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Associational Speech

ABSTRACT. This Article explores the relationship between the First Amendment right of free speech and the nontextual First Amendment right of freedom of association. The Article provides important and new insights into this area of law, drawing upon recent scholarship to urge a substantial rethinking of the Supreme Court's approach to this subject. The Article proceeds in three parts. Part I explores the doctrinal roots of the right of association and reviews recent scholarship regarding the association right, as well as the provisions of the First Amendment addressing public assembly and petitioning the government for a redress of grievances. Drawing on these materials, I demonstrate that the assembly, petition, and association rights historically were important, independent rights of coequal status to the free speech and press rights of the First Amendment, and therefore that the Supreme Court's modern tendency to treat the association right as subordinate to speech is incorrect. Building upon this conclusion, I then advance the novel argument that the key First Amendment rights of speech, assembly, petition, and association should be perceived as interrelated and mutually reinforcing mechanisms designed to advance democratic self-government. In particular, I argue that one of the key functions of free speech in our system is to facilitate the exercise of other First Amendment rights, including notably the right of association. I describe this as the theory of associational speech. Part II explores the implications of the theory of associational speech for various areas of free speech doctrine, including incitement, hostile audiences, and the public forum doctrine. Finally, Part III explores some broader questions regarding what the theory of associational speech teaches us about the basic nature of free speech and about the interrelationships between the various provisions of the First Amendment. It also notes some limits of the associational speech concept.

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In traditional legal thinking, the First Amendment to the U.S. Constitution has been ineluctably, and almost exclusively, tied to freedom of speech. On occasion, mention might also be made of the Press Clause of the First Amendment or of the two Religion Clauses; but free speech has been the central focus of First Amendment law and scholarship. In fact, however, the text of the First Amendment is not limited to, or even particularly focused on, speech. The full text of the Amendment reads as follows: "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."[1]

Freedom of speech is no doubt mentioned, but it is given no particular prominence and is sandwiched in between other, distinct topics. In particular, the First Amendment mentions not only freedom of speech, of the press, and of religion but also freedom of assembly and the right to petition the government. In addition, the Supreme Court has long interpreted the First Amendment to protect an implicit right of association.[2] These last provisions have traditionally been the poor stepchildren of First Amendment law, neglected and ignored.

In the past several years, that tradition of neglect has ended, and we have witnessed an explosion of scholarship on those other aspects of the First Amendment, notably on the rights of association and assembly.[3] These developments appear to have been triggered in part by the general advance of communitarian and civic republican models of democracy in the academy and in part by the Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*, holding that the First Amendment's right of association protected the Boy Scouts' decision to expel a gay assistant scoutmaster, in violation of state antidiscrimination law.[4] Regardless of its cause, this scholarship has thrown important new light on the significance of these forgotten liberties and their

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1. U.S. CONST. amend. I.

2. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

3. *See, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); MARK E. WARREN, DEMOCRACY AND ASSOCIATION (2001); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) [hereinafter Inazu, *Forgotten Freedom*]; John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) [hereinafter Inazu, *Strange Origins*]; Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

4. *Dale*, 530 U.S. 640; *see, e.g.*, Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); Symposium, *The Freedom of Expressive Association*, 85 MINN. L. REV. 1475 (2001).

relationship to the better-known provisions of the First Amendment, notably the Free Speech Clause. Most importantly, this scholarship convincingly demonstrates that the textual assembly and petition rights in the First Amendment were historically at least as significant as, and indeed antecedent to, the free speech right. It also strongly suggests that the nontextual association right is best understood as a significant and distinct right, tied to the Assembly Clause and not (as the modern Supreme Court has suggested) derivative of the free speech guarantee.

This Article seeks to take these insights one step further. It proposes that even today, assembly, petition, and association are at least as central to the process of self-governance as is free speech and that assembly and petition were historically viewed as *more* fundamental to a politically functional society than speech. On the assumption that ensuring self-governance is the primary structural purpose of the First Amendment, this argument suggests that the freedom of association (along with assembly and petition) is not merely derivative of the freedom of speech. Instead, the freedom of association deserves at least equal stature in its own right—and in some contexts enjoys primacy over the freedom of speech. Furthermore, this Article argues that one of the most important functions of free speech in our society, and in constitutional law, is to advance and protect the right of association, rather than purely the converse as the Supreme Court has suggested in recent years.[5] I call this form of speech "associational." Associational speech is speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials). Such speech lies at the heart of the First Amendment's structural goals and plays a central role in many First Amendment controversies. Understanding the speech at issue in those situations in associational terms provides insight beyond that of traditional theory and doctrine because it helps explain why the courts have singled out certain specific forms of speech for particularly stringent constitutional protection. The purpose of this Article is to explain and defend this thesis and to explore its implications for free speech doctrine in a number of different areas.

The thesis propounded here neither claims to be an originalist account (if that is possible with respect to the First Amendment) nor presents associational speech as a grand theory explaining all facets of free speech law. Not all speech is associational, at least in a meaningful sense. Scientific talks

5. *See infra* notes 24-55 and accompanying text (discussing, among other cases, *NAACP v. Alabama ex rel. Patterson*, *Roberts v. United States Jaycees*, and *Boy Scouts of America v. Dale*).

and papers, mass media publications and broadcasts, commercial advertising, and published literature, for example, all have little or no associational element to them, yet are all clearly protected by the First Amendment.[6] Nonetheless, the concept of associational speech is important for several reasons. Most importantly, understanding the associational role of speech leads to a deeper understanding of the broad, structural functions of the First Amendment and, in particular, of how distinct provisions of the First Amendment interact to perform those structural functions. In addition, as the discussion in Part II demonstrates, the associational perspective gives important clarity to some very important areas of First Amendment law, helping to explain distinctions that the Supreme Court has drawn in the area of free speech that are not otherwise easily explicable.

Part I explores the development of the implicit right of association and the evolving relationship of that right with the free speech and assembly rights. It also discusses the relationship of assembly, petition, and association to self-governance and the modern scholarship on the historical roots of these rights. Part I then uses these insights to develop a theory of associational speech. Next, Part II explores the implications of this theory for various areas of free speech law. Finally, Part III explores some broader questions about what the theory of associational speech teaches us about the basic nature of free speech, as well as some of the limits to the concept of the associational speech.

I. ASSOCIATION AND SPEECH—A CONVOLUTED RELATIONSHIP

To understand the relationship among free speech, association, and assembly, some background is necessary. To that end, this Part traces the doctrinal evolution of the First Amendment rights of association and assembly over the past century, as well as the historical roots and functions of those rights and the closely related right of petition. To begin with a clarification, the Supreme Court has over the years used the terms "association" and "assembly" interchangeably (even though assembly is mentioned in the constitutional text and association is not). Generally, however, the scholarship suggests that assembly was understood historically to refer to ad hoc gatherings of citizens, while association was understood to refer to more permanent citizen

6. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) (mass media broadcasts); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (published literature); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (commercial advertising); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (mass media publications).

organizations, whether formally constituted or not.[7] How those rights came to be recognized and enforced in the Supreme Court is a complex tale, to which we now turn.

A. Association and Assembly in the Supreme Court

For the first 125 years of its history, the Free Speech Clause was essentially absent from the Supreme Court's jurisprudence. The reasons for this absence are many: first, prior to incorporation, most free speech controversies raised no *federal* constitutional issues, since state governments were the primary regulatory authorities; second, the Alien and Sedition Act controversy never reached the Supreme Court; and third, the Court itself took a notably narrow view of the scope of the Free Speech Clause.[8] Assembly and association cases were similarly absent from the Court prior to the twentieth century. The evolution of the assembly and associational rights in the Court began a few years after the birth of free speech jurisprudence in the 1919 Espionage Act cases,[9] with the Court's famous decision in *Whitney v. California*.[10]

Whitney is generally cited as a free speech case; indeed, it is remembered as one of the classic triumvirate of free speech cases in which Justices Holmes and Brandeis, in separate opinions, formulated their "clear and present danger" test and developed their underlying theories of free speech.[11] Justice Brandeis's concurring opinion in *Whitney* famously expounded his self-governance rationale for protecting speech and has been described as perhaps the most important free speech opinion in the Supreme Court's history.[12] All of this is a bit odd, however, because *Whitney* was not a free speech case at all. It was a case about association and assembly. The case arose from the prosecution for criminal syndicalism of Anita Whitney, a leading California left-wing activist

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7. *See infra* note 61 and accompanying text.

8. *See, e.g.*, Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454, 462 (1907) (suggesting that the "main purpose" of the First Amendment was to prohibit prior restraints on speech).

9. Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

10. 274 U.S. 357 (1927).

11. The other two cases are *Gitlow v. New York*, 268 U.S. 652 (1925); and *Abrams v. United States*, 250 U.S. 616 (1919).

12. *See generally* Ashutosh A. Bhagwat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 383 (Michael C. Dorf ed., 2d ed. 2009) (discussing the influence of Justice Brandeis's *Whitney* opinion on subsequent First Amendment case law and scholarship).

(and niece of Supreme Court Justice Stephen Field). The crux of the prosecution, however, was not that Whitney's speech constituted criminal syndicalism (which California law defined as the advocacy of crimes or violence to effect change in industrial ownership) but merely that she belonged to an organization, the Communist Labor Party, that engaged in syndicalism. Speech could not have been a basis for the prosecution because Whitney herself had never advocated violence; to the contrary, she was on the record as supporting peaceful, democratic activism.[13] Furthermore, both the majority opinion (affirming Whitney's conviction) and Justice Brandeis's separate opinion seem to have recognized this point, at least implicitly. While both opinions mentioned free speech, they did not limit themselves to it. The majority described the rights at issue as "rights of free speech, assembly, and association,"[14] while Justice Brandeis repeatedly described the relevant constitutional provisions as the rights of free speech *and* assembly.[15]

There are two important lessons to be learned from *Whitney*: first, that as of 1927, members of the Court were treating the rights of free speech, assembly, and association as distinct but coequal (albeit to dismiss them all, in the case of the majority); and second, that no clear distinctions were being drawn at this time between association and assembly. The majority spoke of both rights in the same breath, without clarifying the distinction between them, while Justice Brandeis spoke exclusively of assembly, apparently without thinking his nomenclature had any significance. In his view, as well as in the majority's view, the textual right of assembly protected membership in political organizations.

In the years following *Whitney*, the Court continued to recognize and enforce rights of assembly and association, without clearly distinguishing between the two. In 1937, the Court held in *De Jonge v. Oregon*[16] that convicting an individual for attending a lawful meeting merely because the meeting was held under the auspices of the Communist Party violated the right of peaceable assembly. The Court described the right of assembly as "cognate to those of free speech and free press and . . . equally fundamental."[17] Similarly, in 1945, the Court in *Thomas v. Collins*[18] reversed the conviction of a union organizer who gave a speech to an assemblage of workers in violation of a state statute

13. *Id.* at 387-88.

14. *Whitney*, 274 U.S. at 371.

15. *Id.* at 372-79 (Brandeis, J., concurring).

16. 299 U.S. 353 (1937).

17. *Id.* at 364.

18. 323 U.S. 516 (1945).

and judicial order requiring him to obtain a permit. The Court held that the statutory scheme constituted an unconstitutional prior restraint on the official's rights of free speech *and* assembly,[19] and the Court again described speech, press, assembly, and (this time) petition as cognate rights that in combination constitute "the indispensable democratic freedoms secured by the First Amendment."[20] In 1950, on the other hand, the Court in *American Communications Ass'n v. Douds* upheld a federal statute that, in effect, required union officials to disclaim membership in or support for the Communist Party.[21] At various points, the Court's opinion described the statute as impinging on rights of free speech and assembly,[22] though at one point it referenced "freedom of association" instead,[23] again without drawing any distinction. Note that *Douds* primarily involved not speech but membership in the Communist Party, demonstrating that the Court continued to view assembly and association as interchangeable and as protecting membership in permanent organizations.

The next step in this area, and the key one from the point of view of modern law, was the Court's 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[24] In that case, the Court held that an Alabama law requiring the National Association for the Advancement of Colored People (NAACP) to disclose its membership lists violated what the NAACP members described as their First Amendment right of "lawful association in support of their common beliefs."[25] In the course of its discussion, the Court freely cited cases involving freedom of assembly, such as *De Jonge* and *Thomas*,[26] and at various points used the terms association and assembly interchangeably, though its emphasis was clearly on association rather than assembly.[27] What is noteworthy, however, is that the *NAACP v. Alabama* Court discussed the rights of association and assembly not as independent, cognate rights, but rather as means to enable free speech. Thus, the Court stated: "Effective advocacy of both public and private points of view, particularly controversial ones, is

19. *Id.* at 518.
20. *Id.* at 530.
21. 339 U.S. 382 (1950).
22. *See id.* at 399-402.
23. *Id.* at 409.
24. 357 U.S. 449 (1958).
25. *Id.* at 460. The context of the case was the civil rights movement and the efforts of Southern state governments to resist desegregation.
26. *Id.*
27. *E.g.*, *id.* at 462.

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."[28] On this view, membership in organizations was protected no longer as an independent political freedom but as an aspect of free speech. And something had been lost in the translation.

In later cases, the Court largely followed its new approach, emphasizing association, not assembly, as the relevant right and treating association as subsidiary to free speech. In *Shelton v. Tucker*, the Court struck down an Arkansas statute requiring public school teachers to reveal their membership in organizations, finding that the statute burdened teachers' "right of free association, a right closely allied to freedom of speech."[29] In *NAACP v. Button*, the Court struck down a Virginia statute that in effect prohibited organizations such as the NAACP from providing lawyers to represent civil rights plaintiffs when the organization itself was not involved in the litigation.[30] The right at issue, the Court wrote, was the right "to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[31] The Court also, oddly, described NAACP-supported litigation as "a form of political expression,"[32] and it treated the association right as nontextual and independent of assembly.[33] That the Court struggled to apply a free speech lens[34] in *NAACP v. Button*—a case that centered on litigation, a form of activity otherwise considered a form of petitioning[35]—demonstrates the extent to which the Court had lost sight of the vision of the speech, press, assembly, and petition protections as independent and equal forms of political freedom. Later cases from the 1970s—such as *Healy v. James*, involving the registration of student organizations on a state college

28. *Id.* at 460.

29. 364 U.S. 479, 486 (1960); *see id.* at 480, 490.

30. 371 U.S. 415 (1963).

31. *Id.* at 428.

32. *Id.* at 429.

33. *See id.* at 430.

34. Admittedly, the Court did at one point mention the petition right as well, *id.*, but in a decidedly off-hand fashion.

35. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

campus,[36] and *Kusper v. Pontikes*, involving the rights of individuals to shift political party affiliation between elections[37] – continued to follow this pattern.

The key modern developments in the area of association began with the Court's landmark 1984 decision in *Roberts v. United States Jaycees*.[38] The question in the case was whether the United States Jaycees, a national membership organization dedicated to advancing the interests of young men, had a First Amendment right to restrict its membership to men, in the face of state antidiscrimination laws that required the admission of women. Justice Brennan's majority opinion began its analysis by distinguishing between a right of intimate association, rooted in the Court's privacy jurisprudence,[39] and a First Amendment right of association for the purposes of engaging in activities protected by the First Amendment.[40] The Court then rejected the Jaycees' claims on both fronts. With respect to intimate association, the Court held that the Jaycees, with a national membership of 295,000, simply did not constitute an intimate association.[41] Its analysis of First Amendment association, however, was more complex. The Court acknowledged that requiring the Jaycees to admit members against its will was a clear and direct intrusion into the association's freedom.[42] Ultimately, however, the Court concluded that because of the state's compelling interest in eliminating gender discrimination,[43] and (critically) because admission of women would not significantly interfere with the Jaycees' "freedom of expressive association"[44] – that is, the organization's ability to "engage in . . . protected activities or to

36. 408 U.S. 169, 181 (1972) ("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.").

37. 414 U.S. 51, 56-57 (1973) ("There can no longer be any doubt that 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.").

38. 468 U.S. 609 (1984).

39. *Id.* at 617-18. The privacy jurisprudence is a reference to cases protecting nontextual rights, such as the right to marry, *see* Zablocki v. Redhail, 434 U.S. 374 (1978); the right to cohabitate with one's family members, *see* Moore v. City of East Cleveland, 431 U.S. 494 (1977); and the right to control one's children's upbringing, *see* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

40. Note that at this point of its analysis, the Court linked the First Amendment association right not to speech alone but also to such other First Amendment activities as assembly and petitioning. *Roberts*, 468 U.S. at 618.

41. *Id.* at 613, 621-22.

42. *Id.* at 623.

43. *Id.* at 623-26.

44. *Id.* at 626.

disseminate its preferred views"[45] – no constitutional violation had occurred.[46] Justice O'Connor wrote a separate opinion agreeing with the result but arguing that the majority underprotected associational rights. Her view was that the law should distinguish between commercial associations, which enjoy limited constitutional protection, and associations that engage predominantly in "protected expression," to which she would have accorded essentially complete freedom to select their members.[47] Interestingly, however, she defined the phrase "protected expression" very broadly, to include not only "expressive words" and "strident" conduct but also "quiet persuasion, inculcation of traditional values, instruction of the young, and community service."[48]

In the years following *Roberts*, the Court decided two other cases applying the holding of that case. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[49] the Court upheld a state law requiring local Rotary Clubs to admit women, and in *New York State Club Ass'n v. City of New York*,[50] the Court upheld a local ordinance requiring large eating clubs (with more than four hundred members) to admit women. In the latter case, Justice O'Connor wrote separately to reiterate her view that truly expressive associations possess a First Amendment right to select their members.[51] Following the reasoning of *Roberts* in both cases, the Court relied on the state's strong interest in controlling discrimination and on the fact that the associations involved did not engage in much expressive activity, so that the forced admission of women would not interfere with free expression.[52] These cases demonstrate a critical change to the Court's association jurisprudence in the wake of *Roberts*. In the early association cases, the Court emphasized the link between association and free expression as a means to *strengthen* the right of association, driven in part by the Court's (unwarranted) concerns that the right otherwise lacked constitutional mooring. In *Roberts* and its progeny, however, the Court invoked the connection with free speech to *restrict* the right by rejecting constitutional protection for associations that are not predominantly expressive. With this move, the Court abandoned its original insight that

45. *Id.* at 627.

46. *Id.* at 628-29.

47. *Id.* at 632-35 (O'Connor, J., concurring in part and concurring in the judgment).

48. *Id.* at 636.

49. 481 U.S. 537 (1987).

50. 487 U.S. 1 (1988).

51. *Id.* at 18-20 (O'Connor, J., concurring).

52. *N.Y. State Club Ass'n*, 487 U.S. at 11-14; *Duarte*, 481 U.S. at 548-49.

association and assembly, while linked to free speech and press, are cognate, independent rights.

The most recent turn in the Court's modern association jurisprudence occurred in the 2000 case of *Boy Scouts of America v. Dale*.[53] The case arose when the Boy Scouts revoked James Dale's adult membership and position as an assistant scoutmaster upon learning that Dale was homosexual and a gay rights activist. The New Jersey Supreme Court held that the Boy Scouts' actions violated New Jersey's law banning discrimination in places of public accommodation, and the question posed to the Court was whether New Jersey's application of its antidiscrimination law in this context violated the First Amendment. The Court began in much the same way as in *Roberts* by confirming that, to come within the right of expressive association, "a group must engage in some form of expression, whether it be public or private," and that the right was infringed if forced inclusion of a member "affects in a significant way the group's ability to advocate public or private viewpoints."[54] Unlike in *Roberts*, however, a majority of the Court in *Dale* found a constitutional violation, in that forcing the Boy Scouts to include Dale as a member would impair the Scouts' ability to express a message of hostility to homosexual conduct. (Interestingly, the Court deferred to the Boy Scouts' assertions that the organization was in fact hostile to homosexuality and that Dale's inclusion would interfere with its ability to convey that message.[55]) Justice Stevens wrote a vigorous dissent, joined by three other Justices, contesting both key assumptions of the majority: that the Boy Scouts in fact did disapprove of homosexuality and that Dale's inclusion would interfere with their expression.[56] *Dale* thus demonstrated that while the *Roberts* Court's reformulation of associational rights did not spell the end of those rights, no member of the Court was inclined to question the reformulation itself.

B. Association, Assembly, Petitioning, and Self-Governance

This description of the evolution of the Court's association jurisprudence indicates that, in the seventy-three years between *Whitney* and *Dale*, something went astray in the Court's understanding of the association right. Recent scholarship tends to confirm this view, as does consideration of more foundational principles.

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53. 530 U.S. 640 (2000).

54. *Id.* at 648.

55. *Id.* at 650-53.

56. *Id.* at 663-700 (Stevens, J., dissenting).

As noted earlier, recent years have seen an explosion in scholarship regarding association and assembly. Leaving aside the extensive scholarship discussing the merits and (usually) demerits of the *Dale* decision, a topic that is not the main subject of this Article, the scholarship has two major components. First, in the fields of political science and philosophy, there has arisen a vibrant scholarship discussing the role that civic associations play in American political and social life, both historically and in modern America. Prominent recent examples of works in this area include Amy Gutmann's edited collection *Freedom of Association*,[57] Nancy Rosenblum's *Membership and Morals*,[58] and Mark Warren's *Democracy and Association*.[59] The second branch of scholarship, on which this Article focuses, constitutes legal scholarship examining the historical origins of the assembly and association rights.[60]

Several points emerge from this scholarship. Most importantly, the scholarship confirms the close, historical links between assembly and association. Both were seen as forums in which citizens could engage in the process of self-governance, with the difference being that assemblies were probably understood as ad hoc groups gathered in public or private while associations constituted more permanent groupings of citizens, meeting either publicly or in private.[61] Thus, the early Supreme Court's tendency to conflate these concepts is understandable, and the modern Court's failure to recognize the relationship between association and assembly is significant. Admittedly, as Jason Mazzone points out, there is some ambiguity about whether the assembly and petition clauses were understood by (some of) the Framing generation to protect permanent associations;[62] but the deep historical roots and significance of associations to American democracy are clear. The scholarship also confirms what the textual juxtaposition suggests: that assembly and petition are closely linked rights, again with deep historical roots. Mazzone goes so far as to argue that the Assembly Clause protects only

57. FREEDOM OF ASSOCIATION, *supra* note 3.

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

59. WARREN, *supra* note 3.

60. *See, e.g.*, Abu El-Haj, *supra* note 3; Inazu, *Forgotten Freedom*, *supra* note 3; Inazu, *Strange Origins*, *supra* note 3; Mazzone, *supra* note 3.

61. Inazu, *Strange Origins*, *supra* note 3, at 491 (citing Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 CALIF. L. REV. 336 (1947)); *id.* at 510-11 (citing LEO PFEFFER, THE LIBERTIES OF AN AMERICAN: THE SUPREME COURT SPEAKS 97-123 (1956)).

62. Mazzone, *supra* note 3, at 742-43.

assembly for petitioning purposes.[63] John Inazu has convincingly refuted this narrow reading but confirms the historical link between the two activities.[64] More importantly, Inazu and Mazzone confirm that, historically, assembly and association were essential components of political activism, from the precolonial period through the American Revolution and the nineteenth century.[65]

The tie between the rights of assembly and association on the one hand and of petition on the other also clarifies their deep, historical roots – roots that are much deeper, in fact, than those of free speech. A right to petition the government in England appeared at least as early as the thirteenth century and, unlike free speech and assembly, was explicitly protected by the English Bill of Rights of 1689.[66] Jason Mazzone also points out that in the English tradition, the link between petitioning and association became significant as early as the seventeenth century, as the practice of group or "common" petitioning became linked to the formation of private associations created for the purpose of petitioning.[67] This was during an era when the law of seditious libel and the practice of licensing meant that political speech was restricted and enjoyed far less protection than petitioning (notably because petitions were immune from criminal libel prosecutions).[68]

Finally, the scholarship clearly demonstrates that the Framing generation was fully aware of the importance of assembly and petitioning in a system of democratic government, as opposed to the system from which the Framers had broken. What history we have of the drafting of the Assembly and Petition Clauses indicates that the First Congress, in drafting the Bill of Rights, was fully cognizant of the significance of public assembly and of the close relationship among assembly, free speech, and self-governance.[69] Nor should

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63. *Id.* at 712-13.

64. Inazu, *Forgotten Freedom*, *supra* note 3, at 573-77.

65. *Id.* at 575-88 (recounting numerous historical episodes of association and assembly, from the arrest of William Penn to the Democratic-Republican Societies of the 1790s to the abolitionist and suffrage movements); Mazzone, *supra* note 3, at 642-44, 700-01 (recounting the role of women's clubs during the nineteenth century in engaging women in political participation); *id.* at 730-34 (describing the roles of public assembly and of Revolutionary associations in the American Revolution); *see also* Abu El-Haj, *supra* note 3, at 555-61 (recounting similar historical episodes).

66. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1299-1300 (2008); Mazzone, *supra* note 3, at 720.

67. Mazzone, *supra* note 3, at 722-23.

68. *Id.* at 721-22.

69. Inazu, *Forgotten Freedom*, *supra* note 3, at 571-77.

this awareness be a surprise. The generation that drafted the First Amendment had lived through the Revolutionary era and surely understood the importance of association and assembly in creating a popular revolution. They understood that the rights of speech, press, assembly, association, and petition are all at heart political freedoms that are essential to democratic self-governance. Nor was this awareness limited to the Framing era. In particular, the Reconstruction-era authors of the Fourteenth Amendment were also surely aware of the central importance of these freedoms, especially assembly and association, in the political and economic empowerment of newly emancipated slaves. The Fourteenth Amendment must be understood as a reaction, at least in part, to the evisceration of those liberties by Southern states prior to the Civil War and in the "Black Codes" adopted in the wake of the war.[70]

The passage of time has not reduced the significance of this insight for American democracy. Indeed, despite their English roots, assembly and association have evolved as distinctly American phenomena. In a passage repeatedly quoted by association scholars, Tocqueville commented on the significance of associations to American democracy. "Americans of all ages, all stations of life, and all types of disposition," he said, "are forever forming associations."[71] As Mark Warren points out, Tocqueville saw associations as contributing to democracy in two ways: by permitting organization and resistance to the state and by developing the habits, skills, and values that make collective rule possible.[72] Tabatha Abu El-Haj similarly points out that assembly historically has been a central component of citizen participation in self-government, not only or even primarily to facilitate free speech,[73] and

70. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1280 (1992); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 991 & n.369 (2008); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 446; Inazu, *Forgotten Freedom*, *supra* note 3, at 582-84.

71. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840). For examples of quotations from this passage, see Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASSOCIATION, *supra* note 3, at 3; and Mazzone, *supra* note 3, at 688.

72. WARREN, *supra* note 3, at 29-30. For an insightful discussion of the relationship between association and value-formation, which does not draw a connection to self-governance, see Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840-41, 865-69 (2005).

73. Abu El-Haj, *supra* note 3, at 547, 554-55, 586-89 (discussing the relationship between assembly and political participation, and citing historical and modern examples of assembly).

Mazzone makes similar arguments.[74] Nor has the Supreme Court ignored this relationship. In *Sweezy v. New Hampshire*, the Court pointed out that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association" and that the exercise of "basic freedoms in America has traditionally been through the media of political associations."[75] In *NAACP v. Button*, the Court quoted from this language to support its protection of the NAACP's right to associate for the purposes of litigation, though not for speech.[76]

From a historical perspective, moreover, the long-standing appreciation of the importance of assembly and association to self-governance makes good sense. During the early Republic, large numbers of citizens lacked the franchise—and in any event, voting in occasional elections is a passive and inadequate form of citizen participation in government.[77] Then, as now, the power of individuals to communicate their views widely, or to influence public officials, was very limited (especially in an era of limited communications). Meaningful participation in government aside from voting (which was open only to some) required citizens to act together. Sometimes, that joint action took the form of public assemblies, designed to develop common values and to catch the attention of those in power. Other times, it may have been through associations of the sort discussed by Tocqueville. But either way, group action was and is an essential aspect of *meaningful* self-governance.

Finally, this understanding of assembly and association as critical to self-governance fits well with general First Amendment theories. Over time, three distinct theories of free speech have gained prominence and acceptance.[78] One, based on the writings of John Stuart Mill[79] and on Justice Holmes's famous dissent in *Abrams v. United States*,[80] suggests that the purpose of free speech is to ensure that the truth shall emerge in the marketplace of ideas. Another,

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74. Mazzone, *supra* note 3, at 647, 729-30.

75. 354 U.S. 234, 250 (1957).

76. 371 U.S. 415, 431 (1963).

77. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) (discussing historical limits on the franchise); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/abstract=1670134 (discussing historical forms of political participation aside from voting).

78. For a general discussion, see ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 79-81 (2010).

79. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 20-22 (John Gray ed., Oxford Univ. Press 1998) (1859).

80. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

prominently defended by Edwin Baker and Thomas Emerson, is that free speech's importance lies in its value to individuals as they seek self-fulfillment.[81] It is fair to say, however, that in recent decades the most prominent and widely accepted theory of free speech is the third, which emphasizes its role in self-governance. As noted earlier, this theory was first explicated in the Supreme Court by Justice Brandeis's opinion in *Whitney*.[82] It was later carefully formulated and defended by the philosopher Alexander Meiklejohn[83] and has since been espoused by legal scholars as influential and diverse as Robert Bork[84] and Cass Sunstein.[85] The essence of this theory is that the primary *constitutional* significance of free speech is its contribution to political debate and thus its enablement of democratic self-governance. Without speech, democracy would be impossible because citizens would have no way to discuss and form their views, including their views about the conduct and competence of public officials.

In the literature, self-governance has been advanced as a theory of *free speech*. In fact, however, as the prior discussion indicates, it is better understood as a theory of the First Amendment generally or at least of the provisions of the First Amendment other than the Religion Clauses.[86] Free speech and a free press are undoubtedly essential components of democratic self-governance. But so are the freedoms of assembly, association, and petition. All of these protected activities are distinct, though interrelated, forms of citizen participation in government that work in tandem to make that participation meaningful. Despite the biases of the modern Court and most modern scholarship, free speech should not be given any precedence in this relationship. Assembly, association, and petitioning are older forms of participation, surviving from a predemocratic era, and they are no less foundational to a functioning democracy. The scholarship discussed in this Section has explored and explicated the implications of this insight for the scope of the rights of association and assembly. We now turn to the implications of this thought for the law of free speech.

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81. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 (1989); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966).

82. Whitney v. California, 274 U.S. 357, 375-79 (1927) (Brandeis, J., concurring).

83. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

84. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

85. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993).

86. The relationship between the Religion Clauses and self-governance is beyond the scope of this Article, though I raise some questions about it briefly in the Conclusion.

C. *Associational Speech*

At this point, we have come to recognize that the Speech, Press, Assembly, and Petition Clauses of the First Amendment are independent provisions, protecting distinct human activities but serving the common political and structural goal of enabling meaningful self-governance by the sovereign People. We have also come to realize that the Assembly Clause has been read, and should be read, to protect not only ad hoc public assemblies of citizens but also private assemblies and associations, including long-lasting and permanent ones. Finally, we have seen that the modern tendency to give primacy to the free speech right among these provisions, treating the others as primarily designed to facilitate free speech, is both historically unjustifiable and logically mistaken. If anything, the petition and assembly provisions have at least historical, and to some extent practical, preeminence over the speech and press provisions. But at a minimum they should stand on an equal footing. To complete our understanding of the functioning of the First Amendment, one final step is necessary: to recognize that while the various rights protected by the First Amendment are distinct and independent, they are *not* unrelated. To the contrary, the activities protected by the First Amendment can and generally must be undertaken in tandem for them to be effective. Free speech is central to a functioning system of popular sovereignty, but as the Supreme Court recognized in *NAACP v. Alabama*, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as [the] Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[87] This is the insight underlying all of the Supreme Court's modern association jurisprudence, from *Alabama* through *Dale*.

The modern Court's error has been to fail to recognize that these relationships and dependencies are not limited to the connection between speech and association and do not run in only one direction. For one thing, the historical record clearly establishes that just as association facilitates speech, it also facilitates petitioning the government, and indeed the link between assembly and petitioning is historically much tighter than that between assembly and speech. Underlying this blind spot in the Court's analysis is a bigger problem: an impoverished view of what self-governance means. The Court appears to envision self-governance as voting, pure and simple. Speech enables self-governance by facilitating thoughtful and knowledgeable voting,

87. 357 U.S. 449, 460 (1958) (citing Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353, 364 (1937)).

and association facilitates speech by permitting voices to be heard. But the ultimate goal, and the core of self-governance, is voting. This perspective can be traced to the seminal writings of Alexander Meiklejohn on free speech and self-governance. Meiklejohn describes a New England town meeting as the model of self-governance. The meeting is organized and moderated. Citizens speak in a respectful, controlled way, addressing the topic at hand. If they are disruptive or do not follow the rules set down, speakers can be silenced or ejected. And, ultimately, those present vote. That, according to Meiklejohn, "is self-government."[88] One important consequence of this model is that from Meiklejohn's perspective, what is critical is that free speech educate listeners, not that speakers be able to express themselves: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[89] As Jack Balkin has recently pointed out, Meiklejohn's vision has had enormous influence on modern free speech theory.[90]

The difficulty with Meiklejohn's vision is that it is incomplete. The role of the People in this vision is passive and therefore vulnerable—a concern that Justice Brandeis certainly recognized, as reflected in his statement that "the greatest menace to freedom is an inert people."[91] Voting and civilized discussion among individuals are of course important elements of democratic government, but they are hardly the sum total of the matter—especially in times, such as the Framing era, when large numbers of citizens were excluded from voting yet surely still were part of the sovereign People. For one thing, Meiklejohn's vision of how democratic debate proceeds is curiously naïve. Actual political debate is not, and has never in this country's history been, so polite. Instead, real political debate is often loud, robust, and nasty. Certainly the most casual glance at cable news demonstrates the truth of that proposition today. But this is not just a modern phenomenon. During the first Adams Administration, harsh personal attacks were a standard part of politics, leading the Administration to imprison, under the Sedition Act, Republican newspaper editors responsible for such attacks.[92] Attacks on Abraham Lincoln were no less

88. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-25 (2d ed. 1960).

89. *Id.* at 26.

90. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 439-40 & n.50 (2009); *see also* Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 413-16 (2002) (summarizing Meiklejohn's views on the relationship between free speech and self-governance).

91. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

92. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 15-78 (2004).

pointed,[93] and so on. All of which is to say that the modern phenomenon of attack politics has deep historical roots.

Even recognizing that political speech may be disruptive and uncivilized does not go far enough. For one thing, it completely ignores the role of petitioning in real democratic politics. For self-governance to have meaning, citizens must not only be able to speak among themselves; they must also have some access to public officials. In a recent article, Ronald Krotoszynski and Clint Carpenter point out that petitioning historically has been an essential part of citizen activism and that its modern decline has seriously injured our democracy.[94] Effective petitioning, however, is almost inevitably a group activity. In a large republic, it is unlikely that individual citizens can make themselves heard to those in power (except through litigation, which is a special case). It is only when citizens combine around an issue, and make clear that there are numbers on their side, that elected and other public officials take notice. In other words, petitioning requires association. Moreover, while petitioning historically was a carefully circumscribed and private process, akin to modern lobbying, Krotoszynski and Carpenter convincingly argue that in our modern democracy, public demonstrations and protests—that is, public assemblies—must also be seen as a legitimate form of petitioning.[95] In short, association and assembly are essential components of any effective citizen participation in the democratic process through petitioning.

Finally, the democratic value of citizens' associations is not limited to direct participation in a public, political process. Citizens form their underlying values, both political and personal (if it is possible to distinguish the two), in the context of private associations.[96] If popular sovereignty means anything, it surely means that citizens must be able to decide what they believe and to cooperate in that process of deciding, free from state coercion. Especially in an age of widespread public education, however, citizens can do so only in intimate associations, such as families, and in larger democratic associations.[97] Notice that this function of associations has nothing necessarily to do with *public* debate, the traditional concern of free speech, or with petitioning. Rather, it is private conversation and joint activity that create these shared

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93. *See, e.g.*, DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 257-58, 489 (2005); STONE, *supra* note 92, at 93-94, 109-110, 128-32.

94. Krotoszynski & Carpenter, *supra* note 66.

95. *Id.* at 1308-09.

96. *See* WARREN, *supra* note 3, at 34-38; Shiffrin, *supra* note 72, at 840-41, 865-69.

97. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (distinguishing between intimate associations, protected by substantive due process principles, and expressive associations, protected by the First Amendment).

values.[98] In addition, as noted earlier, associations permit citizens to develop the skills needed for participation in democratic self-governance.[99] Such skills, again, are best developed independently of public officials, whose incentives on the matter are decidedly mixed.

Public assembly and association free of state control, then, are essential both to popular participation in government—self-governance in its active form—and to underlying concepts of popular sovereignty. Given the significance of assembly and association to the underlying structural purposes of the First Amendment, it makes sense to read the First Amendment to protect the process of forming and maintaining such associations. And finally, the key insight is that free speech and a free press are important parts of that process. In other words, just as association can facilitate speech, an important role of speech is to facilitate assembly and association. It is hard to imagine how assemblies or associations can be created without speech. At the most obvious level, to organize a public assembly requires informing participants of the planned assembly, publicizing it more broadly to attract others, and publicizing the occurrence of the assembly after the fact, in order to influence the political process (secret protests being an oxymoron). Assembly without free speech, in other words, is impossible.

The role of free speech in enabling the formation and maintenance of associations is more subtle but no less fundamental. An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values. As Tocqueville points out, "In a democracy an association cannot be powerful unless it is numerous."[100] But numbers cannot be achieved without publicity. Writing in the first part of the nineteenth century, Tocqueville emphasized the role of newspapers in forming and maintaining the common values and goals at the core of associations.[101] Today, the means of communication are broader, including not only the written press but also mass mailings, media advertising, and of course the Internet. But at the heart of the process are free speech and a free press. To achieve the structural purposes of the First Amendment, therefore, one of the primary objects of First Amendment doctrine must be to protect speech, the

98. *See* Shiffrin, *supra* note 72, at 865-66.

99. *See* Mazzone, *supra* note 3, at 697-701; *supra* note 72 and accompanying text.

100. TOCQUEVILLE, *supra* note 71, at 518.

101. *Id.*

function of which is to form and maintain associations and to communicate an association's views to outsiders – what I denote as associational speech.

One last subject that must be considered is the nature of the assemblies and associations that are provided strong First Amendment protection. Not all associations contribute to the First Amendment's democratic goals, and so not all associational speech linked to associations contributes to those goals either. Justice O'Connor's separate opinions in the *Roberts* and *New York State Club Ass'n* cases,[102] in particular, drew a strong distinction between commercial and noncommercial associations, arguing that the former do not deserve First Amendment protections. The difficulty, however, is in defining precisely what that distinction is. Justice O'Connor spoke of a difference between commercial associations, which cannot claim a First Amendment right to control their membership, and expressive associations, which can claim such a right.[103] The latter category, however, seems too narrow. It is rooted in the fallacy, discussed above, that the sole First Amendment function of associations is to facilitate speech. Justice O'Connor herself seemed to recognize this difficulty in *Roberts*, when she defined the possible conduct of expressive associations to include "a broad range of activities."[104] In particular, she wrote that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."[105] She was quite correct to define the protected conduct of noncommercial associations broadly, though she was off the mark in describing that conduct as "expressive." The better

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102. N.Y. State Club Ass'n, Inc. v. New York, 487 U.S. 1, 18-20 (1988) (O'Connor, J., concurring); *Roberts*, 468 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment); *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) (citing Justice O'Connor's concurring opinion in *Roberts* for the proposition that the First Amendment does not protect commercial association).

103. *N.Y. State Club Ass'n*, 487 U.S. at 19-20 (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the [local] law [at issue]."); *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "there is only minimal constitutional protection of the freedom of *commercial* association" and discussing the "dichotomy between rights of commercial and rights of expressive association").

104. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment).

105. *Id.* There is language in Justice Brennan's majority opinion that similarly blurs the line between expressive associations and other noncommercial associations. *See id.* at 622 (majority opinion) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

distinction is one drawn based on the primary *goals* of the association at issue. Protected associations are those whose primary goals are relevant to the democratic process. These include not only expression but also political organization, value formation, and the cultivation of skills relevant to participation in the democratic process.[106] Associations can contribute to self-governance in any number of ways aside from direct advocacy, and all those contributions deserve First Amendment protection. An environmental organization such as the Sierra Club, for example, might run publicity campaigns, lobby, and litigate, but it might also organize local clean-up days, tree planting, and hikes. The latter activities are not themselves protected by the First Amendment, but the existence and autonomy of an *association* directed at such goals should be protected because of the value-forming function of such activities, regardless of whether that association also engages in expression or in the political process.[107] And speech directed at forming and preserving such associations is similarly entitled to protection.

In contrast to the wide range of broadly democratic associations that deserve First Amendment protection, certain associations whose primary goals are immaterial to democracy do not. The most obvious are commercial associations, including for-profit corporations and other commercial entities such as limited and professional partnerships, whose primary goal is to make money.[108] These associations are not outside the ambit of the First

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106. For a more complete development of the relevance of associations to democratic skill-building, see Mazzone, *supra* note 3, at 697-701.

107. This discussion also demonstrates why, like Justice O'Connor's distinction between commercial and expressive associations, the Court's opinion in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), does not fully capture the range of associations protected by the First Amendment. In *MCFL*, the Court held that certain nonprofit corporations may not constitutionally be subject to restrictions on corporate election expenditures. In particular, it identified three necessary features of such an entity: (1) it was "formed for the express purpose of promoting political ideas" and not to engage in business activities; (2) such a corporation has "no shareholders or other persons affiliated so as to have a claim on [its] assets or earnings"; and (3) it was "not established by a business corporation or a labor union" and do not accept contributions from such entities. *Id.* at 264. The difficulty with this definition of protected associations is that the first feature is far too narrow. It limits protection to associations that are formed to promote political ideas, a purely expressive goal. But as discussed in the text accompanying this footnote, democratic associations contribute to self-governance in a plethora of ways aside from "promoting political ideas," and many such associations were clearly not "formed for the express purpose" of engaging in speech. The *MCFL* test would protect none of them. For a discussion of other shortcomings of the *MCFL* standard, *see infra* note 215.

108. For a similar argument, distinguishing protected "social associations" from unprotected commercial ones, see Shiffrin, *supra* note 72, at 865-66, 877. Shiffrin, however, does not draw a link between protected social associations and self-governance.

Amendment, at least from an associational perspective, because their activities are irrelevant to democratic politics—the activities surely *are* relevant. Corporations participate regularly in the political process (excessively, some would say), and the workplace can be an important influence on the values of individuals. Nonetheless, such participation and influence are not the primary goals of commercial associations; they are either instrumental or coincidental. For this reason, such associations are not the types of entities that the First Amendment is intended to protect, even though some of their activities may be entitled to constitutional protection on the basis of First Amendment principles other than the associational perspective.[109]

This understanding of the First Amendment, as protecting democratic associations generally rather than only "expressive" associations, explains the results in the "right to discriminate" association cases—notably *Boy Scouts of America v. Dale*—far better than the convoluted opinions of the Court. The *Dale* majority's reasoning, that the inclusion of Dale as an assistant scoutmaster would interfere with the Boy Scouts' ability to express a message of hostility to homosexuality, is unconvincing for two separate reasons (and is powerfully refuted by Justice Stevens's dissent). First, it is not at all clear why Dale's mere presence as an assistant leader would interfere with the Scouts' ability to communicate a message of hostility to homosexuality, unless Dale himself used his position as a bully pulpit to defend homosexuality, of which there was no evidence in the record.[110] Second, the very idea that the Boy Scouts are a primarily expressive association is a stretch. Of course, the Boy Scouts engage in some expression, including reciting the pledge of allegiance and saying prayers, but that is not the primary function of the organization. Rather, Boy Scouts primarily do things like outdoor activities and community service. These sorts of activities are not expressive as such, but they are still highly relevant to the democratic process because they are driven by the Scouts' broader goal of value formation. (Justice O'Connor's words in *Roberts*, sixteen years before *Dale*, are prophetic in this regard.[111]) The Boy Scouts thus exemplify an association that is democratic, but not primarily expressive. If one

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109. For this reason, the Court's opinion in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), holding that the First Amendment prohibits placing restrictions on the independent electoral expenditures of corporations, including for-profit corporations, is not necessarily incorrect. The breadth of the decision is not defensible on associational grounds, but it might be justified based on other, purely speech-oriented principles. *See infra* notes 215-218 and accompanying text.

110. Boy Scouts of Am. v. Dale, 530 U.S. 640, 688-98 (Stevens, J., dissenting).

111. *See supra* note 105 and accompanying text (quoting Justice O'Connor's description of "the training of outdoor survival skills" as protected, expressive activity).

recognizes that such associations are protected by the First Amendment in their composition and self-definition because they must enjoy autonomy from the state, and thus have a constitutional right to select their own members, then the result in *Dale* follows a fortiori.[112] Of course, this still leaves open the question, raised in Justice Stevens's dissent, whether the Boy Scouts truly were hostile to homosexuality.[113] It seems perilous, however, to grant government officials (including judges) the power to determine the "true" values of democratic associations. Putting such a powerful tool into the hands of the state would threaten the autonomy of such associations.[114] Of course, granting such a high degree of autonomy to these kinds of associations imposes significant costs on society in the form of exclusion and division, but given the importance of associations to the structure of the First Amendment, those are costs that the Constitution requires us to bear.

On the other hand, the distinction set forth above also makes clear that commercial entities have no right to discriminate, either as employers or in their choice of customers and contractual partners. Such associations are not directed toward goals relevant to the democratic process, so their internal organizations are not free from government regulation. There are, of course, difficult intermediate cases, such as those in the Court's 1980s trilogy. The Court's implicit, and Justice O'Connor's explicit, conclusions that Rotary Clubs and eating clubs fall on the commercial side of the line seem correct. The Jaycees, on the other hand, pose a much more difficult problem, given that they undoubtedly engage in substantial civic and political activities but also and probably primarily (as Justice O'Connor points out in her concurring opinion) in commercial activities.[115] On balance, given the lower court's findings regarding the Jaycees' activities, the Court's conclusion is probably defensible, but it is clearly a close case.

II. FREE SPEECH DOCTRINE THROUGH AN ASSOCIATIONAL LENS

The previous Part established the significant, mutually reinforcing relationships between the various protections afforded by the First

112. For a contrary argument that law should encourage internal dissent (of the sort represented by *Dale*) within cultural associations, see Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 555-58 (2001).

113. 530 U.S. at 684-88 (Stevens, J., dissenting).

114. For a similar argument, see Shiffrin, *supra* note 72, at 846-48.

115. Roberts v. U.S. Jaycees, 468 U.S. 609, 639-40 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

Amendment, including the fact that one of the important roles of free speech is to facilitate other types of political freedoms. In particular, it argued that one of the functions of free speech law is to protect associational speech—speech the purpose of which is to create and foster private, democratic associations or to express the views of such associations to the world. Turning now from the abstract to the specific, we will consider several areas of First Amendment doctrine from the perspective of associational speech.

A. Dissident and Subversive Speech

In the modern era, free speech issues have been litigated in a huge and varied range of areas, from pornography and nude dancing[116] to tobacco advertising[117] to campaign finance reform.[118] The roots of First Amendment doctrine, however, lie not in these peripheral areas but in efforts by the government to suppress what it considers to be dissident or subversive speech. Most of the important free speech disputes during the first half-century of the Court's free speech jurisprudence (from 1919 to 1969) arose in this area, and most of the Court's important doctrinal innovations were also driven by such cases. The cases encompass a number of distinct doctrinal strands, including incitement, hostile audiences, and compelled speech. What they have in common, though, is that in each of these areas the Court was faced with efforts to suppress the speech of dissident groups. Viewing these cases as involving associational speech therefore clarifies the constitutional values underlying these disputes.

The earliest, most significant, and most contentious line of subversive speech cases concerns incitement, which is speech that poses the risk of encouraging listeners to engage in illegal action. The problem of incitement first came to the Supreme Court in 1919, in a series of cases involving prosecutions (under the Espionage Act of 1917) of opponents of U.S. entry into World War I. In opinions by Justice Holmes, the Court unanimously affirmed these convictions.[119] One of the cases, *Schenck v. United States*, announced the "clear and present danger" test, under which subversive speech could be suppressed if it produced a clear and present danger of social harm—in that

116. *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803 (2000); City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

117. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

118. Citizens United v. FEC, 130 S. Ct. 876 (2010).

119. Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

case, resistance to conscription during wartime.[120] In the months and years following these first decisions, the Court upheld several other convictions under the Espionage Act[121] and also upheld convictions of members of the Socialist and Communist parties for crimes such as criminal anarchy and criminal syndicalism.[122] These later cases were not, however, unanimous. Justices Holmes and Brandeis wrote separately in all of them and, in the course of doing so, enunciated a much stronger version of the clear and present danger test than that of the majority, providing robust protection to free speech rights. History has vindicated the Holmes-Brandeis position, and the results in these cases (including Justice Holmes's early opinions) have been almost unanimously condemned.[123] By the 1930s, the Supreme Court began moving toward the Holmes-Brandeis view, stepping up its protection of free speech rights—notably in its 1931 decision in *Stromberg v. California*,[124] striking down a California statute that made it a crime to display a red flag as a symbol of opposition to the government.

The adoption of the Holmes-Brandeis approach, however, did not make the problem of incitement go away. Indeed, the problem returned anew with the McCarthy-era persecution of Communists during the Cold War. Once again, the Court at first stumbled, upholding numerous statutes imposing restrictions on Communists. In 1951, for example, the Court affirmed the convictions under the Smith Act of the leaders of the American Communist Party while purporting to apply the Holmes-Brandeis clear and present danger test.[125] By later in that decade, however, the Court's approach to incitement

120. *Schenck*, 249 U.S. at 52. Given that Holmes did not quote the "clear and present danger" language of *Schenck* in the later *Debs* and *Frohwerk* decisions, it is not entirely clear whether he truly intended to create a new "test" in *Schenck*. As related in the text, however, in later cases Holmes, and eventually the Court, unambiguously adopted "clear and present danger" as the relevant doctrinal test.

121. Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919).

122. Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

123. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (overruling *Whitney*); *id.* at 451-54 (Douglas, J., concurring) (describing the Court's treatment of the majority approach in the Red Scare-era cases); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-116 (1980) (criticizing the early cases); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 508 (1985) (describing the Red Scare era as "pathological" and observing the Court's failure "to stem the tide of intolerance"). *But see* Bork, *supra* note 84, at 29-32 (defending the results in the early incitement cases).

124. 283 U.S. 359 (1931).

125. Dennis v. United States, 341 U.S. 494 (1951).

became more nuanced. Notably, in two important decisions, the Court adopted narrowing interpretations of the Smith Act to avoid First Amendment concerns. First, the Court held in *Yates v. United States* that the Act condemned not abstract advocacy of forcible overthrow of the government but only advocacy directed at promoting unlawful actions.[126] Then, the Court held in *Scales v. United States* that the Smith Act criminalized not "passive" membership in the Communist Party but only "active" membership.[127] The final step in the development of the Court's incitement doctrine occurred in 1969, with *Brandenburg v. Ohio*.[128] The *Brandenburg* Court reversed the conviction of a Ku Klux Klan leader for criminal syndicalism (overruling *Whitney v. California*) and, in the course of doing so, abandoned the clear and present danger test.[129] Henceforth, the Court held, advocacy could be condemned as incitement only if it was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[130] In subsequent cases, the Court has made clear that this rule is speech-protective in the extreme, requiring a high degree of both imminence and likelihood of violence before speech can be punished, either criminally or with civil liability.[131] The *Brandenburg* standard appears to have resolved the incitement problem, largely in favor of protecting speech.

This abbreviated history of the incitement doctrine reveals a Court that struggled for decades with the problem of incitement. That struggle is not surprising. While inciting speech is often political in nature, it threatens substantial social harms, whether interference with the war effort (in the Espionage Act cases), a Communist revolution (during the McCarthy era), or racial violence (in *Brandenburg*). Moreover, one may question why the Constitution should protect speech advocating illegal activities, when the

126. 354 U.S. 298 (1957).

127. 367 U.S. 203 (1961).

128. 395 U.S. 444.

129. *Id.* To be precise, the *Brandenburg* Court never explicitly abandoned the clear and present danger test; it merely failed to mention that standard. However, this silence, combined with the omission of "clear and present danger" from the Court's discussion of *Dennis*, seemed to telegraph such a purpose. *Id.* at 447 n.2. That is certainly how Justice Black's concurring opinion read the majority. *Id.* at 449-50 (Black, J., concurring); *see also* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting) (describing the abandonment of the clear and present danger test in *Brandenburg* and other cases).

130. *Brandenburg*, 395 U.S. at 447.

131. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

activities themselves are surely unprotected.[132] It is no answer to point out that such advocacy is often mixed up with legitimate criticisms of our society because that does not answer why the advocacy aspect of the speech cannot be punished. The Court has never resolved this conundrum.

One plausible answer, I submit, lies in the concept of associational speech. What is notable about these important incitement cases is that *all* of them involved speech in the context of public assemblies or political organizations. Most of the cases involved multiple defendants acting jointly. Even in the case of individual prosecutions (such as *Whitney* and *Brandenburg*), membership in and assembly with disfavored organizations such as the Communist Labor Party or the KKK lay at the core of the cases. The Espionage Act cases, for example, all involved pleas by antiwar groups to join opposition to World War I, and they often involved members of the Socialist Party. One of the early defendants, Eugene Debs, was the national leader of the Socialist Party; his conviction was based on a public speech that he had given.[133] Much of the condemned speech and literature constituted efforts to recruit new members to antiwar groups, including the Socialist Party. As Justice Brandeis commented in one of the Espionage Act dissents, the criminalized act of "'distributing literature' is a means commonly used by the Socialist Party to increase its membership and otherwise to advance the cause it advocates."[134] Other cases, if they did not involve explicit recruitment, involved discussions and activities within a group or on behalf of a group aimed at forming agreements and tightening ideological bonds within the group and disseminating the group's messages to others, necessarily with a view to long-term recruitment. Examples include the flag-waving in *Stromberg*, the pamphlets thrown into the streets in *Abrams*, and the propaganda literature and workshops at issue in the Smith Act cases. In other words, the incitement cases at their heart concern speech and actions directed toward forming, expanding, and strengthening dissident associations. *Brandenburg* itself involved a KKK rally, quintessentially a public assembly, and post-*Brandenburg* incitement cases similarly involved either public demonstrations (an antiwar rally in *Hess*[135]) or intragroup dynamics (the organization of a boycott by a civil rights organization in *Claiborne Hardware*[136]). There is a broad modern consensus, as noted above, that the

132. Robert Bork famously made this argument in the course of attacking the Holmes-Brandeis approach to incitement. Bork, *supra* note 84, at 29-32.

133. Debs v. United States, 249 U.S. 211 (1919).

134. Pierce v. United States, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

135. 414 U.S. 105.

136. 458 U.S. 886.

speech in *all* of the incitement cases leading up to *Brandenburg* should have been protected and that under the *Brandenburg* test it would have been protected.[137] The reason, I would argue, is that even if the message communicated by advocacy of illegality has little value to democratic self-governance in isolation, dissident associations play a central role in a system of genuine popular sovereignty, even when the goals of such associations are abhorred by broader society (as the Communists' were in the 1920s and 1950s and the KKK's are today). Such associations ensure that majoritarian institutions, often with close ties to the state—such as the two main political parties—do not gain a monopoly on the formation and dissemination of political values. Dissident associations are also much more likely to become a source for disruptive political activism such as protests and rallies—that is, for an active citizenry—than are more majoritarian organizations. And, ultimately, dissident associations are more likely to become centers for resistance to tyrannical government actions than are broader, more diffuse organizations. As the cases demonstrate, advocacy even of illegal action, short of incitement (as defined in *Brandenburg*), plays an important role in the formation and strengthening of such associations and so must be tolerated despite its potentially harmful results.

The outcomes in two recent incitement cases in the lower courts bolster the thesis that incitement has been granted such strong constitutional protection because of its associational elements. In the first case, *Rice v. Paladin Enterprises*, the Fourth Circuit concluded that a publisher could be held civilly liable to the survivors of murder victims who were killed by a hired attacker who followed directions set forth in a book, published by the defendant, titled *Hit Man: A Technical Manual for Independent Contractors*.[138] The court rejected a First Amendment argument based on *Brandenburg* on the grounds that the detailed instructions at issue were different from the abstract advocacy in *Brandenburg* and earlier decisions.[139] In the second case, *Planned Parenthood v. American Coalition of Life Activists* (*ACLA*), the Ninth Circuit upheld, over a powerful dissent, a RICO verdict in favor of a group of medical professionals who provided abortion services against an antiabortion group that had posted the names, addresses, and photographs of the plaintiffs on the Internet in the form of "Wanted" posters and then crossed out the pictures of those doctors who were assassinated.[140] Again, the Court rejected a First Amendment

137. *See* ELY, *supra* note 123, at 115 & 233 n.26.

138. 128 F.3d 233 (4th Cir. 1997).

139. *Id.* at 255-65.

140. 290 F.3d 1058 (9th Cir. 2002) (en banc).

defense, this time on the theory that the speech constituted an unprotected "true threat."[141]

Leaving aside the doctrinal complexities of these two cases (the *ACLA* majority's threat analysis is particularly problematic), on their faces these cases appear to fall within the confines of *Brandenburg*. After all, both involved pure speech advocating illegality, and yet in neither case could one plausibly argue that the illegality was either *imminent* or *likely* when the book was published or the information posted. In *Paladin* ten years passed between the publication of the book and the murders, and in *ACLA* there was no evidence that the website had ever generated actual violence. What, then, explains the results in these cases? While many potential factors are at play, most significant is that neither case involved associational speech. *Hit Man* was not written with the purpose of recruiting others to a movement or organization; it was intended either as a joke (as some think) or simply to assist strangers in committing crimes. Either way, there was no associational element. *ACLA* is a somewhat more difficult case because ACLA itself was a protected association, and most of its website, including its generalized endorsement of violence, surely constituted protected, associational speech designed to strengthen the organization and express its views. The finding of liability in *ACLA*, however, was not based on those aspects of ACLA's website but on the website's inclusion of personal details about the doctors. Those details had no possible relationship to either recruiting new members to the organization or disseminating the organization's views. The sole purpose of that particular aspect of the website seemed to be to encourage strangers to commit crimes; thus, it was not associational speech. This fact clearly distinguishes *ACLA* from *Brandenburg* because the speech at issue in *Brandenburg*, while containing some vague references to violence,[142] was part of an organizational rally designed to deepen associational bonds and had no real link to violence or the threat of violence against others. Threats of violence and other speech closely associated with violence by associations—as with speech associated with violence by individuals—do not constitute protected speech any more than violence itself is protected, because such speech is closely "brigaded with action."[143] In its 2003 decision in *Virginia v. Black*,[144] the Supreme Court confirmed this distinction, holding that burning a cross could be punished when it was done in order to

141. *Id.* at 1085-86.

142. *See* Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) ("'We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.'").

143. *Id.* at 456 (Douglas, J., concurring).

144. 538 U.S. 343 (2003).

convey a threat to a third party but not when it was done as part of a KKK organizational rally—that is, when it was associational speech.

Thus, because the specific speech punished in *Paladin* and *ACLA* did not constitute associational speech, the results in those cases are consistent with *Brandenburg* from an associational perspective. This is not to say that only publications constituting associational speech deserve First Amendment protection; that would radically narrow the scope of free speech. But in the context of incitement, when serious social ills are threatened, such a limitation might be justified because absent the advancement of associational values, advocacy of illegal conduct simply may not be worthy of protection.

Limiting the protection of incitement to associational speech clarifies the law in this area but does not solve all problems. In particular, the problem of dissident or subversive organizations that *do* directly promote illegal activities remains. As discussed above,[145] despite the value of associations to democracy, not all associations can possibly be entitled to constitutional protection. In particular, associations whose primary or direct goal is criminality cannot find shelter under the First Amendment for the same reason that commercial associations are unprotected[146]: criminal activity is not in itself a part of the democratic process. Of course, breaking the law can sometimes be a part of a political movement, but that is a different matter. Civil rights organizations such as Dr. Martin Luther King's Southern Christian Leadership Conference were entitled to First Amendment protection even though they engaged in massive civil disobedience, but that is because the primary goal of such organizations was not to break the law but to effectuate political and social change. The Mafia, on the other hand, is an organization that surely is unprotected, both because it is fundamentally commercial in nature and because its goals are entirely criminal and therefore irrelevant to the democratic process. Even an ideological organization whose primary activities are criminal, such as the Red Brigades or Al Qaeda, deserves no protection; both membership in and recruitment by such groups can be condemned. Unfortunately, however, not all associations are easily classified. Many organizations that are widely or officially labeled as criminal and terrorist, such as the Palestinian group Hamas, the Kurdish PKK, and the (now-defunct) Liberation Tigers of Tamil Eelam, also engage in peaceful, protected activities.[147] Others, such as the Communist Party, have illegal goals but also

145. *See supra* notes 102-109 and accompanying text.

146. *See supra* notes 108-109 and accompanying text.

147. The latter two were chosen as examples because the Supreme Court recently upheld the constitutionality of criminalizing the provision of "material support" to those groups, even

engage in substantial protected activity, and the precise lines between the two are not always clear (consider the example of a "political" strike pushed by union officials associated with the party). Given these uncertainties, some distinction must be drawn between protected associational speech that nurtures a dissident organization and unprotected speech that supports an association's illegal activities and thus can be suppressed for the same reasons that the illegal activities themselves can be. The modern distinction between abstract and directed advocacy, drawn in *Yates* and *Brandenburg*, appears to try to capture this line. Note that abstract advocacy cannot be protected on the theory that its abstract nature means it risks no social harm. After all, as Holmes pointed out:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[148]

Abstract advocacy of the sort at issue in cases like *Gitlow*,[149] however, is an essential aspect of recruitment, value formation, and the strengthening of bonds within dissident associations. Criminalizing such advocacy would necessarily lead to the evisceration of many dissident associations, which would be a severe blow to democratic values. Direct advocacy of imminent action, on the other hand, is much less directly connected to these values and is more closely related to such clearly unprotected speech as criminal solicitation and conspiracy, which have action and not association as their main aim and effect. And for that reason, it is unprotected incitement.[150]

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when the "support" consisted of speech in the form of training and coordinated advocacy. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

148. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

149. Gitlow was prosecuted for publishing the manifesto of the Left Wing Section of the Socialist Party. *Id.* at 655 (majority opinion).

150. The recent *Humanitarian Law Project* decision might appear to weaken the line between abstract and direct advocacy by permitting the government to impose criminal liability for the provision of even nonviolent training to foreign terrorist organizations. However, that holding is based on the perceived impossibility of separating support for the peaceful activities of foreign terrorist organizations from support for their terrorist activities. *See* 130 S. Ct. at 2724-30. Furthermore, the Court specifically limited its holding to *foreign* organizations, suggesting that domestic organizations may be entitled to greater protection. *Id.* at 2730. This last limitation in particular reduces the significance of the Court's decision for democratic associations composed of citizens.

In addition to incitement, another line of cases involving dissident speech with a strong associational flavor is the line of "hostile audience" cases. The leading case in this area is *Cantwell v. Connecticut*,[151] in which the Court reversed the conviction for breach of the peace of Jesse Cantwell, a Jehovah's Witness. Cantwell was arrested for playing a record on a street corner espousing the views of his faith; the record attacked all organized religion but singled out Roman Catholicism in particular, eliciting a hostile reaction from listeners. Drawing on the Holmes-Brandeis tradition, the Court held that Cantwell could not be convicted unless a clear and present danger existed of violence or other social harm and that the fact that Cantwell's speech offended others was not a constitutionally permissible ground for punishment. *Cantwell* appeared to establish a strong level of protection for speakers in the face of hostile audiences. Eleven years later, however, the Court backed away from *Cantwell* in *Feiner v. New York*,[152] upholding the conviction of another public-corner speaker, this time addressing civil rights issues, because the speaker was stirring up a crowd and refused to obey police instructions to stop speaking. On those facts, the Court found a clear and present danger, even absent evidence of imminent violence that the police could not control. *Feiner* has never been overruled, but later cases strongly suggest that the more protective stance of *Cantwell* has won the day. In a series of cases involving civil rights protestors, the Court consistently overturned convictions of marchers facing hostile audiences, on the ground that the police could have prevented, and had an obligation to prevent, any violence by the audience.[153] Today, those cases are widely understood to reject *Feiner*'s deferential approach and to impose an effective requirement that law enforcement officers protect unpopular speakers from hostile audiences and silence speakers only if controlling the crowd becomes impossible. The Court has in fact extended this principle to the point of holding that governments may not charge unpopular speakers for the cost of protecting them (though nondiscriminatory charges applicable to all speakers are permitted).[154]

There are many solid reasons for protecting speakers from hostile audiences, including the undesirability of permitting a "heckler's veto" of speech. There is, however, something odd about the way in which these cases are typically described. The image is of a lone, street-corner speaker (to use

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151. 310 U.S. 296 (1940).

152. 340 U.S. 315 (1951).

153. Gregory v. City of Chi., 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

154. Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 137 (1992).

Owen Fiss's memorable phrase[155]) facing a hostile crowd and requiring protection. What is odd, however, is that such a lone speaker, while perhaps brave, is contributing nothing to First Amendment values if no one is listening. Working up an angry mob is hardly conducive to self-governance. This description of the hostile audience cases is, however, deeply incomplete. In fact, *all* of the key cases involved not a truly lone speaker but rather associational speech. In particular, they involved associational speech by dissident organizations, seeking to express their views as a means of both building solidarity and recruiting. In the civil rights cases, most obviously, the speakers were organized marchers assembling in large groups (of thousands, in one case).[156] Such marches are classic forms of public assembly by political associations and are therefore constitutionally protected regardless of any speech element. The recent *Forsyth County* case involved another assembly by a dissident group (in that case, white supremacists),[157] and in *Feiner* itself, the defendant was addressing a mixed-race crowd, some members of which were clearly supportive of his views—again, a classic form of assembly.[158] Finally, even though Cantwell was speaking together with only his two sons, he was recruiting on behalf of a religious association, the Jehovah's Witnesses.[159] Seen in this light, the Court's decisions in this area (excluding *Feiner*) seem coherent. Dissident organizations invariably will face public hostility—that is what makes them dissident—but, as we have discussed earlier, they play a critical role in self-governance by challenging established understandings and the predominance of the state. Without protection, however, such associations often cannot engage in public organizational activities, recruiting, or public assembly because of the threat of violence. In short, the hostile audience cases are best understood as preventing not a heckler's veto against lone, unpopular speakers, but societal vetoes of unpopular associations.

Indeed, the Court's protection of dissident, unpopular associations has gone beyond merely providing protection from violence. On a few occasions, the Court has recognized a constitutional right on the part of such associations to obtain exemptions from generally applicable laws so as to be able to maintain their organizational integrity and coherence. The leading Supreme Court decision establishing a right of association, *NAACP v. Alabama ex rel.*

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155. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

156. *See* sources cited *supra* note 153.

157. *Forsyth Cnty.*, 505 U.S. at 137.

158. Feiner v. New York, 340 U.S. 315, 316-17 (1951).

159. Cantwell v. Connecticut, 310 U.S. 296, 300-01 (1940).

Patterson,[160] recognized such an exemption. The holding in the case was that Alabama could not require the NAACP to turn over a list of its in-state members because public exposure would subject those members to harassment and abuse.[161] Notably, however, the Court did not hold that states could never require membership organizations to disclose their membership lists, only that such a requirement could not be imposed on the NAACP in Alabama because of the controversial nature of the NAACP's activities.[162] *Brown v. Socialist Workers '74 Campaign Committee* reached a similar result.[163] The question in *Brown* was whether Ohio could require the Socialist Workers Party to disclose to the public a list of contributors to the Party and recipients of its funds. The Court held that it could not, in a manner consistent with the First Amendment, even though the Court had earlier rejected a facial challenge to a federal statute compelling disclosure of political contributors.[164] Again, the Court made clear that it was not overruling its earlier decision and invalidating disclosure requirements generally; it was only holding that such requirements could not be applied to unpopular, dissident groups such as the Socialist Workers Party.[165]

At their heart, these are cases about dissident groups. This is true in the obvious sense that the need for an exemption arises from membership in a

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160. 357 U.S. 449 (1958).

161. *Id.* at 462-63.

162. *Id.* at 460 (noting that the plaintiff's claims for immunity from disclosure were based on "the facts and circumstances shown in the record"); *id.* at 463 (noting that disclosure may still be required if the state's interest in obtaining the relevant information is strong enough).

163. 459 U.S. 87 (1982).

164. Buckley v. Valeo, 424 U.S. 1, 60-74 (1976).

165. *Brown*, 459 U.S. at 92-93. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is another decision recognizing a constitutionally mandated exemption for a dissident association, though in that case on the basis of the Free Exercise Clause, not the Free Speech Clause. The question in *Yoder* was whether a member of the Old Order Amish could be criminally punished for refusing to send his children to school past the age of fourteen, in conformity with Amish religious beliefs but in violation of state compulsory school attendance laws. Building on an earlier case protecting the religiously based refusal of a Seventh Day Adventist to work on Saturdays, *see* Sherbert v. Verner, 374 U.S. 398 (1963), the Court reversed the conviction on the ground that the Free Exercise Clause required the state to exempt the Amish from school attendance, while reaffirming that school attendance laws are not generally unconstitutional. Indeed, in *Yoder* the Court went one step further than in *Sherbert* or the cases discussed in the text, clarifying that the exemption was required because Yoder's actions were the result of the religious beliefs of "an organized group," 406 U.S. at 216, and not just the beliefs of an individual. But in more recent cases, notably *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court has failed to follow *Yoder* in protecting the religious practices and beliefs of religious associations, thereby rejecting the parallel between free exercise and free speech.

dissident group. But more broadly, the existence of the group seems a necessary precondition for a claim of exemption. It is very difficult to imagine that an individual would ever succeed in claiming an exemption from neutral, generally applicable, and otherwise constitutional laws based on that individual's unusual ideological beliefs.[166] But when a First Amendment exemption is requested on the basis of membership in an unpopular or unconventional *group*, as the cases discussed here show, the Court has been more responsive. Why the distinction? The answer must lie in the special constitutional value of associations and the protections accorded to them under the First Amendment. Protecting dissident and unconventional associations is a sufficiently strong constitutional value that it trumps the general presumption, present throughout First Amendment law, that neutral and generally applicable regulations of conduct are not subject to serious First Amendment scrutiny.[167] The exemption cases, in other words, rest upon the same underlying principles as the general protection for associational speech.

B. The Government as Manager—Public Forums and Government Employees

Another area of free speech law with a strong associational character is the public forum doctrine. The public forum doctrine sets forth the constitutional rules for government regulation of speech on its own property. When the government is regulating speech in either traditional public forums (such as streets and parks) or designated forums (property that the government has intentionally opened up for speech), it may neither ban speech outright nor burden speech based on its content, without showing that the burden "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[168] Even content-neutral "time, place, and manner" regulations of speech in public forums must ensure that alternative avenues for speech exist.[169] In nonpublic forums or limited public forums, however, the government enjoys much broader discretion to regulate speech.[170] The case law in this area is bewildering, in particular on the question of what sorts of

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166. *See* United States v. O'Brien, 391 U.S. 367 (1968); *see also Smith*, 494 U.S. 872 (rejecting a Free Exercise claim of exemption from generally applicable regulations of conduct).

167. *See supra* notes 160-165 and accompanying text.

168. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

169. *Id.*

170. *Id.*; *see* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984 (2010).

property qualify as public forums,[171] but the key underlying principle is that, at least with respect to certain sorts of government property, the government's ability to restrict speech is severely limited.

The difficult question raised by the public forum doctrine is why this should be so. Why, when the government is acting in a proprietary capacity as opposed to a sovereign regulatory capacity, should it not enjoy precisely the same rights as other property owners to ban speech on its property? This was the traditional view,[172] and even today the Court is quite deferential when government employees' speech is restricted by the government in its capacity as an employer.[173] So why not when it acts as an owner? The answer that a plurality of the Supreme Court (speaking through Justice Owen Roberts) gave in the Court's leading case on the public forum doctrine was a historical one: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[174] The difficulty with this explanation is that while Justice Roberts's description of the use of the public forum is accurate, it fails to explain why this tradition creates a constitutional principle, especially in light of the fact that the traditional *legal* view on the question was to the contrary. The answer, I submit, can be found in the concept of associational speech.

The rhetoric of the public forum doctrine, like most of free speech law, focuses on individual speakers and their rights. To quote Owen Fiss: "[T]he Free Speech Tradition can be understood as a protection of the street-corner speaker. An individual mounts a soapbox on a corner in some large city, starts to criticize governmental policy, and then is arrested for breach of the peace."[175] Such a vision, however, is odd. As noted above, such lone speakers contribute little to self-governance or other First Amendment values. Moreover, it is not clear that individual speakers really need the public forum to speak or that the public forum is the most effective way for individuals to reach an audience (especially in the age of the Internet). In fact, however, many if not most public forum cases have not involved individuals seeking access to government properties; they have involved groups wanting to use government property to assemble, to recruit, and to send a collective message to the public or to

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171. *See, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

172. Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895) (Holmes, J.), *aff'd*, 167 U.S. 43 (1897).

173. Garcetti v. Ceballos, 547 U.S. 410 (2006).

174. Hague v. CIO, 307 U.S. 496, 515 (1939).

175. Fiss, *supra* note 155, at 1408.

government officials. The leading case, *Hague v. CIO*, involved efforts by labor organizations to assemble and distribute literature on the streets of Atlantic City, New Jersey.[176] Significant modern public forum disputes have involved Nazis marching in a suburb with a large Jewish population,[177] Hare Krishnas seeking to solicit funds and recruit members,[178] political protestors at the 2004 Democratic National Convention,[179] and, most frequently, abortion protestors.[180]

Simply put, this makes sense. While individual speakers may find use of the public forum desirable, access to the public forum is *essential* for associations and public assemblies. After all, where if not in the public forum can public assembly occur? In short, the crucial rights at issue in the public forum cases are not simply speech rights but rights to assembly, association, and associational speech.

Indeed, if one examines the actual use of the public forum for First Amendment purposes, speech as such is almost peripheral. In the typical modern protest or assembly utilizing the public forum, speeches are no doubt made and signs are waved, but they are hardly the main point of the exercise. After all, most of the speeches are inaudible and the signs often illegible. The point, rather, is the assembly itself. The fact of a large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a message to political officials. Assembly, in short, is a form of petition and a form of associational speech, quite aside from what is said *during* the assembly. And it is assembly, not the actions of a street-corner speaker, that is at the heart of the public forum doctrine.

An appreciation of the fact that access to the public forum is primarily a concern of groups rather than individuals has important implications for some aspects of the doctrine. For one thing, it makes clear that a meaningful public forum must be a large, open, and publicly accessible space or else the purposes of the doctrine cannot be fulfilled. Furthermore, given the close ties between public assembly and petitioning the government, alternative spaces must

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176. *Hague*, 307 U.S. at 501-03.

177. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

178. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

179. Bl(a)ck Tea Soc'y v. City of Bos., 378 F.3d 8 (1st Cir. 2004).

180. Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

provide access to government officials.[181] On this view, the severely restricted "demonstration zone" approved by the First Circuit as a designated site for protests outside the 2004 Democratic National Convention cannot possibly qualify as a true public forum.[182] Another lesson is that when assessing whether content-neutral restrictions on speech in the public forum do leave open ample alternatives, courts should ask not only whether alternative opportunities to speak exist but also whether alternative opportunities to gather in groups, sometimes large groups, are available. Speech substitutes are not necessarily assembly substitutes. Finally, courts should be highly suspicious of rules that restrict particular groups' access to the public forum. Even if such restrictions are not written expressly in terms of the content of disfavored groups' speech, they pose a grave risk that the government is seeking to suppress disfavored associations and assemblies. Awareness of assembly and associational concerns can convert the public forum doctrine into a much more robust protector of all First Amendment liberties, not just speech.

There is some value in contrasting the public forum doctrine with the Court's treatment of the speech of government employees. The public forum doctrine continues to place substantial limits on the government's power to limit speech on its property. Recently, however, the Supreme Court held in *Garcetti v. Ceballos* that the First Amendment places *no* limits on the government's power to restrict the speech of its employees during the course of their employment.[183] What explains the very different approaches? After all, both situations involve the government acting in a proprietary rather than a sovereign capacity, and surely there is no reason to believe that the speech of government employees is less valuable than the speech of protestors. There are many factors at work here, including in part the government's greater managerial needs as an employer than as an owner, but perhaps part of the answer lies in the fact that when a government employee speaks in the course of her employment, her speech has no associational aspect. The speech is uttered as a part of her job and on behalf of her employer, not as a part of forming, strengthening, or representing a private association.

Even on the rare occasions when a government employee's speech does have associational implications – for example, when the employee is organizing community volunteers or when a whistleblower's revelations trigger political activity by private associations – the employee's speech is not itself truly associational. In the first instance, government-sponsored community groups

181. For a similar argument, see Krotoszynski & Carpenter, *supra* note 66, at 1311-13.

182. *Bl(a)ck Tea Soc'y*, 378 F.3d at 10.

183. 547 U.S. 410 (2006).

are not the sorts of associations at the heart of the First Amendment's protections and goals. Such groups, which are necessarily under heavy state influence, cannot play the kind of independent role in self-governance—including in forming values free of state interference and in overseeing and petitioning public officials—that the First Amendment envisions. And while whistleblowers' revelations can trigger associational activities and speech—just as the publication of scientific discoveries or the disclosure of financial crimes can—that does not make the revelations themselves associational speech. After all, associational activities can be triggered just as easily by events, such as oil spills or international confrontations, and those events do not implicate the First Amendment. In short, while speech by government employees in the course of their employment might well have social value, particularly in keeping citizens informed about their government's activities, it is not associational speech and does not play the sort of central role in the process of self-governance that private, associational speech does. This fact, combined with the government's strong managerial interest in controlling such speech, appears to explain the holding of *Garcetti*.[184]

C. *Charitable Solicitation*

Another area of First Amendment doctrine in which the theory of associational speech has important implications is the regulation of charitable solicitations. In a series of cases, the modern Court has extended broad, almost unconditional First Amendment protection to the activities of nonprofit organizations in distributing literature and soliciting funds. It has struck down a requirement that door-to-door canvassers obtain permits;[185] a law regulating the fees that professional fundraisers may charge for soliciting on behalf of charities;[186] a law forbidding charities, in connection with fundraising, from paying expenses of more than twenty-five percent of funds raised;[187] and a statute forbidding door-to-door solicitation by charities that do not spend more than seventy-five percent of funds raised for "charitable purposes."[188] On

184. This is not to say that the Court's conclusion in *Garcetti* was necessarily correct. While not associational, government employees' speech, especially whistleblower speech, does have a role to play in self-governance and was therefore arguably undervalued in *Garcetti*. My point is simply that such speech is less central to the structure of the First Amendment than associational speech is.

185. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002).

186. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

187. Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984).

188. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

the other hand, the Court has accorded substantially less protection to advertising and solicitation by *commercial* entities.[189] Yet both forms of speech at heart have the same content—a request for money. Why does the Court impart such high First Amendment value to charitable solicitations? The answer must lie in principles of associational speech.

From an individualistic perspective, the extraordinary protection that the Court has accorded charitable solicitation seems a bit odd. It is not at all clear how speech asking for money contributes to democratic discourse.[190] From an associational perspective, however, the value of such speech is clear. The ability to solicit funds and supporters is the lifeblood of associations. Without solicitation, nonprofit associations would be limited to activities that their current members can fund, which would necessarily be limited. Charitable solicitations permit associations to organize themselves, to expand, and to fund political activism and petitioning. Protection of solicitation is thus an essential aspect of the Constitution's general protection for private associations and assemblies. Charitable solicitation is valuable not for its speech aspects but for its associational aspects. Viewed as associational speech, charitable solicitation is quite properly treated not as marginal but as at the core of the protections accorded by the First Amendment. Put differently, the reason why charitable solicitation receives strong constitutional protection is not that the solicitation itself has great value but that it enables charitable associations to engage in *other* activities that are central to self-governance and so to the purposes of the First Amendment.[191]

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189. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (holding that commercial speech may be regulated or silenced so long as the relevant law satisfies a reduced, intermediate level of scrutiny); *see also* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477-80 (1989) (confirming that commercial speech receives reduced constitutional protection).

190. I speak here only of charitable *solicitations*. Distribution of literature and other speech is of course highly relevant to democratic discourse and therefore obviously deserving of protection.

191. The associational perspective also helps to explain why *commercial* solicitation receives much more limited First Amendment protection than does charitable solicitation, even though at heart both forms of speech are simply requests for money. *See supra* note 189 and accompanying text. Commercial entities, as discussed earlier, *see supra* notes 108-109 and accompanying text, have far weaker associational rights than do noncommercial entities, because their primary function—profit-making—has no direct connection to self-governance. Just as commercial associations have weaker (or no) associational rights to discriminate in selecting their members, so also the associational speech of commercial entities receives limited constitutional protection. This is because solicitation and advertising of commercial transactions by commercial entities are not directed to other goals, as charitable solicitations are; they are themselves the central profit-making activities

D. Campaign Finance Reform and Corporate Speech

Finally, we will consider what insights the associational speech perspective can provide to an important and recently controversial area of First Amendment law: campaign finance reform. The body of the Supreme Court's case law in this area, from its 1976 decision in *Buckley v. Valeo*[192] to its most recent pronouncement in *Citizens United v. FEC*,[193] is complex and impossible to treat fully in this space. Nonetheless, because of the significance of this area of law and because associational speech issues lie at the heart of many of the disputes here, some discussion is in order. We will focus on two foundational questions: the distinction that the Court has drawn between campaign contributions and expenditures, and the Court's treatment of campaign expenditures by corporations and unions.[194]

We begin with the distinction between contributions and expenditures, a distinction that the Court created in its seminal decision in *Buckley v. Valeo*. The primary issue in *Buckley* was whether statutory restrictions on the amount of money that individuals could contribute to political candidates, and on the amount that individuals could independently spend "relative to a clearly identified candidate" in a federal election, were constitutional.[195] The majority distinguished sharply between contribution limits and expenditure limits, upholding the former and striking down the latter. With respect to contributions, the Court held that while contribution limits do interfere with the rights of individuals to associate with the candidate of their choice, the interference was justified by the government's strong interest in combating corruption and the appearance of corruption.[196] With respect to expenditures,

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toward which such entities are directed. As such, commercial solicitation does not advance principles of self-governance.

192. 424 U.S. 1 (1976).

193. 130 S. Ct. 876 (2010).

194. I do not separately discuss the Court's election law jurisprudence concerning the regulation of political parties, including the early White Primary cases, *e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932), and more recent decisions invalidating various restrictions on how political parties organize their primary elections, *e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989); Tashjian v. Republican Party, 479 U.S. 208 (1986). These cases raise difficult and interesting questions regarding the tension between political parties' associational rights and the government's legitimate power, or obligation, to regulate elections, but they do not directly raise questions of associational speech and so are not relevant to the subject of this paper.

195. *Buckley*, 424 U.S. at 39 (internal quotation marks omitted).

196. *Id.* at 24-29.

on the other hand, the Court held that the heavy burden placed on freedom of expression by limits on expenditures outweighed any governmental interest in regulating expenditures. Expenditure limits were therefore unconstitutional.[197]

The result reached by the Court in *Buckley v. Valeo* was, and remains, highly controversial. Chief Justice Burger dissented from the Court's decision to uphold contribution limits,[198] while Justice White wrote a sharp dissent criticizing the majority's view that expenditure limits raise serious First Amendment concerns.[199] In recent years, several Justices have similarly questioned *Buckley*'s distinction between contributions and expenditures, generally advocating greater suspicion of contribution limits.[200] How does the theory of associational speech illuminate this debate? First, the associational speech principle strongly confirms (contrary to Justice White's *Buckley* dissent) that contributions to political candidates deserve significant First Amendment protection because they constitute a form of association. Giving money to another person is not, of course, always an act of association. But when individuals pool their financial resources to achieve political ends, doing so is surely a core form of association. In the case of most political contributions, the resultant associations are large and relatively anonymous (in the literature, these are called "tertiary" associations[201]), but they are nonetheless protected associations. Moreover, in the context of local elections, contributions may be an important aspect of close, personal associations at the core of the democratic process. This insight in turn suggests that contribution limits should be subject to fairly stringent constitutional scrutiny and that excessively strict limits should be invalidated, as the Court has recently confirmed.[202]

The question that the associational speech perspective cannot answer, however, is whether the First Amendment permits any contribution limits, if the government interests supporting such limits are strong enough. No constitutional rights are absolute, and the question of how to reconcile the

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197. *Id.* at 44-51.

198. *Id.* at 242-46 (Burger, C.J., concurring in part and dissenting in part).

199. *Id.* at 257-66 (White, J., concurring in part and dissenting in part).

200. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 266-69 (2003) (Thomas, J., concurring in part and dissenting in part, joined by Scalia, J.); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 466-82 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (criticizing restrictions on expenditures by political parties in coordination with a candidate, which the majority treats as equivalent to contributions).

201. WARREN, *supra* note 3, at 39-40.

202. *See* Randall v. Sorrell, 548 U.S. 230 (2006) (striking down stringent contribution limits imposed by Vermont in its state elections).

government's legitimate need to limit public corruption with the First Amendment's protections for association is beyond the scope of this Article.

With respect to expenditure limits, an associational perspective leads to the surprising conclusion that whatever the legitimacy of governmental restrictions on expenditures by individuals, restrictions on expenditures by groups are highly suspect.[203] When associations express the joint views of their members, they are engaging in conduct that stands at the intersection of the assembly, association, petition, and speech provisions of the First Amendment. Such conduct is at the core of self-governance as seen through an associational lens, and it must presumptively be free of interference by the government. Moreover, the fact that expenditure limits literally restrict not speech but money cannot answer this argument because, in the context of associations, expenditures are intrinsically linked to the joint expressive and other democratic activities of the group. After all, pooling financial resources is one of the core functions of associations. The *Buckley* Court was thus correct to view such restrictions, at least as applied to groups, suspiciously. Justice Stevens's recent argument to the contrary—that limits on expenditures constitute only indirect and therefore permissible limits on First Amendment freedoms[204]—is incorrect because it fails to consider the impact of spending limits on associations. With respect to restrictions on independent expenditures by individuals, however, associational speech theory has little to say. This is not to say that other First Amendment principles may not limit the government's power in this regard, but associational speech concerns are by definition not implicated in the absence of an association.

Once one recognizes and accepts the stringent protections accorded by the First Amendment to expenditures and expression by groups, a critical question arises: which groups are entitled to this protection? This question was at the core of the Supreme Court's recent, highly publicized, and controversial decision in *Citizens United*.[205] Before turning to *Citizens United*, however, a brief discussion of two earlier Supreme Court decisions regarding corporate speech is in order. In *First National Bank of Boston v. Bellotti*, the Court was faced with a challenge to a Massachusetts statute that forbade corporations from making contributions or expenditures in relation to referendum elections, unless the election involved issues that "materially affect[ed] . . . the property, business or

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203. The *Buckley* Court noted the severe impact of expenditure limits on the ability of associations to express themselves. 424 U.S. at 22-23.

204. *Randall*, 548 U.S. at 276-77 (Stevens, J., dissenting).

205. 130 S. Ct. 876 (2010).

assets of the corporation."[206] The Court struck down the statute, holding that it restricted speech at the core of the First Amendment and that the corporate form of the speakers being regulated was irrelevant.[207] Twelve years later, however, the Court in *Austin v. Michigan Chamber of Commerce* veered away from its holding in *Bellotti*.[208] In *Austin*, the Court upheld a Michigan statute that forbade corporations from making independent expenditures in support of, or in opposition to, candidates for election to state offices. (Corporations were permitted to create segregated funds for such purposes.[209]) The Court acknowledged that, under its precedent, such a restriction severely impaired First Amendment liberties and was therefore subject to stringent scrutiny. But it concluded that Michigan's compelling interest in preventing corporate money from dominating the electoral process justified the law.[210]

This takes us to *Citizens United*. In *Citizens United*, the Court faced a challenge to § 203 of the Bipartisan Campaign Reform Act of 2002, a federal law that prohibited corporations and unions from using their general treasury funds to make "electioneering communications"—speech within a brief period before an election that was either express advocacy for or against a specified candidate for federal office or its functional equivalent.[211] In *McConnell v. FEC*, the Court had upheld this provision, relying on *Austin*.[212] In *Citizens United*, a majority of the Court overruled *Austin* and this aspect of *McConnell*, striking down § 203. The Court held that the speech suppressed by § 203 was at the core of the First Amendment's protections and that (following *Bellotti*) the corporate identity of the speaker was irrelevant for First Amendment purposes. Can associational speech theory contribute to this debate?

Yes, it can contribute powerfully. The key question raised by *Citizens United* is one of corporate "rights": whether the corporate identity of a speaker should influence the scope of First Amendment protections. The majority said that it should not, while the dissent argued to the contrary that corporations

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206. 435 U.S. 765, 768 (1978) (internal quotation marks omitted).

207. *Id.* at 776, 784.

208. 494 U.S. 652 (1990).

209. *Id.* at 655.

210. *Id.* at 658-60.

211. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. § 441b (2006)); Citizens United v. FEC, 130 S. Ct. 876, 889-90 (2010); *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007) (concluding that constitutional considerations precluded the application of § 203 to any speech except express advocacy or speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").

212. 540 U.S. 93, 203-09 (2003).

lack full First Amendment rights. From an associational speech perspective, both sides asked the wrong question and therefore arrived at profoundly incorrect answers. The key issue is not the corporate form of the speaker but what *kind* of collective entity—that is to say, association—the speaker is. If the speaker is a form of association protected by the First Amendment, because it is an association that contributes to self-governance, then the association's speech explicating its views constitutes associational speech, entitled to the highest level of constitutional protection. The corporate form may be relevant to this question, but it cannot be decisive; surely some corporations constitute democratic associations at the core of the First Amendment's protections. Thus, the dissent's assertion that the speech of corporations can be flatly restricted seems clearly incorrect. Indeed, the associational speech perspective suggests that, contrary to the majority's assumption, sometimes such speech is entitled to *more* protection than individual speech because such associational speech contributes more directly to the core self-governance goals of the First Amendment. But a clarification is necessary here. As discussed in detail earlier,[213] not all associations fall within the protection of the First Amendment. Only associations whose primary goals are relevant to self-governance fall within this category. Associations that do not fall within this category, such as those whose primary goals are commercial or criminal, do not enjoy the same level of constitutional solicitude for their speech. From this perspective, the result reached by the Court in *Citizens United* is clearly correct on the facts of the case. Citizens United was a nonprofit corporation whose primary goal was to organize individuals who shared its (conservative) political views and to express those views.[214] It was quintessentially the sort of disruptive, democratic association that is at the heart of the First Amendment's protections for speech, association, and petitioning. The particular speech at issue in the litigation was a film, entitled *Hillary: The Movie*, that was highly critical of then-Senator Hillary Clinton, a candidate for the presidency. This movie was quintessentially associational speech relevant to self-governance. That Citizens United chose to organize itself in a corporate form, and to accept small amounts of contributions from for-profit corporations, cannot change the fact that in its structure, goals, and functions, it was a democratic association whose activities and speech furthered self-governance and thus merited protection.[215]

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213. *See supra* notes 102-109, 145-147 and accompanying text.

214. *See Citizens United*, 130 S. Ct. at 886-87; CITIZENS UNITED, http://www.citizensunited.org/about.aspx (last visited Sept. 5, 2010).

215. It should be noted that despite the obviously democratic character of the Citizens United organization, the Court concluded that the group did not fall within the category of associations granted constitutional protection under the *MCFL* test, *see supra* note 107,

Recognizing that the Court decided *Citizens United* correctly on its facts does not end difficulties here, however, because the majority's holding extended constitutional protection to political speech by *all* corporations, not just those like Citizens United. Indeed, the majority specifically refused to adopt a narrow approach limited to nonprofit corporations.[216] In that respect, the majority's decision is probably unjustified, at least from an associational speech perspective. Most for-profit corporations have the primary goal of making profits, a goal with no relevance to self-governance. These are not the sorts of associations protected by the First Amendment, and their speech is not associational speech for First Amendment purposes. I do not mean to suggest that the line between for-profit and nonprofit corporations (as the Court drew it in *Massachusetts Citizens for Life*[217]) is necessarily decisive here. There may be some technically for-profit corporations that are in practice primarily directed to goals of self-governance, just as there may be nonprofits whose goals are completely tangential to self-governance. The key here is not technical, legal classifications but rather a careful examination of facts. It is fair to say, however, that the vast majority of for-profit corporations—especially large, publicly held corporations—have primarily commercial goals, such that their speech is not associational speech. Given that, the majority in *Citizens United* was wrong to equate the speech of such corporations to the speech of groups like Citizens United itself. This is not to say that there may not be other, nonassociational principles that support extending First Amendment protections to political speech by commercially oriented corporations. That question is beyond the scope of this Article. But from an associational perspective, the holding in *Citizens United* is clearly overbroad because it grants protection to associations whose functions and goals are unrelated to the structural purposes of the First Amendment.[218]

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because Citizens United accepted a small amount of donations from nonprofit corporations. 130 S. Ct. at 891. This suggests another flaw in the *MCFL* test, aside from its excessive focus on expressive associations. *See supra* note 107. After all, why should a legitimately democratic association lose constitutional protection merely because it accepts *some* financial support from unprotected associations? There may well be room to exclude from protection associations that are merely façades for commercial interests, but if that is the goal of the *MCFL* test, then the solution is surely overbroad; it provides a bright-line rule at the expense of the genuine associational rights of such organizations as Citizens United.

216. The Court rejected on statutory grounds the Solicitor General's invitation to limit the holding to nonprofit corporations "funded overwhelmingly by individuals," through a slight modification of the *MCFL* test. 130 S. Ct. at 891-96.

217. *See supra* note 107.

218. The statute at issue in *Citizens United* regulates speech by both corporations and labor unions, though the Court did not discuss labor unions separately. Labor unions are a tough,

In conclusion, analyzing free speech as linked with and sometimes subsidiary to the rights of association and assembly helps to clarify some important areas of First Amendment doctrine. The question to which we now turn is whether the perspective of associational speech sheds light on more basic questions regarding free speech.

III. ASSOCIATION AND SPEECH—BROADER LESSONS

This Article has so far explored the relationship between the First Amendment right of free speech and the other provisions of the First Amendment, including the right of association. It has also explored the implications of that relationship for free speech doctrine. I close with some preliminary thoughts about what this Article's holistic approach to the First Amendment teaches us about more basic questions such as the nature of speech. I also consider some limitations of associational speech as a theory of the First Amendment.

The concept of associational speech is a lens through which the Free Speech, Assembly, and Petition Clauses can be read together, as connected and mutually reinforcing. The theory of associational speech views speech as a fundamentally collective, communal activity. Associational speech is about joining together, whether for a brief exchange of thoughts or for a more sustained period (in the form of associations and assemblies). Associational speech is *not* an atomistic, individual act. Yet because of the liberal, individualistic perspective that contemporary society brings to the Constitution, speech is generally viewed in highly individualistic terms. Such a vision of speech is most obvious in the various "self-fulfillment" theories of free speech,[219] but it is also more pervasive. Generally, theorists focus on the autonomous actions of the speaker, though occasionally the listener takes center stage.[220] But either way, speech is treated as the act of an individual

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in-between case because while arguably their goals are primarily economic, as with for-profit corporations, historically the union movement has had a strong political aspect to it, which suggests that protection is justified. On balance, I am inclined to the view that from an *associational* perspective, the political activities of unions—like those of commercial associations—are not entitled to First Amendment protection because such activities are incidental to unions' economic goals. *See supra* Section II.D. I admit, however, that the question is a close one. In addition, as with commercial associations, I leave open the possibility that there are *nonassociational* reasons why the political activities of unions should receive First Amendment protection.

219. *See supra* note 81 and accompanying text.

220. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (recognizing a First Amendment right of listeners that is "reciprocal" to the right to

acting alone. Of course, some speech today does fit this model—soapbox speakers in London's Hyde Park come to mind—but this perspective ignores the collective nature of most communication by speech. Speech generally involves multiple participants. Put differently, speech is not usually about *self*-expression; it is about bonding, associating, and attempting to find commonality.

Not all speech involves seeking cultural or political commonality of the sort fundamental to self-governance. Negotiating a contract is speech, but it is speech seeking a commercial agreement and therefore receives less constitutional protection. Furthermore, not all speech (as we understand it today) involves immediate, face-to-face association. The written word can join readers separated by vast distances and centuries. Broadcasting similarly involves fairly anonymous interactions, as do most electronic communications via the Internet (though not, significantly, e-mail). Such speech is not associational in the same sense as the speech discussed in this Article. Reconciling such speech to a theory of associational speech raises some complex questions.

One possible path to clarity here may be to distinguish between speech and publication. Speech, in this view, is communication to an audience from whom a response of some sort is expected. Often that response is an associational one. Publication, on the other hand, is one-way communication to an anonymous audience.[221] Telephone conversations, text messages, personal correspondence, and e-mail seem to fall within the category of speech, while large metropolitan newspapers, broadcast and cable television, websites, and blogs fall more in the category of publication. These latter activities do seem less associational than the former.

Nonetheless, an associational element often exists even in communications by publication. After all, even most publications are directed not at completely unknown, perhaps future audiences but at relatively identifiable contemporary

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speak); John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008) (defining communication as requiring an act of free will on the part of a listener).

221. This distinction might be traced to the differences between the Speech and Press Clauses of the First Amendment, on the view that, given the technology available in the Framing era, speech was necessarily a face-to-face affair, while the Press Clause protected printing and publication. I do not insist upon this reading, however, and do not wish to embroil myself in the ongoing debate over whether the Press Clause creates special protections for the institutional media. *Compare Citizens United*, 130 S. Ct. at 905-06, *and id.* at 928 n.6 (Scalia, J., concurring) (rejecting the view that the Press Clause provides special protections to the institutional press), *with id.* at 951-52 n.57 (Stevens, J., dissenting) (arguing that the institutional press does enjoy special protections under the Press Clause), *and* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633-34 (1975) (same).

audiences. Such publications in fact do advance important associational interests. When Martin Luther (allegedly) nailed his ninety-five theses to the door of the church in Wittenberg in 1517, he was in a sense "publishing" the theses, but the purpose and effect of his actions were of course to draw adherents to him in religious association—an associational effect that was magnified by the circulation of printed copies of his theses throughout Germany. Similarly, Tocqueville recognized the importance of newspapers in preserving and strengthening associations in early America.[222] And in the modern world, publications such as newsletters, organizational websites, mass e-mails, tweets, and Facebook pages play a central role in the formation and maintenance of associations, especially larger, national associations. Such tertiary associations,[223] while perhaps not as significant to value formation as more personalized associations, have a central role to play in self-governance by mobilizing large numbers of like-minded citizens independently of the government. Examples range from the NRA to the Sierra Club to the Tea Party movement to President Obama's political group, Organizing for America. Such associations could not exist, and certainly could not thrive, without publications, and from Tocqueville's time and before one of the primary roles of publications has been to foster such associations.

This Article does not contend, however, that all publications—or for that matter all speech—can be explained in associational terms. Communications by the mass media seem truly anonymous and do not fit easily within associational theory. Similarly, books directed at distant audiences, scientific publications, and many other types of speech and publication have goals that are distantly or not at all directed at association. Associational speech does not purport to be a universal theory of the First Amendment. It cannot explain all free speech and press doctrine, nor does it encompass all of the purposes and goals of the First Amendment. The more limited purpose of this Article is to highlight some of the relationships and interactions among different provisions of the First Amendment and to consider how an awareness of those relationships can inform certain areas of free speech law.

CONCLUSION

The goal of this Article has been modest. The Article has not tried to present a grand unified theory of the First Amendment or a lens through which all First Amendment doctrine can be analyzed. Instead, it has explored

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222. TOCQUEVILLE, *supra* note 71, at 518-20.

223. *See supra* note 201 and accompanying text.

relationships among the Free Speech, Assembly, and Petition Clauses of the First Amendment, as well as the right of free association recognized by the courts as implicitly protected by the Amendment, and the ways in which these relationships provide *one* perspective from which to understand the role of the First Amendment.

The Article has focused in particular on the relationship between free speech and association. Modern law tends to treat the associational right as subsidiary to free speech and tends to assume that the primary purpose of association is to facilitate speech. I have argued that this approach is ahistorical and incorrect. In fact, the speech and association rights, as well as the assembly and petition rights, have a primary, common goal: to enable self-governance. These rights do not exist in isolation but support and interact with each other. Association derives from assembly, assembly facilitates petitioning, and speech is closely tied to all of these activities. In this sense, then, the First Amendment does not create distinct rights; it protects a complex set of interrelated human activities that are central to the process of self-governance. The special focus of this Article has been the relationship between speech and association. In particular, I have argued that one of the critical roles of free speech is to facilitate association. In other words, speech is often subsidiary to association, rather than the converse. This is the theory of associational speech. The bulk of this Article has explored the role of associational speech and elucidated how understanding the role of free speech in associational terms can clarify many puzzling areas of First Amendment doctrine. Finally, the Article has identified and addressed some of the limits of associational speech as a theory of the First Amendment.

Recognizing the significance of associational principles in interpreting and understanding the First Amendment opens up many important areas of investigation, building upon the start made in this Article. One particularly fruitful avenue of investigation might be to explore the relationship between associational principles and the Religion Clauses of the First Amendment. The First Amendment, after all, begins with the prohibition against "law[s] respecting an establishment of religion, or prohibiting the free exercise thereof,"[224] and the Establishment and Free Exercise Clauses provide special and powerful protection for religious activities. The reasons for providing such protection are manifold, based in history and experience, but perhaps associational principles can provide some insight here. In a recent article, Paul Fricke argues that the Free Exercise Clause should be read to protect primarily the activities of religious groups, not individuals—what he calls the

224. U.S. CONST. amend. I.

"associational thesis."[225] Other scholars have also in recent years been exploring the institutional aspects of the Religion Clauses.[226] This scholarship resonates in obvious ways with the broader thesis of this Article. Future scholarship may wish to explore the ways in which First Amendment protection of religious institutions—that is, religious associations—relates to self-governance.[227] That religious associations play an important role in self-governance seems clear. After all, religious groups contribute critically to value formation and provide a setting for joint deliberation for vast numbers of citizens. They may focus primarily on religious rather than overtly political questions, but no clear line can be drawn between religion and politics in this area. In addition, religious groups have been important participants in the democratic process itself.[228] Indeed, it would be safe to say that American politics would be unrecognizable without the active participation of overtly religious associations. The Religion Clauses, by protecting the autonomy of religious associations,[229] may thus contribute to the First Amendment's overarching goal of protecting and enabling the process of self-governance.

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225. Paul C. Fricke, *The Associational Thesis: A New Logic for Free Exercise Jurisprudence*, 53 HOW. L.J. 133 (2009).

226. *See, e.g.*, Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

227. I have explored this question to some extent in BHAGWAT, *supra* note 78, at 121-24 (discussing the role of religious institutions in self-governance).

228. For example, religious leaders such as Elijah Parsons Lovejoy played an important role in the antebellum Abolitionist movement. *See* Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997). In the twentieth century, religious leaders and groups were central players in the temperance movement, *see* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920, at 36-37 (1995); ROBERT A. HOHNER, PROHIBITION AND POLITICS: THE LIFE OF JAMES CANNON, JR. 72-73 (1999); THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933, at 114-15 (1998); the civil rights movement (in which the black church and church leaders such as the Reverend Martin Luther King, Jr., were primary leaders), *see generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963 (1988); and the rise of the religious right in the 1980s, *see generally* WILLIAM C. MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA chs. 7-10 (2005). More recently, religious groups such as the Mormon and Catholic Churches have played important roles in the debate over same-sex marriage. *See, e.g.*, Matthai Kuruvila, *To Pass Measure, Catholics and Mormons Allied*, S.F. CHRON., Nov. 10, 2008, at A1.

229. For a summary of judicial decisions protecting church autonomy, see Horwitz, *supra* note 226, at 116-20.