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The Unsettling "Well-Settled" Law of Freedom of Association

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This Article argues that the Supreme Court's categories of expressive and intimate association first announced in the 1984 decision, Roberts v. United States Jaycees*, are neither well-settled nor defensible. These indefensible categories matter deeply to groups that have sought to maintain an unpopular composition and message in the face of antidiscrimination laws. These groups have been denied associational protections. They have been forced to change their composition—and therefore their message. They no longer exist in the form they once held and desired to maintain.*

The Roberts *categories of intimate and expressive association are at least partly to blame. These categories set in place a framework in which courts sidestep the hard work of weighing the constitutional values that shape the laws that bind us. This Article exposes the problems inherent in these categories and calls for a meaningful constitutional inquiry into laws impinging upon group autonomy. It suggests that the Court eliminate the categories of intimate and expressive association and turn instead to the right of assembly. Our right to assemble—to form relationships, to gather, to exist as groups of our choosing—is fundamental to liberty and genuine pluralism.*

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JOHN D. INAZU*

I. INTRODUCTION

The women's soccer team at the University of North Carolina has won twenty national championships, an achievement unmatched anywhere else in amateur athletics. The LPGA hosts a women's professional golf tour with nationally televised tournaments and roughly fifty million dollars in annual prize money. Music has thrived (or perhaps suffered, depending on one's perspective) with all-male groups like the Beatles, the Righteous Brothers, and the Jonas Brothers, and all-female groups like the Pointer Sisters, the Indigo Girls, and the Dixie Chicks. All-black choirs perform gospel music, and the Mormon Tabernacle Choir consists of, well, Mormons. The Talmudical Institute of Upstate New York, the Holy Trinity Orthodox Seminary (Russian Orthodox), and Morehouse College admit only men to their programs; Barnard College, Bryn Mawr College, and Wellesley College admit only women. During the women's movement in the early twentieth century, women organized around banner meetings, balls, swimming races, potato-sack races, baby shows, meals, pageants, and teatimes.[1] Gay organizations "'have relied on exclusively

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[1] LINDA LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 3 (1997). Lumsden has suggested that "virtually the entire suffrage story can be told through the prism of the right of assembly." *Id.* at 144. Iris Marion Young has argued that:

> [Female separatism] promoted the empowerment of women through self-organization, the creation of separate and safe spaces where women could share and analyze their experiences, voice their anger, play with and create bonds with one another, and develop new and better institutions and practices.
>
> Most elements of the contemporary women's movement have been separatist to some degree. Separatists seeking to live as much of their lives as possible in women-only institutions were largely responsible for the creation of the women's culture that burst forth all over the United States by the mid 1970s, and continues to

gay environments in which to feel safe, to build relationships, and to develop political strategy,'" including "many exclusively gay social and activity clubs, retreats, vacations, and professional organizations."[2] Sometimes discrimination is a good thing.

Of course, discrimination also has its costs. Those excluded—the Salt Lake City atheist with perfect pitch, the male golfer with limited swing velocity but machine-like precision—are denied opportunities, privileges, and relationships they might have otherwise had. They may be harmed economically, socially, and psychologically.[3] When groups exclude based upon characteristics like race, gender, or sexual orientation, the psychological harm of exclusion may also extend well beyond those who have actually sought acceptance to others who share their characteristics. For all of these reasons, there is much to be said for an antidiscrimination norm and the value of equality that underlies it.

But our constitutionalism also includes values other than equality,

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> claim the loyalty of millions of women—in the form of music, poetry, spirituality, literature, celebrations, festivals, and dances. Whether drawing on images of Amazonian grandeur, recovering and revaluing traditional women's arts, like quilting and weaving, or inventing new rituals based on medieval witchcraft, the development of such expressions of women's culture gave many feminists images of a female-centered beauty and strength entirely outside capitalist patriarchal definitions of feminine pulchritude. The separatist impulse also fostered the development of the many autonomous women's institutions and services that have concretely improved the lives of many women, whether feminists or not—such as health clinics, battered women's shelters, rape crisis centers, and women's coffeehouses and bookstores.

IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 161–62 (1990) (internal citation omitted).

[2] Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371) [hereinafter Brief in Support of Petitioner] (citations omitted) (internal quotation marks omitted). For a history of the early gay rights movement and its reliance on freedom of association, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1525–33 (2001). Carpenter notes that "[t]he rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of vigorous protection for First Amendment freedom, especially the freedom of association." *Id.* at 1532–33*; see also* Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 659–60 (1st Cir. 1974) ("Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgement of associational rights, even if assumed to be an indirect one."); Brief for Petitionerat 30, Martinez, 130 S. Ct. 2971 (No. 08-1371) [hereinafter Brief for Petitioner] ("In an earlier era, public universities frequently attempted to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior. The courts made short shrift of those policies." (citing Gay & Lesbian Student Ass'n v. Gohn, 850 F.2d 361, 366 (8th Cir. 1988))).

[3] Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043, 1052 (2006) ("The feeling of social isolation that results from private discrimination can be psychologically devastating. This is especially true for children, who are particularly prone to question their own self-worth in reaction to discrimination from their peers, but the effects hold for adults as well. Private discrimination can have a tremendous impact on the psychological well-being of even the most self-assured adults.").

including the value of group autonomy.[4] When these values clash—as they inevitably do whenever antidiscrimination law challenges a group's right to exclude—we ought to encourage a weighing of these constitutional values rather than a wholesale adoption of one over the other.[5] This is no easy task. Even the polarized ways in which we describe the clash of values points to the inherent conflict and the stakes at issue: what Andrew Koppelman and Tobias Wolff characterize as a "right to discriminate"[6] might also be called "a right to exist."[7]

The Supreme Court has chosen to address these challenges through the categories of "intimate" and "expressive" association. Koppelman and Wolff have recently intimated that these categories, first announced in the 1984 decision, *Roberts v. United States Jaycees*,[8] reflect a "well-settled law of freedom of association."[9] Whether the sixteen years between *Roberts* and the Court's 2000 decision in *Boy Scouts of America v. Dale*[10] established an "*ancien regime*"[11] is open to question. But the problem with intimate and expressive association is not simply that they are less entrenched than Koppelman and Wolff assert—it is that they are indefensible. Intimate association offers no constitutional protections beyond those afforded by the right of privacy. Expressive association fails

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[4] I have chosen to call attention to the value of *group autonomy* rather than *liberty* because group autonomy bears an intrinsic relationship to associational freedom while liberty risks being construed in individualistic ways.

[5] The perennial tension between group autonomy and equality is one reason that John Rawls fails to provide a persuasive account of freedom of association in attempting to distinguish between the "basic structure" and the "background society." JOHN RAWLS, A THEORY OF JUSTICE 6, 79, 386 (1971). For one critique among many of Rawls along these lines, see NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 53–55 (1998) [hereinafter ROSENBLUM, MEMBERSHIP AND MORALS]. Rosenblum concludes that "the morality of association provides a pluralist background culture, much of it incongruent with liberal democracy." *Id.* at 55.

[6] ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION xi (2009).

[7] *Cf.* Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006) ("[F]orcing [the Christian Legal Society] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist."); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 142 (1984) ("When an institution that is voluntary in membership cannot define the conditions of belonging, that institution in fact ceases to exist.").

[8] 468 U.S. 609 (1984).

[9] KOPPELMAN & WOLFF, *supra* note 6, at x–xi. I take Koppelman and Wolff's claim to be that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), "capriciously and destructively" disrupted the framework first set in place by *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *Id.* at x–xi. ("Until 2000, . . . [a]ssociations that conveyed messages were entitled to be free of restrictions, including restrictions on their membership practices, that interfered with the dissemination of those messages. Intimate associations of small groups of people had a stronger right, to refuse association with anyone for any reason."). Koppelman and Wolff may have a broader history in mind. For example, they acknowledge the "germinal case" of the right of association in *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). *Id.* at 18–22. But it seems clear that *Roberts* does most of the work that they want to embrace as the "well-settled law of freedom of association." *Id.* at xi.

[10] 530 U.S. 640 (2000).

[11] KOPPELMAN & WOLFF, *supra* note 6, at xi.

to account for the expressive potential inherent in all groups.

Intimate association and expressive association are indefensible categories, but they matter deeply. They matter to the Jaycees. They matter to the Chi Iota Colony of the Alpha Epsilon Pi fraternity, a now defunct Jewish social group at the College of Staten Island that had sought to limit its membership to men.[12] They matter to the Christian Legal Society at Hastings Law School, a religious student group denied official recognition because of its desire to limit its membership to Christians who adhered to its moral code, which included a prohibition on homosexual conduct.[13] Each of these groups sought to maintain an unpopular composition and message in the face of antidiscrimination laws. Each was denied associational protection. Each was forced to change its composition—and therefore its message. Each no longer exists in the form it once held and desired to maintain.

The demise of associational protections is at least partially attributable to the *Roberts* categories of intimate and expressive association. These categories set in place a framework that allows courts to sidestep the hard work of weighing the constitutional values that shape the law that binds us. This Article exposes the problems inherent in these categories and calls for a meaningful constitutional inquiry into laws impinging upon group autonomy. Absent such an inquiry, we are left with antidiscrimination norms unchecked by principles of group autonomy. That conclusion was recently embraced by the Ninth Circuit in denying constitutional protections to a high school bible club that sought to limit its membership to Christians:

> States have the constitutional authority to enact legislation prohibiting invidious discrimination. . . . [W]e hold that the requirement that members [of a high school bible club] possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians . . . , [thus violating] the District's non-discrimination policies. . . .[14]

The Ninth's Circuit's reasoning is troubling, but it in some ways represents the logical end of the current doctrine of association.

This Article examines the reasoning that has led courts to conclude that a Christian group that excludes non-Christians is for that reason invidiously discriminating. Part II revisits the initial recognition of

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[12] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 (2d Cir. 2007).

[13] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980–81 (2010).

[14] Truth v. Kent Sch. Dist., 542 F.3d 634, 644–45 (9th Cir. 2008). The Ninth Circuit relied exclusively on *Truth* in rejecting the claims of the Christian Legal Society. *See* Christian Legal Soc'y v. Kane, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 795 (2009), *aff'd and remanded*, 130 S. Ct. 2971 (2010).

intimate and expressive association in *Roberts*. Parts III and IV trace the roots of intimate and expressive association, respectively. Part V details how the application of these categories in *Roberts* undermined the associational claims of the Jaycees. Part VI uses the Chi Iota and Christian Legal Society cases to illustrate how the *Roberts* framework continues to damage associational freedom. Finally, Part VII proposes that the Court remedy the problems in *Roberts* by eliminating the categories of intimate and expressive association. It suggests that we recover a different constitutional right that offers better historical, theoretical, and doctrinal resources for strengthening group autonomy and the possibility of dissent: the right of assembly.[15]

II. CATEGORIZING THE RIGHT OF ASSOCIATION

The categories of intimate and expressive association first emerged in Justice Brennan's 1984 *Roberts* opinion.[16] Brennan announced that the Court had identified two distinct constitutional sources for the right of association.[17] One line of decisions protected "intimate association" as "a fundamental element of personal liberty."[18] Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[19] Brennan contended that intimate and expressive association represented, respectively, the "intrinsic and instrumental features of constitutionally protected association."[20] These differences meant that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."[21]

Brennan's arguments implied two corollaries: (1) some associations were "nonintimate," and (2) some associations were "nonexpressive." His reasoning thus suggested four possible categories of associations: (1) intimate expressive associations,[22] (2) intimate nonexpressive associations,

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[15] *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010) [hereinafter Inazu, *Forgotten Freedom*] (describing the historical significance of the right of assembly).

[16] The Court first recognized a constitutional right of association in *NAACP v. Alabama* ex. rel *Patterson*, 357 U.S. 449, 466 (1958). For an overview of the origins of association and its political, doctrinal, and theoretical underpinnings, see generally John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) [hereinafter Inazu, *Strange Origins*].

[17] Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

[18] *Id.*

[19] *Id.* at 618.

[20] *Id.*

[21] *Id.*

[22] *See id.* ("The intrinsic and instrumental features of constitutionally protected association may, of course, coincide.").

(3) nonintimate expressive associations, and (4) nonintimate nonexpressive associations. Since *Roberts*, it has become clear that there is no constitutionally significant distinction between the first two categories; intimate associations receive the highest level of constitutional protection regardless of whether they are also expressive.[23]

The same is not true for the distinctions between the other categories. Brennan's parsing of intrinsic and instrumental value and his reference to the varying "nature and degree of constitutional protection" for intimate and expressive associations signaled a clear privileging of the former over the latter.[24] And the category of expressive association drew a line that left nonintimate nonexpressive associations—which would include most of the groups mentioned at the beginning of this Article—without any meaningful constitutional protections.[25]

The *Roberts* framework thus created the following hierarchically ordered categories of associations:

A. Intimate Associations

B. Nonintimate Expressive Associations

C. Nonintimate Nonexpressive Associations

It turns out that the groups in B sometimes lose, and the groups in C always lose.

What is more, once a court places a group within either B or C, a

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[23] *See, e.g.*, Montgomery v. Stefaniak, 410 F.3d 933, 937 (7th Cir. 2005); Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 942 (6th Cir. 2004); City of Bremerton v. Widell, 51 P.3d 733, 741 (Wash. 2002) (en banc).

[24] Brennan's language did not expressly elevate intimate over expressive association, but it has been widely interpreted as having made this distinction. *See infra* note 25 (collecting cases in which courts have applied less than strict scrutiny to laws impinging upon expressive association); *cf.* KOPPELMAN & WOLFF, *supra* note 6, at x (explaining that, under *Roberts*, "[i]ntimate associations of small groups of people had a stronger right [than expressive associations], to refuse association with anyone for any reason"); AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 41 (1995) (contending that Brennan regarded expressive association "as instrumental and therefore subject to greater government intrusion"); David E. Bernstein, *Expressive Association After Dale*, 21 SOC. PHIL. & POL'Y. 195, 202 (2004) [hereinafter Bernstein, *Expressive Association*] ("The Court's apparent disdain for expressive association claims had a marked effect on lower courts."); George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35, 46 (Amy Gutmann ed., 1998) ("Running through Brennan's opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones."); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 532 n.209 (2001) ("In *Roberts*, Justice Brennan described a range of associations, each deserving of different levels of Constitutional protection. While the right to 'intimate' association . . . is 'intrinsic' and worthy of the highest Constitutional protection, . . . the right of 'expressive' association [is] an instrumental right, and thus accorded less absolute protection." (citing *Roberts*, 468 U.S. at 618–20)).

[25] *See, e.g.*, City of Dall. v. Stanglin, 490 U.S. 19, 23–28 (1989) (applying rational basis scrutiny to a city ordinance governing activity that qualified neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts*); Conti v. City of Fremont, 919 F.2d 1385, 1388 (9th Cir. 1990) ("[A]n activity receives no special first amendment protection if it qualifies neither as a form of 'intimate association' nor as a form of 'expressive association,' as those terms were described in *Roberts*."); Swank v. Smart, 898 F.2d 1247, 1251–52 (7th Cir. 1990) (concluding that the First Amendment does not protect nonintimate nonexpressive associations).

generic appeal to the state's interest in eradicating discrimination usually trumps the group's autonomy.[26] In other words, the precise harms that may or may not be caused by the group do not really matter. Following the Supreme Court's lead in *Roberts*, most judicial opinions weighing antidiscrimination objectives against group autonomy make little effort to link the specific remedy—forced inclusion in a particular group—to the specific harm—the effects of discrimination by that group in its particular social context.[27]

Consider the Court's analysis in *Roberts* itself. Justice Brennan's opinion appealed to "Minnesota's compelling interest in eradicating discrimination against its female citizens . . . ."[28] He reasoned that Minnesota furthered that compelling interest by assuring women equal access to the leadership skills, business contacts, and employment promotions offered by the Jaycees.[29] But the national Jaycees already allowed women to join as Associate Individual Members, a status that presumably afforded them many of these business opportunities—the associate status precluded only voting, holding office, and eligibility for national awards, but women could "otherwise participate fully in Jaycee activities."[30] Moreover, the Minneapolis and St. Paul chapters of the Jaycees had, in violation of the national organization's policies, accepted women as full members for ten years.[31]

Roberts's oft-forgotten procedural posture matters here. The litigation began when members of the Minneapolis and St. Paul chapters of the Jaycees brought an administrative enforcement action of the Minnesota Human Rights Act[32] against the national organization after it threatened to

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[26] Koppelman and Wolff note that while *Roberts* introduced a "balancing test" when "interference with membership . . . demonstrably interferes with expressive practice," as a practical matter, "free association claims unrelated to viewpoint discrimination always lost in the Supreme Court under this standard." KOPPELMAN & WOLFF, *supra* note 6, at 20.

[27] *Cf.* Bernstein, *Expressive Association*, *supra* note 24, at 202 ("Following Justice Brennan's opinion in *Roberts*, lower federal courts and state supreme courts routinely held that the right of expressive association had to yield to antidiscrimination statutes."); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 132 (2000) ("One striking feature of both *Roberts* and *Dale* is the ease with which these opinions hold that the antidiscrimination principle counts as a compelling state interest that limits the ability of voluntary associations to determine their own membership.").

[28] *Roberts*, 468 U.S. at 623.

[29] *Id.* at 626.

[30] U.S. Jaycees v. McClure, 709 F.2d 1560, 1563 (8th Cir. 1983); *cf. Roberts*, 468 U.S. at 621 ("[D]espite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions.").

[31] *Roberts*, 468 U.S. at 614.

[32] MINN. STAT. § 363.03(3) (1982) (specifying that it is an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex"). The federal courts deferred to the Minnesota Supreme Court for the threshold determination of whether the Jaycees fell under the scope of the Act as a "public accommodation." *See Roberts*, 468 U.S. at 615–17.

revoke their charters.[33] The national organization responded by suing state officials in federal district court to prevent enforcement of the Act.[34] But the underlying dispute and the immediate effects of the holding of the case were always internal to the Jaycees.[35]

For all of these reasons, it is unclear how forcing the national organization to recognize women as full members helped to eradicate gender discrimination in Minnesota by increasing access to the leadership skills, business contacts, and employment promotions offered by the Jaycees. Even if the Minneapolis and St. Paul chapters had denied full membership to women, it seems doubtful that making women eligible for leadership positions or national awards would have advanced Minnesota's statutory interests significantly beyond the networking and social opportunities already afforded by their limited membership status. Justice Brennan's *Roberts* opinion contained no explanation of why *this* remedy helped to eradicate gender discrimination in *these* circumstances sufficient to trump the autonomy of *this* group.[36] And his analysis did not only shortchange the Jaycees. The framework of intimate and expressive association that crystallized in *Roberts* obscured the need to balance equality against group autonomy more generally, in part because Brennan never adequately articulated the theoretical underpinnings of his two categories of association.

The next two sections will show why the *Roberts* categories are fundamentally misguided and how they hinder the important value of group autonomy. They explore in more detail the roots of these categories and the theoretical challenges they create. If a coherent theory exists to justify intimate and expressive association, it has yet to be identified.

III. INTIMATE ASSOCIATION

The category of intimate association likely originated in a 1980 article by Kenneth Karst in the *Yale Law Journal*.[37] Karst's article, in turn, drew from Justice Douglas's opinion in *Griswold v. Connecticut*.[38] This section

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[33] *Roberts*, 468 U.S. at 614.

[34] *Id*. at 615.

[35] Moreover, it is plausible—perhaps even likely—that the vision favoring the full inclusion of women would have won out in the national organization absent interference by the courts. As Judge Arnold pointed out in the lower court opinion, the question about whether to admit women as full members had been vigorously debated within the organization, and while resolutions favoring the admission of women had been defeated on three occasions prior to the *Roberts* litigation, each time a larger minority had voted in favor of the resolution. *McClure*, 709 F.2d at 1561–62, & n.1.

[36] William Marshall observes that the Court offered a "one-sided" interpretation of the values conflict in *Roberts*: "While the associational rights of the Jaycees were considered to be virtually nonexistent, the state interests were found to be particularly weighty because of the social and business prominence of the Jaycees organization." William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 74 (1986).

[37] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 (1980).

[38] 381 U.S. 479 (1965).

traces these precursors to intimate association and the ways in which Brennan's *Roberts* opinion adopted them.

A. Griswold *and the Right of Association*

Griswold struck down a Connecticut law that prohibited the use of contraceptives and the giving of medical advice about their use, and specifically the application of this law to the use of contraceptives by married persons.[39] Chief Justice Warren assigned the opinion to Douglas. In a draft that he shared only with Brennan, Douglas relied almost entirely on the First Amendment right of association,[40] which the Court had first recognized seven years earlier in *NAACP v. Alabama* ex rel. *Patterson*.[41] Douglas argued that while marriage did "not fit precisely any of the categories of First Amendment rights," it was "a form of association as vital in the life of a man or woman as any other, and perhaps more so."[42] He reasoned that "[w]e would, indeed, have difficulty protecting the intimacies of one's relations to [the] NAACP and not the intimacies of one's marriage relation."[43]

After reviewing the draft, Brennan urged Douglas to abandon his exclusive reliance on the right of association.[44] Brennan argued that marriage did not fall within the kind of association that the Court had recognized for purposes of political advocacy.[45] He suggested that Douglas instead analogize the Court's recognition of the right of association to a similar broadening of privacy into a constitutional right. Because neither privacy nor association could be found in the text of the Constitution, if association could be recognized as a freestanding constitutional right, then so could privacy.[46] In Douglas's memorable formulation: "[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give

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[39] *Id.* at 480, 485.

[40] BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 237 (1985). Douglas's only mention of privacy in the draft came in the concluding paragraph: "The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and association that make up a goodly part of the penumbra of the Constitution and Bill of Rights." *Id.* at 236 (quoting Douglas's draft opinion). Schwartz writes that Douglas's sole mention of privacy in the last sentence of his draft "is scarcely enough to make it the foundation for any constitutional right of privacy, particularly for the broadside right established by the final *Griswold* opinion." *Id.* at 230.

[41] 357 U.S. 449, 462 (1958). For a discussion of the Court's initial recognition of a right of association in this case, see Inazu, *Strange Origins*, *supra* note 16, at 485.

[42] SCHWARTZ, *supra* note 40, at 235 (quoting Douglas's draft opinion).

[43] *Id.* at 235.

[44] *Id.* at 237. Brennan argued that Douglas's expanded view of association would extend First Amendment protection to the Communist Party. *Id.* at 237–38.

[45] *Id.* at 237.

[46] *Id.* at 238.

them life and substance."[47]

The connection between association and privacy had been established in the some of the earliest right of association cases.[48] In fact, Justice Harlan's seminal opinion in *NAACP v. Alabama* had referred to "the vital relationship between freedom to associate and privacy in one's associations."[49] But associational privacy drew from different values than the sense of individual autonomy conveyed by the right "to be let alone."[50] Privacy in the early right of association cases had more to do with protecting the boundaries of *group* autonomy. As Harlan had argued in *NAACP v. Alabama,* "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[51] That kind of privacy did not mean "not public"—in fact, groups like the NAACP and the Communist Party had actively sought public visibility and recognition. It was in this group context that Douglas had first argued for "the need for a pervasive right of privacy against government intrusion" and a "right of privacy implicit in the First Amendment [that] creates an area into which the Government may not enter."[52]

In *Griswold*, Douglas linked his earlier understanding of associational privacy to marriage by emphasizing the human relationships common to all associations:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[53]

This relational focus may have drawn an unlikely connection between a married couple and the NAACP, but it resisted the kind individualism

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[47] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[48] *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 560 (1963) (Douglas, J., concurring) (noting restrictions set forth by the Fourteenth Amendment that limit states' efforts "to investigate people, their ideas, their activities"); Sweezy v. New Hampshire, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring) (acknowledging "the right of a citizen to political privacy, as protected by the Fourteenth Amendment").

[49] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[50] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (internal quotation marks omitted).

[51] *NAACP*, 357 U.S. at 462.

[52] *Gibson*, 372 U.S. at 569–70 (Douglas, J., concurring). Douglas reiterated these arguments in a lecture that he delivered at Brown University which was published subsequently in the *Columbia Law Review*. William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1363, 1367 (1963).

[53] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

that equated associational privacy with "the privacy of private life."[54]

Seven years later, Brennan upended that relational focus in *Eisenstadt v. Baird*, which extended *Griswold*'s holding to unmarried persons desiring access to contraception.[55] His majority opinion relied heavily on *Griswold*, but not on Douglas's reasoning:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[56]

Brennan's language thus converted an understanding of associational freedom rooted in relationships between people to a right of individual autonomy. As H. Jefferson Powell has argued, "Brennan's reading of *Griswold* turned Douglas's reasoning on its head," and *Eisenstadt* signaled "the identification of a radically individualistic liberalism as the moral content of American constitutionalism."[57]

B. *Karst's Intimate Association*

Karst's 1980 article sought to recover the relational emphasis in *Griswold* that Brennan had abandoned in *Eisenstadt*.[58] He began by noting that Douglas had focused specifically on the association of marriage. Karst contended that this language had established a freedom of "'intimate association,'" which he suggested was "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."[59]

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[54] Warren & Brandeis, *supra* note 50, at 215.

[55] 405 U.S. 438, 443 (1972).

[56] *Id.* at 453 (emphasis omitted).

[57] H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 176, 177 (1993).

[58] Although Karst's interpretation of *Griswold* was more nuanced than Brennan's opinions in either *Eisenstadt* or *Roberts*, Karst's own liberal individualism prevented him from fully developing Douglas's non-individualistic arguments about association. *See, e.g.*, Karst, *supra* note 37, at 626 (footnotes omitted) ("[T]he constitutional freedom of intimate association thus serves as an organizing principle in a number of associational contexts by promoting awareness of the importance of [certain] values to the development of a sense of individuality"); *cf.* Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993) (placing Karst in a class of scholars who "still structure their accounts" on the premise that "[i]lliberal, undemocratic beliefs and practices [are] seen only as expressions of ignorance and prejudice, destined to marginality by their lack of rational defenses").

[59] Karst, *supra* note 37, at 629.

The problem with Karst's argument is its implicit corollary that some groups are "nonintimate associations," and that a constitutionally significant line can be drawn between intimate and nonintimate associations. The fundamental critique of both Karst's argument in this subsection and Brennan's argument in the following subsection is that they fail on their own terms to provide a defensible rationale for their line-drawing. They fail for the simple reason that all of the values, benefits, and attributes that they assign to intimate associations are equally applicable to many, if not most, nonintimate associations.[60]

Karst at times recognized the broader applicability of his claims. He noted that "[a]n intimate association, *like any group*, is more than the sum of its members; it is a new being, a collective individuality with a life of its own."[61] And he wrote that "[o]ne of the points of *any* freedom of association must be to let people make their own definitions of community."[62] Yet despite these occasional concessions, Karst repeatedly placed special value on the relationships that form intimate associations.

For example, Karst repeatedly emphasized the importance of "close friendship" in intimate association.[63] For Karst, it was "plain that the values of intimate association may be realized in friendships involving neither sexual intimacy nor family ties," and that "[a]ny view of intimate association focused on associational values must therefore include friendship . . . ."[64] He also tied intimate association to the kinds of bonds that form through personal interaction: the "chief value in intimate association is the opportunity to satisfy" the "need to love and be loved";[65] "[t]he opportunity to be cared for by another in an intimate association is

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[60] The one distinction that may have been plausible when Karst wrote in 1980 is no longer true today. Karst claimed that intimate association "implies an expectation of access of one person to another particular person's physical presence, some opportunity for face-to-face encounter." *Id.* at 630. While physical presence may have been a distinguishing characteristic of intimate associations thirty years ago, that is no longer true today. Many people now bridge physical separation and connect in emotionally rich ways with friends and family through online social networking sites, blogs, and video conferencing. Others project their identities or create new ones through virtual representations ranging from simple text (like an online profile) to avatars. Some of these online relationships foster deep feelings of intimacy and connectedness. *See, e.g.*, HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (revised ed., 2000); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1171–72 (2000) (noting that in online forums, "pregnant women share experiences; the elderly console each other after losing loved ones; patients fighting cancer provide information and support; disabled children find friends who do not judge them immediately on their disability; users share stories about drug addiction; and gays and lesbians on the brink of coming out give each other emotional shelter").

[61] Karst, *supra* note 37, at 629 (emphasis added).

[62] *Id.* at 688 (emphasis added).

[63] *Id.* at 629 ("The connecting links that distinguish [an intimate] association from, say, membership in the PTA may take the form of living in the same quarters, or sexual intimacy, or blood ties, or a formal relationship, or some mixtures of these, but in principle the idea of intimate association also includes close friendship, with or without any such links.").

[64] *Id.* at 629 n.26.

[65] *Id.* at 632.

normally complemented by the opportunity for caring" that requires a "personal commitment";[66] "[c]aring for an intimate requires taking the trouble to know him and deal with him as a whole person, not just as the occupant of a role," which "limits the number of intimate associations any one person can have at any one time, or even in a lifetime."[67]

Karst's attention to friendship and personal bonds is eminently reasonable. But the potential for and the existence of such close friendships can be found in many kinds of associations, including many that would not meet the current legal definition of intimate associations. It may well be that attributes of friendship and personal bonds distinguish small or local groups from large and impersonal groups such as behemoth mailing list organizations. But surely fraternities, student groups, and local chapters of civic associations are capable of producing "close friendships" of the kind that Karst describes.

To be sure, some relationships between members of these groups will be superficial and casual. But this is also true of the relationships that constitute many intimate associations. Karst recognized that protecting the values he saw as inherent in intimate association required offering "some protection to casual associations as well as lasting ones."[68] In fact, "[o]ne reason for extending constitutional protection to casual intimate associations is that they may ripen into durable intimate associations."[69] Karst argued that "[a] doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including states of mind."[70] It is hard to understand why these principles would not apply equally to nonintimate associations.

Karst's other attempts to mark the bounds of intimate association are similarly unavailing:

> An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others.[71]
>
> . . . .
>
> Transient or enduring, chosen or not, our intimate associations profoundly affect our personalities and our senses of self. When they are chosen, they take on

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[66] *Id.*

[67] *Id.* at 634–35.

[68] *Id.* at 633.

[69] *Id.*; *cf. id.* at 688 ("[A]ny constitutional protection of enduring sexual relationships can be effective only if it is extended to the choice to engage in casual ones . . . .").

[70] *Id.* at 633.

[71] *Id.* at 636.

> expressive dimensions as statements defining ourselves.[72]
>
> . . . .
>
> When two people [voluntarily enter into an intimate association], they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags.[73]
>
> . . . .
>
> First Amendment doctrine cautions us to be sensitive to the need to protect intimate associations that are unconventional or that may offend a majority of the community.[74]

Each of these claims applies with equal force if we remove the adjective "intimate." Some associations and associative acts will lack significance for some people, but that is true for both intimate and nonintimate associations. The extent to which expression, self-definition, and unconventional norms unfold in a group's practices is not contingent upon whether the group is an intimate association.

Some of Karst's conceptual problems likely arose because he was not explicitly attempting to distinguish intimate from nonintimate associations. He appears to focus on trying to develop a category of intimate association as an alternative to the then-nascent right of privacy,[75] and to use the right of intimate association to advance legal protections for homosexual relationships.[76] Today, these particular goals are unlikely to be advanced by the right of intimate association.[77] We need look no further than

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[72] *Id.* at 637.

[73] *Id.* at 654.

[74] *Id.* at 658.

[75] Karst regarded the freedom of intimate association as on "the cutting edge" of "the current revival of substantive due process." *Id.* at 665. In contrast, he believed that "[c]alling the rights in *Griswold* and *Roe* rights of privacy invites the rejection of comparable claims on the ground that, after all, they do not rest on any concerns about control over the disclosure of information." *Id.* at 664.

[76] *See, e.g.*, *id.* at 672 ("[A]s I have argued in connection with the prohibition on homosexual conduct, there is no legitimacy in an effort by the state to advance one view of morals by preventing the expression of another view."); *id.* at 682 ("By now it will be obvious that the freedom of intimate association extends to homosexual associations as it does to heterosexual ones."); *id.* at 685 ("The chief importance of the freedom of intimate association as an organizing principle in the area of homosexual relationships is that it lets us see how closely homosexual associations resemble marriage and other heterosexual associations.").

[77] Toni Massaro has recognized the "problems" with relying on intimate association to advance gay rights: "While a robust freedom of association principle promises greater freedom to gay men and lesbians to choose their companions, it also promises greater freedom to others to choose not to associate with gay men and lesbians." Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 66 (1996). Massaro identifies a risk in gay rights scholars advocating for neutral applications of the right of association: "Unless we aim for an asymmetrical version of freedom of association, or one that is zoned in a manner similar to that of freedom of expression, this call to neutrality, taken alone, may be the riskiest approach of all." *Id.* *But see* Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 311–12 (2006) (arguing for a greater role for intimate association in gay rights).

Lawrence v. Texas,[78] the Supreme Court's overruling of its decision in *Bowers v. Hardwick*.[79] *Bowers* drew two dissents, one from Justice Stevens that emphasized *Griswold*'s liberty arguments,[80] and one from Justice Blackmun that drew upon *Griswold*'s intimate association arguments and twice cited Karst's article.[81] *Lawrence* relied on Stevens's dissent and never mentioned the right of intimate association.[82]

C. *Brennan's Intimate Association*

Brennan's *Roberts* opinion never cites Karst's article, but the intellectual debt is apparent.[83] And while Karst had focused on increasing protections for intimate associations, Brennan's use of the category of intimate association degraded protections for nonintimate ones.[84] He

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[78] 539 U.S. 558, 578 (2003).

[79] 478 U.S. 186 (1986).

[80] *Id.* at 216 (Stevens, J., dissenting).

[81] *Id.* at 204–05, 211 (Blackmun, J., dissenting) (citing Karst, *supra* note 37, at 627, 637).

[82] *See Lawrence*, 539 U.S. at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."). Nancy Marcus has suggested that "principles of intimate association underlie the *Lawrence* decision" and that "*Lawrence* is the first actual affirmation of a litigant's intimate associational rights by the Supreme Court since *Roberts*." Marcus, *supra* note 77, at 303, 308. Laura Rosenbury and Jennifer Rothman argue similarly that the majority's "shift from sex acts to relationships aligns *Lawrence* with the right to intimate association already articulated by the Court in other contexts." Laura A. Rosenbury and Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 826 (2010). These claims seem undermined by the lack of any mention of intimate association in the *Lawrence* opinion, particularly in light of the fact that the Justices had before them Blackmun's *Bowers* dissent and arguments about intimate association from the *Lawrence* Petitioners. *See, e.g.*, Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352 at *11–12, *15 & n.9 (citing Karst's article, discussing *Roberts*'s category of intimate association, and asserting that "[t]he adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association"); Reply Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1098835 at *5 ("The relationship of an adult couple—whether heterosexual or gay—united by sexual intimacy is the very paradigm of an intimate association in which one finds 'emotional enrichment' and 'independently . . . define[s] one's identity,' and it is protected as such from 'unwarranted state interference.'" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984))).

[83] The similarities between Karst's article and Brennan's opinion have gone relatively unnoticed. Among the few articles making the connection are Marcus, *supra* note 77, at 278, and Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231 (1998). Udell suggests that *Roberts* "lifted the right to intimate association from Karst's article." *Id.* at 232.

[84] Post-*Roberts* cases have made clear that most associations are nonintimate, and few courts have extended the category of intimate association beyond family relationships. *See, e.g.*, FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 237 (1990) (holding that patrons of a motel which limited room rentals to ten hours did not have an intimate relationship protected by the Constitution), *overruled on other grounds by* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); City of Dall. v. Stanglin, 490 U.S. 19, 24 (1989) (holding that dance hall patrons "are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*" that give rise to the protections of intimate association); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (holding that the relationship among Rotary Club members is not the type of intimate relationship that merits constitutional protection); Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 96 (1st Cir. 2009) (refusing to extend protections of intimate association to "[t]he unmarried cohabitation of adults"); Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 173 (3d Cir. 2008) ("While the Supreme Court has held that the Constitution protects certain relationships, those protected relationships require a closeness that is not present between a high school football coach and his team."); Swanson v. City of Bruce, 105 F. App'x

began by noting: "[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."[85] This passage attempts to draw the reader into a kind of Tocquevillean ethos in which intimate associations at once facilitate support for "the Nation" and resistance to "the State."[86] But Brennan's argument lacks coherence and specificity. What is the difference between Nation and State? What are the national culture (singular) and national traditions (plural) brought about by "shared ideals and beliefs"? How do personal bonds "foster diversity" and act as "critical buffers" from state power? More to the point, why are these functions unique to intimate associations? If Brennan's argument is that intimate associations sustain some kind of shared culture—"cultivating and transmitting shared ideals and beliefs"—then why can't nonintimate associations also serve as "schools of democracy"?[87] Conversely, if he means to position intimate associations as "mediating structures"[88] between individuals and the state—"foster[ing] diversity and act[ing] as critical buffers"—then don't some of the largest—and least intimate—groups have the greatest capacity to resist the state? The passage also belies a more troubling vagueness. It contains an irresolvable tension that doesn't let the reader know whether Brennan is ultimately prioritizing the state, the non-state group, or the individual, and

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540, 542 (5th Cir. 2004) ("The tight fellowship among police officers, precious though it may be, does not include 'such deep attachments and commitments of thoughts, experiences, and beliefs' or personal aspects of officers' lives sufficient to constitute an intimate relationship." (quoting *Roberts*, 468 U.S. at 620)); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) (holding that a college fraternity is not an intimate association); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 198 (3d Cir. 1990) (holding that intimate association is unlikely to cover religious groups because "[m]ost religious groups do not exhibit the distinctive attributes the Court has identified as helpful in determining whether the freedom of association is implicated"); Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that a brother-in-law relationship is not protected as an intimate association). *But see* Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (assuming, for summary judgment purposes, that a dating relationship between two police officers qualified as an intimate association because the two were monogamous, had lived together, and were romantically and sexually involved); Akers v. McGinnis, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (concluding that some types of personal friendships may constitute intimate associations); La. Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497–98 (5th Cir. 1995) (extending the right of "private association" to a private club).

[85] *Roberts*, 468 U.S. at 618–19 (1984).

[86] The textual tension in some ways replicates the strain between stability and pluralism of mid-twentieth century liberalism and the ways in which scholars like Robert Dahl and David Truman appropriate Tocqueville. *See generally* Inazu, *Strange Origins*, *supra* note 16.

[87] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 511 (Henry Reeve trans. 1899). Indeed, as Nancy Rosenblum has argued: "The onus for cultivating the moral dispositions of liberal democratic citizens falls heavily on voluntary groups such as the Jaycees and their myriad counterparts." Nancy Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION 75, 76 (Amy Gutmann ed., 1998) [hereinafter Rosenblum, *Compelled Association*].

[88] PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 51–63 (2d ed. 1996).

the answer to that question matters a great deal. From the rest of his opinion and his broader jurisprudence, we might infer that Brennan wants to privilege the individual, then the state, and lastly, the group. But if that is where his argument rests, then some language—"critical buffers," "traditions," "shared ideals"—becomes much harder for him to employ in an unqualified sense.

Brennan next enlisted notions of liberty and autonomy in his defense of intimate association, embracing the individualistic gloss that his *Eisenstadt* opinion had cast on *Griswold*: "[T]he constitutional shelter afforded [intimate associations] reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[89] These phrases—"emotional enrichment," "[defining] one's identity," and "[the] concept of liberty"—again call to mind lofty ideals, but their meanings are imprecise.[90] As before, Brennan fails to explain why his reasoning extends only to intimate associations. People form close ties with others through all kinds of associations. Some lifelong friendships emerge from within nonintimate associations; some intimate associations collapse in a matter of months.[91] Self-definition also comes in myriad forms of association—one's decision to join the ACLU or make a financial contribution to Greenpeace can speak volumes about his or her identity.

Like Karst, Brennan fails to offer a convincing rationale for privileging intimate associations over nonintimate ones. His theoretical anchor is the residue of *Eisenstadt* that supplants the inherently relational aspects of association with an individualistic notion of privacy. Intimate association is reduced to intimate individualism.[92]

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[89] *Roberts*, 468 U.S. at 619.

[90] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[91] Or hours. *See, e.g.*, *Britney Spears Sheds Another Husband*, N.Y. TIMES, Aug. 1, 2007, at E2 (referencing Spears's annulment of marriage to her childhood friend, Jason Alexander, fifty-five hours after they wed).

[92] The constitutional protections offered by intimate association are today almost completely redundant of those found in the right of privacy. *See, e.g.*, Montgomery v. Stefaniak, 410 F.3d 933, 937 (7th Cir. 2005) ("The freedom of intimate association 'receives protection as a fundamental element of personal liberty,' and as such is protected by the due process clauses." (quoting *Roberts*, 468 U.S. at 618)); Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 942 (6th Cir. 2004) ("Whether called a right to intimate association, or a right to privacy, the point is similar: 'choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'" (quoting *Roberts*, 468 U.S. at 617–18)); City of Bremerton v. Widell, 51 P.3d 733, 741 (Wash. 2002) (en banc) ("[O]ur own cases have held that the right of intimate association stems from the right of privacy, which normally applies only to familial relationships, and 'extend[s]

IV. EXPRESSIVE ASSOCIATION

The second category that Brennan announced in *Roberts* was expressive association. Like intimate association, it has distant echoes of Douglas's *Griswold* opinion and the Court's earliest cases on the right of association.[93] But it is shaped even more determinatively by decisions that emerged out of the Civil Rights Era. This section assesses the doctrinal developments in these cases and then examines the ways in which Brennan adopted them in *Roberts*.

A. *Civil Rights and the Right to Exclude*

Douglas had argued in *Griswold* that the right of association "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[94] In other words, as he had asserted in a dissent four years earlier, "[j]oining is one method of expression."[95] Seven years after *Griswold*, Douglas insisted that the right of association included the right not to associate:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.[96]

For Douglas, the First Amendment "precludes government from interfering with private clubs or groups."[97]

Douglas's defense of the "right to exclude" came in the midst of the Civil Rights Era when racist white groups repeatedly invoked the right of association in an attempt to curb integration. In Herbert Wechsler's infamous formulation, "integration force[d] an association upon those for

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only as far as the principles of substantive due process permit.'" (quoting Bedford v. Sugarman, 772 P.2d 486, 495 (Wash. 1989))).

[93] Karst may have also played a role in shaping the category of expressive association by recasting *NAACP v. Alabama* ex rel. *Patterson* as a case of "political association." Karst, *supra* note 37, at 656–57 n.149 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958)). Harlan's opinion in the earlier case had contained no such adjective. In recent decades, the Court appears to have developed a distinct right of "political association" in a line of cases involving closed and semi-closed primaries. *E.g.*, Clingman v. Beaver, 544 U.S. 581, 592 (2005); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

[94] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[95] Lathrop v. Donohue, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting).

[96] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting).

[97] *Id.* at 179; *see also* Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person . . . solely on the basis of personal prejudices including race.").

whom it [was] unpleasant or repugnant."[98] Wechsler's objection made no sense in public settings.[99] But Charles Black's response to Wechsler was equally unavailing. Black argued that the freedom not to associate "exists only at home; in public, we have to associate with anybody who has a right to be there."[100] In our society, the boundary between public and private is not, and never has been, the home. People live their private lives outside of the home in religious communities, civic groups, social clubs, and a panoply of other collective enterprises that do not border on "public" in the sense that Black employed the term.

The critical question for the right of association during the Civil Rights Era was the extent to which it could justify private discrimination by whites against African Americans, and the issue was far more complicated than either Wechsler or Black suggested. Three important legal developments provided an answer to this question: (1) the Civil Rights Act of 1964; (2) the Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*;[101] and (3) the Court's 1976 decision in *Runyon v. McCrary*.[102]

Title II of the Civil Rights Act of 1964 prohibited racial discrimination in places of "public accommodation."[103] The legislation encompassed inns, restaurants, gas stations, and places of entertainment but exempted private clubs and other establishments "not in fact open to the public."[104] Five years later, the Court made clear that sham attempts to meet the private club exception would not prevail.[105]

The second important development for the right of association during the Civil Rights Era was the Court's 1968 decision in *Jones v. Alfred H. Mayer*, which interpreted a Reconstruction era statute, the Civil Rights Act of 1866, to bar racial discrimination in the sale or lease of private

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[98] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

[99] Although Wechsler directed part of his critique against *Brown v. Board of Education*, 347 U.S. 483 (1954), it was implausible to argue that segregationists had a freedom to associate (or a right to exclude) in situations where the government provided a public good or service. *Cf.* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 179 (1996) ("Wechsler's objection to *Brown* is silly with respect to public schools . . . .").

[100] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960). The exchange between Wechsler and Black is recounted in KOPPELMAN & WOLFF, *supra* note 6, at 17.

[101] 392 U.S. 409, 444 (1968).

[102] 427 U.S. 160 (1976).

[103] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1981–2000h-6 (2006)); *cf.* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 816 (2007) ("The statute's extension of the civil rights norm to private conduct marks a striking shift from constitutional requirements that pertain only to a state actor.").

[104] 42 U.S.C. § 2000a(b), (e).

[105] Daniel v. Paul, 395 U.S. 298, 301–02 (1969) (rejecting an amusement park's contention that it was a private club exempt from the Act because it charged patrons a twenty-five cent "membership" fee and distributed "membership" cards).

property.[106] The Court reasoned that the 1866 Act reached even private discrimination because "the exclusion of Negroes from white communities" reflected "the badges and incidents of slavery."[107] It extended the reach of *Jones* to membership in a community park and playground in *Sullivan v. Little Hunting Park, Inc.*,[108] and a private swimming pool in *Tillman v. Wheaton-Haven Recreation Ass'n*.[109] *Jones*, *Sullivan*, and *Tillman* all involved sales or leases related to real property covered under the Fair Housing Act of 1968.[110] The Court's reliance on a somewhat strained interpretation of the Civil Rights Act of 1866 rather than a straightforward application of the Fair Housing Act prompted Justice Harlan (joined by Justice White and Chief Justice Burger) to dissent in *Sullivan*, noting that the "vague and open-ended" construction of section 1982 risked "grave constitutional issues should [that authority] be extended too far into some types of private discrimination."[111]

These two developments—the Civil Rights Act of 1964 and the Court's decision in *Jones*—represented major steps toward ending segregation. Both also constrained group autonomy. But few people today object to these constraints along racial or any other lines—the idea that owners of businesses open to the public or sellers of private homes should have a constitutional right to discriminate finds few defenders. In other words, if the constraints on group autonomy were limited to these applications, contemporary debates would be virtually nonexistent.

More complicated questions arose from the Court's line of cases addressing private school segregation that culminated in its 1976 decision in *Runyon v. McCrary*.[112] These private segregated schools, many of which emerged in the wake of the Court's integration of public schools, represented a key battleground of the Civil Rights Era.[113] Preliminary challenges focused on government financial support, and in the late 1960s, the Court affirmed a number of decisions enjoining state tuition grants to

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[106] *Jones*, 392 U.S. at 444. As George Rutherglen notes, the Court's interpretive analysis "has proven to be controversial," but "the extension of the 1866 Act to private discrimination in *Jones* was both much more acceptable and much less radical" because "the Civil Rights Act of 1964 had legitimatized federal regulation of private discrimination." George Rutherglen, *Civil Rights in Private Schools: The Surprising Story of* Runyon v. McCrary, *in* CIVIL RIGHTS STORIES 119 (Myriam E. Gilles & Risa Lauren Goluboff eds., 2008).

[107] *Jones*, 392 U.S. at 441–42.

[108] 396 U.S. 229, 234–35 (1969).

[109] 410 U.S. 431, 432, 437 (1973).

[110] 42 U.S.C. §§ 3601–3631. In *Sullivan*, the Court characterized Little Hunting Park's exclusion of African Americans as "a device functionally comparable to a racially restrictive covenant." 396 U.S. at 236. In *Tillman*, a unanimous Court concluded that "[t]he structure and practices of Wheaton-Haven . . . are indistinguishable from those of Little Haven Park." 410 U.S. at 438.

[111] *Sullivan*, 396 U.S. at 241, 248 (Harlan, J., dissenting).

[112] Runyon v. McCrary, 427 U.S. 160 (1976).

[113] On the emergence of segregated private schools in the late 1960s and early 1970s, see, for example, DAVID NEVIN AND ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH (1976).

students attending racially discriminatory private schools.[114] In 1973, the Court concluded in *Norwood v. Harrison* that state-funded textbook loans to students attending these schools were "not legally distinguishable" from tuition grants.[115] *Norwood* was the Court's first explicit consideration of the conflict between anti-discrimination norms and the right of association. Summarizing recent legislative and judicial developments, Chief Justice Burger noted that "although the Constitution does not proscribe private bias, it places no value on discrimination."[116]

Shortly after *Norwood*, the Justices addressed the use of public recreational facilities by private segregated schools in *Gilmore v. City of Montgomery*.[117] Justice Blackmun's majority opinion noted that in contrast to the relatively easy question of integrating public facilities and programs, "[t]he problem of private group use is much more complex."[118] The dispositive question was whether the use of public facilities made the government "a joint participant in the challenged activity."[119] The Court concluded that municipal recreational facilities, including parks, playgrounds, athletic facilities, amphitheaters, museums, and zoos, were sufficiently akin to "generalized governmental services" like traditional state monopolies, such as electricity, water, and police and fire protection.[120] Accordingly, the use of these facilities by private groups that discriminated on the basis of race did not rise to the level of government endorsement of discriminatory practices.[121] But Blackmun went even further, noting that the exclusion of a discriminatory group from public facilities would violate the group's freedom of association.[122] He asserted that "[t]he freedom to associate applies to the beliefs we share, and to those we consider reprehensible" and "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful,

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[114] *E.g.*, Brown v. S.C. Bd. of Educ., 296 F. Supp. 199, 202–03 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 222 (1968); Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833, 835 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[115] 413 U.S. 455, 463 (1973).

[116] *Id.* at 463. Burger concluded that simply because "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Id.* Additionally, "even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment . . . ." *Id*. at 470.

[117] Gilmore v. City of Montgomery, 417 U.S. 556, 567 (1974). The decision came after repeated instances of Montgomery's blatant disregard of mandates to integrate its public facilities. *Id.* at 569–72.

[118] *Id.* at 572.

[119] *Id.* at 573 (internal quotation marks omitted).

[120] *Id.* at 574.

[121] Blackmun observed that the result might be different if "the city or other governmental entity rations otherwise freely accessible recreational facilities" in a manner suggestive of discriminatory intent. *Id.*

[122] *Id.* at 575. (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting)).

orderly change."[123] At the same time, he cautioned that "the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action."[124]

Two years later, the Court retreated from both its defense of the right of association and its state action requirement in *Runyon*, a decision that construed another provision of the Civil Rights Act of 1866 to preclude racial discrimination by "private, commercially operated, nonsectarian schools."[125] Rejecting the suggestion that the legislation "d[id] not reach private acts of racial discrimination,"[126] Justice Stewart wrote:

> From [the] principle [of the freedom of association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.[127]

Stewart buttressed his argument with a truncated quotation from *Norwood*. Burger had written in *Norwood* that, "*although the Constitution does not proscribe private bias*, it places no value on discrimination."[128] Stewart's quotation omitted Burger's prefatory clause and asserted: "As the Court stated in *Norwood*[,] . . . the Constitution . . . places no value on discrimination."[129] The abbreviated language stood for a broader legal principle. *Norwood* had prevented government subsidization of a disfavored social practice. *Runyon* precluded the practice itself and marked the first time that Court had in the interest of antidiscrimination norms denied the right of existence to a private group with neither ties to state action nor meeting the definition of a public accommodation.[130]

Runyon's symbolic and substantive importance is beyond challenge. The decision made clear that the Court understood the Civil Rights Act of 1866 "to reach all intentional racial discrimination, public and private, that interfered with the right to contract," and that it trumped the right of

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[123] *Gilmore*, 417 U.S. at 575.
[124] *Id.*
[125] Runyon v. McCrary, 427 U.S. 160, 168 (1976).
[126] *Id.* at 173.
[127] *Id.* at 176 (emphasis omitted).
[128] Norwood v. Harrison, 413 U.S. 455, 469 (1973) (emphasis added).
[129] *Runyon*, 427 U.S. at 176 (internal quotation marks omitted).
[130] *See* Rutherglen, *supra* note 106, at 111 (*Runyon* "subordinated private choice to civil rights policy and extended federal law beyond the limitations of the state action doctrine").

association.[131] That core holding has been undisturbed and was, in fact, codified in the Civil Rights Act of 1991.[132] Few people today believe that private schools ought to have a constitutional right to exclude African-Americans, and the decision as a symbolic marker for civil rights and racial integration is indisputable.

Runyon's doctrinal significance is less clear, and it is on this doctrinal level that the case maintains its greatest significance for contested questions of group autonomy today. Two moves in particular are open to question, and both of them are mirrored eight years later in *Roberts*'s much different context. The first is the argument that forced inclusion of unwanted members does not change the core expression of a discriminatory group. Justice Stewart quoted with approval the Fourth Circuit's conclusion that "'there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.'"[133] If we set aside the political and moral context of *Runyon* and examine the argument on its own terms, it is implausible to claim that forcing a school to abandon its racially discriminatory admissions policy would not inhibit its teaching of racist ideas and dogma.[134] The United States Court of Appeals for the First Circuit made a related observation about the message conveyed by a group's very existence in upholding the associational rights of a gay student group:

> [B]eyond the specific communications at [its] events is the

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[131] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1138 (1990).

[132] *See* Rutherglen, *supra* note 106, at 111, 122 (noting that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–75 (1989), the Court decided against overruling *Runyon* and that *Patterson* was superseded by the Civil Rights Act of 1991, "which amended section 1981 to make clear that it covered all aspects of contractual relations and applied to all contracts").

[133] *Runyon*, 427 U.S. at 176 (*quoting* McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

[134] *See* KOPPELMAN & WOLFF, *supra* note 6, at 19 ("If the schools are integrated, it is hard to imagine that this will not have some effect on the ideas taught."); William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 831 (1989) ("[T]he assertion that forcing a school to admit black children will 'in no way' inhibit the school's intended message that racial integration is bad proves too much to swallow. Just as government-mandated school segregation conveys a powerful message that black people are unworthy to associate with whites, state-mandated integration conveys a powerful message that blacks and whites are human beings with equal worth and dignity. That message must blunt any merely verbal message, taught in the school, that segregation is a good thing." (footnote omitted)). Some scholars have nevertheless left Stewart's reasoning here unchallenged, arguing instead that the defendants in *Runyon* never contended that they should be protected as "expressive associations," notwithstanding the fact that the Court had yet to recognize such a category. *See, e.g.*, David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 626–27 (2001) ("[A] close reading of *Runyon* and the briefs filed in it reveal that *Runyon* was not an 'expressive association' case. The defendants in *Runyon* made what amounts to a short, throw-away argument that their right to 'freedom of association,' floating somewhere in the penumbral ether of the Constitution, was violated by compelled integration. However, the defendants did not make an expressive association claim grounded in the First Amendment. They did not argue in their briefs that the school's ability to promote segregation would be compromised, nor did they provide evidence at trial on that issue.").

> basic "message" [Gay Students Organization] seeks to convey—that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.[135]

Stewart's second questionable doctrinal move was his distinction between the act of discrimination and the message of discrimination. In Stewart's view, the right of association protected only the latter, and the exclusion of African Americans counted only as the former. In other words, the right of association only extended to the expression of ideas, and exclusion wasn't expression. But that argument makes an arbitrary distinction between act and message that could be applied to any form of symbolic expression. It tells us nothing about the value or harm of the expression itself.[136]

B. *Brennan's Expressive Association*

Brennan's *Roberts* opinion characterized expressive association as "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[137] The Court had "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."[138]

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[135] Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974).

[136] Stewart soon reiterated this narrower understanding of the right of association in cases beyond the Civil Rights context. Writing for the majority in *Abood v. Detroit Board of Education*, a 1977 case involving an "agency shop" arrangement for state government employees, he described "the freedom of an individual to associate *for the purpose of advancing beliefs and ideas*." 431 U.S. 209, 233 (1977) (emphasis added). And four years later, writing for the Court in *Democratic Party of the United States v. Wisconsin*, a case involving political parties, Stewart referred to the "freedom to gather in association *for the purpose of advancing shared beliefs*." 450 U.S. 107, 121 (1981) (emphasis added). That same year, Burger echoed Stewart's view in *Citizens Against Rent Control v. Berkeley*. 454 U.S. 290 (1981) (emphasis added). Although acknowledging that "the practice of persons sharing common views banding together *to achieve a common end* is deeply embedded in the American political process," Burger asserted that the real value of association was "that by collective effort individuals can *make their views known,* when, individually, their voices would be faint or lost." *Id.* at 294 (emphasis added). Three years later, Brennan adopted Stewart's distinction between belief and practice and rendered association wholly instrumental to other First Amendment freedoms. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

[137] *Roberts*, 468 U.S. at 618.

[138] *Id.* at 622. Lower courts have generally adopted Brennan's instrumental gloss on expressive association. *See, e.g.*, Schultz v. Wilson, 304 F. App'x 116, 120 (3d Cir. 2008) ("A social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance."); Willis v. Town of Marshall, 426 F.3d 251, 261 (4th Cir. 2005) ("[A] constitutionally protected right to associate depends upon the existence of an activity that is itself protected by the First Amendment."); Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 50 (1st Cir. 2005) ("[I]n a free speech case, an association's expressive purpose may pertain to a wide array of ends (including economic ends), but the embedded associational right protects only collective

Despite his instrumental characterization of expressive association, Brennan proposed an ostensibly protective legal test: "Infringements on [the right of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[139]

The language of "compelling state interests, unrelated to the suppression of ideas" calls to mind the strict scrutiny standard established in other areas of the Court's First Amendment law.[140] But the reference to "means significantly less restrictive" differs from the usual strict scrutiny language of "least restrictive means."[141] On closer examination, what resembles a strict scrutiny test might actually invert the presumption favoring the protected First Amendment activity to one that favors the government. Brennan's phrasing suggests that a government regulation that is to a large extent—but not significantly more—restrictive of associational freedoms than a less onerous regulation would survive the test. Although Brennan elsewhere intimated that he was applying strict

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speech and expressive conduct in pursuit of those ends; it does not cover concerted action that lacks an expressive purpose." (internal citations omitted)); McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994) ("The right of expressive association . . . is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms. . . . [A] plaintiff . . . can obtain special protection for an asserted associational right if she can demonstrate . . . that the purpose of the association is to engage in activities independently protected by the First Amendment." (internal citations omitted)); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 199 (3d Cir. 1990) ("The [Supreme] Court has not yet defined the parameters of the right to associate for religious purposes, but it has made it clear that the right to expressive association is a derivative right, which has been implied from the First Amendment in order to assure that those rights expressly secured by that amendment can be meaningfully exercised. Thus, there is no constitutional right to associate for a purpose that is not protected by the First Amendment." (internal citations omitted)). *But see* Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 396 (6th Cir. 2002) (finding that the First Amendment "protects the entertainers and audience members' right to free expressive association" at an adult establishment because "[t]hey are certainly engaged in a collective effort on behalf of shared goals" and "[t]he dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless").

[139] *Roberts*, 468 U.S. at 623. Brennan also emphasized that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.*

[140] The most commonly asserted elements of the test require that a statute subject to strict scrutiny must be narrowly tailored and use the least restrictive means to further a compelling government interest. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (summarizing the strict scrutiny test); Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989) (finding that protecting the psychological and physical wellbeing of minors is a compelling government interest, but that the government must still choose the least restrictive means to further said interest); First Nat'l Bank of Bos. v. Bellotti, 435 U. S. 765, 786 (1978) (noting that a state-imposed restriction on corporate speech cannot stand in the absence of a compelling state interest).

[141] It is worth noting that in the twenty-five years since *Roberts*, the Court has never elaborated on its "significantly less restrictive" language and has cited it only four times, twice in footnotes. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 (2010) (quoting *Roberts* for this language); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (same); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 n.3 (2000) (same); Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 n.11 (1986) (same).

scrutiny,[142] his only formulation of the legal test proposed a different standard, and, unsurprisingly, some courts have construed *Roberts* as intending something less than strict scrutiny.[143]

C. *The Problems with "Nonexpressive" Association*

Brennan's rendering of the constitutional test for regulations impinging upon expressive association was not the only problem with his analysis. His category of expressive association implied that some associations were "nonexpressive."[144] The problems with this line-drawing are not merely doctrinal—they are philosophical as well.[145] The purported distinction between expressive and nonexpressive association fails to recognize that: (1) all associations have expressive potential; (2) meaning is dynamic; and (3) meaning is subject to more than one interpretation. These three claims rely on hermeneutical arguments whose full consideration exceeds the scope of this Article and which are addressed here in summary fashion.[146]

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[142] *See Roberts*, 468 U.S. at 626 (noting that the state achieved its interest through "the least restrictive means"); *id.* at 628 (finding that the "incidental abridgment" of protected speech "[was] not greater than [was] necessary"). Four Justices later equated the *Roberts* test of "means significantly less restrictive" to strict scrutiny. *See Dale*, 530 U.S. at 680 (Stevens, J., dissenting) (finding that eliminating discrimination is a compelling government interest, and observing that the court in *Roberts* "held that Minnesota's law [was] the least restrictive means of achieving [the state's compelling] interest"). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent. *Id.* at 663. But in some ways, *Dale* only adds to the ambiguity of the test the Court applies in freedom of association cases. *See id.* at 658–59 (rejecting "the intermediate standard of review enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968)," but noting that under the proper analysis, "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other").

[143] *See, e.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 105 (2d Cir. 2007) ("*Roberts* does not require the government to exhaust every possible means of furthering its interest; rather, the government must show only that its interest 'cannot be achieved through means *significantly less restrictive* of associational freedoms.'" (emphasis added) (quoting *Roberts*, 468 U.S. at 623)); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 139 (2d Cir. 2007) ("The mere fact that the associational interest asserted is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny."); Hatcher v. Bd. of Pub. Educ., 809 F.2d 1546, 1559 n.26 (11th Cir. 1987) (describing a "balancing of interests" (quoting *Roberts*, 468 U.S. at 623)); Every Nation Campus Ministries v. Achtenberg, 597 F. Supp. 2d 1075, 1083 (S.D. Cal. 2009) ("'[S]tate action that burdens a group's ability to engage in expressive association [need not] always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum.'" (quoting Truth v. Kent Sch. Dist., 542 F.3d 634, 652 (9th Cir. 2008) (Fisher, J., concurring))); *cf.* Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219, 247 (3d. Cir. 2004) (Aldisert, J., dissenting) (describing *Roberts* as having announced a "balance-of-interests test").

[144] Justice O'Connor's concurrence explicitly refers to "nonexpressive association." *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("[T]his Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations.").

[145] *Cf.* Epstein, *supra* note 27, at 122 (arguing that the distinction between expressive and nonexpressive association "is indefensible both as a matter of political theory and constitutional law").

[146] For the kind of argument on which these claims are based, see generally LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., Basil Blackwell & Mott, Ltd. 3d ed. 1958) (1953).

1. *The Ubiquity of Expressive Association*

The first problem with "nonexpressive association" is that every association—and every associational act—has expressive potential. Expressive meaning comes through the performance of communal acts, and communicative possibility exists in joining, excluding, gathering, proclaiming, engaging, or not engaging.[147] Once an association is stipulated between two or more people, almost any associative act by those people—when consciously undertaken as members of the association—has expressive potential reflective of that association.[148]

Erwin Chemerinsky and Catherine Fisk reject this capacious understanding of expressive meaning in their consideration of *Dale*.[149] For example, they assert that "[t]he membership of an association is not inherently expressive in the way that the membership of a parade is . . . ."[150] But this is not always the case—membership in the Ku Klux Klan likely conveys greater expressivism than marching in the Macy's Thanksgiving Day Parade.[151]

Chemerinsky and Fisk make a related error when they propose a *speech*-based remedy for the Boy Scouts in a world in which the Court had decided *Dale* differently. They argue that even if the Scouts had been forced to include James Dale as part of its association,

> [it] easily could proclaim to the world that it is anti-gay and that it was accepting gay scoutleaders, like James Dale, because the law required it to do so. In other words, the Boy Scouts could use the forced inclusion of homosexuals as the occasion for making clear its anti-gay message, and that the inclusion of Dale was a result of legal compulsion and not a

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[147] *Cf. Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("Even 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.").

[148] The claim is intentionally broad—it is difficult to envision any associative act that lacks expressive potential. William Marshall posits a counterexample: "Tom and Fred walking down the street is, in no meaningful sense, expression." Marshall, *supra* note 36, at 77. But as long as Tom and Fred's stroll reflects a conscious decision to walk with one another, then the act of walking may express a kind of shared (though perhaps fleeting) affiliation. The meaning of that expression will vary based upon the surrounding circumstances. Consider, for example, the expressive meaning if Tom is black and Fred is white and they are walking merrily down the main street of a small southern town in the 1950s.

[149] Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 600–04 (2001).

[150] *Id.* at 604. Chemerinsky and Fisk make the comment in an attempt to distinguish *Dale* from *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 578 (1995). Chemerinsky & Fisk, *supra* note 149, at 604.

[151] *Cf.* Chemerinsky & Fisk, *supra* note 149, at 599 ("[T]he Klan likely could exclude African Americans or the Nazi party could exclude Jews because discrimination is a key aspect of their message.").

matter of condoning his sexual orientation.[152]

Chemerinsky and Fisk's proposal assumes that policy statements made by the Boy Scouts will perfectly mitigate the direct and indirect expressive effects of Dale's forced inclusion. But once we recognize that expressive meaning extends beyond words, there is no guarantee that words alone will restore an expressive equilibrium. For example, the Scouts might be forced to adjust their policy statement about homosexuality in a way that is suboptimal to their associational purposes and beliefs. It is also possible that the Scouts could believe that no words or statements would adequately disavow the symbolic meaning of Dale's forced inclusion in their group.

To illustrate further why the category of expressive association fails to encompass the broader understanding of meaning suggested in this Article, consider a gay social club.[153] Suppose that the club has twenty members, placing it well outside of the currently recognized contours of an intimate association. Suppose further that the club's members engage in no verbal or written expression directed outside of their gatherings but make no effort to conceal their membership from their friends, colleagues, and acquaintances who are not part of the club. There is no way that the members of this club are engaging in "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[154] And yet there is clearly an expressive message in their very act of gathering.[155]

2. *Meaning Is Dynamic*

The second problem with the reasoning underlying expressive association is that meaning is dynamic. The messages, creeds, practices,

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[152] *Id.* at 603.

[153] *See* Brief in Support of Petitioner, *supra* note 2, at 11 (emphasizing that "many exclusively gay social and activity clubs, retreats, vacations, and professional organizations" have "relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy" (quoting Carpenter, *supra* note 2, at 1550).

[154] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). I assume here that Justice Brennan's conception of assembly is a narrow and historically decontextualized one. For an alternative vision of assembly, see *infra* Part VII.

[155] Provided, of course, that at least one person external to the group is aware of the gathering. The expressiveness inherent in an act of gathering presupposes an audience of some kind. Thus, for example, the gathering of a secret society would not have an outward expressiveness. *Cf.* Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("The right to engage in verbal locutions which no one can hear and in conduct which no one can observe may sometimes qualify as a due process 'liberty,' but without an actual or potential audience there can be no first amendment speech right."). While Nimmer's observation may be formally correct, it makes little difference in the *application* of an expressive restriction. Any act of self-expression (for example, expression undertaken without an actual or potential audience) becomes communicative when the state attempts to restrict it. The very determination by a government actor that an act is not "communicative" or not "protected" is an interpretation of the meaning of the act that creates an audience in the government actor restricting the act.

and even the central purposes of associations change over time. Justice Souter missed this reality when he argued in his *Dale* dissent that "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way."[156] That standard proves too much. What would it mean for a group to advocate a "clear position" "over time" in "an unequivocal way"?[157]

3. *Meaning Is Subject to More than One Interpretation*

The final problem with the idea of expressive association is that meaning is subject to more than one interpretive gloss.[158] Acknowledging the subjective interpretation of meaning exposes a related problem inherent in the "message-based" approach of the expressive association doctrine: who decides what counts as the message of the group? Chemerinsky and Fisk criticize the Supreme Court in *Dale* for unduly deferring to the Boy Scouts' leadership's views about the group's expressive message.[159] But there is not a readily apparent alternative that more "justly" or "accurately" captures the group's expressive meaning. For example, it is not obvious that a majority of the group's members should be recognized as having the authoritative interpretation of the group's meaning, particularly for

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[156] Boy Scouts of Am. v. Dale, 530 U.S. 640, 701 (2000) (Souter, J., dissenting).

[157] Even "[t]he 'message' conveyed by a monument may change over time." Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1136 (2009). The character of an organization or association may likewise change over time:

> [T]he line between commercial associations and political organizations is not easily drawn, nor can one predict when a commercial association will metamorphose into an important expressive association. For example, America's most powerful lobbying organization, the American Association of Retired Persons, began as a commercial association organized to sell health care products to the elderly, and still has substantial business interests.

David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 183 [hereinafter Bernstein, *Sex Discrimination*].

[158] *Cf.* ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 5, at 6 ("There are always alternative understandings of an association's nature and purpose, and competing classifications."). Justice Alito recently made a similar observation about monuments:

> Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. . . .
>
> . . . [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.

Summum, 129 S. Ct. at 1135.

At least three of the other *Dale* justices appear to share Souter's view. Justices Ginsburg and Breyer joined Souter's dissent. 530 U.S. at 702. Justice Stevens made a similar claim in his dissent. *Id.* at 685 (Stevens, J., dissenting) ("Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being 'morally straight' and 'clean' is a far cry from the clear, unequivocal statement necessary to prevail on its claim.").

[159] *See* Chemerinsky & Fisk, *supra* note 149, at 600 (arguing that the Court's holdings in *Dale* "will allow any group that wants to discriminate to do so by claiming . . . a desire to exclude based on any characteristics that it chooses").

hierarchically structured groups.[160] And as Andrew Koppelman has suggested, "it is unseemly, and potentially abusive, for courts to tell organizations—particularly organizations with dissenting political views—what their positions are."[161]

The challenges to determining a group's meaning get even thornier. Consider three different characterizations that Chemerinsky and Fisk offer about the purposes of the Boy Scouts: (1) a "significant number of current and former scouts . . . reasonably believed that scouting was, and should be, about camping";[162] (2) all members of the Boy Scouts understand that "the Boy Scouts is for boys," and "[a]ll presumably believe that same sex experiences offer valuable developmental opportunities for children";[163] and (3) "we suspect [that] Boy Scouts of America is understood [by its members] to be about honesty, self-reliance, service, leadership, and camping."[164] These descriptions are not interchangeable. They assign different purposes to the Boy Scouts (camping vs. gender-based activities vs. camping plus other things), they attribute those purposes to different subsets of the association (a significant number of current and former scouts vs. all members vs. members), and they attach varying degrees of certainty to the asserted meaning (the belief was "reasonable" vs. all members "presumably believed" vs. the belief is something that Chemerinsky and Fisk "suspect"). All of these variations and their varying rhetorical emphases spring from the description of a single association in a single law review article. It is not hard to see how the interpretive dilemmas multiply when assertions of purpose and meaning are expanded ever further. These interminable inquiries into what counts as *the* expressive message of a group are artificially imposed by the artificial distinction between expressive and nonexpressive associations.

4. *The Limits of Expression*

Once we acknowledge the multivalent expression inherent in group activity, we can no longer easily label some groups as "nonexpressive." It might be argued that this claim runs afoul of basic First Amendment doctrine. For example, in *United States v. O'Brien*, the seminal case on symbolic speech, the Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging

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[160] For examples of groups whose meaning and message are not determined by majority vote, see U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); Roberts v. U.S. Jaycees, 468 U.S. 609, 613 (1984) ("The ultimate policymaking authority of the Jaycees rests with an annual national convention, consisting of delegates from each local chapter, with a national president and board of directors," instead of by a majority vote of the entire membership).

[161] KOPPELMAN & WOLFF, *supra* note 6, at 24.

[162] Chemerinsky & Fisk, *supra* note 149, at 608.

[163] *Id.* at 609.

[164] *Id.* at 611.

in the conduct intends thereby to express an idea."[165] But the Court has itself undermined this distinction with its expansive embrace of the concept of symbolic speech, and interpreting *O'Brien*'s parsing of speech and conduct too mechanically is "doomed to failure."[166] All that the purported definitional limitation on "speech" means is that some conduct can be regulated based upon its content or harm irrespective of whether it has an expressive component.[167] Thus, the Court acknowledges the expressive dimensions of dancing naked[168] and sleeping in a park[169] even as it endorses the government's proscription of those activities. Of course, as these examples illustrate, not every expressive act warrants constitutional protection: *defining what constitutes expression differs from determining the scope of legal protection.* Recognizing the expressive potential of associations tells us nothing about whether they will be constitutionally protected. But it prevents those who exercise coercive power over our lives from avoiding a meaningful weighing of constitutional values simply by classifying some groups as "nonexpressive."[170]

V. THE COST TO THE JAYCEES

The preceding two sections have traced the developments leading to the Court's recognition of the categories of intimate and expressive association in *Roberts* and identified the problems with these categories. This section explores how the Court's use of intimate and expressive association in *Roberts* illegitimately rejected the associational claims of the

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[165] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[166] *See* Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 110 (1989) ("[The] attempt to distinguish between speech and conduct is doomed to failure.").

[167] *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("We have sometimes said that [certain] categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution . . . ." (internal citations omitted)).

[168] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

[169] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (assuming that "overnight sleeping" in a park, as an act of protest, might be expression covered by the First Amendment but upholding a ban on overnight sleeping as a content-neutral restriction).

[170] The Supreme Court occasionally evades this distinction. *See* Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 66 (2006) (claiming that "we have extended First Amendment protection only to conduct that is inherently expressive"). Commenting upon this sentence in *FAIR*, Dale Carpenter rightly notes that the Court "cites no precedent for this conclusion or for the phrase 'inherently expressive.' No prior majority opinion on the subject has suggested that in deciding whether conduct is expressive we should look *only* at the conduct itself, rather than at both the conduct and the context in which it occurs." Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 243 (2006).

Jaycees. It first considers Justice Brennan's unconvincing focus on the size, seclusion, and selectivity of the Jaycees in his attempt to cast the group as nonintimate. It then turns to the ways in which both Brennan and Justice O'Connor, in her concurrence, characterized the purpose and activities of the Jaycees in denying the group protection as an expressive association.

A. *Size, Seclusion, Selectivity, and the Specter of Segregation*

After distinguishing between intimate and nonintimate associations, Justice Brennan attempted to determine where an association's "objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[171] He defined an intimate association as "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[172] He noted that factors relevant to determining intimacy include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[173] The size of an association is critical to Brennan's argument. He had reported in the first part of his opinion that the Jaycees was a 295,000-member organization.[174] In considering whether the group was an intimate association, he observed that even "the local chapters of the Jaycees are large and basically unselective groups."[175] The Minneapolis chapter, for example, had "approximately 430 members."[176] These figures are meant to persuade the reader that the Jaycees clearly falls outside of the bounds of an intimate association. But Brennan's numbers also deflect attention away from the actual relationships that undoubtedly formed in local chapters of the large national organization. It is hard to imagine the Minneapolis Jaycees coming together in meetings, social events, charitable activities, and planning sessions without meaningful interaction between members, including some that led to close friendships

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[171] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[172] *Id.* at 620. Brennan continued: "As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.*

[173] *Id.* Brennan's appeal to "other characteristics that in a particular case may be pertinent" has not offered a very clear judicial test for defining the contours of intimate association. As Justice Stevens noted in his *Dale* dissent, "the precise scope of the right to intimate association is unclear." Boy Scouts of Am. v. Dale, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting); *see also* Udell, *supra* note 83, at 239–40 (describing the "chaos" of lower court attempts to construe intimate association and noting "myriad tests, even within the same circuit"). *But see supra* note 84 and accompanying text (suggesting that courts have found most associations to be nonintimate).

[174] *See Roberts*, 468 U.S. at 613 ("At the time of trial in August 1981, the Jaycees had approximately 295,000 members in 7,400 local chapters affiliated with [fifty-one] state organizations.").

[175] *Id.* at 621.

[176] *Id.*

and personal bonds.

Brennan's focus on lack of seclusion as an indicator of intimacy is also problematic. He critiqued the Jaycees because women and nonmembers—"strangers," actually—were present at the group's events:

> [W]omen affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions. Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings. In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship.[177]

These assertions raise a number of questions. How does Brennan know which activities were "central to the decision of many members to associate with one another"? Similarly, on what basis can he purport to know "the activity central to the formation and maintenance of the association"?[178] Even if he were capable of making these determinations, what is the significance of the fact that "strangers" participated in "various community programs, awards ceremonies, and recruitment meetings"?[179] Isn't this the case with many associations that rent conference space, enlist professional fundraisers, or cater their events?[180]

Brennan's least convincing argument in his attempt to characterize the Jaycees as nonintimate was his focus on the group's lack of selectivity. He distinguished the Kiwanis Club from the Jaycees because the Kiwanis had "a formal procedure for choosing members on the basis of specific and selective criteria" while the Jaycees looked only at gender and age.[181] That distinction seems strained, and it also calls into question the relationship between selectivity and intimacy. Book clubs, gardening clubs, and some recreational sports leagues are often less selective than the Jaycees in their

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[177] *Id.* (internal citations omitted).

[178] *Id.*

[179] *Id.*

[180] *Cf. id.* at 635 (O'Connor, J., concurring) ("No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings."). One might also wonder exactly which "local chapters of the Jaycees" Brennan is describing, given that the Minneapolis and St. Paul Jaycees already admitted women as full members. *Id.* at 627 (majority opinion).

[181] *Id.* at 621, 630. In fact, the Jaycees looked at more than gender and age. *See* U.S. Jaycees v. McClure, 709 F.2d 1560, 1571–72 (8th Cir. 1983) (noting that the St. Paul bylaws required that applicants be of "good character and reputation").

membership requirements, but they can foster intimate connections among their members.

Brennan's focus on selectivity did, however, establish a link between the Jaycees and segregationist groups.[182] To support his contention that "the local chapters of the Jaycees are large and basically unselective groups,"[183] Brennan cited three cases: *Tillman v. Wheaton-Haven Recreation Ass'n*,[184] *Sullivan v. Little Hunting Park, Inc.*,[185] and *Daniel v. Paul.*[186] But the problem with *Tillman*, *Sullivan*, and *Daniel* wasn't that they employed a single membership criterion. It was that the criterion was: (1) race; (2) used by whites to exclude blacks; (3) in membership groups closely tied to housing (*Tillman* and *Sullivan*) or created as an obvious sham (*Daniel*); (4) in the midst of the Civil Rights Era. The constitutional rationale underlying these cases wasn't that unselective groups lacked an intimacy worthy of constitutional protection but that: (1) their lack of selectivity factored against qualifying under the public club exception to the public accommodations provisions of the Civil Rights Act of 1964; and (2) "the exclusion of Negroes from white communities" reflected "the badges and incidents of slavery."[187]

Toward the end of his *Roberts*'s opinion, Brennan revisited the connection between the Jaycees and segregationist groups:

> [E]ven if enforcement of the [Minnesota] Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. *As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.* In prohibiting such practices, the Minnesota Act therefore "responds precisely to the substantive problem which legitimately concerns" the

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[182] *Roberts*, 468 U.S. at 621 (citing Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969); Daniel v. Paul, 395 U.S. 298, 302 (1969)). Andrew Koppelman and Tobias Wolff's recent book employs a similar approach. *See* KOPPELMAN & WOLFF, *supra* note 6, at 6 ("The libertarian right to exclude, then, is racist at the core.").

[183] 468 U.S. at 621.

[184] 410 U.S. 431 (1973).

[185] 396 U.S. 229 (1969).

[186] 395 U.S. 298 (1969).

[187] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–42 (1968).

> State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.[188]

Notice the italicized language. It adds little to Brennan's analysis of whether Minnesota's Act was narrowly tailored and minimally intrusive (the doctrinal focus of the paragraph). In fact, it contradicts that analysis, asserting that the Jaycees's desire to limit the participation of women was "entitled to no constitutional protection."[189] If the right of expressive association was "plainly implicated in this case,"[190] then it clearly enjoyed *some* constitutional protection. Brennan's citation to *Runyon* is also problematic. His pincite tags Stewart's distinction between belief and practice, which rested on the view that "even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment."[191] Stewart relied on the Thirteenth Amendment in this passage not as a source of congressional power but for the direct authority to interfere with some forms of private discrimination. That raises the question of whether the principle announced in *Runyon* trumps a right of association claim in cases involving discrimination not based on race.[192] Brennan never explained how remedying the "unique evils" in *Runyon* (rooted in the "badges and incidents of slavery") provided a legal justification for destroying the Jaycees for their gender-based discrimination.

Whether he intended it or not, the real force of Brennan's references to *Runyon* and "invidious discrimination" was the visceral emotion that they stirred, equating the Jaycees's position to the racism of segregation.[193] The Jaycees had warned of this danger in its brief to the Court:

> Sprinkled throughout the opposing briefs are references to "invidious discrimination" as applied to the Jaycees' all-male policy. The term is used in such cases as *Runyon v. McCrary* and *Gilmore v. City of Montgomery* against a backdrop of racial discrimination. The use of this term is

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[188] *Roberts*, 468 U.S. at 628–29 (emphasis added) (citations omitted) (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)). Both *Roberts* and the Civil Rights cases Brennan cited stretched the meaning of "public accommodation" to bring private activity within the reach of the relevant statutes.

[189] *Id.* at 628.

[190] *Id.* at 622.

[191] Runyon v. McCrary, 427 U.S. 160 175–76 (1976).

[192] *Cf.* William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 826 (1989) ("The thirteenth amendment, then, seems a fully adequate power to prevent race discrimination and race-like discrimination, but it is not a likely candidate as a source of federal legislative power for preventing private club discrimination on the basis of sex.").

[193] *Roberts*, 468 U.S. at 628*; cf.* Bernstein, *Expressive Association*, *supra* note 24, at 200–01 ("Brennan characterized the Jaycees' discriminatory practices as akin to violence and not worthy of constitutional protection, and therefore gave the right of expressive association short shrift in his compelling interest analysis.").

> apparently intended to suggest that the Jaycees' all-male membership policy is somehow immoral and unsavory and therefore not entitled to protection against the State's police powers.[194]

Yet rather than heed this warning, Brennan embraced the comparison, writing the "stigmatizing injury [of discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[195] In one sense, the claim is correct—the kind of exclusion in which the Jaycees engaged is undoubtedly hurtful and stigmatizing to some people. But we ought to pause before accepting Brennan's specific application of the general principle. It is not clear that the circumstances facing women in Minneapolis in 1984 were on the same order of those facing African Americans in Montgomery in 1974, or that the judicial remedies in these situations would have accomplished objectives of similar magnitude, and these differences may well have mattered had Brennan engaged in a meaningful weighing of constitutional values.

B. *Monolithic Meaning*

The Court's treatment of the Jaycees in *Roberts* also illustrates the thin protections of expressive association when expression is narrowly construed. Justice Brennan contended that the Jaycees "failed to demonstrate that the Act impose[d] *any* serious burdens on the male members' freedom of expressive association."[196] He dismissed as "sexual stereotyping" the Jaycees' argument that allowing women to vote "will change the content or impact of the organization's speech."[197] Judge

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[194] Brief of Appellee at *23, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237 [hereinafter Brief of Appellee] (internal citations omitted).

[195] *Roberts*, 468 U.S. at 625.

[196] *Id.* (emphasis added). The assertion is indefensible. *See* SOIFER, *supra* note 24, at 40 ("Surely the Jaycees . . . will be a different organization [after admitting women with voting rights]. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."); Richard W. Garnett, Jaycees *Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587, 597 n.53 (2005) ("[I]f the application of the Human Rights Act really imposed *no* 'serious burdens' on the freedom of expressive association, it is not clear why the Act's application should require justification under the Court's strict-scrutiny methodology."); Kateb, *supra* note 24, at 55 ("Brennan's claim that young women may, after their compulsory admission, contribute to the allowable purpose of 'promoting the interests of young men' is absurd."); Rosenblum, *Compelled Association*, *supra* note 87, at 78 ("The Jaycees' 'voice' was undeniably altered once it was forced to admit young women as full members along with young men."). *But see* Sunder, *supra* note 24, at 539 ("In *Roberts* and the cases immediately following it, the balance between liberty and equality swung in favor of equality interests because the associations at issue offered *no* evidence of any expressive message that would be threatened by inclusion of the plaintiffs.").

[197] *Roberts*, 468 U.S. at 628. Richard Garnett suggests that some of Brennan's "assertions sound dated today, like the kind of things one might have expected from an elderly, well-meaning, liberal

Richard Arnold's reasoning in the court below provides a useful contrast:

> If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. . . .
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> . . . .
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> [S]ome change in the Jaycees' philosophical cast can reasonably be expected. It is not hard to imagine, for example, that if women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the "brotherhood of man," or declaring how "free men" can best win economic justice. Such phrases are not trivial. The use of language betrays an attitude of mind, even if unconsciously, and that attitude is part of the belief and expression that the First Amendment protects.[198]

Judge Arnold's attention to the Jaycees's expressivism is missing not only from Brennan's opinion but also from Justice O'Connor's concurrence.[199] O'Connor concluded that the Jaycees's attention to and success in membership drives meant that it was "*first and foremost*, an organization that, at both the national and local levels, promote[d] and practice[d] the art of solicitation and management."[200] Other language in her concurrence suggested that:

> [A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective

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male jurist eager to say 'the right thing' about sex discrimination and stereotypes in the mid-1980s." Garnett, *supra* note 196, at 600.

[198] U.S. Jaycees v. McClure, 709 F.2d 1560, 1571 (8th Cir. 1983). Garnett offers a more detailed contrast between Judge Arnold's reasoning and the Brennan and O'Connor opinions. *See generally* Garnett, *supra* note 196.

[199] O'Connor's concurrence is sometimes viewed more favorably than Brennan's majority opinion. *See, e.g.*, Douglas O. Linder, *Freedom of Association After* Roberts v. U.S. Jaycees, 82 MICH. L. REV. 1878, 1896 (1984) ("On balance, the O'Connor approach seems to enjoy several distinct advantages over the majority approach."); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 876 (2005) ("Justice O'Connor's concurrence in *Jaycees* was largely correct.").

[200] *Roberts*, 468 U.S. at 639 (O'Connor, J., concurring) (emphasis added).

voice that would otherwise be heard.[201]

O'Connor's reasoning is problematic on three counts. First, she posits a false dichotomy between commercial and expressive associations—associations can be both commercial and expressive.[202] Second, her requirement that an association be "predominantly engaged"[203] in protected expression to avoid being classified as commercial hurts associations that, because of their size or unpopularity, must devote a substantial portion of their activities to fundraising or other commercial activities.[204] Finally, she leaves unclear which activities are "of the type protected by the First Amendment."[205]

Judge Arnold's opinion offers a very different perspective to O'Connor's assertion that the Jaycees was "first and foremost" a commercial association:

> Some of what local chapters do is purely social. They have parties, with no purpose more complicated than enjoying themselves. Some of it is civic. They have conducted a radio fund-raising drive to combat multiple sclerosis. They have conducted a women's professional golf tournament. They have engaged in many other charitable and educational projects for the public good. (And there is no claim, incidentally, of any discrimination in the offering to the public of the benefits of these projects. Money raised to fight disease, for example, is not used to benefit only male patients.) And they have advocated, through the years, a multitude of political and social causes. Governmental affairs is one of the chief areas of the organization's activity. Members on a national, state, and local basis are frequently meeting, debating issues of public policy, taking more or less controversial stands, and making opinions known to local, state, and national officials.[206]

Arnold further elaborated:

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[201] *Id.* at 635–36.

[202] As Larry Alexander notes, "[l]aws regulating membership in *any* organization—including commercial ones—will affect the content of that organization's expression." Larry Alexander, *What Is Freedom of Association and What Is Its Denial?*, 25 SOC. PHIL. & POL'Y 1, 7 (2008).

[203] *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

[204] One of the clearest illustrations of this consequence is the disparate effect of some charitable solicitation regulation on small or unpopular charities. *See* John D. Inazu, *Making Sense of* Schaumburg*: Seeking Coherence in First Amendment Charitable Solicitation Law*, 92 MARQ. L. REV. 551, 581–83 (2009) (explaining that, in the area of charitable solicitation, the more burdensome content-neutral regulations tend to threaten less established charities, and thus endanger their First Amendment rights).

[205] *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

[206] U.S. Jaycees v. McClure, 709 F.2d 1560, 1569 (8th Cir. 1983).

> The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of First Amendment freedom of association.[207]

His view is consistent with the Jaycees' own assertions that they were:

> [O]rganized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.[208]

Parsing which of these activities constitute the group's "predominate" activities is a difficult interpretive task, one that neither Brennan nor O'Connor undertook.[209]

VI. WHY DOCTRINE MATTERS

The harm of the doctrinal framework in *Roberts* did not end with the Jaycees. The categories of intimate and expressive association continue to shape legal decisions that profoundly affect people's lives. This section recounts two more recent examples of groups that have suffered under the *Roberts* framework.[210] The first is the Chi Iota Colony of the Alpha

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[207] *Id.*

[208] Brief of Appellee, *supra* note 194, at *5.

[209] Brennan's opinion did note that the Jaycees engaged in "protected expression on political, economic, cultural, and social affairs" and recognized that "the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626–27. But in the very next sentence, he wrote that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 627.

[210] Of course, the case law on freedom of association has changed since *Roberts*. Some post-*Roberts* cases have affected the doctrinal development of freedom of association in important ways, most notably *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). *See also* Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 68–70 (2006) (refusing to expand the scope of *Dale*); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., Inc., 515 U.S. 557, 559 (1995)

Epsilon Pi fraternity at the College of Staten Island (a nonintimate nonexpressive association). The second is the student chapter of the Christian Legal Society at Hastings Law School (a nonintimate expressive association).

A. *The Chi Iota Colony of Alpha Epsilon Pi*

Alpha Epsilon Pi ("AEPi") is a national social fraternity founded in 1913 "to provide opportunities for the Jewish college man seeking the best possible college and fraternity experience."[211] According to its Supreme Constitution, AEPi seeks "to promote and encourage among its members: Personal perfection, a reverence for God and an honorable life devoted to the ideal of service to all mankind; lasting friendships and the attainment of nobility of action and better understanding among all faiths . . . ."[212]

In 2002, the Chi Iota Colony ("Chi Iota") of AEPi formed at the College of Staten Island.[213] Between 2002 and 2005, Chi Iota never had more than twenty members.[214] Its past president described the purpose of the fraternity as fostering a "lifelong interpersonal bond termed brotherhood," which "results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives."[215] In furtherance of those goals, the fraternity limited its membership to males.[216]

Chi Iota applied to be chartered and officially recognized by the College of Staten Island in March 2004.[217] The Director of the Office of

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(rejecting, on free speech rather than free association principles, the challenge of a gay, lesbian, and bisexual group of its exclusion from a city parade); City of Dall. v. Stanglin, 490 U.S. 19, 20–21 (1989) (denying the expressive association claim of the owner of a for-profit skating rink who challenged an ordinance restricting admission to certain ages); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 7–8 (1988) (upholding anti-discrimination laws applied to a consortium of New York City social clubs); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (upholding anti-discrimination laws applied to the Rotary Club). But the basic premise of this article is that the categories of intimate and expressive association that began in *Roberts* remain essentially intact, and it is in these categories that the most significant doctrinal and theoretical problems surrounding the right of association remain. Neither *Dale* nor any of the other post-*Roberts* cases alters this premise. *Cf.* Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right To Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 57 (2004) ("*Dale* is a mess, but the upshot of the mess is that we still have the old message-based rule of *Roberts*."); Shiffrin, *supra* note 199, at 841 ("The Court's framing of the issues [in *Dale*] grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*.").

[211] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 376 (E.D.N.Y. 2006) (quoting Alpha Epsilon Pi's mission statement).

[212] *Id.* at 377 (quoting Alpha Epsilon Pi's bylaws).

[213] *Id.* at 376. The College of Staten Island is a primarily commuter campus of just over 11,000 undergraduates.

[214] *See id.* (noting that, at the time of the case in 2005, the fraternity had eighteen members, and the plaintiffs estimated that membership was unlikely to exceed fifty persons).

[215] *Id.* at 377 (quotation marks omitted).

[216] *See id.* at 379 (explaining the selection and initiation process for prospective members).

[217] *Id.* at 380.

Student Life denied the application on the basis that the fraternity's exclusion of women violated the college's nondiscrimination policy.[218] The denial of official recognition precluded Chi Iota from using the college's facilities, resources, and funding, as well as from using the college's name in conjunction with the group's name, and from posting events to the college's calendars.[219]

In 2005, the members of Chi Iota filed suit in the United States District Court for the Eastern District of New York, arguing violations of their rights to intimate and expressive association and to equal protection.[220] The district court granted the fraternity's motion for a preliminary injunction against the college on its intimate association claim but concluded that Chi Iota had not shown a clear or substantial likelihood of success on its expressive association claim.[221] On appeal, the United States Court of Appeals for the Second Circuit reversed the district court's grant of a preliminary injunction and remanded the case, noting that the fraternity's "interests in intimate association are relatively weak."[222] Although the district court would still have had Chi Iota's intimate and expressive association claims before it on remand, neither looked to have a reasonable chance of success given the posture of the litigation. As the Second Circuit was considering the case, the Chi Iota Colony of the Alpha Epsilon Pi Fraternity at the College of Staten Island disbanded.[223]

Chi Iota is not the most sympathetic plaintiff to bring a freedom of association claim. Although its Jewish roots suggested religious freedom interests, most of its members were nonpracticing Jews.[224] It was a social group, but some of its social activities were coarse and banal, including visits to strip clubs.[225] It may well be that the brothers of Chi Iota were a self-focused, hedonistic group of boys who brought a collective drain on whatever community existed at the mostly commuter campus at the College of Staten Island.[226]

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[218] *Id.*

[219] *Id.* at 380; *cf.* Healy v. James, 408 U.S. 169, 181 (1972) ("There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [the right of individuals to associate to further their personal beliefs].").

[220] *Chi Iota*, 443 F. Supp. 2d at 381.

[221] *Id.* at 389, 395.

[222] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 (2d Cir. 2007).

[223] E-mail from Gregory F. Hauser, to author (Sept. 30, 2009) (on file with author and *Connecticut Law Review*). Mr. Hauser represented Chi Iota in the litigation.

[224] *See Chi Iota*, 443 F. Supp. 2d at 378 (quoting Chi Iota's president, explaining that the fraternity members were "not extremely religious, but [did] talk about [their contributions] to the community, an expression of Judaism").

[225] *Chi Iota*, 502 F.3d at 141.

[226] Of course, the brothers of Chi Iota may also have had many endearing characteristics, especially to one another. As David Bernstein notes:

> [M]any believe that college fraternity and sorority members experience a "special camaraderie" that would not exist if members of the opposite sex were included.

But all of this is beside the point. Associational protections should not turn on whether a group's purposes or activities are sincere or wholesome to an outsider's perspective. The group's practices and activities meant something to the brothers of Chi Iota. They meant enough for the brothers to pursue membership through an application and rush process, to participate in the group's activities, and to bring a federal lawsuit in an attempt to preserve their associational bonds.

B. *The Christian Legal Society at Hastings Law School*

The Christian Legal Society ("CLS") is a "nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ."[227] Founded in 1961, its purposes include "providing a means of society, fellowship, and nurture among Christian lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor."[228] CLS maintains student chapters at many law schools around the country.[229] These student chapters invite anyone to participate in their events but require members—including officers—to sign a Statement of Faith consistent with the Protestant evangelical and Catholic traditions.[230] Part of this Statement of Faith affirms that sexual conduct should be confined to heterosexual marriage. Accordingly, CLS student chapters do not accept as members anyone who engaged in or affirmed the morality of sex outside of heterosexual marriage.[231]

In 2004, the CLS chapter at Hastings Law School in San Francisco inquired about becoming a recognized student organization.[232] Hastings officials withheld recognition because CLS's Statement of Faith violated the religion and sexual orientation provisions of the school's

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> For young people especially, the presence of the opposite sex in a social setting is likely to create sexual tension and concern for one's appearance, making it harder for them to relax and to get away from the pressure and stress of everyday life.

Bernstein, *Sex Discrimination*, *supra* note 157, at 186–87.

[227] Petition for Writ of Certiorari at 6, Christian Legal Soc'y Chapter of Univ. of Cal. v. Newton, No. 08-1371 (S. Ct. May 5, 2009).

[228] *Id.*

[229] *Id.*

[230] *Id.* at 7 (citation omitted).

[231] *See id.* at 8 ("In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." (internal quotation marks omitted). CLS specifies that "[a] person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership," but "CLS individually addresses each situation that arises in a sensitive Biblical fashion." *Id*.

[232] *Id.*

Nondiscrimination Policy.[233] As a result, the school denied CLS travel funds and funding from student activity fees.[234] It also denied them the use of the school's logo, use of a Hastings e-mail address, the opportunity to send mass e-mails to the student body, participation in the annual student organizations fair, and reserved meeting spaces on campus.[235] Hastings subsequently asserted that its denial of recognition stemmed from an "accept-all-comers" policy that required any student organization to accept any student who desired to be a member of the organization.[236]

CLS filed suit in federal district court asserting violations of expressive association, free speech, free exercise of religion, and equal protection.[237] In *Christian Legal Society v. Kane*, the court granted summary judgment against CLS on all of its claims.[238] With respect to CLS's expressive association claim, the court concluded that *Roberts* and *Dale* were inapplicable because "CLS is not being forced, as a private entity, to include certain members or officers" and "the conditioned exclusion of [an] organization from a particular forum [does] not rise to the level of compulsive membership."[239] The court also asserted that "Hastings has denied CLS official recognition based on CLS's conduct—its refusal to comply with Hastings's Nondiscrimination Policy—not because of CLS's philosophies or beliefs."[240]

Despite resting its holding on the inapplicability of *Roberts* and *Dale*, the court held in the alternative that CLS's claim failed under those

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[233] *Id.* at 9.

[234] *Id.* at 10.

[235] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *17 (N.D. Cal. May 19, 2006); Petition for Writ of Certiorari, *supra* note 227, at 10. Hastings did not deny CLS the "use of campus facilities for meetings and other appropriate purposes," which the Supreme Court has called "[t]he primary impediment to free association flowing from nonrecognition." Healy v. James, 408 U.S. 169, 181 (1972). Still, nothing in *Healy* suggests that the lack of access to campus facilities for meetings is the only burden caused by nonrecognition, and it is not hard to see how the inability to reserve meeting spaces, to access e-mail lists, or to participate in student fairs could burden associational freedoms:

> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

Id. at 181–82 (footnote omitted).

[236] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

[237] *Kane*, 2006 WL 997217, at *4.

[238] The district court granted leave for a group called Hastings Outlaw to intervene in the case. Outlaw asserted that its members had a right to be officers and voting members in any other campus group (including CLS) and that its members opposed their student activity fees funding an organization that they found offensive. Petition for Writ of Certiorari, *supra* note 227, at 10–11.

[239] *Kane*, 2006 WL 997217, at *15 (citing Boy Scouts of Am. v. Wyman, 335 F.3d 80, 91 (2d Cir. 2003)).

[240] *Id.* at *17.

authorities as well. It assumed that CLS qualified as an expressive association because Hastings did not dispute that characterization.[241] But the court determined that "CLS has not demonstrated that its ability to express its views would be significantly impaired by complying with [the school's nondiscrimination] requirement."[242] The court concluded:

> [U]nlike the Boy Scouts in *Dale*, CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission.[243]

In fact, the court found "no evidence" that "a non-orthodox Christian, gay, lesbian, or bisexual student" who became a member or officer of CLS, "by [his or her] presence alone, would impair CLS's ability to convey its beliefs."[244] That conclusion repeats the fallacy in *Runyon* that forcing integration on a racist group wouldn't alter its message and the fallacy in *Roberts* that forcing an all-male group to accept women wouldn't alter its message.

CLS appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The appellate court affirmed the district court with a terse two-sentence opinion: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable."[245] CLS petitioned for a writ of certiorari to the United States Supreme Court, arguing, among other things, that the Ninth Circuit's *Kane* decision (subsequently restyled as *Christian Legal Society v. Martinez*) created a circuit split with a Seventh Circuit case invalidating the denial of official recognition to a CLS student chapter at the Southern Illinois University School of Law.[246]

A divided Supreme Court rejected CLS's challenge.[247] Justice

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[241] *Id.* at *20; *cf.* Christian Legal Soc'y v. Walker, 453 F.3d 853, 862 (7th Cir. 2006) ("It would be hard to argue—and no one does—that CLS is not an expressive association.").

[242] *Kane*, 2006 WL 997217, at *20.

[243] *Id.* at *22.

[244] *Id.* at *23.

[245] Christian Legal Soc'y v. Kane, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 795 (2009), *aff'd and remanded*, 130 S. Ct. 2971 (2010). The court cited its opinion in *Truth v. Kent School District*, 542 F.3d 634, 649–50 (9th Cir. 2008), in which it ruled that a school district could deny recognition to a high school Bible club that limited its voting members and officers to those who shared the group's beliefs.

[246] Christian Legal Soc'y v. Walker, 453 F.3d 853, 859–60 (7th Cir. 2006).

[247] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

Ginsburg's majority opinion concluded that Hastings' all-comers policy was "a reasonable, viewpoint-neutral condition on access to the student-organization forum."[248] Justice Alito authored a dissent joined by Chief Justice Roberts and Justices Thomas and Scalia.[249]

The majority's free speech analysis is not entirely persuasive—its reasoning obscures a tension between the viewpoint neutrality of the all-comers policy (under a public forum analysis) and Hastings' non-neutral policy preferences expressed through its own speech and subsidies (under something akin to a government speech analysis).[250] But in the context of this Article, an even more disturbing aspect of the opinion is the majority's failure to take seriously CLS's freedom of association claim.

From the premise that it "makes little sense to treat CLS's speech and association claims as discrete," Ginsburg concluded that the Court's "limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights."[251] The problem with this doctrinal move is two-fold. First, it essentially elects rational basis scrutiny over strict scrutiny, and therefore all but preordains the outcome.[252] Second, it casts aside the competing constitutional values underlying CLS's freedom of association claim.[253]

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[248] *Id.* at 2978.

[249] *Id.* at 3000 (Alito, J., dissenting).

[250] *See, e.g.*, *id.* at 2976 (Hastings' policy "encourages tolerance, cooperation, and learning among students" and "conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'"). In addition to the doctrinal complications, *Martinez* involved a disputed factual question as to whether Hastings' applied an all-comers policy or a policy that prohibited certain kinds of discrimination, including discrimination based upon religion and sexual orientation. The Court remanded on the question of whether Hastings selectively applied its all-comers policy. *Id.* at 2995. While this factual question might be important to a public forum analysis, it is less relevant to the freedom of association analysis that I believe the Court should have made. The strength of CLS's constitutional claim to exist as a group should not turn on whether the restriction against it is viewpoint neutral or selectively enforced against it.

[251] *Id*.

[252] *See id.* ("[T]he same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums."); *id.* ("[T]he strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may 'reserv[e] [them] for certain groups'"). After deciding to pursue a public forum analysis, the viewpoint neutrality of Hastings' all-comers policy was self-evident to the majority. *See id.* at 2993 ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."); *id.* ("An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral."). Accordingly, the majority "consider[ed] whether Hastings' policy is reasonable taking into account the RSO forum's function and 'all the surrounding circumstances,'" *id.* at 2988, and concluded that "the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes." *Id.* at 2991.

[253] For example Ginsburg cites an important article by Eugene Volokh. *Id.* at 2985–86 (citing Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006)). Among other things, Volokh's article considers a conflict very similar to the one at issue in *Martinez*: whether a public university can apply antidiscrimination rules to the Christian Legal Society. *Id.* at 1935. Ginsburg highlights Volokh's observation that a school may limit official recognition to groups comprised only of students, even though this infringes upon the associational

CLS's associational claim highlights the underlying conflict of values in this case: the clash between group autonomy and equality, the same tension at issue in *Runyon* and *Roberts*. Taking this values clash seriously means refusing to make an artificial distinction between expression and conduct and recognizing that, in some cases, they are one in the same. Contrary to Justice Ginsburg's insistence that "CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO [registered student organization] status,"[254] CLS's "conduct" is inseparable from its message.

Ginsburg's opinion misses this connection. Quoting from CLS's brief, she writes that "expressive association in this case is 'the functional equivalent of speech itself'"[255] to set up the idea that expressive association is entitled to no more constitutional protection than speech. But CLS had asserted:

> [W]here one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself.[256]

CLS wasn't arguing that association is nothing more than speech but that association is itself a form of expression—who it selects as its members and leaders communicates a message. CLS underscored this point elsewhere in its brief, arguing that "[b]ecause a group's leaders define and shape the group's message, the right to select leaders is an essential element of its right to speak."[257] Ginsburg interpreted this assertion to mean that "CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role."[258] That interpretation may be consistent with the *Roberts* understanding of expressive association, but as I have argued throughout this Article, it misses the more fundamental connection between a group's message and its composition.

Ginsburg distinguished the Court's associational cases like *Dale* and *Roberts* because those cases "involved regulations that *compelled* a group

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freedoms of those who wish to form a group with non-students. *Martinez*, 130 S. Ct. at 2986. The point is a nice one, but the non-student constraint could also be construed as a jurisdictional limit linked far more closely (and less ideologically) to the nature of the public forum than an all-comers policy. More importantly, Volokh spends considerable time accounting for the values introduced by the right of association. Volokh, *supra*, at 1935. The majority subsumes this dimension into its speech analysis and avoids the harder questions.

[254] *Martinez*, 130 S. Ct. at 2994.

[255] *Id.* at 2984–85 (quoting Brief for Petitioner, *supra* note 2, at 35).

[256] Brief for Petitioner, *supra* note 2, at 35.

[257] *Id.* at 18.

[258] *Martinez*, 130 S. Ct. at 2985 (citing Brief for Petitioner, *supra* note 2, at 18).

to include unwanted members, with no choice to opt out."[259] But this is really a matter of perspective. Sometimes a group must choose between receiving benefits and adhering to its policies at the cost of those benefits.[260] But withholding some benefits—like access to meeting space or email lists or the opportunity to be part of a public forum—can be akin to stamping out a group's existence. After *Martinez*, the Hastings-Christian-Group-that-Accepts-All-Comers can exist, and the Christian-Legal-Society-for-Hastings-Law-Students-that-Can-Sometimes-Meet-on-Campus-as-a-Matter-of-University-Discretion-If-Space-Is-Available-but-Can't-Recruit-Members-at-the-Student-Activities-Fair can exist. But the Hastings Christian Legal Society—whose views and purposes are in no way sanctioned by and can be explicitly disavowed by Hastings—cannot.[261]

VII. REMEMBERING THE RIGHT OF ASSEMBLY

On the same day that the Court issued its *Martinez* opinion, it released its decision in *McDonald v. City of Chicago*.[262] Justice Alito's opinion in the latter case observed:

> In [*United States v. Cruikshank*], the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the states. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment.[263]

It was only the sixth time in the last twenty years that the Court had even *mentioned* the right of assembly.[264] But this passing nod to a long-

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[259] *Id.* at 2986.

[260] Ginsburg cites *Grove City College v. Bell*, 465 U.S. 555, 575–76 (1984), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983).

[261] "Official recognition" is a term of art that doesn't entail any endorsement of private groups by the state actor. Hastings made clear that it "neither sponsor[]s nor endorse[s]" the views of registered student organizations and insisted that the groups inform third parties that they were not sponsored by the law school. Brief for Petitioner, *supra* note 2, at 4.

[262] 130 S. Ct. 3020 (2010).

[263] *Id.* at 3031 (alteration in original) (quoting United States v. Cruikshank, 92 U.S. 542, 551–52 (1876) and De Jonge v. Orgeon, 299 U.S. 353, 364 (1937)).

[264] Other than *McDonald*, a majority opinion of the Supreme Court has mentioned the right of assembly five times in the last twenty years. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010) ("Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite."); District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008) (describing "right of the people" clause in relation to assembly); *id.* at 2797 (intimating that assembly and petition are two separate rights); Watchtower Bible and Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164 (2002) (quoting discussion of free assembly in Thomas v. Collins, 323 U.S. 516, 539–40 (1945));

forgotten right gestured toward the constitutional framework that should have decided *Martinez* and should have protected the Christian Legal Society.

From the House debates over the Bill of Rights that appealed to William Penn's defense of assembly to the rallying cries of the Democratic-Republican Societies, from the early suffragist and abolitionist movements of the antebellum era to the labor and civil rights movements of the Progressive Era, and from the political rhetoric of Abraham Lincoln to the political rhetoric of Martin Luther King, Jr., the right of assembly has emphasized the importance of shielding dissident groups from a state-enforced majoritarianism throughout our nation's history.[265] As C. Edwin Baker has argued, "the function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms."[266] This role of assembly and its appeal to groups of different ideologies "makes it a better 'fit' than the right of association within our nation's legal and political heritage."[267] Indeed, principles of constitutional interpretation suggest that the First Amendment's right of assembly, not the late-arriving and judicially-constructed right of association, holds a central place in our constitutional tradition.[268]

The importance of assembly is strikingly evident in Justice Brandeis's famous opinion in *Whitney v. California*.[269] The now discredited majority opinion expressed particular concern that Anita Whitney had undertaken her actions in concert with others, which "involve[d] even greater threat to the public peace and security than the isolated utterances and acts of

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McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) ("The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights." (citation omitted)); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 476 (1995) ("'Fear of serious injury cannot alone justify suppression of free speech and assembly.'" (quoting Whitney v. California, 274 U.S. 357, 376, (1927))). The last time the Court *applied* the constitutional right of assembly appears to have been in *NAACP v. Claiborne Hardware Co*., 458 U.S. 88 (1982)—twenty-eight years ago.

[265] *See generally* Inazu, *Forgotten Freedom*, *supra* note 15 (chronicling the role of assembly in these historical events and movements).

[266] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989).

[267] Inazu, *Forgotten Freedom*, *supra* note 15, at 568. By "fit," I refer to the ways in which assembly falls plausibly within our tradition of American constitutionalism. The notion of fit is intimated in different ways by both Ronald Dworkin and Alasdair MacIntyre. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3d ed. 2007).

[268] Philip Bobbitt has suggested that we engage in six modalities of constitutional argument: textual, structural, prudential, historical, doctrinal, and ethical). PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION xi, 7–8 (1982).

[269] 274 U.S. 357 (1927) (Brandeis J., concurring). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

individuals."[270]

Rejecting this rationale, Brandeis penned some of the most well-known words in American jurisprudence:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[271]

The freedoms of "speech and assembly" lie at the heart of Brandeis's argument—the phrase appears eleven times in his brief concurrence. The Court had linked these two freedoms only once before; after *Whitney*, the nexus occurs in over one hundred of its opinions.[272] Brandeis's entwining of speech and assembly establishes two important connections. First, it recognizes that a group's expression includes not only the spoken words of those assembled but also the expressive message inherent in the group's existence. Second, it emphasizes that the rights of speech and assembly extend across time, preceding the actual moment of expression or gathering.[273] Just as freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group's autonomy, composition, and existence.[274]

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[270] *Whitney*, 274 U.S. at 372.

[271] *Id.* at 375 (Brandeis, J. concurring). Judges and scholars have written volumes about these words and those that followed, but almost all of them focus on speech alone rather than speech and assembly. Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis's Whitney concurrence the "classic formulation" of the fundamental principle underlying free speech. 376 U.S. 254, 270 (1964); *see also* Robert Cover, *The Left, the Right, and the First Amendment: 1918–1928*, 40 MD. L. REV. 371 (1981) ("classic statement of free speech"); *cf.* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 194 (2002).

[272] The only mention of "speech and assembly" prior to *Whitney* came in *New York* ex rel *Doyle v. Atwell*, 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the "rights of freedom of speech and assembly").

[273] *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713, 720–25 (1971) (Douglas, J., concurring); Kingsley Int'l Pictures Corp. v. New York, 360 U.S. 684, 697–98 (1959) (Douglas J., dissenting) ("I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."); Poulos v. New Hampshire, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting) ("There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment.").

[274] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (noting that *Douds* referred to "the varied forms of governmental action which might interfere with freedom of assembly"

As M. Glenn Abernathy argued in his seminal work, *The Right of Assembly and Association*, assembly "need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall" but "can justifiably be extended to include as well those persons who are joined together through organizational affiliation."[275] Abernathy also noted that assembly avoids the artificial line-drawing inherent in the right of association. Writing in 1961, he observed that the Court's initial recognition of a constitutional right of association three years earlier had inserted an instrumental gloss on group autonomy:

> It must be noted that [*NAACP v. Alabama*] does not clearly extend the First Amendment protection to *all* lawful affiliations or organizations. What Justice Harlan discusses is the association "for the advancement of beliefs and ideas." Clearly a vast number of existing associations would fall within this description, but it is questionable whether the characterization would fit the purely social club, the garden club, or perhaps even some kinds of trade or professional unions.[276]

As Abernathy noted, this message-based analysis—explicitly recognized twenty-six years later in *Roberts*'s category of expressive association—is absent in the right of assembly: "No such distinction has been drawn in the cases squarely involving freedom of assembly questions. The latter cases emphasize that the right extends to any lawful assembly, without a specific requirement that there be an intention to advance beliefs and ideas."[277]

The right of assembly may thus provide a less arbitrary and more persuasive framework for protecting dissenting practices than the right of

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and concluding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order"); Am. Commc'ns Ass'n. v. Douds, 339 U.S. 382, 402 (1950) ("[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. (forthcoming 2010). The principle that assembly encompasses membership is also evident in the now discredited logic underlying a number of the communist cases decided prior to the Court's recognition of the right of association. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79, 84 (D.C. Cir. 1949) ("[N]othing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of speech and assembly is denied no one. Freedom of thought and belief is not impaired. Anyone is free to join the Committee and give it his support and encouragement. Everyone has a constitutional right to do these things, but no one has a constitutional right to be a government employee."); *cf.* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (Edgerton, J., dissenting) ("[G]uilt by association . . . denies both the freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth.").

[275] M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 173 (2d ed. rev. 1961).

[276] *Id.* at 236–37 (quoting *NAACP*, 357 U.S. 449).

[277] *Id.* at 237.

expressive association. Its approach is captured in Justice Rutledge's opinion in one of the most important cases on the right of assembly, *Thomas v. Collins*.[278] Rutledge argued that, because of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," only "the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[279] He explained:

> Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation [of] both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.[280]

Justice Rutledge's opinion also noted that the right of assembly guarded "not solely religious or political" causes but also "secular causes," great and small.[281] As Aviam Soifer has suggested, Rutledge's "dynamic, relational language" emphasized that the right of assembly was "broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements."[282]

Soifer, Rutledge, Abernathy, and Brandeis gesture toward an important insight about group autonomy. Its primary value is not intimacy or expressivism—we have other rights, such as privacy and speech, that are better suited toward those ends. Rather, its primary value is that it permits dissent to manifest through groups. Justice Brennan glimpsed this value in *Roberts* when he noted that "collective effort on behalf of shared goals" is "especially important in preserving political and cultural diversity and in

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[278] 323 U.S. 516 (1945).

[279] *Id.* at 530.

[280] *Id.* at 531–32 (internal citation omitted).

[281] *Id.* at 531. The "preferred place" language originated in Justice Douglas's opinion for the Court in Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943), in which Douglas wrote: "Freedom of press, freedom of speech, freedom of religion are in a preferred position."

[282] SOIFER, *supra* note 24, at 77–78; *see also* Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule . . . ."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("[T]he right [of assembly] . . . cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions . . . ."); *id.* ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . .").

shielding dissident expression from suppression by the majority."[283] This value of dissent entails risk because it strengthens a genuine pluralism against majoritarian demands for consensus.[284] It resists what Nancy Rosenblum has called the liberal state's "logic of congruence," which requires "that the internal life and organization of associations mirror liberal democratic principles and practices."[285]

Dissenting practices often embody meaning different than that ascribed to them by outside observers, and "[m]any group expressions are only made intelligible by the practices that give them meaning."[286] Because "[c]hallenges to existing values and decisions to embody and express dissident values are precisely the choices and activities that cannot be properly evaluated by summations of existing preferences," the right of assembly protects "activities that are *unreasonable* from the perspective of the existing order."[287] And a group need not lack privilege or status in

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[283] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (finding that freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas" (footnote omitted)).

[284] The importance of dissent was downplayed by the "liberal consensus" that formed the background to the initial recognition of the constitutional right of association in the middle of the twentieth century. Inazu, *Strange Origins*, *supra* note 16, at 541–42, 558 & n.558 (describing the prominence of mid-twentieth century liberalism that accompanied the Court's initial framing of the constitutional right of association). In particular, pluralists like David Truman and Robert Dahl failed to recognize that "the capacity for groups to maintain autonomous practices, detached from and even antithetical to the will of the majority, was in some ways a destabilizing freedom. . . . [G]roup autonomy poses risk rather than stability for the democratic experiment." *Id.* at 542–45, 555–57. For the contrast between the competing narratives of dissent and the pluralist consensus, see Sheldon S. Wolin, *Democracy, Difference, and Re-Cognition*, 21 POL. THEORY 464, 464 (1993), observing:

> From Roger Williams's Bloody Tenent (1644) to John Calhoun's Disquisition, Margaret Fuller's Woman in the Nineteenth Century, Booker Washington's Up from Slavery, and the Autobiography of Malcolm X, discursive representations of difference have appeared but until recently have had little effect on the main conceptual vocabulary or thematic structure of the theoretical literature of American politics. Instead, from Madison's Tenth Federalist to the writings of Mary Follett, Charles Beard, Arthur Bentley, David Truman, and Robert Dahl, those modes of difference mostly disappeared or were reduced to the status of interests. The result: on one side, themes of separation, dismemberment, disunion, exploitation, exclusion, and revenge and, on the other, themes extolling American pluralism as the distinctive American political achievement and the main reason for the unrivaled stability of American society and its political system.

To Wolin's second list, we can add John Rawls, who became for Wolin the paradigmatic thinker of liberalism's suppression of difference. *See* SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 549 (2004) (noting that the "repressive elements in Rawls's liberalism . . . reflect an aversion to social conflict that is in keeping with his elevation of stability, cooperation, and unity as the fundamental values").

[285] ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 5, at 36; *see also* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3 (2002) ("Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.").

[286] Inazu, *Forgotten Freedom*, *supra* note 15, at 567. *See generally* MACINTYRE, *supra* note 267.

[287] BAKER, *supra* note 266, at 134.

society to assume an "unreasonable" or dissenting posture—dissent is defined by a group's refusal to ascribe to state-enforced majoritarian norms in the particular setting in which it finds itself.[288] Successful businessmen, non-practicing Jewish male college students, and Christian law students all play a part in "political and cultural diversity."[289] When the state seeks to inhibit or destroy their way of life, the groups that they inhabit become forms of "dissident expression."[290] We tolerate these forms of expression not because we endorse them or seek to emulate them, but because we recognize the state's tendencies to dominate and control through the interpretations and meanings it assigns to a group's activities.

Facilitating a space for meaningful dissent against suppression by majoritarian norms is also a fundamentally democratic goal. It protects not only Christian groups that oppose homosexual conduct but also gay groups that embrace and embody it.[291] As Stephen Carter has argued, "[d]emocracy needs diversity because democracy advances through dissent, difference, and dialogue. The idea that the state should . . . create a set of meanings, [and] try to alter the structure of institutions that do not match it, is ultimately destructive of democracy because it destroys the differences that create the dialectic."[292] Beginning from a very different perspective, William Eskridge arrives at a similar conclusion: "The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the

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[288] *Cf.* Healy v. James, 408 U.S. 169, 196 (1972) (Douglas, J., concurring) ("[T]he *status quo* of the college or university is the governing body (trustees or overseers), administrative officers, who include caretakers, and the police, and the faculty." (emphasis added)).

[289] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[290] *Id.*

[291] *See, e.g.*, Brief in Support of Petitioner, *supra* note 2, at 9 ("The genius of the First Amendment is that it knows no bias. Protections for one minority voice extend to all."). One proponent of gay rights has critiqued the "overly formal, inconsequential, empty version of equality" that underlies the application of antidiscrimination law to the Christian Legal Society. *See* Joan W. Howarth, *Religious Exercise, Expression, and Association in Schools*, 42 U.C. DAVIS L. REV. 889, 897 (2009).

[292] Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 33 (Michael W. McConnell et al. eds., 2001). The importance of protecting difference and dissent is particularly relevant to the "counter-assimilationist" ideal of religious freedom that allows people "of different religious faiths to maintain their differences in the face of powerful pressures to conform." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990). In the context of religious freedom, and in contrast to his relatively unsympathetic treatment of the Jaycees throughout his *Roberts* opinion, Justice Brennan adopted a more communitarian approach. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."); Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against [the] quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.").

triumph of one community over all others."[293]

The call for greater group autonomy through the right of assembly is not without limiting principles. The text of the First Amendment offers one: assemblies must be peaceable.[294] Our constitutional, social, and economic history suggests another: antidiscrimination norms should typically prevail when applied to commercial entities.[295] Other questions are more difficult to answer. I take up some of them in my forthcoming book, *Liberty's Refuge*.[296] Among the most difficult is whether the right of assembly tolerates racial discrimination by peaceable, noncommercial groups. Our constitutional history supports a plausible argument that "race is just different," that the state's interest in eliminating racial discrimination justifies a nearly total ban on racially segregated private groups.[297] As Justice Stewart in *Jones v. Alfred H. Mayer Co.*:

> Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. . . . [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[298]

For these reasons, we might plausibly treat race differently when considering the boundaries of group autonomy. I would be quick to do so as a matter of personal preference—I can think of no racially discriminatory group to which I attach personal value or worth. But treating race differently in all dimensions of the private sphere ultimately

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[293] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997).

[294] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .").

[295] *See, e.g.*, Brief for Petitioner, *supra* note 2, at 2 ("All *noncommercial* expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles." (emphasis added)). Justice O'Connor proposed a similar line. *See Roberts*, 468 U.S. at 635–36 (O'Connor, J., concurring). As I suggested earlier in this Article, O'Connor's requirement that an association be "predominantly engaged" in expressive activity introduces considerable difficulty to her conceptual categories, and her conclusion that the Jaycees itself was a commercial association is problematic. *Id.* at 635–37. For a clearer example of a commercial association, see *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989), in which the Supreme Court denied the freedom of association claim of the owner of a skating rink who challenged a Dallas ordinance restricting admission to "dance halls" to people between the ages of fourteen and eighteen. As the Court noted, "[t]he hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment." *Id.* at 24.

[296] *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (forthcoming 2011, Yale University Press).

[297] Even here, however, very few people make categorical arguments—the Ku Klux Klan, for example, is still permitted to tout its racist message.

[298] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

undercuts a vision of assembly that protects pluralism and dissent against state-enforced orthodoxy. We cannot move from the premise that genuine pluralism matters to an effort to rid ourselves of the groups that we don't like.[299]

On the other hand, the right of assembly will not always trump competing interests. Courts will have to draw lines and balance interests, just as they do with the freedom of speech. In my view, the protections for assembly ought to be constrained when a private group wields so much power in a given situation—as private groups did in the American South from the decades following the Civil War to the end of the Civil Rights Era—that it prevents other groups from meaningfully pursuing their own visions of pluralism and dissent.[300] Seen in this light, assembly is a self-limiting right.[301] But as long as private groups do not tip the balance of power in this way, we should tolerate even those groups that offend our sensibilities.

Line drawing questions like the permissibility of race-based discrimination are immensely important. But these difficult questions should not prevent us from beginning to address the inadequacies of

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[299] The question of racial discrimination, and specifically discrimination by whites against African Americans, is one of the most difficult issues confronting any argument for greater group autonomy. My argument would permit some racially discriminatory groups. It is an argument rooted in social change and hope in social change—that we are a different society today than we were in 1960 and that we will continue to hold the ground that has been won. I do not mean to suggest that we have solved the problem of race. I do argue that in this, as in many other areas of the law, we recognize that the structural politics today are different. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2516 (2009) ("More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today." (citing South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966))); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); Freeman v. Pitts, 503 U.S. 467, 491–92 (1992) ("[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish . . ."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future"); Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 435–38 (1968) (holding that a school district may be declared unitary and lacking racial discrimination based on satisfactory performance in five areas of a school district's operations).

[300] My proposal for assembly differs in this respect from what Andrew Koppelman and Tobias Wolff have called the "neolibertarian[]" position, which they attribute to an eclectic group of scholars that includes David Bernstein, Dale Carpenter, Richard Epstein, Michael McConnell, John McGinnis, Michael Paulsen, Nancy Rosenblum, and Seana Valentine Shiffrin. KOPPELMAN & WOLFF, *supra* note 6, at xii (quotation marks omitted).

[301] A similar rationale underlies the free exercise of religion. A religious group that used its freedom to establish a theocracy would undermine the principles of the free exercise of religion. The relationship between the right of assembly and the religion clauses of the First Amendment is a yet unexplored dimension of constitutional law that might shed some light on the troubled jurisprudence surrounding "church-state" issues.

current doctrine. This Article has suggested that the current balance—or lack of balance—is deeply problematic. Our world is one in which courts have decided that fraternities cannot exclude women and Christian student groups cannot exclude those who do not share their religious convictions. The relevant question today is not whether a constitutional vision that offers strong protections for pluralism and dissent will be realized (as if this area of the law could ever reach finality), but whether we ought to move in that direction.

Some people will be unpersuaded by any constitutional vision that gives greater protections to dissenting groups, particularly one that limits the reach of antidiscrimination laws. They will push instead for greater congruence and less difference. That is the logic underlying the Court's decision in *Martinez*. It surfaces in Justice Kennedy's belief that a state-run public school "quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations."[302] It is the fundamental tenet of the Ninth Circuit's decision in *Truth v. Kent* that equates a Christian club's desire to limit its members to Christians to invidious discrimination.[303]

Those who endorse decisions like *Martinez* and *Kent* and reject a constitutional vision that challenges the current approach to protecting group autonomy need to provide a better justification for the categories of intimate and expressive association. They should articulate a convincing constitutional doctrine and ethos that legitimates the jurispathic silencing of "those who would make a *nomos* other than that of the state."[304] What Thomas Emerson observed almost fifty years ago remains true today: "[T]he constitutional source of 'the right of association,' the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth."[305] The protections for group autonomy deserve greater respect—and a more coherent jurisprudential approach—than we have given them thus far.

VIII. CONCLUSION

This Article has called attention to flaws in the Supreme Court's categories of intimate and expressive association. It is unlikely that these categories reflect "well-settled" doctrine.[306] But even if they do, sometimes well-settled doctrine is wrong. The very real constitutional issues unfolding before us should not be answered by rote invocations of

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[302] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2998 (2010) (Kennedy, J., concurring).

[303] Truth v. Kent Sch. Dist., 542 F.3d 634, 644–45 (9th Cir. 2008).

[304] Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

[305] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964).

[306] KOPPELMAN & WOLFF, *supra* note 6, at xi.

these ill-formed categories.

The alternative constitutional vision of assembly is not without risk. It reintroduces a weighing of constitutional values that some would prefer remain suppressed. It strengthens protections for groups that you and I do not like. But it also strengthens protections for groups that we care about, against a state-enforced majoritarianism whose threat we might not recognize. As Justice Black once wrote: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[307]

[307] Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).