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Mapping the Forms of Expressive Association

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MAPPING THE FORMS OF EXPRESSIVE ASSOCIATION

by Randall P. Bezanson, Sheila A. Bentzen, and C. Michael Judd

Abstract: Freedom of expressive association is a relatively new right under the First Amendment, and as a result, its key definitional aspects are continually in flux. Scholarship to-date focuses on the Supreme Court's treatment of expressive associations, but because the Court has never truly defined what an expressive association is, the Scholarship also fails to really define the boundaries and characteristics of an expressive association. This Article begins to fill this gap in the literature and takes on the task of "mapping" the forms of expressive association. Our goal is to begin the organizing, defining, and classifying task by identifying the essential forms of expressive associations and the boundaries that should attach to the various and often overlapping forms of collective First Amendment activity. By doing so, the First Amendment values associated with each typology begin to emerge and key patterns and characteristics are identified. With this map, we begin to see the landscape of expressive associations.

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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.

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. 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.³

Simply stated, expressive association is “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition . . . and the exercise of religion.”⁴ Under that definition, it requires both an *organization* (the association itself) and a *purpose* (a First Amendment activity). The right protects both individuals and groups: the right limits state interference in group activities, even when the group’s purposes may seem distasteful, and it limits state action against individuals who are part of such groups.⁵

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.⁶ 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 is a confusion that goes to the First

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

² Among the recent cases, which exhibit varying typologies, are *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Rumsfeld v. F.A.I.R.*, 547 U.S. 47 (2006); *Citizens United v. F.E.C.*, 130 S.Ct. 876 (2010); *Doe v. Reed*, 130 U.S. 2811 (2010).

³ Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 1024 (2011) (“[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.”)

⁴ *Roberts*, 468 U.S. at 618.

⁵ 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.”).

⁶ 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.* 1484 (2001); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *CAL. L. REV.* 2353 (2000).

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.

Against this background of history, 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. Nonetheless, the law has developed and expanded sufficiently to make the setting of limits and the recognition of distinct typologies critical.

Our goal is to begin the organizing, defining, and classifying task by identifying the essential forms of expressive associations and the boundaries that should attach to the various and often overlapping forms of collective First Amendment activity. Doing so requires that we traverse the entire range of collective organization activity in fields as diverse as education, commerce, religion, philosophy, research, self-reflection, political or economic action, and so forth. 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 and not others, to some of the activities and not others. In short, we hope in a general and preliminary way to map 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. We begin, in Part I, by briefly tracing the Supreme Court's path towards the right of expressive association. Part II then 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 III, to the core of our mapping exercise—identifying the functional typologies. We categorize these typologies by three key characteristics: inward-oriented expression and outward-oriented expression; heterogeneous and homogeneous associations; and finally, form and formless associations. In Part IV, 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.

I. 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 concrete; 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,⁷ and just as individuals have a right to associate with one another, they have a right not to associate with others.⁸ Arguably, this freedom is driven, at least in part, by the idea of the “people” as sovereign.⁹ 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.¹⁰ On the other hand, the focus can be shifted to the association as a whole—what are the rights of the entity?¹¹

The Supreme Court has divided freedom of association into two categories—intimate associations and expressive associations.¹² Intimate associations, such as familial relationships, are those deriving from the term “liberty” found in the Fifth and Fourteenth Amendments.¹³ In contrast, expressive associations form in order to engage, at least in part, in activities protected by the First Amendment.¹⁴ However, these groups need not be engaged in advocacy¹⁵ or form for the specific purpose of disseminating information.¹⁶ Instead, to trigger First Amendment protection, the association must center on a shared set of beliefs, ideas, or values.¹⁷ It does not

⁷ NAACP v. Alabama, 357 U.S. 449, 460 (1958).

⁸ Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (“Freedom of association therefor plainly presupposes a freedom not to associate.”).

⁹ 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.”).

¹⁰ This area of the law is much more well settled. See Farber, *supra* note 6, at 1486 (2001) (“[Early] cases provided some protection to the autonomy of the organizations as such, but more vigorously defended the rights of members to join associations.”).

¹¹ *Id.* at 1496 (“The focus of recent cases . . . is on the rights of the organization as an entity, not on the rights of its individual members.”).

¹² *Roberts*, 468 U.S. at 618.

¹³ *Id.*

¹⁴ *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.”).

¹⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (“The First Amendment’s protection of expressive association is not reserved for advocacy groups.”).

¹⁶ *Id.* at 655 (“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.”).

¹⁷ NAACP v. Alabama, 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’ of the Due Process Clause of the Fourteenth Amendment.”); see also *Boy Scouts of Am.*, 530 U.S. at 650 (“It seems

matter whether the beliefs held relate to “political, social, economics, educational, religious [or] cultural ends.”¹⁸ 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.¹⁹

Acknowledging the existence of an expressive association does not end the analysis. The Supreme Court has declared that expressive associations receive First Amendment protection, so it naturally 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.²⁰ Just as the many States have rights because they form the collective voice of the people, so an association has rights, reflecting that same collective voice. 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.²¹ In one view, these collective associations protect against the power of the State. This “right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas.”²² 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.

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 perhaps even greater protection.²³ An expressive association takes the rights proffered by the First Amendment and amplifies them. A

indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”).

¹⁸ *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.

¹⁹ *Boy Scouts of Am.*, 530 U.S. at 655 (“The First Amendment simply does not require that every member of a group agree on every issue for the group’s policy to be ‘expressive association.’”).

²⁰ *See AMAR*, *supra* note 9.

²¹ 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.”).

²² *Boy Scouts of Am.*, 530 U.S. at 647.

²³ *NAACP*, 357 U.S. at 460 (“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 v. U.S. Jaycees* 468 U.S. 609, 622 (1984) (“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.”).

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 be a combined or amplified expression of other protected First Amendment freedoms.

Though expressive associations receive the full protection of the First Amendment, there is no absolute right to associate.²⁴ As a consequence, the Supreme Court has developed various tests to determine whether government interference of a groups' association is permissible and drawn distinctions before selecting a test to apply. Is the association utilizing a public forum or limited public forum? Is the government withholding a benefit or requiring action? Does the state regulation target the expressive activities of the association or is the regulation neutrally aimed? The interplay between these distinctions is murky and the doctrine remains nascent. But as we explore the murky domain, important points will be drawn from the cases in which the Court has applied them.²⁵

II. DISTINGUISHING BELIEFS

With a broad background in place, we next address in a general way an issue that lurks beneath the surface of all forms of expressive association. It concerns the types and substance of shared beliefs and the role of these belief types in assessing the merit of any expressive association. How, 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 manifest limit a group's ability to claim protection? The answers to these two distinct but often related questions are uncertain in the decided cases.

A. Membership and Inclusion

First, should all members of an expressive association be required to share in a group's beliefs? 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?

In the *Jaycees*²⁶ 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. 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."²⁷ 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

²⁴ *Roberts*, 468 U.S. at 623 ("The right to associate for expressive purposes is not . . . absolute.").

²⁵ See generally *Roberts*, 468 U.S. 609 (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.*, 530 U.S. 640 (holding that the state did not demonstrate a compelling interest in requiring inclusion of homosexual members into the local Boy Scout chapter).

²⁶ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

²⁷ *Id.* at 626.

views.”²⁸ 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 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.

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, like “Doctors Against Health Care Reform”—should qualify as an expressive association notwithstanding the extra-belief-based membership limit. 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 belief 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 would be 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 Club²⁹ 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 *Jaycees* decision, Justice O’Connor suggested there may be substantive limits on the beliefs of an expressive association in order to qualify for First Amendment protection. 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.³⁰ 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. Our view, in short, focuses more on the nature of the association’s function than on its substantive beliefs or goals.

²⁸ *Id.* at 627.

²⁹ *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

³⁰ *Roberts*, 468 U.S. at 634 (O’Connor, J, concurring).

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 – speech intended to promote a commercial transaction with the speaker," that at some point along this spectrum of commercial beliefs a line should be drawn.³¹

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 are, with the narrowest of exceptions, protected by the First Amendment. 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. To infuse it with more protection than the 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,³² or to an investor/shareholder in a company, or to the employees of a private company or a public agency. There is little doubt that Amway members believe fervently in the company and the venture to which they made a commitment, and shareholders may 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*³³ and *Sorrell*³⁴ decisions suggests that the answer is "no," given that the corporations themselves—Amway Inc. 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 more explicit as a factor in others,³⁵ this seems wrong in the First Amendment setting, where freedom of belief and expression of belief are at the heart of the guarantee.³⁶ Excluding a belief in "commerce" or capitalism, for example, simply cannot be squared with free speech principles.

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; instead, realization of the beliefs and goals are solely the product of individual action.

³¹ *Id.*

³² See FOUNDER'S FUNDAMENTALS, <http://www.amway.com/about-amway/our-company/heritage/founders-fundamentals> (last visited Mar. 18, 2012) (explaining that Amway "continue[s] to build on the original values and principles established by [its] founders," which include Freedom, Family, Hope, and Reward).

³³ *Citizens United v. F.E.C.*, 130 S.Ct. 876 (2010).

³⁴ *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011).

³⁵ *Scales v. United States*, 367 U.S. 203 (1961); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁶ The most famous and still dominant statement of this view was expressed by Justice Holmes in 1919 in dissent. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

There is clear evidence of this group-function view in several cases, especially in Justice O'Connor's concurring opinion in the *Jaycees* case. 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 in using the organization as a training or networking facility for each individual member.³⁷ 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."³⁸ Like a group that forms momentarily simply by speaking in unison 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.

The distinction lies in the definitional nature of an association under the First Amendment, not in the value of a group's common beliefs. 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. 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. 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 actions (unless they serve 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 with public companies. Nonprofit and charitable corporations or groups are typically different, as the opportunity for the pursuit of wholly individual and atomistic goals is largely foreclosed, at least in the sense of shareholder profit.

The distinction, then, is not the "belief," but the "association." It rests on the means by which belief is advanced and, most basically, 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 *Jaycees* and *Rotary* cases.

³⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

³⁸ *Id.* at 639.

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. 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. 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.

III. 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 directed inward and meant only to be shared by those within the group. Expression may also be projected outward to the public. Additionally associations may be classified as either heterogeneous or homogeneous in composition—this heterogeneity may be reflected in both purpose and form. Finally, groups may be classified according to their form, or lack thereof. Closely related to this question of form is the cohesiveness of the message that the group projects. 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 question 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. 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. And yet, other groups lie somewhere in between—neither wholly inward, nor wholly outward, but opting instead for some combination of the two.

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.³⁹ 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.⁴⁰

³⁹ Later typologies will explore the intricacies of group membership, but for now we focus on the types of expression an association centers itself around.

⁴⁰ 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 between these types of groups, the First Amendment values worthy of protection become much clearer.

For outward expressive groups and activities, the 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. 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 of participation.

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.⁴¹ 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.

Counsel and Support

Some associations may exist for and express themselves through counseling and support services. Members, often sharing common struggles 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.”⁴² Further, Alcoholics Anonymous prides itself on its inner-organizational focus and disclaims outward allegiances.⁴³ As their 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.”⁴⁴ This policy statement makes clear that Alcoholics Anonymous exists solely for the benefit of its members, expressing itself inward through counseling and recovery services.

Ritual and Secrecy

⁴¹ This is not to say that once a group exercises inward expression they cease to exist for the benefit of outsiders. As discussed at the beginning of this section, many groups are neither wholly inward nor wholly outward. Thus, where a group falls somewhere between the ends of the spectrum, only its inward expression is solely for the benefit of the group.

⁴² *Information on A.A.*, ALCOHOLICS ANONYMOUS, <http://www.aa.org/subpage.cfm?page=1> (last visited Feb. 4, 2012).

⁴³ *Id.*

⁴⁴ *Id.*

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 Skull and Bones—a society for select undergraduate seniors at Yale University.⁴⁵ Little is known about this student organization, but much speculation surrounds its secret rituals and prominent list of members.⁴⁶ As another example, Scientologists require membership—and a series of donations—as prerequisite to learning about and experiencing many of the group’s religious and philosophical beliefs.⁴⁷ These groups not only direct their expression inward, but they also seek to prevent outsiders from having access to this expression.

Study and Intellectual Growth

And 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.”⁴⁸ One of its primary goals is to “promote stimulating intellectual and social opportunities for its members.”⁴⁹ And 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.”⁵⁰

Bonding and Training

Finally, many associations form, so that members can bond together through a common mentoring, education, or training goal. These groups include such organizations as the Girl Scouts⁵¹, 4-H clubs⁵², and the National FFA Organization.⁵³ The Boy Scouts of America also fit

⁴⁵ Judith Ann Schiff, *How the Secret Societies Got that Way*, YALE ALUMNI MAGAZINE (Sept./Oct. 2004), http://www.yalealumnimagazine.com/issues/2004_09/old_yale.html.

⁴⁶ *Id.*; see also Molly Ball & Emily Bell, *Behind the Walls of Yale’s Secret Societies*, YHONLINE, <http://www.yaleherald.com/archive/frosh/1998/blue/secret.html> (last visited Feb. 2, 2012).

⁴⁷ 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.”).

⁴⁸ *About Mensa International*, MENSA, <http://www.mensa.org/about-us> (last visited February 5, 2012).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Facts*, GIRL SCOUTS, http://www.girlscouts.org/who_we_are/facts/ (last visited Feb. 5, 2012) (“Girl Scouting builds girls of courage, confidence, and character, who make the world a better place.”).

⁵² See *Who We Are*, 4-H, <http://www.4-h.org/about/youth-development-organization/> (last visited Feb. 5, 2012) (“[T]he 4-H movement supports young people from elementary school through high school with programs designed to shape future leaders and innovators.”).

⁵³ See *Welcome to the National FFA*, NATIONAL FFA ORGANIZATION, <https://www.ffa.org/Pages/default.aspx#> (last visited Feb. 5, 2012) (“FFA makes a positive

this form—bonding together and educating young men. 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.”⁵⁴ The Boy Scouts rally around certain values known as “Scout Law.”⁵⁵ Indeed, all scouts aspire to be trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent.⁵⁶

The Supreme Court addressed the nature of the Boy Scouts expression in *Boy Scouts of America v. Dale*.⁵⁷ 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.”⁵⁸ The Court found that the general mission of the Boy Scouts was to instill values in its young members, and accepted the Scout’s assertion that homosexuality was at odds with the Scout Oath and Law, which sets forth those general value principles.⁵⁹ 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 right to expressive association.⁶⁰ 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.”⁶¹ 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.”⁶²

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.

difference in the lives of students by developing their potential for premier leadership, personal growth and career success through agricultural education.).

⁵⁴ *About the BSA*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/About.aspx> (last visited Feb. 5, 2012).

⁵⁵ *Visitor*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/FAQ/Visitor.aspx> (last visited Feb. 5, 2012).

⁵⁶ *Id.*

⁵⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁵⁸ *Id.* at 648.

⁵⁹ *Id.* at 650.

⁶⁰ *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.”)

⁶¹ *Id.* at 654. (citation omitted) (internal quotations marks omitted).

⁶² *Id.* at 655.

Charitable

Some groups—most obviously nonprofit organizations—organize themselves around charitable pursuits. These associations seek to help those outside of the group through philanthropic endeavors. Included in this form are the Knights of Columbus—a male-only Catholic organization dedicated to charity.⁶³ The Knights of Columbus’s “charitable activities encompass an almost infinite variety of local, national and international projects.”⁶⁴ Another example includes the United Way, which seeks to “advance the common good and mobilize the caring power of communities around the world” by “ignite[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.”⁶⁵ Charitable associations such as these express themselves outwardly through service to others.

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,”⁶⁶ 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.”⁶⁷ 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.”⁶⁸ Political groups exist to advocate beliefs to the public, and so could not exist without an outlet for outward expression.

Issue Based

Sharing many similarities and often overlapping with political groups, 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.⁶⁹ It describes its four million members as “among history’s most committed, most active

⁶³ See *Activities*, KNIGHTS OF COLUMBUS, <http://www.kofc.org/un/en/about/activities/index.html> (last visited Feb. 5, 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.”).

⁶⁴ *Id.*

⁶⁵ *About United Way Worldwide*, LIVE UNITED, <http://liveunited.org/pages/about-united-way-worldwide/> (last visited Feb. 5, 2012).

⁶⁶ *About Us*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, <http://www.fed-soc.org/aboutus/> (last visited February 19, 2012).

⁶⁷ *Id.*

⁶⁸ *About Us*, SDS, <http://www.newsds.org/about-us> (last visited February 19, 2012). In *Healy v. James*, the Supreme Court addressed Students for a Democratic Society and its role as an expressive association.⁶⁸

⁶⁹ *Wayne’s Commentary*, NRA (Feb. 10, 2012), http://home.nra.org/#/nraorg/text/generic_page,3.

and most politically savvy defenders of the fundamental freedom.”⁷⁰ Another issue-based group includes the NAACP—a group dedicated to preserving and enhancing the civil rights of Americans.⁷¹ 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. Even those groups nearing one end of the spectrum, may, at times, engage in group activity outside of its norm. 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.⁷²

Moreover, not only might the expression be different, but the constitutional provisions triggered will often be different—namely, freedom of speech or/and the free exercise clause.⁷³ For instance, few would question 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. 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.

⁷⁰ *Id.*

⁷¹ See *Welcome to the NAACP*, NAACP, <http://www.naacp.org/> (last visited Feb. 19, 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*, 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. *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁷² 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 (“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.”).

⁷³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of 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).

An example is provided by the Christian Legal Society (“CLS”), a religious-academic student organization. The Supreme Court specifically dealt with the nature of its expression in *Christian Legal Society v. Martinez*.⁷⁴ CLS is a national religious organization centered around Christian beliefs which describes its mission as follows:

1. 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; and
2. To establish vibrant Christian Legal Society student chapters at every law school in that nation and at key Christian colleges.⁷⁵

Additionally, CLS requires all members, as a condition of membership, to sign a “Statement of Faith.”⁷⁶ 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 membership.”⁷⁷ Sexually immoral conduct was defined to “include all 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.”⁷⁸ 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.⁷⁹

The case pits a religious-student organization—claiming rights to associate only with members who ascribe to their 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.”⁸⁰ 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.

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. 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.⁸¹ CLS, then, as a religious-academic organization, is clearly an expressive association, but less clearly a

⁷⁴ *Christian Legal Soc’y v. Martinez*, 130 S.Ct. 2971(2010).

⁷⁵ *Id.* at 3001; <http://www.clsnet.org/page.aspx?pid=367> (last visited Feb. 5, 2012).

⁷⁶ *Statement of Faith*, CHRISTIAN LEGAL SOCIETY, <http://www.clsnet.org/page.aspx?pid=367> (last visited Feb. 5, 2012).

⁷⁷ *Christian Legal Soc’y*, at 3001

⁷⁸ *Id.* at ____.

⁷⁹ *Id.* at 2980

⁸⁰ *Id.* at 2979.

⁸¹ For instance, CLS prides itself on its legal aid clinics. *Legal Aid Ministries*, CHRISTIAN LEGAL SOCIETY, <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.”).

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. 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. The Supreme Court seemed to agree, analyzing only CLS' expressive association claims rather than free exercise claims.⁸²

Beyond the threshold question of which guarantee—religion or 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. Between these two types the type and strength of scrutiny may appropriately be distinct. It is not our purpose to develop those differences, but such an effort would be built on a mapping exercise like the one we outline here.

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.⁸³ 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 seen as intimately connected. We will later deal separately with heterogeneity in the organizational composition of membership, which we will call the conglomerate question.

1. Beliefs and Aims

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

⁸² CLS argued that the Law School's nondiscrimination policy violated both their free exercise rights and right to an expressive association. *CLS*, 130 S. Ct. 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.

⁸³ An instructive history and discussion can be found in Justice Scalia's concurring opinion in *Citizens United v. FEC*, 130 S.Ct. 876, (2010).

Common aims or beliefs must therefore be ascertainable as a definitional prerequisite to protection under the First Amendment. 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. 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*. For example, 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 ACLU, for example, has a stated commitment to expression and action in defense of civil rights.⁸⁴ 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. 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 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.⁸⁵ 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 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. 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

⁸⁴ See www.ACLU.org.

⁸⁵ See www.lwv.org.

governance structure, and a set of aims and purposes to which the individual members subscribe or, at least, consent, and a duration.⁸⁶ 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 that the group's 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,⁸⁷ 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 Elections Commission*,⁸⁸ holding that, at least with respect to political speech, corporations qualify as fully protected speakers under the First Amendment. "Political 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 corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"⁸⁹ 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 speaker's [here corporation's] ideas."⁹⁰ That is, it matters not for First Amendment purposes that the shareholders and investors, for example, disagree with the corporation's speech. While *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 speech rights to individuals, at least with respect political speech. 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. Many, like the ACLU, have corporate members and receive significant corporate support. The protection such associations enjoy serves their members' expressive freedom and the

⁸⁶ See *infra* pages

⁸⁷ See Louis Menand, *THE METAPHYSICAL CLUB* (2002).

⁸⁸ 130 S.Ct. 876 (2010).

⁸⁹ *Id.* at

⁹⁰ *Id.* at

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 associations.

Nonetheless, the right to speak and the right to expressive association are two distinct questions.. Being an entity with freedom to speak does not in itself mean that the entity is an expressive association. The Court has held that the Jaycees and Rotary do not enjoy the freedom granted qualifying expressive associations.⁹¹ 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.

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 beliefs. 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-“corporation” organizations that share the qualities – the kinds of activities and aims—of corporations: limited partnerships; partnerships; alliances of various kinds; etc. Of equal importance, there are many types of “corporations” in terms of their objects, missions, and activities: charitable; religious; social service. And of course there are the dominant special purpose corporations that we will call “business corporations.”

It is to the business corporations that *Citizens United* was addressed,⁹² and it is on business corporations and organizations that we will principally focus on in relation to the expressive association interest of the organization itself, its activities and policies, and its 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. 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.⁹³

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. Their protection under the First Amendment, according to the

⁹¹ *Rotary International v. Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁹² Ironically, however, *Citizens United* was clearly an ideological and belief-based corporation whose mission was to engage in public communication. 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.

⁹³ Adolf A. Berle and Gardiner C. Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (New York:Harcourt, Brace & World, [1932] 1968).

Supreme Court, is for “commercial speech.”⁹⁴ 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 speaking as such, whether by an ad agency or the corporation itself. Second, the First Amendment primarily protects the public as consumers for whom the information is valuable in a market economy.⁹⁵ In these respects, the kind of First Amendment protection against government regulation of commercial speech is (1) less and differently strong 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. Reasonableness is instead the standard.

Outside of the commercial speech arena, business corporation speech receives much the same protection as individual speech, at least with respect to political speech as *Citizens United* held. 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. As a result, and if prior experience with “political” or “public issue” boundaries in other First Amendment settings is any indication,⁹⁶ 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 the effect of the change wrought by *Citizens United* will be for business corporation and shareholder claims that they are an expressive association, and that their expression, though animated by their commercial purposes, should qualify the corporation and its shareholders for protection that is no different than that accorded to the NAACP or to religious groups. We can identify three principle effects of such a claim of expressive association status, *if successful*:

1. Almost certainly the *Jaycees*⁹⁷ and *Rotary*⁹⁸ cases, which rested on what the Court deemed less valuable personal business interests in denying protection to the organizations’ membership rules,⁹⁹ will be undermined. Both 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. Business corporations generally, if they qualify as expressive associations, should be constitutionally entitled to have policies and practices regarding membership and

⁹⁴ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*, 425 U.S. 748 (1976).

⁹⁵ *Id.* at

⁹⁶ E.g., *Gertz v. Welch*, 418 U.S. 323 (1974) (abandoning as ungovernable the earlier matter of public concern standard)..

⁹⁷ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁹⁸ *Rotary International v. Duarte*, 481 U.S. 537 (1987).

⁹⁹ See *supra*; 468 U.S. 609 (1984)(O’Connor, concurring).

corporate activity that are protected by the strict scrutiny test against government regulation. These might include anti-discrimination laws as well as expression-related restrictions by the SEC, or EPA, or product safety agencies, and so on. The validity of such regulations would have to meet a much higher standard of strict First Amendment scrutiny.

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 and social and economic beliefs and affiliations.¹⁰⁰

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 First Amendment has been premised from the start on protecting associations of a certain type and on certain subjects in order that their members, and the association's expression for the members, not be inhibited by disclosure from engaging in group formation in areas important for the individual's liberty – like religion, politics, ideology, and social, economic, and cultural beliefs and interests. Such group formations foster individual belief within the group and strengthened expression in the public arena on behalf of the group and its beliefs.

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 public disclosure of the individual's membership. 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.¹⁰¹

In the face of *Citizens United*, are there grounds upon which business corporation can and should nevertheless be excluded from the category of expressive associations? Shareholders of a business corporation are typically 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 sticky 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 has had to rest on a value preference and a judgment that beliefs about civil rights are more central under the First Amendment than beliefs about commerce.¹⁰² But granting full speech liberty to business corporations and their expression places this distinction in considerable doubt. If the corporation's speech is *fully* protected, then it must be as important as religious, ideological, and governance interests (such as civil rights). The

¹⁰⁰ See *infra* at notes , discussing the *Doe* case.

¹⁰¹ *Id.* at ; *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁰² *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

purely self-interested commercial stuff 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 shareholder/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. As the Court said in *Citizens United*, these and related business matters and interests are critically important to the public in the market place of ideas.

Do sufficiently coherent common values exist among shareholders of business corporations to justify expressive association status? Or to put it a bit differently, outside of the commercial speech area where there may well be common interests and agreement by the shareholder/members, are there sufficient shared beliefs and convictions on matters of public policy among the 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 for an IBM shareholder are no less consistent and coherent than the common values of a member of the ACLU. The ACLU takes many positions, nationally and locally, and engages in a broad range of specific litigation and lobbying and political persuasion. Individual members often, indeed regularly, disagree strongly with some or many of the positions the ACLU takes. But they are united in the importance of civil liberties and the watchdog role the organization plays in the system. This is really 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. Absence 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.

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 Chevy's quite 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.

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 as a matter of First Amendment right, 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. 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.¹⁰³

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.

The purpose of an expressive association is to serve the beliefs and goals of the members individually. In an outward, speaking 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.¹⁰⁴ This implies a relationship between owners and managers that is quite distinct from the discretion afforded a board or corporate officers in a business corporation, who make decisions for the corporation as a separate enterprise whose profit-maximization and business success, as such, are the governing values for the shareholders. Those values are structural and not specific for the individual shareholders; they are part of the transactional terms when shares are purchased. They do not take individualized, belief-based, shape, other than in the atomized investment purposes of each individual shareholder. 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. 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. The investor/shareholder/partner interests are individualized and economic – atomized at the individual level. For most such organizations, unless they are structured around a set of non-business beliefs and goals that determine the group's actions, small business are both horizontally and vertically heterogeneous.

¹⁰³ *Citizens United*, 130 S.Ct. 876, (2010).

¹⁰⁴ See discussion *supra* notes

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. It may pursue expressive ends dictated by the owner. But it would not do so, 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.

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*¹⁰⁵

We begin our exploration of form in expressive associations with the recent case of *Doe v. Reed*,¹⁰⁶ 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. 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. The petition itself was a success, gaining sufficient signatures to suspend the everything-but-marriage law until a state-wide referendum vote.

Before the referendum, the State of Washington decided to publish the names and addresses of all petition signatories on the internet, as they qualified as public records under the Washington public records law. 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.

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

¹⁰⁵ Portions of this section are drawn in edited form from a chapter on the Doe case in the forthcoming book, Bezanson, *Too Much Free Speech* (forthcoming 2112, U Illinois Press).

¹⁰⁶ 130 S.Ct. 2811 (2010).

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.

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."

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. Instead, the relevant state action for First Amendment purposes was the 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, or for what*, the signator voted.

In fact, the claimed state action was even narrower, because disclosure of the names still didn't reveal the *reason* behind a signator's support for the referendum. 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.

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.

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. 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. It is hard to imagine an anonymity claim 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. 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. The act of signing would represent a real or attributed message of affiliation with an "association" of like-minded people. 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).

Such a claim would rest on an interest in privacy. That is, it 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.¹⁰⁷ 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 *expressing through affiliating*, not, as the Court seemed to treat it in *Doe*, a claim of physical safety compromised by threats or intimidation by others.

Such an expressive-association claim rests on the person's mental state and personal preferences. In theory, such a claim might be made in *Doe*. But the Chief Justice didn't expressly refer to it. Only Justices Alito and, more fully, Thomas, addressed and supported such a claim. 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. Such affiliations had traditionally been formal membership groups with their own expressive missions and activities. 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. Even "corporations" may claim to be affiliations for the purposes of expressive-association protection. 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. 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.¹⁰⁸ Nor was

¹⁰⁷ NAACP v. Alabama, 357 U.S. 449 (1958).

¹⁰⁸ See *Doe v. Reed*, 130 S.Ct. 2811 (2010) There were groups, but no affiliation claimed by Does or others. [As if affiliation not relevant.]

such a group alleged to be involved in any way.

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. Second, and critical for our purposes, the “message” lacks any reference to a formal “association.”

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. What does that mean for the 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. This must be the case, it might be argued, because such an 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. They comfort, reinforce, or challenge the individual. 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. The group can act collectively on their beliefs – politically, economically, morally, and ideologically. They can amplify and focus the message of their beliefs to the outside world. They can provide succor to those within the group – strengthening and reinforcing ideas, emotions, views, and beliefs.

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.¹⁰⁹ 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. 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. All the signators did was sign a petition, an expressively ambiguous act, at best. The motivations of individual signators cannot be ascertained simply by noting this act alone. The fact that 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.

c. An Alternative Approach: Privacy and Freedom from Association

¹⁰⁹ Jaycees case See discussion supra notes

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, a possible kin to the Court's freedom from compelled speech doctrine(s).¹¹⁰ 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 my own beliefs or expressed views—is disrupted by a compelled arrangement. 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.

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

A classic expressive association claim rests on the claim that individuals will be inhibited in speaking through and with groups and associations. 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. 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*, proof of violence against signers or, perhaps, it's almost certain occurrence in the near future.

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*.¹¹¹ Disclosure alone, the Court said, doesn't prevent anyone from voting, or from joining groups or associations in

¹¹⁰ *West Virginia St. Bd. of Educ., v. Barnette*, 319 U.S. 624 (1943); *Barnette*; religion in school cases; *Wooley v. Maynard*, 430 U.S. 705 (1977). *Maynard*; the *Johanns* government-sponsored private speech case

¹¹¹ 130 S.Ct. at

speaking in a campaign setting. 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.

2. *Expressive Ambiguity in Belief or Message*

One of *Doe*'s weakness 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. 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*. Unlike in *Doe*, the lack of clear expression in *FAIR* was based on the diffused structure of the association itself.

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, particularly if, as the Court argued 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.”¹¹² 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. *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)* centered on the application of the Solomon Amendment, which requires educational institutions to provide military recruiters equal access to students. 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.

FAIR is a coalition of law schools and law school faculties opposing discrimination. Its rallying cry – and the coalition's first project – was the overturning of the Solomon Amendment. 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. The Solomon Amendment threatened to strip funding in response to those policies.

¹¹² 547 U.S. 47, 68 (2006).

FAIR challenged the Solomon Amendment on First Amendment grounds, focusing on free speech claims: in essence, by requiring law schools to provide military recruiters access to students, the government was restricting the law schools' free speech – or, at least, compelling speech. There are several overlapping speech issues in *FAIR*: whether the Solomon Amendment restricts speech or conduct,¹¹³ whether the act of providing access to students qualifies as expression (and therefore qualifies for First Amendment protection),¹¹⁴ and whether requiring a law school to “host speech” it opposed violated its First Amendment rights.¹¹⁵ The opinion also addresses whether the Amendment unconstitutionally restricts the law school's expressive conduct.¹¹⁶

Only in the opinion's final section did Justice Roberts center on the idea of expressive association. He begins by explaining that the Court, in *Boy Scouts of America v. Dale*, had already “recognized a First Amendment right to associate for the purpose of speaking” – the “right of expressive association” that is the focus of this piece.¹¹⁷ In *Dale*, the Court had held that the Boy Scouts' message opposing homosexuality was impaired (and thus its free speech rights violated) by a New Jersey statute that required the group to include a homosexual as a scoutmaster.¹¹⁸

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

[T]he Boy Scouts' freedom of expression 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.¹¹⁹

That holding requires at least five separate determinations: 1) Is the organization in question an *association*? 2) Is it *expressive* (does it have a message)? 3) Does the law in question require *inclusion* of another member? 4) Does that inclusion impair the association's expression

¹¹³ The Court found that “as a general matter, the Solomon Amendment . . . affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.” *FAIR*, 547 U.S. at 60.

¹¹⁴ The Court concluded that the speech compelled by the Amendment—emails, for example, relaying an interview schedule—“is plainly incidental to the Solomon Amendment's regulation of conduct” and therefore allowable under *Giboney*. *Id.* at 62.

¹¹⁵ The Court found that requiring a law school to allow military interviewers access did not compromise the law school's message. *Id.* at 63.

¹¹⁶ *Id.* at 65–66.

¹¹⁷ *Id.* at 68.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (internal quotation marks omitted).

(its “message”)? 5) Does the significance of this intrusion outweigh any competing state interest? 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. 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 . . . law in *Dale*, the Solomon Amendment does not force a law school ‘to accept members it does not desire.’”¹²⁰ The Court made it clear that it is the *court*, not the association, that determines whether the association’s message is impaired: “[A] speaker cannot ‘erect a shield’ against laws requiring access ‘simply by asserting’ that mere association ‘would impair its message.’”¹²¹

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 doesn’t force inclusion, it does not compromise the group’s message. 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.

For example, even if the Court determines that FAIR qualifies as an association, is the *message* of a grouping of distinct faculties sufficiently clear to constitute 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. 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. 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 doesn’t compromise the group’s message.

Though it was FAIR that brought suit, the Court focuses whether *law schools* are expressive organizations, a peculiar decision based, apparently, on FAIR’s own pleadings. The Court, however, provides no analysis as to whether a law school qualifies as an association (we’d 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.

¹²⁰ *Id.* at 69 (quoting from *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), which is quoting in turn from *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

¹²¹ *Id.* (quoting from *Dale*, 530 U.S. at 653).

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 similarly refused to do so.

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.” 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. 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”) 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. 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, “signing a referendum petition amounts to ‘political association.’”

Thomas goes on to agree with Roberts’ majority opinion, 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.’” 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, by combining an individual voice with others like it, how does sharing space on a petition “amplify one’s voice” if others have joined the petition for an entirely different reason?

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 *CLS*, the majority and dissent both 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. 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. The examples the Court points to seem to all be dedicated to a clear, single cause.

CLS’ cause—and more importantly for the Court’s analysis, its message or expression—is less clear: Is it to promote faith? Or oppose sin? The law school seemed to object to two portions of CLS’ by-laws: one that prohibited “unrepentant homosexual behavior” and another that prohibited “non-believers” from being members. 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, for example, or the Jaycees from a law that would require them to include girls.

But *Rumsfeld v. FAIR* addressed a different kind of group: a group of groups, really, or what we'll call a “conglomerate” – an association of law school faculties. 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.

The Supreme Court didn't express any concerns about applying the same analysis to a conglomerate that it had applied to groups of individuals. But conglomerates create several identifiable problems in expressive association analysis, one of which is a diluted—or even conflicting—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.” “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: 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.

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 that a group incorporates, the less likely it is that the group truly makes an individual's speech more effective.

IV. 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 right holder.¹²² It is the associated activities of individual members that is at the heart of constitutional liberty.¹²³ 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.

1. 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. 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.
2. A basic distinction should be drawn between inward and outward oriented expressive associations. 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, in contrast expression geared towards the public where the main function is brotherhood in shared beliefs and augmentation of personal views by the combined voice of many. 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.

¹²² This is the very approach taken by the Supreme Court in the NAACP v. Alabama case, where the NAACP was given third party standing to represent the interest of individual members. 357 U.S. 449 (1958).

¹²³ But see our discussion of mixed corporate and individual associations, and conglomerate associations, for some variants on this central principle.

3. 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.
4. Elements of form are important to determining whether a group or an organization should qualify as an expressive association. 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 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.

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.