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Mapping the Forms of Expressive Association

Randall P. Bezanson,^{*} Sheila A. Bentzen,^{**} and C. Michael Judd^{***}

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I. INTRODUCTION

Freedom of expressive association under the First Amendment is relatively new, with roots in Supreme Court doctrine tracing back only about a half century.¹ Further, First Amendment expressive association principles are swiftly developing and expanding in a pattern begun only over the last decade or so.² Today, the very concept of expressive association is undergoing rapid evolution, and the nature of constitutional protection is in a state of considerable flux.³

While not formally recognized under the First Amendment, expressive associations have existed for centuries in America in the form of religious, political, and interest groups of virtually all stripes.⁴ This history is so deep-seated that one scholar recently suggested that expressive activity by groups is more basic and more important to the role of freedom of speech in our democracy than speech by individuals.⁵

Simply stated, expressive association is “a right to associate for the purpose of engaging in those activities protected by the First Amendment—

1. The case generally considered foundational is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

2. Among the recent cases are *Christian Legal Society Chapter of the University of California Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *John Doe #1 v. Reed*, 130 S. Ct. 2811 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

3. Compare *Boy Scouts*, 530 U.S. 640, with *Citizens United*, 130 S. Ct. 876.

4. See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 982–1001 (2011).

5. *Id.* at 1024 (“[T]he associational speech perspective suggests that . . . sometimes such speech is entitled to *more* protection than individual speech because such associational speech contributes more directly to the core self-governance goals of the First Amendment.”).

speech, assembly, petition . . . and the exercise of religion.”⁶ Under that definition, it requires both an organization (the association itself) and a purpose (a First Amendment activity).⁷ The right protects both individuals and groups by limiting state interference in group activities even when the group’s purposes may seem distasteful, and by limiting state action against individuals who are part of such groups.⁸

But a rapid evolution of this freedom of expressive association in the Supreme Court’s decisions has fostered considerable disorder in the settled free speech landscape, and its continued development is likely to introduce even further disarray.⁹ The uncertainty lies not only with the level of protection accorded associational expression, but more basically at the foundational, definitional level of what an expressive association is and what qualities it must possess to qualify for constitutional protection. This confusion goes to the First Amendment purposes served by such associations and the various ways in which those purposes become manifest in the form of an expressive association, as well as the distinct kinds of expressive associations that exist and the distinct constitutional roles each fulfills.¹⁰

Against this background of recent legal development and ongoing scholarly and judicial attention, we undertake our inquiry. Our purposes are limited, but important. Expressive associations, in our view, take many forms and serve many and diverse constitutional purposes. The limits on those forms and purposes are barely discernible from the Supreme Court’s decisions; indeed, they are highly elastic and intertwined.¹¹ Nonetheless, the law has developed and expanded sufficiently to make the setting of limits and the recognition of distinct typologies critical.¹²

Our goal is to begin organizing, defining, and classifying these different

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

7. *Id.*

8. See Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 811 (2001) (Expressive association “protects organizations like the NAACP from being banned or persecuted because state actors do not like their First Amendment activity It [also] protects an individual from being punished or harassed for being a member of an organization like the NAACP.”).

9. See Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Daniel A. Farber, Foreword, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000).

10. See *infra* Part IV.

11. See *Boy Scouts*, 530 U.S. at 647–59.

12. See *infra* Part IV.

typologies of expressive association by identifying their essential forms and the boundaries that should attach to the various and often overlapping forms of collective First Amendment activity. To do so, we must traverse the entire range of collective organization activity in fields as diverse as education, commerce, religion, philosophy, research, self-reflection, and political or economic action. Our goal is to cut across this wide array of collective or cooperative human activity by thinking about the essential forms that group expressive activity may take, and the justifications for extending special First Amendment protection to some of the forms but not others, and to some of the activities but not others. In short, we hope to make a preliminary map of the legal landscape of expressive associations. In so doing, we begin to flush out the values inherent in each form and make broad suggestions as to the type of protection each may warrant.

We do not purport to be exhaustive in our mapping, but we aim to identify the core elements of the key associational forms and the essential landscape of constitutional protection. Part II briefly traces the Supreme Court's path toward the right of expressive association. Part III provides a general discussion of the role, if any, of substantive distinctions among beliefs in defining whether a group qualifies for constitutional protection as an expressive association.

We then turn, in Part IV, to the core of our mapping exercise—identifying the functional typologies. We categorize these typologies by three key characteristics: inward-oriented expression versus outward-oriented expression;¹³ heterogeneous versus homogeneous associations;¹⁴ and finally, formed versus formless associations.¹⁵ In Part V, we conclude by reflecting on the First Amendment principles reflected through each typology.

These are all deeply interrelated inquiries, so our organization will reflect the constantly circling and shifting course required to unwind, organize, and reveal a map. Our conclusion will not be a test or a specific definition, but instead a better understanding of the new legal characters now populating the First Amendment landscape and a map of their domains.

II. THE PATH TO EXPRESSIVE ASSOCIATION

Before embarking on our mapping exercise, we first explore briefly and generally the formal law of expressive association. As this article will show, the Supreme Court's jurisprudence in this area of the law is far from

13. *See infra* Part IV.A.

14. *See infra* Part IV.B.

15. *See infra* Part IV.C.

concrete;¹⁶ however, some basic principles can be gleaned from the Court's decisions over the past decades. These opinions mark the path from a general freedom to associate to the more specific right to associate for expressive purposes.

Freedom of association is a free-standing right,¹⁷ and just as individuals have a right to associate with one another, they also have a right not to associate.¹⁸ Arguably, this freedom is driven, at least in part, by the idea of the "people" as sovereign.¹⁹ We could, thus, view the formation of an association through two lenses—both as a reflection of this individual sovereignty. In one view, an association is formed based on the autonomous choice of individuals to join or not join together.²⁰ On the other hand, the focus can be shifted to the association as a whole—what are the rights of the entity?²¹

The Supreme Court has divided freedom of association into two categories—intimate associations and expressive associations.²² Intimate associations, such as familial relationships, are those deriving from the term "liberty" found in the Fifth and Fourteenth Amendments.²³ In contrast, expressive associations form in order to engage, at least in part, in activities protected by the First Amendment.²⁴ However, these groups need not be engaged in advocacy²⁵ or formed for the specific purpose of disseminating information.²⁶ Instead, to trigger First Amendment protection, the

16. See, e.g., *Boy Scouts*, 530 U.S. at 647–59.

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

18. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

19. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 11 (2005) ("[A]ssorted speeches, essays, and ratification texts emphasizing the 'popular rights' that 'the people' 'retain' and 'reserve' and may 'resume' and 'reassume' exemplified what the First Congress had centrally in mind in 1789 when it proposed certain amendments as part of a general bill of rights.").

20. This area of the law is much more well-settled. See Farber, *supra* note 9, at 1486 ("[Early] cases provided some protection to the autonomy of the organizations as such, but more vigorously defended the rights of members to join associations.").

21. *Id.* at 1495 ("The focus in recent cases . . . is on the rights of the organization as an entity, not on the rights of its individual members.").

22. *Roberts*, 468 U.S. at 617–18.

23. *Id.* at 618.

24. *Id.* ("[Expressive association is a] right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.").

25. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The First Amendment's protection of expressive association is not reserved for advocacy groups.").

26. *Id.* at 655 ("[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association

association must center on a shared set of beliefs, ideas, or values.²⁷ It does not matter whether the beliefs held relate to “political, social, economic, educational, religious [or] cultural ends.”²⁸ The values or all of the specific beliefs held by the association, moreover, need not be held by every single member of the association; it is enough that the association’s leadership espouses a viewpoint.²⁹

Acknowledging the existence of an expressive association does not end the analysis. The Supreme Court has declared that expressive associations receive First Amendment protection,³⁰ so it follows that one must determine how much protection these associations should receive. And that question is dependent on why we want to protect these associations in the first place.

Much of the discussion about why associations qualify for protection returns to the idea of the “people” of the United States as sovereign.³¹ Just as the states have rights because they form the collective voice of the people, so an association has rights, reflecting that same collective voice.³² Moreover, associations are important because they are a body unique from the State. We protect expressive associations because we view as fundamental the right of the people to assemble free from government interference.³³ In one view, these collective associations protect against the power of the State. Freedom of expressive association “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”³⁴ This is particularly true for those associations that express themselves inwardly, sharing and exploring beliefs and ideas to and among members free from public scrutiny or expression.³⁵

must merely engage in expressive activity that could be impaired in order to be entitled to protection.”).

27. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“[F]reedom 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. . . .”); *see also Boy Scouts*, 530 U.S. at 650 (“It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”).

28. *Roberts*, 468 U.S. at 622 (“[Expressive association may be] in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”); *see also NAACP*, 357 U.S. at 460–61.

29. *See Boy Scouts*, 530 U.S. at 655 (“[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”).

30. *See NAACP*, 357 U.S. at 460.

31. *See AMAR*, *supra* note 19, at 11.

32. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

33. *See, e.g., Thomas I. Emerson, Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 4 (1964) (“In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interests and his rights are paramount. Association is an extension of individual freedom.”).

34. *Boy Scouts*, 530 U.S. at 647–48.

35. *See infra* Part IV.A.1.

In another view, freedom of expressive association strengthens the individual voice by placing it into a collective. The collective voice formed by an expressive association is often more powerful than an individual voice, warranting even greater protection.³⁶ An expressive association takes the rights proffered by the First Amendment and amplifies them.³⁷ A lone protester on the street might be heard by those passing by, but a hoard of protestors, each communicating a similar message, might be heard not only from a greater distance, but receive the attention of the various media outlets. Thus, an expressive association may involve combined or amplified expression of other protected First Amendment freedoms.³⁸

Though expressive associations receive the full protection of the First Amendment, there is no absolute right to associate.³⁹ Consequently, the Supreme Court has developed various tests to determine whether government interference in a group's expressive association is permissible, and has drawn distinctions before selecting a test to apply. Is the association utilizing a public forum or limited public forum?⁴⁰ Is the government withholding a benefit or requiring action?⁴¹ Does the state regulation target the expressive activities of the association or is the regulation neutrally aimed?⁴² The interplay between these distinctions is murky and the doctrine remains nascent.⁴³ But as we explore the murky domain, important points will be drawn from the cases in which the Court has applied them.

36. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."); *see also Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

37. *See NAACP*, 357 U.S. at 460.

38. *Id.*

39. *Roberts*, 468 U.S. at 623 ("The right to associate for expressive purposes is not . . . absolute.").

40. *See Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2985–86 (2010).

41. *See id.* at 2986.

42. *See id.* at 2991–92.

43. *See generally Roberts*, 468 U.S. at 630–31 (holding that the state demonstrated a compelling interest in ending gender discrimination, and that the anti-discrimination law was narrowly tailored to serve that purpose); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000) (holding that the state did not demonstrate a compelling interest in requiring inclusion of homosexual members into the local Boy Scout chapter).

III. DISTINGUISHING BELIEFS

With a broad background in place, we next address the types and substance of shared beliefs, and the role of these belief types in assessing the merit of any expressive association. How much, if at all, should the substance of a group's shared beliefs matter? Should certain categories or types of beliefs disqualify a group from First Amendment status as an expressive association? Should certain ways in which common beliefs or goals are manifested limit a group's ability to claim protection? The answers to these two distinct but often related questions are uncertain in the decided cases.⁴⁴

A. Membership and Inclusion

First, should all members of an expressive association be required to share in a group's beliefs?⁴⁵ And should the group's beliefs be the sole and determinative criteria for membership, thus foreclosing additional membership restrictions like gender, race, profession, and the like?⁴⁶

In the *Roberts* case, the Court rejected a group's expressive association claim, holding that the Jaycees's qualifying belief—fostering success by young men in the free market system—was not logically related to the exclusion of women from the group.⁴⁷ As Justice Brennan wrote for the Court, “[A] ‘not insubstantial part’ of the Jaycees activities constitutes protected expression on political, economic, cultural, and social affairs.”⁴⁸ But the Court found “no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in these protected activities or to disseminate its preferred views.”⁴⁹ A group's beliefs and aims, in short, must somehow be related to its membership criteria.

But why should this be so, especially when the membership standard is underinclusive, not overinclusive? As long as the members share the relevant belief, the group would seem to qualify as an “expressive

44. See, e.g., *Roberts*, 468 U.S. at 627.

45. See *Boy Scouts*, 630 U.S. at 655–56 (stating that “the First Amendment . . . does not require that every member of a group agree on every issue,” and noting that it is sufficient if the group espouses an official position).

46. See *Roberts*, 468 U.S. at 627 (rejecting organization's claim that “admission of women as full voting members [would] impede” the organization's right to full expressive association by noting that such admission would “[impose] no restrictions on the organization's ability to exclude individuals with *ideologies or philosophies* different from those of its existing members” (emphasis added)).

47. *Id.*

48. *Id.* at 626 (quoting *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983)).

49. *Id.* at 627.

association” even if certain types of people—racial groups, women, academics, people from out of town—are excluded; for the constitutional value is based on a group’s function, not the particulars of its membership.⁵⁰

If the point of expressive association is to explore or pursue shared beliefs, an underinclusive group—in which all members share a belief but others, who also believe, are not admitted, such as Doctors Against Health Care Reform—should qualify as an expressive association, notwithstanding the extra-belief-based membership limit.⁵¹ At least, this is so, as long as the more narrowly defined group is lawful and its narrow definition does not undermine the group’s aims. By similar logic, we suggest that all those admitted to membership must in fact share the group’s beliefs and aims, and do so at a level of generality commensurate with the form and function of the group and its governance.

B. Judging Beliefs

A second way of looking at the qualifying belief question is to judge the beliefs themselves and permit only certain beliefs or types of belief to qualify a group as an expressive association. This approach goes to the substance of beliefs, not simply their function in group formation and operation.

One might, for example, see groups like the Jaycees or the Rotary Club⁵² as resting on beliefs or forms of belief that do not fully qualify for First Amendment protection. There are two possible hurdles for groups pursuing belief-based qualification. The first is that a group’s beliefs themselves are disqualifying. The second is that the pursuit of the beliefs, which themselves qualify, is not collective, but individual, and therefore the “group,” nominally speaking, is not definitionally an expressive association because it *does not employ the group* in the pursuit of beliefs or action held in common.

1. Disqualifying Beliefs as Substantive Limits

In her concurrence to the Court’s *Roberts* decision, Justice O’Connor suggested there may be substantive limits on the beliefs of an expressive

50. See *id.* at 618 (defining expressive association).

51. See *id.*

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

association in order for it to qualify for First Amendment protection.⁵³ Specifically, she suggested that “there is only minimal constitutional protection of the freedom of *commercial* association,” a statement that implies substantive distinctions based on the ideas and actions of certain kinds of associations.⁵⁴ As discussed more fully below, we believe that the import of her statements can best be understood to suggest something about the nature of the association and its activities, not the type of beliefs that underlie the association’s activities.⁵⁵ Our view, in short, focuses more on the nature of the association’s function than on its substantive beliefs or goals.⁵⁶

But the question remains an important one: What would be the basis for a substantive belief criterion for expressive associations? What about beliefs and actions in pursuit of free markets, or free competition in certain commercial markets or industries? Or what about beliefs tied to a specific product, a particular company, or a particular sales or marketing technique? One might say, as Justice O’Connor implied by her specific reference to lower protections for commercial speech, that at some point along this spectrum of commercial beliefs a line should be drawn.⁵⁷

But drawing that line, and then justifying its constitutional disqualification for an association of beliefs and expression, is a daunting task fraught with free speech problems. Individuals hold an almost limitless variety of beliefs, and their speech stemming from or expressing those beliefs is, with the narrowest of exceptions, protected by the First Amendment.⁵⁸ Expressive association is simply an instrument of the First Amendment by which those beliefs can be expressed or explored in common by a group of like-minded believers.⁵⁹ To infuse it with more protection than the free speech principle otherwise requires would be to separate it from its very roots in free speech.

Yet it is hard to imagine the expressive association First Amendment label being attached, for example, to Amway,⁶⁰ or to an investor or shareholder in a company, or to the employees of a private company or a public agency.⁶¹ Doubtless, many Amway members believe in the

53. *Roberts*, 468 U.S. at 633 (O’Connor, J., concurring).

54. *Id.*

55. *See infra* notes 67–70 and accompanying text.

56. *See infra* Part IV.

57. *Roberts*, 468 U.S. at 634 (O’Connor, J., concurring).

58. *See* U.S. CONST. amend. I.

59. *Roberts*, 468 U.S. at 622.

60. Amway is a multinational direct selling company that sells a variety of products, predominately in the health, beauty, and home care markets. *See Founders’ Fundamentals*, AMWAY, <http://www.amway.com/about-amway/our-company/heritage/founders-fundamentals> (last visited Sep. 24, 2012).

61. *See id.* (explaining that Amway “continue[s] to build on the original values and principles

company's mission and purpose, and many shareholders probably believe fervently in the company in which they invest. Are these beliefs to be discounted under the First Amendment when pursued by a group of people, though fully protected under the free speech guarantee? If nothing else, the *Citizens United*⁶² and *Sorrell*⁶³ decisions suggests that the answer is no, given that the corporations themselves—Amway among them—possess robust free speech protection. Thus, while the first aspect—disqualifying beliefs—is hinted at in some of the cases, and even made explicit in others,⁶⁴ this seems wrong in the First Amendment setting, where freedom of belief and expression of belief are at the heart of the guarantee.⁶⁵ Excluding an association built around belief in commerce or capitalism, for example, simply cannot be squared with free speech principles.⁶⁶

2. Association, Not Expression

But the relationship of beliefs to the association serves an alternative explanatory function. This inquiry concerns the function of the nominal group, and disqualifies groups whose activity consists only of individual pursuit of beliefs or goals *by way of* the group but not through it; groups in which, instead, realization of the beliefs and goals is solely the product of individual action.

There is clear evidence of this group-function view in several cases, especially in Justice O'Connor's concurring opinion in the *Roberts* case.⁶⁷ In her view, the common belief meriting protection was not a belief shared by the group as a whole, but a belief held by each individual alone, which the group facilitated by using the organization as a training or networking

established by [its] founders," including the values of Freedom, Family, Hope, and Reward).

62. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding "that the Government may not suppress political speech on the basis of the speaker's corporate identity [because no] sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations").

63. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2659 (2011) (finding that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment").

64. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Scales v. United States*, 367 U.S. 203, 220, 228–29 (1961).

65. The most famous and still dominant statement of this view was expressed by Justice Holmes in 1919. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

66. *See NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious[,] or cultural matters . . .").

67. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 639 (1984) (O'Connor, J., concurring).

facility for each individual member.⁶⁸ The Jaycees, she claimed,

is, first and foremost, an organization that . . . promotes and practices the art of solicitation and management. The organization claims that the training it offers its members gives them an advantage in business. . . . Jaycee members hone their solicitation and management skill, under the direction and supervision of the organization, primarily through their active recruitment of new members.”⁶⁹

Like a group that forms momentarily simply by speaking in unison and then quickly dispersing, there is no reason to see the atomized function of the Jaycees as serving the expression or achievement of common goals by the group acting as one.⁷⁰

The distinction lies in the definitional nature of an association under the First Amendment, not in the value of a group’s common beliefs.⁷¹ Amway representatives, like shareholders in a corporation, may believe in the company at many levels, and their investment may advance the company’s goals—but their association with the company is atomistic, not collective. Like the Jaycees, as Justice O’Connor described them, shareholders may be like-minded, but they act as individuals pursuing their own beliefs, not those of others.⁷² Their decisions to invest or sell are not instances of collective action by the group.

An expressive association under the First Amendment is a common enterprise consisting of expression *by and for* the group, not the individual members who can easily enough speak for themselves. The First Amendment protects their association 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.⁷³ Amway representatives, in contrast, seek to advance their own, often common, beliefs and interests through the group, but they are not interested in the group’s expressive action unless it serves their own financial interests. They are like football players on a ranked college team: dependent on each other and on the cohesiveness of the group in athletic competition, but ultimately concerned about their own success through the team. Shareholders, no matter how fervent, are similarly interested in their own economic return, at least within public companies. Nonprofit and

68. *Id.*

69. *Id.*

70. *See id.*

71. *See id.* at 622 (majority opinion).

72. *See id.* at 639 (O’Connor, J., concurring).

73. *Id.* at 618–19 (majority opinion).

charitable corporations or groups are typically different, as the opportunity for the pursuit of wholly individual and atomistic goals, at least in the sense of shareholder profit, is largely foreclosed.

The distinction, then, is not the beliefs unifying the individuals but the nature of the association. It rests upon the means by which belief is advanced and, most basically, upon the individual group members' relationship to the group. Protected associations speak as a group for the group. Whether the group is spiritual, ideological, or commercial makes no difference. It is the *group's* expressive activities that are protected, and the individual's part must be subordinated to the collective action and pursuit of beliefs by the group. This, we think, is the better and sounder way to understand the *Roberts* and *Rotary Club* cases.

Some have seen these cases as reflecting a distinction between philosophy, ideology, and social action, on the one hand, and commerce and business on the other.⁷⁴ Such a distinction would be very hard to manage in the expressive association setting, and, in any event, the underlying distinction between commercial speech and fully protected speech is quickly breaking down in the Supreme Court's free speech jurisprudence.⁷⁵ It is much easier, and much more consistent with the collective expressive action premise of the expressive association concept, to rest the distinction on a clear requirement that the association, to qualify, must engage in expression or action collectively and not simply through the individual action of its members.⁷⁶

IV. THE FUNCTIONAL TYPOLOGIES OF EXPRESSIVE ASSOCIATION

At the heart of the expressive association map are the various functional typologies. As we dissect both the types of associations and the types of expression, patterns begin to emerge. As a starting point, expression may be

74. See, e.g., Carpenter, *supra* note 9, at 1517 (2001) ("Justice O'Connor's analysis distinguishes predominantly commercial associations, which do not enjoy full associational protection, from expressive associations, which do.").

75. See Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 231 (2001) (noting that, in the United States free speech context, "the walls of previously defined categories are breaking down, or being stretched," and recognizing that "[p]reviously unprotected categories of speech [like commercial speech] are now given some degree of protection").

76. See David P. Gearey, *New Protections After Boy Scouts of America v. Dale: A Private University's First Amendment Right to Pursue Diversity*, 71 U. CHI. L. REV. 1583, 1600 (2004) (collective action is a requirement for expressive association).

directed inward and meant only to be shared by those within the group.⁷⁷ Expression may also be projected outward to the public.⁷⁸ Additionally, associations may be classified as either heterogeneous or homogeneous in composition—this heterogeneity may be reflected in both purpose and form.⁷⁹ Finally, groups may be classified according to their structure, or lack thereof.⁸⁰ Closely related to this question of form is the cohesiveness of the message that the group projects.⁸¹ The sections that follow deal with these questions of classification. The ideas and typologies suggested are by no means exhaustive, but provide an important starting point for truly tackling the questions of what is an expressive association and what are its constitutional boundaries.

A. *Inward and Outward Expression*

We turn now to our first functional typology—inward-oriented expressive activities and outward-oriented action in the form of speech or other expressive activities. Some associations may be defined solely by their inward-facing expression. For instance, associations may center themselves around prayer, group counseling, team-building exercises, or other self-supporting activities.⁸² In contrast, other groups engage almost exclusively in outward expression, invoking activism over silence—a protest on the capitol steps, a direct-mail campaign, or a series of television advertisements.⁸³ Yet other groups lie somewhere in between—neither wholly inward, nor wholly outward, but opting instead for some combination of the two.⁸⁴

Thus, this functional typology looks not to the *who* of the group, but to the *how*. In other words, the inward-outward distinction reflects how a group expresses itself as opposed to who makes up the association.⁸⁵ Foremost, the distinction analyzes how a group conveys its message—or messages—and to whom. How a group expresses itself may dictate the justification for and the level of First Amendment protection granted to the association.⁸⁶

77. See *infra* Part IV.A.1.

78. See *infra* Part IV.A.2.

79. See *infra* Part IV.B.

80. See *infra* Part IV.C.

81. See *infra* Part IV.C.2.

82. See *infra* Part IV.A.1.

83. See *infra* Part IV.A.2.

84. See *infra* Part IV.A.3.

85. Later typologies will explore the intricacies of group membership, but for now we focus on the types of expression an association centers itself around.

86. Identifying the specific level of protection that a court should apply to an inward versus outward group is beyond the scope of this article. Nonetheless, by flushing out the distinctions

For outward expressive groups and activities, First Amendment claims will primarily track conventional free speech interests, including access to fora for speech as well as freedom from impermissible discrimination based on content.⁸⁷ In contrast, the interests of inward expressive associations will reflect the greater importance for their activities of access to places and use of public property, confidentiality and privacy for individual members and the collective organization, and freedom in defining goals and the terms of membership or participation.⁸⁸

For each association, then, we can ask whether the expression turns inward or outward or both. Through a study of existing associations, we can also see the distinction in action, thus providing meaningful insight into the murky definition of expressive association.

1. Inward Expression

Inward expressive activity is characterized by its boundary within the group. Group members channel expression within the confines of the association and for the benefit of the group alone. In such instances, associations are not trying to enact political change, recruit new members, or disperse a message outside of the bounds of the group. Instead, where the expression is inward, the association exists for the benefit of the association itself.⁸⁹ Whether to support its members, spur intellectual curiosity, or continue long-lasting traditions, inward expression serves to strengthen associations, while espousing ambivalence towards those outside of the group. This type of expression can take many forms.

a. Counsel and Support

Some associations may exist for and express themselves through counseling and support services. Members, often sharing common struggles

between these types of groups, the First Amendment values worthy of protection become much clearer.

87. See, e.g., *Christian Legal Soc’y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2984–86 (2010) (applying public forum analysis to the Christian Legal Society’s expressive association claim).

88. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–63 (1958).

89. This is not to say that once a group exercises inward expression it ceases to exist for the benefit of outsiders. As discussed at the beginning of this section, many groups are neither wholly inward nor wholly outward. See *supra* note 84 and accompanying text; see also *infra* Part IV.A.3. Thus, where a group falls somewhere between the ends of the spectrum, only its inward expression is solely for the benefit of the group.

or pain, share those experiences with one another in a safe and comforting environment. For instance, Alcoholics Anonymous—an organization for recovering alcoholics—describes itself as a “fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from alcoholism.”⁹⁰ Further, Alcoholics Anonymous prides itself on its inner-organizational focus and disclaims outward allegiances.⁹¹ As its informational statement describes, “AA is not allied with any sect, denomination, politics, organization or institution; does not wish to engage in any controversy, neither endorses nor opposes any causes.”⁹² This policy statement makes clear that Alcoholics Anonymous exists solely for the benefit of its members, expressing itself inwardly through counseling and recovery services.⁹³

b. Ritual and Secrecy

For other groups, inward expression is defined not just by its boundary within the group, but also by its exclusivity. For these groups, certain information and knowledge is available only to those within the group and otherwise kept strictly confidential. One such group cloaked in secrecy is the Skull and Bones—a society for select undergraduate seniors at Yale University.⁹⁴ Little is known about this student organization, but much speculation surrounds its secret rituals and prominent list of members.⁹⁵ As another example, Scientologists require membership—and a series of donations—as a prerequisite to learning about and experiencing many of the group’s religious and philosophical beliefs.⁹⁶ These groups not only direct their expression inward, but they also seek to prevent outsiders from having access to this expression.

90. *Information on A.A.*, ALCOHOLICS ANONYMOUS, <http://www.aa.org/subpage.cfm?page=1> (last visited Sep. 25, 2012).

91. *Id.*

92. *Id.*

93. *Id.*

94. Judith Ann Schiff, *How the Secret Societies Got that Way*, YALE ALUMNI MAG., Sep.–Oct. 2004, http://www.yalealumnimagazine.com/issues/2004_09/old_yale.html.

95. *Id.*; see also Molly Ball & Emily Bell, *Behind the Walls of Yale’s Secret Societies*, YALE HERALD ONLINE, <http://www.yaleherald.com/archive/frosh/1998/blue/secret.html> (last visited Sep. 25, 2012).

96. See Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 6, 1991, at 50 (“Today the church invents costly new services with all the zeal of its founder. Scientology doctrine warns that even adherents who are ‘cleared’ of engrams face grave spiritual dangers unless they are pushed to higher and more expensive levels.”).

c. Study and Intellectual Growth

Yet other groups express themselves inwardly to foster intellectual discussion and advance their respective studies. For instance, Mensa prides itself on only admitting members whose “IQ is in the top 2% of the population.”⁹⁷ One of its primary goals is to “promote stimulating intellectual and social opportunities for its members.”⁹⁸ Like Alcoholics Anonymous, Mensa seeks to disassociate itself from beliefs outside of its primary aim, disclaiming any purpose beyond the fostering of intelligence by taking “no stand on politics, religion or social issues.”⁹⁹

d. Bonding and Training

Finally, many associations form so that members can bond together through a common mentoring, educational, or training goal. These groups include such organizations as the Girl Scouts,¹⁰⁰ 4-H clubs,¹⁰¹ and the National FFA Organization.¹⁰² The Boy Scouts of America also fit this form—bonding together and educating young men.¹⁰³ The Boy Scouts mission is to “provide[] a program for young people that builds character, trains them in the responsibilities of participating citizenship, and develops personal fitness.”¹⁰⁴ The Boy Scouts rally around certain values known as “Scout Law.”¹⁰⁵ Indeed, all scouts aspire to be trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and

97. *About Mensa International*, MENSA INT’L, <http://www.mensa.org/about-us> (last visited Sep. 25, 2012).

98. *Id.*

99. *Id.*

100. *See Who We Are: Facts*, GIRL SCOUTS, http://www.girlscouts.org/who_we_are/facts/ (last visited Sep. 25, 2012) (“Girl Scouting builds girls of courage, confidence, and character, who make the world a better place.”).

101. *See Who We Are, 4-H*, <http://www.4-h.org/about/youth-development-organization/> (last visited Sep. 25, 2012) (“[T]he 4-H movement supports young people from elementary school through high school with programs designed to shape future leaders and innovators.”).

102. *See Who We Are: Mission and Motto*, NAT’L FFA ORG., <https://www.ffa.org/about/whoweare/Pages/MissionandMotto.aspx> (last visited Sep. 25, 2012) (“The National FFA Organization is dedicated to making a positive difference in the lives of students by developing their potential for premier leadership, personal growth and career success through agricultural education.”).

103. *See About the BSA*, BOY SCOUTS OF AM., <http://www.scouting.org/About.aspx> (last visited Sep. 25, 2012).

104. *Id.*

105. *Visitor: What Are the Scout Oath and Scout Law?*, BOY SCOUTS OF AM., <http://www.scouting.org/FAQ/Visitor.aspx> (last visited Sep. 25, 2012).

reverent.¹⁰⁶

The Supreme Court addressed the nature of the Boy Scouts expression in *Boy Scouts of America v. Dale*.¹⁰⁷ In *Dale*, the Court considered whether the inclusion of an “unwanted member”—in this instance, a homosexual scoutmaster—impermissibly “infringe[d] the group’s freedom of expressive association . . . [by affecting] in a significant way the group’s ability to advocate public or private viewpoints.”¹⁰⁸ The Court found that the general mission of the Boy Scouts was to instill values in its young members, and accepted the Boy Scouts’s assertion that homosexuality was at odds with the Scout Oath and Law, which sets forth those general value principles.¹⁰⁹ Deferring to the association’s view of what would “impair its expression,” the Court held that the forced inclusion of a homosexual scoutmaster would impermissibly interfere with the Boy Scouts’s right to expressive association.¹¹⁰ The Court provided this protection to the Boy Scouts despite the fact that it did not “associate for the purpose of disseminating the belief that homosexuality is immoral.”¹¹¹ Indeed, the Court seemed to acknowledge and protect the inward-oriented nature of the Boy Scouts, holding that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”¹¹²

2. Outward Expression

At the other end of the expressive association spectrum are groups exhibiting outward expression. Quite the opposite of inward expression, outward expression goes well beyond the boundaries of the association itself. Groups wishing to express themselves outwardly must reach out to nonmembers in a notable way. This outreach can take many forms.

a. Charitable

Some groups—most obviously nonprofit organizations—organize themselves around charitable pursuits. These associations seek to help those

106. *Id.*

107. 530 U.S. 640 (2000).

108. *Id.* at 648 (citation omitted).

109. *Id.* at 650.

110. *Id.* at 653 (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”).

111. *Id.* at 654 (citation omitted) (internal quotation marks omitted).

112. *Id.* at 655.

outside of the group through philanthropic endeavors. Included in this form are the Knights of Columbus—a male-only Catholic organization dedicated to charity.¹¹³ The Knights of Columbus’s “charitable activities encompass an almost infinite variety of local, national and international projects.”¹¹⁴ Another example includes the United Way, which seeks to “advance the common good and mobilize the caring power of communities around the world” by “ignit[ing] a worldwide social movement, and thereby mobiliz[ing] millions to action—to give, advocate and volunteer to improve the conditions in which they live.”¹¹⁵ Charitable associations such as these express themselves outwardly through service to others.

b. Political

Political groups represent another outward-oriented paradigm. Obvious examples include political parties, but this classification also covers smaller, activist-based groups. For instance the Federalist Society, “a group of conservatives and libertarians interested in the current state of the legal order,” organizes around a shared belief that the judiciary should take a textually and historically limiting approach to interpreting laws and the Constitution, and “seeks both to promote an awareness of these principles and to further their application through its activities.”¹¹⁶ Another example includes Students for a Democratic Society, which describes itself as “a radical, multi-issue student and youth organization working to build power in our schools and communities.”¹¹⁷ Political groups exist to advocate beliefs to the public, and so could not exist without an outlet for outward expression.

c. Issue-Based

Sharing many similarities and often overlapping with political groups,

113. See *Activities*, KNIGHTS OF COLUMBUS, <http://www.kofc.org/un/en/about/activities/index.html> (last visited Sep. 25, 2012) (“From the moment of our founding in 1882, charity has been the first principle of the Knights of Columbus. We are men of faith and men of action.”).

114. *Id.*

115. *About United Way Worldwide*, UNITED WAY, <http://www.unitedway.org/pages/about-united-way-worldwide/> (last visited Sep. 25, 2012).

116. *About Us*, THE FEDERALIST SOC’Y FOR LAW AND PUB. POLICY STUDIES, <http://www.fed-soc.org/aboutus/> (last visited Sep. 25, 2012).

117. *About Us*, STUDENTS FOR A DEMOCRATIC SOC’Y, <http://www.newsds.org/about-us> (last visited Sep. 25, 2012). In *Healy v. James*, 408 U.S. 169, 171–80 (1972), the Supreme Court addressed Students for a Democratic Society and its role as an expressive association.

issue-based groups organize around a single issue and advocate on behalf of that issue. For instance, the National Rifle Association seeks to preserve the Second Amendment and individual gun ownership rights.¹¹⁸ It describes its four million members as “among history’s most committed, most active and most politically savvy defenders of the fundamental freedom.”¹¹⁹ Another issue-based group is the NAACP—a group dedicated to preserving and enhancing the civil rights of Americans.¹²⁰ These issue-based groups strive to raise awareness of their central issues and to convince outsiders to adhere to the group’s message.

3. Falling Along the Spectrum: A Case Study in Religious Organizations

As noted above, few groups can be classified as wholly outward or wholly inward.¹²¹ Even those groups nearing one end of the spectrum may, at times, engage in group activity outside of their norms. Thus, it is more important to classify the type of expression than the type of group. In other words, a group’s inward expression raises different constitutional questions than a group’s outward expression. An apt illustration of this arises when analyzing religious groups. For instance, a self-identified Baptist engages in different expression within the confines of a Bible study than if she hands out Bibles on the street corner.¹²²

Moreover, not only might the expression be different, but the constitutional provisions triggered will often be different—namely, freedom of speech or the Free Exercise Clause.¹²³ For instance, few would question

118. See Wayne LaPierre, *LaPierre: NRA Has Never Backed Down*, HUMAN EVENTS (Feb. 14, 2012, 7:45 AM) <http://www.humanevents.com/2012/02/14/lapierre-nra-has-never-backed-down/1345271130000/>.

119. *Id.*

120. See *Welcome to the NAACP*, NAACP, <http://www.naacp.org/> (last visited Sep. 25, 2012) (“[T]he NAACP is the nation’s oldest and largest civil rights organization. From the ballot box to the classroom, the thousands of dedicated workers, organizers, leaders and members who make up the NAACP continue to fight for social justice for all Americans.”).

The NAACP triggered the Court’s expressive association jurisprudence. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958), the Supreme Court upheld the right of the NAACP to not reveal the names and addresses of its members to the states, holding that such a revelation would violate the group’s expressive association rights, curtailing the group’s ability to advocate its beliefs.

121. See *supra* note 84 and accompanying text.

122. Though the case did not dive into the religion clauses, the Westboro Baptist Church described in *Snyder v. Phelps* provides an example of the types of outward expression associated with a religion-centered expressive association. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (“The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.”).

123. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of

that the Free Exercise Clause protects the right of evangelicals to join together in a morning church service, espousing whatever beliefs they choose and excluding whomever they choose. However, whether the Free Exercise Clause protects the right of evangelical students to exclude members from their public-funded student organization is a much murkier question and perhaps one better dealt with in the expressive association context.¹²⁴ This switch from an evangelical in a church to an evangelical in a student organization also reflects a shift in expression. The closely knit community of a church calls for much inward expression, while a student organization incorporates outward expression.

An example is provided by the Christian Legal Society (CLS), a religious-academic student organization.¹²⁵ The Supreme Court specifically dealt with the nature of its expression in *Christian Legal Society v. Martinez*.¹²⁶ CLS is a national religious organization centered around Christian beliefs which describes its mission as follows:

(1) to build communities of Christian law students who glorify God in their lives, their schools, and their profession, and (2) to nurture and encourage Christian law students by providing mentors and resources aimed at fostering spiritual growth, compassionate outreach, and the integration of faith and practice.¹²⁷

Additionally, CLS requires all members, as a condition of membership, to sign a “Statement of Faith.”¹²⁸ Most controversial for purposes of the case, CLS interpreted the Statement of Faith to mean that “unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS

religion, or prohibiting the free exercise thereof . . .”). See generally Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 75 (providing in depth discussion of merits of analyzing religion under the free exercise clause versus as an expressive association).

124. See generally *Christian Legal Soc’y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

125. See *About Us*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/page.aspx?pid=327> (last visited Sep. 25, 2012) [hereinafter *About CLS*].

126. 130 S. Ct. 2971.

127. *What is Christian Legal Society? Law Student Ministries*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/pages/law-students/chapter-manual-what-is-cls/> (last visited Sep. 25, 2012).

128. *Statement of Faith*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/page.aspx?pid=367> (last visited Sep. 25, 2012).

membership.”¹²⁹ Sexually immoral conduct was defined to “include[] engaging in ‘acts of sexual conduct outside of God’s design for marriage between one man and one woman[,]’” which acts include fornication, adultery, and homosexual conduct.¹³⁰ Thus, by choosing not to associate with those unwilling to sign the Statement of Faith, CLS ran afoul of the law school’s nondiscrimination policy.¹³¹

The case pitted a religious-student organization—claiming the right to associate only with members who ascribe to its principles of faith—against a law school, claiming the right to cut off funding to any student group whose membership excluded others based on “status or belief.”¹³² The case called upon the Court to weigh CLS’s right to associate with members of its own choosing, CLS’s evangelizing in the law school environment, and the law school’s interest in maintaining an academic environment that was inclusive of all students.¹³³

Unlike individuals attending a church service or Bible study, members of CLS consist of law students who affiliate with the group as an extension of their academic study.¹³⁴ The association’s expression is not wholly inward—as an intimate church service may be—but, instead, involves spreading a message and interacting with those outside of the group.¹³⁵ CLS, then, as a religious-academic organization, is clearly an expressive association, but less clearly a group demanding the protections of the Free Exercise Clause. Therefore, where religious groups, such as CLS or the Knights of Columbus, express themselves outwardly, protections may be better analyzed under the right to expressive association than the Free Exercise Clause.¹³⁶ If instead, CLS were a private religious organization communicating mostly within the confines of the group, the Free Exercise Clause provides a more exacting fit.¹³⁷ The Supreme Court seemed to agree, analyzing only CLS’s expressive association claims rather than free exercise

129. *Christian Legal Soc’y*, 130 S. Ct. at 3001.

130. *Id.* (quoting *Running a Student Chapter: CLS Community Life Statement*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/pages/law-students/chapter-manual-running-a-chapter?> (last visited Sep. 25, 2012)).

131. *Id.* at 2980.

132. *Id.* at 2979.

133. *Id.* at 2978.

134. *See, Running a Student Chapter*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/pages/law-students/chapter-manual-running-a-chapter?> (last visited Sep. 25, 2012).

135. For instance, CLS prides itself on its legal aid clinics. *Legal Aid Ministries*, CHRISTIAN LEGAL SOC’Y, <http://www.clsnet.org/page.aspx?pid=429> (last visited Feb. 22, 2012) (“Since 2000, thousands of CLS members have donated hundreds of thousands of legal service hours to helping the disadvantaged untangle debilitating legal issues, seek Christian guidance for personal problems, and understand their rights under the law so they can lead more productive lives.”).

136. *Christian Legal Soc’y*, 130 S. Ct. at 2975.

137. *See id.* at 2979.

claims.¹³⁸

Beyond the threshold question of which guarantee—freedom of religion or freedom of speech—dominates the analysis, expressive associational principles may also shape the constitutional protection to applicable First Amendment values. Inward expression serves different values and ends than outward expression, which is more dominantly mechanical and focused on amplification of individuals' speech.¹³⁹ Between these two types, the strength of scrutiny may appropriately be distinct. It is not our purpose to develop those differences, but the structure we provide here is a starting point.

B. Heterogeneous and Homogeneous Associations

Beyond classifying the nature of a group's expression, expressive associations may also be classified according to the conformity of the group's composition and purpose—whether it be homogeneous or heterogeneous. The classic form of expressive association recognized by the Supreme Court consists of a homogeneous and largely single purpose group like the NAACP or the Sons of Liberty.¹⁴⁰ But the composition of many expressive associations is more complex than these, and one of the axes of complexity concerns the heterogeneity that a qualifying group might contain. There are two types of heterogeneity that concern us in this Part: heterogeneity in composition and purpose and heterogeneity in the form of the group. Both attributes, as we will see, are best understood as intimately connected.¹⁴¹ We will later deal separately with heterogeneity in the organizational composition of membership, which we will call the conglomerate question.¹⁴²

1. Beliefs and Aims

In this part we focus on the glue—beliefs and common interests—that

138. CLS argued that the law school's nondiscrimination policy violated both their free exercise rights and their right to an expressive association. *Id.* at 2979. In the end, the Court upheld the law school's nondiscrimination policy through a novel application of forum analysis to its expressive association jurisprudence, holding that the law school's policy was viewpoint neutral and a reasonable regulation. *Id.* at 2993–94.

139. *See supra* Part IV.A.1–2.

140. An instructive history and discussion can be found in Justice Scalia's concurring opinion in *Citizens United v. FEC*, 130 S.Ct. 876, 925–26 (2010) (Scalia, J., concurring).

141. *See infra* Part IV.B.3.a–b.

142. *See infra* Part IV.C.2.c.

binds the group. As a general matter, we are not concerned with diversity of membership, as such, or even different views and attitudes on matters of politics, socioeconomic status, or the like. These are simply different backgrounds against which common affiliations typically exist. Instead we are concerned with the relationship between a group's common aims or beliefs and the affiliation of members, otherwise diverse or not, in the group. Without some common core of aims or beliefs, the very idea of expressive association would be meaningless.¹⁴³

Common aims or beliefs must therefore be ascertainable as a definitional prerequisite to protection under the First Amendment.¹⁴⁴ Those aims and beliefs must be ascertainable at some level of concreteness, and adherence to them by the group must be governable and governed within the group.¹⁴⁵ If there is no governing control of the common purposes to be pursued by the group, there is no reason to treat the collection of individuals or members as an expressive *association*.¹⁴⁶ For example, if a group focused on economic issues takes a position on a matter of religion unrelated to the group's economic aims, then the high degree of heterogeneity in the common aims and purposes of the group should disqualify its action as an instance of expressive association, and may even lead to the conclusion that the group's governance toward its aims has been fatally undermined by the unilateral action in the face of the group's expressive aims.

But group aims and purposes may be broad and quite diverse, within limits. The American Civil Liberties Union (ACLU), for example, has a stated commitment to expression and action in defense of civil rights.¹⁴⁷ Such a broad set of common aims and purposes can involve many specific actions and policy positions with which the members of the group disagree, perhaps strenuously.¹⁴⁸ Whether such disagreement is disqualifying is a function of the breadth and heterogeneity of the aims and purposes themselves. It is also a function of the range of actions the group has delegated to the governing authority in the group. The League of Women Voters has general aims as a national organization, but members of the group also subscribe to a governance structure under which many of its constituent chapters reach their own policy positions, and individual

143. See *supra* note 24–29 and accompanying text (defining the concept of expressive association).

144. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621–22 (1984).

145. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–56 (2000).

146. See *supra* note 24–29 and accompanying text.

147. See *About the ACLU*, ACLU, <http://www.aclu.org/about-aclu-0> (last visited Sept. 25, 2012) (stating the broad panoply of rights the ACLU seeks to protect, including First Amendment rights, equal protection rights, due process rights, and privacy rights).

148. E.g., John de J. Pemberton, Jr., Letter to the Editor, *Dissension in the ACLU*, N.Y. REV. BOOKS, Sep. 14, 1967, <http://www.nybooks.com/articles/archives/1967/sep/14/dissension-in-the-aclu/>.

members do not condition their affiliation on specific personal agreement with any particular decision made as long as it is pursuant to processes of judgment and decision to which a member must knowingly subscribe.¹⁴⁹ Thus, the First Amendment may protect these diverse groups' right of expressive association so long as a diverse array of purposes is made a hallmark of the organization and such purposes are defined. These heterogeneous groups touch on more traditional First Amendment interests of speech and the members use the group as a means to amplify their message.

2. Form and Structure of Groups

The heterogeneity inquiry thus inevitably must focus heavily on the *form* of the group, not just any single instance of collective action. Whether a band of people who casually congregate in common cause, only to disband after a brief moment in time, constitutes an expressive association for purposes of the First Amendment, as opposed to a set of individual speakers with a very specific and momentary agreement, is an open question. But it does seem clear that something more formal and lasting (even briefly) goes to the heart of the constitutional values that underlie the First Amendment expressive association label.¹⁵⁰ Momentary agreement, like singing in unison, should be seen as the speech of each individual singer, with respect to which the First Amendment provides full and ample protection. Something more lasting, however, may trigger other protections such as the right to association.

It is thus on questions not only of substance of belief but also of non-transitory form of a group or association that we will focus in our discussion of heterogeneity and expressive association. Form, as we will use the term, includes not just the composition of the membership of a group, but more importantly whether the group has a formal, recognized identity, a governance structure, and a set of aims and purposes to which the individual members subscribe—or, at least, consent—and a duration. Furthermore, we will ask whether the aims and purposes represent a common core of individual member belief or commitment, and whether and how the members themselves participate in a governance fashion with those who govern the group, at least to a sufficient degree such that the group's

149. See *About the League*, LEAGUE OF WOMEN VOTERS, <http://www.lwv.org/content/about-us> (last visited Sept. 25, 2012).

150. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621–22 (1984).

collective actions can be said to reflect the aims and purposes of the individual members, who are the First Amendment speakers in fact. As the question might be put in corporate terms: is there a clear separation between ownership and management, and what sorts of duties of allegiance to the common aims and purposes of the members or owners does the management have?

As an extension of the heterogeneity question we will look to the formal nature of the group. Is its expressive activity inward-directed only, or outward-oriented, as with public speech? It is likely, perhaps, that the heterogeneity of beliefs and aims regarding those beliefs will be greater with inward-directed groups, which might assemble, as did the famous Metaphysical Club,¹⁵¹ in order to discuss, study, or explore a broad or limitless set of beliefs or ideas. In contrast, an outward-oriented group engaged purposely in expressing views outside its membership would seem ill-suited under the Supreme Court's rationale for expressive association protection if its aims were intellectually global and its positions wholly undetermined.

3. Business Corporations as Expressive Associations

As an illustration of the heterogeneity question, we turn to the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, holding that, at least with respect to political speech, corporations qualify as fully protected speakers under the First Amendment.¹⁵² In the words of the Court:

[P]olitical speech does not lose First Amendment protection "simply because its source is a corporation. . . ." The Court has thus rejected the argument that political speech of a corporation or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."¹⁵³

And, the Court adds, a corporation's speech is protected by the First Amendment "even if it was enabled by economic transactions with persons or entities who disagree with the [corporation's] ideas."¹⁵⁴ That is, it does not matter for First Amendment purposes that the shareholders and investors, for example, disagree with the corporation's speech.¹⁵⁵ While

151. See generally Louis Menand, *THE METAPHYSICAL CLUB* (2002).

152. 130 S. Ct. 876, 913 (2010).

153. *Id.* at 900 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 784 (1978)).

154. *Id.* at 905.

155. See *id.*

Citizens United deals only, at least explicitly, with the speech questions, it may have far-reaching implications for the rights of expressive associations.

In light of *Citizens United*, how are corporations to be treated in the expressive association context? Corporations are now fully protected speakers equivalent in First Amendment rights to individuals, at least with respect to political speech.¹⁵⁶ But they are also organizations consisting of members. The NAACP, the Boy Scouts, and religious groups, to name but a few, have speech rights, but they are also protected expressive associations.¹⁵⁷ Many, like the ACLU, have corporate members and receive significant corporate support.¹⁵⁸ The protection such associations enjoy serves their members' expressive freedom and the organizations' capacity to act on it through speech by the organization. The fact that under *Citizens United* corporations are themselves, as organizations, speakers, even in the absence of agreement by shareholders or members, does not itself foreclose the corporation also being protected as an expressive association.

Nonetheless, the right to speak and the right to expressive association are two distinct issues.¹⁵⁹ Being an entity with freedom to speak does not in itself mean that the entity is an expressive association.¹⁶⁰ The Court has held that the Jaycees and Rotary Club do not enjoy the freedom granted qualifying expressive associations.¹⁶¹ Something else pertaining to beliefs, qualifications for membership, and the types of expressive commitments or activities, whether kept within the group or channeled outward, is needed to qualify an association as an expressive association speaking or existing on behalf of the members' own expressive interests.¹⁶²

Has *Citizens United* changed all of that? To explore this question we must first consider the various forms of corporation or group enterprise and the distinct purposes and functions they serve—in other words, the heterogeneity of corporations. *Citizens United* was an ideological corporate organization dedicated to speaking on behalf of known political interests and

156. *Citizens United*, 130 S. Ct. at 913.

157. *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2978 (2010); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–53 (2000); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–63 (1958).

158. *See, e.g., Boy Scouts*, 530 U.S. 640; *NAACP*, 357 U.S. 449; *see also* David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 90 (2001).

159. *Compare Citizens United*, 130 S. Ct. at 913, *with Boy Scouts*, 530 U.S. at 648–53.

160. *Cf. Citizens United*, 130 S. Ct. at 913.

161. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

162. *Roberts*, 468 U.S. at 622–23; *Rotary Int'l*, 481 U.S. at 545–48.

beliefs.¹⁶³ But this is far from true with most corporations and their organizational kin.

There are many forms of corporation: profit; nonprofit; charitable; Subchapter-S; joint ventures; as well as other non-corporate organizations that share the qualities of corporations: limited partnerships; partnerships; alliances of various kinds; etc.¹⁶⁴ Of equal importance, there are many types of corporations in terms of their objects, missions, and activities: charitable; religious; and social service.¹⁶⁵ And of course there are the dominant special purpose corporations that we call “business corporations.”¹⁶⁶

It is to the business corporations that *Citizens United* was addressed,¹⁶⁷ and we will principally focus on how these corporations act as expressive associations, specifically, their activities and policies, and their members’ rights of affiliation and association within the organization. Business corporations and organizations are entities whose primary activity is to conduct business—selling, serving, buying, transacting—for the overriding purpose of making profit and maximizing economic value and return to shareholders.¹⁶⁸ Of equal importance, they are also organizations marked by a formal legal separation between management and ownership, a feature that is most pronounced with publicly held corporations.¹⁶⁹

Most business corporations have protection under the First Amendment for the necessary business speech in which they engage—like advertising, defending their commercial interests in the marketplace, and the like.¹⁷⁰ Their protection under the First Amendment, according to the Supreme Court, is for “commercial speech.”¹⁷¹ Two things are important to note in relation to commercial speech. First, the protection is accorded to the speech—or commercial information communicated—not to the act of

163. *Citizens United*, 130 S. Ct. at 886–87.

164. See Romualdo P. Eclavea, *Joint Venture Distinguished From Other Relationships*, in 46 AM. JUR. 2d *Joint Ventures* § 5 (2012).

165. See WILLIAM MEADE FLETCHER, *Classifications and Kinds of Corporations: Charitable and Benevolent Corporations*, in 1A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS. § 79 (2012).

166. See Eclavea, *supra* note 164.

167. Ironically, however, *Citizens United* was clearly an ideological and belief-based corporation whose mission was to engage in public communication. *Citizens United*, 130 S. Ct. at 922–24. The Court, however, treated this fact as irrelevant—indeed essentially rejected its significance—by rejecting the government’s argument that was very much premised on this fact. *Id.*

168. See Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primary*, 31 DEL. J. CORP. L. 533 (2006).

169. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6 (Harcourt, Brace & World, Inc. 1968).

170. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759–61 (1976).

171. *Id.* at 758–61.

speaking as such, whether by an ad agency or the corporation itself.¹⁷² Second, the First Amendment primarily protects the public as consumers for whom the information is valuable in a market economy.¹⁷³ In these respects, the kind of First Amendment protection against government regulation of commercial speech is (1) weaker than that accorded speech by an individual, (2) qualified in part by the acknowledged ability of government to regulate such speech to assure that it is accurate and non-deceptive, and (3) leaves government more room for regulatory decisions than would be available for regulation of individual speech under the strict scrutiny test.¹⁷⁴ Reasonableness is instead the standard.¹⁷⁵

Outside of the commercial speech arena, business corporation speech receives much the same protection as individual speech, at least with respect to political speech.¹⁷⁶ The political speech boundary is very ambiguous. The Court in *Citizens United* addressed only business corporation support of and engagement in independent expenditures related to political campaigns, but it used the political speech descriptor in stating its broad holding.¹⁷⁷ As a result, and if prior experience with political or public issue boundaries in other First Amendment settings is any indication,¹⁷⁸ the political speech boundary of *Citizens United* will be greatly broadened in future cases, and the Court may well ultimately conclude that all non-commercial speech by corporations is fully protected.

This is the landscape against which the business-corporation-as-expressive-association issue exists. Our first question is what effect *Citizens United* will have on corporate shareholders' claims that they are an expressive association even though their speech is animated by commercial purposes. We can identify three principal effects of such a claim of expressive association status, *if successful*:

1. The *Jaycees*¹⁷⁹ and *Rotary*¹⁸⁰ cases, which rested on the less

172. *Id.*

173. *Id.* at 756–57.

174. Cecil C. Kuhne, *Testing the Outer Limits of Commercial Speech: Its First Amendment Implications*, 23 REV. LITIG. 607, 613–14 (2004).

175. Ann K. Wooster, *Protection of Commercial Speech Under the First Amendment—Supreme Court Cases*, in 164 A.L.R. Fed. 1 (2000).

176. *Citizens United v. FEC*, 130 S. Ct. 876, 951 (Stevens, J., concurring in part and dissenting in part).

177. *Id.* at 900 (majority opinion).

178. *E.g.*, *Gertz v. Welch*, 418 U.S. 323, 343–44 (1974) (abandoning as unworkable the earlier matter of public concern standard).

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

valuable nature of personal business interests to deny protection,¹⁸¹ will be undermined. Business entities should now be eligible for protection as First Amendment expressive associations whose speech is, at least on political matters related to business interests, fully protected, and whose membership and other practices, including nondisclosure, might be protected from state regulation under the First Amendment.

2. Government regulations of business membership practices should be subjected to strict scrutiny. These regulations might include anti-discrimination laws as well as expression-related restrictions by the SEC, or EPA, or product safety agencies, and so on.

3. Membership and other disclosure requirements (political contributions and expenditures) will be subject to strict scrutiny if the organization or its members assert that their membership (including stock purchase) would be inhibited by the prospect of lost privacy in political, social, and economic beliefs and affiliations.¹⁸²

Whether business corporations qualify as expressive associations after *Citizens United*, however, is a distinct question from whether such corporations themselves, independent of the members, have free speech rights.

Expressive association law under the First Amendment has been premised from the start on the protection of certain types of associations and on certain subjects, in order that disclosure not inhibit the members of associations from engaging in group formation in areas important to individual liberty—like religion, politics, and ideology, and social, economic, and cultural beliefs and interests—nor inhibit the associations’ expression on behalf of the members.¹⁸³ Such group formations foster individual belief within the group and strengthened expression in the public arena on behalf of the group and its beliefs.¹⁸⁴

Protection for such expressive associations has also afforded the members of such groups privacy from unwanted public disclosure, on the theory that the choice of group formation and association may be chilled by

180. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

181. *Roberts*, 468 U.S. at 639 (O’Connor, J., concurring).

182. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–60 (1958) (applying this principle to shield the NAACP from having to disclose its membership lists).

183. *See Farber, supra* note 9, at 1488 n.31.

184. *See id.* at 1484 nn.5–6.

public disclosure of the individual's membership.¹⁸⁵ Members may be inhibited by the loss of privacy in their thoughts and beliefs, the impact on friendships, jobs, and security that might result from shunning, or retaliation by other persons or groups, both private and governmental.¹⁸⁶

In light of *Citizens United*, are there any possible grounds upon which a business corporation can and should be excluded from the category of expressive associations? Arguably, shareholders of a business corporation are in a position to protect their own privacy by simply selling their shares on the market. The relationship with the corporation, in other words, is not permanent enough to warrant general First Amendment protection. This has never been a very persuasive rationale, in large part because selling shares is arguably harder and more costly than simply terminating membership in another form of organization. One can cancel membership in the ACLU or NRA more easily and cheaply than selling one's shares in IBM.

The distinction between the ACLU and IBM rests rather on a value judgment that beliefs about civil rights are more central under the First Amendment than beliefs about commerce.¹⁸⁷ But granting full free speech rights to business corporations and their expression places this distinction in considerable doubt.¹⁸⁸ If the corporation's speech is *fully* protected, then it must be as important as religious, ideological, and governance interests (such as civil rights).¹⁸⁹ The purely self-interested commercial element exists on the side in the commercial speech doctrine—in the field of advertising for the buying or selling of products alone—where, ironically, there likely is broad agreement with the messages on the part of the shareholders/members.

Should group affiliation and action in support of the profit aims of a business corporation in the commercial market be enough for expressive association qualification? As to such values and purposes as commercial success, deregulation, honesty in conduct, skill in pricing, originality, and business success in a capitalistic market, it is hard in light of *Citizens United* to deny the corporation and its shareholders/members protection under the expressive association umbrella.¹⁹⁰ As the Court said in *Citizens United*,

185. See *NAACP*, 357 U.S. at 462.

186. *Id.*

187. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 639 (1984) (O'Connor, J., concurring).

188. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").

189. See *id.*

190. See *id.* at 913.

these and related business matters and interests are critically important to the public in the marketplace of ideas.¹⁹¹

Do sufficiently coherent common values exist among shareholders of business corporations to justify expressive association status? Or, put differently, outside of the commercial speech context, are there sufficient shared beliefs and convictions on matters of public policy among the corporate membership to support a constitutional right of the corporation to speak on behalf of the members, and thus for the members to claim constitutional protection for their affiliation with the corporation? Where do business corporations fall on the heterogeneous to homogeneous spectrum? This was an issue left unexplored in *Citizens United*. But there are two possible approaches to its answer—both leading to the conclusion that a business corporation is not an expressive association.

a. Horizontal Heterogeneity

One might argue that the common values among IBM shareholders are no less consistent than the common values of ACLU members. The ACLU takes many positions, nationally and locally, and engages in a broad range of specific litigation, lobbying, and political persuasion.¹⁹² Individual members often, indeed regularly, disagree strongly with some or many of the positions the ACLU takes.¹⁹³ But they are united in the importance of civil liberties and the watchdog role the organization plays in the system.¹⁹⁴ This is arguably no different than the IBM shareholder, who may disagree with many of IBM's corporate and expressive choices, but who believes strongly in the private ownership of property and the free enterprise system, as well as in IBM's success in that system. Absent a distinction between economic and political interests, it seems difficult if not impossible to justify treating the ACLU and IBM differently. More importantly, the *Citizens United* court rejected any such distinction in open and forceful language.¹⁹⁵

But, for expressive associations, the question is not the presence or substance of a common interest, like selling Chevys, but instead the individual shareholder's relation to the interest as one to be accomplished for them as individuals through the corporation's expressive acts. For the ordinary publicly-held business corporation, the shareholder's interest cannot be described in this way. The shareholder may love Chevys quite

191. *See id.*

192. ACLU, *supra* note 147.

193. *See* Pemberton, *supra* note 148.

194. *See* ACLU, *supra* note 147.

195. *Citizens United*, 130 S. Ct. at 913 (“The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”).

apart from GM's success. As an investor in GM, the shareholder's interest is entirely individual and atomistic: value and return on investment. The shareholder is much like the member of Jaycees, whose stake is not the organization's expression of their philosophy, but instead its valuable experience and training in the art of marketing and public relations, which benefits the member individually and not in a collective expressive way.¹⁹⁶

b. Vertical Heterogeneity

The second argument is that common interests and shared beliefs are simply not relevant under the First Amendment after *Citizens United*. If the business corporation (independent of its shareholders or members) has its own speech rights, the need for common interests and beliefs on the part of shareholders and members has been necessarily eliminated, and therefore the same result must hold for any expressive association claim. The expressive association right, it should be recalled, is necessarily premised on a First Amendment speech right: either by the individual member rights-holders for whom the corporation speaks, ventriloquist-like; or by the corporate entity itself that speaks for its members, even if they agree or intend not to speak through their ownership.¹⁹⁷ It is the latter model that *Citizens United* quite explicitly adopted, not to the exclusion of the first model, but alongside it and, indeed, often absorbing it.¹⁹⁸

In the end, however, there is a seemingly insuperable obstacle to treating the conventional business corporation as an *expressive association*. In those corporations (or, for that matter, other forms of organization) that practice the legal separation of management and shareholders, the associational quality of the speaker is fatally undermined, for the association members are insufficiently connected to the speech communicated by the association for the members.¹⁹⁹

196. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612–13 (1984) (“The objective of the Jaycees, as set out in its bylaws, is to pursue ‘such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of the community, state and nation, and to develop true friendship and understanding among young men of all nations.’”).

197. See generally *id.*; *Citizens United*, 130 S.Ct. at 891–917.

198. *Citizens United*, 130 S. Ct. at 899–908.

199. Cf. BERLE & MEANS, *supra* note 169, at 6 (generally discussing the business implications of the separation of ownership and control in a corporation).

The purpose of an expressive association is to serve the beliefs and goals of the members individually.²⁰⁰ In an outward-focused association, this means that the organized group's expression must be closely tailored to the beliefs and expressive intentions of the members or shareholders, and those who manage the speech by the organization must be closely tethered to the intentions of the membership.²⁰¹ This implies a relationship between owners and managers that is quite distinct from the discretion afforded officers in a business corporation, who make decisions for the corporation as a separate enterprise.²⁰² Those values are structural and not specific for the individual shareholders; they are part of the transactional terms when shares are purchased.²⁰³ They do not take individualized, belief-based, shape—other than in the atomized investment purposes of each individual shareholder.²⁰⁴ They do not, in other words, qualify as beliefs and aims of the individual for the group (corporation) that reflects them.

Is this conclusion different in the context of a small, privately-owned or even individually-owned business? It appears not to be. For the small business with limited owners, the aims and organization of the business are not analytically distinct for expressive association purposes.²⁰⁵ The businesses are most often run just like a larger corporation: they are managed for profit and value, and decisions are made by management for the benefit of the business entity and its success, not for and on behalf of the expressive needs of a group.²⁰⁶ The investor/shareholder/partner interests are individualized and economic—atomized at the individual level.²⁰⁷ Most such organizations, unless they are structured around a set of non-business beliefs and goals that determine the group's actions, are both horizontally and vertically heterogeneous.

A different analysis applies to the business owned by one individual—the sole proprietor or private corporation model. In such cases, the business is the alter ego of the owning individual or, perhaps, family.²⁰⁸ It may pursue expressive ends dictated by the owner. But it would not do so,

200. See Christian A. Malanga, *Expressive Association—Student Organizations' Right to Discriminate: A Look at Public Schools' Nondiscrimination Policies and Their Application to Christian Legal Society Student Chapters*, 29 W. NEW ENG. L. REV. 757, 759 (2007).

201. See *supra* Part IV.A.2.

202. See BERLE & MEANS, *supra* note 169, at 6.

203. Cf. *id.*

204. Cf. *id.*

205. See *What Is SBA's Definition of a Small Business Concern?*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/what-sbas-definition-small-business-concern> (last visited Oct. 6, 2012).

206. See *id.* (defining a small business as a business “that is independently owned and operated, is organized for profit, and is not dominant in its field”).

207. Cf. *id.*

208. Raymond T. Nimmer, *Sole Proprietorships*, in 1 COMMERCIAL ASSET-BASED FINANCING § 2:6 (2012).

generally, as an association or group, but instead as an individual who, of course, has a full measure of free speech rights to be exercised through the corporation or business. It would not be an expressive association, however, simply but fundamentally because it is not a group, but an individual who owns and controls it.²⁰⁹

For these reasons, in the modern business corporation, the associational claim should not be recognized at all. The association—for that is truly what most corporations (and their kin) are—is simply too heterogeneous to qualify as an *expressive association* under the First Amendment.

C. Form and Formless Associations

Our final typology in this mapping exercise explores the form of expressive associations.

1. The Strange Case of *Doe v. Reed*²¹⁰

We begin our exploration of form in expressive associations with the recent case of *Doe v. Reed*,²¹¹ in which form played a mysterious, if not wholly inscrutable, role. Accordingly, the facts of the *Doe* case nicely present the question of form at its most elemental level.

a. Context and the Court's Decision in *Doe*

The *Doe v. Reed* case began in Washington State, where referendum petitions are part of the public record and the names and addresses of petition signers are available to everyone on the internet.²¹² The plaintiff Does signed a petition seeking to place a recently enacted everything-but-marriage gay-rights law on the ballot to be weighed by the electorate in a general election.²¹³ The petition itself was a success, gaining sufficient signatures to suspend the everything-but-marriage law until a state-wide referendum vote.²¹⁴

Before the referendum, the State of Washington decided to publish the

209. *See id.*

210. Portions of this section are drawn in edited form from a chapter on the *Doe* case in the forthcoming book, RANDALL P. BEZANSON, TOO MUCH FREE SPEECH (2012).

211. *John Doe #1 v. Reed*, 130 S. Ct. 2811 (2010).

212. *Id.* at 2815.

213. *Id.* at 2815–16.

214. *Id.*

names and addresses of all petition signatories on the internet, as they qualified as public records under the Washington public records law.²¹⁵ The petition signers sued to block disclosure of their names and addresses, claiming that publication of their names and addresses by the State would violate their First Amendment rights.²¹⁶

The Court's opinion, by Chief Justice Roberts, was brief, and its sparseness left the definition of the plaintiffs' First Amendment claim unclear:

The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." In either case, the expression of a political view implicates a First Amendment right.²¹⁷

Justice Thomas addressed more clearly the First Amendment interest he believed was threatened by disclosure of the petition names:

This Court has long recognized the "vital relationship between" political association "and privacy in one's associations," and held that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs." This constitutional protection "yield[s] only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest."²¹⁸

In order to explore the expressive association claim in *Doe*, and largely fill in an area left unaddressed by the Court, it is essential that the precise nature of the constitutional claim in the case be defined. The case did not involve a state restriction on the vote or its expressive message.²¹⁹ Instead, the relevant state action for First Amendment purposes was the

215. *Id.* at 2816.

216. *Id.* at 2816–17.

217. *Id.* at 2817.

218. *Id.* at 2839 (Thomas, J., dissenting) (citations omitted).

219. *See, e.g., id.* at 2829 (Stevens, J., concurring) (explaining the nature of the case and lack of any vote restriction issues).

government's distinct act of disclosing the vote—in this case the name of the referendum signator and, thus, the signator's vote—in other words, disclosure of how the signator voted.²²⁰

In fact, the claimed state action was even narrower, because disclosure of the names still did not reveal the *reason* behind a signator's support for the referendum.²²¹ Even if a person signed the petition mistakenly, or did so for reasons other than supporting a referendum on the gay rights legislation, according to the Chief Justice, the act of signing or voting was still expressive, and the state disclosure of the signator's name and address still triggered First Amendment scrutiny.²²²

Even setting aside problems with that attribution assumption, should the State's disclosure be enough to trigger First Amendment protection? Here matters become even murkier. Does the revelation of one's personal view through a general rule of state disclosure qualify as a First Amendment claim? It could, under certain conditions, but those seem unlikely. General state disclosure may qualify for First Amendment protection, for example, if the First Amendment contains a very strong right of anonymous speech that (a) entitles an individual to force nondisclosure of his or her preference (here an attributed meaning given to the simple act of signing); (b) applies even though the State's action stems from a general public-records regime (consider, for example, e-mail to a public official or candidate for office); and (c) applies even if the voter/signer did not seek anonymity at the time of the expressive act or even claim afterward that simple disclosure, as opposed to disclosure that could result in threats of harm, would be problematic.²²³

The likelihood that *Doe* invoked such a right is very, very slim indeed. First, such a strong claim would destroy public disclosure laws generally, and would do so in the political arena with particular force.²²⁴ Second, *Doe* was decided shortly after the Court's broad conclusions, expressed in *Citizens United*, that disclosure does not prevent or restrict speech and that the federal disclosure regime for political contributions and expenditures was perfectly constitutional.²²⁵ It is hard to imagine an anonymity claim

220. *See id.*

221. *See id.*

222. *Id.* at 2818 (majority opinion).

223. For further discussion on *Doe v. Reed* and anonymous speech see Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L. J. 2140 (2011).

224. *See Doe*, 130 S. Ct. at 2164 (“The modern right to anonymous speech is in tension with a parallel doctrine of disclosure.”).

225. *See id.* at 2821; *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

strong enough to explain *Doe* yet coexist with *Citizens United*.

b. Formless Association

It is thus difficult, if not impossible, to view state disclosure of a petition vote as a violation of a First Amendment right to free speech. This leaves only one remaining claim: a right to the privacy of expressive association.²²⁶ Such a claim, to be clear, would in theory be that the State's disclosure of the signer's mute act would compromise his or her right of expressive association.²²⁷ The act of signing would represent a real or attributed message of affiliation with an association of like-minded people.²²⁸ This, in turn, would inhibit or restrict the signer's right to so affiliate or associate for purposes of expression—not expression through voting, but expression through affiliation with others through messages and beliefs expressed privately within the group or publicly through public speech or expressive action (like a public sit-in or protest or advertisement).²²⁹

Such a claim would rest on an interest in privacy.²³⁰ That is, not strictly a claim of anonymity, but instead a First Amendment interest in keeping one's affiliations and associations in groups confidential, lest the very purposes of the groups—to engage in private forms of expression and inquiry—be defeated.²³¹ The claim, in other words, is group and affiliation oriented, unlike the anonymity claim, which is individually isolated. It is also a claim resting on personal inhibition of expression through affiliation, not, as the Court seemed to treat it in *Doe*, a claim of physical safety compromised by threats or intimidation by others.²³²

Such an expressive association claim rests on the person's mental state and personal preferences. In theory, such a claim could have been made in *Doe*, but the Chief Justice didn't expressly refer to it. Only Justice Alito²³³ and, more fully, Justice Thomas,²³⁴ addressed and supported such a claim.

226. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–63 (tracing the NAACP's claim along these lines).

227. See *id.*

228. See *id.*

229. See generally Christopher R. Edgar, *The Right to Freedom of Expressive Association and the Press*, 55 STAN. L. REV. 191, 192–93 (2002).

230. See *NAACP*, 357 U.S. at 462.

231. See *id.*

232. See *Doe*, 130 S. Ct. at 2825 (Alito, J., concurring) (“Once again, permitting the government to require speakers to disclose such information runs against the current of our associational privacy cases. But more important, when speakers are faced with a reasonable probability of harassment or intimidation, the State no longer has any interest in enabling the public to locate and contact supporters of a particular measure—for in that instance, disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights.”).

233. *Id.*

234. *Id.* at 2838–39 (Thomas, J., dissenting).

The identity and nature of the expressive association at issue in *Doe* was thus almost completely unclear and surprisingly unlimited.

In previous expressive-association cases there has always been an association, or a formal affiliation of some kind, that could be identified and judged for First Amendment purposes.²³⁵ Such affiliations had traditionally been formal membership groups with their own expressive missions and activities.²³⁶ Examples from the cases abound: the NAACP; Rotary Clubs; the Jaycees; the Boy Scouts; churches; religions; religious and philosophical groups; political organizations, such as PACs; campaign committees; and so forth.²³⁷ Even corporations may claim to be affiliations for the purposes of expressive-association protection.²³⁸ But missing in *Doe* is any requirement that a particular belief or affiliation be identified, or even exist, or that any group, large or small, formal or informal, be shown to be engaged in expressive activity.²³⁹ Indeed, it seems clear from the circumstances in which the case arose and the evidence upon which it relied that no identifiable affiliation or group existed for the Does or other anonymous claimants.²⁴⁰ Nor was such a group alleged to be involved in any way.²⁴¹

This reveals the two central problems in *Doe*, both of which are instructive on the expressive-association issue. First, the Court recognizes a claim of speech based on a mute act—signing—whose message of belief is, at best, wholly a product of attribution by those who see nothing more than an act of signing, or voting, disclosed by the State.²⁴² Second, and critical for our purposes, the message lacks any reference to a formal association.²⁴³

The very idea of expressive association seems undermined by the apparent absence of any association upon which the Does rested their claimed freedom from public disclosure.²⁴⁴ What does that mean for the

235. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *NAACP*, 357 U.S. 449.

236. E.g., *Boy Scouts*, 530 U.S. 640; *Rotary Int'l*, 481 U.S. 537; *Roberts*, 468 U.S. 609; *NAACP*, 357 U.S. 449.

237. *Boy Scouts*, 530 U.S. 640; *Rotary Int'l*, 481 U.S. 537; *Roberts*, 468 U.S. 609; *NAACP*, 357 U.S. 449.

238. *Rotary Int'l*, 481 U.S. at 548–49 (noting that corporations have rights of expressive association).

239. *Doe*, 130 S. Ct. 2811.

240. See *id.* There were groups, but no affiliation claimed by Does or others, as if affiliation were not relevant. *Id.*

241. *Id.*

242. *Id.* at 2818.

243. See *id.* at 2815–21.

244. See *id.*

nature and meaning of expressive association claims under the First Amendment? Virtually all of the previous expressive association claims have rested on an association—a formal group or organization with ascertainable functions, practices, and beliefs or expressive missions.²⁴⁵ Such a functional association arguably must exist because some organizational foundation is necessary to achieving the very expressive purposes the First Amendment seeks to protect.

Expressive association may protect multiple interests. Expressive groups support an individual's formation and exploration of beliefs through interaction with like-minded or similarly inclined people.²⁴⁶ They comfort, reinforce, or challenge the individual.²⁴⁷ Such groups also enhance the power of individual beliefs or ideas as members speak and act together, as well as when they employ organizational methods not available to individuals.²⁴⁸ The group can act collectively on their beliefs—politically, economically, morally, and ideologically.²⁴⁹ It can amplify and focus the message of its beliefs to the outside world.²⁵⁰ It can provide succor to those within the group—strengthening and reinforcing ideas, emotions, views, and beliefs.²⁵¹

Typically, an expressive association is built on a belief or set of ideas. As the Supreme Court has made clear, qualifying First Amendment expressive associations do not include mere social clubs or groups whose specific reasons for existing cannot be reduced to clear focus, like the Rotary Club or the Jaycees.²⁵² The reason, from a First Amendment perspective, is that expressive associations are protected because they serve as alternative forms by which the individual's own beliefs can be expressed and explored.²⁵³ It is expression that is the important common denominator.

There is nothing in the *Doe* case to suggest that the Does signed the Washington referendum as members of a group or in coordination with a belief-based association.²⁵⁴ All the signators did was sign a petition, an expressively ambiguous act, at best.²⁵⁵ The motivations of individual signators cannot be ascertained simply by noting this act alone. The fact that

245. See *supra* note 235 and accompanying text.

246. Malanga, *supra* note 200, at 759.

247. See *id.*

248. *Id.*

249. E.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

250. See, e.g., *Welcome to the Christian Legal Society*, CHRISTIAN LEGAL SOC'Y, <http://www.clsnet.org/> (last visited Sep. 26, 2012).

251. See, e.g., *id.*

252. See *supra* notes 27–29 and accompanying text.

253. See *supra* Part III.A.

254. See *John Doe #1 v. Reed*, 130 S. Ct. 2811 (2011).

255. *Id.* at 2813.

there were groups actively involved in the petition and referendum process on all sides—religious and political—is legally irrelevant and hardly even mentioned in the many pages of opinions.²⁵⁶

c. An Alternative Approach: Privacy and Freedom from Association

An alternative approach to understanding the Court's *Doe* decision is that the constitutional interest in the case is freedom from *compelled* or *unwanted* expressive association, possibly akin to the Court's freedom from compelled speech doctrine.²⁵⁷ The argument would go something like this: the government should not use disclosure to compel individuals to affiliate or associate with one or more groups with which the individual disagrees or, at least, chooses not to join. This protection may apply even if the compulsion stems from a general government program and results from affiliation and association that is purely a function of attribution by others.

Would such a claim make constitutional and logical sense? If the compelled association were the direct result of the government's acts and involved a requirement of *real* association, the claim would make sense and, more importantly, consist of a conventional freedom of association (or non-association) claim. That is, the value of associations—the value of gathering with people who share one's own beliefs or expressed views—is disrupted by a compelled arrangement.²⁵⁸ Forced association, against an individual's will and contrary to his or her views, would violate the very constitutional purposes that support the protection of associations.²⁵⁹

But applying this alternative approach to *Doe* creates serious problems. The government is compelling nothing and, indeed, it is saying nothing. It is simply disclosing an already public act with clearly ambiguous expressive significance.²⁶⁰ Disclosure does not force participation in any group—like a pro-beef group, or a non-pacifist group in New Hampshire. If by attribution one is forced, as the Court said Maynard was, to carry and publish a disagreeable view, ample recourse would be available in the compelled-

256. *See id.*

257. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).

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

259. *Id.*

260. *Doe*, 130 S. Ct. at 2836 (“That would have been utterly implausible, since the inhabitants of the Colonies, the States and the United States had found public voting entirely compatible with “the freedom of speech” for several centuries.”).

speech doctrine and in the privacy and defamation torts.²⁶¹ Association, except in the loosest sense of the term, is not pertinent in any way.

A classic expressive association claim rests on the notion that individuals will be inhibited in speaking through and with groups and associations.²⁶² The relevant harm to the First Amendment right, in other words, is inhibition in its *exercise*, not the suffering of any particular and limited form of harm like physical threats and intimidation.²⁶³ The proof of harm consists not of the likelihood of physical threats, as in *Doe*, but in the state of mind of the claimants who are moved not to undertake risk of consequences, whatever their nature and notwithstanding their uncertainty. The evidence consists of testimony of persons who will not join expressive groups in the absence of protection from disclosure of their vote and the reasonableness of their apprehension in the surrounding circumstances—not, as in *Doe*, of proof of violence against signers or, perhaps, its almost certain occurrence in the near future.²⁶⁴

Why was the Court's approach to the *Doe* case so much narrower? A broader associational claim based on the more general harm of inhibition—a particularly tenable claim—would be legally uncontainable, and thus would seriously threaten the disclosure regime that the Court had recently given its constitutional blessing in *Citizens United*.²⁶⁵ Disclosure alone, the Court said, doesn't prevent anyone from voting, or from joining groups or associations in speaking in a campaign setting.²⁶⁶ So much, then, for the classic and traditional expressive-association claim, and, in fact if not in legal fiction, so much for the Court's statement that signing a petition, or voting, is an expressive act protected by the First Amendment free-speech guarantee.

Without an identifiable form or group identity, without a remedy oriented to affiliation and belief, without any need for affiliation, the expressive association claim is like a boat with neither sail nor rudder—formless, inert, and directionless. Form, affiliation, and collective expressive action matter. Thus, for an expressive association to exist, some tangible form must be discernible.

261. *See Wooley*, 430 U.S. at 713 (holding that New Hampshire could not constitutionally require individuals to participate in dissemination of an ideological message by displaying it on their private property, and, therefore, that the state could not require plaintiffs to display state motto upon their vehicle license plates).

262. *E.g., Boy Scouts*, 530 U.S. at 648 (“The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”).

263. *Id.*

264. *Compare Doe*, 130 S. Ct. at 2816, with *Boy Scouts*, 530 U.S. at 648.

265. *Citizens United v. FEC*, 130 S. Ct. 876, 914–16 (2010).

266. *Id.* at 914.

2. Expressive Ambiguity in Belief or Message

One of *Doe*'s weaknesses as an expressive association case was the absence of a formal association. The other is the ambiguity of the expression: as discussed above, affixing one's name to a petition says little about the motivations and ideas that underlie an individual's support for a referendum.²⁶⁷ In the *Doe* case, therefore, a group's expression was unclear because of the uniform simplicity of the expressive act (signing a petition). The Court, however, had struggled with an association's expressive clarity only several years before, in *Rumsfeld v. FAIR*.²⁶⁸ Unlike *Doe*, the lack of clear expression in *FAIR* was based on the diffused structure of the association itself.²⁶⁹

a. Introduction to *Rumsfeld v. FAIR*

In expressive association cases, determining the coherence of a group's message is essential: if the Court is to protect group speech under the idea of expressive association, the existence and strength of *the expression* is arguably as important as the existence and strength of the association. As the Court noted in *Rumsfeld v. FAIR*, expressive association is valuable because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others."²⁷⁰ Thus, the group's message itself must also have form.

The Court has long included the *existence* of expression in its list of requirements when applying expressive association, but has not delved deeply into analysis of the depth and coherence of that expression.²⁷¹ *FAIR* centered on the application of the Solomon Amendment, which requires educational institutions to provide military recruiters equal access to students.²⁷² If any part of an institution fails to provide military recruiters with a level of student access equal to the access provided to the most-privileged recruiters, the institution loses a portion of its federal funding.²⁷³

FAIR is a coalition of law schools and law school faculties opposing

267. See *supra* Part IV.C.1.c.

268. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 68–70 (2006).

269. *Id.* at 68.

270. *Id.*

271. *E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

272. *FAIR*, 547 U.S. at 56.

273. *Id.*

discrimination.²⁷⁴ Its rallying cry—and the coalition’s first project—was the overturning of the Solomon Amendment.²⁷⁵ Faculty members at coalition schools objected to the military’s Don’t Ask, Don’t Tell policy, and sought to respond to the policy by restricting military recruiters’ access to students.²⁷⁶ The Solomon Amendment threatened to strip funding in response to those policies.²⁷⁷

FAIR challenged the Solomon Amendment on First Amendment grounds, focusing on free speech claims and arguing, in essence, that by requiring law schools to provide military recruiters with access to students, the government was restricting the schools’ free speech—or, at least, compelling speech.²⁷⁸ There are several overlapping speech issues in *FAIR*: whether the Solomon Amendment restricts speech or conduct,²⁷⁹ whether the act of providing access to students qualifies as expression (and therefore qualifies for First Amendment protection),²⁸⁰ and whether requiring a law school to host speech it opposes violates the school’s First Amendment rights.²⁸¹ The opinion also addresses whether the Amendment unconstitutionally restricts the law school’s expressive conduct.²⁸²

Only in the opinion’s final section did Justice Roberts center on the idea of expressive association.²⁸³ He begins by explaining that the Court, in *Boy Scouts of America v. Dale*, already “recognized a First Amendment right to associate for the purpose of speaking”²⁸⁴—the right of expressive association that is the focus of this piece. In *Dale*, the Court had held that the New Jersey public accommodations law requiring the group to include a homosexual scoutmaster impaired the Boy Scouts’ message opposing homosexuality.²⁸⁵

The law schools relied on the Court’s reasoning in *Dale* to make what they felt was a similar argument: their message included opposition to discrimination and military policies were discriminatory; therefore, hosting

274. *Id.* at 47.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. The Court found that the Solomon Amendment “affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.” *Id.* at 60.

280. The Court concluded that the speech compelled by the Amendment—for example, emails relaying an interview schedule—“is plainly incidental to the Solomon Amendment’s regulation of conduct” and therefore allowable. *Id.* at 62.

281. The Court found that requiring a law school to allow military interviewers access did not compromise the law school’s message. *Id.* at 63.

282. *Id.* at 65–66.

283. *Id.* at 68–70.

284. *Id.* at 68.

285. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–59 (2000).

military recruiters on campus impaired their message and violated their right to speech.²⁸⁶ The Court disagreed, finding the law schools' plight distinguishable from the Boy Scouts'.²⁸⁷ The Court begins its analysis with its own summary of the holding in *Dale*:

[T]he Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster. After determining that the Boy Scouts was an expressive association, that the forced inclusion of Dale would significantly affect its expression, and that the State's interests did not justify this intrusion, we concluded that the Boy Scouts' First Amendment rights were violated.²⁸⁸

That holding requires at least five separate determinations: (1) Is the organization in question an *association*?²⁸⁹ (2) Is it *expressive* (does it have a message)?²⁹⁰ (3) Does the law in question require *inclusion* of another member?²⁹¹ (4) Does that inclusion impair the association's expression (its "message")?²⁹² (5) Does the significance of this intrusion outweigh any competing state interest?²⁹³ Presumably, only if the court can answer "yes" to all five questions will it hold the law unconstitutional.

The Court's decision in *Rumsfeld v. FAIR* focuses squarely on the third question.²⁹⁴ Requiring law schools to host military recruiters, the Court reasoned, does not require the coalition to *include* the recruiters in their association: "Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. . . . Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school to accept members it does not desire."²⁹⁵ The Court made it clear that it is the *court*, not the association, that determines whether the association's message is

286. *FAIR*, 547 U.S. at 68.

287. *Id.*

288. *Id.* (internal quotation marks omitted).

289. *Boy Scouts*, 530 U.S. at 647–48.

290. *Id.* at 648–53.

291. *Id.* at 646–47, 657.

292. *Id.* at 653–56.

293. *Id.* at 657–59.

294. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 69 (2006).

295. *Id.* (internal quotations omitted).

impaired: “[A] speaker cannot ‘erect a shield’ against laws requiring access ‘simply by asserting’ that mere association ‘would impair its message.’”²⁹⁶

b. Mixed Messages and the Court’s Silence

The Court’s analysis of inclusion seems sound: hosting a group on campus is quite different from accepting a new member, and because the law does not force inclusion, it does not compromise the group’s message.²⁹⁷ More interesting, though, is what the Court chose *not* to address in *FAIR*. By focusing on a single aspect of the *Dale* test, the Court declined to address difficult questions related to the other elements.²⁹⁸

For example, even if the Court determines that FAIR qualifies as an association, it remains unclear whether a group comprised of faculties from multiple law schools is sufficiently cohesive to engage in common expression. Does FAIR have a clear message? What is that message? Is it anti-discrimination? Or is it anti-military discrimination? Or is it anti-Solomon Amendment? This question is important, and it is one that the Court declines to address in either *Dale* or *FAIR*. The Court seems content to allow the association to declare what its message is.²⁹⁹ But the Court explicitly refuses to allow groups to determine whether the inclusion of a dissenting voice will compromise its message—that role the Court reserves for itself.³⁰⁰ This creates an obvious conflict: if the group declares itself anti-Solomon Amendment, for example, the Court will have a hard time deciding that the Solomon Amendment does not compromise the group’s message.

Though it was FAIR that brought suit, the Court focused on whether law schools are expressive organizations, a peculiar decision based, apparently, on FAIR’s own pleadings.³⁰¹ The Court, however, provides no analysis as to whether a law school qualifies as an association (we would presume that it does) and as expressive (a more open question). The Court does conclude that FAIR has “plainly overstat[ed] the expressive nature of their activity and the impact of the Solomon Amendment on it,” but this conclusion is not expanded into individual analysis of the association and its expression.³⁰²

Given other opportunities to address the nature of group expression—which would, in all likelihood, require the Court to investigate more carefully what an expressive association’s message truly is—the Court has

296. *Id.* (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000)).

297. *Id.* at 69.

298. *Id.*

299. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000).

300. *FAIR*, 547 U.S. at 64–65.

301. *Id.* at 68–70.

302. *Id.* at 70.

similarly refused to do so.³⁰³

In his concurrence to the *Citizens United* decision, Justice Scalia reasoned that because the Constitution did not distinguish between individual speakers and associated speakers, the case (like the First Amendment) was about “‘speech,’ not speakers.”³⁰⁴ That rhetorical flourish allows Scalia to sidestep analysis of whether a corporation, even if it is an association for First Amendment purposes, can be considered an expressive one. What, though, is a corporation’s expression? Presumably its purpose is maximizing shareholder wealth.³⁰⁵ That goal does not lend itself to a clear expression the way a pro-choice group’s goals (preventing abortions) or even the Jaycees’ goals (helping young men develop personal and leadership skills)³⁰⁶ would.

Similarly, in his dissent in *Doe v. Reed*, Justice Thomas suggests that signers of a petition qualify as members of an association, using a very broad definition of the term.³⁰⁷ Because (1) the signers have a “common view,” (2) more than one signer is needed to place a petition on a ballot, and (3) the signers joined with “a state political action committee” by signing the petition, Thomas reasoned that, “signing a referendum petition amounts to ‘political association.’”³⁰⁸

Thomas goes on to agree with Roberts’s majority opinion,³⁰⁹ which reasons that “[a]n individual expresses a view on a political matter when he signs a petition”—either that he believes the law should be overturned, or, at the very least, that he believes “that the question should be considered ‘by the whole electorate.’”³¹⁰ But those two views are distinctly different—believing that a law should be overturned expresses opposition to the substance of the law, while believing that the entire electorate should consider an issue expresses a commitment to a particular political process. If, as the Court urges, we accept that expressive associations make individual speech stronger by amplifying it through the combination of multiple voices expressing a similar message,³¹¹ then how does sharing

303. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring).

304. *Id.*

305. See Bevis Longstreth, *Reflections on the State of Corporate Governance*, 57 BROOK. L. REV. 113, 115 (1991).

306. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984).

307. *John Doe #1 v. Reed*, 130 S. Ct. 2811, 2839 (2010) (Thomas, J., dissenting).

308. *Id.*

309. *Id.*

310. *Id.* at 2818 (majority opinion).

311. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 68

space on a petition amplify one's voice if others have joined the petition for entirely different reasons? In short, there is a difference between an individual's act being expressive and an association being expressive. Even if the referendum signers share a common goal, one could still argue that having a goal is different than being expressive.

In *Christian Legal Society*, both the majority³¹² and dissent³¹³ note that CLS members sign a pledge that commits them to certain behaviors and beliefs. But does this make the group expressive? The dissent notes that “many of [Hastings'] registered groups were and are dedicated to expressing a message” and lists, as examples, a pro-choice group, a pro-life group, the American Constitution Society, and an animal-rights group.³¹⁴ The fact that other campus groups are expressive, however, does not mean that CLS is, and the Court never fully addresses this question, nor proposes a test to determine what makes a group expressive.³¹⁵ The examples the Court points to seem to all be dedicated to a clear, single cause.³¹⁶

CLS's cause—and, more importantly for the Court's analysis, its message or expression—is less clear: is it to promote faith, or to oppose sin?³¹⁷ The law school seemed to object to two portions of CLS's by-laws: one that prohibited “unrepentant homosexual behavior” and another that prohibited “non-believers” from being members.³¹⁸ Does the existence of more than one expressive purpose make the right of associative expression more difficult to apply? Again, if we accept that expressive association should be protected because uniting individual voices bolsters each individual's ability to speak, how does CLS, with its variety of loosely tied purposes, further that goal?

c. Total Dilution: Conglomerates as Thematic Groups

The first cases that outlined the idea of expressive association protected groups from laws that would dilute their message by requiring inclusion of dissenting voices: protecting the Boy Scouts of America from a law that would require them to include a gay scoutmaster,³¹⁹ for example, or the Jaycees from a law that would require them to include girls.³²⁰

(2006).

312. *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2974, 2980 (2010).

313. *Id.* at 3001 (Alito, J., dissenting).

314. *Id.* at 3002.

315. *Id.* at 2971–95 (majority opinion).

316. *Id.* at 2984–85.

317. *See generally About CLS*, *supra* note 125.

318. *Christian Legal Soc'y*, 130 S. Ct. at 2974.

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

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

But *Rumsfeld v. FAIR* addressed a different kind of group: a group of groups, really, or what we will call a conglomerate—an association of law school faculties.³²¹ FAIR, then, is a group of groups—a coalition of faculties—and even if we assume that the coalition is unified in its fight against discrimination (making the group homogenous), the subgroups are almost certainly not unified. In fact, FAIR members join through faculty votes, indicating the strong possibility that not all faculty members embrace the faculty's decision to join FAIR.³²²

The Supreme Court did not express any concerns about applying the same analysis to a conglomerate that it had applied to groups of individuals.³²³ But conglomerates create several identifiable problems in expressive association analysis, one of which is a diluted—or even conflicted—group message.

One common justification for protecting expressive association is that supporting association also supports speech: the Court in *FAIR*, referring to *Jaycees*, reasoned that “[t]he right to speak is often exercised most effectively by combining one’s voice with the voices of others.”³²⁴ “Combining” is an interesting word to choose, because it allows for some variety of expression—using the word “unifying,” on the other hand, would have suggested that the individual speakers share identical views, which is often not the case.

This justification for protecting expressive association, however, is strongest when the members’ views are very similar.³²⁵ The more the voices share, the more they resonate; the more diverse the viewpoints, the less likely it is that associating with group members helps you project your own voice.

This rationale is problematic even in groups of individuals. Members of the League of Women Voters, for example, may have dramatically different political views. Is an individual member’s speech more effective because of that association? To arrive at an agreed-upon message, often individual members would be required to omit personal beliefs that the group as a whole did not embrace—the voice may be louder, but it also must be simplified.

321. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 52 (2006).

322. *Id.*

323. *Id.* at 68.

324. *Id.*

325. *Id.*

This is doubly problematic for conglomerates: group messages are less sophisticated than individual voices, and conglomerate messages less sophisticated still. The more levels of consensus and simplification a group incorporates, the less likely it is that the group truly makes an individual's speech more effective.

V. CONCLUSION: PUTTING TOGETHER THE MAP

Expressive associations are complex and varied in type, function, and relationship to the First Amendment. The differences among them bear on the definitional questions with which we have been concerned in this mapping exercise. More importantly, the differences bear on the basic reasons for constitutional protection and thus on the measures, or standards, by which the First Amendment interests should be protected.

We conclude that there are four often overlapping elements of the expressive association landscape—or map. They emerge from two overarching assumptions we have made. First, distinctions among expressive associations grounded on substantive preferences for certain ideas or kinds of ideas should be rejected. In this respect all expressive associations are identical under the First Amendment, whatever the nature of their shared beliefs. Second, as a general rule we think it necessary and useful to think of an expressive association as little more than a representative of the constitutional interests of its members, not as an independent rights-holder.³²⁶ It is the associated activities of individual members that is at the heart of constitutional liberty.³²⁷ And the group is the instrument by which the individual members are served.

With these background principles in mind, we identify four features of the map of expressive associations.

First, expressive associations must be based on identifiable beliefs to which all members subscribe in fact. Beliefs are at the heart of the very idea of expressive associations under the First Amendment.³²⁸ Moreover, this feature explains and supports the essential distinction between beliefs and status that was at the heart of the Supreme Court's *CLS* opinion. Status is not what the First Amendment is about.

Second, a basic distinction should be drawn between inward- and

326. This is the very approach taken by the Supreme Court in the *NAACP v. Alabama* ex rel. *Patterson* case, where the NAACP was given third party standing to represent the interests of individual members. 357 U.S. 449 (1958).

327. But see our discussion of mixed corporate and individual associations, and conglomerate associations, for some variants on this central principle. *Supra* notes 208–09, 321–25 and accompanying text.

328. See *supra* note 27 and accompanying text.

outward-oriented expressive associations.³²⁹ This essential distinction yields different measures of constitutional protection in view of different constitutional functions performed: when the activities are inward, and thus often deeply personal, the measure of constitutional protection differs from when expression is geared toward the public, with the primary function being brotherhood in shared beliefs and augmentation of personal views effected by the combination of many voices. Inward is introspective and contemplative. Outward is publicly expressive and largely mechanical in function. The two types of expressive association activity are often combined—that is, performed by a single expressive association—but they must still be kept distinct in relation to any specific activity claimed to be protected.

Third, individual membership must involve individual action and aims undertaken with and through the group or association, not independent of it. Affiliation focused on atomistic rewards for the individual should not be protected in the name of expressive association rather than, for example, individual free speech or self-improvement alone.³³⁰

Fourth, elements of form are important to determining whether a group or an organization should qualify as an expressive association.³³¹ The group or association must be non-transitory; it should have a formal identity, a mission and expressed set of beliefs, a duration, and some form of known membership by the individuals claimed as members. Like-mindedness, without more, won't do. Moreover, the association should have some form of organizational structure and governance related to member beliefs and choices, for without these it cannot be said that the acts of the group represent the ideas and beliefs of the individual members. Finally, conglomerate groups are unlikely to qualify as expressive associations because they almost always lack a coherent and core set of beliefs shared by all members—including the members of the groups in the conglomeration—and also lack the governance discipline to maintain fidelity to the beliefs and mission of the collective sets of members.³³²

Our map, in short, focuses on beliefs; consensus and cohesion; action by and through the group and for the group (not the individual); and a form necessary to maintaining the protected acts as those of the collective, not the individual or leadership or some portion of the membership.

329. *See supra* Part IV.A.

330. *See supra* Part IV.B.3.a.

331. *See supra* Part IV.C.

332. *See supra* Part IV.C.2.c.
