan) emphasized that the Scouts had a First Amendment right to their views, even if those views were “unpopular” or “unwise.”²⁷⁰

Many Scouts, used to camping and knot-tying and the like, would probably be surprised to learn that they belong to the anti-gay organization the Court portrayed the Scouts to be. The point is nicely made in a *New Yorker* cartoon that appeared shortly after the *Dale* decision:

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“And this one’s for homophobia.”²⁷¹

270. See *Dale*, 530 U.S. at 660 (citing *inter alia* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

271. *THE NEW YORKER*, Jan. 22, 2001, at 77. © 2002 The New Yorker Collection from cartoonbank.com. All rights reserved. Used with permission.

The difficulty is not that the Boy Scouts do not exclude gays. They zealously defended their right to do so. Nor is it that individual Scouts should not be aware of the organization's policy. They should know and decide for themselves whether to participate, under all of the relevant circumstances. The difficulty is that the Court's focus on message almost inevitably leads to a distortion of a group's position. Thus, just as the Court overlooked the possibility that the Jaycees and Rotary believe women are sufficiently different to be excluded, the Court likely overstated the Scout's views on gay members.

F. The Intrusiveness Problem

Investigating an organization's "private" expression²⁷² is particularly problematic. Indeed, it is startling. Private expression depends in a very substantial way on privacy. It does not take much to recognize that the richness of associational life derives in significant part from the ability to come together with other like-minded individuals, free from the scrutiny of outsiders. Judicial prying appears inconsistent with this most basic feature of associations.

Private expression is also very difficult to measure and evaluate. There is not likely to be much evidence: private expression is not generally recorded. It is also likely to be subtle, varied, and largely beyond the reach of external monitoring. Asking whether an association's private values will be altered by the application of a government regulation seems, therefore, both destructive of associational life and poorly suited to protecting the First Amendment interests at stake.

G. The Governmental Interest Problem

The Court's approach also seems insensitive to the interests of the government in regulating certain associations or certain associational activities. *Dale* exemplifies the problem. Framing the relevant issue as whether the Boy Scouts' expression will be impaired by James Dale's presence, the Court effectively presents the state's interest in prohibiting discrimination as purely the personal (and possibly selfish) interest of James Dale in being able to express his own views. Indeed, James Dale himself is treated as the embodiment of a viewpoint, one that the Court finds incompatible with the views of the Scouts. Thus, the Court invokes *Hurley*,

272. *Dale*, 530 U.S. at 648.

and compares James Dale's efforts to remain a Scout to marchers excluded from the St. Patrick's Day parade.²⁷³

However, the Boy Scouts is not a parade, and James Dale was not seeking a right to march with a sign. More generally, New Jersey's purpose in prohibiting discrimination had little to do with facilitating one speaker over another. Rather, the point of New Jersey's statute is to allow individuals equal access, without regard to their race, religion, sexual orientation, or other such characteristics, to a wide variety of services and entities, including stores, theaters, motels, and swimming pools.²⁷⁴ It is certainly appropriate, when evaluating a claim to freedom of association, to ask whether the state's interests reasonably extend to the particular type of organization or entity being regulated. It would, therefore, be appropriate to see how an organization like the Boy Scouts compares to some of these other entities being regulated. But treating, as the Court does in *Dale*, the relevant state interest as akin to an individual's desire to march in a parade just misses the point.

H. Implications

My purpose in setting out these problems in the Supreme Court's analysis of freedom of expressive association is not simply to criticize what the Court has done. These shortcomings point to how an alternative approach to freedom of association, one more sensitive to the realities of associational life and more faithful to the constitutional and governmental interests at stake, should look. Such an approach would meet the following criteria: First, there must be a clear understanding of the subject matter in question. What, in other words, are associations? What do they look like? What do they do? Second, the approach must carefully identify the constitutional interests at stake in associational life. Why should associations be protected under the Constitution? In particular, the approach must provide a satisfactory theory of associational freedom that goes beyond simple assertions and conclusions. Third, the approach must take seriously the state's interests in regulating associations. What is the state trying to accomplish and how it is going about that? Fourth (and perhaps most difficult of all) the approach must offer a method for identifying, in a reliable and coherent manner, when the Constitution protects an association from

273. *Id.* at 654.

274. See N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (2000).

state regulation. In other words, it is not enough simply to wait for a judge to take a look at an association's minutes and other records to tell us if a regulation goes too far. We need clear tools that can be usefully brought to a variety of contexts.

With these criteria in mind, I turn in the next sections to developing and applying an alternative account of freedom of association. I begin by seeking to understand the subject matter: what are associations and why do they matter?

IV. A SOCIOLOGY OF ASSOCIATIONS

Visiting the United States in the 1830s, Alexis de Tocqueville remarked on the propensity of Americans to join associations. He wrote:

Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute . . . Nothing, in my view, more deserves attention than the intellectual and moral associations in America.²⁷⁵

Commentators frequently invoke these words because Tocqueville's observation that associations are a central feature of American life remains pertinent today. The United States is a "nation of joiners."²⁷⁶ Summarizing cross-national data, Sidney Verba and his colleagues report "associational life in America is probably unparalleled in the number of organizations and the diversity of their concerns. Americans are [also] more likely to be members of voluntary associations . . . than are citizens of other nations."²⁷⁷

Social scientists have researched numerous aspects of associations.²⁷⁸ If we are to think meaningfully about constitutional protections for freedom of

275. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513–17 (J.P. Mayer ed., George Lawrence trans., Perennial Library 1988) (1835).

276. Arthur M. Schlesinger, *Biography of a Nation of Joiners*, 50 *AM. HIST. REV.* 1 (1944).

277. SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 79 (1995). See also James E. Curtis et al., *Voluntary Association Membership in Fifteen Countries: A Comparative Analysis*, 57 *AM. SOC. REV.* 139, 148 (1992) (reporting that worldwide Americans are the most likely to join associations if religious organizations are included; excluding religious organizations Americans join at the same rate as citizens of other nations).

278. See generally, David Horton Smith, *Major Analytical Topics of Voluntary Action Theory and Research: Version 2*, 1 *J. VOLUNTARY ACTION RES.* 1 (1972) (identifying the following areas of research: conceptual issues; rates of participation; the effect of the state on associational involvement; the effect of

association, this research is a useful—perhaps necessary—place to begin. In this section, I therefore draw on the research to provide an overview of the associational terrain.

A. *Definitions*

Researchers have defined “association” in various ways.²⁷⁹ In an early formulation, G.D.H. Cole defines an association as “any group of persons pursuing a common purpose or system or aggregation of purposes by a course of cooperative action extending beyond a single act, and, for this purpose, agreeing together upon certain methods of procedure, and laying down, in however rudimentary a form, rules for common action.”²⁸⁰ More recently, Mark Warren describes associations as “those kinds of attachments we choose for specific purposes—to further a cause, form a family, play a sport, work through a problem of identity or meaning, get ahead in a career, or resolve a neighborhood problem.”²⁸¹ Yael Tamir refers to an association as “any kind of formalized, non-governmental, human interaction.”²⁸²

Some commentators discuss voluntary associations, a formulation that emphasizes organizations individuals enter by choice.²⁸³ Other commentators define associations as those social arrangements located between the family and the state.²⁸⁴ Still other commentators emphasize that associations

the development of institutional sectors of society on participation; the nature and determinants of the incidence, growth, change, and dissolution of associations; the nature and determinants of relationships between associations and other groups and individual affiliates; the effectiveness of associations; the internal functioning of associations; the nature of individual activity; role selection; the impact on participants; and the development of theories of associations).

279. A useful overview (and critique) is provided by MARK E. WARREN, *DEMOCRACY AND ASSOCIATION* 39–59 (2001).

280. G.D.H. COLE, *SOCIAL THEORY* 37 (1920).

281. WARREN, *supra* note 279, at 39.

282. Yael Tamir, *Revisiting the Civic Sphere*, in *FREEDOM OF ASSOCIATION* 214, 216 (Amy Gutmann ed., 1998).

283. *See, e.g.*, RICHARD CORNUELLE, *RECLAIMING THE AMERICAN DREAM: THE ROLE OF PRIVATE INDIVIDUALS AND VOLUNTARY ASSOCIATIONS* 7 (1993); MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 296–98 (1999); Theda Skocpol, *How Americans Became Civic*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 27, 34–37 (Theda Skocpol & Morris P. Fiorina eds., 1999).

284. *See, e.g.*, Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in *ASSOCIATIONS AND DEMOCRACY* 7 (Erik Olin Wright ed., 1995).

embody non-hierarchical social relationships.²⁸⁵ Some researchers define association using a tripartite scheme: primary associations comprising intimate connections (particularly among family and friends); secondary associations involving personal connections and face-to-face contact (such as in religious groups, hobby clubs, and self-help groups); and tertiary associations with many members who do not know each other personally (such as the AARP or a state bar association).²⁸⁶

While these approaches all provide some guidance in conceptualizing associations, a definition may ultimately be of limited use. For instance, broad distinctions and descriptions overlook more subtle characteristics of particular associations. The Boy Scouts is a large, mass-membership association. But it is also a collection of small, localized troops. Membership in the local PTA or neighborhood group may be entirely voluntary. But everybody might also expect you to join if your child attends school or you live on the block. An association might comprise private citizens. But it might also have extensive relationships with the government. And so on. In view of complications of these kinds, Nancy Rosenblum is surely correct to caution that “[g]ross references to ‘voluntary’ associations . . . and general terms like ‘secondary’ . . . associations obscure the mixed makeup of most groups.”²⁸⁷

Further, any reliance on a single definition is likely unrealistic in view of the huge variety of associations in the United States. The most recent edition of the *Encyclopedia of Associations* includes organizations as diverse as the American Belgian Hare Club, the Association of Food Journalists, the Society of Dance History Scholars, the Friends of French Art, the North American Truffling Society, the Renaissance Transgender Association, the American Singles Golf Association, the Americans for Customary Weight and Measure, the Hereditary Order of the First Families of Massachusetts, the Cookie Cutter Collectors Club, and the Association for People with Dogs Named Marty.²⁸⁸ As one commentator points out, “[t]he ingenuity of

285. See, e.g., ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 173 (1993) (referring to “networks of civic engagement” that link citizens together in “horizontal” relationships).

286. See, e.g., Amy Gutmann, *An Introductory Essay*, in FREEDOM OF ASSOCIATION, *supra* note 282, at 3, 10. Gutmann describes the central function of “secondary” associations as “bringing members together in local chapters for regular meetings and cooperative activities.” *Id.*

287. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 6 (1998).

288. See 1 ENCYCLOPEDIA OF ASSOCIATIONS: AN ASSOCIATIONS UNLIMITED REFERENCE 329, 528, 775, 1081, 1097, 1399, 1400, 1945, 2152, 2274, 2292 (Kimberly N. Hunt ed., Gale Research, 38th ed. 2002).

Americans in creating organizations knows no bounds.”²⁸⁹ Seeking to unite these sorts of diverse organizations under a single definition is likely to produce either inaccuracy (some groups will not fit), or such vagueness in terms that the definition is not practically helpful.

Moreover, for purposes of thinking about the proper scope of constitutional protection for freedom of association, it may ultimately be less important to describe “association” as a general matter, than to have tools to recognize and speak meaningfully about particular kinds of associations, to be able to identify and evaluate their relevant features, and to compare and contrast them to other kinds of associations. It may, in other words, be less useful to say that a gardening club and the Jaycees and the KKK are all “associations,” than to say what these entities have in common, and to be able to recognize how they differ.

B. *Numbers and Types*

On that score, it is useful to have some understanding of the number and the types of associations that exist in the United States. Precise figures are hard to come by because many associations do not report their existence to anybody. The *Encyclopedia of Associations*—which does not include local organizations—lists nearly 23,000 non-profit membership organizations of national scope.²⁹⁰ The *Nonprofit Almanac* reports that as of 1995, there were 576,133 tax-exempt organizations of 645 different types.²⁹¹ But this figure is also only the tip of the iceberg. It excludes the many thousands of religious associations,²⁹² as well as perhaps several million smaller secular groups that lack tax-exempt status.²⁹³

Perhaps more useful than the sheer number of associations is the information researchers have gathered on participation in various types of

289. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48 (2000).

290. See *ENCYCLOPEDIA OF ASSOCIATIONS: AN ASSOCIATIONS UNLIMITED REFERENCE* (Kimberly N. Hunt ed., Gale Research, 38th ed. 2002).

291. See VIRGINIA ANN HODGKINSON ET AL., *NONPROFIT ALMANAC 1996–1997: DIMENSIONS OF THE INDEPENDENT SECTOR* 234 (1996).

292. See, e.g., ROSENBLUM, *supra* note 287, at 8 (reporting that “[r]oughly 75 million Americans belong to small religious fellowship groups and secular recovery and support groups.”).

293. Robert Wuthnow estimates from his recent survey evidence that there are possibly three million small, informal groups (such as support groups, book clubs, neighborhood associations) in the United States. See ROBERT WUTHNOW, *SHARING THE JOURNEY: SUPPORT GROUPS AND AMERICA’S NEW QUEST FOR COMMUNITY* 45 (1994).

associations. Recent work by Sidney Verba and his colleagues is of particular relevance.²⁹⁴ Verba and his colleagues report the results of a national survey of citizen participation in a wide variety of associations.²⁹⁵ According to the results of the survey, seventy-nine percent of respondents were affiliated with one or more associations either as members or by making financial contributions; forty-one percent of respondents had four or more such affiliations.²⁹⁶ Among respondents reporting affiliation with at least one association, sixty-five percent had attended a meeting of the association within the past year; forty-two percent reported active membership, such as service on a committee; and twenty-eight percent reported that they had served as a board member or officer.²⁹⁷

C. *Nature of Participation*

There are also important differences in the ways in which individuals participate in different types of associations. Verba and his colleagues report a broad range of involvement in the various organizations they examined. The largest portion of respondents (forty-four percent) indicated affiliation with a large charitable or social service organization.²⁹⁸ But seventy-nine percent of the members in these organizations simply made a financial

294. See VERBA ET AL., *supra* note 277.

295. See *id.* The survey asked respondents about the extent and nature of their involvement in the following categories of organizations: service clubs or fraternal organizations; veterans' organizations; religious groups; ethnic organizations; senior citizens' groups; women's groups; labor unions; business or professional organizations; issue-specific groups like gun control or environmental groups; general civic organizations such as the League of Women Voters; organizations supporting liberal or conservative causes, for instance the Conservative Caucus; candidate or party organizations; youth groups; literary, art or study groups; hobby, sport or leisure groups; neighborhood or homeowners' groups; charitable or service organizations; educational organizations like the PTA; and cultural organizations such as a museum group. See *id.* at 60–61. The study also included a category for "other" groups not covered by these categories. See *id.* That only one percent of respondents indicated they were affiliated with an organization that did *not* fall within one of the specified types of organizations evidences the comprehensiveness of the list. See *id.* at 63.

296. See *id.* at 62.

297. See *id.* See also DAVID HORTON SMITH, GRASSROOTS ASSOCIATIONS 41, 51 (2000) (reporting that sixty-seven percent of adult Americans, or 124 million individuals, belong to one or more grassroots organizations and that there are seven and a half million such associations); WUTHNOW, *supra* note 293, at 45 (reporting that forty percent of the adult population, or seventy-five million Americans, are members of a "small group" that meets regularly and estimating that there are three million small groups in the United States); Frank Baumgartner & Jack Walker, *Survey Research and Membership in Voluntary Associations*, 32 AM. J. POL. SCI. 908, 920 (1988) (reporting that 77.7 percent of respondents are members of one or more association).

298. See VERBA ET AL., *supra* note 277, at 63–64.

contribution and did not attend meetings.²⁹⁹ Participation in cultural organizations (such as museum groups), veterans' groups, and liberal or conservative groups was also mostly limited to giving money.³⁰⁰ However, of the respondents involved in other kinds of groups—service or fraternal groups; religious groups; educational groups; literary, art or discussion groups; hobby, sports or leisure groups; business or professional groups; unions; and neighborhood or homeowners' groups—at least half reported regularly attending group meetings.³⁰¹

D. Demographic Variations

Different people also participate in associations to different degrees. Researchers have long examined how participation varies by race, gender, age, and other demographic characteristics.³⁰² For present purposes, it is necessary simply to highlight some of the most recent findings.

299. *See id.*

300. *See id.*

301. *See id.*

302. *See generally* Morris Axelrod, *Urban Structure and Social Participation*, 21 AM. SOC. REV. 13 (1956) (reporting that education, income, and occupational status are positively related to participation in associations); Wendell Bell & Maryann Force, *Social Structure and Participation in Different Types of Formal Associations*, 34 SOC. FORCES 345 (1956) (reporting that low-income respondents are more likely to be involved in unions but that for all other associations participation is higher among high-income respondents); Floyd Dotson, *Patterns of Voluntary Association Among Working Class Families*, 16 AM. SOC. REV. 687 (1951) (reporting that working class respondents are active primarily in athletic and church groups); John Edwards & Randall White, *Predictors of Social Participation: Apparent or Real*, 9 J. VOLUNTARY ACTION RES. 60 (1980) (reporting that education, occupational prestige, income, and years in a neighborhood all have a positive effect on association membership but the significance of these factors diminishes when a larger number of variables are considered); Howard Freeman et al., *Correlates of Membership in Voluntary Associations*, 22 AM. SOC. REV. 528 (1957) (reporting that residential mobility, job mobility, and a positive attitude toward the community are positively related to participation in associations); T.B. Guterbock & B. London, *Race, Political Orientation, and Participation*, 48 AM. SOC. REV. 439 (1983) (reporting and analyzing higher participation of Whites than Blacks); Robert Hagedorn & Sanford Labovitz, *Occupational Characteristics and Participation in Voluntary Associations*, 47 SOC. FORCES 16 (1968) (reporting that individuals in occupations that require leadership skills and individuals in bureaucratic positions participate more than other types of workers); David Knoke & Randall Thomson, *Voluntary Association Membership Trends and the Family Life Cycle*, 56 SOC. FORCES 48 (1977) (reporting that for adults, association membership rises after marriage, drops with the birth of children, rises when children enter school, and continues to rise through the departure of children from the home, and then declines again towards the end of life); Charles Wright & Herbert H. Hyman, *Association Memberships of American Adults: Evidence from National Survey Samples*, 23 AM. SOC. REV. 284 (1958) (reporting that Whites are more likely to be members of associations than are Blacks and that participation is directly related to socio-economic status); Basil G. Zimmer & Amos H. Hawley, *The*

Researchers report that associational membership increases with education; indeed, education is often the most important predictor of membership.³⁰³ Accordingly, participation is positively and strongly correlated with income.³⁰⁴ Membership is also positively correlated with age: older Americans belong to more organizations than do younger Americans.³⁰⁵ Racial differences in associational membership are not large. If religious organizations are counted, Black Americans are slightly more likely to belong to associations than are White Americans.³⁰⁶ Rural residents are more likely to participate in associations than are urban dwellers.³⁰⁷ Women belong to slightly fewer associations than do men (although this gender gap is narrowing).³⁰⁸ Married men and women, and those with children, join more religious, school and youth groups, but they participate less often than do single Americans in other types of groups.³⁰⁹

E. Effects

A large body of research examines the effects of associations on the lives of their members and the roles associations play in the broader community.

1. Individual Benefits

Some associations confer obvious benefits on their members by allowing them to pursue their interests with like-minded individuals. If I enjoy gardening, for example, I may join a gardening association to share tips, trade seedlings and cuttings, learn about new products and techniques, or just to spend some time in the company of other green thumbs. Certain

Significance of Membership in Associations, 64 AM. J. SOC. 196 (1959) (reporting higher participation in the central city than in the suburbs).

303. See Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 PS 664, 667 (1995).

304. See PUTNAM, BOWLING ALONE, *supra* note 289, at 193; VERBA ET AL., *supra* note 277, at 191–204.

305. See PUTNAM, BOWLING ALONE, *supra* note 289, at 247; Putnam, *Tuning In, Tuning Out*, *supra* note 303, at 673.

306. See PUTNAM, BOWLING ALONE, *supra* note 289, at 280; VERBA ET AL., *supra* note 277, at 231–41; Putnam, *Tuning In, Tuning Out*, *supra* note 303, at 672.

307. See PUTNAM, BOWLING ALONE, *supra* note 289, at 205; Putnam, *Tuning In, Tuning Out*, *supra* note 303, at 670.

308. See PUTNAM, BOWLING ALONE, *supra* note 289, at 194–203; VERBA ET AL., *supra* note 277, at 251–63; Putnam, *Tuning In, Tuning Out*, *supra* note 303, at 670.

309. See PUTNAM, BOWLING ALONE, *supra* note 289, at 278; Putnam, *Tuning In, Tuning Out*, *supra* note 303, at 671.

associations exist solely for the tangible benefits they provide to their members: I join the AAA, for instance, not because I want to schmooze with other drivers, but in order to get professional auto assistance, travel discounts, and road maps.

A different individual benefit of associational membership may be the realization of an important goal or furtherance of a personal belief. If, for example, I believe that spotted owls should be protected, I may join an environmental organization not simply because I want to associate with others who share my ideas (although that might be nice), but because I recognize that together we have a better chance of influencing legislation.

Beyond these obvious reasons for joining, researchers have demonstrated more subtle ways in which associations affect the lives of their members. These include: providing emotional support, friendship, solidarity, and stability;³¹⁰ conferring economic benefits;³¹¹ nourishing social identity and prestige;³¹² and providing a forum in which individuals can develop and live their values.³¹³

Of course, some people are just “joiners” out of habit, and they may have memberships in a variety of associations without expecting or receiving any obvious personal benefits.³¹⁴ I may join an association for no other reason than that somebody (a co-worker or a neighbor, for instance) asks me to sign up. Alternatively, I might join because my parents were members and their parents were members before them, and that is just how things are done.

2. Cooperation

Beyond these individual motivations and effects, there are also significant social and political consequences of associational membership. The oft-recited features of associations identified by Tocqueville in the 1830s are especially important. Tocqueville observed that associations keep anonymity in check by drawing individuals out of their world of private self-interest and

310. See SMITH, *supra* note 297 at 195–212; WUTHNOW, *supra* note 293, at 183, 344–45.

311. See James Kerri, *Anthropological Studies of Voluntary Associations and Voluntary Action: A Review*, 3 J. VOLUNTARY ACTION RES. 10, 15–16 (1974).

312. See *id.*

313. See SMITH, *supra* note 297 at 56, 195–212.

314. See PUTNAM, *BOWLING ALONE*, *supra* note 289, at 98.

teaching them habits of cooperation, solidarity, and other civic skills.³¹⁵ Of course, not all associations do this: simply joining a mass-membership organization like the AARP or Greenpeace, for example, does not suddenly give me a roster of close friends. But some associations can clearly serve this kind of function. If, for example, for the past twenty years I have gathered with the same six people every Wednesday evening to discuss French poetry, it seems likely I will feel closely connected to those people, I will share and cooperate with them, and, conversely, that they will notice if one Wednesday I do not show up.

3. *Power*

According to Tocqueville, associations also generate power because in associations collective agendas are set and refined, and organized individuals are able to exercise greater influence together than if they each labor alone.³¹⁶ Therefore, the broader social impact of an association may lie in the goals it pursues and the outcomes it achieves: influencing legislation, for instance—but also, perhaps, raising funds for some purpose (the new hospital, an ill child, victims of war); changing our physical environment (beautifying the

315. See DE TOCQUEVILLE, *supra* note 275, at 515 (“Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another.”). Echoing these observations, John Stuart Mill writes that through association with others, a citizen is drawn out of the sphere of self-interest and learns to pursue collective ends: “He is called upon . . . to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good: and he usually finds associated with him in the same work minds more familiarized than his own with these ideas and operations, whose study it will be to supply reasons to his understanding, and stimulation to his feeling for the general interest.” John Stuart Mill, *Considerations on Representative Government*, in *THREE ESSAYS* 143, 197–98 (Oxford U. Press ed. 1975) (1861).

316. See DE TOCQUEVILLE, *supra* note 275, at 190. A useful empirical investigation of the effects of associations is Jason Kaufman, *Three Views of Associationalism in 19th-Century America: An Empirical Examination*, 104 AM. J. SOC. 1296 (1999). Examining associations in fifty-three cities in 1880, Kaufman finds that while these associations brought people together to perform collectively beneficial acts, there was no evidence that an increased number of associations reduced governmental spending or promoted greater political participation as measured by voter turnout. See *id.* at 1337. Kaufman reaches the following conclusions about the effects of associations:

[C]ivic associations help people (particularly self-enfranchised groups of people) get what they want from government, for better or worse. Indeed, [James] Madison may have been right in suggesting that the best cure for factionalism is more factionalism. Given the wide range of special interests represented by associations, past and present, associationalism may be desirable if for no other reason than to counteract the nearly inevitable presence of other factions On the other hand, excessive associationalism may simply lead a few associations to wield political power disproportionate to their actual membership

Id. at 1339.

park, building a statue); helping somebody get elected to public office; or transmitting information to others.

Of course, not everything an association achieves is necessarily good for everybody else, or even good for anybody else. An association might impact its broader community by creating fear (as gangs do), limiting access to certain places (the effect of some homeowner associations, or of a picket line), destroying something other people happen to enjoy, preventing an activity from taking place, or funding some nefarious cause.

In considering these social influences, it is important to recognize that associations often work to empower otherwise politically weak individuals. As Tocqueville recognized, associations can serve as a counterweight to the interests of majority groups by giving minority interests a stronger political voice, and serving a representative function.³¹⁷ There are numerous examples of the phenomenon of strength in numbers, such as the impact of well-organized gay rights groups.³¹⁸

4. *Self-Governance*

Associations also provide a forum for self-governance.³¹⁹ In associations, individuals develop skills and undergo experiences that better equip them to take care of themselves, and to solve problems without having to rely on the intervention of the state.³²⁰ Verba and his colleagues report how the “civic skills” acquired in associations are an important resource for various kinds of social and political activity:

Civic skills, the communications and organizational abilities that allow citizens to use time and money effectively in political life, constitute a . . . resource for politics. Citizens who can speak or write well or who are comfortable organizing and taking part in meetings are likely to be more effective when they get involved in politics. Those who possess civic skills should find political activity less daunting and costly and,

317. See VERBA ET AL., *supra* note 277, at 192–95.

318. See generally DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* (1999); JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* (1976); *THE QUESTION OF EQUALITY: LESBIAN AND GAY POLITICS IN AMERICA SINCE STONEWALL* (David Deitcher ed., 1995).

319. See DE TOCQUEVILLE, *supra* note 275, at 513–17. For a modern Tocquevillian commentary on the “democratic virtues of special interest groups,” see Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 *YALE L. & POL’Y REV.* 553 (1997).

320. See DE TOCQUEVILLE, *supra* note 275, at 515.

therefore, should be more likely to take part. Furthermore, those capacities allow participants to use inputs of time and money more effectively, making them more productive when they are active.³²¹

Internally, then, associations teach individuals organizing skills that are useful in advancing political agendas: how to write letters, run meetings, and recruit associates.³²² Externally, associations allow individuals to express their interests and demands on government and to protect their interests.³²³ Associations aggregate political power: they permit individuals who would otherwise be politically weak to join together to express their views and advance their interests. "Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous."³²⁴

5. *By-Products*

Importantly, membership in an association may have these kinds of social and political implications even if the association is not itself socially activist or politically engaged.³²⁵ Associations stimulate social and political activity by broadening the sphere of interest and concern of their members, bringing members into contact with diverse people, and providing channels through which to act.³²⁶ Participation in associations in adolescence, for example,

321. VERBA ET AL., *supra* note 277, at 304.

322. See PUTNAM, BOWLING ALONE, *supra* note 289, at 338.

323. See *id.* See also Kerri, *supra* note 311, at 11–16 (explaining that externally associations act as political pressure groups; perform deliberative functions; and serve as points of articulation with officials).

324. Gutmann, *An Introductory Essay*, in FREEDOM OF ASSOCIATION, *supra* note 282, at 3. See also Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 67–91 (James Bohman & William Rehg eds., 1999).

325. See Bonnie H. Erickson & T.A. Nosanchuk, *How an Apolitical Association Politicizes*, 27 CANADIAN REV. SOC. & ANTHROPOLOGY 206, 206–219 (1990). Conversely, we should not assume that the importance of overtly political organizations lies solely or even principally in their political achievements. One commentator reports, for instance, that early suffrage picketing and pageants were less significant for their effect on the public than for their effects on participants, who became unified and energized around a common cause. See LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 98, 119, 153 (1997).

326. See David Knoke, *Associations and Interest Groups*, 12 ANN. REV. SOC. 1, 1–21 (1986). See also David KNOKE, ORGANIZING FOR COLLECTIVE ACTION: THE POLITICAL ECONOMIES OF ASSOCIATION 201–12 (1990); SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 5–20 (1972); Jane Leighley, *Group Membership and the Mobilization of Political Participation*, 58 J. POL. 447, 447–63 (1996); Phillip H. Pollock III, *Organizations as Agents of Mobilization: How Does Group Activity Affect Political Participation?*, 26

increases political activity in adulthood: adolescents who join associations are more likely to discuss political issues, campaign, vote, and join political organizations in early adulthood.³²⁷ Individuals involved in associations are more likely to engage both in institutionalized politics (such as through party mechanisms), as well as in spontaneous activities like protests.³²⁸

Similarly, civic skills develop in associations without overt political purposes.³²⁹ Verba and his colleagues report that civic skills are often acquired early in life, especially through education; hence, education is positively correlated with political activity.³³⁰ In adult life, participation in various kinds of associations provides additional opportunities for acquiring and practicing these skills.³³¹ Non-political associations provide a forum for members to discuss political issues and for political recruitment.³³² In addition, through non-political activities, individuals develop communication and organizational skills that are useful in politics.³³³

AM. J. POL. SCI. 485, 485–503 (1982); David L. Rogers et al., *Voluntary Association Membership and Political Participation: An Exploration of the Mobilization Hypothesis*, 16 SOC. Q. 305, 305–10 (1975).

327. See M. Hanks, *Youth, Voluntary Associations, and Political Socialization*, 60 SOC. FORCES 211, 211–23 (1981); Thomas Janoski et al., *Being Volunteered? The Impact of Social Participation and Pro-Social Attitudes on Volunteering*, 13 SOC. F. 495, 496–517 (1998).

328. See Rory McVeigh & Christian Smith, *Who Protests in America: An Analysis of Three Political Alternatives—Inaction, Institutionalized Politics, or Protest*, 14 SOC. F. 685, 697–700 (1999).

329. There is an important similarity between this notion and Jürgen Habermas' discussion of the public sphere. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (T. Burger & F. Lawrence trans., 1989). According to Habermas, civil society in seventeenth- and eighteenth-century Europe developed as "the genuine domain of private autonomy . . . opposed to the state." *Id.* at 12. Since civil society stood in opposition to the state, a public sphere emerged in which citizens discussed and debated state authority and action as it related to private interests. See *id.* at 24. In contrast to the Greek polis, in the public sphere, individuals formed primarily in the realm of *private* life came together to debate *public* issues:

The bourgeois public sphere may be conceived above all as the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason.

Id. at 27. Habermas illustrates the point by his account of the prevalence in London, at the beginning of the eighteenth century, of coffee houses, where private individuals met publicly to discuss issues of common concern. See *id.* at 36.

330. See VERBA ET AL., *supra* note 277, at 305.

331. See *id.* at 309.

332. See *id.*

333. See *id.* at 309–10.

For Black citizens, associations are particularly important sites for acquiring civic skills. In the workplace, educated White citizens disproportionately occupy the high-level positions—such as teaching and the legal profession—that impart civic skills.³³⁴ However, in associations, Black citizens have about the same opportunities, as do Whites, to develop and practice civic skills.³³⁵ In church groups, Black citizens (and members of other minority groups) are on average able to practice civic skills more frequently than are White citizens.³³⁶ Accordingly, “[c]hurches . . . are one of the few vital institutions left in which low-income, minority, and disadvantaged citizens of all races can learn politically relevant skills and be recruited into political action.”³³⁷

Historically, many groups formed for social purposes have prepared their members for political activity. In the 1860s, women in the United States, although excluded from voting, holding office, or serving on juries, exercised political influence through leadership roles in religious organizations.³³⁸ In the 1870s, the Woman’s Christian Temperance Union immersed members in prison reform, youth advocacy, and labor issues.³³⁹ In the 1890s, the members of women’s reading groups became involved in

334. *See id.* at 314–20.

335. *See id.*

336. *See id.* There is also evidence that involvement in religious groups increases the propensity of individuals to engage in protest activities relative to activities through institutionalized politics (e.g. through parties). *See* McVeigh & Smith, *supra* note 328, at 696.

337. PUTNAM, BOWLING ALONE, *supra* note 289, at 339 (citing Frederick C. Harris, *Religious Institutions and African American Political Mobilization*, in CLASSIFYING BY RACE 299 (Paul Peterson ed., 1995)). *See also* Phillip L. Miller, *The Impact of Organizational Activity on Black Political Participation*, 63 SOC. SCI. Q. 83, 83–98 (1982). For a discussion of the historical role of Black churches in politics, *see* JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICA TEMPERANCE MOVEMENT* (1963); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984). On the role of churches in modern interest group politics, *see* ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY* (1988).

Echoing the significance of associations to otherwise politically weak citizens, Theda Skocpol observes that in the locally organized chapters of national associations that flourished in the United States during the 1830s to 1850s, members enjoyed unique opportunities for advancement:

[T]he top posts were often held by white-collar, business, or professional men or women. But lowly clerks and farmers and skilled workers, or their wives, also attained such posts. Civic associations created status ladders that were not identical to the class hierarchies of the economy. A person of lesser occupational status could work his or her way up an associational ladder all the way to the top.

Theda Skocpol, *How Americans Became Civic*, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, *supra* note 283, at 67.

338. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 239–41 (1998).

339. *See* PUTNAM, BOWLING ALONE, *supra* note 289, at 389–90.

various kinds of political reforms, including protections for women and children.³⁴⁰ Non-political associations and church organizations have historically been important sites of social and political activism for Black citizens.³⁴¹ Indeed, it was precisely because associations of Blacks represented a political threat that early Southern governments sought to prohibit such organizations.³⁴²

F. *Social Capital*

A further, and perhaps the most important, perspective on the impact of associations comes from recent work in political science and related fields on the significance of social capital.

1. *Overview*

Social capital refers to “features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated action.”³⁴³ The key idea of social capital theory is that there is value in social networks and the norms these networks sustain.³⁴⁴ Just as physical capital, like tools, and human capital, like education, can increase the productivity of individuals and groups, so too can social capital improve individual and collective productivity.³⁴⁵ Transactions between and among individuals occur more readily when the individuals are embedded in strong social networks and can draw upon the norms and trust that result from social ties. It is, for instance, cheaper for me to lend money to somebody I know and trust than to lend it to a stranger whose background I have to investigate. It is easier if I can find a job through a friend than if I have to use an employment agency. It is more efficient for both of us if we can agree to car pool than if we each drive alone. These are simple examples

340. *See supra* Prologue.

341. *See* AMAR, *supra* note 338, at 241; PUTNAM, BOWLING ALONE, *supra* note 289, at 392; Allan D. Hertzke, *The Role of Churches in Political Mobilization: The Presidential Campaigns of Jesse Jackson and Pat Robertson*, in INTEREST GROUP POLITICS 177, 177–98 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991).

342. *See* AMAR, *supra* note 338, at 241.

343. *See* PUTNAM, MAKING DEMOCRACY WORK, *supra* note 285, at 167.

344. *See id.*

345. Robert D. Putnam, *Bowling Alone, Revisited*, THE RESPONSIVE COMMUNITY, Spring, 1995, at 20.

of the basic point: getting things accomplished takes less time and energy when we know and we can depend on the people with whom we interact.

2. *Collective Action Dilemmas*

In particular, social capital can often solve prisoner's dilemmas and similar collective action problems that impede cooperation for mutual advantage. There are a variety of contexts in which cooperation between and among individuals would make everyone better off, but not cooperating is the dominant strategy pursued by self-interested actors. In the classic formulation of this problem, the eighteenth-century philosopher David Hume explained the dilemma confronting two farmers who would each benefit by jointly harvesting each other's crop:

Your corn is ripe today; mine will be so to-morrow. 'Tis profitable for us both, that I shou'd labour with you to-day, and that you shou'd aid me to-morrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I shou'd be disappointed, and that I shou'd in vain depend upon your gratitude. Here then I leave you to labour alone: You treat me in the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.³⁴⁶

Dilemmas of collective action mean that no individual will cooperate unless there can be a reasonable expectation that others will follow in step. Thus, you and I will both benefit if we get together to harvest our crops (or to paint our apartments), but unless I can rely on you to come to my place after I have helped you, I will refuse to cooperate. And you will not cooperate first because you understand that I can then refuse to help you later. Each of us will end up harvesting (or painting) alone, with lower efficiency.

Game theorists have several labels for failures to cooperate for mutual benefit. In the prisoner's dilemma, two prisoners would be better off if they both refused to confess to a crime, but because each is individually better off confessing no matter what the other does, and unable to coordinate their actions, they fail to achieve the optimal outcome.³⁴⁷ In the tragedy of the commons, each individual has an incentive to maximize her own use of a

346. DAVID HUME, A TREATISE OF HUMAN NATURE pt. 2, § 5 (1740).

347. See ROBERT AXELROD, THE EVOLUTION OF COOPERATION 7-24 (1984).

common resource (e.g. grazing land), but the end result is that the resource disappears to the detriment of everybody.³⁴⁸ Public goods (e.g. clean air) are goods that can be used by any individual regardless of whether that individual contributes to the provision of the good; as a result, nobody has an incentive to contribute and everybody loses the benefit of the good.³⁴⁹ In the logic of collective action, individuals do not contribute to collective ends (e.g. labor strikes) because each individual receives only some of the benefit of her contribution and because she can free ride on the contributions of others.³⁵⁰ In all of these settings, without some guarantee that if I cooperate you will reciprocate, and with the knowledge that once I cooperate you will have an incentive to defect, neither of us cooperates even though cooperation would produce a more desirable outcome for us both. In each instance, self-interest works as an impediment to mutually beneficial outcomes.

One solution to these kinds of dilemmas is that offered by Thomas Hobbes in *Leviathan*: enforcement by a third-party such as the state.³⁵¹ Under this approach, a powerful sovereign prevents cheating and therefore harmonizes civil life. Thus, we can agree to help each other to harvest (or to paint our respective apartments) by first entering into a duly executed contract. If you fail to live up to the bargain, I can sue you for breach. I will therefore help you because I know you do not want to be sued, and you will reciprocate for the same reason. The threat of sanction imposed by the state works to ensure we both live up to the bargain.

Third-party mechanisms are costly. The expense involved in negotiating and writing up the contract and going to court to have it enforced can easily outweigh the benefit of cooperation. In addition, reliance on a third-party itself presents a collective action problem: the third-party is likely to pursue its own interests once we grant it power. Moreover, because a third-party lacks familiarity with the specific circumstances of a collective action setting, the third-party may not be very good at regulating for optimal results. Elinor Ostrom provides striking evidence of the failure of governmental policies to overcome dilemmas of collective action where the government

348. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 2–3 (1991).

349. See John Ledyard, *Public Goods: A Survey of Experimental Research*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 111, 111–12 (John Kagel & Alvin Roth eds., 1995).

350. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 27–28 (1965).

351. See THOMAS HOBBS, *LEVIATHAN* 223–34 (C.B. Macpherson ed., Penguin Classics 1986) (1651).

lacks sufficient monitoring capacities and the skills for tailoring policies to the specific circumstances of a particular setting.³⁵²

Social capital—in the form of social networks and norms—is a resource that can solve collective action problems, often more effectively than any other mechanism. “Success in overcoming dilemmas of collective action and the self-defeating opportunism that they spawn depends on the broader social context within which any particular game is played. Voluntary cooperation is easier in a community that has inherited a substantial stock of social capital”³⁵³ Social capital facilitates cooperative interactions to overcome collective action dilemmas because it provides information about participants and it helps ensure the enforcement of their commitments. While I may be too suspicious to cooperate with a stranger (because I suspect she may not return the favor), I will cooperate with my friend: I have known her for a long time and I know she is an honest and reliable person, we have done things for each other in the past, and it seems unlikely that she will sacrifice our friendship (or embarrass herself in front of our mutual acquaintances) by cheating. Social capital facilitates the exchange.

These same mechanisms can extend beyond tight personal connections to produce cooperation in broad social settings. It is not simply having lots of trustworthy friends that counts. Indeed, personal ties might be too time-consuming to allow for very broad cooperative endeavors. Rather, social capital can exist in the form of more general interlocking networks that provide information about individuals and incentives for compliance, and that monitor and punish defection. Thus, I will be more inclined to cooperate with a stranger who turns out to be a member of my gardening club, or my neighbor’s friend, or if others can vouch for her reputation. My fear that she will defect decreases because of the social context in which the transaction occurs.

Two specific forms of social capital are especially relevant to our discussion: civic networks and norms of generalized reciprocity.

3. *Civic Networks*

Civic networks are various types of social groups in which individuals are brought together, usually with some shared purpose or interest. Neighborhood associations, choral societies, sports clubs, religious

352. See OSTROM, *supra* note 348 at 143–81.

353. See PUTNAM, *MAKING DEMOCRACY WORK*, *supra* note 285, at 167.

organizations, and interest groups are examples of civic networks.³⁵⁴ Civic networks link citizens horizontally: they bring together people of similar status and power (as distinguished from vertical networks which are hierarchical links of dependency).³⁵⁵ Thus, while cat clubs, Rotary, and PTAs represent civic networks, most workplaces, hierarchically arranged, do not.

We may summarize the ways in which civic networks produce cooperation and overcome collective action dilemmas in the following manner. First, civic networks increase the costs of defection.³⁵⁶ An individual who is embedded in a dense network of social relationships has more to lose from defecting: defection puts at risk all of the other transactions in which the individual is engaged, as well as the benefits from future transactions.³⁵⁷ Second, civic networks can foster norms governing acceptable behavior.³⁵⁸ These norms improve the efficiency of transactions because everyone can reasonably anticipate how others will behave (and everyone can act with confidence that nobody is going to cheat). Third, civic networks provide information and allow for monitoring: cooperators (as well as cheaters) develop reputations that are relayed to others who can figure them into future transactions.³⁵⁹ Fourth, civic networks provide a template for future cooperation: having collaborated in the past, it is easier for networked individuals to do so again.³⁶⁰

Civic networks are able to connect broad segments of society, thereby greatly expanding the scope of cooperative endeavors.³⁶¹ In this manner, civic networks can provide the background conditions for a wide range of citizen activity. Evidence of this effect is reported in political scientist Robert Putnam's study, *Making Democracy Work*.³⁶² In that study, Putnam sought to explain the substantial variations he observed in the performance of newly formed regional governments in Italy, and in particular differences

354. *See id.* at 173.

355. *See id.*

356. *See id.*

357. *See id.*

358. *See id.*

359. *See id.* at 174.

360. *See id.*

361. *See id.* at 175.

362. *See id.* at 83–120.

between the North and the South.³⁶³ Some of these new regional governments were inefficient and corrupt; others were highly successful in pursuing programs and creating local prosperity.³⁶⁴ After eliminating other explanatory factors, Putnam determined that regional differences could only be accounted for by regional variations in civicness—the density of voluntary associations and the degree of citizen participation in public affairs.³⁶⁵ Northern regions of Italy were characterized by a long tradition of associational life: from twelfth-century guilds and religious organizations to nineteenth-century cooperatives and mutual aid societies to dense modern networks of choral societies, hiking clubs, and the like.³⁶⁶ The South, by contrast, embodied a tradition of small separate family units and passive membership in the Catholic Church.³⁶⁷ During the several decades of Putnam's study, the North prospered and local government was effective, while the South was marred by corruption, suspicion, and poverty.³⁶⁸ Putnam argues that civic culture made all the difference in the North, where networks of associational ties and the norms and trust they sustained overcame collective action problems and made individuals and groups more productive and government more effective.³⁶⁹ “[O]bjective measures of effectiveness and subjective measures of citizen satisfaction concur,” Putnam concludes, “in ranking some regional governments consistently more successful than others. Virtually without exception, the more civic the context, the better the government.”³⁷⁰

Importantly, civic networks are not necessarily (or even usually) formed in order to reap the benefits of social capital. People join choral societies because they enjoy music, not because they want to reduce crime and unemployment. People bowl in leagues because they enjoy the game in the company of others (and they like pizza), not to make government more effective or to help the economy grow faster. The benefits of civic networks are, therefore, often the unintended by-products of membership and participation.

363. *See id.* at 63–82.

364. *See id.*

365. *See id.* at 120.

366. *See id.* at 162.

367. *See id.* at 143–48, 175–76.

368. *See id.* at 115.

369. *See id.* at 182.

370. *Id.*

4. *Generalized Reciprocity*

Reciprocity refers to the disposition of individuals to engage in cooperation with other citizens.³⁷¹ We may usefully distinguish between two types of reciprocity: specific reciprocity and generalized reciprocity.³⁷² Specific reciprocity involves cooperation between two (or perhaps more) identifiable individuals. It exists when one person does a favor for another—who, either immediately or at some future date, returns the favor to that same person.³⁷³ “I’ll scratch your back if you’ll scratch mine,” is an instance of specific reciprocity. By its very nature, specific reciprocity requires trusting that the person to whom the favor is granted will return the favor in the future. Individuals who fail to reciprocate quickly enough or generously enough may, therefore, be shut out of cooperation in the future. Specific reciprocity often confers significant benefits on individuals. Individuals who are able to exchange favors with others may hear about job opportunities, have somebody available to mind their children or watch their house, more easily borrow money, or get a ride to work. But the benefits of specific reciprocity are mostly limited to the individuals granting and then receiving favors, with few benefits to the general population. Indeed, this is true by definition: favors are not valuable if they confer substantial benefits on other people, because then the benefit is widely available, and there would be no need for reciprocity.

Generalized reciprocity exists where a favor granted by one person does not depend on any expectation that the recipient will repay it to that person. Instead, the person grants the favor because he or she is part of a community in which it is understood that people do favors for each other. The favor will be returned only in the sense that the person giving it will in turn benefit, somewhere down the road, from other favors from other members of the community. Accordingly, generalized reciprocity exists where individuals trust each other generally, and exhibit cooperative behavior with each other, even though there is no specific guarantee in any particular instance of a reciprocal exchange.³⁷⁴

371. *See id.* at 172.

372. *See id.*

373. *See id.*

374. *See* Ernst Fehr and Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 159–61 (2000); Armin Falk and Urs Fischbacher, *A Theory of Reciprocity* (Feb. 1999) (unpublished manuscript, on file with author).

Generalized reciprocity is an important form of social capital, conferring substantial benefits on groups or communities in which it exists. Generalized reciprocity is a normative feature of the social context. As is true with other norms, generalized reciprocity shapes behavior because failing to abide by the norm results in public disapproval and exclusion from social groups.³⁷⁵ Moreover, quite practical considerations prevent individuals from breaching a code of reciprocity. Where social ostracism means the disappearance of neighborly help (no loaned gardening tools, no baby-sitters, no advice or warnings, no consultation), and where other individuals in a community do cooperate for efficiency gains, violating norms of reciprocity can mean deep and long-lasting personal costs. Norms of generalized reciprocity can thus greatly reduce the risk of defection in collective action situations. I will harvest your crop (or paint your apartment) because I am expected to do so and because I can rely on somebody to help me later on; you will help me because you prefer not to be shunned by your neighbors and because you also need help from others in the future. As such, generalized reciprocity makes possible cooperation for mutual benefit.³⁷⁶ On a larger scale, reciprocity may overcome or reduce free-rider barriers to the provision of public goods. Individuals acting reciprocally contribute to public goods even without any specific guarantee that others will also contribute.³⁷⁷ Summarizing the evidence, Eric Uslaner reports that “[w]hile the effects of social trust [*i.e.* generalized reciprocity] on collective action are not always . . . large, they are consistent. No other variable affects as many types of collective action.”³⁷⁸

More generally, norms of reciprocity reduce a variety of transaction costs. When individuals do not need to check constantly that they are not being taken advantage of but instead may rely on shared cooperative norms, their goals become easier to achieve. It is, for instance, cheaper and easier for me if somebody on the street will lend me a quarter to make a phone call than if I have to use a credit card or call collect. It is easier for me to leave my briefcase at my table when I go to order coffee than to drag it along because I worry it will be stolen. If I may be confident that a salesperson is not cheating me, it is easier for me to buy a car. If I do not need to rely on lengthy legal documents to borrow money, it is cheaper and easier to get a

375. See JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 311 (1990).

376. See PUTNAM, MAKING DEMOCRACY WORK, *supra* note 285, at 172.

377. See Fehr and Gächter, *supra* note 374, at 164; R. Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 ECON. J. 772, 774 (1984).

378. Eric M. Uslaner, *Democracy and Social Capital*, in DEMOCRACY AND TRUST 121, 130 (Mark Warren ed., 1999).

loan. In numerous ways such as these, “[a] society that relies on generalized reciprocity is more efficient . . . for the same reason that money is more efficient than barter.”³⁷⁹ Generalized reciprocity serves to “lubricate the inevitable frictions of social life.”³⁸⁰

5. *Empirical Evidence*

Empirical studies confirm that social capital in the form of civic networks and norms of reciprocity leads to substantial individual and collective benefits.³⁸¹ In the first place, social capital confers important economic advantages. Research in economic sociology demonstrates that economic activity is highly dependent on social capital: the structure of social relationships among economic actors, including shared understandings and trust, plays a crucial role in economic outcomes.³⁸² For instance, a large body of evidence documents the benefits to individuals of social ties and relationships of trust for obtaining employment, receiving higher compensation, getting promoted, and finding a new job after being laid off.³⁸³ Children also do much better, as measured by their risk of abuse, their behavioral and emotional problems, their performance in school, and their prospects for the future, when they grow up in families and neighborhoods characterized by high levels of social capital in the form of civic networks and reciprocal norms.³⁸⁴ In addition, a striking body of empirical evidence demonstrates that social capital has important health consequences: people

379. PUTNAM, *BOWLING ALONE*, *supra* note 289, at 135.

380. *Id.*

381. *See id.* at 307–25, 336–49.

382. *See generally* RONALD BURT, *STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION* (1992); CHARLES SMITH, *AUCTIONS: THE SOCIAL CONSTRUCTION OF VALUE* (1989); SHARON ZUKIN & PAUL DiMAGGIO, *THE STRUCTURES OF CAPITAL: THE SOCIAL ORGANIZATION OF THE ECONOMY* (1990); Neil Fligstein, *A Political-Cultural Approach to Market Institutions*, 61 *AM. SOC. REV.* 656 (1996); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *AM. J. SOC.* 481 (1985); Alejandro Portes & Julia Sensenbrenner, *Embeddedness and Immigration: Notes on the Social Determinants of Economic Action*, 98 *AM. J. SOC.* 1320 (1993).

383. *See, e.g.*, MARK S. GRANOVETTER, *GETTING A JOB* (1974); PUTNAM, *BOWLING ALONE*, *supra* note 289, at 319–25; Nan Lin, *Social Networks and Status Attainment*, 25 *ANN. REV. SOC.* 467, 467–87 (1999).

384. *See* PUTNAM, *BOWLING ALONE*, *supra* note 289, at 296–306; James S. Coleman, *The Creation and Destruction of Social Capital: Implications for the Law*, 3 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 375, 384 (1983); Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction*, 39 *SANTA CLARA L. REV.* 1, 8–10 (1998); Toby L. Parcel & Elizabeth G. Menaghan, *Family Social Capital and Children’s Behavior Problems*, 56 *SOC. PSYCHOL. Q.* 120 (1993).

embedded in strong civic networks with sturdy norms of generalized reciprocity are less prone to a variety of physical and mental ailments, including heart attacks, strokes, cancer, and depression, and these same people recover faster when they do become ill.³⁸⁵

Importantly, social capital often benefits bystanders. When people around me are connected through civic networks and reciprocal norms, those people do better. But the quality of my own life may also improve as a result of the social capital of a group of people of which I am not myself a part. Communities characterized by high levels of social capital experience less crime, poverty, unemployment, welfare dependency, drug use, teenage pregnancy, and juvenile delinquency; these same communities have more productive workers, more effective government, and they enjoy greater economic prosperity than do communities with weaker social networks.³⁸⁶ These things obviously benefit the individuals whose civic connections and commitment to reciprocal norms produce all of these effects. At the same time, there are positive externalities: some of the benefits flow to the people who are less connected or hardly connected at all. It is useful to be socially connected. But a person who has few social ties is better off living among people who are socially connected than among other loners.³⁸⁷

6. *Anti-Social Capital*

To be sure, social capital, like other tools, can be used for malevolent purposes. Social capital may, for instance, be employed to identify and weed out government opponents. It may allow certain groups to pursue anti-democratic goals, such as the oppression of minorities, violence, or terrorism. Gangs, the Ku Klux Klan, Al Qaeda, and exclusionary neighborhoods all put their social capital to bad uses. There is always an issue as to the particular purposes social capital serves, just as we should always ask whether knowledge (human capital), corporate resources (financial capital), and other tools are being put to desirable ends.

Nonetheless, the general point remains: social capital serves as a kind of capital that can solve collective action dilemmas by furnishing sufficient guarantees of trust and by tempering self-interested behavior. Groups that

385. See PUTNAM, BOWLING ALONE, *supra* note 289, at 326–35; Lisa F. Berkman, *The Role of Social Relations in Health Promotion*, 57 *PSYCHOSOMATIC MED.* 245, 245–54 (1995); Teresa S. Seeman, *Social Ties and Health: The Benefits of Social Integration*, 6 *ANNALS EPIDEMIOLOGY* 442, 442–51 (1996).

386. See generally PUTNAM, BOWLING ALONE, *supra* note 289, at 307–25, 336–49.

387. See *id.* at 20.

are able to draw upon civic networks and the norms of reciprocity such networks sustain can therefore reap the benefits of cooperation in collective action settings and enjoy increased productivity more readily than groups in which social relationships are too weak to overcome suspicion and self-dealing.

G. Summary

Americans are involved, to varying degrees, in a wide variety of associations. These associations confer tangible benefits on their members and they may have substantial effects on the broader community. Some associations are directly involved in politics. Yet even non-political associations may produce broader social and political effects by instilling skills that their members take to political life and by producing social capital for collective action.

V. ASSOCIATION AND THE CONSTITUTION

Having set out the principle features of associations and their effects, I turn now to examine constitutional protections for freedom of association. The goal is to provide an account of the reasons for protecting associations under the Constitution and the proper scope of such protections, as well as to generate tools for analyzing a claim to associational freedom.

This section takes a fresh look at the very idea of freedom of association. I ask: why does the Constitution protect freedom of association? The question is vital because without a satisfactory theory of the underlying purposes of the constitutional right of association, it is difficult to determine the proper scope of the right, or to assess whether governmental regulations (like anti-discrimination laws) infringe that right.

I propose that rather than infuse association with notions of “expression” in order to tie freedom of association to freedom of speech, it makes more sense to begin with a different constitutional protection: the First Amendment’s petition and assembly clause. Although assemblies and petitions receive relatively little attention in modern legal analysis,³⁸⁸ in the early Republic, the ability of citizens to assemble together and to petition their government was an important political freedom. The right of assembly

388. For instance, a leading treatise on constitutional law discusses the right of petition in a footnote. See TRIBE, *supra* note 252, at 866 n.31.

and petition was a core provision of the Bill of Rights, and it was in terms of *this* right, rather than free speech, that associations in the early Republic were understood and their place and role debated.

My aim is to provide a *conceptual* account of freedom of association. I do not, therefore, pretend to offer either a sustained historical description of associations or a constitutional argument derived from historical practices. Rather, I look to the past because people before us have also thought about associations and the Constitution. Instead of working on a blank canvas, it is useful to see what we can learn from those early efforts.

My bottom line is this: Freedom of association merits constitutional protection because association is a critical means of popular sovereignty. Associating is a way for citizens to exercise political influence, get things done, and keep government in check. This idea, which underlies freedom of petition and assembly, informed early historical perspectives on associations. It also provides a useful basis for understanding the proper scope of freedom of association today.

A. *Assembly and Petition: Text*

A good place to begin constitutional analysis is with the text. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³⁸⁹ The amendment has two main commands—evidenced by the use of the semicolon. The first is the limitation on Congress’ authority with respect to religion. The second, our present interest, is the limitation on Congress’ power with respect to speech, the press, assembly and petition.

Focusing on this second command, as a textual matter there are three issues of concern: abridging the freedom of speech; abridging the freedom of the press; and abridging the freedom of the people to assemble and petition the government. There are two clues that we should understand assembly and petition to belong together. The first clue is the use of “and to petition,” which contrasts with the use of “or” in the remainder of the First Amendment’s language.³⁹⁰ The second clue is the use of “right,” in the singular (as in “the right of the people peaceably to assemble, and to petition”), rather than the plural “rights” (as in “the rights of the people

389. U.S. CONST. amend. I.

390. *Id.*

peaceably to assemble, and to petition”).³⁹¹ The prohibitions on Congress’ power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.³⁹²

It is also useful to note the difference in syntax between the two principle commands of the First Amendment. Beginning with the religion command, the Amendment prohibits Congress from making a law that respects the establishment of religion, or that prohibits free religious exercise.³⁹³ There is no indication that there are no laws (i.e. laws made by individual states) that respect an establishment of religion; similarly there is no indication that individuals necessarily enjoy the free exercise of religion. It is just that Congress may not legislate with respect to these matters. Contrast the syntax of the speech, press, and assembly/petition command. Congress is prohibited from making a law abridging the freedom of speech, the freedom of the press, or the right of assembly and petition. Textually, the implication is that these freedoms already exist—Congress is prohibited from interfering with them.

Two additional textual observations about the assembly/petition clause merit comment. First, unlike the other provisions of the First Amendment, the assembly/petition clause specifically refers to a right of “the people.”³⁹⁴ The phrase reflects a populist notion, a commitment to popular sovereignty.³⁹⁵ It also suggests a relationship between assembly and petition and the other provisions of the Constitution that also refer to “the people.”³⁹⁶ For instance, the phrase alerts us that the right of assembly and petition is not just any old right, but rather a right belonging to the same “We the People” that established the Constitution in the first place.³⁹⁷

Second, the right of petition and assembly is qualified. It is the right “peaceably to assemble.”³⁹⁸ This suggests something about the scope of Congress’ power: while Congress may not abridge the right peaceably to

391. *Id.*

392. Note that the comma in “to assemble, and to petition” mirrors the comma in “establishment of religion, or prohibit the free exercise thereof.” *Id.* It does not therefore signal a right of petition separate from the right of assembly.

393. *Id.*

394. *Id.*

395. See AMAR, *supra* note 338, at 28–30.

396. See U.S. CONST. pmbl.; art. I, § 2; amend. II; amend. IV; and amend. IX. See generally Jason Mazzone, *We the Judges*, 25 LEGAL STUD. F. 647, 654–55 (2001).

397. See AMAR, *supra* note 338, at 26–32.

398. U.S. CONST. amend I (emphasis added).

assemble, some limitations on un-peaceable assembly are permissible. The qualification also suggests that the scope of the present right is already limited: there is no general right of assembly, but only a right of peaceable assembly that the people enjoy.

Further light is shed on the meaning of these textual provisions by examining briefly their passage through the Congress that proposed them to the States. James Madison's draft Bill of Rights, introduced on June 8, 1789, contained separate amendments for religion, for freedom of speech and the press, and for freedom of assembly and petition.³⁹⁹ The select committee of the First Congress rewrote and combined the speech and press proposal with the assembly and petition proposal into a single amendment that read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for the redress of grievances, shall not be infringed."⁴⁰⁰ When this proposed amendment was debated in the House, Theodore Sedgwick of Massachusetts moved to eliminate the assembly clause on the ground that it was "derogatory to the dignity of the House to descend to such minutiae."⁴⁰¹ In Sedgwick's view, the right to speak necessarily entailed the right to assemble: "If people converse freely, they must assemble for that purpose: it is a self-evident, unalienable right which people possess."⁴⁰² Sedgwick's motion was defeated.⁴⁰³ Also defeated was a proposal by Thomas Tucker of South Carolina to add a clause protecting the right of the people not just to petition, but to instruct their representatives.⁴⁰⁴

In the Senate, the language of the proposed amendment was changed to apply specifically to Congress: "That Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government

399. Madison's proposed speech and press clause read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Madison Resolution* (June 8, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12* (Helen E. Veit et al. eds., 1991). Madison's assembly and petition clause read: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances." *Id.*

400. 1 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791*, at 28 (Charlene B. Bickford & Helen E. Veit eds., 1986).

401. 1 *ANNALS OF CONG.* 732 (Joseph Gales ed., 1834) (statement of Theodore Sedgwick).

402. *Id.*

403. *See id.*

404. *See id.* at 761. On the history of instruction, *see* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 188-96 (2d. ed. 1998).

for a redress of grievances.”⁴⁰⁵ The Senate thereafter combined this amendment with Madison’s separate amendment protecting religion, and deleted from the result the phrase, “and consult for their common good.”⁴⁰⁶ Following some additional minor changes, on September 25, 1789, the Speaker and the Vice-President signed a resolution asking President George Washington to send this amendment, as the third of twelve proposed amendments, to the States for ratification.⁴⁰⁷ The first two of these twelve proposed amendments were not ratified and so this, the third, became our First Amendment.⁴⁰⁸

We should not make too much of prior drafts of constitutional provisions. But here is one understanding of how this short textual history is instructive. First, it underscores that assembly and petition were not simply afterthoughts to free speech and free press. Rather, they originated in a separate proposed amendment. Second, Madison’s original proposal combines assembly and petition in the same amendment, underscoring that these rights are linked.⁴⁰⁹ Third, Madison’s draft includes some additional information about the right of assembly: the right allows for the people to “consult for their common good.” This suggests that assembly is not just any old gathering, but it has an important underlying purpose connected to the collective welfare.

Antecedent state constitutional provisions also shed light on the meaning of the assembly and petition clause.⁴¹⁰ At the time the Bill of Rights was ratified, the constitutions of Delaware,⁴¹¹ Maryland,⁴¹² Massachusetts,⁴¹³ New

405. JOURNAL OF THE FIRST SESSION OF THE SENATE 70–71 (J. Gales & W. Seaton printers, 1820) (1789).

406. *See id.* at 77.

407. *See id.* at 96–97.

408. *See AMAR, supra* note 338, at 8–9. The original second amendment became our 27th Amendment when it was ratified on May 7, 1992.

409. On the other hand, in Madison’s draft, assembly is separated from petitioning by a semi-colon, perhaps indicating that while the right of assembly is related to the right of petition, assembly is not necessarily limited to formulating petitions.

410. On the use of state constitutions to interpret the Bill of Rights, see *AMAR, supra* note 338, at 29; Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 251–62 (1992).

411. *See* DELAWARE DECLARATION OF RIGHTS § 9 (1776), *reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 276, 277 (1971) (“That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.”).

412. *See* CONSTITUTION OF MARYLAND, A DECLARATION OF RIGHTS, &c. § XI (1776), *reprinted in* 3 *THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1687* (Francis Newton Thorpe ed. & compiler, 1909) (“That every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner.”).

Hampshire,⁴¹⁴ North Carolina,⁴¹⁵ Pennsylvania,⁴¹⁶ and Vermont⁴¹⁷ provided for a right of assembly or petition or both. Four observations are especially relevant. First, in these state constitutions, assembly and petitioning are closely linked. While Maryland's Constitution provides for a right of petition but no specific right of assembly,⁴¹⁸ all of the other states protect the right of assembly and petition in the very same constitutional provision. Second, in every case, protections for assembly and petitioning are contained in amendments separate from protections for free speech and free press.⁴¹⁹ Third, in every instance except one, the right of assembly is specifically limited to "peaceable" activities.⁴²⁰ Fourth, assembly is plainly related to

413. See CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, pt. I, art. XIX (1780), reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 412, at 1892 ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.").

414. See CONSTITUTION OF NEW HAMPSHIRE, pt. I, art. I, § XXXII (1784), reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 412, at 2453, 2457 ("The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good; give instructions to their representatives; and to request of the legislative body, by way of petitions or remonstrance, redress of the wrongs done them, and of the grievances they suffer.").

415. See CONSTITUTION OF NORTH CAROLINA, A DECLARATION OF RIGHTS, &c. § XVIII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 412, at 2787, 2788 ("That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.").

416. See PENNSYLVANIA DECLARATION OF RIGHTS, 1776 at § XVI reprinted in 1 SCHWARTZ, *supra* note 411, at 266 ("That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.").

417. See VERMONT DECLARATION OF RIGHTS, 1777, at § XVIII, reprinted in 1 SCHWARTZ, *supra* note 411, at 324 ("That the people have a right to assemble together, to consult for their common good to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance."); CONSTITUTION OF VERMONT, 1786, ch. I, A Declaration of the Rights of the Inhabitants of the State of Vermont § XXII ("That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances, by address, petition or remonstrance."), reprinted in 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 503 (William Finley Swindler ed., 1973-79).

418. It may have been taken for granted that a right of petition included a right to assemble: the clue is that the Maryland Constitution protects a right to petition "in a peaceable and orderly manner," a similar qualification as in the other states on the right to assemble.

419. See DELAWARE DECLARATION OF RIGHTS, *supra* note 411, at § 23; CONSTITUTION OF MARYLAND, *supra* note 412, at § VII; CONSTITUTION OF MASSACHUSETTS, *supra* note 375, at § XVI; Constitution of New Hampshire, *supra* note 414, at § XXII; CONSTITUTION OF NORTH CAROLINA, *supra* note 415, at § XV; CONSTITUTION OF PENNSYLVANIA, *supra* note 416, at § XII; Vermont Declaration of Rights (1777), *supra* note 417, at § XIV; Vermont Declaration of Rights (1786), *supra* note 417, at § XV.

420. The exception is North Carolina. See CONSTITUTION OF NORTH CAROLINA, *supra* note 415, at § XVIII.

popular sovereignty: in all of the state constitutions protecting a right of assembly, the right belongs to “the People,” to allow them to consult upon their common good, redress grievances, and instruct their representatives.

B. *Judicial Decisions*

How has the modern Supreme Court construed the assembly and petition clause? Four developments are notable. First, the Court has made clear that the right of assembly and petition is not limited to the preparation and discussion of petitions in their traditional sense. Rather a variety of activities are protected, including political meetings,⁴²¹ marches,⁴²² sit in protests,⁴²³ rallies before government buildings,⁴²⁴ gatherings in a public park,⁴²⁵ group boycotts,⁴²⁶ labor pickets,⁴²⁷ the filing of lawsuits,⁴²⁸ and lobbying government.⁴²⁹ The Court has also refused to limit the right of assembly and petition to the pursuit of political goals.⁴³⁰

Second, the Court has come to view assembly and petition as largely a right of free expression, rather than as the opportunity to influence government.⁴³¹

421. *See, e.g.*, *De Jonge v. Oregon*, 299 U.S. 353, 365–66 (1937); *Herndon v. Lowry*, 301 U.S. 242, 264 (1937).

422. *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969).

423. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

424. *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

425. *See, e.g.*, *Hague v. CIO*, 307 U.S. 496, 512–13 (1939).

426. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–12 (1982).

427. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971).

428. *See, e.g.*, *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

429. *See, e.g.*, *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961).

430. *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

431. The change is evidenced by the difference in the way the Court describes the right of assembly in two cases. In the first, in 1875, the Court writes:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, 92 U.S. 542, 552 (1875). Here, assembly is protected specifically to allow the petitioning of government for the redress of grievances. By 1937, however, the Court describes the right as involving a more general interest of free speech:

Third, the Court has treated the rights of speech and petitioning as equally important.⁴³² Accordingly, the Court understands limitations on free speech to apply with the same force to petitioning.⁴³³

Fourth, the Court has emphasized that the right at issue is a right only of peaceable assembly; the Court has, therefore, upheld regulations designed to prevent disturbances, and to protect public safety.⁴³⁴

Freedom of speech and of the press are fundamental rights The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

De Jonge v. Oregon, 299 U.S. 353, 354–55 (1937).

Commentators criticize the Court for conflating assembly and petition with speech. *See, e.g.*, Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 143 n.2 (1986) (“The short line of Supreme Court cases that raise the petition clause . . . consistently err in their interpretation of the petition clause as merely a free expression guarantee. These cases reveal an unstudied treatment of colonial legal history by ignoring the original meaning of the right, and especially its remedial, legislative character.”) (citation omitted); Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 346 (1989) (“The phrasing of the amendment undoubtedly reflects an intent to prohibit measures . . . severely limiting the number of individuals who could join in or present a petition, and to place within the protections of the petition clause . . . any peaceable concerted speech or action taken to influence the course of government conduct.”) (emphasis added).

432. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (“The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable.”) (citation omitted); *id.* at 482 (“The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression.”).

433. *See id.* Some commentators argue that because, historically, petitions received greater protection than speech, the modern Court errs in according speech and petitions the same degree of protection. *See, e.g.*, Schnapper, *supra* note 431, at 343–47. Schnapper disputes the claim that the grouping of speech with petition and assembly in the First Amendment signals that these rights are meant to receive the same degree of protection:

This syntactical argument is far too weak to support the extraordinary conclusion that the framers actually wanted to reduce the scope of the then existing right to petition. It is virtually inconceivable that the framers intended to afford American citizens a lesser degree of protection if they complained to the President or Congress than the Colonists had enjoyed when, as British subjects, they complained to the King or Parliament Indeed, there is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states.

Id. at 345.

C. *Madison on Factions*

As commentators who discuss the constitutional status of associations frequently remind us,⁴³⁵ Madison and other delegates to the Philadelphia convention were opposed to “factions.” The oft-cited text is *Federalist 10*, where Madison promises that an advantage of the constitutional design, in particular the large size of the union and the broad electoral basis, will be to “break and control the violence of faction.”⁴³⁶ A faction, according to Madison, is “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁴³⁷ The trouble with these factions is their influence in political processes: self-interested collectivities, allowed to pursue their own agendas, destabilize government, undermine the public good, and weaken protections for minorities.⁴³⁸ Madison sees factions as a natural “propensity of mankind.”⁴³⁹ However, factions cannot simply be abolished, because the liberty that allows factions to exist is a cornerstone political freedom.⁴⁴⁰ Accordingly, all that can be done is to minimize the effects of factions by setting in place a polity large enough to prevent the dominance of any single interest.⁴⁴¹

434. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 478 (1988) (upholding ban on picketing in front of a single residence); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–17 (1982) (explaining that the government may limit boycotts designed to suppress competition for economic advantage and the government may also limit violent gatherings); *Grayned v. City of Rockford*, 408 U.S. 104, 121 (1972) (upholding anti-noise ordinance); *Cameron v. Johnson*, 390 U.S. 611, 616–17 (1968) (upholding statute which prohibited picketing “in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from” any courthouse); *Adderley v. Florida*, 385 U.S. 39, 43 (1966) (upholding prohibition of demonstrations on jailhouse grounds); *Cox v. Louisiana*, 379 U.S. 559, 564 (1965) (upholding ban on picketing near courthouse); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding city ordinance prohibiting noise trucks); *Cox v. New Hampshire*, 312 U.S. 569, 576–78 (1941) (upholding ordinance requiring a permit for all parades and public meetings in light of municipality’s need to ensure no overlapping events and advance notice to ensure policing). See generally M. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 19–49 (2d ed. 1981).

435. See, e.g., SCHUDSON, *supra* note 283, at 64–66; Schuck, *supra* note 319, at 553–56; Kaufman, *supra* note 316, at 1302.

436. THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961).

437. *Id.* at 57.

438. See *id.*

439. *Id.* at 59.

440. See *id.* at 58.

441. See *id.* at 63–65.

Many kinds of modern associations fall within Madison's definition of a faction. A political advocacy group, for example, contains individuals united by a "common impulse of passion, or of interest" that is often adverse to the interests of their opponents. Some commentators therefore see Madison's complaints about factions as evidence of the weak constitutional status for associations.⁴⁴² That is surely too drastic. Not all associations can easily be characterized as Madisonian factions: reading groups, church groups and hobby clubs, for instance, do not pursue interests adverse to the rights of other citizens or to the interests of the community. Further, as *Federalist 10* itself demonstrates, concern with the effects of associations does not necessarily lead to the conclusion that there should be no right of association, that citizens should be legally prevented from gathering together. Moreover, as it quickly became evident in the new Republic, opposition to factions is hard to square with protections for assemblies and petitions.⁴⁴³ Before exploring that problem, we must first understand the right of assembly and petition in its historical context.

D. *Assembly and Petition: History*

1. *English Origins*

A petition is a formal request or prayer by an individual or a group to a governing official for the exercise of the official's authority to redress a wrong or to grant a privilege.⁴⁴⁴ The custom of petitioning originated in England as early as the thirteenth century,⁴⁴⁵ and a right of petition was recognized in the 1689 English Bill of Rights.⁴⁴⁶ Petitioning therefore has a longer pedigree than freedom of speech. "In the late seventeenth century, although the existence of a right to petition was widely accepted and

442. See *supra* note 435.

443. See *infra* Part V.D.vi.

444. See BLACK'S LAW DICTIONARY 1145-46 (6th ed. 1990).

445. On the history of petitioning, see Higginson, *supra* note 431, at 153-55; Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* (1971) (unpublished Ph.D. dissertation, Texas Tech University, on file with author).

446. The 1689 clause provided for "the right of the subjects to petition the King" and stated that "all commitments and prosecutions for such petitioning are illegal." *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (The Bill of Rights), 1 W. & M., sess. 2, ch. 2 (1688-89), reprinted in 9 STATUTES AT LARGE 67, 69 (Pickering, 1764). See Schnapper, *supra* note 431, at 312-29.

understood, there was no comparable recognition of any general right of freedom of speech."⁴⁴⁷

In medieval England, petitions were submitted to parliament, which met as high courts to receive and try them.⁴⁴⁸ These medieval petitions dealt with mostly private matters: complaints of miscarriages of justice and requests for relief from taxes and other regulations.⁴⁴⁹ By the fourteenth century, parliament acted also in a legislative capacity to consider petitions expressing collective interests.⁴⁵⁰ In the seventeenth century, petitioning firmly took root.⁴⁵¹ Petitions involving a wide variety of private and public concerns were received by virtually all governing authorities, including parliament, the King, the courts, and local officials.⁴⁵²

Especially significant was the populist nature of petitioning. Individuals, such as the poor, who could not otherwise exercise influence, relied on petitions to obtain favors or relief.⁴⁵³ Accordingly, "[t]he word 'petition' was a common figure of speech, used literally and metaphorically to signify a deferential request for favor or for redress of a problem."⁴⁵⁴ Petitions to government officials typically contained a "prayer" for relief. The use of the term underscored the universality of petitioning. Just as God heard all prayers, everyone could petition the government.⁴⁵⁵

Under the English Bill of Rights, petitions enjoyed greater protection, in particular from prosecution for criminal libel, than did other forms of speech and writing.⁴⁵⁶ "Petitions afford[ed] subjects . . . immunity to norms that otherwise restrict[ed] public commentary on political matters."⁴⁵⁷ Eric

447. Schnapper, *supra* note 431, at 318. Schnapper observes, for instance, that the 1689 Bill of Rights contained no reference to freedom of speech, indeed that the Licensing Act (requiring government approval for printing a book) was still in effect. *Id.* See generally LARRY D. ELDRIDGE, *A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA* (1994); Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America, 1607–1700*, 39 AM. J. LEGAL HIST. 337, 337–38 (1995).

448. See David Zaret, *Petitions and the "Invention" of Public Opinion in the English Revolution*, 101 AM. J. SOC. 1497, 1509–11 (1996).

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 1510 (footnote omitted).

455. See *id.* at 1513 n.9.

456. *Id.* at 1512; Schnapper, *supra* note 431, at 328.

457. Zaret, *supra* note 448, at 1512.

Schnapper explains that the protections accorded petitioning arose as an institutional response to what we would today call a separation of powers problem: immunizing petitions prevented the House of Lords, in its judicial capacity, from interfering with the legislative functions of the House of Commons.⁴⁵⁸

Safeguards for petitioning did not reflect a commitment to notions of free speech *per se* because petitions were more akin to lawsuits than to instances of popular expression. “[T]he common-law prohibition against libel actions founded on petitions was not a particular application of a more general free speech principle [P]etitions and lawsuits were regarded as simply two different ways in which an aggrieved subject might request redress from the government.”⁴⁵⁹

Further, despite its considerable reach, petitioning was not an absolute right. David Zaret explains that the protections accorded petitions involved several important restrictions. A petition was understood not to assert a claim of popular sovereignty: the petitioner was asking—praying—for relief, rather than demanding an entitlement in the name of popular will.⁴⁶⁰ Petitions were, therefore, expressed in highly deferential language that gave an appearance of conveying information, instead of criticizing an official or making a demand.⁴⁶¹ Petitions were also locally grown: they were based on the personal experiences of the petitioners, and requested particular relief on their behalf, rather than expressing general discontent.⁴⁶² Finally, petitions were not made public: a petition was a way to communicate directly with an authority, not an opportunity to share opinions with other people.⁴⁶³

In England, the organizing of petitions on matters of collective importance—known as “common” petitions—initially occurred within the existing structures of civil society.⁴⁶⁴ Churches, wards, guilds, common councils, and quarter and assize sessions were the units in which collective petitions were prepared and the necessary signatures gathered.⁴⁶⁵ Although a petition is a written document, collective petitioning did not depend on literacy. In churches, taverns, and other local settings, the common petitions

458. Schnapper, *supra* note 431, at 334.

459. *Id.* at 343.

460. See Zaret, *supra* note 448, at 1513–14.

461. See *id.* at 1514–16.

462. *Id.* at 1516.

463. *Id.* at 1516–17.

464. *Id.* at 1524.

465. *Id.*

were read aloud and discussed.⁴⁶⁶ Churches were particularly significant to common petitions. Ministers often made themselves available to give advice on proposed petitions,⁴⁶⁷ and Sunday service was an opportunity to gather signatures.⁴⁶⁸

By the seventeenth century, new entities emerged to organize common petitions. “[P]rivate associations of individuals met in homes, taverns, and sectarian congregations to debate and sign petitions.”⁴⁶⁹ Here we see the first hints of the relationship between petitions and associations. In the seventeenth century, “petitioning cut across traditional residential affiliations by ward and parish, uniting like-minded individuals in voluntary associations.”⁴⁷⁰ In this context, petitioners asserted not just their right to petition but also the right to “meet together to frame and promote petitions.”⁴⁷¹

Around the same time, an important link between petitioning and publishing also emerged. By the mid-seventeenth century, printing and the press played a substantial role in petitioning.⁴⁷² Printed petitions could be more widely circulated, expanding the potential for gathering a large number of signatures.⁴⁷³ Printing also allowed the circulation of commentary in favor of a petition or in opposition to a competing petitioning campaign.⁴⁷⁴ Petitions to parliament were reported in newspapers even though, in light of the restrictions on petitioning discussed, news reports on petitions were often brief or vague.⁴⁷⁵ As a result of publication, petitions slowly began to take the form of an appeal to a broader public based on reason and argument, rather than merely an outright request for an official favor.⁴⁷⁶

466. *Id.* at 1519. Note the similarity to newspapers: in colonial America, “[i]t may be that more people read newspapers at taverns or coffeehouses than at home, and many others could hear them read aloud or discussed.” SCHUDSON, *supra* note 283, at 39 (citing DAVID W. CONROY, *IN PUBLIC HOUSES* 179–80, 236–40 (1995)).

467. *See* Zaret, *supra* note 448, at 1524.

468. *Id.* at 1519.

469. *Id.* at 1525.

470. *Id.* *See generally* R.J. Morris, *Clubs, Societies, Associations*, in 3 *THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN, 1750–1950: SOCIAL AGENCIES AND INSTITUTIONS* 395 (F.M.L. Thompson ed., 1990).

471. Zaret, *supra* note 448, at 1525 (quotation omitted).

472. *See id.* at 1528.

473. *See id.*

474. *See id.* at 1530–32.

475. *See id.* at 1528.

476. *See id.* at 1536–38.

2. Colonial Petitions

While in the American colonies there was no general right to free speech,⁴⁷⁷ individuals and groups of individuals had a right to petition their assemblies—the “chief symbol of colonial rights,”⁴⁷⁸ and “the Repository of the People’s Privileges”⁴⁷⁹—and a right to receive a response to their petitions.⁴⁸⁰ Colonial petitions dealt either with private grievances that could not be resolved through other legal mechanisms, or with issues of public concern.⁴⁸¹ As such, petitions were an important mechanism to transmit information to the colonial assemblies about the needs of individuals and local communities.⁴⁸² Petitions were therefore an important form of popular politics—what Alan Tully, in his study of colonial New York and Pennsylvania, calls “the most noticeable feature of the[ir] political cultures.”⁴⁸³ Petitions also served to expose mistreatment, corruption, or waste by public officials.⁴⁸⁴ “Petitions were not the only vehicle for political messages in this era. In sermons, newspapers, pamphlets, and official ordinances and declarations, messages went from the political center to the periphery. But for messages in the opposite direction . . . petitions were a principal device.”⁴⁸⁵

In particular, groups who were not enfranchised—such as women, felons, Indians, aliens, and slaves—were nonetheless able to express their

477. See LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY*, at v (1964) (noting that notions of free speech only emerged around the time the First Amendment was adopted). See also David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 487 (1983). Anderson argues that “[f]reedom of expression,” the notion of an interrelated complex of protections for thought, belief, and expression, is a modern concept. To impose it retrospectively on the framers is anachronistic. Although they gradually recognized a relationship between the freedoms of press, speech, petition, assembly, and religion, the process was inductive, rather than deductive. The Framers began not with a general theory of intellectual freedom, but with specific solutions to concrete grievances.” *Id.* at 488.

478. ALAN TULLY, *FORMING AMERICAN POLITICS: IDEALS, INTERESTS, AND INSTITUTIONS IN COLONIAL NEW YORK AND PENNSYLVANIA* 118 (1994).

479. *Id.* (quoting *N.Y. WKLY. J.*, May 17, 1735).

480. Higginson, *supra* note 431, at 142.

481. See *id.* at 153–54.

482. See *id.* at 153.

483. TULLY, *supra* note 478, at 416.

484. See Higginson, *supra* note 431, at 154. See also Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 *U. CINN. L. REV.* 1153, 1178 (1986).

485. Zaret, *supra* note 448, at 1498.

grievances, and seek benefits, through petitions.⁴⁸⁶ Petitions thereby provided a broad means for representation and influence. Reporting on this characteristic, one commentator concludes,

the historical record appears to be devoid of colonial authority denying that a person had a right to petition based on any of the factors associated with disenfranchisement. Put another way, petitions might have been rejected on the merits; they might have been ignored for failure of sufficient supplication; they might have been dismissed as absurd; but, they were not rejected on any ground akin to standing. Indeed, their reception and reading was largely automatic.⁴⁸⁷

As a result of its widespread practice, petitioning “originated more bills in pre-constitutional America than any other source of legislation.”⁴⁸⁸

The practice of petitioning in colonial Virginia is illustrative. There, petitions consisted of a “body” containing a claim or grievance, and the signature of the individual or group seeking relief.⁴⁸⁹ Petitions addressing issues of public concern were posted in public places, such as churches and courthouses, so that people who agreed with the petition could add their signatures to it.⁴⁹⁰ In the early seventeenth century, the entire body of the Virginia Assembly met to consider the petitions it received.⁴⁹¹ Later petitions were referred to select committees for initial review.⁴⁹² The Virginia Committee of Propositions and Grievances, established in 1666, came to handle most petitions, making recommendations to the assembly on appropriate action.⁴⁹³ In eighteenth-century Virginia, more than half of all statutes enacted originated in petitions.⁴⁹⁴ These statutes were far from trivial. Edmund Morgan observes, for example, that the Virginia Statute of

486. See Higginson, *supra* note 431, at 153; Smith, *supra* note 484, at 1178, n.159. See also LUMSDEN, *supra* note 325, at 54.

487. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2190 (1998) (footnote omitted).

488. Higginson, *supra* note 431, at 144.

489. See RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA* 26 (1979).

490. See *id.* at 26–28.

491. See *id.* at 28.

492. See *id.*

493. See *id.*

494. See *id.* at 64. A similar study of petitioning in Pennsylvania reveals that fifty-two percent of the acts passed between 1717 and 1775 originated in petitions. See Alan Tully, *Constituent-Representative Relationships in Early America*, 11 *CANADIAN J. HIST.* 139, 140–42 (1976).

Religious Liberty, drafted by Thomas Jefferson in 1779 and enacted in 1786, “would probably not have been passed if it had not been supported by a large number of petitions.”⁴⁹⁵

3. *Petitions to Congress*

In the early American Republic, petitioning was also an important means of resolving grievances and an influential source of congressional legislation.⁴⁹⁶ According to one study, petitioning in the early years of the Republic “provide[d] the most widespread means for popular participation in the political process.”⁴⁹⁷ In the early Congresses, petitions were read on the floor of the House and then referred to a committee or to the executive for a report and recommendation—which sometimes resulted in the passage of an appropriate bill.⁴⁹⁸ A careful study of the fate of petitions presented to the early Congresses shows that “most petitioners were assured of at least a detailed examination and consideration of their prayer”⁴⁹⁹

Among the petitions presented to the first Congress are the following: an April 28, 1789 petition from “the Citizens of New Jersey,” “[c]omplaining of illegality in the late election of Representatives for that State to the House of Representatives;”⁵⁰⁰ an April 15, 1789 petition from one John Churchman, “[p]raying an exclusive right of vending of spheres, hemispheres, maps, charts, and tables on petitioner’s principles of magnetism throughout the United States;”⁵⁰¹ January 5, 1791 petitions from the Baptist Associations of New Hampshire, Massachusetts, Rhode Island, and Vermont, “[p]raying that Congress will adopt measures to prevent the publication of any inaccurate editions of the Holy Bible;”⁵⁰² an August 5, 1790 petition from Alexander Macomb and William Edgar, “[p]raying release from a contract entered into with the United States for the purchase of a quantity of western lands;”⁵⁰³

495. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 229 (1988)

496. See JOSEPH COOPER, *THE ORIGINS OF STANDING COMMITTEES AND THE DEVELOPMENT OF THE MODERN HOUSE* 3 (1970).

497. STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., *PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 14, 1795*, at 6 (Comm. Print 99-AA).

498. See *id.* at 7–8.

499. *Id.* at 11.

500. *Id.* at 16.

501. *Id.* at 119.

502. *Id.* at 127.

503. *Id.* at 43.

and numerous war-related petitions, seeking compensation for military services and for lost or damaged property.⁵⁰⁴

Over the years, some issues have generated very large numbers of petitions to Congress, including the Alien, Sedition, and Naturalization Act in the late eighteenth century;⁵⁰⁵ the Sunday mails debate in the early nineteenth century;⁵⁰⁶ and prohibition⁵⁰⁷ and women's suffrage in the early twentieth century.⁵⁰⁸

4. *Abolitionist Petitions*

The issue that most tested the right of petition was slavery. Abolitionist petitions began with a petition by the New York and Pennsylvania Quakers to the first Congress on February 11, 1790,⁵⁰⁹ and another petition, the very next day, by the Pennsylvania Abolition Society.⁵¹⁰ By the early 1830s, Congress was inundated with abolitionist petitions.⁵¹¹ John Quincy Adams famously presented fifteen such petitions on December 12, 1831.⁵¹² In the mid-1830s, the pace quickened. On February 2, 1835, for instance, eight hundred New York women presented Congress with their anti-slavery petitions.⁵¹³ Many abolitionist petitions were from groups and organizations opposed to slavery, but some were also from former slaves threatened with return to slavery under the operation of state laws.⁵¹⁴

Congress' practice, even on petitions dealing with contentious issues, was to review all submitted petitions, issue a report, and either pass a bill or reject the petition.⁵¹⁵ However, on February 8, 1836, the House appointed a special committee to determine new ways to deal with petitions on issues

504. *See id.* at 45–102.

505. *See Smith, supra* note 445, at 112–18.

506. *See id.* at 118–22.

507. *See id.* at 111–12.

508. *See id.* at 143–44.

509. *See* STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, *supra* note 497, at 126.

510. *See id.*

511. *See Smith, supra* note 445, at 85.

512. *See id.*

513. *See id.* at 85–86.

514. *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 229–32 (1997).

515. *See Smith, supra* note 445, at 87.

related to slavery.⁵¹⁶ That committee recommended, and the House quickly adopted, a resolution prohibiting any action on abolitionist petitions.⁵¹⁷ This was the first of a series of abolition “gag-rules” that would bitterly divide the House for a decade.⁵¹⁸ John Quincy Adams strenuously opposed these gag-rules.⁵¹⁹ In his view, the rules violated the very right of petition, and he spearheaded their repeal.⁵²⁰

As a result of the efforts of Adams and others, the gag-rules were finally repealed in 1844,⁵²¹ but petitioning never regained its full force.⁵²² Increasingly, petitions were automatically referred to committees, where many simply died a silent death.⁵²³ One commentator concludes that the gag-rules “effectively abolished the right of petition” as originally conceived.⁵²⁴

516. *See id.* at 88.

517. *See id.* The resolution read:

And whereas it is extremely important and desirable that the agitation of this subject should be finally arrested, for the purpose of restoring tranquillity to the public mind, your committee respectfully recommend the adoption of the following additional resolution, viz: *Resolved*, That all petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table and that no further action whatever shall be had thereon.

12 CONG. DEB. 4051 (1836). The resolution was re-adopted in nearly identical language at the beginning of each Congress until it was made a standing rule in 1840. CONG. GLOBE, 26th Cong., 1st Sess. 150 (1840).

518. *See* Higginson, *supra* note 431, at 158–65. A detailed discussion of the gag-rules and their effects is beyond the scope of this Article. In addition to the sources cited in this brief summary, see WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, at 308–52 (1990); WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 305–09 (1996); PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 355–56, 364–65, 402–03 (1997); Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 846–49 (1995). Older accounts of interest are GILBERT HOBBS BARNES, THE ANTISLAVERY IMPULSE 1830–1844, at 109–20 (1933); Robert P. Ludlum, *The Antislavery “Gag-Rule”: History and Argument*, 26 J. NEGRO HIST. 203 (1941); James M. McPherson, *The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839–1842*, 3 J. NEGRO HIST. 177 (1963).

519. *See supra* note 518.

520. *See* Higginson, *supra* note 431, at 162–64.

521. *See* Smith, *supra* note 445, at 103.

522. *See id.* at 103–04.

523. *See id.*

524. Higginson, *supra* note 431, at 144. We should be careful about causality here. At least one commentator suggests that the experience with abolitionist petitions did not cause the demise of petitioning, but rather the gag-rules simply demonstrated that the right of petition had already lost its significance in American political culture. *See* Mark, *supra* note 487, at 2216. We should also not overstate the decline of petitioning in light of the petitioning campaigns of the nineteenth and early twentieth centuries. *See id.* at 2226–28.

Today, petitions are filed with the House Parliamentarian, who refers them to the appropriate House committee and compiles a list for publication in the Congressional Record.⁵²⁵ There is no mechanism for presenting petitions on the floor of the House, or for securing a response.⁵²⁶

5. *Popular Sovereignty*

Underlying the assembly and petition clause is a commitment to popular sovereignty.⁵²⁷ Popular sovereignty means that the government derives its powers from the People, who are therefore ultimately in charge.⁵²⁸ While today we may not reflect too much on the notion of popular sovereignty, in the decade after the Revolution, “[t]he problem of sovereignty was . . . the most important theoretical question of politics . . . the ultimate abstract principle to which nearly all arguments were sooner or later reduced.”⁵²⁹ An important complaint in the Declaration of Independence was, of course, that the King had ignored the colonists’ petitions,⁵³⁰ and that this amounted to tyranny.⁵³¹ In the early Republic, therefore, “many Americans believed their representatives to be . . . mere agents or tools of the people who could give

525. See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, *supra* note 497, at 9.

526. *See id.*

527. See AMAR, *supra* note 338, at 26–32. On notions of popular sovereignty, see generally MORGAN, *supra* note 495; WOOD, *supra* note 404, at 344–89.

528. See, e.g., THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.”); THE FEDERALIST No. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.”); Noah Webster, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia (1787)*, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 57 (Paul L. Ford ed., 1888) (“The powers vested in Congress are little more than nominal; nay real power cannot be vested in them, nor in any body, but in the people. The source of power is in the people of this country.”).

529. WOOD, *supra* note 404, at 354.

530. See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). After a list of specific grievances, the Declaration reads: “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.” *Id.*

531. The Stamp Act of 1765 in particular resulted in a flurry of colonial petitions, to no avail. See generally EDMUND S. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (1995 ed.).

[them] binding directions.”⁵³² In line with this belief, early petitions to Congress were understood as the directions “of a free people [to] their servants.”⁵³³

The First Amendment’s assembly and petition clause promotes popular sovereignty by protecting a right akin to the colonial practice of individuals and groups petitioning their local assemblies.⁵³⁴ Elected officials can be voted out of office come election day. In the meantime, petitions allow people to inform their representatives of their needs and opinions.

At the same time—because now the People are in charge—something more than colonial style petitions is contemplated. The First Amendment safeguards the ability of all citizens to assemble together, in a constitutional convention, to alter or abolish their government.⁵³⁵ On a small scale, therefore, local assemblies and petitions allow specific groups to formulate programs and demands, and to influence the course of government.⁵³⁶ Assembly in a constitutional convention permits the political collectivity—the People—to change their government entirely.⁵³⁷

6. *Early Associations*

In colonial America, popular gatherings were common and they often entailed violence.⁵³⁸ Mobs and riots disrupted economic activity, blocked thoroughfares, destroyed property, and closed government offices.⁵³⁹ “These were not the anarchic uprisings of the poor and destitute; rather they represented a common form of political protest . . . by groups who could find

532. WOOD, *supra* note 404, at 371.

533. Philadelphia, No. 5, *reprinted* in 3 THE COMPLETE ANTI-FEDERALIST 117 (Herbert Storing ed., 1981).

534. See AMAR, *supra* note 338, at 26–32.

535. See *id.* at 26.

536. See *id.* at 26–32.

537. See *id.*

538. See WOOD, *supra* note 404, at 319–20.

539. See generally PAUL A. GILJE, RIOTING IN AMERICA (1996); PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776 (1972); Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 3 (1970); John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justifications in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043 (1979); Lloyd I. Rudolph, *The Eighteenth Century Mob in America and Europe*, 11 AM. Q. 447 (1959).

no alternative institutional expression for their demands and grievances.”⁵⁴⁰ Accordingly, these gatherings were referred to as “conventions,” or as “popular assemblies,” terms denoting a variety of meetings for public purposes organized outside of the regularly constituted authority.⁵⁴¹ In the colonies, such extra-legislative conventions and assemblies received measured support from the Whigs, who saw them as a form of legitimate political activity rather than as illegal disruptions.⁵⁴²

By 1775, transient mobs and riots were less common, displaced by the better-organized revolutionary associations.⁵⁴³ These associations were the institutional embodiment of the political functions served earlier by the mobs and riots, representing the same notion of popular assembly.⁵⁴⁴ In the years leading up to independence, the revolutionary associations took on governmental responsibilities, implementing policies where the government was slow to act.⁵⁴⁵ Numerous commentators have discussed the substantial role these associations played during the course of the Revolution.⁵⁴⁶

With independence, Americans continued to assemble in regional and interstate committees to voice grievances, as well as to pursue and

540. WOOD, *supra* note 404, at 320. See also Rudolph, *supra* note 539, at 447 (“Mob action provided the first concrete indication of the common man’s claim to participate in the decision-making process which is government, of his demand for a share of political power.”).

541. See WOOD, *supra* note 404, at 312, 320–21. The term “assembly” continued to be used in the early Republic to refer to various public and private gatherings. A few examples illustrate the point. In a proclamation in 1794, Massachusetts Governor Samuel Adams condemned the “certain persons . . . [who] did riotously and tumultuously assemble in the town of Boston in disguise, and with force and violence illegally enter the houses of certain persons, break their furniture, and in several instances pull down parts and in others the whole of their dwelling-houses, in violation of the laws, and of the rights of security and of property therein guaranteed to every citizen.” PA. GAZETTE, July 9, 1794 (emphasis added). A public notice in the same year advised that a forthcoming Harrisburg, Pennsylvania “meeting of the country gentlemen, and others, is expected, to assemble at the Court-house in this town.” PA. GAZETTE, Sept. 17, 1794 (emphasis added). A letter to the *Pennsylvania Gazette* in 1787 stated that a “great concourse of people assemble every evening at the house of a certain major Boyd . . . to circulate pamphlets and pieces against the new constitution.” PA. GAZETTE, Oct. 31, 1787 (emphasis added). Religious gatherings were also referred to as assemblies, as evidenced by a report on a Philadelphia meeting of the Quakers in 1790. See PA. GAZETTE, Dec. 29, 1790 (“Through the continued favor of Divine Providence, being once more permitted to assemble for the purpose of preserving circumspection of life, and decent order throughout our religious society, and as far as infinite Wisdom may be pleased to qualify us to promote an encrease of Gospel Righteousness and Peace in the earth.”) (emphasis added).

542. See WOOD, *supra* note 404, at 320–21.

543. See *id.* at 322.

544. See *id.*

545. See MORGAN, *supra* note 495, at 257–58.

546. See, e.g., *id.*; WOOD, *supra* note 404, at 320–24.

implement political goals, and to regulate the economy.⁵⁴⁷ “The emergence of a distinctive pattern of voluntary association was inextricably bound in with the history of liberty in America for it created a significant range of alternatives to the use of coercive power through the state.”⁵⁴⁸ Gordon Wood reports that more associations serving quasi-public purposes arose in the dozen years after independence than in the entire colonial period.⁵⁴⁹

Historians offer different accounts of associations in the new Republic,⁵⁵⁰ and it is clear that more research is needed to set the story straight.⁵⁵¹ For present purposes, it is sufficient to identify some of the main developments from independence up to the Civil War. Theda Skocpol traces the growth of associations in the new Republic as a function of politics, religious freedom, and republican government.⁵⁵² According to Skocpol’s account, the

547. See WOOD, *supra* note 404, at 323–24.

548. OSCAR & MARY HANDLIN, *THE DIMENSIONS OF LIBERTY* 89–90 (1961).

549. WOOD, *supra* note 404, at 325.

550. There is a growing literature on the history of associations. See generally, RICHARD FRANKLIN BENSEL, *SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT 1880–1980* (1984); STUART M. BLUMIN, *THE EMERGENCE OF THE MIDDLE CLASS: SOCIAL EXPERIENCE IN THE AMERICAN CITY, 1760–1900* (1989); PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920* (1978); ELISABETH S. CLEMENS, *THE PEOPLE’S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890–1925* (1997); PETER DOBKIN HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1700–1900: PRIVATE INSTITUTIONS, ELITES, AND THE ORIGINS OF AMERICAN NATIONALITY* (1982); ALVIN J. SCHMIDT, *FRATERNAL ORGANIZATIONS* (1980); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1967); Benjamin R. Barber, *An American Civic Forum: Civil Society between Market Individuals and the Political Community*, 13 *SOC. PHIL. & POL’Y* 269 (1996); Elisabeth S. Clemens, *Organizational Repertoires and Institutional Change: Women’s Groups and the Transformation of U.S. Politics, 1890–1920*, 98 *AM. J. SOC.* 755 (1993). Perhaps the most useful overview is HANDLIN, *supra* note 548, at 89–112.

551. In particular, many studies focus on the rise of associations beginning in the 1830s, but very little work has ever been done on associations in the late eighteenth century. An important exception is Albrecht Koschnik, *Voluntary Associations, Political Culture, and the Public Sphere in Philadelphia, 1780–1830* (2000) (unpublished Ph.D. dissertation, University of Virginia). My understanding of early associations has been greatly enhanced by Koschnik’s research. See generally STEVEN C. BULLOCK, *REVOLUTIONARY BROTHERHOOD: FREEMASONRY AND THE TRANSFORMATION OF THE AMERICAN SOCIAL ORDER 1730–1840* (1996); MARY ANN CLAWSON, *CONSTRUCTING BROTHERHOOD: CLASS, GENDER, AND FRATERNALISM* (1989); LORI D. GINZBERG, *WOMEN AND THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES* (1990); John L. Brooke, *Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic*, in *LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 273* (Ronald Hoffman & Peter J. Albert eds., 1996); Don H. Doyle, *The Social Functions of Voluntary Associations in a Nineteenth-Century American Town*, 1 *SOC. SCI. HIST.* 333 (1977); Marc L. Harris, *The Process of Voluntary Association: Organizing the Ravenna Temperance Society*, 94 *OHIO HIST.* 158 (1985).

552. Skocpol, *How Americans Became Civic*, in *CIVIC ENGAGEMENT*, *supra* note 283, at 42. See also Theda Skocpol et al., *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 *AM. POL. SCI. REV.* 527, 527–46 (2000). While I rely on Skocpol’s account here, it is important to recognize that her research is skewed towards large associations, particularly beginning in the

American Revolution marked the first period of active association membership.⁵⁵³ The Revolution expanded the group of people engaged in thinking about issues of equality and freedom, and the experience of rebellion brought together dispersed individuals in circles of loyalty, thereby giving them tools for collective action.⁵⁵⁴ Skocpol argues that during the 1820s to 1850s, association was closely tied to politics: representative politics institutionalized both political parties and civic associations, and both types of groups sought to maximize membership in order to exert political influence.⁵⁵⁵ In this period, the very nature of associational organization at times mirrored the design of the nation itself: many associations implemented internal constitutional rules and procedures, provided for the election of leaders and representatives, and arranged themselves as local units of a national body.⁵⁵⁶ During the Civil War, according to Skocpol, trans-local associations flourished, often with political purposes.⁵⁵⁷ In particular, fraternal organizations were actively engaged in aiding members away from home.⁵⁵⁸ Skocpol further reports that at the end of the Civil War, associations played an important unifying role.⁵⁵⁹ The number of associations surged as a result of deliberate efforts to link Northern and Southern citizens in common groups with a shared purpose.⁵⁶⁰

How were these associations perceived and understood? In the new Republic, the proper role and proper limits of associations were hot issues.⁵⁶¹ Although associations and other forms of popular assembly had played

1830s, and so it may understate the importance of fledgling associations in the eighteenth century. *See generally* Koschnik, *supra* note 551, at 3–7.

553. *See* Skocpol, *How Americans Became Civic*, in *CIVIC ENGAGEMENT*, *supra* note 283, at 43.

554. *Id.*

555. *See id.*

556. *See id.* at 47.

557. *See id.* at 55.

558. *Id.*

559. *See id.* at 55–57.

560. *See id.* We can continue Skocpol's story by adding that during the Progressive Era, when Americans created and joined an unprecedented number of associations, association-building was specifically directed at curing various social ills which were thought to result from decreased solidarity among citizens because of dramatic changes in the economy and society. *See* PUTNAM, *supra* note 289, at 367–401.

561. In understanding this debate, it is important to keep in mind that the definition of "association" in the late eighteenth century was very broad and it included corporations. *See* Koschnik, *supra* note 551, at 18. Note also that in the early years of the Republic, newspapers were often organized as an "association" of their readers. *See* SCHUDSON, *supra* note 283, at 122–26. The point was to unite "members" through the exchange of views; readers were therefore encouraged to submit opinion pieces. *See id.*

celebrated roles in colonial America and in the Revolution, after independence associations came to be viewed in a quite different light. Associations continued to represent a form of political activity outside the existing structure. But this was now a dangerous thing. Associations of like-minded citizens were viewed as aspiring to a governmental role.⁵⁶² Since associations drew their strength from the allegiance of their members, these political aspirations were perceived as based on a claim to popular sovereignty.⁵⁶³ Such a claim could only be illegitimate, because associations were not subject to election and other popular constraints on representative government.⁵⁶⁴ A rival claim to popular sovereignty therefore threatened to destabilize and undermine the authority of the new constitutional government.⁵⁶⁵ “There were legitimate channels for public expression in the town meetings, warned Governor John Sullivan of New Hampshire; assemblies of private orders of men ‘under the cover of convention authority’ would only undermine the constitution of the state.”⁵⁶⁶

These fears were raised in the widespread opposition to the forty-odd Democratic-Republican Societies that formed in the years 1793 and 1794.⁵⁶⁷ The members of these societies, a mix of professional men, merchants, printers, farmers, and manual laborers,⁵⁶⁸ united in the belief that the new government was insufficiently responsive to popular will, and that some additional mechanism was needed to keep elected officials in check.⁵⁶⁹ The societies therefore aimed to debate public questions—to conduct, in the words of one proponent, “a jealous examination of all the proceedings of administration”⁵⁷⁰—and the societies regularly published resolutions critical of Federalist policies.⁵⁷¹ The societies also engaged in practical activities, like poll watching, philanthropy, tracking the voting of representatives, and

562. See Koschnik, *supra* note 551, at 33.

563. See *id.*

564. See *id.*

565. See *id.* at 36.

566. WOOD, *supra* note 404, at 326–27.

567. See RICHARD BUEL JR., *SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789–1815*, at 97–105, 127–34 (1972). See generally *THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS* (Philip S. Foner ed., 1976); EUGENE P. LINK, *DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800* (1942).

568. See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 86 (1993).

569. See *id.* at 85.

570. GEN. ADVERTISER, May 16, 1794, quoted in SHARP, *supra* note 568, at 85.

571. See Koschnik, *supra* note 551, at 79.

even monitoring English ships in local harbors.⁵⁷² “The Democratic-Republican societies were organized, then, at least in the minds of their founders . . . to preserve the legacy of the American Revolution.”⁵⁷³

The Democratic-Republican societies were widely condemned as aspiring to a quasi-governmental role, and seeking to represent popular sovereignty.⁵⁷⁴ These societies were not by today's standards large: many had only a few dozen members, and the biggest counted a few hundred individuals in their ranks.⁵⁷⁵ The societies also insisted their role was, like a town meeting, simply to promote the public good.⁵⁷⁶ But influenced by accounts of the political role of the Jacobin clubs in France, the critics of the societies feared that they challenged the power of the state.⁵⁷⁷ This fear was especially strong when the societies were linked—with some justification—to the Whiskey Rebellion of 1794.⁵⁷⁸

One historian reports that the societies' “claims to represent the community at large . . . violated the governing principle of associational life in the republican polity, that is, with the exception of charity, every organization ought to manage only its internal affairs and touch only the lives of its members.”⁵⁷⁹ Of particular concern, the secrecy and membership restrictions of the Democratic-Republican societies were inconsistent with a claim of popular representation.⁵⁸⁰ Writing in the *Gazette of the United States* in 1794, for instance, “A Friend to Representative Government” complained, “Undoubtedly the people is sovereign, but this sovereignty is in the whole people, and not in any separate part, and cannot be exercised, but by the Representatives of the whole nation.”⁵⁸¹ In other words, “[b]ecause it was the legislature that was supposed to discuss, decide, and speak for the

572. See SCHUDSON, *supra* note 283, at 56.

573. SHARP, *supra* note 568, at 89.

574. See Koschnik, *supra* note 551, at 79.

575. See SCHUDSON, *supra* note 283, at 55–56.

576. See SHARP, *supra* note 568, at 87.

577. See Koschnik, *supra* note 551, at 52, 66–71.

578. See SCHUDSON, *supra* note 283, at 58–60. See generally THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES (Steven R. Boyd ed., 1985). Assessing the evidence, one historian concludes, “[a]lthough virtually all the clubs . . . denounced the violence . . . and there is no evidence the societies as institutions fomented the outbreak, it is true that some members . . . did actively participate in the insurrection.” SHARP, *supra* note 568, at 98 (footnote omitted).

579. Koschnik, *supra* note 551, at 51.

580. See *id.* at 68–69.

581. GAZETTE OF THE UNITED STATES, April 4, 1794, quoted in Koschnik, *supra* note 551, at 70 n.51.

people, when organizations did this, [the Federalists] saw only the individuals involved, not the 'people.'"⁵⁸² George Cabot expressed this concern, when he asked in 1895: "[W]here is the boasted advantage of a representation system . . . if the resort to popular meetings is necessary?"⁵⁸³ Fisher Ames was especially critical of the Democratic-Republican societies. During House debates in November 1794, he warned: "If the clubs prevail, they will be the Government, and the more secure for having become so by a victory over the existing authorities."⁵⁸⁴

Importantly, this indictment was not limited to the Democratic-Republican societies, or even to overtly political associations. The historian Albrecht Koschnik shows that the same fear of a "government within a government" characterized opposition to a range of entities.⁵⁸⁵ Business corporations were viewed with a similar skepticism in the early Republic because they entailed the granting of special legal privileges that, like the Democratic-Republican Societies, threatened to undermine the cohesiveness of the polity.⁵⁸⁶ The incorporation of cities, with privileged status granted to city officials, also raised the threat of a competing sovereign.⁵⁸⁷ "The Revolutionary heritage had sharpened certain public values that included an abhorrence of special privileges and monopolies; at the same time, it was found less and less easy to determine for any given purpose what the public good was. This meant a corresponding difficulty in deciding that the advantages of incorporation should be extended to some groups and denied to others."⁵⁸⁸

582. James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 132 (1999).

583. SCHUDSON, *supra* note 283, at 61.

584. 3 ANNALS OF CONG. 929 (1794), *quoted in* Koschnik, *supra* note 551, at 81.

585. *See* Koschnik, *supra* note 551, at 46–51.

586. *See id.* at 27–30, 46–49 (discussing opposition in the 1780s to the charter of the Bank of North America). On early corporations, see generally PETER D. HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1700–1900: PRIVATE INSTITUTIONS, ELITES, AND THE ORIGINS OF AMERICAN NATIONALITY* (1982); RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION* (1982); Simeon E. Baldwin, *American Business Corporations before 1789*, 8 AM. HIST. REV. 449 (1903); Peter D. Hall, *Organizational Values and the Origins of the Corporation in Connecticut 1760–1860*, 29 CONN. HIST. 63 (1988); Pauline Maier, *The Revolutionary Origins of the American Business Corporation*, 50 WM. & MARY Q. 51 (1993).

587. *See* Koschnik, *supra* note 551, at 49–51 (discussing opposition to the 1789 Philadelphia charter). On the other hand, churches, colleges, and charitable organizations largely avoided this criticism. *See id.* at 28, 36.

588. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 453 (1993).

Early criticism of the Democratic-Republican societies and other entities had an uneasy relationship with support of, and constitutional protection for, assembly and petitioning. "Petitioners were in a sense rivals of representatives, claiming to speak the voice of the people but unrestricted by the qualifications placed on voting and uninhibited by the responsibilities of being part of the government."⁵⁸⁹ It was, therefore, hard to explain why individuals could assemble together and submit petitions to influence government, but not form associations for the same purpose. While some of the petitions to the first Congress came from temporary assemblies of local folk gathered together to address a specific problem,⁵⁹⁰ many petitions were from established associations pursuing particular interests.⁵⁹¹

Some observers, in favor of assembly and petition, but against associations, drew a distinction between temporary assemblies for the purposes of consulting for the common good and submitting a petition, on the one hand, and free-standing associations, representing an ongoing claim to political influence, on the other.⁵⁹² This strategy was evident in the Republican-sponsored public meetings in opposition to the Jay Treaty in 1795: "[b]y styling their opposition to the treaty as an ad-hoc gathering, meant only to collect 'the public sense,' the steering committee of the meetings tried to shun activities that could be construed as perpetual assemblies with unlimited goals."⁵⁹³

589. MORGAN, *supra* note 495, at 226.

590. There are numerous examples. On March 26, 1790, "[m]erchants and traders of Portsmouth, New Hampshire" petitioned for Congress to enact regulations governing foreign shippers and for the district and circuit courts to be located in Portsmouth. *See* STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, *supra* note 497, at 41. On January 20, 1790, "[s]undry inhabitants of Westchester County, New York" petitioned for "[c]ompensation for wheat, rye, corn, oats and hay, cattle, sheep and hogs, which were taken for [Army] use during the late war." *Id.* at 89. On May 13, 1789, "[m]erchants and traders of Portland, Massachusetts" submitted a petition in opposition to a molasses tax. *See id.* at 103. On April 16, 1790, "[t]radesmen, manufacturers and others of Baltimore, Maryland" petitioned for a tax on imports of all products that could be made domestically. *Id.*

591. For instance, on January 27, 1791, the Boston Marine Society petitioned for the establishment of hospitals for disabled seamen. *See id.* at 117. On December 20, 1790, the College of Physicians in Philadelphia petitioned for a tax to discourage the use of distilled spirits. *See id.* at 127. On January 5, 1791, the Baptist Associations of New Hampshire, Massachusetts, Rhode Island, and Vermont petitioned for "measures to prevent the publication of any inaccurate editions of the Holy Bible." *Id.*

592. *See* Koschnik, *supra* note 551, at 70.

593. Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793–1795*, 58 WM. & MARY Q. ¶ 33 (2001) (<http://www.historycooperative.org/journals/wm/58.3/koschnik.html>) (last visited, June 21, 2002).

Of course, such a distinction was not in practice very clear.⁵⁹⁴ As the experience in seventeenth century England had already showed, once the right to petition was understood to allow for something more than merely individual petitions, to protect also petitioning by groups of like-minded citizens, associations are inevitable. If individuals may assemble together to discuss issues of mutual concern for the purpose of drafting and signing a collective petition, then it is hard to prevent people from forming more permanent associational ties for the purpose of dealing with problems as they emerge, or for anticipating them in advance. Accordingly, some early commentators went further, asserting that while associations in colonial and revolutionary America legitimately pursued political goals, the legislatures were the sole elected representatives of the People; therefore extra-legislative assemblies were unnecessary and improper in the new republic.⁵⁹⁵

A different approach was to distinguish illegitimate “self-created societies” from legitimate “associations.”⁵⁹⁶ “[T]he latter existed as collections of individuals organized for civic purposes (such as charity or education), the former denoted organizations not chosen by the people but born out of individual ambition, which violated the principles of popular sovereignty by giving its members disproportionate public influence.”⁵⁹⁷ For instance, Noah Webster, the editor of *American Minerva* celebrated civic associations even while he condemned political societies.⁵⁹⁸ This distinction often seemed to turn on spin: organizations that were careful in the press, and in their other public announcements, to present themselves as engaging in private or civic activities, managed to avoid the condemnation directed at entities with a more blatant public or reformist agenda.⁵⁹⁹

Although modern commentators dwell on Madison and his fear of factions, George Washington was the more zealous critic of the early

594. Indeed, this tension underlay the gag-rules of the 1840s (at the very time associations were on the upswing). Much of the opposition to the abolitionist petitions reflected an inability to contain the right of assembly to episodic gatherings for the purposes of formulating a specific petition. The abolitionist petitions were so disruptive precisely because, aside from their difficult subject matter, they entailed not a request to elected representatives for redress of an individual or collective grievance, but rather a continuous criticism of the activities of Congress by well-organized standing associations of citizens. See Ludlum, *supra* note 518, at 236–38; McPherson, *supra* note 518, at 177–79.

595. See WOOD, *supra* note 404, at 375.

596. See Koschnik, *The Democratic Societies of Philadelphia*, *supra* note 593, at ¶ 21.

597. *Id.*

598. *See id.*

599. *See id.* at ¶ 22. See also DAVID S. SHIELDS, CIVIL TONGUES AND POLITE LETTERS IN BRITISH AMERICA 176–87 (1997).

associations.⁶⁰⁰ Writing privately on the role of the Democratic-Republican societies in the Whiskey Rebellion, Washington asked if anything was

more absurd, more arrogant, or more pernicious to the peace of Society than for self created bodies, forming themselves into permanent Censors, and under the shade of Night in a conclave resolving that acts of Congress which have undergone the most deliberate, and solemn discussion by the Representatives of the people, chosen for their express purpose, and bringing with them from different parts of the Union the sense of their Constituents, endeavoring as far as the nature of the thing will admit, to form that will into Laws for the government of the whole; I say, under these circumstances, for a selfcreated *permanent* body, (for no one denies the right of the people to meet occasionally, to petition for, or remonstrate against, any Act of the Legislature etc.) to declare that this *act* is unconstitutional, and that act is pregnant of mischief; and that all who vote contrary to their dogmas are actuated by selfish motives, or under foreign influence; nay, in plain terms are traiters to their Country, is such a stretch of arrogant presumption to be reconciled with laudable motives: especially when we see the same set of men endeavouring to destroy all confidence in the Administration, by arraigning all its acts, without knowing on what ground, or what information it proceeds and this without regard to decency or truth.⁶⁰¹

This paragraph says it all. The trouble with associations is that they are self-constituted, rather than popularly elected. They are permanent assemblies, ready to criticize everything Congress does, rather than occasional gatherings in response to specific legislation. They challenge Congress, even though they themselves do not properly represent the People. They also have an unfair advantage: whereas Congress must deliberate and act in accordance with popular will, associations are responsible only to narrow interests.

These were not mere private musings. In an address to Congress in the fall of 1794, Washington publicly denounced the Democratic-Republican

600. See SCHUDSON, *supra* note 283, at 61–64. Citing the importance of *some* public scrutiny of government, Madison encouraged Washington to temper his comments on extra-governmental associations of citizens. See *id.* See also SHARP, *supra* note 568, at 103.

601. Letter from George Washington to Burgess Ball (Sept. 25, 1794), in GEORGE WASHINGTON: WRITINGS 885 (John Rhodehamel ed., 1997).

societies,⁶⁰² and Washington's supporters sponsored resolutions condemning them.⁶⁰³ In his farewell address, published in 1796, Washington emphasized the danger associations presented:

[A]ll combinations and Associations, under whatever plausible character, with the real design to direct, controul counteract, or awe the regular deliberation and action of the Constituted authorities, are . . . of fatal tendency. They serve to organize faction, to give it an artificial and extraordinary force; to put in the place of the delegated will of the Nation, the will of a party; often a small but artful and enterprizing minority of the Community; and, according to the alternate triumphs of different parties, to make the public administration the Mirror of the ill concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils and modified by mutual interests.⁶⁰⁴

Less than two years later, Congress enacted the 1798 Sedition Act.⁶⁰⁵ While the Act notoriously penalized speech critical of the government,⁶⁰⁶ it also made it a crime for any persons to "unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States."⁶⁰⁷

To be sure, not everybody shared the view that associations were dangerous. Some commentators celebrated the Democratic-Republican societies precisely because they represented a form of popular sovereignty. "To the participants such associations of the people outside of the regularly constituted government seemed as necessary under their new republican governments as they did under the British government."⁶⁰⁸ In addition, essayists expressed support for the societies as mediating institutions,

602. See George Washington, Sixth Annual Address to Congress (Nov. 19, 1794), in 34 THE WRITINGS OF GEORGE WASHINGTON 29 (John C. Fitzpatrick ed., 1931-44).

603. See SHARP, *supra* note 568, at 103.

604. George Washington, Farewell Address (Sept. 17, 1796), in WRITINGS, *supra* note 601, at 968.

605. See "An act for the punishment of certain crimes against the United States," 1 Stat. 596-97 (July 14, 1798).

606. See *id.* at § 2.

607. *Id.* at § 1. Modern commentators often overlook the assembly portion of the Sedition Act, focusing instead on the Act's restrictions on speech. See, e.g., AMAR, *supra* note 338, at 23. But even when it was passed, there was apparently little concern with Section I of the Act, while Section II (the speech provision) met with vigorous criticism. See Martin, *supra* note 582, at 122 n.7. See also CURRIE, *supra* note 514, at 260-62; Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 272-76 (1997). The Supreme Court recognized that the Act was unconstitutional in *N.Y. Times v. Sullivan*, 376 U.S. 254, 276 (1964).

608. WOOD, *supra* note 404, at 326.

providing—like town meetings—a pipeline for transmitting information between citizens and elected representatives.⁶⁰⁹ When Tocqueville arrived in the 1830s, he, too, saw the vast network of associations in the United States as a form of popular sovereignty, and he celebrated them for that very reason.⁶¹⁰

Thomas Jefferson thought Washington's hostility towards the Democratic-Republican societies misplaced. He wrote privately: "The denunciation of the democratic societies is one of the extraordinary acts of boldness of which we have seen so many from the faction of monarchs. It is wonderful indeed, that the President should have permitted himself to be the organ of such an attack on the freedom of discussion, the freedom of writing, printing and publishing."⁶¹¹ Sharing a similar view, Madison privately described Washington's denunciation of the societies as "the greatest error of . . . his political life."⁶¹² Nonetheless, the two Virginians made little public comment on the societies because of the political risk of being publicly linked to them, and thereby to insurrection.⁶¹³

Further, even the critics of the Democratic-Republican societies were often generous towards other associations that did not appear to threaten the government's singular claim to popular sovereignty. The Masons, for example, enjoyed strong popularity in the early years of the Republic.⁶¹⁴ George Washington was a Mason, as were other eminent individuals, including Benjamin Franklin and Andrew Jackson.⁶¹⁵ The Masons played a substantial role in politics, such as by facilitating the election of their members and sympathizers to public office.⁶¹⁶ Yet Masonry was celebrated, as embodying virtue and patriotism, and thereby contributing to the Republic's success.⁶¹⁷ In contrast to the Democratic-Republican societies, the

609. See SHARP, *supra* note 568, at 104.

610. See *supra* Part IV.E.

611. Letter from Thomas Jefferson to James Madison (Dec. 28, 1794), in 15 THE PAPERS OF JAMES MADISON 426–29 (Robert A. Rutland ed., 1985) (hereinafter MADISON PAPERS), *quoted in* SCHUDSON, *supra* note 283, at 62. (By "wonderful," Jefferson means surprising.); see SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785) (entry for "wonderful").

612. Letter from James Madison to Thomas Jefferson (Nov. 30, 1794), in MADISON PAPERS, *supra* note 611.

613. See SHARP, *supra* note 568, at 103.

614. See BULLOCK, *supra* note 551 at 137–38. The anti-Masonic movement began in the 1820s. See *id.* at 277–307.

615. See *id.* at 1.

616. See *id.* at 220–38.

617. See *id.* at 139.

Masons were understood to have the interests of the whole society at heart.⁶¹⁸ “Masonry’s national and worldwide membership, its lack of explicit exclusions, its voluntary nature, and its ancient origins all seemed to refute any suspicion of a desire for power of selfish advantage.”⁶¹⁹ The acclaim the Masons enjoyed in the early Republic, in contrast to the Democratic-Republican societies, is evidenced by an extraordinary act on September 18, 1793.⁶²⁰ Dedicating the United States Capitol, President Washington, dressed in Masonic garb, placed a silver plate on the corner stone and covered it with corn, oil, and wine (the Masonic symbols).⁶²¹ The plate identified the date as “the thirteenth year of American independence . . . and . . . the year of Masonry, 5793.”⁶²²

E. Summary

In the early Republic, associations were understood not in terms of free speech, but in terms of assemblies, petitions, and popular sovereignty. Like mobs, riots, conventions, and the revolutionary committees, associations embodied extra-legislative political activity. Because today we focus on expression, and we see associations as just another kind of speaker, we have largely overlooked this political aspect of associations that lay at the core of their treatment in the early Republic.⁶²³ To be sure, historically this link between associations and popular sovereignty was highly problematic, revealing early fears about political forces that threatened to destabilize the new union. As we saw, for many critics, it was one thing for citizens to gather in temporary assemblies to exert occasional political influence, but quite another for permanent associations to assume a post-Revolutionary political role. Moreover, it may be that in safeguarding, in the Bill of Rights, a right to assemble and petition, it was not widely expected that the First Amendment would extend to freestanding associations like the Democratic-

618. *See id.* at 152.

619. *Id.*

620. *See id.* at 137.

621. *See id.*

622. *Id.*

623. Other aspects of the First Amendment may also be usefully understood in terms of a commitment to popular sovereignty. *See* AMAR, *supra* note 338, at 20–26; ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 154–55 (1960); Anderson, *supra* note 477, at 487; Potter Stewart, *Or the Press*, 26 HASTINGS L.J. 631, 634 (1975). *See generally* Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405 (2002).

Republican societies. Nonetheless, it was in terms of popular sovereignty that associations in the early Republic were understood.

Accordingly, instead of forging a new doctrine of expressive association, we might have more success in thinking about associational freedom if we also understand associations in popular sovereignty terms. In so doing, we need not agree with the views of Washington and other early critics on whether this sort of popular sovereignty is a good thing. Indeed, we will probably disagree. Today, the notion that there might be too much, or the wrong kind, of popular sovereignty seems strange. Knowing, as we do, that the Republic succeeded, it is more difficult to understand that groups of citizens exercising political influence interfere with the “real” site of popular sovereignty, the elected government. From a modern perspective, the early criticisms directed at the Democratic-Republican societies are inconsistent with understandings of self-rule. We should, therefore, be inclined to protect the popular sovereignty associations represent, rather than worry about its destabilizing effects.

In sum, rather than think of associations as speakers, we should see their significance—their constitutional significance—to lie in enabling people to influence government. Associations matter not because of what they say but because of their political role. The task, therefore, becomes to understand what, in practice, freedom of association means once it is understood in terms of citizens exercising political influence—and protected for that reason. What, in other words, is the proper scope of constitutional protection for associations if their value lies in popular sovereignty? I take up that issue in the next section.

VI. THE SCOPE OF CONSTITUTIONAL PROTECTIONS

Understanding the significance of freedom of association to lie in popular sovereignty does not alone provide an adequate basis for determining the proper scope of associational freedom or for evaluating claims to constitutional protection. We need also to be able to draw distinctions among associations, and associational activities, in ways that allow us to see what popular sovereignty means in practice. Rather than begin from scratch, however, it is sensible to make use of the tools social scientists have already developed for classifying associations. I first provide an overview of these tools and then use them to identify the proper scope of constitutional protections for freedom of association.

A. *An Associational Typology*

1. *Operative Organization*

The sociologist Talcott Parsons distinguishes three “types of operative organization” in modern society: markets, bureaucracies, and associational relations.⁶²⁴ The three represent differentiated methods for organizing collective action, and for making collective decisions.⁶²⁵ Markets organize through economic exchanges based on price.⁶²⁶ Bureaucratic organization is based on rules enforced by coercive power, that is the power of the state.⁶²⁷ Associational relations are a form of social organization based on social ties, communication, and shared norms.⁶²⁸ Associations are therefore those entities in which associational relations are dominant.⁶²⁹ According to Parsons, “the prototype of an association is the societal collectivity itself, considered as a corporate body of citizens holding primarily consensual relations to its normative order and to the authority of its leadership.”⁶³⁰

Modern associational relations, in Parsons’ account, are characterized by egalitarianism among members; voluntary ties (i.e. the possibility of exit); and adherence to procedures and deliberation in decision-making.⁶³¹ Accordingly, when entities are organized through associational relations, outcomes are determined through influence based on persuasion rather than through the mechanisms of money or governmental power.⁶³² As one commentator on Parsons puts it, “[m]odern associations rely on attachments that are held and justified in terms of the intrinsic criteria of the norms—and herein lies their distinctive means of influence, their ethical vitality, as well as their dynamism.”⁶³³

624. See TALCOTT PARSONS, *THE SYSTEM OF MODERN SOCIETIES* 22–26 (1971).

625. See *id.*

626. See *id.*

627. See *id.*

628. See *id.* The theory of social norms as a means of organization has, of course, a long history in sociology, beginning with Durkheim. See generally EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., The Free Press 1995) (1912); EMILE DURKHEIM, *SUICIDE* (John A. Spalding & George Simpson trans., The Free Press 1951) (1897).

629. See PARSONS, *supra* note 624, at 24.

630. *Id.*

631. See *id.* at 24–25.

632. *Id.* at 25.

633. WARREN, *DEMOCRACY AND ASSOCIATION*, *supra* note 279, at 50.

While most entities are organized principally according to one of the three forms of organization Parsons identifies, a single entity may exhibit features of more than one organizational form.⁶³⁴ Thus, the PTA is organized principally through associational relations; a corporation is typically organized under market structures; government entities are normally organized as bureaucracies. But a firm may also include structures organized as associational relations, such as an internal committee of minority workers. An association, such as a gardening club or sports league, may have features organized along market lines, for instance an office that sells merchandise. A predominantly bureaucratic government office may incorporate associational and market-oriented structures.

2. *Ease of Exit, Medium, and Goods*

Building on Parsons' approach, as well as on the related work of Niklas Luhmann⁶³⁵ and Jürgen Habermas,⁶³⁶ political scientist Mark Warren provides a helpful discussion of differences in associational forms.⁶³⁷ Warren invokes three broad criteria for distinguishing among associations: the degree to which an association is voluntary; the constitutive medium of the association; and the association's goods or purposes.⁶³⁸

"Voluntary," in this context, means "the associational bond is held together by *chosen* normative allegiance rather than by other kinds of force."⁶³⁹ In other words, the members of a voluntary association join, and remain members, because they are persuaded by the principles of the association and the social influence of others, rather than because of motivations of money or the threat of state sanctions. An association is non-voluntary where costs coerce membership, or prevent an individual from

634. See PARSONS, *supra* note 624, at 25–26.

635. See generally NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (Stephen Holmes trans., 1982).

636. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 137 (Thomas McCarthy trans., 1987). See also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 25–27, 37 (William Rehg trans., 1998); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 12 (T. Burger & F. Lawrence trans., 1989); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 285–86 (Thomas McCarthy trans., 1984).

637. See WARREN, *DEMOCRACY AND ASSOCIATION*, *supra* note 279, at 94–133.

638. See *id.* at 94.

639. *Id.* at 98.

leaving.⁶⁴⁰ Thus, a workplace is often non-voluntary because most people need income. On the other hand, a workplace might be voluntary if, for instance, there are multiple alternative employment opportunities.⁶⁴¹ A church is voluntary for an individual who joins at age thirty after coming to believe in the tenets of a particular faith. A church is less voluntary for an individual who has grown up with deep ties to a particular religious tradition and cannot imagine any alternative.⁶⁴²

The constitutive medium refers to the location of an association within the three Parsonian media of state power, markets, or social resources.⁶⁴³ Here, the distinction between an association and associational relations becomes important. "While associational relations are defined by the social resources, associations are differentially embedded in these three media."⁶⁴⁴ Thus a bar association might be organized principally through associational relations, but it is embedded in the medium of power.

In considering the medium of an association, Warren draws a further distinction between associations that are vested in their medium and associations that are merely oriented towards their medium.⁶⁴⁵ Vested associations are situated firmly within the medium and they seek to reproduce it.⁶⁴⁶ Non-vested associations, on the other hand, aim to alter the medium and its flow of resources.⁶⁴⁷ For example, a regulatory group that monitors compliance with rules and recommends or imposes sanctions is vested within the medium of state power because its authority depends upon the power of the state, and its activities serve to reproduce that power. Professional organizations, like state bar associations, the American Institute of Certified Public Accountants, and the National Association of Securities Dealers, are vested in state power because they regulate admission to professions and enforce standards of professional conduct. By contrast, a special interest group engaged in lobbying or litigation, such as the NAACP, is oriented towards the medium of state power, but it is not vested in that medium. The NAACP aims to alter state-sponsored rules and outcomes, and to redirect the flow of the resources and benefits state power sustains.

640. *See id.* at 98–99.

641. *See id.* at 99.

642. *See id.*

643. *See id.* at 109.

644. *Id.*

645. *See id.* at 110.

646. *See id.*

647. *See id.*

Warren identifies the following different types of associational goods: individual material goods (such as food and clothing); public material goods (such as public radio); interpersonal identity goods (such as the identities that emerge from friendship ties); status goods (such as degrees and titles or prestigious memberships); exclusive group identity goods (such as goods based on group distinctions like religion, language, race, gender, or a common interest); and inclusive social goods (such as voting rights and other goods related to membership in a broad social body).⁶⁴⁸

3. *Social Capital*

We can also draw distinctions among associations based on their capacity for equipping their members with civic skills and other resources that enable members to exercise political influence. In other words, we can distinguish between associations that represent high levels of social capital and impart these skills and associations where social capital is low and members do not have the same opportunities for gaining politically relevant skills.⁶⁴⁹

4. *Summary*

Associations can be divided up according to whether they are located in the medium of politics, markets, or social resources, and whether they are vested in their medium or merely oriented towards it. Further distinctions can be made based on the degree to which the associational ties are voluntary, and based on the goods the association produces. Finally, we can distinguish among associations high in social capital and associations with low social capital.

These criteria provide multiple axes along which to organize particular associations. Of course, no set of criteria is perfect. In practice, it may not be easy to classify all associations according to the criteria I have identified, and there may be disagreement as to where any particular association falls. Some associations might have mixed or ambiguous features that do not easily place them within a single classification. I also recognize that there are other

648. *See id.* at 123–33.

649. *See supra* Parts IV.E & F.

methods for distinguishing among associations.⁶⁵⁰ Nonetheless, these criteria provide one way to draw, in a systematic manner, distinctions among various kinds of associations.

B. *Constitutional Implications*

In order to identify the associations that merit constitutional protection and the proper scope of that protection, we need to examine the implications of each of these criteria for the underlying value of popular sovereignty.

1. *Medium and Popular Sovereignty*

An association's medium is an especially important factor in evaluating the association's claim to constitutional protection. Other things being equal, we should expect associations located in the medium of political power to be more closely related to popular sovereignty than associations located in either the medium of money and markets or in the medium of social resources. The medium of political power is where public policies are debated and determined, and where the opportunity to influence political outcomes exists. In the medium of political power, associations act as a link between the interests of individuals and the exercise of the state's power over them. Associations located within this medium represent popular sovereignty by communicating the preferences of citizens, articulating differences and disagreements, and influencing the operation of state power. More simply, associations that influence politics play a more significant role in popular sovereignty than do associations that are engaged in buying and selling in markets or associations limited to social life.

The distinction between associations vested in the political medium and associations oriented towards the political medium is also important. Politically vested associations are less likely to represent popular sovereignty than are non-vested associations. Vested associations are those that depend upon and deal in public power. Associations vested in the political medium do not, therefore, represent popular sovereignty because they do not aim, through contributions to deliberation, representation of interests, and the like, to alter power structures and mechanisms, and to change political outcomes. A bar association, for example, is vested in the medium of

650. See, e.g., DAVID KNOKE, ORGANIZING FOR COLLECTIVE ACTION: THE POLITICAL ECONOMIES OF ASSOCIATIONS 47-66 (1990); C. Wayne Gordon & Nicholas Babchuk, *A Typology of Voluntary Associations*, 24 AM. SOC. REV. 22, 22-29 (1959).

political power. It is responsible for licensing lawyers and for regulating the practice of law, and it discharges its responsibilities by promulgating rules and imposing state-sponsored sanctions against lawyers who violate those rules. A bar association does not criticize its exercise of these functions, or advocate assigning them to somebody else, or contend that lawyers should not be regulated at all. In performing these kinds of regulatory functions, a bar association does not, therefore, represent popular sovereignty because while it depends upon state power, it is not involved in altering it.

Associations in the medium of markets or in the medium of social resources also do not represent popular sovereignty. In markets, decision-making occurs anonymously through price mechanisms rather than through deliberation and debate about appropriate outcomes.⁶⁵¹ A firm sells widgets if there is demand for widgets at the price and quality the firm offers. The firm does not sell widgets by relying on the police or the mayor to direct customers to buy them.

Associations located in the social medium deal in social resources such as shared norms. Accordingly, "they thrive on background consensus, which they will tend to maintain through self-selection and exit rather than by going public with their conflicts."⁶⁵² While they may play a significant role in the lives of their members, these associations do not influence public outcomes through the representation of interests, and contributions to public debates and decision-making. The Catholic Church, for example, may strongly influence the lives of its congregation. But such influence occurs through reliance upon religious commands and priestly persuasion, rather than through state force.

We can distinguish associations oriented towards the political medium from associations vested in the political medium, and from associations located in the market or in the social medium. Associations oriented toward, but not vested in, the political medium have a high capacity to represent popular sovereignty. Associations vested in politics, or located in the market, or in social media, have a low capacity for representing popular sovereignty. We should be inclined to grant greater constitutional protection to non-vested political associations, than to these other kinds of associations. Table 1 summarizes these distinctions.

651. See MICHAEL HECHTER, *PRINCIPLES OF GROUP SOLIDARITY* 169–74 (1987).

652. WARREN, *DEMOCRACY AND ASSOCIATION*, *supra* note 279, at 165.

Associational Medium	Vesting in Medium	Popular Sovereignty Capacity
Political	Vested	Low
Political	Non-vested	High
Social	Vested	Low
Social	Non-vested	Low
Market	Vested	Low
Market	Non-vested	Low

Table 1. Associational Medium and Popular Sovereignty.

Which associations merit constitutional protection on this basis? Non-vested political associations include political parties, business lobbies, social movements, racial advocacy groups like the NAACP, environmental lobbies, the NRA, religious advocacy groups, civil rights organizations like the ACLU, child welfare lobbies, animal rights lobbies like PETA, unions engaged in political lobbying, human rights organizations, as well as parades and marches. All of these associations seek to influence state power, but they do not themselves exercise it. We should, therefore, be inclined to grant constitutional protection to these kinds of associations. We should be less inclined to protect firms, cooperatives, and unions engaged in wage negotiations (all located in the medium of the market); fraternal orders, cultural entities, churches, sports clubs, social clubs, and hobby groups (all located in the social medium); and regulatory organizations like bar associations (vested in politics). These associations are less closely related to popular sovereignty because they do not principally seek to alter the exercise of state power.⁶⁵³

653. I, of course, recognize that since many organizations have mixed features, non-political entities may, at times, be oriented towards the political medium. This does not, however, alter the basic analysis: the more an organization is politically oriented, the more inclined we should be to grant it protection.

2. *Social Capital and Popular Sovereignty*

In addition to influencing political outcomes directly, a second way in which associations may be relevant to popular sovereignty is by providing their members with politically relevant skills and opportunities. Associations with high levels of social capital are more closely related to popular sovereignty than are associations in which social capital is low. High social capital means that individuals have more frequent and more significant contact with each other, greater experience in getting along with other people, more opportunities to hear about political issues and to be recruited into political action, and more experience in organizing activities, running meetings, making speeches, and developing other civic skills from the day-to-day operations of the group. Associations with high social capital are important to popular sovereignty, not because they necessarily engage in political activities themselves, but because they equip their members with political skills. Accordingly, we should be inclined to grant constitutional protection to high social capital associations.

Associations high in social capital may exist in any of the three media discussed. Hence, associations that do not themselves influence political life may merit constitutional protection because they provide their members with political skills. For example, consumer cooperatives or ethnic self-help networks, although located in the market, may be significant to popular sovereignty to the extent these organizations entail high social capital. The early women's study clubs discussed at the outset of this Article provide a vivid example of organizations located in the social medium that are nonetheless significant to popular sovereignty. While these study clubs were not formed for political purposes, by teaching politically relevant skills, they enabled their members to exercise political influence.⁶⁵⁴

Groups low in social capital do not have the same significance to popular sovereignty. In low social capital groups, citizens lack opportunities to develop skills useful for political activity. Low social capital groups include large, mass-membership organizations, where citizen activity is limited, often not extending beyond making a financial contribution. Instead of citizens overseeing activities, the operation of these associations tends to be guided by a cadre of professional managers. Members are relatively anonymous to the leadership and to each other. Associations low in social capital include organizations like the Sierra Club and the NRA; political

654. See *supra* Prologue.

parties; many unions; rallies and parades; university alumni organizations; many corporations; professional organizations like state or city bar associations; large museum groups; and many charitable organizations. Low social capital groups merit less constitutional protection than do groups whose high social capital makes them important to popular sovereignty.⁶⁵⁵ Table 2 summarizes the distinction.

Level of Social Capital	Popular Sovereignty Capacity
Low	Low
High	High

Table 2. Social Capital and Popular Sovereignty.

How do we recognize whether an association is high in social capital? Size is obviously a clue. Groups with a small number of active members likely embody high levels of social capital. In considering size, however, the level of analysis is also significant. A large organization with many members may entail high social capital if the organization consists of smaller affiliated units. Thus, for instance, the total membership of Mensa may be a poor indicator of the organization’s social capital if members are arranged in small active local clubs affiliated with the national body. High member turnover disrupts social networks, so stability also suggests an organization embodies high social capital. Organizations with high social capital are also likely to involve relatively egalitarian structures, with a commitment to deliberation in decision-making. Low social capital organizations often have centralized decision-making, and little member influence. High social capital organizations involve the election of officials by members, unpaid leadership, and rotation of members through administrative roles. Low social capital organizations have paid organizers and a professional staff arranged in a hierarchical manner. High social capital organizations show frequent personal interactions among members in meetings and other events. In low

655. To be sure, low social capital organizations may nonetheless be significant to popular sovereignty because they exercise political influence on their members’ behalf, that is, because they are oriented towards the political medium. The AARP, for example, is a powerful and effective lobby on behalf of its members.

social capital organizations, members are less directly connected, perhaps with their principle contact an organizational newsletter. Low social capital organizations are likely to place few constraints on the growth of their organization and provide for easy joining (such as by the payment of a membership fee). High social capital organizations less readily admit newcomers, and more carefully screen prospective members (such as by requiring personal recommendations or attendance at a certain number of meetings before admission).

3. *Voluntariness and Popular Sovereignty*

Whether an association involves voluntary or involuntary ties also bears on its significance to popular sovereignty. Voluntary associations are more effective at formulating a position that represents the interests of the association's members and promoting that position through political influence. By definition, a voluntary association is one in which individuals who disagree with what the association does or says can leave the association and join a more compatible organization.⁶⁵⁶ Voluntary associations are comprised of more similar members than are found in non-voluntary associations.⁶⁵⁷ As a result, "[v]oluntary associations may be able to attain a relative 'purity' of purpose when compared to compulsory associations,

656. See WARREN, *DEMOCRACY AND ASSOCIATION*, *supra* note 279, at 96. The classic work on the subject is ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

657. See Pamela A. Poppielarz & J. Miller McPherson, *On the Edge or In Between: Niche Position, Niche Overlap, and the Duration of Voluntary Association Memberships*, 101 AM. J. SOC. 698, 698–99 (1995) ("[V]oluntary associations are overwhelmingly homogeneous, promoting relations between similar people but inhibiting contact between dissimilar ones. Since the relations that people form can only be as heterogeneous as the structures within which they meet other people, voluntary group homogeneity acts as a barrier to societal integration.") (citations omitted). See also J. Miller McPherson & Lynn Smith-Lovin, *Homophily in Voluntary Organizations: Status Distance and the Composition of Face-to-Face Groups*, 52 AM. SOC. REV. 370, 370–79 (1987).

For instance, many voluntary associations are sex-segregated. See J. Miller McPherson & Lynn Smith-Lovin, *Sex Segregation in Voluntary Associations*, 51 AM. SOC. REV. 61 (1986). The authors find that, in a study of 815 voluntary associations, almost one-half were exclusively female and one-fifth exclusively male, and gender-integrated associations were dominated by one gender. See *id.* at 65. Work-related organizations tended to be sex-heterogeneous, while veterans groups, lodges, and hobby groups were single-sex. See *id.* at 67. Church-related, social, and recreational groups were somewhat heterogeneous. See *id.* Groups with some kind of community representation role (such as an advisory board or chamber of commerce) were especially likely to be sex-heterogeneous. See *id.* at 75. All-female groups tended to have more internal differentiation through committees. See *id.* at 70.

which in turn may enable them to . . . develop a distinctive voice in the public sphere.”⁶⁵⁸

Voluntary associations are, therefore, more closely related to popular sovereignty than are non-voluntary associations. Voluntary associations include organizations devoted to a hobby, recreation, or some other common interest. Sporting associations, wine-tasting clubs, book groups, and choral societies are all voluntary. Some voluntary associations are distinctly political: a political party, for instance, involves individuals united because they share common beliefs.

Non-voluntary associations include integrated bar associations, neighborhoods, and many corporations. In each, the ability of individuals to leave the group, while not impossible, is more constrained. Non-voluntary associations often lack a distinctive voice and are less effective in exercising political influence because the members are unable to overcome divisions among themselves and formulate a distinctive agenda. Alternatively, the contributions of non-voluntary associations to politics may reflect the interests of the association’s leaders or its most outspoken members, rather than those of the entire group. Thus, non-voluntary associations are less significant to popular sovereignty.

However, the mere fact that an association is voluntary should not alone entitle the association to constitutional protection. Some voluntary associations have little bearing on popular sovereignty, because they neither engage in politics themselves nor provide their members with politically relevant skills. A church, for example, is not significant to popular sovereignty just because its members attend services voluntarily. A university alumni association is a voluntary organization, but it has little relevance to popular sovereignty unless it is politically influential or it politicizes its members. In order to merit constitutional protection, a voluntary association should still be required to engage directly in political activity or entail sufficient levels of social capital to facilitate the political activities of its members.

Nonetheless, the presence of voluntary ties allows us to evaluate the contributions politically relevant associations make to popular sovereignty. While associations oriented towards the political medium merit constitutional protection, we should be more inclined to protect politically oriented associations that are *also* voluntary. Such associations provide a stronger and more distinct contribution to political life. Thus, for example,

658. WARREN, DEMOCRACY AND ASSOCIATION, *supra* note 279, at 107.

we should be more inclined to protect the political activities of a highly voluntary organization like the NAACP than those of a less voluntary organization like a professional society.

Whether an association is voluntary may also indicate its level of social capital. Individuals choose to join voluntary associations. They are therefore likely to be higher in social capital than compelled associations, in which individuals happen to find themselves.⁶⁵⁹ On the other hand, ease of exit may work to disrupt or undermine social capital. Individuals free to leave an association, who do not need to work at resolving their differences and overcoming conflicts, may find it difficult to develop high levels of social capital. As Warren observes, because non-voluntary associations “must deal with internal conflict, members may be more likely to have the politically developmental experiences important for democracy, especially if the association’s response to conflict is democratic in nature.”⁶⁶⁰ In other words, non-voluntary associations may be better at producing social capital if they force individuals to harmonize their differences and develop working relationships.

In addition, the extent to which membership is voluntary may allow us to determine which kinds of high social capital associations merit the strongest constitutional protections. Social capital theorists distinguish between two overall varieties of social capital: “bonding” social capital, which is “inward looking and tend[s] to reinforce exclusive identities and homogeneous groups,” and “bridging” social capital, which is “outward looking and encompass[es] people across diverse social cleavages.”⁶⁶¹ Or, to put the distinction more vividly, “[b]onding social capital constitutes a kind of sociological superglue, whereas bridging social capital provides a sociological WD-40.”⁶⁶² Bridging social capital is often more significant to popular sovereignty than bonding social capital, because bridging social capital represents the union of a greater cross-section of the population. Non-voluntary associations may be better at producing bridging social capital, by bringing together diverse individuals without allowing them the possibility of exit. Voluntary associations, on the other hand, are likely more adept at producing bonding social capital, because dissenters will leave to form their own associations with other likeminded individuals. Therefore, while both

659. On the importance of choice to social capital formation, see Mazzone, *supra* note 384, at 35–38.

660. WARREN, DEMOCRACY AND ASSOCIATION, *supra* note 279, at 108.

661. PUTNAM BOWLING ALONE, *supra* note 289, at 22.

662. *Id.* at 23.

voluntary and non-voluntary associations may embody social capital, to the extent that non-voluntary associations can develop social capital, they represent a particularly important form of popular sovereignty. For example, community development corporations with appointed representatives from diverse sectors of the community (representing poor neighborhoods, wealthy neighborhoods, the city, and corporate interests) may be especially significant to popular sovereignty—to the extent the representatives develop a working relationship and agree upon a program. High social capital associations with non-voluntary ties are relatively rare. While we may be inclined to protect all associations with high social capital, we should especially protect non-voluntary associations with high levels of social capital because of their unique contributions to popular sovereignty.

In sum, voluntary associations high in social capital have a high capacity for popular sovereignty. Non-voluntary associations high in social capital have a very high popular sovereignty capacity and merit particularly strong protection. Table 3 summarizes the distinctions.

Associational Ties	Level of Social Capital	Popular Sovereignty Capacity
Voluntary	Low	Low
Voluntary	High	High
Non-voluntary	Low	Low
Non-voluntary	High	Very High

Table 3. Associational Ties, Social Capital, and Popular Sovereignty.

4. *Associational Goods and Popular Sovereignty*

The goods an association produces also bears on its significance to popular sovereignty. Associations that produce public material goods, like parks, public radio, or neighborhood security, are likely to promote popular sovereignty. The production of public goods requires agreement by contributors that these goods are beneficial, as well as a commitment to preventing (or sufficiently reducing) the effects of free-riding. “[P]ublic goods must be achieved by collective action against the background potential for conflict. Thus, associations that pursue public goods must attend to common interests, and must persuade individuals they in fact have common

interests.”⁶⁶³ We should, therefore, be inclined to grant constitutional protection to these kinds of associations.

Associations that pursue inclusive social goods are also important for popular sovereignty. Inclusive social goods are goods that exist by virtue of membership in democratic society, including voting rights, access to information about the operation of government and politics, and shared culture and traditions. In general, these goods are available to everyone. Associations that pursue inclusive social goods include debating societies, educational organizations, voting rights groups, and providers of information about political processes. These kinds of associations are closely related to popular sovereignty, because they seek to improve conditions for democratic participation. “Associations devoted to social goods are essential to underwriting public spheres and political processes.”⁶⁶⁴ Associations that promote inclusive social goods therefore merit constitutional protection.

Exclusive group identity goods are goods distributed on the basis of some kind of distinction among people, such as gender, age, religion, race, or a common interest or hobby.⁶⁶⁵ Associations that produce these goods may contribute to popular sovereignty, to the extent that such goods provide a basis for solidarity, cooperation, and other forms of social capital. However, the mere production of exclusive group identity goods is unlikely to promote popular sovereignty, because these goods, by definition, are enjoyed by a select few. Similarly, status goods (such as membership in a country club or a prestigious degree or title) may also provide a basis for social capital among those who receive the goods, but the goods themselves contribute little to popular sovereignty. Interpersonal identity goods produced through friendships and other intimate ties may also produce social capital, but otherwise are weakly related to popular sovereignty. Individual material goods have little relationship to popular sovereignty. Table 4 summarizes the distinctions.

663. WARREN, *DEMOCRACY AND ASSOCIATION*, *supra* note 279, at 128.

664. *Id.* at 132.

665. *See id.* at 130–31.

Associational Good	Popular Sovereignty Capacity
Public	High
Inclusive Social	High
Individual Material	Low
Interpersonal Identity	Low
Status	Low
Exclusive Group Identity	Low

Table 4. Associational Goods and Popular Sovereignty.

5. *Summary*

The criteria I have identified for distinguishing among associations provide a basis for determining which kinds of associations are more significant to popular sovereignty. We should be inclined to grant constitutional protection to associations that are oriented towards (but not vested in) the political medium and to associations that are high in social capital. Political orientation and social capital are two important ways in which associations contribute to self-government. We may draw further distinctions among these protected associations. Voluntary politically oriented associations merit greater protection than do non-voluntary politically oriented associations. Of the associations protected because they are high in social capital, non-voluntary associations, while rare, merit particularly strong protection. In addition to these kinds of associations, we should also be inclined to protect associations that produce public goods or inclusive social goods because these goods are also closely related to popular sovereignty.

C. *Burdens on Free Association*

Having determined, in light of the criteria relevant to popular sovereignty, the associations that merit constitutional protection, we can also identify when specific kinds of governmental regulations infringe associational freedom.

1. *Formation*

The most obvious way in which the government infringes associational freedom is by preventing citizens from forming associations that serve popular sovereignty. The government can do this by outlawing the association and by criminalizing membership. Prohibitions on politically oriented, or high social capital, associations, or on associations pursuing public or inclusive social goods, should, therefore, be impermissible. That is to say, assuming that freedom of association, like other constitutional rights, is not absolute, such prohibitions should be subject to strict scrutiny.⁶⁶⁶

2. *Burdens on Associations and Individuals*

Short of an outright ban, the government may undermine popular sovereignty by burdening an association or its members. The government might, for example, disrupt an association's meetings or harass participants. The government might subject members to a tax penalty or deny them rights and privileges like public employment, as in *Elrod and Branti*,⁶⁶⁷ or the use of public facilities, as in *Healey*.⁶⁶⁸ The government might also burden associations by publicizing their activities. This may be achieved by photographing participants or printing their names in a newspaper when members prefer to remain anonymous, or, as in *Shelton*,⁶⁶⁹ requiring members to disclose their affiliations. Governmental action of this nature should be strictly scrutinized.

3. *Burdens on Popular Sovereignty Criteria*

Governmental regulation not directed specifically at associations that burdens the associational criteria conducive to popular sovereignty may also be constitutionally suspect. We should carefully examine state regulations that interfere with the opportunities for associations to exercise political influence such as prohibitions on fundraising, lobbying, recruitment, or dissemination of information. Similarly, we should examine, for their effects on popular sovereignty, governmental interference with social capital such as

666. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

667. See *supra* Part II.B.

668. See *id.*

669. See *id.*

general limitations on small-scale gatherings. We should also be attentive to more subtle mechanisms that impede the formation of high social capital groups such as shifts in the distribution of governmental power between the national government and the states.⁶⁷⁰ In addition, we should carefully scrutinize governmental efforts that may prevent associations from pursuing public goods or inclusive social goods in light of the implications for popular sovereignty.

4. *Regulation of Other Associations*

On the other hand, governmental regulation of associations that do not meet the criteria for popular sovereignty is less likely to raise a problem of constitutional dimension.⁶⁷¹ For instance, governmental regulation of low social capital associations located in the market or in the social medium does not present a freedom of association issue. Most business entities are neither high in social capital, nor politically oriented, and they do not have a valid claim to freedom of association.⁶⁷² Similarly, most large-scale social organizations, like sporting leagues, do not merit constitutional protection. Likewise, organizations such as bar associations that perform quasi-state regulatory functions are only weakly related to popular sovereignty. The government should have greater latitude to regulate these kinds of groups.

5. *Membership*

As we have seen, the issue that has given the Supreme Court the most trouble is governmental interference—particularly through anti-discrimination law—with an association's selection of its members. Here, too, the popular sovereignty account of freedom of association proves useful. The account makes clear why some associations should not be entitled to a constitutional defense against the application of anti-discrimination law. Associations that do not contribute to popular sovereignty may properly be prevented from discriminating in their membership. Many corporations, for example, are neither politically oriented, nor high in social capital, nor do

670. See generally Jason Mazzone, *The Social Capital Argument for Federalism*, 11 S. CAL. INTERDISC. L.J. 27 (2001).

671. That is to say, a freedom of association problem. A regulation may, of course, raise some other constitutional problem.

672. Some associations located in the market medium may be high in social capital and merit constitutional protection on this basis. Economic self-help networks among immigrants are a good example.

they produce public or inclusive social goods. Thus, corporations are properly subject to anti-discrimination law,⁶⁷³ as has long been the case.⁶⁷⁴

With respect to associations entitled to constitutional protection because of their relationship to popular sovereignty, interference with the selection of members will not always infringe associational freedom. Let us return to the associational criteria we have identified as related to popular sovereignty. The application of anti-discrimination law does not alter an association's medium. Anti-discrimination law does not impact whether an association is oriented towards the political medium rather than towards the market or the social medium. It is also unlikely that anti-discrimination laws alter the type of goods an association produces. Accordingly, if an association is protected because it is politically oriented, or protected because of the types of goods the association produces, the association should not, on these grounds, be exempt from anti-discrimination law.

Despite the protests of some commentators,⁶⁷⁵ anti-discrimination law also does not affect whether an association is voluntary or non-voluntary. If *A*, *B*, and *C* are members of an association and they are, by operation of state law, required to admit *D*, the association does not, thereby, become any less voluntary. *A*, *B*, and *C* retain exactly the same option to leave the association as they did before *D* arrived. *A*, *B*, and *C* are not required to associate with anybody, not even with *D*, to any greater degree than they were before the application of the law. As Warren puts it, "as long as exit options remain, the compulsion exercise against the association does not translate into compulsion against members."⁶⁷⁶ Accordingly, there should be no exemption from anti-discrimination law just because an association is voluntary.

Associations that are protected because they entail high social capital are in a different position. Governmental regulation that prohibits an association from selecting its own members on whatever basis it chooses is likely to

673. See generally Hunter, *supra* note 249, at 1613–16.

674. In a comprehensive study of public accommodations laws, Joseph Singer argues that as early as the eighteenth century, owners of commercial properties had a duty (under laws of implied contract) to serve all patrons. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1303–31 (1996).

675. See, e.g., Nancy L. Rosenblum, *Public-Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION, *supra* note 282, at 75, 75–108.

676. WARREN, DEMOCRACY AND ASSOCIATION, *supra* note 279, at 103. For this reason, it is more appropriate to analyze anti-discrimination laws as *burdens* on associational freedom rather than as *compelled* association. An anti-discrimination law does not *compel* *A*, *B*, and *C* to associate with *D*. Rather, the law mandates that if *A*, *B*, and *C* wish to associate together, they must *also* associate with *D*. The law therefore imposes a *burden* on the ability of *A*, *B*, and *C* to get together.

undermine the association's social capital and the association's contribution to popular sovereignty. Thus, the application of anti-discrimination law to high social capital organizations should be subject to strict scrutiny.

We need not speculate, as the *Dale* Court did, about the impact of certain kinds of people on group settings to see why this is true. A large body of research in the social sciences demonstrates that the ability of high social capital groups to choose their own members, free from any compulsion, is often a vital condition for the cohesiveness,⁶⁷⁷ and effectiveness,⁶⁷⁸ of the groups, as well as for the commitment of members to a group⁶⁷⁹ and their trust in each other.⁶⁸⁰ In other words, it is not that the presence of certain individuals undermines the group, or even that anti-discrimination law per se affects an association. Rather the problem anti-discrimination law represents

677. See RUPERT BROWN, GROUP PROCESSES 30–34, 44–52 (1988); A. PAUL HARE, HANDBOOK OF SMALL GROUP RESEARCH 126–66, 206–23 (1962); MICHAEL A. HOGG, THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS: FROM ATTRACTION TO SOCIAL IDENTITY 22–30, 35–37, 80–83, 99–100 (1992); Holly Arrow & Jopseh E. McGrath, *Membership Matters: How Member Change and Continuity Affect Small Group Structure, Process, and Performance*, 24 SMALL GROUP RESEARCH 334, 355 (1993); Albert V. Carron & Lawrence R. Brawley, *Cohesion: Conceptual and Measurement Issues*, 31 SMALL GROUP RESEARCH 89, 90 (2000); Nancy J. Evans & Paul A. Jarvis, *Group Cohesion: A Review and Reevaluation*, 11 SMALL GROUP BEHAV. 359, 361–67 (1980). Cohesion is generally defined as a commitment of group members to each other and to the work performed by the group. See Barbara A. Wech et al., *Does Work Group Cohesiveness Affect Individuals' Performance and Organizational Commitment?: A Cross-Level Examination*, 29 SMALL GROUP RESEARCH 472, 473 (1998); Brian Mullen et al., *Group Cohesiveness and Quality of Decision Making*, 25 SMALL GROUP RESEARCH 189, 190 (1994).

678. See Albert V. Carron & Kevin S. Spink, *The Group-Size Cohesion Relationship in Minimal Groups*, 26 SMALL GROUP RES. 86, 86–105 (1995); Stanley M. Gully et al., *A Meta-Analysis of Cohesion and Performance: Effects of Level of Analysis and Task Interdependence*, 26 SMALL GROUP RES. 497, 512–14 (1995); Claus W. Langfred, *Is Group Cohesiveness a Double-Edged Sword?: An Investigation of the Effects of Cohesiveness on Performance*, 29 SMALL GROUP RES. 124, 124–43 (1998); Wech et al. *supra* note 677, at 473. *But see* Clint A. Bowers et al., *When Member Homogeneity is Needed in Work Teams: A Meta-Analysis*, 31 SMALL GROUP RES. 305, 305–27 (2000) (arguing that such effects are small and limited to certain tasks).

679. See generally G.H. Dobbins & S.J. Zaccaro, *The Effects of Group Cohesion and Leader Behavior on Subordinate Satisfaction*, 11 GROUP & ORGANIZATION STUD. 203 (1986); David Knoke, *Commitment and Detachment in Voluntary Associations*, 46 AM. SOC. REV. 141 (1981); Harry Prapavessis & Albert V. Carron, *Cohesion and Work Output*, 28 SMALL GROUP RES. 294 (1997); Clagett G. Smith & Michael E. Brown, *Communication Structure and Control in a Voluntary Association*, 27 SOCIOMETRY 449 (1964); Wech et al., *supra* note 677, at 473.

680. See ROSABETH MOSS KANTER, COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE 67 (1972); Gary Alan Fine & Lori Holyfield, *Secrecy, Trust, and Dangerous Leisure: Generating Group Cohesion in Voluntary Associations*, 59 SOC. PSYCH. Q. 1, 26 (1996); Joseph Paul Stokes, *Components of Group Cohesion: Intermember Attraction, Instrumental Value, and Risk Taking*, 14 SMALL GROUP BEHAV. 163, 163–73 (1983). Interfering with membership selection may also undermine the secrecy upon which some groups depend. See Fine & Holyfield, *supra*, at 26.

is that, when the government interferes with the selection of an association's members, the group's social capital often diminishes as a result.

Accordingly, anti-discrimination law only infringes freedom of association with respect to groups that are protected because they represent high levels of social capital. For example, it should be unconstitutional for the government to require women's study groups to admit men: interfering with the power of the group to select its members undermines social capital conducive to popular sovereignty. On the other hand, associations that do not depend on social capital for their constitutional protection lack a valid claim to exemption from anti-discrimination law. Political parties, for instance, are constitutionally protected because they operate in the political medium, rather than on the basis of their social capital (which is often quite low). Even though political parties have a valid claim to freedom of association, and the government should be prevented from interfering in other ways with this freedom, parties should not be exempt from laws that prohibit racial or other kinds of discrimination. Low social capital organizations do not depend on unrestrained control over their membership in order to contribute to popular sovereignty.

6. *Popular Sovereignty as Inclusion*

Indeed, anti-discrimination law may often *enhance* the contributions of politically-oriented groups to popular sovereignty. By increasing popular participation, anti-discrimination law gives these associations a broader basis of public support and a stronger mandate. The relevant analogy is the town hall meeting. At least in idealized form, a town hall meeting involves the assembly of a cross-section of the community.⁶⁸¹ Inclusion is what gives the town hall meeting its claim to popular sovereignty.⁶⁸² Associations that are inclusive—that look more like town hall meetings—better serve popular sovereignty than do associations with narrow membership criteria.⁶⁸³ This is a principle reason the socially inclusive Masons fared better in the early Republic than did the more selective Democratic-Republican societies.⁶⁸⁴

681. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24–25 (1960).

682. See *id.*

683. See generally Carl F. Taeusch, *Freedom of Assembly*, 63 *ETHICS* 33, 40–42 (1952).

684. See *supra* Part V.D.6.

Both types of organizations influenced government.⁶⁸⁵ However, by drawing from a broader social base, the Masons—at least in popular imagination—enhanced, rather than undermined, popular sovereignty.⁶⁸⁶

D. *Applications to Previous Cases*

Having identified the proper scope of freedom of association, we can now reevaluate the claims to constitutional protection raised in some of the cases the Supreme Court has considered. Beginning with *Patterson*, it is clear that the NAACP is oriented towards politics and, on this basis, has a strong relationship to popular sovereignty. The *Patterson* Court therefore properly invalidated governmental interference with the ability of NAACP members to associate together.⁶⁸⁷

Political parties are also closely related to popular sovereignty because their principle function is political influence. The government should be prevented from interfering with the ability of people to join parties, and with the ability of parties to influence politics through such things as organizing rallies, criticizing government policies, disseminating information, and fielding candidates for public office. However, because their importance lies in direct influence rather than in the political effects of high social capital, political parties should not be entitled to discriminate in membership on the basis of race or similar characteristics. While the Court in the *White Primary Cases* invalidated such discrimination as unlawful state action,⁶⁸⁸ the popular sovereignty approach presented in this Article suggests that discriminatory membership is not an aspect of the associational freedom political parties enjoy.

Unions may have some significance to popular sovereignty, by either engaging in political influence directly, or, if they are small and intensive enough, equipping their members with politically relevant skills. On the other hand, many unions are principally market oriented: they seek, through collective bargaining, to increase the market position of their members with respect to wages and conditions of employment. Many unions are also too large to involve high levels of social capital. Accordingly, unions do not

685. *See id.*

686. *See id.*

687. *See supra* Part II.A.

688. *See supra* Part II.D.

always merit constitutional protection. Union activities may, therefore, be better protected (as they currently are) under statutory law.⁶⁸⁹

The Jaycees operates in multiple media. The organization is, in many respects, a social organization.⁶⁹⁰ It also exerts political influence.⁶⁹¹ Further, it performs significant market-related functions, for example, by providing its members with unparalleled access to business opportunities.⁶⁹² However, as we have seen, an association's medium is not relevant to the question of gender discrimination at issue in *Roberts*. The Jaycees should only be exempt from anti-discrimination law if an exemption is necessary to maintain the organization's contributions to popular sovereignty based on social capital.

Nationally, the Jaycees is an enormous organization, with thousands of members.⁶⁹³ The national organization has only a very weak claim to protection based on social capital. Accordingly, the national Jaycees should not be permitted to exclude women in violation of anti-discrimination law. In contrast, local chapters of the organization may fare better in claiming that interference with their selection of members undermines their social capital.

In *Roberts*, the Minnesota chapter included more than four hundred members with a high admission rate.⁶⁹⁴ The level of social capital was likely quite low. Some local chapters may be sufficiently small and cohesive to claim that interfering with membership undermines their social capital and their contributions to popular sovereignty. Such a claim may only be theoretical. A national organization like the Jaycees might not permit its local chapters to determine their own membership policies. (In *Roberts*, the lawsuit came about after the Minnesota Jaycees sought to admit women in defiance of the national organization's policy.)⁶⁹⁵ At the end of the day, the limitations on associational freedom and the practicalities of associational life may, therefore, work to prevent discrimination by even local affiliates of a national organization.

689. See 29 U.S.C. § 151 (2000). In addition, because union membership is often non-voluntary, where a union engages in political influence, individual workers should not be required to finance the union's political activities. The Court's approach in cases like *Abood*, therefore, makes sense under a popular sovereignty approach. See *supra* Part II.C.

690. See *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984).

691. See *id.* at 626.

692. See WARREN, DEMOCRACY AND ASSOCIATION, *supra* note 279, at 243 n.9.

693. See *Roberts*, 468 U.S. at 631 (O'Connor, J., concurring).

694. See *id.* at 621.

695. See *id.* at 614.

Even more clearly, freedom of association does not exempt the Boy Scouts from anti-discrimination laws. Although the BSA is federally chartered⁶⁹⁶ and receives various governmental benefits,⁶⁹⁷ the organization operates in the social medium. It is involved in producing and transmitting norms and values.⁶⁹⁸ Accordingly, on the basis of its medium, the BSA has only a very weak claim to associational freedom. In contrast to politically oriented associations like political parties or lobbying organizations, the BSA makes little contribution to popular sovereignty.⁶⁹⁹ Nevertheless the BSA is entitled to associational freedom if it embodies high social capital and governmental regulations like anti-discrimination law that undermine the BSA's social capital should be strictly scrutinized. Nationally, the BSA has more than three million members and more than one million adult leaders.⁷⁰⁰ On a national scale, therefore, the organization's social capital is very low. Local Scout troops, which contain between eighteen and thirty Scouts,⁷⁰¹ embody higher social capital and have a stronger claim to associational freedom. Yet the members of a scout troop do not select each other. After joining the organization, Scouts simply participate in a troop that meets in their neighborhood. A boy who wants to be a Scout pays the fee, puts on the uniform, and shows up at a meeting.⁷⁰² Even if a troop embodies high social capital its social capital plainly does not depend on the ability of individual troop members to choose who may participate. In other words, even if a troop is constitutionally significant because it embodies high social capital and thereby provides its members with politically relevant skills, the troop

696. See 36 U.S.C. §§ 30901 et seq. (2002).

697. See Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, THE HUMANIST, Sept.–Oct. 1995, at 6–13.

698. Both sides in *Dale* understood the BSA to be a social organization. See Brief for Petitioners at 2, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (“It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.”); Brief for Respondent at 1, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (“Boy Scouts of America . . . is a national recreational organization”).

699. The *Dale* Court intimates that the BSA operates to some degree in the political medium. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (“the organization . . . send[s] a message . . . to . . . the world”); *id.* at 654. (“the Boy Scouts . . . propound a . . . point of view”). Even accepting that some of the organization's activities may be sufficiently politically oriented to entitle it to some associational freedom, for the reasons discussed, such freedom would not entitle the BSA to an exemption from anti-discrimination law.

700. See *Boy Scouts of America Annual Report*, available at <http://www.scouting.org> (last visited June 12, 2002).

701. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1220 (N.J. 1999).

702. This statement draws on the program information from the Scouts' website. See <http://www.scouting.org>. (last visited June 12, 2002).

can perform that function whether or not the BSA's policy prevents a gay Scout from joining the troop. Individual troop members do not determine whether a gay boy, or any other boy, can be a Scout. On a popular sovereignty account to freedom of association, the result in *Dale*⁷⁰³ is, therefore, incorrect. Even if the BSA contributes to political life in a manner contemplated by the assembly and petition clause, those contributions do not depend on the Scouts' ability to discriminate against gay members.

The analysis highlights how associational freedom protects—and limits—the activities of organizations that take the form of local units governed by a national body that sets membership criteria. Such organizations may make powerful contributions to political life, in large measure, because they can draw upon a network of members and supporters across the nation. The organizations' political activities—in the form of lobbying, supporting candidates, contributing to causes, and disseminating information—deserve constitutional protection. Local chapters of these organizations may also be constitutionally significant if the chapters embody high social capital and impart politically relevant skills to their members. However, if membership policy is controlled at the national level, the organization will not generally have a supportable claim that it must be exempt from anti-discrimination laws. The organization's significance to popular sovereignty does not depend on the ability of the national organization, or of its local chapters, to select members free from all governmental interference.

VII. CONCLUSION

This Article has offered a new approach to freedom of association under the Constitution. The significance of associations, I have argued, lies in their contributions to popular sovereignty, rather than to free speech. Some associations directly engage in political activities. Other associations promote popular sovereignty by equipping their members with politically relevant skills. Self-government requires citizens to contribute to public life. Recognizing how associations enable citizens to exercise political influence allows us to align freedom of association with a core principle of our constitutional democracy.

703. See *supra* Part II.F.

