

# FRIENDS, ASSOCIATES, AND ASSOCIATIONS: THEORETICALLY AND EMPIRICALLY GROUNDING THE FREEDOM OF ASSOCIATION

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*This Article argues that while the freedom of association is back at the center of the First Amendment, it suffers from the fact that it has been both theoretically and doctrinally subsumed by the freedom of speech. The First Amendment's self-governance interest is necessarily broader than an interest in political debate and a vibrant marketplace of political ideas.*

*Association and associations enable the political participation that can turn ideas and debate into the action required to create democratic accountability. Free association doctrine is, therefore, uniquely positioned to promote representative government by protecting conditions necessary for an active citizenry.*

*A reoriented freedom of association doctrine would focus on how its protections affect civic and political engagement, taking into account findings from the empirical sciences. The result would be a unique right that furthers the self-governance interest of the First Amendment by protecting groups (formal and informal) and their capacity to act. This would ensure, first, that the First Amendment protects the participation necessary for meaningful self-governance and, second, that free association doctrine is not redundant. Free speech doctrine could continue to attend to its traditional ends.*

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### INTRODUCTION

In the last few years, there has been a resurgence in the United States and around the world of people taking to the streets with their political demands. Tens of thousands participated in labor demonstrations in Wisconsin and elsewhere in the Midwest in the winter of 2011 to protest efforts to quash public unions.<sup>1</sup> Shortly thereafter, numerous cities confronted the relatively difficult-to-contain offshoots of Occupy Wall Street. Internationally, we witnessed the Arab Spring, at one end of the spectrum, and the London riots, at the other. Finally, the Tea Party, which found its original momentum in public gatherings, but now largely gathers

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1. See, e.g., Karen Tumulty, *Wisconsin Governor Wins His Battle with Unions on Collective Bargaining*, WASH. POST, Mar. 11, 2011, at A03; Mark Guarino, *Union Battle Echoes Beyond Wisconsin: 'We're Fighting for Our Very Existence'*, CHRISTIAN SCI. MONITOR (Feb. 17, 2011), <http://www.csmonitor.com/USA/Politics/2011/0217/Union-battle-echoes-beyond-Wisconsin-We-re-fighting-for-our-very-existence> (“About 40,000 public-sector employees crammed into the Wisconsin State Capitol and surrounding blocks in Madison Thursday, hoping to sway three Republican state senators to block a bill they say is designed to wipe out 50 years of union labor laws in the state.”).

in private, has become a powerful political player, working within the Republican Party to shape national legislative priorities and to win electoral seats.<sup>2</sup>

Underlying each of these political assemblies are, of course, associations. Each movement gained momentum through social networks—formal and informal, grassroots and astroturf, embodied and virtual. Each of the underlying associations, moreover, was organized in some way. The labor movement in Wisconsin reconnected a long-standing and well-defined, but recently dormant, union network.<sup>3</sup> The Occupy movement, in contrast, was loose, evolving, and self-consciously participatory.

As in politics, so too in law, the freedom of association is back. In a series of high-profile cases, the U.S. Supreme Court has strengthened constitutional protections for some associations while undercutting protection for others.<sup>4</sup>

The Court's perplexing results have given rise to newfound interest in the freedom of association. A growing body of legal scholarship criticizes the Court's free association doctrine for viewing the freedom of association as a form of free speech and offers a variety of solutions, all of which ground the freedom of association squarely within the well-established First Amendment interest in promoting self-governance.<sup>5</sup>

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2. See THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 131–34 (2012) (recounting that the Tea Party manifested first as synchronized local rallies and subsequently took off after a September 12, 2009 rally on the National Mall in Washington, D.C. organized by Glenn Beck and FreedomWorks).

3. Guarino, *supra* note 1, *passim*; accord Douglas Belkin & Kris Maher, *Protests Fail to Sway Wisconsin Governor*, WALL ST. J., Feb. 17, 2011, at A5; Monica Davey & Steven Greenhouse, *Big Budget Cuts Add Up to Rage in Wisconsin*, N.Y. TIMES, Feb. 17, 2011, at A1.

4. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that corporations are persons with First Amendment rights to independently spend money to express their views on political candidates); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that forced inclusion of homosexual member pursuant to state antidiscrimination law violated the expressive rights of the organization). *But see* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding statute that criminalized association with terrorist groups for any purposes including to encourage the pursuit of nonviolent and peaceful conflict resolution); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (holding state law school could constitutionally deny official recognition to a student group that refused to admit gay students as well as unrepentant sexually active students).

5. Among the first in this line of scholarship was the work of Jason Mazzone, who developed a grand theory of the right of association derived from the First Amendment's textual right to assemble for the purpose of petitioning government. See Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002). Mazzone concluded that "associations merit constitutional protection if they directly engage in political activities, or if they equip their members with politically relevant skills." *Id.* at 639. However, "only small, member-intensive associations" should be exempted from antidiscrimination laws. *Id.* Ultimately, Mazzone developed a comprehensive matrix explaining which associations deserve what kinds of constitutional protection based on their

This Article extends this work by further theorizing the First Amendment's interest in promoting democracy in order to clarify the distinct functions the freedom of association ought to serve. Out from under the shadow of the freedom of speech, one can see more clearly that self-governance requires more than a vibrant marketplace of political ideas, and that the freedom of association is uniquely positioned to further those additional conditions of democratic self-governance.

Democracy-in-action bears little resemblance to the iconic marketplace of ideas in which the best idea will prevail by withstanding challenges from dissenting voices.<sup>6</sup> Ideas must manifest as action to make a difference.<sup>7</sup> Individuals

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relative contribution to popular sovereignty. *See id.* at 743-58. More recently, John D. Inazu has offered a rich history of the development of the right of association, noting the ways that that doctrine developed in concert with twentieth-century democratic theory. *See* JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012). Inazu argues, like Mazzone, that the right of association must be understood as deriving from the First Amendment's textual right of assembly, although his conception of the right is broader, including both ongoing assemblies (associations) and those for purposes other than petitioning for redress of grievances. Inazu further argues that the Court's current doctrine is underprotective of dissenting associations and attributes this failing to the fact that it is mistakenly derived from the speech clause. Regrounding protection of associations in the assembly clause, he contends, explains, among other things, why associations that dissent from liberal values warrant much more constitutional protection than is currently available to them. *Id.* at 1-6, 20-62, 150-52. Ashutosh Bhagwat, meanwhile, has used this literature on the right of assembly to turn free speech doctrine on its head: Insofar as "ensuring self-governance is the primary structural purpose of the First Amendment . . . one of the most important functions of free speech in our society, and in constitutional law, is to advance and protect the right of association." Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 981 (2011). This follows from the fact that assembly and association are critical to democracy, and it is "hard to imagine how assemblies or associations can be created without speech." *Id.* at 998. Bhagwat proceeds to show that, in fact, many of the most important free speech cases of the twentieth century "involved speech in the context of public assemblies or political organizations." *Id.* at 1006. That is, they were instances of "[a]ssociational speech"—defined as "speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials)." *Id.* at 981.

6. The theoretical portion of this Article articulates a necessary condition of a sociologically legitimate democracy. It does not purport to engage with the normative concept of democracy, hence the term *democracy-in-action* is used here, although later the term *democracy* is used in this same sense for ease of reading. *Cf.* Robert Post, *Democracy and Equality*, 603 *ANNALS AM. ACAD. POL. & SOC. SCI.* 24, 25 (2006) ("Democracy is distinct from popular sovereignty and majoritarianism because democracy is a normative idea that refers to substantive political values whereas popular sovereignty and majoritarianism are descriptive terms that refer to particular decision-making procedures."). For the classic statement that the First Amendment protects a marketplace in which political ideas compete, see Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—

and groups must be willing to undertake efforts to realize ideas in policy. Political participation is a necessary, if not sufficient, condition of a functioning democratic government (i.e., one in which officials are accountable to the people).<sup>8</sup>

The central theoretical point that we in law have missed, due to our exclusive focus on the value of free speech, is, therefore, that the democracy-promoting function of the First Amendment gives rise to a constitutional interest in political participation.<sup>9</sup> Fundamental dynamics by which political participation is generated have, as a result, been obscured in legal conversations about the proper scope of constitutional protections for associations.<sup>10</sup> The result is a gaping hole in

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that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”)

7. *Cf. Reverse-Engineering Chinese Censorship*, HARV. MAG. (Sept. 19, 2013), <http://harvardmagazine.com/2013/09/reverse-engineering-chinese-censorship> (reporting that the Chinese government does not censor “[w]ords alone” on social media “no matter how critical and vitriolic[,] [b]ut mere mentions of collective action—of any gathering not sponsored by the state, whether peaceful or in protest—are censored immediately”).

8. Throughout, I use the term *political participation* broadly to include not just electoral participation, but all action that seeks to influence government policy. For more on the definition of political participation, see *infra* notes 36–44 and accompanying text.

9. *Cf. Daniel R. Ortiz, Recovering the Individual in Politics*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 263, 264–70 (2012) (lamenting the ascendancy of structural rationales for First Amendment protection on the grounds that they undervalue the importance of individual political participation). This Article’s central theoretical contribution is an argument for the need to focus squarely on political participation as a central First Amendment value. More specifically, it argues that the structural concern to promote self-governance creates a constitutional value in individual political participation. In this regard, it takes issue with Daniel R. Ortiz’s position that structural rationales necessarily sideline the importance of individual political participation. *See id.* at 287 (arguing that “[i]f we are to protect individual participation in politics,” it is important to lessen structural concerns for self-governance or the marketplace of ideas and to recover an individual, self-expression perspective in First Amendment theory). More significantly, it takes issue with the mid-century ambivalence toward political participation evident in mainstream political science—an ambivalence underlying some of the empirical political science research relied on in Part II. *See* Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE I, 7–8 (Bob Edwards et al. eds., 2001) (noting that the middle of the twentieth century saw “profound mistrust of popular mobilization outside the most narrow channels of then conventional political behavior” and explaining that Robert Putnam’s and others’ efforts to document civic virtue were intended to show that participation tamed by civic virtue need not be feared).

10. The role of associational life in generating political action is implicit in the new literature on the freedom of association. *See, e.g.,* INAZU, *supra* note 5, at 5 (noting in passing that “almost every important social movement in our nation’s history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity”); Mazzone, *supra* note 5, at 644 (recognizing that participation in political life by women in the early twentieth century arose out of early association with other women in clubs based on shared interest and solidarity); *see also id.* at 698–701 (noting that the byproduct of associational life is often increased

our conception of the self-governance interest of the First Amendment, generally, and in our account of the proper aims of freedom of association doctrine, in particular.

Highlighting the importance of an active citizenry to a functioning democracy allows us to see both that our associational life plays a foundational role in generating civic and political participation, and that current free association doctrine is critically unmoored from the real-world dynamics of self-governance.<sup>11</sup> The time has come for legal conversations about the proper scope of constitutional protections for associations to be informed by the real-world evidence regarding how associations (from churches and PTAs to cycling and birding clubs) foster an active citizenry and thus help realize the project of self-governance.

Associations perform a vital function in our democracy: They grease the wheels of political participation and, in turn, promote democratic accountability. This is their primary contribution to our democracy, which is not to deny that they also accomplish the ends for which they are commonly recognized in law and legal scholarship—amplifying voice, protecting dissent, and solving collective action problems.<sup>12</sup>

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political activity of youth and historically of women and African Americans). Bhagwat's work goes the furthest in this regard insofar as he identifies, in my view correctly, the relevant question as whether an association is "one whose activities, broadly defined, are more than tangentially relevant to the process of self-governance, also broadly defined." Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1387 (2012) [hereinafter Bhagwat, *Limits of the Right of Assembly*]; see also Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543, 552–54 (2011) [hereinafter Bhagwat, *Associations and Forums*]. Bhagwat, however, tends to emphasize a more traditional list of ways that an association's activities might further that end. Bhagwat, *Limits of the Right of Assembly, supra*, at 1386–87 (arguing that the Constitution protects associations to the degree they help citizens develop their values, organize themselves, and enable political skills development); see also Bhagwat, *Associations and Forums, supra*, at 552–53 (same).

11. The tendency of such scholarship to emphasize political theory over the rough and tumble of politics largely explains this gap. See, e.g., INAZU, *supra* note 5, at 13, 153–73 (developing a theoretical defense of the proposition that liberal democracy requires dissenting groups by relying on the political theory of Sheldon Wolin); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 953 (2004) (relying on classic social theory to argue that associations mitigate the problem of anomie by mediating between the individual and the state). Even Mazzone's work is normatively driven, notwithstanding the fact that he systematically reviews the empirical research on American associational life that is otherwise missing in legal scholarship. Mazzone, *supra* note 5, at 711 (providing an overview of the social science research about associational life in the United States to show that "Americans are involved, to varying degrees, in a wide variety of associations . . . [that] confer tangible benefits on their members and that may have substantial effects on the broader community[, including] . . . instilling skills that their members take to political life and . . . producing social capital for collective action").

12. I use the term *associational life* because associations range from relations to groups. See George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 36

Freedom of association doctrine is, therefore, uniquely positioned to promote the constitutional interest in political participation. Current doctrine would, however, need to be significantly reoriented to do this work. Steeped in liberal theory, the doctrine has (like most commentators) been constrained by the metaphor of the First Amendment as protecting a competitive marketplace of political ideas. The result has been an overemphasis on the role associations play in securing dissenting voices and creating individual identities.

The critical fact, missed by the legal world, is that association itself (friends and associates) is central to generating political participation. If associations grease the wheels of political participation, association itself turns out to be the grease. The decision to take action in the world—civic and political—is importantly personal. This is what the disciplines of political science and sociology have learned from their studies of civic associations, social movements, and American politics.

Whether citizens called upon to engage civically and politically will respond depends far more on social ties and social networks than on ideological commitment. It is who you know, what they ask of you, and how much you like, trust, or need them that will determine whether and what type of action occurs.<sup>13</sup> Personal ties are capable of turning dormant ideological preferences into action and of generating action from individuals without ideological inclinations. Put differently, ideas gain traction largely through friends and associates, and these same relations are key to generating the action necessary to realize preferences.

The formal and informal groups (clubs, churches, and interest groups) that we in law tend to refer to when we speak of associations are also important. Civic groups play an important role in generating political activity both because of the relationships among members and because the fact that they are organized makes them more capable of effectively channeling any activity generated.

Associations strengthen democracy in important part because they are places to bring friends, places to make friends, and places to organize friends. The role civic associations play in generating political action cannot be explained apart from the foundational role of social ties and organization. The ability of groups—both formal and informal—to generate civic or political action importantly arises out of relationships (personal and professional, embodied and virtual), but their organizational form shapes the efficacy of their mobilization efforts.

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(Amy Gutmann ed., 1998) (“There are, of course, many kinds of association . . . there are organizations and institutions; there are enterprises; there are ties and bonds in everyday life; and there are chosen enclaves, communes, and communities.”).

13. Professor Inazu, too, recognizes that associations are valuable because they build and sustain friendships. *See* INAZU, *supra* note 5, at 137. For Inazu, however, the value of such friendships is largely intrinsic and unconnected to their potential to generate civic and political activity. *See id.* at 138 (arguing that close bonds found between members in many associations, including those that are not intimate, “affect our personalities and our senses of self[,] . . . influence a person’s self-definition,” reveal who we are, and enable unconventional choices); *accord* Kateb, *supra* note 12, at 37 (arguing that relationships in associations can be more valuable “than the goals of the association”).

The lesson to be learned from the social sciences, therefore, is that associations do speak, but this is not their distinctive contribution. Relationships, affiliations, and organizations are at least as important as ideas, voice, or expression in the process of forming preferences and translating them into actions. The point is not that ideas do not matter at all, but rather that relationships matter a great deal.

Linking the freedom of association to insights from the social sciences underscores the need for rethinking both what types of association deserve constitutional protection and how much constitutional protection associations deserve. A theoretically and empirically grounded doctrine would strive to protect—and where possible promote—political participation as a means of achieving democratically accountable representative government. It would attend to the attributes of associations that contribute to political participation. It would, therefore, protect social groups and their capacity to act, leaving to free speech doctrine the job of protecting those organizations that actively seek to speak in the public domain. The presence of an identifiable message would not be determinative of whether an association was entitled to constitutional protection.

This Article proceeds in three parts. Part I reconsiders the First Amendment interest in protecting the conditions necessary for democracy. It explains why an active citizenry is central to representative government and criticizes the Court's free association doctrine for being organized around other values. Part II integrates the literature in political science about civic participation with the sociological literature on social movements to highlight key findings regarding the ways that association (social relations) and associations (organized groups) promote democratic participation today. Finally, Part III draws out the implications of these findings, offering the basic contours of a new freedom of association doctrine oriented toward the promotion of political participation in the service of self-governance.

## I. FREEDOM OF ASSOCIATION: THEORY AND DOCTRINE

There is little question that the promotion of democratic self-governance is one of the primary values driving First Amendment doctrine. What is less obvious, but no less true, is that political participation is essential to democracy-in-action, and that within the First Amendment's domain, free association doctrine is uniquely positioned to promote representative government by protecting the conditions necessary for an active citizenry.

### *A. The Centrality of Political Participation*

The First Amendment aims foremost to secure democracy understood as a government of the people by the people.<sup>14</sup> While one can debate whether the First

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14. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.



Amendment's sole purpose is to ensure self-governance, it is beyond debate that protecting the republican project was, and remains, a core function of the Amendment.<sup>15</sup>

The self-governance interest, despite its pedigree, has been incompletely theorized in First Amendment law.<sup>16</sup> Developed originally as a theory of free speech, it has overemphasized ideas as the driver of democratic change.<sup>17</sup> More critically, this focus on the importance of a free exchange of ideas has crowded out other equally important dynamics of self-governance.

First Amendment scholars, influenced by classic theoretical work on the relationship of state and society, have tended to focus on the formation of public opinion through discourse rather than the manifestation of public opinion in action.<sup>18</sup> Even those scholars who have argued that the Amendment protects participatory democracy appear to theorize participation as the right of citizens to share views and shape public discourse.<sup>19</sup> Defining “the constitutional value at

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They 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.”); accord Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (arguing that “the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance”).

15. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); accord Bhagwat, *supra* note 5, at 994 (“It is fair to say, however, that in recent decades the most prominent and widely accepted theory of free speech is [one] . . . which emphasizes its role in self-governance”); Post, *supra* note 14, at 478 (identifying the three major First Amendment values as the creation of knowledge, individual autonomy, and democratic self-governance).

16. See Bhagwat, *supra* note 5, at 994 (making the astute observation that although “[i]n the literature, self-governance has been advanced as a theory of free speech[,] . . . it is better understood as a theory of the First Amendment generally” with the possible exception of the Religion Clauses) (emphasis added).

17. Cf. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“The First Amendment ‘was fashioned to assure *unfettered interchange of ideas for the bringing about of political and social changes desired by the people.*’ ‘Speech concerning public affairs is more than self-expression; it is *the essence of self-government.*’”) (alteration omitted) (internal citations omitted) (emphasis added); see also Bhagwat, *supra* note 5, at 994 (explaining that “[t]he essence of [the] theory is that the primary constitutional significance of free speech is its contribution to political *debate* and thus its enablement of democratic self-governance”) (emphasis added).

18. Cf. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 184–88 (1995) (noting, among other things, that these theoretical accounts are not interested in the mechanics of voting or other means of representing public opinion).

19. See *id.* at 134–35 (arguing that one of three central but competing themes in First Amendment law is the protection of “a special kind of ‘world of debate about public

stake [as] participation in the effort to change public opinion” obscures the fact that public opinion must be turned into action before it is instantiated in representative institutions or public policy.<sup>20</sup>

The emphasis on discourse eclipses the importance of participation as conduct, not just voice, for a democracy-in-action: Gathering as a crowd, for instance, is a political act in and of itself whether or not it has a precise message. A large crowd, regardless of its message or the clarity of that message, claims the right to be considered as part of a democratic decision-making process. Thus, while political acts frequently have an expressive element, they do not always have one, nor must they. By the same token, expression alone, even where there is consensus, does not by itself create self-governance. Even social change requires more than just a change in public opinion.

In extending its protection to enumerated forms of conduct (assembly, petitioning, and, by extension, association), the First Amendment itself appears to recognize that discussion without action is an empty threat.<sup>21</sup> Written at the beginning of the era of McCarthyism, before the Supreme Court had consolidated its current all-encompassing free speech doctrine, Alexander Meiklejohn’s original account of the self-governance value acknowledged the importance of one form of political participation, voting. Meiklejohn argued that “[t]he First Amendment . . . is not the guardian of unregulated talkativeness”<sup>22</sup> in the interest of generating truth; rather, it demands that “whatever truth may become available shall be placed at the disposal of all the citizens of the community,” so that all voters may have access to it.<sup>23</sup> Unfortunately, subsequent scholars have not developed this element of his work—perhaps because of his narrow focus on voting.<sup>24</sup>

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affairs” that is not policed by community norms and which protects the authentic expression of a wide range of ideas in the public sphere); *see also* Post, *supra* note 14, at 482 (arguing that the First Amendment seeks to ensure “that citizens have access to the public sphere so that they can participate in the formation of public opinion”); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (2011) (arguing that “contemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves”).

20. Post, *supra* note 14, at 486.

21. Regarding the extension to association, *see* INAZU, *supra* note 5, at 21–60 (arguing that the right of association derives from the First Amendment’s textual right of assembly, which is not limited to intermittent assemblies or to those seeking to petition government); Mazzone, *supra* note 5, at 646–48, 712–17 (arguing that right of association derives from the First Amendment’s textual right to assemble for the purpose of petitioning government and thus is limited by the self-governance rationale of that clause).

22. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22 (1948). Alexander Meiklejohn famously argued that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.” *Id.* at 25.

23. *Id.* at 88.

24. *Id.* (“[The First Amendment’s] purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it

Political participation is a necessary, if not sufficient, condition for representative government.<sup>25</sup> At the most basic level, the electorate determines the victor. President Obama's 2008 victory depended on changing the electorate; he won because his campaign successfully changed which states were swing states, and it did that largely by encouraging new voters to participate in the election process. Politicians are not elected and policies are not enacted without votes, petitions, lobbying, marches, sit-ins, demonstrations, encampments, or squatting.

Even more importantly, participation matters because it makes government bodies more responsive to citizen views.<sup>26</sup> For example, public participation in the decision-making processes of administrative agencies makes these increasingly important sources of policymaking and regulation more accountable to the public.<sup>27</sup>

Both who participates and how they participate matters. Research shows that when political activity communicates constituent views to policymakers, it "creat[es] pressure on them to heed what they hear."<sup>28</sup> Low levels and unequal distribution of political participation matter, therefore, because "what public officials hear . . . influences what they do."<sup>29</sup> When officials hear primarily from

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is not enough that the truth is known by someone else, by some scholar or administrator or legislator.").

25. This is not to deny that the realization of self-governance may require other necessary but similarly insufficient conditions—for example, the participation of *autonomous* individuals—although it would be important to distinguish which are necessary for a sociologically legitimate democracy and which are necessary to a normative concept of democracy. See POST, *supra* note 18, at 7 (explaining why democracy requires both that "the people" [are] given the power to determine the nature of their government" and that "the individuals who [make] up 'the people' . . . experience themselves as free to choose their own political fate").

26. JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 6 (1993) ("The most important impact of participation on the institutions of government is to make them more responsive to the preferences of citizens.").

27. See, e.g., Kevin Abourezk, *On a Cold Day, Potluck Warms Up Pipeline Opponents*, LINCOLN J. STAR (Apr. 18, 2013, 4:00 PM), [http://journalstar.com/news/state-and-regional/nebraska/on-a-cold-day-potluck-warms-up-pipeline-opponents/article\\_4639cf9e-c6db-51ec-a511-17cd16cc50af.html](http://journalstar.com/news/state-and-regional/nebraska/on-a-cold-day-potluck-warms-up-pipeline-opponents/article_4639cf9e-c6db-51ec-a511-17cd16cc50af.html) (noting that Nebraskans travelled to U.S. State Department public hearings to protest the proposed Keystone XL pipeline, which requires federal approval); PROTEST AND ASSEMBLY RIGHTS PROJECT, REPORT BY THE GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW) & THE WALTER LEITNER INT'L HUMAN RIGHTS CLINIC AT THE LEITNER CTR. FOR INT'L LAW & JUSTICE (FORDHAM LAW SCHOOL), *SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET* 13 (2012), [http://chrgj.org/wp-content/uploads/2012/10/suppressing\\_protest.pdf](http://chrgj.org/wp-content/uploads/2012/10/suppressing_protest.pdf) (noting submission of 325-page letter in defense of the Volcker Rule, which would "prohibit consumer banks from engaging in certain kinds of risky trades, such as those that led to the subprime mortgage crisis[,] to the Security and Exchange Commission by the Occupy movement).

28. SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 12 (1995).

29. See Henry E. Brady et al., *Who Bowls? The (Un)Changing Stratification of Participation*, in *UNDERSTANDING PUBLIC OPINION*, 219, 221 (Barbara Norrander & Clyde

Wilcox eds., 2002) (demonstrating that when elected officials hear only from certain segments of the population, they respond only to those needs). In 2010, only 40.3% of eligible voters came out, and “those who voted were markedly older, whiter, and more comfortable economically than those who stayed home.” SKOCPOL & WILLIAMSON, *supra* note 2, at 161. Such patterns in voting and beyond have been the norm since the early 1970s. A key study of the period from 1973 to 1994 found that the richest 20% of the population (measured by income) is responsible for 44% of all participation, while the poorest 20% is responsible for only 1.5% of all participation (civic or political). Brady et al., *supra*, at 219–20. In fact, “[t]hose at the highest level of SES [socio-economic status] are roughly five times more active than those at the bottom.” *Id.* at 227. The study concluded: “[C]itizens who take part in politics are unrepresentative of the American public in a number of ways. Most importantly, they are socioeconomically advantaged: better educated, more affluent, and more likely to hold high-status jobs. They are also disproportionately likely to be Anglo-white rather than African American or, especially, Latino; middle-aged, rather than elderly or, especially, young; and men rather than women.” *Id.* at 220. Only “[r]eligious attendance is not stratified by social class,” making “religious activity . . . a rare source of continuing participatory equality in the United States.” *Id.* at 230. Newer studies have reached similar conclusions. See, e.g., Neal Caren et al., *A Social Movement Generation: Cohort and Period Trends in Protest Attendance and Petition Signing*, 76 AM. SOC. REV. 125, 142–47 (2011) (finding protest attendance is highly correlated to education though not income and that petition signing is highly stratified by race and socioeconomic status).

Interestingly, voting is the most egalitarian form of political participation. See VERBA ET AL., *supra* note 28, at 24 (noting that voters are more representative of American society than other political participants even accounting for low and systematically stacked voter turnout). The past two presidential election cycles have seen a rise in participation among younger, minority, and female voters. Tyler Kingkade, *Young Voters Help Secure Obama Victory, Passage of Progressive Ballot Measures*, HUFFINGTON POST (Nov. 7, 2012, 7:40 PM), [http://www.huffingtonpost.com/2012/11/07/young-voters-2012-obama\\_n\\_2089789.html](http://www.huffingtonpost.com/2012/11/07/young-voters-2012-obama_n_2089789.html) (reporting that “[t]he 2012 election marks the third presidential election in a row where roughly half of young voters cast a ballot—well above the youth participation rate of only 37 percent in 1996” and that the youth vote, which is significantly more diverse, had increased to 19% of the total electorate, a 1% change since 2008); see also SKOCPOL & WILLIAMSON, *supra* note 2, at 161 (describing similar trends for 2008).

Trends with respect to low voter turnout are less encouraging. While the 2008 presidential election brought out 63% of the electorate, in 2012 voter turnout dipped significantly. Curtis Gans, *2012 Election Turnout Dips Below 2008 and 2004 Levels: Number of Eligible Voters Increases by Eight Million, Five Million Fewer Votes Cast*, BIPARTISAN POLICY CTR. (Nov. 8, 2012), <http://bipartisanpolicy.org/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf> (“Voter turnout dipped from 62.3 percent of eligible citizens voting in 2008 to an estimated 57.5 in 2012. That figure was also below the 60.4 level of the 2004 election but higher than the 54.2 percent turnout in the 2000 election.”). In general, voter turnout is higher when elections are competitive and lowest during midterm elections. See Susan Page, *2012 Voting Brisk in Swing States: The Deluge of Ads May Widen Voter Turnout Gap*, USA TODAY, Dec. 24, 2012, at A1 (noting that in 2012 “64.2% of eligible citizens went to the polls in the battlegrounds compared with 56.8% in the rest of the nation—a disparity of 7.4 points”). But see Albert R. Hunt, *In Politics, More Can Mean Less*, N.Y. TIMES, Dec. 10, 2012, at NA(L) (“Even in some of the most competitive battleground states like Ohio, where both sides poured in cash, turnout decreased.”). Reflecting the discipline’s ambivalence toward political participation, low voter turnout is not considered a problem within certain circles in political science. See

elite interests, they are unlikely to address the concerns of the middle class or the poor.<sup>30</sup> Equally important, when the participation of interest groups is not matched by the participation of the broader public, interest groups are able to pursue narrow, self-interested legislation to the detriment of the public's interest.<sup>31</sup>

Political engagement certainly will not by itself resolve all the legitimacy deficits of our democracy. A realistic assessment of American politics requires one to acknowledge that there is no direct correspondence between citizen inputs and policy outputs.<sup>32</sup> American politics is complicated and imperfect. Legislative outcomes do not mirror voter preferences for a host of reasons.

Still, democratic accountability is hard to imagine without an active citizenry. Participation remains a necessary condition for achieving accountable, representative government officials—the essence of self-governance. In addition, participation, all things being equal, increases democratic legitimacy.

By protecting important forms of collective action—not just speech—the First Amendment recognizes that ideas and actions are both required to realize the republican project of self-governance. Our neglect of this fact is yet another casualty of “the myopic focus of the Supreme Court and most modern First Amendment scholars on the Free Speech Clause of the First Amendment.”<sup>33</sup> While oversight of the value of civic and political participation is more understandable and less problematic when it is the theoretical foundations of the freedom of

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FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE AND WHY POLITICIANS WANT IT THAT WAY* 3–4 (2000) (explaining that a large body of political science contends nonvoting should not be considered a problem and should be understood as a tacit expression of consent and evidence of satisfaction).

30. See SKOCPOL & WILLIAMSON, *supra* note 2, at 100–04 (explaining that since the 1970s, business interests, initially through organizations but more recently as individuals, have channeled money into lobbying to influence the agenda in Congress and have done so with much success) (citing JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* (2005) and JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL-POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010)).

31. Cf. Keith Whittington, *Revisiting Tocqueville's America: Society, Politics and Association in the Nineteenth Century*, in *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE*, *supra* note 9, at 21, 26–27 (noting that civic groups “also place[] demands on the state, redirecting the mechanisms of government to serve private ends” and offering protective tariffs as a nineteenth-century example).

32. William A. Gamson, *Social Movements and Cultural Change*, in *FROM CONTENTION TO DEMOCRACY* 57, 65 (Marco G. Giugni et al. eds., 1998) (offering the abortion rights movement as an example insofar as it has had measurable success in changing public discourse—e.g., with respect to the right of privacy and autonomy—even as access to abortions “has significantly declined in some areas”).

33. Bhagwat, *Limits of the Right of Assembly*, *supra* note 10, at 1382; accord Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 *UCLA L. REV.* 543, 547, 588–89 (2009) (criticizing the Supreme Court for collapsing the right of assembly into the concept of free expression because in protecting assembly itself, the Amendment seeks to protect collective public deliberation and action on public issues).

speech that are being explained, this is not true when it comes to the freedom of association.

In sum, the First Amendment interest in promoting democracy entails a constitutional interest in political participation. To the degree that an active citizenry enhances the functionality of a democracy, First Amendment doctrine must do what it can to secure political participation. The freedom of association is uniquely positioned to advance that end because associational life is critical to generating civic and political participation. Before elaborating on these claims, it is worth pausing to define political participation and to review the current law with respect to free association.

### *B. Political Participation—Activities with a Family Resemblance*

Political participation must be understood broadly as a family of activities united by their goal of tethering representative government to the will of the people. It is not limited to voting.<sup>34</sup> Elections, political parties, and voting, while playing a critical role in producing a democratic polity, hardly describe the full array of activities that ensure that governmental bodies and policies are responsive to popular will.<sup>35</sup> Americans today engage in politics in wide-ranging ways.<sup>36</sup>

Political participation encompasses any activity that seeks to ensure the greatest practical amount of democratic accountability. A recent controversy in Nebraska over a proposed crude oil pipeline illustrates the wide range of activities that qualify: “Newly minted activists organized potlucks, educational forums, music benefits, tractor pulls, poetry readings, flashlight rallies, wildflower drops in Capitol offices and pumpkin carving protests.”<sup>37</sup> According to a local paper, two

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34. VERBA ET AL., *supra* note 28, at 23 (explaining at the start of a seminal study of civic and political participation that “it is incomplete and misleading to understand citizen participation solely through the vote”); *see also id.* at 24 (noting further that voting is “a singularly blunt instrument for the communication of information”).

35. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 7 (2011) (developing account of repertoire of nineteenth-century American political practices, including jury service, legislative petitioning, public meetings, and public assemblies, to challenge core assumption “that democracy and elections are synonymous”); *accord* Bhagwat, *supra* note 5, at 995–98 (noting that the Supreme Court’s “impoverished view of . . . self-governance . . . as voting, pure and simple” neglects disruptive and uncivilized speech, petitioning, and the formation of public and private values, all of which are enabled by association and assembly).

36. *See, e.g.*, ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 189, 191 (2012) (arguing that “collective civic life remains active” based on finding from study demonstrating that protest levels in Chicago between 1990 and 2000 were higher than in the 1970s, and further, that protests comprise only a small percentage of Chicagoans’ political activity, which also included a range of civic events and public meetings).

37. Mary Pipher, *Lighting a Spark on the High Plains*, N.Y. TIMES, Apr. 18, 2013, at A27. The Nebraska example is not an outlier. The political participation of individuals and groups in the United States is wide-ranging as evidenced by the fact that the decline in electoral turnout is not matched by a decline in other forms of political activity. *See* VERBA ET AL., *supra* note 28, at 9, 24.

hundred people attended the pumpkin-carving event in which organic pumpkins were carved with the message, “91 leaks and 0 regulations are scary, call a special session Governor Heineman.”<sup>38</sup> Meanwhile, an Apple Pie Brigade, in which participants brought baked goods to the Governor’s mansion, was organized by grandmothers opposed to the project in an effort to persuade the Governor to take action against the proposed pipeline.<sup>39</sup> Nebraskans also engaged in a series of colorful protests, including a flashlight rally in front of the Governor’s mansion, to symbolize the protestors’ intent to keep the Governor accountable.<sup>40</sup> Such uses of community events (parades, festivals, and barbeques) for social and political ends are an increasingly common form of political participation.<sup>41</sup>

In sum, political participation is collective action that gives voice to grievances or concerns and demands that something be done.<sup>42</sup> All of the activities in Nebraska, including the meetings at churches, cafes, and living rooms, constituted political participation insofar as they were efforts to raise public awareness of the environmental hazards associated with the proposed pipeline and to persuade government officials to prevent its construction.<sup>43</sup> All of these examples, as it happens, also include an expressive element, but their political power—that is, the likelihood that they will change policy—lies in the fact that individuals have taken time out of their lives to act as citizens. In fact, their message is, by and large, underdeveloped, even symbolic—certainly not calculated to persuade by rational debate.<sup>44</sup>

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38. Ben Jervey, *Nebraska Governor Calls for Special Session to Discuss Keystone XL*, ONEARTH BLOG (Oct. 25, 2011), <http://www.onearth.org/blog/nebraska-governor-calls-for-special-session-to-discuss-keystone-xl>.

39. Pipher, *supra* note 37.

40. Cindy-Lange Kubick, *Standing with Randy—The Real Man Behind the Cardboard Cutout*, LINCOLN J. STAR (Aug. 2, 2011, 11:00 AM), [http://journalstar.com/news/local/article\\_aedde8b4-a53a-5dec-8330-b533a55e3e89.html](http://journalstar.com/news/local/article_aedde8b4-a53a-5dec-8330-b533a55e3e89.html) (describing various protests including another in which protestors flew old sheets, designed at a sheet-painting party with homemade slogans, from their rooftops). The same local grassroots organization also hosted barbeques and flashlight prayer circles at local farms. See Jane Kleeb, *State Dept. Hearing Info: For Press and Public*, BOLD NEBRASKA (Apr. 23, 2013, 7:52 AM), [http://boldnebraska.org/statedept\\_ne](http://boldnebraska.org/statedept_ne).

41. See SAMPSON, *supra* note 36, at 184–86, 190 (offering evidence that political actors in Chicago increasingly organize community events to assert demands from local government and offering examples).

42. See VERBA ET AL., *supra* note 28, at 9 (defining political participation as “activity that is intended to or has the consequence of affecting, either directly or indirectly, government action”).

43. Pipher, *supra* note 37.

44. The fact that many of these activities, such as putting up signs, or putting up tent cities as Occupy did, require being classified as symbolic conduct to gain First Amendment protection, rather than simply being recognized for the political acts they are (or in the last case as an assembly, which is textually protected by the Amendment) reveals the contortions placed on current First Amendment doctrine by its exclusive interest in free speech. See, e.g., *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 248–53 (D. Conn. 2012) (analyzing whether Occupy New Haven’s tent city met the First Amendment test for expressive conduct); *Occupy Boston v. City of Boston*, No. 11-4152-G, slip op. at 11–

Speech too can be political participation, but not all speech about politics is best understood as political activity. To count as political activity, speech must be a call to action; it must be an effort to organize people to directly or indirectly influence government officials or policy.<sup>45</sup> Whereas the Federalist Papers, written as they were with the explicit goal of convincing people to ratify the Constitution, are a quintessential example of speech that counts as political participation, a *New York Times* article about the negative consequences of sequestration or even the barrage of *New Yorker* articles critical of the Bush Administration's actions in Iraq would not qualify. The latter may well prompt a person to decide to vote in a certain way in subsequent elections or otherwise get involved politically, but the articles were written to inform rather than to induce specific political acts.

### C. Freedom of Association in the Shadow of Speech

A constitutional right to freedom of association was recognized shortly after the First Amendment was incorporated against the states and the Court began to make good on the Constitution's promise of free speech.<sup>46</sup> The decision to extend constitutional protection to civic associations was not particularly controversial given their long-recognized contribution to American democracy.<sup>47</sup>

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13 (Mass. Super. Dec. 7, 2011), [http://aclum.org/sites/all/files/legal/occupy\\_boston/Memorandum\\_and\\_Decision.pdf](http://aclum.org/sites/all/files/legal/occupy_boston/Memorandum_and_Decision.pdf) (explaining that Occupy Boston sought a declaratory judgment that the city's trespass and unlawful assembly statutes could not be applied to them insofar as they were engaged in symbolic conduct); see also Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. PA. J. CONST. L. (forthcoming 2014) (manuscript at 14) (on file with author).

45. Cf. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981) (recalling that eighteenth-century Committees of Correspondence, including the Federalist Papers, were an instance of "the practice of persons sharing common views banding together to achieve a common end . . . [of a] tradition of volunteer committees for collective action").

46. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing the "freedom to engage in association for the advancement of beliefs and ideas" as a liberty interest protected by the Constitution).

47. Although early on some argued that the freedom of association must be understood as a Due Process liberty right insofar as the First Amendment explicitly mentions only freedom of speech, press, and a right to assemble and petition, the Court settled relatively quickly into the view that civic and political groups derive constitutional protection from the First Amendment. See *Patterson*, 357 U.S. at 460 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). For a thorough history of the Supreme Court's recognition of a right of association in the mid-twentieth century, see INAZU, *supra* note 5, at 63–93 (describing the evolution of the doctrine as part of his critique of the Court's unconsidered decision to replace the original and broad right of peaceable assembly with a more narrow right of association).



The right of association, as recognized by the Court, however, proves to be both misguided and redundant.

As interpreted by the Supreme Court, the First Amendment protects the “freedom to engage in association for the advancement of beliefs and ideas.”<sup>48</sup> That is, it protects so-called expressive associations, defined as those in which individuals “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.”<sup>49</sup> Associations need not be actively political or issue-oriented to receive protection, but their mission must be coherent enough that one could characterize them as “engag[ing] in expressive activity that [has been] impaired.”<sup>50</sup>

Expressive associations are distinguished, in the doctrine, from intimate associations. The Court’s cases recognize two distinct types of freedom of association: one protecting “choices to enter into and maintain certain intimate human relationships” and another protecting “a right to associate for the purpose of engaging in those activities protected by the First Amendment.”<sup>51</sup> The former’s constitutional protection is grounded in the individual’s right to privacy and exists to guarantee “individual freedom,” while the latter, like all First Amendment rights, is protected because it is “an indispensable means of preserving other individual liberties.”<sup>52</sup> Although the Supreme Court has not clearly delineated the boundaries of intimate association,<sup>53</sup> it is generally assumed that the category is limited to families and a few family-like relationships.<sup>54</sup> Intimate association is

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48. *Patterson*, 357 U.S. at 460.

49. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

50. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (explaining that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment”); *accord Roberts*, 468 U.S. at 622 (noting that associations organized for a wide range of purposes—“social, economic, educational, religious, and cultural”—count as expressive associations). Although the *Dale* Court claimed that it was simply applying the framework established in *Roberts*, see *Dale*, 530 U.S. at 647–48, its application of that framework, if followed, significantly increases the likelihood of an organization being found to be expressive. See Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 125 (2000) (noting that “for better or worse,” *Dale* marked “a substantial departure from *Roberts*”).

51. *Roberts*, 468 U.S. at 617–18.

52. *Id.* at 618.

53. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (acknowledging that the Court “[has] not attempted to mark the precise boundaries of this type of constitutional protection” but “emphasiz[ing] that [it] protects those relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life’”) (citing *Roberts*, 468 U.S. at 619–20).

54. See *Rotary Int’l*, 481 U.S. at 550 (“In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from

generally given greater constitutional protection because it is considered “a fundamental element of personal liberty” and thus not subject to the equality principle.<sup>55</sup>

As with the other rights under the First Amendment, “[t]he right to associate for expressive purposes is not . . . absolute.”<sup>56</sup> The government must, however, provide a “compelling state interest[], unrelated to the suppression of ideas” and must show that its interest “cannot be achieved through means significantly less restrictive of associational freedoms” to constitutionally burden the right.<sup>57</sup>

From the beginning, the Court carried into free association doctrine a conception of the self-governance interest developed in the context of its free speech jurisprudence. That is, the Court conceptualized the dynamics of representative government and the catalyst of political change as a marketplace of diverse ideas about politics and the good life to which associations contribute in important ways.<sup>58</sup> In one of the first cases implicating the freedom of association, Justice Douglas explained:

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critical aspects of the relationship.”); *Roberts*, 468 U.S. at 619–20 (offering “size, purpose, policies, selectivity, congeniality” as possibly pertinent to the analysis). The line-drawing has largely been left to the lower courts. *Compare Johnson v. City of Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002) (holding city’s “drug-exclusion zone” violated grandmother’s right of intimate association by preventing her, as a convicted drug offender, from participating in the upbringing of her grandchildren), *with Poirier v. Mass. Dep’t of Corr.*, 558 F.3d 92, 96 (1st Cir. 2009) (holding cohabitation between unmarried adults did not qualify as a constitutionally protected intimate association subject to strict scrutiny when burdened), *and Cameron v. Seitz*, 38 F.3d 264, 275 (6th Cir. 2002) (holding that dating relationship or engagement was not clearly established constitutionally protected form of association); *see also INAZU*, *supra* note 5, at 139 n.41 (reviewing circuit court cases on intimate association).

55. *See INAZU*, *supra* note 5, at 133 (noting irony in this state of affairs insofar as it was originally assumed that the right of association would be weaker if it was conceptualized as a liberty interest).

56. *Roberts*, 468 U.S. at 623.

57. *Id.*

58. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294–95 (1981) (explaining in a case involving a question regarding the constitutionality of limiting contributions to political committees formed to support or oppose ballot measures that “[t]he Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas”) (emphasis added). The concept of a marketplace of ideas has been the central image with which to describe what the First Amendment protects. The passages in which the Supreme Court has articulated the marketplace of ideas concept suggest, however, less a marketplace in which knowledge will be established and truth will be determined in the long run than the notion that a democratic society requires an openness to competing conceptions of the good life. *See, e.g., Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (“The First Amendment creates ‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.”); *FEC v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 257 (1986) (articulating concern about “corrosive influence of concentrated corporate wealth” as a concern “to protect the integrity of the marketplace of political ideas”) (emphasis added).

Assembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. The holding of a meeting for peaceable political action cannot be proscribed. A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.<sup>59</sup>

Like assemblies, associations were, in the first instance, places to talk—to crystallize ideas and form preferences—and, thereafter, efficient mechanisms to broadcast those preferences.<sup>60</sup> They required constitutional protection because “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”<sup>61</sup>

This remains the dominant conception of the contribution of associations to our democracy. Writing in 2006, Chief Justice Roberts explained: “The reason we have extended First Amendment protection [to expressive associations] is clear: The right to speak is often exercised most effectively by combining one’s voice with the voices of others.”<sup>62</sup>

The Court’s conception of the self-governance interest diverts our attention from the importance of political participation and, perhaps more importantly, from investigating the conditions that stimulate it.<sup>63</sup> The emphasis on

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59. *Gibson v. Fla. Legislative Investigation Comm’n*, 372 U.S. 539, 562–63 (1963) (Douglas, J., concurring).

60. *See, e.g., Citizens Against Rent Control*, 454 U.S. at 294 (noting “that by collective efforts individuals can make their views known, where individually, their voices would be faint or lost” and that this “practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process”); *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976) (noting that “group association is protected because it enhances ‘(e)ffective advocacy’” and, therefore, “the right to pool money through contributions” must be protected “for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective’”) (internal citations omitted); *Gibson*, 372 U.S. at 564–65 (Douglas, J., concurring) (defending a strong right of association on the ground that “[a] coming together is often necessary for communication—for those who listen as well as for those who speak”).

61. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

62. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (dismissing law schools’ claim that their “ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools’ obligation to assist them”).

63. The image of the clash of competing ideas manifests in seminal First Amendment theory as well. *See, e.g., MEIKLEJOHN, supra* note 22, at 26 (“And this means that though citizens may, on other grounds, be barred from speaking they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. . . . The reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they—and no one else—who must

speech and ideas over people, relationships, and action leads to a particularly cramped account of the contribution of civic and political associations to American democracy. It also leads to an overemphasis on the value of dissenting voices.<sup>64</sup> Doctrinally, it results in the position that nonexpressive associations are not worthy of protection.

Associations certainly are places to talk and clarify ideas.<sup>65</sup> They are places where individuals are exposed to politics through informal chats, and there is no question that they resolve inherent collective action problems faced by citizens.<sup>66</sup> Associations can also be forums for the development of individual identity and self-expression.<sup>67</sup> Some certainly are sources of dissent—although it is somewhat naïve to assume, as the Court appears to, that the Communist Party or the Black Panthers are more vital to our democracy than centrist organizations like unions or the two major political parties.<sup>68</sup>

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pass judgment upon unwisdom, unfairness and danger. And this means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”).

64. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (stressing that the fact that the Boy Scouts’ views on homosexuality are increasingly a minority view amplified the need for First Amendment protection: “that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view”); *Gibson*, 372 U.S. at 556–57 (asserting that freedom of association is “all the more essential” where the group “espous[es] beliefs already unpopular with their neighbors”); *Barenblatt v. United States*, 360 U.S. 109, 151 (1959) (Black, J., dissenting) (explaining that “[h]istory . . . teach[es] us . . . that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out” and that “[i]t was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time”).

65. See, e.g., MARK E. WARREN, *DEMOCRACY AND ASSOCIATION* 27 (2001).

66. See Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493, 494 (2000) (noting that both political and nonpolitical associations “share in the business of organizing interests and values and wielding political influence”).

67. See, e.g., WARREN, *supra* note 65, at 11.

68. Professor Bhagwat’s more recent work suggests a related concern. While his earlier work identified key reasons for protecting dissident associations, including, and to my mind most importantly, that such groups “are also much more likely to become a source for disruptive political activism such as protests and rallies—that is, for an active citizenry,” his more recent work has noted potential drawbacks for democracy associated with socially isolated ideologically extreme groups. Compare Bhagwat, *supra* note 5, at 1007, 1024 (arguing that the associations most worthy of protection are the “quintessentially . . . disruptive, democratic association[s] . . . at the heart of the First Amendment[]” because, among other things, “dissident associations . . . ensure that majoritarian institutions, often with close ties to the state—such as the two main political parties—do not gain a monopoly

Even so, conceptualizing the value of associations primarily in terms of their contribution to the marketplace of ideas and their role in securing dissenting views fundamentally misunderstands the central role played by associations in our democracy. The most distinctive way associations contribute to tethering governmental bodies to the will of the people is their role in fostering political participation. This role, it turns out, depends far less on associations as incubators of ideas than on associations as incubators of relationships.<sup>69</sup> Free association doctrine, therefore, should be reoriented toward protecting and promoting the

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on the formation and dissemination of political values”), with Bhagwat, *Limits of the Right of Assembly*, *supra* note 10, at 1392–99 (articulating host of difficulties posed by subversive groups that advocate violence).

69. While the Supreme Court’s association cases have prompted a rich literature in the legal academy, the bulk of the scholarship on the freedom of association mirrors the Court’s narrow account of the functions of associations in a democracy. *See, e.g.*, Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 34 (2012) (explaining that “[t]he First Amendment protects [expressive] association[s] because of the strength that expression of a single message by a believing group speaking in concert may possess, or the internal belief-based satisfaction or succor that sharing beliefs within a group may yield” and offering an account of the boundaries and key characteristics of such associations in terms of expression). As in the doctrine, associations are seen as places to crystallize ideas and form preferences and as efficient mechanisms to aggregate individuals and their preferences. *See, e.g.*, SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 214 (4th ed. 2012) (noting that individuals typically participate in politics through civic groups “ranging from churches to labor unions to neighborhood associations to contemporary mass-mailing ideological and affinity groups[,] . . . [which] serve as vehicles for making their members’ voices more effective in the electoral process, and, in many cases, help to shape their members’ preferences”); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1520 (2001) (emphasizing associations as places where ideas and preferences are formed); Vischer, *supra* note 11, at 978 (describing associations as mechanisms for “providing a collective voice to sentiments that likely would go unheard if left to be expressed by an individual standing alone” and asserting that “much of an association’s day-to-day value for its members derives from its ability to disseminate the members’ views to the broader, impersonal world”) (emphasis added). Associations are also understood as expressive places that foster the development of individual identity, autonomy, and self-expression. *See, e.g.*, Carpenter, *supra*, at 1557, 1581. Interestingly, this emphasis on self-fulfillment is a slight deviation from the Court insofar as the latter has suggested that it is intimate associations—family not civic groups—that are primarily responsible for the development of individuality and self-expression. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (noting that “individuals draw much of their emotional enrichment from close ties with others” and that “[p]rotecting these relationships . . . safeguards the ability independently to define one’s identity”). Finally, legal academics, perhaps even more than the Court, have emphasized the essential role played by dissenting associations. “Intermediate organizations,” we are told, “not only facilitate individual self-definition and expression, but also keep the state from replicating itself by nurturing deviance, diversity, and dissent.” Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1719, 1721 (1988). The emphasis on the importance of dissent has also been a central theme in the literature most critical of the Court’s First Amendment association jurisprudence. *See e.g.*, INAZU, *supra* note 5, *passim*.

mechanisms by which associations fulfill this role. It is to these mechanisms that we turn next, after a brief aside.

*D. An Aside on Associations, Democracy, and Political Theory*

The stress placed in this Article on associations as drivers of political participation stands outside current debates among political theorists about associations, democracy, and social capital.<sup>70</sup> While contemporary political theorists generally accept the importance of associational life to a working democracy, the account they offer is subtly, but importantly, different than the one offered here.<sup>71</sup>

Mainstream political theorists generally ascribe a moral perspective on associational life. The moral view of associational life comes in two schools of thought. According to the first—helpfully dubbed by Nancy Rosenblum the “congruence theory”—liberal democracy depends on the existence of civic groups whose “internal life and organization . . . mirror liberal democratic principles and practices.”<sup>72</sup> These associations “integrate members into liberal democratic public culture . . . directly, by cultivating specific democratic competencies.”<sup>73</sup> Associations are, for congruence theorists, “schools of democratic virtue where men and women develop the dispositions essential to liberal democracy.”<sup>74</sup>

A second school of thought requires less liberalism of civic associations. Associations, in its view, support democracy so long as they provide “social networks” that cultivate social capital, defined as the inculcation of the basic social norms “that hold any society together.”<sup>75</sup> Social capital is produced when members learn generic virtues such as “civility, sociability, responsibility, and cooperation.”<sup>76</sup> According to the second school, at least some associations that do

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70. Given my interdisciplinary training as a social scientist is grounded in sociology rather than political theory, my interest is to draw out from the empirical social science literature a much less controversial finding: Evidence that friendship plays a range of straightforward roles in the nexus between associational life and political participation. For an overview of the critiques of the social capital literature, see generally *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE*, *supra* note 9. Interestingly, the primary aspect of the political science literature that has been absorbed by the legal academy in any depth is the controversial concept of social capital (i.e., the notion that engaging in associations leads to cooperative attitudes that are likely to increase engagement in society). *See, e.g.*, Mazzone, *supra* note 5, at 695–96, 704–09 (explaining the importance of friendship in terms of the cooperative virtues (trust and reciprocity) that are critical to social capital and are more likely to be developed in small, face-to-face associations); Vischer, *supra* note 11, at 963, 975 & n.100 (relying on concept of social capital in his account of value of associational life).

71. *See infra* notes 94–124 and accompanying text describing the empirical research.

72. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36 (1998).

73. *Id.* at 29.

74. *Id.* at 26.

75. *Id.* at 41.

76. *Id.*

not ascribe to liberal values are also capable “of instilling habits of responsibility, reciprocity, cooperation, or trust.”<sup>77</sup>

The theoretical account offered in this Article, by contrast, seeks to return to the “orthodox preoccupation with associations as buffers against government and avenues to political participation.”<sup>78</sup> As in classic liberal theory, its emphasis is on the importance of an active citizenry to ensure government is both representative and capable of being resisted when abuses of governmental authority occur.<sup>79</sup>

The classic view has several advantages as a theoretical starting point. First, as a historical matter, it is likely closer to the original conception of the purposes of the First Amendment. Second, and perhaps more importantly, associations can perform this function regardless of whether they ascribe to liberal values or are formed for political purposes.<sup>80</sup> This is because the empirical focus is on the ways associations foster and organize social ties rather than social virtues.<sup>81</sup>

Finally, the classic view is not open to Rosenblum’s devastating critique of the currently salient moral accounts of the value of associational life in democracy. As Rosenblum succinctly puts it, even if we assumed that associations breed virtues, “virtues are not contagious.”<sup>82</sup> Both the “congruence and [the] mediating approaches to civil society . . . fail[] to explain . . . *how* moral dispositions are cultivated in groups . . . and *how these virtues (or vices) are*

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77. *Id.* at 42.

78. *Id.* at 26; see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (arguing that freedom of speech enables citizens to check egregious abuses of power by government officials).

79. See ROSENBLUM, *supra* note 72, at 25 (noting that classic liberalism argues that “[l]ike a wide dispersion of private property, a multiplicity of associations with resources of leadership and organization checks government and insures the possibility of political resistance”).

80. *Id.* (“The checking value of associations capable of mobilizing against arbitrary or oppressive government is attributed to groups whether or not they are formed for political purposes . . . or intended as centers of power and opposition.”).

81. This Article, in other words, does not rely on the social capital explanation of the effects that the empirical studies show. See *infra* text accompanying notes 100–03. Similarly, because the theoretical emphasis is on the role of association and associations in generating an active citizenry, this Article need not take a position on the debate as to whether America’s civic associations are local and grassroots or whether they have always been tied to national politics in important ways. Compare ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000), with THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003). For a short and accessible summary of the debate, see Theda Skocpol, *Unravelling from Above*, in TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULTS ON DEMOCRACY 292, 295–97 (Robert Kuttner ed., 1996) [hereinafter Skocpol, *Unravelling from Above*] (criticizing Putnam for writing “as if civic associations spring from the purely local decisions of collections of individuals” because organized civic groups in the United States have historically been tied to key national moments—the American Revolution, the Civil War, and the New Deal, for instance).

82. ROSENBLUM, *supra* note 72, at 43.

transmitted to other spheres.”<sup>83</sup> At the same time, everyday experience undermines this assumption. We constantly encounter individuals who are virtuous, cooperative, and trusting in one sphere (home, work, church) while intolerant, distrustful, and disruptive elsewhere (work, country club, political group)—the loving, caring father and respectable politician who is a member of the KKK and willingly participates in its rallies.<sup>84</sup>

The classic liberal view sidesteps Rosenblum’s concerns because it does not require virtue. Associations serve their function so long as they encourage citizens to take action to shape the policies of authorities.<sup>85</sup> The empirical evidence supporting the classic liberal view, moreover, is robust. Engagement in civic and political associations increases political participation in all forms, although not necessarily equally for all social classes.<sup>86</sup>

## II. FRIENDS, ASSOCIATES, AND ASSOCIATIONS: GENERATING POLITICAL PARTICIPATION

While law has long recognized that associations play an important role in our democracy,<sup>87</sup> the more pertinent question is the more specific one: How do

83. *Id.* at 46 (emphasis added); *see also id.* at 43 (arguing that both schools “fail to offer a social or psychological dynamic capable of explaining whether and how trust, say, or cooperation, is transferred from sphere to sphere, including democratic arenas”).

84. *Cf.* Dietlind Stolle & Thomas R. Rochon, *Are All Associations Alike? Member Diversity, Associational Type, and the Creation of Social Capital*, in *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE*, *supra* note 9, at 143, 144 (noting the reasonableness of doubting whether groups organized around exclusion promote a propensity toward generalized trust and reciprocity among their members).

85. None of this is meant to deny that associations have intrinsic value for individual members or that, for many, they are places to foster individual liberty. *See, e.g.*, Kateb, *supra* note 12, at 36 (theorizing value of association “as integral to a free human life, to being a free person”); Seana Valentine Shiffirin, *What’s Really Wrong with Compelled Association?* 99 *NW. U. L. REV.* 839, 840–41 (2005) (arguing that associations are intimately related to the freedom of speech’s interest in individual autonomy and, therefore, that compelled association, in particular, undermines individual autonomy by distorting one’s views and, more importantly, one’s thought processes). Certainly, “[a]ssociations serve private, even idiosyncratic values that may have little to do with public life. They are conditions of self-perfection.” ROSENBLUM, *supra* note 72, at 26. They can be places to “[e]scape from hereditary and ascriptive attachments,” and to form “new affiliations for every conceivable purpose,” although they can also be places where birth attachments are reinforced. *Id.* Democracy, however, is a collective endeavor, so it is that aspect of associations that is the focus here.

86. *See, e.g.*, Stolle & Rochon, *supra* note 84, at 147 (conceding, even as arguing that different types of associations create different sorts of social capital and thus distinctions between associations are relevant, that compared to “nonmembers, associational members score highest on political participation, participation in community activities, and political engagement”).

87. Alexis de Tocqueville was the first, but certainly not the last, to recognize the important role played by associations in American democracy. *See* Bhagwat, *supra* note 5, at 990–93 (describing the theoretical and historical consensus).



associations facilitate self-governance? On this question, First Amendment law (and scholarship, it turns out) is not well informed. Whereas law has tended toward theoretical and philosophical accounts of the value of free association, sociologists and political scientists have long been interested in the range of associations that exist in society and the different ways that they contribute to self-governance. Among their findings has been important work on the empirical dynamics by which associations breed civic and political activity.

Associations grease the wheels of political participation, and association itself (relationships, close or casual) turns out to be the grease. The causal chain explaining both why individuals opt to participate in associations and how those associations, in turn, promote political participation is a complicated one involving a range of factors.<sup>88</sup> Nevertheless, empirical studies from both disciplines consistently reveal that social ties and organization are the keys to the mobilizing potential of civic and political associations.

Friendship (whether close, professional, or casual) plays a central role in determining whether an individual (with or without an ideological disposition to act) will choose to act civically or politically.<sup>89</sup> Relationships go a long way toward explaining who will take action and what type of action they will undertake.<sup>90</sup> In particular, “*the thickness [or] thinness of associative relations*” explains much about mobilization.<sup>91</sup>

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88. Other important factors include belief and availability/time. Time, in particular, can offset the importance of personal ties in certain contexts. See, e.g., Florence Passy, *Social Networks Matter. But How?*, in *SOCIAL MOVEMENTS AND NETWORKS: RELATIONAL APPROACHES TO COLLECTIVE ACTION* 21, 35 (Mario Diani & Doug McAdam eds., 2003) (on the importance of time). Education and socioeconomic status are additional explanatory variables, as is gender. See Doug McAdam, *Gender as a Mediator of the Activist Experience: The Case of Freedom Summer*, 97 *AM. J. SOC.* 1211 (1992) (underscoring gender as another mediating factor). In addition, the relative importance of social ties depends on the political regime in which one operates, the visibility of the organization, and the type of action that is being imagined. See Passy, *supra*, at 24.

89. For an alternative definition of friendship (one limited to intimate and close friendship) developed for legal use, see Ethan J. Leib, *Friendship and the Law*, 54 *UCLA L. REV.* 631, 660 (2007).

90. The role of friendship in generating political participation has not been systematically explored until now, notwithstanding the recent interest among legal scholars in exploring how law should respond to the importance of friendships in our lives. See, e.g., Leib, *supra* note 89, 642–52 (arguing that law should recognize private, intimate friendships in a range of legal contexts); Laura A. Rosenbury, *Friends with Benefits?*, 106 *MICH. L. REV.* 189 (2007) (arguing that by focusing on marriage and ignoring friendship, family law reformers have inadvertently frustrated their efforts at achieving full gender equality). Passing references to the role of friendship in generating political participation, on the other hand, are not uncommon. See, e.g., INAZU, *supra* note 5, at 152 (noting that “[i]nformal relationships and activities nurtured the nascent groups that eventually produced the greatest political change”); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 *SUP. CT. REV.* 203, 230 (asserting that “nonpolitical association plays a critical role in making political association possible” because, among

If association itself is a critical part of the causal picture, so too are the groups that we in law refer to as associations. For one, it is the relationships formed in the associations of civil society that are most likely to breed civic and political activity. For another, once civic and political action gets going, its effectiveness depends a great deal on the existence of a group organized in some fashion. The ability of associations to mobilize people to act politically and the effectiveness of their mobilization depend on how personal ties are organized and channeled. In sum, associations perform a vital function for our democracy by promoting political participation and, thereby, accountability for government officials and policies.

The time is long overdue for theorizing about the right of association to integrate an empirically grounded account of the ways in which civic engagement and political participation are generated by association and associations.<sup>92</sup> Two elements of the causal picture—social ties and organization—are critical to understanding how the Constitution should protect associational life in the service of representative government.

#### *A. Personal Ties: The Critical Link to Participation*

Even as political science and sociology define self-governance differently and are driven by different theoretical questions and research methods, the findings from these two disciplines regarding the role of personal ties are highly consistent. The empirical research that is most relevant seeks to explain which individuals are likely to participate in the world and how such involvement drives political mobilization.<sup>93</sup>

##### *1. Political Science: Civic Associations and Political Participation*

In the late twentieth century, political scientists became intrigued by evidence that communities with strong civic associations both demand and get better government.<sup>94</sup> Political activity, it appeared, was strongly “embedded . . . in the non-political institutions of civil society.”<sup>95</sup> The question was why.

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other things, “[f]riendships forged on street corners and golf courses, and in dance halls and country clubs, are essential to making political association possible”).

91. WARREN, *supra* note 65, at 39.

92. Mazzone’s review of the political science research goes the furthest by offering a comprehensive map of our associational life, but even he does not delve deeply into findings pertaining to the dynamics by which associations foster political participation. See Mazzone, *supra* note 5, at 688–711 (overview of literature); *id.* at 697–701 (cataloguing wide range of contributions to self-governance (skill development, aggregation, increased political activity, forums for discussion, recruitment) without exploring the explanations for these effects).

93. The relevant political science literature attends to engagement in civic life and its implications for democracy while the relevant sociological literature is largely concerned with social movement recruitment and success.

94. See PUTNAM, *supra* note 81, at 344–47 (summarizing social science research and its measures of successful government); see also Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. OF DEMOCRACY 65, 66 (1995) (“The norms and

Why exactly did partaking in nonpolitical organizations of civil society so often prove to be a “politicizing experience?”<sup>96</sup> One simple answer, consistent with legal theorizing about the freedom of association, is that many associations in civil society actively engage in politics.<sup>97</sup>

Another relatively straightforward finding was that civic associations shape individuals in ways that enhance their ability to positively influence government. Civically active individuals are politics ready: Even when associational activities have nothing to do with politics, individuals “can develop organizational and communications skills that are transferrable to politics.”<sup>98</sup> They develop “the practical skills necessary to partake in public life”—such as how to run meetings, speak publicly, persuade others, and raise funds.<sup>99</sup>

More controversially, some political scientists argued that social capital explained the observed good governance.<sup>100</sup> Civic groups, they asserted, are “schools of democracy” that foster “‘other-regarding’ behavior,” including a disposition toward reciprocity and trust.<sup>101</sup> The associations of civil society, they reasoned, “instill in their members habits of cooperation and public-spiritedness” necessary for collective action.<sup>102</sup> Communities with high levels of “civic engagement,” therefore, are flush with “social capital,” defined as the value or utility that arises from “connections among individuals” and “the norms of reciprocity and trustworthiness that arise from them.”<sup>103</sup>

Stripped of this theoretical perspective (that is, of a moral view of associational life), these studies offer lessons for the development of a freedom of association jurisprudence attentive to protecting political participation.<sup>104</sup> In particular, their discrete empirical findings expose the importance of social ties in explaining how association facilitates and enhances political activity.

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networks of civic engagement also powerfully affect the performance of representative government.”).

95. VERBA ET AL., *supra* note 28, at 40.

96. *Id.*

97. *See id.* at 41 (offering as examples churches, the Children’s Defense Fund, and the National Rifle Association).

98. *Id.* at 40; *accord id.* at 17–18 (finding that ordinary activities in nonpolitical organizations, including work, “can develop organizational and communication *skills* that are relevant for politics and thus can facilitate political activity”) (emphasis added); WARREN, *supra* note 65, at 3 (same).

99. PUTNAM, *supra* note 81, at 338.

100. For an elucidation of different theories of social capital in political science and sociology, see Edwards & Foley, *supra* note 9, at 1, 8–13.

101. *See, e.g.*, WARREN, *supra* note 65, at 3, 9.

102. PUTNAM, *supra* note 81, at 338.

103. *Id.* at 19; *see also id.* at 18–24 (discussing concept more fully); Mazzone, *supra* note 5, at 701–10 (offering concise definition of social capital in Putnam tradition and explaining how it solves collective action dilemmas by providing trust and tempering self-interest).

104. For an explanation of why it is important to strip these studies of their theoretical take, see *supra* notes 82–84 and accompanying text.

The positive relationship between membership in a civic association and subsequent civic and political engagement depends, first, on a mundane fact: One is unlikely to take action in the world unless one has been asked.<sup>105</sup> Second—and this is the key point—whether a call for action is likely to be taken up turns on the personal ties that exist between the asker and asked. The latter finding is an obvious one.

Most of us are much more likely to pick up the phone when it rings if we know the person calling. If the caller then asks us to take time out of our life to do something for the civic good or for a political cause, we are more likely to pause before saying no if we know her. In fact, if we like the caller enough, we occasionally might say yes simply because it would be fun to spend time with that person—even if we do not particularly share her political commitments.

This everyday experience is exactly what the most extensive study to date of the relationship of associational life to democratic participation in the United States corroborates.<sup>106</sup> A seminal study by Sidney Verba and his co-investigators inquired specifically “into the process by which citizen activists are recruited,” focusing on “the circumstances under which solicitations are likely to be met with assent.”<sup>107</sup>

The study’s findings “underscore . . . the personal basis of recruitment to political participation.”<sup>108</sup> The bottom line is that “a substantial share of requests [for political participation] are denied,” but this is especially the case “if they come from strangers.”<sup>109</sup> Things look different when the person being invited to take action knows the person inviting it. The study found that, with respect to all forms of political activity, “those who know the people who attempt to recruit them are much more likely to give a positive answer than those solicited by strangers.”<sup>110</sup>

A personal relationship can be central to actualizing political participation, even when it is not deep.<sup>111</sup> Neighbors, coworkers and the people one knows through the associations in which one participates are among the most likely to recruit successfully.<sup>112</sup>

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105. VERBA ET AL., *supra* note 28, at 3 (explaining that “[t]hose who have both the motivation and the capacity to become active are more likely to do so if they are asked”); *see also id.* at 133–34 (same).

106. *Id.*, *passim*.

107. *Id.* at 35 (explaining that the study accounted for “the extent to which attempts at recruitment emanate from friends or from strangers and to the nonpolitical institutional settings that mediate and generate requests for participation”).

108. *Id.* at 145.

109. *Id.* at 134.

110. *Id.* at 142.

111. *Id.* (“When the personal connection was present, respondents acceded to requests for involvement 58 percent of the time—regardless of whether the appeal came from a close friend or relative or from an acquaintance.”).

112. *Id.* at 145 (“Reflecting these personal links, requests through neighborhood, workplace, and organizational networks have a relatively high probability of success.”).

A request for a donation received through a mass mailing is more likely to be ignored than a request from your neighbor who is running for office or from a class parent raising money for a local charity. The reason is friendship—association in the most basic sense. People know this: When respondents were asked why they participated, “[a] striking number mentioned selective social benefits—for example, enjoying the other people involved.”<sup>113</sup>

More interesting still, those with personal connections are also likely to make more demanding requests. Verba and his colleagues found, for example, that 68% of requests to attend a protest, 67% of requests for community activity, and 56% of requests for campaign work (as compared to 18% of campaign contributions) came from someone known personally.<sup>114</sup> The protest figure is particularly striking since protest requests are the most likely to be turned down.<sup>115</sup>

Civic groups, in turn, play an important role because they are the places from which successful requests are most likely to originate.<sup>116</sup> Americans are more likely to be asked to engage in political activity by friends they know through civic associations than by any other friends they have.<sup>117</sup> The Verba study specifically investigated whether Americans were more likely to be recruited into political activity at work, in their neighborhoods, or through organizational connections. It found that “[t]he organizational nexus [was] . . . by far the most important: fellow organization members [were] responsible for fully 48% of the requests,” compared to 18% from neighbors and 13% from fellow workers.<sup>118</sup> This is especially the case when the organization was one that took a stand on political issues.<sup>119</sup>

Finally, empirical research indicates that civic participation breeds more participation.<sup>120</sup> Initial forays into public life quickly turn into a habit, as individuals become part of social networks likely to encourage it. A recent study of the Tea Party movement, for example, found that many of its active members at the local level—defined as those “who actually attend meetings” or take on

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113. *Id.* at 22.

114. *Id.* at 141.

115. *Id.* at 144.

116. *Cf. id.* at 157 (explaining that “non-political institutions of adult life—the workplace, voluntary association, and church—serve to enhance political participation,” and that this can be explained in a variety of ways, including that “these institutions are frequently the locus of attempts to stimulate political involvement both because those who are affiliated with these institutions develop the personal networks from which requests for activity often spring and because these institutions, or those who run them, frequently make explicit attempts to recruit political participation”).

117. *See id.* at 144.

118. *Id.*

119. *Id.* (noting further that when the organization was one that took a stand on political issues, requests from fellow organization members were even more likely).

120. PUTNAM, *supra* note 81, at 396 (describing the systematic path from preexisting social networks to nonpolitical associations to political movements during the Progressive Era); *see also id.* at 339 (noting that associations “serve not only as forums for deliberation, but also” nurture “active participation in public life”).

organizational roles—had extensive prior political and civic experience.<sup>121</sup> Organizers, in particular, were likely to have previously volunteered in election campaigns and in socially conservative issue advocacy organizations or to have worked for charitable and religious organizations.<sup>122</sup> Such prior experiences meant they had both organizing skills and a preexisting network of contacts interested in conservative causes, which they could tap into when organizing for the Tea Party.<sup>123</sup> Finally, it found that local Tea Party groups were either founded by friends or by activists who had met in person at rallies and other protest activities.<sup>124</sup>

In sum, association goes a long way toward explaining whether individuals are likely to take action. Associations, meanwhile, play an important role because our civic friends are the ones most likely to ask us to take on more civic and political projects. The more one has agreed to do, the more one will be asked to do, especially by one's associational ties.

## 2. Sociology: Associations and Social Movement Participation

Despite significant theoretical and methodological differences, the findings from sociology are highly consistent. The relevant sociological research seeks to explain participation in social movements: Why do some people and not others become active in social movements?<sup>125</sup>

The foundational sociological finding in this regard is that information rarely prompts political activity unless it is transmitted through personal ties.<sup>126</sup> This sense of the limits of information is a long-standing one and appears to be true in a wide array of contexts.<sup>127</sup>

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121. SKOCPOL & WILLIAMSON, *supra* note 2, at 41.

122. *Id.*

123. *Id.* at 94–95.

124. *Id.* at 93–94.

125. See David A. Snow et al., *Social Networks and Social Movements: A Microstructural Approach to Differential Recruitment*, 45 AM. SOC. REV. 787, 787 (1980) (framing primary research question in the discipline as: “Why are some people rather than others recruited into a particular social movement organization?”).

126. Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1374 (1973); accord Sidney Tarrow, *Dynamics of Diffusion: Mechanisms, Institutions, and Scale Shift*, in THE DIFFUSION OF SOCIAL MOVEMENTS: ACTORS, MECHANISMS, AND POLITICAL EFFECTS 204, 209 (Rebecca Kolins Givan et al. eds., 2010) (noting innovations in form of collective action do occasionally spread between individuals without social relationships but that “innovations travel most easily along established lines of interaction”).

127. See Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 34–35 (2011) (discussing sociological study of 1948 U.S. presidential election that found that “mass media alone does not change people’s minds;” rather, ideas transmitted in the media must be “echoed by friends, family members, and colleagues” before political beliefs are formed); Damon Centola & Michael Macy, *Complex Contagions and the Weakness of Long Ties*, 113 AM. J. SOC. 702, 730 (2007) (noting that it is a well-known fact among public health officials that information alone rarely “chang[es] entrenched yet risky behaviors without . . . social

This is not to say beliefs do not matter at all, but rather that relationships matter a great deal.<sup>128</sup> Strength of conviction and commitment turn out to be poor predictors of the likelihood of an individual's social movement participation.<sup>129</sup>

Social ties (strong or weak) serve at least three roles in facilitating social movement participation. First, they have a “*socialization function*.”<sup>130</sup> Beliefs are not exogenous to social networks, as those networks are frequently where one's beliefs and disposition to participate in public life are formed. In this regard, sociologists would not take issue with the suggestion that associations are places to talk and to form beliefs about political and social issues.<sup>131</sup> They would, however, emphasize that preassociational ties (along with a number of other factors) determine the initial decision to join a group.<sup>132</sup>

Second, individuals frequently learn of events or activities through their social connections.<sup>133</sup> Other avenues for connecting with opportunities to take action—such as the media—are significantly less effective.<sup>134</sup> In this regard, social

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reinforcement”); *see also* Atul Gawande, *Slow Ideas: Some Innovations Spread Fast. How Do You Speed the Ones that Don't?* NEW YORKER, July 29, 2013, at 36, 44–45 (exposing problems with the spread of medical innovation and strongly implying that the reason that “[p]eople talking to people is still how the world's standards change” is because of the relationships they form).

128. *See* Michael Biggs, *Who Joined the Sit-Ins and Why: Southern Black Students in the Early 1960s*, 11 MOBILIZATION 321, 322, 331 (2006) (reporting results of quantitative analysis of sit-in participants and nonparticipants as “revealing the critical importance of beliefs and sentiment” but also that “[g]rievances and optimism were powerful predictors of participation in protest”).

129. Doug McAdam & Ronnelle Paulsen, *Specifying the Relationship Between Social Ties and Activism*, 99 AM. J. SOC. 640, 643 (1993) (documenting that previous studies clearly demonstrate a “disparity between attitudinal affinity and actual participation” and that this is precisely what “requires explanation”).

130. Passy, *supra* note 88, at 23–24.

131. *Id.* at 24; *accord* VERBA ET AL., *supra* note 28, at 157 (explaining that association breeds political participation in part because “involvement at work, in organizations, or in church brings exposure—both formal and informal—to political conversations and messages”).

132. Mario Diani, *Introduction: Social Movements, Contentious Actions, and Social Networks: 'From Metaphor to Substance'?*, in SOCIAL MOVEMENTS AND NETWORKS: RELATIONAL APPROACHES TO COLLECTIVE ACTION, *supra* note 88, at 1, 8 (explaining that social relations are often “the source of social pressure on prospective participants . . . provid[ing] the context for the socialization of individuals to specific sets of values”); Passy, *supra* note 88, at 23–24 (explaining that social networks “build and reinforce the identities of individuals and provide them with a political consciousness that allows them to get ideologically closer to a given political issue”).

133. Passy, *supra* note 88, at 24 (“Social ties are one of the major channels through which potential activists [i.e., those with a disposition toward political action] are connected with an opportunity for participation.”).

134. *See id.*

networks facilitate social movement participation by solving collective action problems.<sup>135</sup>

Third, social ties frequently explain an individual's decision to take political action.<sup>136</sup> Friends and associates are extremely relevant when it comes to predicting both whether a person will join a social movement and the form that his or her participation is likely to take. In fact, "[k]nowing someone who is already involved in social movement activity is one of the strongest predictors of recruitment into the membership."<sup>137</sup> Summarizing the literature, Mario Diani writes: "[T]he notion that prior social ties operate as a basis for movement recruitment . . . [is one of] the most established findings in social movement research."<sup>138</sup> Explaining further, he writes:

Personal friends, relatives, colleagues, and neighbours, may all affect individual decisions to become involved in a movement; so may people who share with prospective participants some kind of collective engagement, such as previous or current participation in other movement activities, political or social organizations, and public bodies.<sup>139</sup>

Studies consistently find that participants in social movements are most effectively recruited through preexisting relationships. In a seminal study, Doug McAdam compared those who participated in the 1964 Freedom Summer with those who dropped out.<sup>140</sup> He found that the students who stuck it out in Mississippi in 1964 were those who had deeper personal connections within the Civil Rights movement.<sup>141</sup> Specifically, among those *with both the motivation and ability to participate*, those who became most active were those who had closer personal ties to movement participants at the time of joining.<sup>142</sup> The study, by his own admission, however, failed to answer a number of key questions, including

135. Diani, *supra* note 132, at 8 ("Networks . . . provide opportunities for action through the circulation of information about on-going activities, existing organizations, people to contact, and a reduction of the practical costs attached to participation.").

136. See, e.g., Snow et al., *supra* note 125, at 787 (aggregating existing quantitative studies and concluding that movement recruitment cannot be explained by individual disposition but rather is influenced by three factors, including preexisting relationships to movement members).

137. McAdam & Paulsen, *supra* note 129, at 644 (examining the role of social ties in movement recruitment having addressed theoretical and empirical imprecision that had plagued earlier work); accord Passy, *supra* note 88, at 34 (finding "social networks are important channels for the recruitment of participants" into movement organizations, even ones that are larger and better known, although the effect may be slightly smaller); Snow et al., *supra* note 125, at 790–92 (noting, for example, a study showing that 63% of students involved in a political movement while in college were recruited by a movement participant with whom they had a preexisting friendship).

138. Diani, *supra* note 132, at 7.

139. *Id.*

140. See Doug McAdam, *Recruitment to High-Risk Activism: The Case of the Freedom Summer*, 92 AM. J. SOC. 64, 64 (1986).

141. *Id.* at 64, 70, 81–82.

142. *Id.* at 70.



“whether it [was] the presence of a [social] tie, the number of ties, or the salience, centrality, or strength of the tie that determine[d] its effectiveness as a recruitment agent.”<sup>143</sup> It also failed to account for the fact that individuals have multiple relationships, tying them to competing social networks and thus potentially pulling them in multiple conflicting directions.<sup>144</sup> Accounting for these and other theoretical questions, McAdam and Ronnelle Paulsen refined McAdam’s earlier study. Even controlling for these alternative explanations, they found that participation in the Freedom Summer was best explained by the existence of strong ties to movement activists.<sup>145</sup> Most relevantly, they found that no participants expressed a strong subjective identification with the cause without also having preexisting individual or organizational ties.<sup>146</sup>

American political activists know this. This is why MoveOn.org always asks members who have signed a petition or otherwise taken action to forward requests for action to their immediate friends and relatives. Grassroots elements of the Tea Party similarly have used e-mail lists, social media, and blogs in an effort to ensure that their target audience receives their information from a trusted source.<sup>147</sup>

In fact, efforts to recruit movement participants among strangers are far less effective than recruitment efforts that draw on existing members’ associates. Only a few social movements have done so with any measure of success.<sup>148</sup> The Hare Krishna, for example, have recruited strangers in public places because members are required to sever their preexisting relationships. The organization, therefore, had to depend on the recruitment of strangers as a matter of necessity and has devised compensating strategies.<sup>149</sup> Their success—though limited compared to other religious groups not so hindered—points to two other factors explaining recruitment: time and the social isolation of the new recruits.<sup>150</sup>

A further sociological finding that is relevant to our theorizing about the ways that association and associations foster political participation is the finding that initial forays into politics breed further, more intense political activity. McAdam’s original study found that initial, typically low-cost and low-risk activism in the Civil Rights movement deepened personal relationships to others in

143. McAdam & Paulsen, *supra* note 129, at 641.

144. *Id.*

145. *Id.* at 654 (explaining that enhanced methodology has “done nothing to undermine the special significance previously ascribed to contact with another activist”).

146. *Id.* at 659.

147. SKOCPOL & WILLIAMSON, *supra* note 2, at 128–29 (noting Tea Party experience conformed to findings of “classic sociological work document[ing] . . . that citizens find news more credible if trusted people vouch for its veracity and relevance”).

148. See, e.g., James M. Jasper & Jane D. Poulsen, *Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests*, 42 SOC. PROBS. 493, 493 (1995) (arguing that moral shock and playing on cultural meanings are important strategies for recruiting strangers where social networks are missing); Snow et al., *supra* note 125, *passim* (discussing Hare Krishna’s recruiting efforts).

149. Snow et al., *supra* note 125, at 791, 796–97.

150. *Id.*

the movement, thereby facilitating the choice to engage in the high-risk summer of 1964.<sup>151</sup> A follow-up study found that sustained activism and political engagement over the long term was significantly explained by continued contact with activist friends from the Civil Rights movement.<sup>152</sup> Similarly, both political scientists and sociologists classify protests as an intensive, if not necessarily high-risk, form of participation given the time involved, and they have found protestors frequently have extensive prior political experience.<sup>153</sup>

The final sociological finding that is pertinent to our efforts to empirically ground the freedom of association is the finding that the strength of the personal tie matters in predicting the type of civic or political engagement one might expect.<sup>154</sup> Strong ties are more likely to increase the levels of risk participants will be willing to assume, while weak ties may generate broader dissemination of social movement activity.

High-risk activism is more likely when an individual has strong relationships to other activists.<sup>155</sup> A recent study of recruitment into two Swiss nonprofits is consistent with the work of McAdam (but also Verba and his colleagues) in this regard.<sup>156</sup> The Swiss study further found that most members of the organizations “were already members of numerous social movement organizations”—confirming also that participation breeds participation.<sup>157</sup>

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151. McAdam, *supra* note 140, at 70, 81–82.

152. Doug McAdam, *The Biographical Consequences of Activism*, 54 AM. SOC. REV. 744, 751 (1989) (finding that increased activism and political engagement over the long-term was significantly explained by continued contact with activist friends).

153. To cite just one study, James M. Jasper & Jane D. Poulsen’s comparison of animal rights and anti-nuclear protestors found that both had “extensive political experience.” Jasper & Poulsen, *supra* note 148, at 500. The primary difference between the two groups was their self-report as to the significance of that experience. While only 7% of antinuclear protestors “said that neither previous activism nor family and friends were important” thus indicating that social networks helped draw almost all of them into the movement, “27[%] of the animal rights protestors said that neither of these was important.” *Id.*

154. Passy, *supra* note 88, at 34 (concluding that “it is the nature of the ties that affects the level of participation rather than the mere fact of being connected to the opportunity for mobilization through interpersonal ties”); *see also* Michael W. Foley et al., *Social Capital Reconsidered*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE, *supra* note 9, at 266, 276 (arguing empirical studies suggest that relationships from previous protest experiences are more likely to lead to recruitment to more radical projects, whereas private personal ties, such as acquaintances known from the neighborhood or a child’s school, are more likely to draw members to more traditional civic groups).

155. McAdam, *supra* note 140, at 70, 81–82.

156. Passy, *supra* note 88, at 34 (finding that “being recruited by a close friend gives rise to strong activism” and that this was especially true for the less visible of the two organizations studied).

157. *Id.* at 30.

Strong ties, however, have their limits.<sup>158</sup> A movement seeking to expand based solely on close relationships runs the risk of running out of people to mobilize.<sup>159</sup>

Weak personal ties have a different set of strengths when it comes to politics. Their value arises out of an obvious social fact: Acquaintances run in different social circles.<sup>160</sup> When a political group taps into its members' acquaintances, it has the potential to become a widespread movement.<sup>161</sup>

The mobilizing capacity of weak ties tends, however, to be limited to moderate goals.<sup>162</sup> As we all know, you can't ask too much of an acquaintance.<sup>163</sup> Weak ties are most successful, therefore, when what one is asking of participants is relatively minimal—a five-dollar contribution to a cause or a quick click to join an online petition.

In sum, the empirical research in both political science and sociology draws attention to the personal basis of recruitment to civic, political, and social causes.<sup>164</sup> First, there is widespread agreement that “[t]hose who have both the

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158. See, e.g., Bob Edwards & John D. McCarthy, *Strategy Matters: The Contingent Value of Social Capital in the Survival of Local Social Movement Organizations*, 83 SOC. FORCES 621, 645–46 (2004) (finding local chapters of Mothers Against Drunk Driving that originated out of preexisting strong ties were the least likely to survive over time).

159. See *id.* at 625–26 (explaining in detail various reasons why strong ties are a limited basis for mobilization); see also Lars Barkstrom et al., *Group Formation in Large Social Networks: Membership, Growth, and Evolution*, in PROCEEDINGS OF THE 12TH ACM SIGKDD CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING 45 (Lyle Ungar et al. eds., 2006) (modeling the structural weakness of an entirely strong-tie political movement by showing that strong-tie groups grow significantly less quickly than groups with weaker, nonmutually reinforcing personal ties).

160. Centola & Macy, *supra* note 127, at 702 (“The strength of weak ties is that they tend to be long—[connecting] socially distant locations.”). See generally Mark S. Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 209 (1983).

161. Granovetter, *supra* note 126, at 1376 (“Weak ties are more likely to link members of *different* small groups than are strong ones, which tend to be concentrated within particular groups.”); see, e.g., Edwards & McCarthy, *supra* note 158, at 638 (summarizing their findings as “offer[ing] clear support for the long-standing body of work on the strength of weak ties and their ability to counter social closure” by “extend[ing] the group’s reach into a broader” community and “increas[ing] a group’s . . . access to resources of all kinds”); see also McAdam & Paulsen, *supra* note 129, at 655 (“Numerous studies have shown that movements often spread by means of diffuse networks of weak bridging ties or die for lack of such ties.”).

162. Diani, *supra* note 132, at 8 (noting weak ties tend to “facilitate the contacts between a movement organization and a constituency with more moderate or at least diversified orientations” and thus weak ties tend to lend themselves to moderate goals).

163. But see Passy, *supra* note 88, at 34 (noting that in the two Swiss nonprofits studied, “recruitment by acquaintances (weak ties) [did] not seem to affect the intensity of participation”).

164. There are, of course, researchers skeptical of this emphasis on the personal. None of the competing accounts offered support theorizing the value of associational life as

motivation and the capacity to become active are more likely to do so if they are asked.<sup>165</sup> Second, and more importantly, the evidence shows that calls to action are more likely to be accepted if made by persons with whom one has some kind of relationship, although these need not be close ones. Neighbors, fellow soccer dads, and other acquaintances can do the trick, depending on what is asked. The strength of the personal tie, however, is likely to shape the nature of political engagement. Finally, participation breeds more participation, including in politics. Life-changing political experiences—like the Freedom Rides or being in Tahrir Square during the Arab Spring—greatly increase the likelihood of future political activism.

### *B. Organization: Making Participation Matter*

If association itself matters, so too do the associations we, in law, normally think of as protected by the First Amendment. In addition to being important places from which requests for action are made, civic and political groups (formal and informal) matter because they channel generated political activity in valuable ways.

First, associations—churches and PTAs but also professional listservs—breed the kinds of relationships that are most likely to result in accepted requests to participate in public life, as we have seen.<sup>166</sup> There is, in other words, broad consensus that “belonging to an organization is a good way to meet people and the

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its contribution to a marketplace of political ideas or political discourse (as law has so far). For example, the most recent study to take aim at the claim that social ties and membership in civic groups drives civic and political action argues not that it is ideas that do the work, but rather that it is organizations that explain civic participation. See SAMPSON, *supra* note 36, 179–209. For reasons that will be explained in our discussion of why organization matters, Robert J. Sampson’s finding is perfectly consistent with the account offered here despite his theoretical objections to the political science literature relied on here. Meanwhile, the most prominent critique within the social movements literature is one that emphasizes the cognitive and emotional processes that go into social movement recruitment. The critics do not, however, deny that social ties explain mobilization to some degree. Rather, they claim that the reason that social networks are important is “because of the meanings they transmit.” Jasper & Poulsen, *supra* note 148, at 495. A person’s associates form, at a prerational level, their sensibilities about the world, which in turn affect social movement participation. See *id.* at 494–96 (reviewing debate); Francesca Polletta, “It Was Like A Fever . . .” *Narrative and Identity in Social Protest*, 45 SOC. PROBS. 137, 149–52 (1998) (criticizing the literature’s near exclusive focus on the question of why people are inclined to participate in the first place and arguing that attention should be paid to the role of narratives and collective identity in explaining why participation takes the particular forms it does).

165. VERBA ET AL., *supra* note 28, at 3.

166. See *id.* at 40 (noting, for example, that “church and organization members make social contacts and, thus, become part of networks through which requests for participation in politics are mediated”).

likelihood of being pulled into social movement activity increases through this contact with others.<sup>167</sup>

Second, organization itself matters. The organized nature of groups has independent value insofar as it has the capacity to create opportunities for those inclined to take civic or political action to do so. A recent study of Chicago, undertaken by McAdam and Robert J. Sampson, found that civic participation is strongest in neighborhoods with the highest concentration of nonprofit organizations, other than Black churches.<sup>168</sup> When it came to predicting collective events advertised and reported on in local newspapers, “the density of formally defined nonprofit organizations” outpredicted both social ties and individual memberships in civic groups.<sup>169</sup> This is exactly what we would expect from a study focused on the factors that explain organized public events.<sup>170</sup> Organizations make big things happen.<sup>171</sup>

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167. McAdam & Paulsen, *supra* note 129, at 644. For example, McAdam and Paulsen’s revised study (the one which controlled for limitations of previous studies) reached the following conclusion: “Neither organizational embeddedness nor strong ties to another volunteer are themselves predictive of high-risk activism. Instead, it is a strong subjective identification with a particular identity, *reinforced by organizational or individual ties*, that is especially likely to encourage participation.” *Id.* at 659. In particular, those who ultimately participated were significantly more likely to have identified a community, including an organizational affiliation, which was the source of their interest in the Freedom Summer than the no-shows. *Id.* at 656–58.

168. SAMPSON, *supra* note 36, at 192 (finding that “a community’s organizational service base directly predicted later collective civic engagement and blended social action”); *see also id.* at 200–05 (explaining how this was not the case for Black churches).

169. *Id.* at 198; *see also id.* at 180, 186–87 (describing data collection process).

170. Although Sampson emphasizes that both interpersonal ties and the scale and prevalence of individual civic memberships are irrelevant to predicting collective action events, it appears that he would agree with my analysis of why this is not surprising given what is being measured. *Compare id.* at 192, 195 (relaying findings on personal ties and civic membership), *with id.* at 200 (suggesting that because “collective civic events” are not spontaneous they “require forward planning of the sort that is enhanced by the formal incorporation of nonprofit organizations”). Moreover, although Sampson is particularly critical of the Putnam school and is eager to emphasize that his findings show that civic engagement is a product of “organizational and spatial” determinants “rather than interpersonal in nature,” *id.* at 181, his disagreement with Putnam appears largely theoretical. *Cf. id.* at 183 (“Thus, while high rates of individual participation and dense personal ties may be related to organizational infrastructure, conceptually they are not the same thing.”).

171. *Cf.* Kenneth T. Andrews & Michael Biggs, *The Dynamics of Protest Diffusion: Movement Organizations, Social Networks, and News Media in the 1960 Sit-Ins*, 71 AM. SOC. REV. 752, 765, 768–69 (2006) (finding sit-in protests were likely to move to cities where there were established organizations to orchestrate movement protests and that what mattered for diffusion purposes was the existence of the organization and a cadre of activists rather than a large membership); *see also id.* at 756 (explaining various schools of thought and noting that a dominant view argues that movement organization is the most critical explanation for movement success).

Third, how effective an association will be in generating civic and political action depends in large measure on its organizational processes. Associations that function as diffuse networks work differently than those that are more formally structured. It is useful, therefore, to analyze associations in terms of the relative formality of their organizational structure.

Established institutions have the advantage when it comes to articulating a coherent message, to sustaining activism over time, and to organizing high-risk activism.<sup>172</sup> They also have an advantage when it comes to organizing civic events that require planning.<sup>173</sup> The advantage arises because “[o]rganization implies discipline—at least enough discipline to coordinate its parts and to implement its decisions.”<sup>174</sup> The critical issue is not hierarchy but an established commitment to a procedure for resolving internal disagreements.<sup>175</sup>

On the other hand, network-based associations—defined by their lack of leadership and increasingly facilitated by the Internet—have greater capacity for spontaneity. Wikis and crowdsourcing, for example, have been used to support destabilizing activism because they are virtually impossible to quash.<sup>176</sup>

The critical distinction between a formal organization and a network, therefore, is the existence of established processes for resolving disagreements. Authority and power within established organizations, however, can be structured in various ways, embodying varying degrees of hierarchy or lack thereof. This was apparent within the Civil Rights movement. The National Association for the Advancement of Colored People (NAACP) was quite traditional and hierarchical, while the Student Nonviolent Coordinating Committee (SNCC) emphasized

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172. Cf. Molly Beutz Land, *Networked Activism*, 22 HARV. HUM. RTS. J. 205, 215–16, 224–28 (2009) (explaining that efforts to create participatory human rights advocacy networks frequently evolve into “small, hierarchically-organized decision-making models” because it is difficult to control message and take effective action otherwise).

173. See SAMPSON, *supra* note 36, at 200 (suggesting that formal, incorporated groups have an advantage over informal groups such as neighborhood watches, block groups, or afterschool programs when it comes to organizing events); J. Slobbe & S.L.C. Verberkt, *Hacktivists: Cyberterrorists or Online Activists? An Exploration of the Digital Right of Assembly* at 4 (June 4, 2012), <http://arxiv.org/pdf/1208.4568.pdf> (noting that “every digital protest and no digital protest at all can originate from [the online group] Anonymous” because of its commitment to decentralization).

174. FRANK J. SORAUF, *PARTY POLITICS IN AMERICA* 107 (5th ed. 1984).

175. *Id.* (noting that organization “implies some well-established systems of authority for making . . . decisions”).

176. Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 156–62 (2001) (discussing early examples of digital graffiti and digital sit-in campaigns as well as unauthorized digital leaks); Raffi Khatchadourian, *No Secrets: Julian Assange’s Mission for Total Transparency*, NEW YORKER, June 7, 2010, at 40, 40 (noting “a government or company that wanted to remove content from WikiLeaks would have to practically dismantle the Internet itself”); Peter Ludlow, *WikiLeaks and Hactivist Culture*, THE NATION, Oct. 4, 2010, at 25 (remarking that online leaks would continue even without Julian Assange’s WikiLeaks because “new sites would emerge to replace it”).

bottom-up decision-making.<sup>177</sup> While the NAACP was certainly more able to reach final decisions and to take action more quickly, it would be a mistake to speak of SNCC's organization as equivalent to a network or as lacking a locus of authority.

*C. Association and Associations: Integrating the Findings*

Together, personal ties and organization are able to explain a great deal about the political potential of groups and social movements. It is perhaps worth thinking in terms of four categories of associations: *Strong-Tie, Formal Organization*; *Weak-Tie, Formal Organization*; *Strong-Tie Network*; and *Weak-Tie Network*. That said, individual civic and political groups operate along a continuum (from weak to strong ties and from diffuse to centralized organization). Moreover, they are likely to shift along either or both axes over time.

Some associations have distinct organizational structures and are comprised of individuals with strong personal ties. The NAACP and the Sixteenth Street Baptist Church in Birmingham, Alabama are paradigmatic examples of *strong-tie, formal organizations*. They were established, hierarchical organizations that successfully drew on and generated strong ties in their political efforts. Nineteenth-century urban machine politics similarly depended on the confluence of relatively strong personal ties and a formal organization. Ward and precinct workers maintained personal connections with voters precisely in order to create a “web of loyalty and gratitude which enabled [them] to ‘deliver the vote.’”<sup>178</sup> Party workers were subject to internal party discipline and were expected to take time to get to know voters and to learn of the personal troubles of constituents in order to provide assistance where possible.<sup>179</sup>

Diametrically opposite in the space of associations are *weak-tie networks*. The flood of Internet donations to Ian's Pizza to support the delivery of free food to pro-union protestors in Madison, Wisconsin during the 2011 protests against Governor Walker, illustrate the potential of networked weak ties: News about the opportunity spread quickly on Facebook and Twitter, and the cost of a pizza is not a great sacrifice for most Internet users.<sup>180</sup> Weak-tie networks certainly have their place in politics—money is not nothing—but they appear to be unable to generate additional civic and political engagement.<sup>181</sup>

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177. See Polletta, *supra* note 164, at 152–53 (explaining that SNCC, which emerged out of the student movement, was significantly constrained by the student-participants' commitment to spontaneity which translated into a desire for coordination but resistance to direction and wariness of leaders).

178. SORAUF, *supra* note 174, at 69.

179. *Id.*

180. See, e.g., Steven Greenhouse, *Delivering Moral Support in a Steady Stream of Pizzas*, N.Y. TIMES, Feb. 26, 2011, at A13.

181. See, e.g., Beutz Land *supra* note 172, at 219–20 (noting that the aggregation potential of the Internet has led, for example, to donation of more than “\$39.2 million dollars in the form of over 55,000 [micro] loans in 42 countries” but also that it is not clear that “initial act[s] of participation” can be turned “into a deep and sustained commitment to [human rights] work”).

Associations that channel weak ties through a strong organization (*weak-tie, formal organization*) greatly increase the potential of political action dependent on weakly tied individuals. Organization compensates for weak personal ties so long as political aims are relatively moderate. A weak-tie, centralized organization, such as MoveOn.org, illustrates how a well-organized group can effectively harness the power of weak ties toward national political ends. Such organizations are much more likely to be successful, however, when they do not ask too much. MoveOn.org's petition drives presumably are much easier to accomplish than its in-person debate parties. One thing is clear: the organization frequently seeks to improve its returns by asking members to forward requests for action to their friends.

Finally, *strong-tie networks*—such as your close friends and relations—have a different set of strengths and weaknesses. On the one hand, they can be quite effective in generating initial involvement in civic groups, social movements, and politics. One is most likely to agree to take action when the request comes from a close friend or colleague, whether the solicitation is made in person or by e-mail. On the other hand, networks of close associates are not ideal for generating a movement or creating big change, as they are quickly exhausted. There are only so many close friends and family members an individual can mobilize.

The most politically potent combination occurs when personal ties, weak or strong, are used to link disparate groups held together by strong ties—that is, when strong-tie, formal organizations are linked through either weak- or strong-tie networks. This form of diffusion has the potential to create “scale shift.”<sup>182</sup> Diffusion across scales occurs where individuals “make connections among groups that would otherwise be isolated from one another” and is necessary for a major social or political transformation to occur.<sup>183</sup>

The Civil Rights movement, as it developed and operated in the 1960s, is a prime example of the power of networking strong-tie, formal organizations.<sup>184</sup> This combination generated the scaling up of the sit-ins, such that what began as four students sitting in at a segregated lunch counter in Greensboro, North Carolina on February 1, 1960 became, by mid-April, a movement in which 50,000 had participated in similar sit-ins across the South.<sup>185</sup> The participants in the

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182. Tarrow, *supra* note 126, at 214–18 (explaining that scale shift is defined in the literature as when contention spreads across social and political hierarchies—from industrial strife to political strife, for example).

183. *Id.* at 215.

184. Another example in the literature is the international Islamist movement. *See id.* at 209–10 (emphasizing jihadi networks were importantly expanded because “a number of movement ‘nodes’ that connected individuals within a geographic cluster . . . were linked . . . by a small number of weak ties” while summarizing research on the diffusion of Islamist movement).

185. Some scholars disagree with this account. *See, e.g.,* Andrews & Biggs, *supra* note 171, at 769 (“Clearly sit-ins were facilitated by friendships among students within a college, and friendships among students at different colleges in the same city. There is a surprising lack of evidence, however, for social networks acting as channels for the diffusion of protest among cities.”). Andrews and Biggs argue that news media and



Greensboro sit-in were close friends, who, when asked, said that the idea originated out of a conversation in their dorm room. In fact, the students also had been “members of a NAACP Youth Council, which had close ties with people who had conducted sit-ins in Durham in the late 1950s.”<sup>186</sup> As such, the Greensboro sit-in energized “a network of ministers, NAACP officials, and other activists,” who played a critical role in spreading the movement.<sup>187</sup> The movement spread, in other words, by networking churches and legal organizations—strong-tie, formal organizations.<sup>188</sup> The diffusion of bus boycotts as a mechanism for challenging segregation during the Civil Rights Era offers a second illustration of the dynamic. The boycott movement spread through “an existing network of black ministers,” and the Southern Christian Leadership Conference emerged as “the principal vehicle of upward scale shift throughout this period.”<sup>189</sup>

#### *D. Politics and New Media*

The interplay of personal ties and organizational form brings important clarity to the raging debate over so-called New Politics.<sup>190</sup> Some believe new

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favorable local politics were the crucial factors in explaining why the sit-in movement expanded to certain cities but not others. *See id.* at 766. Their conclusion, however, is significantly tainted by the variables they used to measure the role of social networks. The two proxies used to measure the effect of social networks were distance from Greensboro and use of intercollegiate athletic associations. *Id.* at 757. Both seem to be particularly limited indicia of social networks.

186. Polletta, *supra* note 164, at 138, 149–52. Francesca Polletta’s work emphasizes the role of narrative and personal identity in explaining the type of activity a social movement generates. For example, why did students decide that participation should involve “putting one’s body on the line” rather than talking about race relations or politics? *Id.* at 145. Ultimately, she argues that to get students to sit-in, they not only needed to hear the stories of the sit-ins, but to decide that the protestors were just like them, and thus in effect to decide that “if they can do it, so can I.” *Id.* at 143. That is, a compelling narrative of agency and rebellion created the sit-in movement by forging a rebellious collective for the students.

187. *Id.* at 138 (explaining network of ministers “swung into action, contacting colleagues to spread the news, training students in sit-in techniques, and persuading adults to support the protests”).

188. *Cf. id.* at 149–52 (explaining how the black church—a classic strong-tie, formal organization—“was the linchpin of student activism”). A recent study of Chicago suggests that black churches may no longer be fostering civic engagement, although the finding is preliminary. SAMPSON, *supra* note 36, at 204–05

189. Tarrow, *supra* note 126, at 217.

190. This debate crystallized in the public sphere around an article by Malcolm Gladwell in *The New Yorker*, in which he took the provocative position that the revolution will not be tweeted. *See* Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, *NEW YORKER*, Oct. 4, 2010, at 42. The effects of new media on our democracy and its potential for political and social movements have also been debated in the legal academy. *See, e.g.*, CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 5–6, 12 (2007) (discussing the potential dangers to democracy of fragmentation of conversations and egocentric Internet use); Beutz Land, *supra* note 172, at 228, 232–40 (developing a model for participatory human rights advocacy that would focus on using new media to link highly participatory small groups while leveraging the expertise of established human rights organizations);

media will transform politics because it “compensate[s] for the disadvantages” traditionally associated with “undisciplined groups by reducing the cost of coordination.”<sup>191</sup> Others are more skeptical.<sup>192</sup>

The first, and perhaps most important, point is that social media platforms are not associations, and they should not be confused with them. They are new networking tools—an advance on the telephone, the mass mailing, and the nineteenth-century agitator.<sup>193</sup> A recent comprehensive study of activism on the Internet finds four broad uses of the Internet for political purposes: information dissemination; facilitation of offline protest; online participation; and online organizing.<sup>194</sup> Each amounts to a new organizing tactic.

The political potential of new media lies in its capacity to harness association and associations.<sup>195</sup> The Internet is an important advance in networking social ties as is the advent of mobile phones and now smart phones, especially with respect to generating civic and political action out of weak ties.<sup>196</sup>

The ultimate efficacy of online political organizing, however, depends, as with all political organizing, on the underlying relationships. Political mobilization may be facilitated by the connectivity of the Internet, but without relationships, the Internet is simply a marketplace for ideas—a closed one at that insofar as it primarily reinforces preexisting preferences and interests. Even in the era of the Internet, “connections among acquaintances, friends and relatives—often mediated through mutual institutional affiliations—are still crucial for political recruitment.”<sup>197</sup> In particular, Internet mobilization is unlikely to generate radical

Kreimer, *supra* note 176, *passim* (listing the advantages that the Internet brings to social movements as well as its limitations).

191. Shirky, *supra* note 127, at 35.

192. Gladwell, *supra* note 190, *passim*; Beutz Land, *supra* note 172, at 220–27.

193. Shirky, *supra* note 127, at 18 (recognizing that cell phones and social media are the newest iteration of technological inventions with political implications, which started with “the printing press, the postal service, the telegraph, and the telephone”). For an interesting account of how nineteenth-century traveling agitators did the work that phone banks, mass mailings, and e-mail do today, see Peter Hedstrom et al., *Mesolevel Networks and the Diffusion of Social Movements: The Case of the Swedish Social Democratic Party*, 106 AM. J. SOC. 145, 157–58, 165 (2000).

194. Jennifer Earl and Katrina Kimport, *The Diffusion of Different Types of Internet Activism: Suggestive Patterns in Website Adoption of Innovations*, in *THE DIFFUSION OF SOCIAL MOVEMENTS: ACTORS, MECHANISMS, AND POLITICAL EFFECTS* 125, 126 (Rebecca Kolins Givan et al. eds., 2010).

195. *Id.* at 125 (explaining that social networking sites, in particular, “change[] . . . the scale of organizing by increasing the speed of diffusion, increasing the size of the audience, or increasing the global reach of messages”).

196. *Cf.* Shirky, *supra* note 127, at 28–30, 38 (arguing that texting and social networking capacities have become important coordinating tools for international social movements regardless of their ultimate political success); Beutz Land, *supra* note 172, at 215 (explaining evidence of “inverse relationship between broad mobilization and meaningful participation”).

197. VERBA ET AL., *supra* note 28, at 17; see also Keith Hampton & Barry Wellman, *Neighboring in Netville: How the Internet Supports Community and Social*

or high-risk action if the individuals receiving a call to action are only weakly related to the source of the call. The return on electronically delivered calls to act politically remains limited absent a personal connection.

Politicians, at least the savvy and well-funded ones, appear to know the importance of a personal connection. When President Obama was faced with polls showing that roughly one-fifth of his 2008 supporters were wavering in their support, his political team turned to Facebook to “identify persuadable friends” of “self-described supporters.”<sup>198</sup> Specifically, their goal was to figure out who among the Facebook friends of Obama’s supporters “were most likely to be their real-life friends, not just casual Facebook acquaintances,” and they used friends tagged in supporters’ photos as the indicator.<sup>199</sup> Once a “workable list of . . . the most persuadable voters” was generated, the team sought to recruit each one through either the original supporter or through more conventional means of recruitment, including knocking on doors.<sup>200</sup>

Social media are likely to be most effective when they link and coordinate the actions of disparate groups tied together by strong personal ties.<sup>201</sup> During the ouster of Egyptian President Hosni Mubarak, protest organizers used social media in precisely the way that sociologists and political activists theorized could lead to big change. Twitter and Facebook were used to motivate preexisting friendships (forged in college, elite social and professional circles, and political parties, such as the Muslim Brotherhood) and to generate new connections among disparate social groups.<sup>202</sup> The movement’s ultimate success, however, did not depend on new media. In fact, Mubarak’s government succeeded, quite remarkably, in shutting down the Internet for five full days.<sup>203</sup>

New media’s political potential depends, in other words, on its incorporating the central lesson of old-style politics—politics is personal. The Internet can reduce the costs of organizing greater numbers of people, but it cannot

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*Capital in a Wired Suburb*, 2 CITY & COMMUNITY 277, 277 (2003) (arguing that online networks reinforce real-world ones, rather than supplanting them); Tarrow, *supra* note 126, at 211 (explaining that without underlying relationships to be mobilized, online mobilization is unlikely to diffuse contention far and wide).

198. Jim Rutenberg, *Data You Can Believe In*, N.Y. TIMES, June 20, 2013, at MM22.

199. *Id.*

200. *Id.*

201. See Beutz Land, *supra* note 172, at 229–32 (arguing for a model of networked activism in which small participatory human rights groups are linked through weak ties based on same insight).

202. Cf. David D. Kirkpatrick, *Wired, Educated and Shrewd, Young Egyptians Guide Revolt*, N.Y. TIMES, Feb. 10, 2011, at A1.

203. See Joshua Yaffa, *Downloading the Uprising*, WALL ST. J., Feb. 5, 2011, at C9 (noting that “[t]he opposition movement actually grew most dramatically after the Egyptian government shut down nearly all Internet and cellphone service” and further that “once in the streets, protesters didn’t need Facebook or Twitter to tell them where to go or that their friends would be there, too”); see also James Glanz & John Markoff, *Egypt’s Autocracy Found Internet’s ‘Off’ Switch*, N.Y. TIMES, Feb. 16, 2011, at A1.

entirely compensate for social isolation. This is unlikely to change even as technologies do. The only open question is whether relationships forged in the virtual world—through e-mail exchanges and the like—can be sufficiently robust to generate political activity on their own.

### III. A RIGHT OF ASSOCIATION IN THE SERVICE OF POLITICAL PARTICIPATION

It is time to distill the lessons to be drawn from the social sciences and to explore their implications for First Amendment doctrine. The precise contours of a new free association doctrine will likely be contested, and given the array of contexts in which claims could arise, would certainly require its own article. Nevertheless, the theoretical and empirical perspectives developed above already suggest guiding principles. Let us review the argument so far before elaborating those principles.

#### *A. Reconceiving the Dynamics of Self-Governance*

A central function of the First Amendment is to secure the conditions necessary for representative government. A functioning democracy requires political participation at least as much as robust political debate. Preferences, if not expressed in action, can neither tether government policies to popular will nor serve as checks on government officials. High levels of political participation, moreover, bolster legitimacy, all things being equal.

This gives rise to a First Amendment interest in political participation—a constitutionally required obligation to prevent the state from acting in ways that risk a regression in political participation. Despite the importance of an active citizenry, the Supreme Court has generally been dismissive when litigants have sought to draw its attention to political participation as a central constitutional value.<sup>204</sup> The fact that the Court has done so in cases involving political parties—the associations primarily oriented toward democratic governance—reveals the depths of the problem of focusing on a marketplace of political ideas above all else.<sup>205</sup>

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204. *Cf.* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 600–01 (2000) (Stevens, J., dissenting) (“The Court’s glib rejection of the State’s interest in increasing voter participation is particularly regrettable.”). *But cf.* *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 255 (1986) (expressing strong concerns that compliance with campaign finance regulations might lead “at least some groups [to] decide[] that contemplated *political activity* was simply not worth it”) (emphasis added).

205. The Court has granted political parties strong associational rights, but has done so without being attentive to the actual associational dynamics that drive voter participation. Even in a context where it explicitly understands itself to be protecting free association and not free speech, the doctrine has been driven by an emphasis on ideas and messages over people and relationships. Influenced by a strand in the political science literature that conceptualizes elections through a market metaphor, the Court has viewed voters as consumers in a political marketplace where parties produce messages and platforms in order to win elections. *Cf. Cal. Democratic Party*, 530 U.S. at 567, 574

Within the First Amendment's domain, freedom of association doctrine is especially well positioned to protect political participation. Association and associations play a critical role in generating civic and, in turn, political, engagement. This propensity is the distinctive contribution of association as compared to the other activities protected by the First Amendment (speech in particular).

A properly oriented freedom of association doctrine would protect and, where possible, promote, an active and engaged citizenry. Free speech doctrine could continue to protect speakers, including those associations that are consciously speakers, for a wide range of reasons. Devoting one line of First Amendment doctrine exclusively to protecting the associational life necessary for an active citizenry would have the added benefit of relieving pressure on free speech doctrine.<sup>206</sup>

### *B. Lessons from the Social Sciences*

The main lessons to be drawn from the social science literature in our quest for a free association jurisprudence attentive to protecting and generating political activity concern the dynamics by which the associational life of Americans promotes an active citizenry.<sup>207</sup> The empirical literature, as we have

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(striking down blanket primary, open to nonparty voters, as depriving party of control over its brand); see also Rosenblum, *supra* note 66, at 496 (explaining that mainstream political science views “electoral parties as cadres of candidates, professional organizers, and hired consultants, and citizens as consumers of their products”). The value of political parties is that they “supply[] voters with ‘brand names’ and low cost information about candidates” thereby “‘reducing the transaction costs’ of democracy.” Rosenblum, *supra* note 66, at 497; accord *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986) (“To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.”).

By focusing on the availability of choices in the political marketplace (a variant on the marketplace of ideas), the Court has fundamentally misunderstood the drivers of political participation. See, e.g., *Cal. Democratic Party*, 530 U.S. at 584–85 (implying that “increasing voter participation” is a matter of offering “more choices favored by the majority [that] will produce more voters”). Political parties are (potentially, at least) the most important vehicles for mobilizing political participation, but it is their associational lives that drive their capacities to generate political activity. They are the associations in our society whose entire mission it is to ensure democratic self-governance. Rosenblum, *supra* note 66, at 494 (noting that they remain “the voluntary association[s] principally committed to making democracy work”). A doctrine inattentive to the nature of the relationships within political parties and the nexus between them and party organization is likely to undermine engaged citizens, democratic accountability, and the representativeness of government that the First Amendment seeks to ensure.

206. Free speech doctrine operates in a wide range of contexts and has been tasked with a wide range of purposes, resulting in convoluted and frequently incoherent doctrine. Respite from serving another master would thus be welcome. For a summary of the range of masters served by the freedom of speech, see Blasi, *supra* note 78, at 527.

207. Reviewing the social science literature, Professor Mazzone was similarly led to the conclusion that associations contribute to democracy not so much as speakers but as

seen, reveals that both association and associations play a role in generating civic and political participation.

Association itself draws individuals into public life. Relationships drive the decision to act far more than ideas. Whether citizens called to engage civically and politically will respond depends far more on friendship than on ideological commitment. Even the spread of ideas and information depends on personal ties.<sup>208</sup>

It is the quality of social ties, in particular, that matters.<sup>209</sup> While closer ties tend to draw out more intense and higher risk activities, more distant relationships are needed to generate widespread political activity—electoral victories, social change, or political upheaval. Both types of ties, therefore, are valuable.

The political potential of personal relationships has been entirely obscured in legal discussion about the freedom of expressive association. The Court's only recognition of the importance of personal relationships has been in the context of intimate association. As such, it has acknowledged only an autonomy interest arising out of the "emotional enrichment [derived] from close ties with others."<sup>210</sup>

As for the associations we tend to think of in law when we speak of the freedom of association, they turn out to contribute to political participation in two distinct ways. First, they foster the relationships that are most likely to result in requests to participate in public life. Second, the fact that they are organized means that they contribute to the efficacy of political activity once generated.

The likelihood that a social or political movement will spread (as well as how far) depends not just on the nature of the personal ties within the movement, but also on the organization of the associations driving it. Channeling civic and political participation through groups makes it more effective.

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mechanisms for "enabling people to influence government." See Mazzone, *supra* note 5, at 743 (arguing that "rather than think of associations as speakers, we should see . . . their constitutional significance" as lying in "their political role"). The lessons Mazzone draws for law, however, are quite different. Starting from the theoretical work of Talcott Parsons and Mark Warren, he seeks to categorize associations along four axes—voluntariness; orientation toward state, society, or market; purpose; and social capital—to distinguish associations that deserve constitutional protection from those that do not. See *id.* at 743–48. Our differing perspectives manifest most clearly in our differing conclusions, as highlighted below. My own view is that the four typologies Mazzone offers do not map the dynamics by which associations promote political participation, because they were developed out of theoretical, rather than empirical, work.

208. See *supra* notes 126–29 and accompanying text.

209. Cf. VERBA ET AL., *supra* note 28, at 157 (explaining that association breeds political participation in part because "involvement at work, in organizations, or in church brings exposure—both formal and informal—to political conversations and messages").

210. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (noting that "individuals draw much of their emotional enrichment from close ties with others" and that "[p]rotecting these relationships . . . safeguards the ability independently to define one's identity").

### *C. Guiding Principles for Granting Associational Rights*

Once reoriented, free association doctrine would attend to the mechanisms by which associational life contributes to political participation: social ties and organization. It would, therefore, seek to protect social groups (formal and networked) and their capacity to act. This section offers a few examples to illustrate the ways that such a reorientation would significantly change the questions that drive doctrinal analysis.

Under current doctrine, the constitutional right of free association developed by the Supreme Court attaches to expressive associations.<sup>211</sup> It is, therefore, a stretch to extend constitutional protection to a purely social club, such as a gardening club, let alone to an informal group of birders. Similarly, trade and professional organizations generally do not meet the test for expressive association.<sup>212</sup>

By exclusively focusing on expressive associations as those worthy of constitutional protection, the Court has missed a fundamental point. The message of an organization may be much less critical for determining whether it should be entitled to constitutional protection, as an *association*, than the nature of the relationships within it and the ways in which they are organized.<sup>213</sup>

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211. This point has long been understood. See GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 236–37 (1961) (remarking that even the Court’s earliest pronouncement of a possible right of association attached to “association ‘for the advancement of beliefs and ideas’” while noting that such a limitation is not present for peaceful gatherings under the right of assembly).

212. See *supra* notes 49–51 and accompanying text.

213. While other legal academics have criticized the Court’s decision to limit First Amendment protection to expressive associations, their reasons have differed. Whereas I emphasize the importance of political participation and argue that the focus on expression misses the distinct contribution of associations to democracy, Professor Inazu’s primary worry is that the doctrine is underprotective of associations that dissent from mainstream, liberal values. See INAZU, *supra* note 5, at 4, 61 (arguing “for strong protections for the formation, composition, expression, and gatherings of groups, especially those groups that dissent from majoritarian standards”). Inazu further argues that social and nonpolitical groups should be constitutionally protected because *all association is expressive*. See, e.g., *id.* at 160 (criticizing the distinction between “expressive and nonexpressive associations” for, among other things, “fail[ing] to recognize that . . . all associations have expressive potential” because “every associational act . . . has expressive potential”). This point is further developed in his most recent work in which he argues that group boundary formation and maintenance is inherently expressive. See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1094–96 (2013) (arguing that associational boundaries are formed and maintained by excluding, embracing, expelling, and establishing—each of which are inherently expressive acts). A few academics have raised entirely different concerns about the doctrine. See, e.g., Epstein, *supra* note 50, at 119–20 (arguing that the decision to afford constitutional protection only to expressive associations incentivizes extremism and that all associations that do not wield monopoly power should be exempted from antidiscrimination laws on First Amendment grounds).

Friends, acquaintances and associates can often persuade those who do not share an ideological position to take action. In fact, most of us are able to think of instances where those whom we know have persuaded us to take action on issues, even on issues about which we have little or no interest. We attend an annual gala event at a local nonprofit organization simply because our colleagues are board members. We donate to a college friend's private animal shelter or place a sign on our lawn at the request of a neighbor during a local election.<sup>214</sup>

Joining a cycling club—like joining a sorority or a pickup basketball game—similarly has the potential to generate civic and political activity. Political conversation among cycling friends may lead to a commitment to canvas for an election.<sup>215</sup> Groups where personal ties are attenuated can also activate citizens. Alumni networks and professional organizations provide exactly the kinds of long bridges that spread civic and political participation.<sup>216</sup>

Nonexpressive groups have latent potential with respect to politics. Birding buddies, like gardening clubs and neighborhood swimming pools, generate civic and political action based on the strength of the personal ties within the group. Large, nonpolitical membership organizations comprised of weak ties, enhanced by centralized, hierarchical decision-making, can also be effective political agents—low social capital notwithstanding.<sup>217</sup>

Investment in the latent potential of such groups may yield vast returns in terms of civic and political engagement. The value of such association accrues like compounding interest. Initial forays into public life, as we have seen, tend to breed more frequent and more intensive participation, civic and political.

From a participatory perspective, therefore, constitutional protection should not turn on whether the association is expressive. The distinction between a

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214. These are all real examples. The point is not that preferences or ideology have no role. A strong supporter of civil rights is unlikely to be persuaded by a friend to donate to the Ku Klux Klan, though a strong supporter of the Democratic Party might be persuaded by a friend to attend a Republican rally to hear the other side.

215. This again is a real example. During the 2012 election season, a group of cyclists in South Carolina were persuaded to canvas for Obama in the nearby swing state of North Carolina by one of their members. Of course, much of the time cycling clubs generate no civic activity, and there are certainly many cycling clubs that will never generate either civic or political participation. The anecdote, however, is consistent with empirical studies. See, e.g., Stolle & Rochon, *supra* note 84, at 151 (reporting finding that membership in leisure groups resulted in political participation 60% of the time even though it did not appear to build other significant forms of social capital).

216. *But see* Mazzone, *supra* note 5, at 754 (arguing that “[a] university alumni association is a voluntary organization, but it has little relevance to popular sovereignty unless it is politically influential or it politicizes its members”).

217. See WARREN, *supra* note 65, at 40 (arguing that to fully comprehend how associations function to support democracy, we need to rid ourselves of the Tocquevillian emphasis on “face-to-face” associations because it “injects an unnecessary parochialism into the concept, while over-looking the democratic benefits of socially ‘thin’ associations”). The legal literature has largely neglected the contribution of weak-tie associations to political participation.



local birding club and the Sierra Club, for example, is a false one: Associations established for the purposes of pursuing personal interests with like-minded individuals, such as birding groups or gardening clubs, are of central importance because they are precisely where requests to protect the spotted owl or to “Eat Local” are most likely to be made and accepted.<sup>218</sup> Key pieces of momentous legislation from Aid to Families with Dependent Children to the Social Security Act to the GI Bill arose out of federated, nonpolitical membership organizations such as the National Congress of Mothers (now the PTA) and the American Legion.<sup>219</sup>

Whether an association deserves constitutional protection should instead turn on the nature of its social ties and on its organizing potential. Associational protections of the First Amendment, as others have argued before, should attach to those associations that further self-governance by ensuring that we have a politically engaged citizenry capable of influencing public policy and holding government institutions accountable.<sup>220</sup> The empirical research shows, however, that a much wider swath of associational life meets this criterion.<sup>221</sup> Any group with the latent potential to foster civic or political participation is worthy of constitutional protection.<sup>222</sup>

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218. *But see* Mazzone, *supra* note 5, at 750 (arguing that unless such groups equip their members with political skills (public speaking, letter writing, organizing), associations such as, “fraternal orders, cultural entities, churches, sports clubs, social clubs, and hobby groups” do not warrant constitutional protection because they “do not principally seek to alter the exercise of state power”).

219. *See* Skocpol, *Unravelling from Above*, *supra* note 81, at 298–99.

220. Others have argued for a similar focus on protecting groups oriented toward self-governance. *See, e.g.*, Bhagwat, *supra* note 5, at 1024 (arguing that “[o]nly associations whose primary goals are relevant to self-governance” deserve to be granted associational rights); Mazzone, *supra* note 5, at 758 (concluding constitutional protection is most important for associations that contribute to self-governance either because they are politically oriented or because they develop skills in their members that can translate into politics).

221. Mazzone, in particular, defends the protection of a much narrower group of associations. *See* Mazzone, *supra* note 5, at 751–52, 758 (arguing that among groups with civic or political ends, “[w]e should be inclined to grant constitutional protection . . . to associations that are high in social capital” because they equip their members with political skills); *id.* at 754 (“[i]n order to merit constitutional protection, a voluntary association should still be required to engage directly in political activity or entail sufficient levels of social capital to facilitate the political activities of its members”).

222. *See* Nancy L. Rosenblum, *Feminist Perspectives on Civil Society and Government*, in *CIVIL SOCIETY AND GOVERNMENT* 151, 169 (Nancy L. Rosenblum & Robert C. Post eds., 2002) (arguing that those who suppose “that voice precedes association,” i.e., “that independent individuals intend the same communication and that associations simply aggregate and amplifies their voices,” are incorrect; instead, “[m]ost often, members of groups formed for nonpolitical purposes engage in political expression as a result of the unanticipated internal dynamics of group life”).

In fact, the open question is whether a national advocacy group, like the Sierra Club, deserves protection as an association.<sup>223</sup> It is not entirely clear, from a participatory perspective, whether these interest groups have sufficient social ties to warrant granting them *associational* rights to participate in elections.<sup>224</sup> Insofar as a central mission of such groups is to contribute to the marketplace of ideas, they would, however, be protected by the freedom of speech when they undertake that mission, including during election campaigns.<sup>225</sup> Existing free speech doctrine, in other words, could be left to address those situations where organizations are burdened when they seek to speak.

Finally, the empirical research suggests it is a mistake to require that an association have an established set of procedures and defined mission as a prerequisite for associational rights.<sup>226</sup> While formal organizations have certain advantages when it comes to political organizing, less structured networks, especially on the Internet, tend to be more open and participatory and to encourage

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223. Such associations are known in the literature as tertiary associations. *See* WARREN, *supra* note 65, 39 (explaining that the “most common theoretical take on associations relies on a distinction between the thickness and thinness of associative relations” and defining “*tertiary* associations—the membership-based interest groups and professional organizations that populate Washington D.C. . . . [as ones in which] members are relatively anonymous to one another and have little in common beyond the specific purpose they are pursuing”). They are distinctive for relying on professional staff, frequently based in Washington, and for being funded by foundations or other donors rather than by membership dues. *See* Skocpol, *Unravelling from Above*, *supra* note 81, at 300 (noting these characteristics and giving example of AARP, in which less than 10% of its 35 million members are active in local clubs).

224. *See* Mazzone, *supra* note 5, at 751 (explaining why, unlike “[a]ssociations with high levels of social capital [which] are more closely related to popular sovereignty . . . . mass-membership organizations, where citizen activity is limited, often not extending beyond making a financial contribution” do not significantly contribute to popular sovereignty).

225. *Cf.* Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE, *supra* note 9, at 183, 186, 191 (arguing, among other things, that national interest groups are important because of their role in promoting public debate on social issues while acknowledging that “members are linked to the organization and to each other through financial contributions”).

226. The fact that association itself is critical to generating political participation raises, of course, the question whether the doctrine should protect association outside of groups. It might be that the answer should be yes, provided that there was reason to believe the civic and political potential of such association was likely to be capable of being harnessed. On the other hand, it might be that such a doctrine would be too difficult to administer, and for that reason only organized association should be afforded constitutional protection. If at least some association itself is given constitutional protection, it is likely that courts would need to recognize a wider range of compelling interests because a virtually absolute right of association would be untenable. *Cf.* Cole, *supra* note 90, at 204–05 (noting particular challenges of drawing lines around association). For now, I focus on the more limited question of the implications for the freedom of association of *associations*.

more spontaneous and subversive political acts. As such, they too have a role to play in the project of self-governance.

The following sections use two controversial associational claims—that of corporations and that of illiberal groups—to illustrate the ways that this new focus would fundamentally alter the associational rights analysis. These sections do not purport to resolve these controversies. Indeed, they do not even claim that properly analyzing the associational interests dissolves the dilemmas. The central claim, for now, is that when we are faced with inevitably difficult line drawing and balancing tasks, we should focus on the most relevant reasons for protecting the association. This is all the more important because the participatory perspective exacerbates the need for both line drawing and balancing insofar as it points toward constitutionally protecting more nonpolitical, nonexpressive association as compared to current doctrine.

### *1. The Associational Life of Corporations*

Let us consider the question of whether corporations are associations worthy of constitutional protection as *associations* in the context of elections. Doing so will reveal the kinds of considerations that would inform an analysis of the associational rights of corporations if freedom of association doctrine were oriented toward the value of political participation. To reiterate, the discussion that follows does not purport to resolve this question or the related question of whether corporations should be understood as persons with free speech rights in the context of political campaigns. It does, however, seek to explain why these are distinct inquiries that may lead in different directions.

In *Citizens United v. FEC*, the Supreme Court held that a corporation can use its general treasury funds to independently express its views on elections and candidates.<sup>227</sup> The case was the first to hold that corporations had distinct First Amendment rights in the political process: The closest the Court had previously come to this conclusion was to hold, in *First National Bank of Boston v. Bellotti*, that corporations were entitled to independently express their views on a ballot initiative because there is a First Amendment interest in voters having access to all pertinent information, including that provided by corporations.<sup>228</sup> For some Justices, it was relevant that *Bellotti* involved a ballot initiative rather than a

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227. 558 U.S. 310, 339 (2010) (striking down federal campaign finance statute's "prohibition on corporate independent expenditures [as] . . . a ban on speech").

228. Cf. 435 U.S. 765, 775–76 (1978) ("The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect . . ."); accord ISSACHAROFF ET AL., *supra* note 69, at 469–70 (noting that *Bellotti* "had emphasized the rights of voters to receive information as the basis for the Court's invalidation of bans on corporate spending, rather than any First Amendment right of the corporation itself") (emphasis added).

campaign to elect a representative.<sup>229</sup> In their view, this meant that there was no regulatory interest in preventing the corruption of officials or the erosion of public confidence in the political process through the appearance of corruption—the only compelling state interest that the Court has accepted in the campaign finance context.<sup>230</sup>

Although the *Citizens United* decision did not come out of the blue, the Court's analysis exacerbated the controversy over corporate spending in elections.<sup>231</sup> While the Court might have held more narrowly that the statute was unconstitutional as applied to *Citizens United*, a nonprofit corporation established for expressive purposes, it opted instead for a broad holding applicable to all business corporations, including large, publicly traded ones such as The Coca-Cola Company, General Motors, and Chevron.<sup>232</sup> The Court rejected the narrower ground as a matter of statutory interpretation, but the Majority's foundational premise—that the freedom of speech bars the government from distinguishing between speakers, even corporate speakers—would appear to have required the same result regardless of statutory text.<sup>233</sup>

For our purposes, what is most significant is that while *Citizens United* was decided as a freedom of speech case, it is clear that the Court assumes that corporations are entitled to constitutional protection as associations as well.<sup>234</sup> The

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229. *Bellotti*, 435 U.S. at 769, 789.

230. *Compare* *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 211 n.7 (1982) (distinguishing *Bellotti* on the grounds that “the Court specifically pointed out that in election of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption”), *with* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 702 (1990) (Kennedy, J., dissenting) (arguing that interest in preventing corruption or its appearance did not arise in *Bellotti* for the simple reason that “independent expenditures . . . [have] no tendency to corrupt,” that is, apparently, regardless of the type of election).

231. *See* *Austin*, 494 U.S. at 679–95 (Scalia, J., dissenting) (foreshadowing many of the arguments of the Court in *Citizens United*); *id.* at 695–713 (Kennedy, J., dissenting) (same).

232. Previously, the Court had held that corporations formed for the purpose of promoting their members' political and social views had a First Amendment right to make independent expenditures during election campaigns. *See* *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263–64 (1986) (holding that corporations “formed for the express purpose of promoting political ideas” are “more akin to voluntary political associations than business firms, and therefore, should not have to bear burdens on independent spending solely because of their incorporated status” provided that certain other criteria were also met).

233. *Compare* *Citizens United v. FEC*, 558 U.S. 310, 327–28 (2010) (rejecting argument to limit holding based on *Mass. Citizens for Life*), *with* *id.* at 340–43 (noting that “quite apart” from specific doctrines, “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers” and further that the “political speech of corporations or other associations should [not] be treated differently under the First Amendment simply because such associations are not ‘natural persons’”) (internal citations omitted).

234. One might ask why any of this matters given that the Court has already decided that corporations are speakers. One reason it might matter is that it would appear after *Dale* and *Citizens United* that it is not clear how long the *Roberts* compromise, which

Court, for instance, expressed concern that finding the campaign finance law under review constitutional would “permit the Government to ban the political speech of millions of associations of citizens”—the associations it referred to in so remarking were for-profit corporations.<sup>235</sup>

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ensures corporations must abide by antidiscrimination norms, will last. In order to be immunized from antidiscrimination laws, corporations would also have to have the protection of the freedom of association. The Court’s current rhetoric suggests that corporations obviously are associations, but the perspective offered here suggests it is not nearly that clear. A second reason that it might matter is that constitutional rights are hardly ever clear-cut, and the question whether The Coca-Cola Company should have free speech rights is a much closer call than whether the National Rifle Association should. The argument in favor of granting free speech protections to corporations runs roughly as follows: To the degree that money is speech, the corporation in its corporate form is an important speaker. It has both political interests and money with which to speak. The corporation’s speech rights are burdened by preventing it from using its corporate coffers to engage in political spending, for example by requiring it to form a Political Action Committee (PAC) in order to express its views during elections. There are, however, a number of potential fault lines in this argument for corporate speech rights as evident by the fact that only five Justices agree. *See Citizens United*, 558 U.S. at 393–479 (Stevens, J., dissenting) (cataloguing numerous objections to the majority’s reasoning). Perhaps money is not speech in the campaign finance context. *See, e.g.,* Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953, 955–56 (2011) (arguing that whether a constitutional right includes the right to spend money toward that end should depend on whether the constitutional right is allocated through the market). Perhaps it does not follow from the fact that corporations are speakers that they should have the same rights as speakers that are real persons. *See Citizens United*, 558 U.S. at 465 (Stevens, J., dissenting) (“The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it.”). Perhaps partiality and undue influence should count as corruption, and thus bans on independent electioneering expenditures would be justified by the government’s interest in preventing corruption or the appearance of corruption. *Contra id.*, 558 U.S. at 359 (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: ‘Favoritism and influence are not . . . avoidable in representative politics.’”). Perhaps the interest in preventing distortion of the political process should be a compelling interest. *Contra id.* at 349–56. It is pretty clear that public outrage at the decision is motivated by precisely this concern—that corporate money distorts the political process. Perhaps, as a practical matter, it is just too difficult to police whether independent expenditures are indeed undertaken without coordination with candidates, and this empirical reality constitutes a compelling government interest in regulating such expenditures. Although the matter appears to be resolved in favor of corporate speech rights for now, the tide may turn as it has before in constitutional doctrine.

235. *Citizens United*, 558 U.S. at 354 (citing evidence that “5.8 million for-profit corporations filed 2006 tax returns”); *see also id.* at 349 (“If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”) (emphasis added); *id.* at 359 (Scalia, J., concurring) (criticizing the dissent for “offer[ing] no evidence—none whatever—that the First Amendment’s unqualified text was originally understood to exclude [the] associational speech” of “[b]oth corporations and voluntary associations”).

A reoriented free association doctrine would likely agree that many, perhaps even most, corporations are the types of associations that the First Amendment ought to protect. But the decision to grant associational rights would be driven by questions pertaining to the capacity of corporations to generate political action and, thus, democratic accountability.

Whether association through the corporate form is the type of association the freedom of association should protect depends on whether it enables social connections with the latent potential to generate civic and political engagement. Insofar as corporations are *formal organizations*, the critical question for associational rights is the nature of the underlying social ties, because organizational capacity is clearly present. That corporations may be important political speakers and, as such, expressive associations, would be immaterial.<sup>236</sup>

This focus on the relationships and social networks of individuals within corporations requires us to acknowledge upfront that lawyers and laypersons understand the term *corporation* differently. When a lawyer thinks of a corporation, like The Coca-Cola Company, she thinks of it as a legal entity, The Coca-Cola Company, that more likely than not has a set of subsidiaries that produce the bottles, distribute the drinks, and so forth. She likely would also entertain the possibility that it might be a subsidiary itself. By contrast, when a layperson thinks of that same company, she is likely to think, first and foremost, of its products and thereafter of its CEO, its Atlanta headquarters, its factories, and its employees. She is unlikely to distinguish management from employees. From here on, I will use the term *firm* to capture the layperson's conception of a corporation.

Let us start, therefore, with the following questions: Does a *firm* have associational life? And, if so, is it the sort of associational life that the freedom of association should protect?

A firm is a composite of association and associations. It both forms social networks and depends on preexisting social ties, as in the context of hiring and contracting. Firms, moreover, frequently create separate, sometimes ancillary, associations. They create executive boards but also employee softball teams.

Reframed in this way, there is little question that firms foster the sort of association and associations that deserve constitutional protection. People within firms have exactly the types of relationships that encourage civic and political participation. An invitation to join the company's softball team or community service project, when made by one's colleague or supervisor, is likely to be accepted because employees tend toward congeniality.<sup>237</sup> Even where common

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236. Note that while the Court has not analyzed the question this way, it would seem that if corporations are important speakers, they must necessarily be expressive associations. See Epstein, *supra* note 50, at 139–40 (suggesting, as part of an argument that the line between expressive and nonexpressive associations is untenable, that many corporations are expressive as evidenced by the phrase “corporate culture[.]”).

237. Cf. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 147 (2009) (noting that “[m]any people today have such a sense of camaraderie with their work

interests are absent, employees are likely to have strategic reasons for cooperating with one another and with supervisors. Corporate boards, meanwhile, are notorious for being filled with the friends of corporate management. Even where strong ties are absent, board members are likely to have incentives to take on additional civic responsibilities at the request of fellow board members. It is easy to imagine how such association, at some point, could turn into political participation—into an agreement to donate to a political campaign, sign a petition, or vote on Election Day.<sup>238</sup>

The harder question is whether a corporation has a similar associational life. To be precise, the more controversial question is whether granting constitutional rights to the corporate legal entity protects its firm's associational life.

When the Justices have spoken of the associational rights of corporations, they have spoken as lawyers: When corporations are said to have rights as associations, it is the formal legal entity, with its ability to accumulate capital through, among other things, limited liability and perpetual life, that is the rights bearer.<sup>239</sup> Corporate rights do not attach to employees, board members, or even shareholders. In the campaign finance context, none of these constituents control corporate political spending or have any access to the general treasury funds.<sup>240</sup>

If one were to take only one lesson from the social sciences, it would have to be: Association needs to take place among people to further democratic participation. Capital is not capable of relationships, just as information is not. A reoriented freedom of association doctrine would, therefore, seek to distinguish corporations that are best understood as examples of citizens “in association with other individuals . . . in the corporate form” from those that are best understood as aggregations of capital or otherwise void of the relevant sort of social ties.<sup>241</sup>

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colleagues that they feel closer to their work groups than to their own immediate family members”).

238. See VERBA ET AL., *supra* note 28, at 157 (explaining that “non-political institutions of adult life—the workplace, voluntary association, and church—serve to enhance political participation”).

239. *Cf.* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990) (noting that under state law corporations are granted special advantages including “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets,” which “enhance[s] their ability to attract capital and to deploy [those] resources in ways that maximize the return on their shareholders’ investments”).

240. Political spending is typically considered an ordinary business expense. As such, corporate managers typically make political spending decisions in the course of their authority over ordinary business expenses. See Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 55–58 (2009) (explaining why shareholders lack meaningful control over political spending by corporate management).

241. *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring). The most obvious objection, which can quickly be put aside, is that this approach would involve distinguishing between persons, which *Citizens United* clearly stated the First Amendment prohibits. Doctrinal details matter here. *Citizens United* held that the First

Analyzing the facts of *Citizens United* itself from the participatory perspective might well lead to the conclusion that Citizens United was the type of corporate entity that fostered an associational life deserving of First Amendment protection. As a nonprofit, the question would be whether its board members had the sort of personal ties that are likely to generate additional civic and political activity. Citizens United would not, however, be understood to have associational rights because it was a political advocacy group (an expressive association) or because of some supposed inherent virtue associated with being a nonprofit. Rather, it would be an association worthy of constitutional protection because its corporate form fostered social ties with at least latent potential to generate further civic and political participation and, thereby, further our collective interest in democratic self-governance.

It would not necessarily follow, however, that the freedom of association should also protect, for example, The Coca-Cola Company. As a large, publicly traded corporation managed by a director, the company would have to show that its shareholders were not evanescent and anonymous and thereby lacking in even weak social ties. It would have to show that it did indeed network more than capital—that some significant portion of its shareholders feel connected to one another as shareholders, the way that alumni of a college feel connected to one another as alumni, and that these connections have the potential to foster civic and political engagement (or, even better, have in fact done so).

The most controversial question, in other words, is whether large, publicly traded corporations—the corporations that critics of *Citizens United* are most concerned about participating in elections—are in fact associations of people and not capital.<sup>242</sup> There are those who will argue that to describe large, publicly held corporations, today, as a set of individuals who have chosen to associate with

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Amendment prohibits the government from privileging some speakers over others, but existing free association doctrine, as we have seen, is predicated on distinguishing those associations that are constitutionally protected (expressive and intimate) from those that are not. Ronald J. Colombo has also suggested the need to distinguish between corporations in determining which deserve constitutional protection. See Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMPLE L. REV. 1 (2012). He argues that corporations can be genuine communities organized around a particular vision of the good as evident in their culture and practice and that when they are, they function as classic Tocquevillian intermediate associations (checking the state and mitigating against radical individualism). Such corporations, he contends, deserve protection under the freedom of speech. *Id.* at 4–5, 35–36 (defining question to be answered as whether “corporations are capable of ‘speaking’ as this term is understood within the context of the First Amendment” and thus should be welcomed as participants in the political process).

242. Cf. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1664 (noting that “it has become increasingly difficult to envision and identify real people behind large corporations”). For a concise summary of leading accounts of the development of the modern American corporation, see Burt Neuborne, *Of ‘Singles’ Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769, 776–81 (2003).



one another through the corporate form is frankly misleading.<sup>243</sup> In the contemporary world, shareholders of publicly traded corporations are rarely individual Americans. In fact, more often than not, shareholders of publicly traded corporations are other legal structures—mutual funds, hedge funds, and institutional investors—in which individuals have shares.<sup>244</sup> Even more critically, the fact that shareholders in publicly traded corporations change daily and are unlikely to know one another means that they lack any personal relationships capable of promoting civic or political engagement.

Others will respond, “a corporation is nothing more than the collection of individuals who choose to group together to conduct their business in corporate form.”<sup>245</sup> They will argue that shareholders of large, publicly traded corporations often have strong affection for the corporations in which they own stock.<sup>246</sup> They respond to e-mails and calls to action they receive as shareholders. They attend annual meetings of shareholders. The advocates of corporate associational rights will point to instances of shareholder activism—for example, the movement to divest from South Africa. All corporations, they will argue, are comprised of social ties that can and have generated important examples of civic and political activism.<sup>247</sup>

The point, for now, is not to adjudicate who is right. The point is rather that both the Court and its staunchest critics currently operate with a frankly thin account of association.

A relatively standard criticism of conceptualizing large, publicly traded corporations as expressive associations is that shareholders have a wide variety of views, so all of them should not be forced to be associated with a political message with which they might not agree.<sup>248</sup>

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243. See Colombo, *supra* note 241, at 44 (suggesting that “many corporations . . . are merely paper entities” lacking associational life and offering as examples certain types of holding companies and investment vehicles).

244. See Pollman, *supra* note 242, at 56 (pointing out that individuals today typically own stock indirectly through “mutual funds, 401(k) accounts, or other pension or retirement plans”).

245. Ripken, *supra* note 237, at 160.

246. Cf. Colombo, *supra* note 241, at 40 n.303 (noting that “scores of employees, investors, and customers . . . are drawn to a particular corporation because of its unique qualities” and values and that some scholars argue further that investment provides an opportunity for self-realization).

247. I wish to thank my colleague Karl Okamoto for drawing my attention to these types of arguments. *But see, e.g.*, Pollman, *supra* note 242, at 1630 (noting that in today’s world, “[s]hareholders in publicly traded corporations are not a static set of identifiable human actors”). For a critique of the inconsistent ways in which the Supreme Court has conceptualized corporate personhood since the nineteenth century, see *id.* at 1650 (identifying the three theories of corporate personhood as a concession from the state, as an aggregation of real persons, and as real entity).

248. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 806 (1978) (White, J., dissenting) (arguing that “there is no basis whatsoever for concluding that the[] views [expressed by corporate management through their political expenditures] are expressive of

Association with an idea is not the relevant form of association once one has processed an empirically grounded account of the real-world dynamics of democratic self-governance. Association needs to take place among people.

Similarly, while a majority of the Justices believe that corporations, including large, publicly traded ones, create association between real persons (shareholders in the context of the typical business corporation) and therefore should be granted associational rights, it is not at all clear that they see why the networking of real people matters.<sup>249</sup> The Court's confusion is evident if we consider the fact that the law prior to *Citizens United* not only protected, but arguably promoted, exactly the sort of associational life that the First Amendment should care about. *Ex ante* federal and state law prohibited corporations and unions from using their general treasury funds to engage in political speech. Instead, they were required to create separate Political Action Committees (PACs) with contributions from their stakeholders out of which political expenditures could be made, an arrangement upheld until recently by the Court.<sup>250</sup>

PACs are, from a participatory perspective, the institutionalization of shareholder activism. The fact that the Court did not consider the creation of a fund for political activity generated by contributions from corporate management and shareholders to be a manifestation of the latent political potential of the associational life of corporations shows just how problematic our current theoretical account of the freedom of association is.

A reoriented freedom of association doctrine will not magically resolve the difficult line-drawing tasks that plague this area of the law. This is, however, the nature of the beast. Without distinctions, the right would be untenably

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the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment"); *see also* Neuborne, *supra* note 242, at 791 (arguing that "the inevitable conflicts of interest within a large multi-shareholder corporate community about which candidate to support in a contested election" suggest that it is inappropriate to create corporate rights that allow management to spend shareholders' money in political campaigns); Pollman, *supra* note 242, at 53 (reviewing long-standing concerns that "when corporations are allowed to spend general funds on electoral advocacy, stockholders may have money they invested in a corporation used for political advocacy they oppose" and noting that today the problem is exacerbated by fact that stockholders are likely to be a very diverse group with disparate political views).

249. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring) (criticizing the dissent for failing to "show[] why 'the freedom of speech' that was the right of Englishmen did not include the *freedom to speak in association with other individuals*, including associations *in the corporate form*") (emphasis added).

250. *See id.* at 321 (describing the Bipartisan Campaign Reform Act of 2002 as allowing corporations to "establish . . . a 'separate segregated fund' (known as a political action committee, or PAC) for these purposes . . . [with] donations from stockholders and employees of the corporation or, in the case of unions, members of the union").

capacious, but the drawing of those distinctions is invariably difficult.<sup>251</sup> Current doctrine struggles to make distinctions that are no less difficult. The line-drawing task of deciding which corporations “have features more akin to voluntary political associations than business firms” has haunted the Court for years.<sup>252</sup> The alternative proposed here would at least relieve judges from the task of adjudicating the true essence of groups—of asking whether corporation X is best understood as an ideological interest group, a business corporation, or something else entirely.<sup>253</sup> More importantly, it will ensure that the lines being drawn are the right ones. The business of deciding whether corporation X is or is not a weak-tie, strong organization that contributes to civic and political engagement will be difficult, but at least we will know why it is the right question.

## 2. Analyzing the Burdens Liberalism Places on Illiberal Groups

The abundance of illiberal groups in our society has posed theoretical problems for political theorists and practical problems for American constitutional law.<sup>254</sup> Revisiting the challenges posed by illiberal groups who seek constitutional protection from antidiscrimination norms provides an opportunity to illustrate how the participatory perspective also changes the analysis when courts turn from the question of whether an association should be protected to assessing whether a constitutionally protected association is being burdened by state action.

Illiberal groups are ones that have rejected one or more core values of liberal democracy (e.g., individual freedom, equality, or tolerance).<sup>255</sup> Sometimes their illiberalism manifests as severe restrictions on the choices of their members as to marriage, sex, careers, and lifestyles; other times, it takes the form of barring persons of color, women, or homosexuals from joining the group or holding leadership positions within it.

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251. Cf. Cole, *supra* note 90, at 203, 233–46 (noting “serious challenges to crafting a coherent jurisprudence” with respect to the right of association given that “virtually all conduct is at least potentially associational”).

252. Cf. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263 (1986) (granting First Amendment rights to Massachusetts Citizens for Life because it “was formed to disseminate political ideas, not to amass capital”); see also Ortiz, *supra* note 9, at 281 (“[*Mass. Citizens for Life*]’s real distinction between ideological and ordinary business corporations rests instead on whether the Court believes each type of corporation is an expressive association. Ideological corporations are; business corporations are not.”).

253. Litigants who desire distinctions have tended to emphasize the for-profit/nonprofit distinction or the business/nonbusiness distinction. Cf. *Citizens United*, 558 U.S. at 485 n.4 (Scalia, J., concurring) (ridiculing notion of distinguishing “between the rights of business corporations and the rights of non-business corporations [as] even more imaginative than finding a distinction between the rights of all corporations and the rights of other associations”).

254. ROSENBLUM, *supra* note 72, at 32 (noting that many associations in the United States are “authoritarian, elitist, bureaucratic and hierarchic[al], ‘feudalistic,’ sexist, racist, [or] blindly traditionalist”).

255. CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 2–3 (2003) (defining illiberal groups as those that do not share classic liberal values).

Such groups have frequently come into conflict with state and local governments in the post-Civil Rights Era. When they do, they argue that being forced to comply with state and local antidiscrimination laws conflicts with their illiberal values and infringes on their freedom of association.<sup>256</sup> They contend that when liberty and equality come into conflict, the First Amendment protection of a group's liberty should trump the Fourteenth Amendment guarantee of equality.

Constrained by the First Amendment's prohibition against differentiating between the rights of individuals (and, by extension, groups) on the basis of their values, the Supreme Court has been forced to take seriously the claims of illiberal associations. When groups seek tolerance for their dissenting lifestyles, their plea poses a dilemma. On the one hand, it is hard to deny that antidiscrimination laws burden the associational rights of illiberal groups. Compelled inclusion appears to change their message, which under current law creates a burden on them as expressive associations. Perhaps more importantly, tolerance of dissenting views would appear to be a central tenet of both liberalism and the First Amendment. On the other hand, in the post-Civil Rights Era, there is virtual agreement that democracy requires equality and that the message of inequality sent by permitting widespread private discrimination is, therefore, problematic.<sup>257</sup> Given the merits on each side, Justices, like academics, have tended to divide as to whether liberty or equality should trump.<sup>258</sup>

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256. *Christian Legal Society v. Martinez* is a variation on this theme insofar as the case was primarily argued as a public forum question—i.e., whether the state university had created a limited public forum and was unconstitutionally engaging in viewpoint discrimination by requiring the student association to comply with its policy of required inclusion. There was further a factual dispute as to whether it was a permissible all-comers policy or a more problematic nondiscrimination policy. 130 S. Ct. 2971, 2984–86 (2010). Cases involving the associational rights of civic groups, of course, are not limited to disputes over whether they can be forced to comply with antidiscrimination norms. Early associational rights cases frequently involved disputes as to whether associations could be required to disclose their membership to government officials. *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101–02 (1982) (holding law requiring disclosure of membership lists unconstitutional).

257. One clear manifestation of the near-universal acceptance of this proposition is evident in the fact that even the staunchest advocates of the associational rights of groups that dissent from liberal values tend to steer clear of defending the proposition that private groups should be able to exclude racial groups or of arguing that race-based civil rights legislation is unconstitutional. *Cf.* INAZU, *supra* note 5, at 123 (noting that “*Runyon's* symbolic importance is beyond challenge” and “[f]ew people today believe that private schools ought to have a constitutional right to exclude African Americans”).

258. *See, e.g., id.* at 184 (arguing that too often, the tension between equality and autonomy is resolved in favor of equality (consensus and stability) over autonomy (dissent, difference, and pluralism) as evidenced by the Court's willingness to force antiliberal associations to adhere to antidiscrimination norms). *But see* Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423, 1432–34 (2012) (arguing that one must distinguish between discrimination in the form of exclusion and subordination in the form of inclusion as lesser members).

From a participatory perspective, the focus on whether forced inclusion burdens a group's message in important respects misses the mark.<sup>259</sup> For the reasons previously explained, the ability of an organization to control and disseminate its message is not the relevant axis for determining whether it has been burdened in a constitutionally significant way.

The relevant question is instead whether compliance with the antidiscrimination norm will burden the illiberal group's potential for fostering civic and political participation. The first, and most important, question to be asked, therefore, is whether the challenged law burdens the personal ties within the group. Would forced inclusion of unwanted members undermine the social relationships in the group either by creating a lack of trust or by causing members to exit?

The participatory perspective is likely to strengthen the claims of illiberal groups.<sup>260</sup> Many illiberal groups will certainly have strong arguments that internal social ties will be undermined by forced inclusion. The virtual relationships on Sonoma County Mom—an online group devoted to the joys and pitfalls of parenting from pregnancy, breastfeeding, and sex to cooking and playground etiquette—may indeed be burdened by having to include fathers.<sup>261</sup> Female participants may feel less connected to the group, less willing to participate, and may even exit. Similarly, single-sex schools and colleges may have stronger arguments if the focus turns to how forced inclusion may affect the relationships among the students within the school.

There are, however, at least two important contexts in which it is much less clear that an association will be able to show that compliance with antidiscrimination laws will burden the social relations within it. The first is in the context of commercial associations. It is not clear that The Coca-Cola Company or Apple, were they to be granted constitutional rights as associations, would be able to argue that compliance with antidiscrimination laws burdened their associational lives, i.e., their shop floors or sales floors. Those arguments might once have been more compelling but no longer are. As such, the participatory perspective may

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259. In this regard, I agree with Professor Shiffrin that “the risk that outsiders will misunderstand the association’s message or that the association’s message will somehow become garbled and less intelligible” is fundamentally the wrong concern. Shiffrin, *supra* note 85, at 840. Where I part company is with her focus on defining the value of association in terms of the values of freedom of speech and, more specifically, on the noninstrumental value of individual autonomy. *See id.* at 865–66.

260. This may not sit well with many political liberals and progressives like myself. It is, however, worth remembering that there is no guarantee that state power will not be abused and that persuasion is often preferable to coercion, among other things, because it is likely to be more effective. *See KUKATHAS, supra* note 255, at 136–37 (elaborating on these points in response to potential objections to the consequences of his account of the good society as one that involves near-absolute freedom of association in order to protect liberty of conscience).

261. Inazu, *supra* note 213, at 130–31 (describing a controversy that arose when a father joined the group).

render antidiscrimination laws constitutional as applied to corporations without having to discriminate against corporations as corporations.

Second, a reoriented free association doctrine would analyze the associational rights of federated associations in a way that would not require the views of a national organization to always trump the membership rules of its local chapters.<sup>262</sup> Many American civic associations are federated. Geographic diversity creates situations where the social ties within a local chapter of the group may not be adversely affected by local antidiscrimination laws. In *Roberts v. U.S. Jaycees*, for example, both the St. Paul and the Minneapolis local Jaycees had opted to include women: The case arose because the national organization objected to the local chapters' decision to comply with local antidiscrimination norms and, thereby, defy the national organization's membership rules.<sup>263</sup>

Putting aside the Court's actual holding to the contrary for the moment, a reoriented free association doctrine would be likely to find that the U.S. Jaycees' freedom of association would be burdened by antidiscrimination laws. Insofar as the national group firmly believed in their male-only membership rules, forcing its members to accept women may well have adversely affected social relations within the group. Those men may not have felt comfortable chatting about business with women, for example. But it would not necessarily follow that the men in the two Minnesota chapters that had already accepted women would be able to show the same.<sup>264</sup> For those who like the holding of *Roberts v. U.S. Jaycees*, this is no small thing, as the tide appears to be turning.

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262. An additional payoff of such an approach is that it allows the doctrine to create space for rather than shut down internal divisions within illiberal groups and thus keeps open the possibility of internally driven change. Cf. Shiffrin, *supra* note 85, at 880 (arguing that "associations provide welcome sites for the development of ideas, discussions" but also for "disputes . . . in an environment [individuals] find sufficiently comfortable" and thus that associations should be "susceptible to dynamic change"). But see Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1648 (2001) (arguing against "permit[ting] dissenting factions to circumvent an organization's established means of effective internal change").

263. 468 U.S. 609, 612 (1984); see also *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 541 (1987) ("In 1977, the Rotary Club of Duarte, California, admitted Donna Bogart, Mary Lou Elliott, and Rosemary Freitag to active membership. International notified the Duarte Club that admitting women members is contrary to the Rotary constitution. After an internal hearing, International's board of directors revoked the charter of the Duarte Club and terminated its membership in Rotary International. The Duarte Club's appeal to the International Convention was unsuccessful."); Johnson, *supra* note 262, 1648 (acknowledging that *Dale* litigation documents reveal internal disagreements within the Boy Scouts as to the appropriateness of allowing gays to hold leadership positions within the group).

264. The focus on strains on social ties may also provide a way to distinguish between discrimination and subordination. To what degree can a group that allows women or gays to participate but limits their membership status (e.g., by precluding full membership or leadership roles) say that its members' social ties are burdened by forced inclusion? Although this would require additional analysis, the group has, in an important sense, already taken a step toward inclusion.

Potential burdens on the personal ties within the association, however, would not exhaust the analysis. Insofar as organization matters, the doctrine would also need to consider whether compliance with the law undermined the organizational potential of the association. It might turn out that accepting a legal regime which allowed state law to essentially rewrite the internal governance rules of federated groups—by, for instance, allowing organizational choices of local groups to prevail against those of the national organization where concerns of equity are present—might create the kind of burden on associations that warrants constitutional intervention. On the other hand, to the degree that local organizations are more likely to foster the sort of strong personal ties that have the greatest potential for generating political participation, a strong case could be made for allowing the local chapter to comply with local law.<sup>265</sup> This might especially be the case when countervailing constitutional interests—such as equality—are added to the mix.

The important point here is that from a participatory perspective the relevant considerations would no longer be whether the association is or is not expressive and whether forced inclusion creates a sufficient burden on the expressive group's message.<sup>266</sup> Instead, the relevant question would become whether forced inclusion of unwanted members undermines the social relationships in the group—either by creating a lack of trust or by causing members to exit—or undermines the organizing potential of the association.

Once again, the participatory perspective does not wash away the challenges posed by illiberal groups or obviate the need to balance the interest in furthering civic and political engagement with other interests central to our Constitution, such as equality. What it does do is ensure that we are focusing on the constitutionally relevant burdens that laws might place on an association—burdens on its ability to generate civic and political participation and thereby contribute to the project of self-governance.

## CONCLUSION

This Article has argued that a politically active citizenry is a necessary, if not sufficient, condition for a functioning democracy. First Amendment theory must, therefore, broaden its conception of the requirements of self-governance, and free association doctrine must move away from its exclusive focus on speech and expression.

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265. Practically speaking, local chapters would use compliance with antidiscrimination laws as a means to circumvent corporate bylaws. *Cf.* Johnson, *supra* note 262, at 1642, 1651–52 (explaining that the Boy Scouts' corporate bylaws vest authority to resolve internal policy disagreements with the national leadership, an elected body).

266. *Cf. id.* at 1641, 1652–55 (arguing that nonreligious associations have an interest in managing their own internal affairs, including how much dissent to tolerate, and should not have to fear being sued by dissenting factions, on the grounds that “[t]he right of expressive association necessarily presupposes not only *the right to express views*, but the right to select the means of deciding *what views should be expressed*, how they should be ordered in relation to *the other values* of the organization, and who should *express them*”) (emphasis added).

The unique contribution of associations to the project of self-governance is that they grease the wheels of political participation. Ideas and preferences turn out to be only one half of the equation. Social ties and organization play a pivotal role. Friendships are key to explaining which ideas will gain traction politically as well as who will take political action. Strong-tie association warrants protection if we want to incentivize individuals to engage in more costly forms of political participation; weak-tie association warrants protection because it facilitates both modest everyday politics and radical scale shifts. Finally, both organized associations and associations that function through loose networks warrant constitutional protection insofar as each enhances the effectiveness of political action, albeit in different ways.

Free association doctrine must, therefore, move away from its singular interest in expressive associations. Similarly, while dissent is certainly important, and nothing offered here is meant to suggest that we need to “reject[] dissenting and destabilizing groups in the interest of consensus norms,” dissent (which is largely expressive) is only part of the democratic picture.<sup>267</sup> We need an engaged majority to make democracy work. Most political moments are not transformative, let alone revolutionary. It is thus essential that First Amendment law be structured to foster association that encourages ordinary as well as transformative moments of self-governance.

A freedom of association doctrine cognizant of the effects its choices have on civic and political engagement would be a nonredundant right that furthers the self-governance interest of the First Amendment in important ways. It would be attentive to the distinctive features of associational life that make it worthy of First Amendment protection. Constitutional analysis would focus on the degree to which particular associations foster, and particular regulations burden, civic and political participation.

A reoriented freedom of association doctrine will not magically resolve the difficult questions that plague this area of the law. It will not obviate the need to balance the interest in furthering civic and political engagement with other interests central to democracy, such as equality. It will, however, ensure that we are focused on the unique contribution of associational life to our democracy and on important First Amendment interests.

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267. INAZU, *supra* note 5, at 119.