1999

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1999 SUP. CT. Rev. 203-252

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> "History should teach us . . . that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out."[1]

The freedom of association vies with privacy and state sovereign immunity as one of the most potentially capacious and least textually based rights that the Supreme Court has ever found in the Constitution. On the one hand, it is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion, and petition—without a corresponding right of association, so it is not surprising that the absence of any explicit mention of association in the Constitution has proven little barrier to recognition of the right. But, on the other hand, virtually all conduct is at least potentially associational, presenting serious challenges to crafting a coherent jurisprudence. As a matter of democratic theory, the right of association is something we cannot live

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AUTHOR'S NOTE: I would like to thank for their helpful comments and input my colleagues Nancy Chang, Dennis Hutchinson, Gerald Neuman, Stephen Schulhofer, and Steven Shapiro, and my research assistants Jessica Attie, Ellis Johnston, and Allen Pegg. I am or was involved in litigating three cases discussed herein: *Texas v Johnson*, 491 US 397 (1989); *Reno v American-Arab Anti-Discrimination Comm.*, 119 S Ct 936 (1999), and *Humanitarian Law Project, Inc. v Reno*, 9 F Supp 2d 1176 (CD Cal 1998).

[1] *Barenblatt v United States*, 360 US 109, 150–51 (1959) (Black, J, dissenting).

0-226-36317-1/2000/1999-0006$02.00

without; but as a matter of social governance, the right, if uncontained, is something we cannot live with.

The Supreme Court has sought to navigate these shoals in recent years by adopting a categorical approach, treating associations as either protected or unprotected depending on their character. The approach is founded on the proposition that associational rights derive from other constitutional rights, and therefore should be protected only when those other rights are at risk. On this view, the right of association is protected by the First Amendment when it serves an "expressive" function, and by the Fifth Amendment's right of privacy when it is "intimate." Association that is neither expressive nor intimate, however, is categorically excluded from constitutional protection.[2]

Two Supreme Court decisions last term reflect this categorical approach. In *City of Chicago v Morales*,[3] the Court rejected in a single sentence a "right of association" challenge to a Chicago loitering ordinance that criminalized public association with gang members. The Court simply asserted that there is no right of social association, apparently assuming without discussion that gangs are neither expressive nor intimate associations. Moreover, the Court suggested that the real problem with the Chicago ordinance was that it reached non-gang-members, and suggested that if the ordinance had been exclusively targeted at gang members, it might have withstood constitutional scrutiny.[4] The same term, in *Reno v American-Arab Anti-Discrimination Comm.*,[5] the Court dismissed a First Amendment challenge to selective enforcement of the immigration laws against alleged members of a terrorist organization. Lower courts had found a First Amendment violation because the government had selectively targeted eight aliens for deportation based on their political associations, without regard to whether the aliens had furthered any illegal conduct of the terrorist group with which they were allegedly connected. The Supreme Court's rationale focused on the problems with recognizing any selective enforcement defense to deportation, whether the selection were predicated on politics, race, or religion. But the Court simulta-

[2] See *Roberts v United States Jaycees*, 468 US 609, 617–23 (1984).

[3] 119 S Ct 1849 (1999).

[4] Id at 1862; id at 1864 (O'Connor concurring in part and concurring in judgment).

[5] *Reno v American-Arab Anti-Discrimination Comm.*, 119 S Ct 936 (1999).

neously if cryptically acknowledged that some (unstated) bases for selection might justify a selective enforcement defense, while asserting without explanation that selection based on membership in a terrorist organization certainly would not.[6]

The federal government has advanced a related categorical approach in other associational rights cases, in which it seeks to distinguish regulation of association per se from regulation of associational *conduct.* The government has argued that a restriction on financial contributions to a political group or individual should not be viewed as a direct restraint on association, subject to rigorous scrutiny, but as regulation of conduct that only incidentally affects the right of association, and therefore subject to relaxed scrutiny under *United States v O'Brien.*[7] This term, the Solicitor General urged the Supreme Court to adopt that view with respect to the regulation of political campaign contributions.[8] The government advances the same contention in defending the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), which criminalizes material support of the *lawful* activities of "foreign terrorist orgamizations." Here, too, the government argues that the law regulates the conduct of material support, not association per se, and should therefore be subject only to relaxed scrutiny.[9]

These developments threaten to erode constitutional protection of the right of association, and warrant a reconsideration of the right's purpose in a democratic society. The Court's and the federal government's categorical approaches to the right of association are unsatisfactory for three principal reasons. First, they require courts to engage in incoherent line-drawing. Under these approaches, judges must ask whether associations are sufficiently "expressive" to warrant protection, and whether acts of association should be viewed as "association" or "conduct." But most, if not all, association is expressive to one degree or another, and one cannot distinguish conduct from association without reducing the right to a meaningless formality.

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[6] Id at 947.

[7] 391 US 367 (1968).

[8] Brief Amicus Curiae of the United States in *Shrink Missouri Government PAC v Nixon,* No 98-963, 1998 US Briefs (LEXIS) 963, at *25 n 12.

[9] 18 USC § 2339A; 8 USC § 1189(a); *Humanitarian Law Project, Inc. v Reno,* 9 F Supp 2d 1176 (CD Cal 1998) (upholding in part AEDPA provisions making it a crime to provide humanitarian support to lawful activities of designated "foreign terrorist organizations"); Brief for the Appellees/Cross-Appellants in *Humanitarian Law Project, Inc. v Reno,* No 98-56062 (9th Cir pending), at 30–54.

Second, these categorical approaches cannot explain a central feature of the right of association—its prohibition on guilt by association. That principle insists on individual culpability, and in no way turns on whether the association for which an individual is punished is expressive or intimate, nor on whether the punishment turns on associational conduct or association per se.

Finally, the categorical approaches used by the Court and advanced by the government are insufficiently protective of association, which deserves recognition not merely as a derivative right, but as an independent constitutional right, and which if it is to be a meaningful right must protect associational conduct as well as association in the abstract. Association, no less than speech, plays a central role in both the political process and personal development, and deserves protection analogous to, but not limited to, that afforded speech.

Part I will sketch the current contours of the right of association, a right limited to "expressive" and "intimate" association, and will describe the government's attempts to extend this categorical approach by limiting associational protection still further to membership per se. Part II will argue that the Court's limitation of associational rights to expressive and intimate associations and the government's attempt to distinguish association from conduct are unworkable, inconsistent with the Court's own precedents, and fail to reflect the normative reasons for protecting the right of association. Part III will offer an alternative framework for addressing the right of association, borrowing from the Court's jurisprudence with respect to another potentially limitless but critical constitutional right, the right of symbolic speech. I will argue that the focus of a jurisprudence of association ought to be on *association*, not expression or intimacy, and that it should protect association in its physical manifestations as well as its abstract essence. The critical inquiry should not be whether an association is expressive or intimate, nor whether the individual affected is engaged in conduct or pure association, but rather whether the government's regulation arises from or is targeted at the associational character of the conduct. Where government seeks to regulate conduct without regard to its associational character, its actions should be subject to relaxed review, but where government seeks to regulate conduct because of its associational character, its actions must satisfy heightened scrutiny. Only that approach, which mirrors the

Court's jurisprudence of symbolic expression, does justice to the freedom of association.

I. Contours of the Right of Association

The right of association was born in the civil rights movement and crystallized in the crucible of the Cold War. The Court's first decisions expressly relying on a right of association protected the NAACP from harassment by southern states by barring compelled disclosure of its membership lists.[10] But the right took definitive shape—and certainly played its most important role in American life to date—in a series of decisions from the 1960s condemning a variety of anti-Communist measures for imposing guilt by association.[11] Since then, the Court has confronted assertions of the right in a wide range of settings, from objections to compulsory union dues,[12] to challenges to campaigu finance regulation,[13] to defenses against the application of nondiscrimination provisions.[14] While the Court has never seriously questioned its initial recognition of a right of association, it has been less than clear about what the right entails. As Judge Frank Easterbrook has stated, "We have never had a principled theory of the appropriate scope of regulation of non-economic association."[15]

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[10] See, e.g., *NAACP v Alabama ex rel Patterson*, 357 US 449 (1958); *Bates v City of Little Rock*, 361 US 516 (1960). As early as 1937, the Court invalidated the conviction of a man for participating in a meeting held under Communist Party auspices, but its decision rested on the right of assembly, not the right of association. *De Jonge v Oregon*, 299 US 353 (1937). *NAACP v Alabama* was the first time the Court explicitly relied on the right of association.

[11] See *United States v Robel*, 389 US 258, 262 (1967) (invalidating ban on Communist Party members working in defense facilities); *Keyishian v Board of Regents*, 385 US 589, 606 (1967) (invalidating statute barring employment in state university system to Communist Party members); *Elfbrandt v Russell*, 384 US 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party); *Scales v United States*, 367 US 203, 221–22 (1961) (construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent" to further group's illegal ends); *Noto v United States*, 367 US 290, 299–300 (1961) (same).

[12] *Abood v Detroit Bd of Educ.*, 431 US 209 (1977).

[13] *Buckley v Valeo*, 424 US 1 (1974).

[14] *Roberts v United States Jaycees*, 468 US 609 (1984); *Runyon v McCrary*, 427 US 160, 175–76 (1976) (rejecting private school's assertion that right of association barred application of 42 USC § 1981 to its racially exclusive admission policy); *Hishon v King & Spalding*, 467 US 69, 78 (1984) (rejecting law firm's assertion of right of association as defense to Title VII sex discrimination claim).

[15] Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harv J L & Pub Pol 91, 98 (1987).

In its most recent applications of the doctrine, the Supreme Court has sought to limit the right of association categorically, maintaining that the Constitution protects only expressive and intimate association.[16] The theory underlying this approach is that association is only a means of protecting other rights—speech and privacy—and therefore ought to receive protection only where the association serves one of those rights.

On this view, expressive association derives its protection from the First Amendment. Association is not mentioned in the First Amendment, the Court reasons, but deserves protection (at least where it is not intimate) because it is a necessary means to the ends that are expressly mentioned—speech, assembly, petition, and religion. The right to petition or to assemble, for example, would be meaningless if one did not have the right to associate with others for these ends. The practice of religion is almost always group based. And without the right to join with others for speech purposes, the right to speak would be largely ineffectual. Because nonintimate association is but a means to these expressly protected ends, however, it does not deserve constitutional protection where it fails to serve those ends.[17] Thus, a private St. Patrick's Day parade organization cannot be required to include a gay and lesbian contingent in its parade, because the parade is an act of expressive association whose message would be altered by the compelled inclusion of the unwanted group.[18] But the Jaycees and the Rotary Club can be required to admit women against their will, because, the Court concluded, women's admission would not seriously alter these groups' *expressive* activities.[19]

Professor Thomas Emerson advocated a similar approach to as-

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[16] *Roberts v United States Jaycees*, 468 US 609.

[17] Id at 618 ("the Court has recognized 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") (emphasis added); *Abood v Detroit Board of Education*, 431 US 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to association *for the purpose of advancing beliefs and ideas* is protected by the First and Fourteenth Amendments.") (emphasis added); *Bates v City of Little Rock*, 361 US at 522–23 (Constitution protects "freedom of association *for the purpose of advancing ideas and airing grievances*") (emphasis added).

[18] *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 (1995).

[19] *Roberts v United States Jaycees*, 468 US 609 (1984); *Board of Directors of Rotary Int'l v Rotary Club of Duarte*, 481 US 537 (1987); *New York State Club Assn, Inc. v City of New York*, 487 US 1 (1988).

sociation, maintaining, much as he did in the free speech area, that the Court should draw a sharp line between expression and action, protecting the former absolutely and the latter only minimally. In Emerson's view, it is "essential to determine in each [right of association] case—in most cases it is the critical issue—whether the conduct involved is properly classified as 'expression,' and hence fully protected, or is classifiable as 'action,' and hence subject to a greater measure of government regulation."[20] On Emerson's view, as on the Court's view, association deserves First Amendment protection where it is "expressive," but not otherwise.

Under the Court's current jurisprudence, nonexpressive association warrants constitutional protection only where it is "intimate," and then the source of its protection is not the First Amendment but the right of privacy. This right protects "highly personal relationships" and extends to such matters as "marriage; childbirth; the raising and education of children; and cohabitation with one's relatives."[21] As Kenneth Karst has defined it, "intimate association" describes "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."[22] Intimate associations, which serve a range of deep human needs, are an integral part of the private decision making that the Constitution protects from state interference. The right of "intimate association," however, is dependent on the association being private and intimate, and therefore does not extend to large nonintimate associations such as the Jaycees or the Rotary Club.

Under this approach, which might be called the "labeling" theory of the right of association, an association that is neither intimate nor expressive lacks any constitutional protection. In *Dallas v Stanglin*,[23] for example, the Court reasoned that social association in a dance hall was neither intimate nor expressive, and therefore concluded that its regulation did not implicate the right of association. Last term, the Court relied on *Stanglin* to reject in a single sentence an associational rights objection to a Chicago ordinance

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[20] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L J 1, 24 (1964).

[21] *Roberts*, 468 US at 618, 619 (internal citations omitted).

[22] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L J 624, 629 (1980).

[23] 490 US 19, 25 (1989).

that made it a crime to stand in public without an apparent purpose with a gang member, even though the law selectively imposed criminal penalties on gang members and those associated with them.[24]

Thus, the Court's approach to the right of association is, at least at first glance, a fairly simple one. Association is protected where it serves free speech or privacy aims, but not otherwise. The right of association is, in this view, less a right in itself than an implicit corollary to other rights, worthy of protection only where those other rights are at risk.

The federal government's approach to the right of association builds on the Court's "labeling" theory, but seeks to introduce still another categorical threshold inquiry. On its view, the right of association should trigger stringent scrutiny only when a government regulation penalizes association qua association. Thus, a law that penalized members of disfavored groups would be subjected to strict scrutiny. If, by contrast, a law penalizes not membership per se, but associational conduct, the government maintains, the law should trigger only relaxed scrutiny. Thus, a limit on financial contributions to political candidates, or a prohibition on material support to a terrorist organization, it has argued, should not be analyzed as a direct restraint on association triggering strict scrutiny, but as a regulation of *conduct* that only incidentally affects association, requiring only relaxed review.[25] The campaign finance regulation allows people to associate with the candidate in ways other than by making financial contributions, and the material support prohibition permits individuals to join terrorist organizations, the government argues, and therefore they should not be viewed as regulations of association, but of particular forms of conduct.

Borrowing from the Supreme Court's limitation of First Amendment protection to "expressive association," the government argues further that where a law regulates associational conduct and does so not to restrict expression, but to serve some other legitimate end, there is no basis for subjecting it to strict scrutiny. Campaigu finance restrictions are designed to limit corruption, and the material support provision is designed to limit terrorism,

[24] *Morales*, 119 S Ct at 1857.

[25] See notes 8 and 9.

the government maintains. Because these interests are unrelated to expression, it reasons, the laws should not be subjected to strict scrutiny. On this view, because nonintimate association is protected only where it serves expressive purposes, the regulation of nonintimate associational conduct sbould not trigger heightened review unless the regulation is a ruse for controlling or penalizing speech.

What the government's and the Court's approaches have in common is a search for limiting categorical principles. The Court's approach seeks to delimit the range of protected association at the threshold, by extending protection to association only where it serves expressive or privacy goals. The government's approach similarly seeks to treat a wide range of associational action as presumptively regulable conduct rather than presumptively protected association. Each of these categorical approaches has the benefit of limiting an otherwise capacious right. But, as I will argue below, each approach carves off far more than is warranted by the search for a limiting principle, and ends by sacrificing valuable associational rights.

II. The Constitutional Values of Association

The Court's modern-day limitation of the right of association to "expressive" and "intimate" association, and the federal government's attempt to extend that categorical approach still further, fail for three reasons. First, the lines these approaches would have courts draw are largely unworkable. Second, the restrictive reading of associational rights that they imply does not account for a central tenet of the right—namely, the prohibition on guilt by association. And third, these approaches shortchange association by treating it as a merely derivative right, in the face of a strong normative case for independent constitutional protection, grounded in the right of assembly and the structure of the Constitution.

A. DRAWING UNWORKABLE LINES

There is much to be said for adopting categorical approaches to constitutional law issues. Bright lines are easier to administer and enforce, and can give much needed breathing room to other-

wise delicate constitutional freedoms. Nowhere is this more important than in the area of political rights—the right to speak and associate with whom one pleases—because the chilling effect of uncertainty is so powerful there.[26] Accordingly, the Court has sought to establish bright-line rules to govern many speech issues, including the advocacy of illegal conduct,[27] sexual speech,[28] and libel.[29] But if a bright-line rule is to be effective, it must both pose a workable set of questions and carefully track the normative values of the right it is designed to protect. The Court's "labeling" approach to association—protecting only expressive and intimate association—and the government's extension of that approach fail both requirements. In this section, I will address whether these "labeling" approaches are administrable. In the next two sections, I will argue that even if the rules were workable, they do not serve the values underlying the right of association.

The Court's current approach to association establishes an incoherent inquiry. Asking whether association is expressive, and therefore deserving of First Amendment protection, is akin to asking whether a given action should be treated as "conduct" or "expression," an approach long rejected in free speech jurisprudence. Neither conduct nor association is usefully divided into "expressive" and "nonexpressive" categories. All association, like all conduct, is at least potentially expressive.[30] At a mimimum, the act of associating with a group expresses something about one's relationship to other members of the group. In most instances, it will also express something about one's values and self-image. Even a purely social association—joining a bridge club, for example, or choosing which bar or dance club to frequent—is expressive of one's interests, likes

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[26] *NAACP v Button*, 371 US 415, 433 (1963) (because First Amendment "freedoms are delicate and vulnerable," and "need breathing space to survive, government may regulate in the area only with narrow specificity"); *Reno v American Civil Liberties Union*, 117 S Ct 2329, 2344–45 (1997).

[27] *Brandenburg v Ohio*, 395 US 444 (1969).

[28] *Miller v California*, 413 US 15 (1973).

[29] *New York Times v Sullivan*, 376 US 254 (1964).

[30] Kenneth Karst has argued that:

> [a]lmost everything we do is expressive in one way or another, and thus to say that the First Amendment is a generalized presumptive guarantee of liberty to do anything that has expressive aspects would be much like saying that the constitutional right of privacy guarantees "the right to be let alone." The First Amendment would, in short, be stretched to cover all our constitutional freedoms.

Kenneth Karst, 89 Yale L J at 654 (cited in note 22).

and dislikes, and character. In a social world, we are defined, and we define ourselves, by the relationships we have with others, from the most intimate to the most public.

By expressive association, the Court seems to mean an association whose purpose is to express a point of view or idea. Thus, the ACLU is an expressive association because its very purpose is to gather like-minded people together to express their common views about the importance of protecting civil liberties. The local dance hall obviously has no such advocacy purpose. But it is not clear why choosing to go to the local dance hall is less expressive for the individual who makes that choice than choosing to go to an ACLU meeting is for an ACLU member. The dancer may well be expressing the view that companionship, camaraderie, drinking beer with friends, and physical expression are more important than defending individual liberties, for example.

In any event, if there is such a thing as nonexpressive association, it is far from clear how courts are to go about distinguishing it from expressive association. The question whether an association is expressive might turn either on the individual's subjective experience or on an objective assessment of the association from the standpoint of the reasonable observer. If the inquiry is subjective, wherever it matters individuals will likely claim that their association is expressive. Can courts realistically reject an individual's claim that she experienced her act of association as expressive?

An objective test fares little better. From an objective standpoint, all associations are expressive, even if they are not intended to express a particular point of view. All acts of association inevitably communicate something about the interests, character, or likes and dislikes of the actor. Even secret societies, which if truly secret do not communicate anything to the outside world, are expressive vis-à-vis other members of the secret society, and may well serve an expressive purpose for the individual. Thus, it makes little sense to ask whether a given association is "expressive," because in some sense all probably are.

At first blush there is undoubtedly a commonsense difference between the ACLU on the one hand and Standard Oil or the Mafia on the other. The ACLU's purpose is almost exclusively expressive, while the principal purpose of Standard Oil or the Mafia is to make as much money as possible, through licit and/or illicit means. But for many if not most of those who associate with Stan-

dard Oil or the Mafia, their association is nonetheless expressive in some way of who they are and what they believe, just as are their associations with family, church, friends, and neighbors. Even business associations provide a sense of identity and meaning to the lives of those who choose to associate themselves with them. And if the line between the ACLU and Standard Oil seems clear, how should we characterize the *New York Times*, Working Assets, or Benneton, for-profit businesses that seek to maximize profits but whose purpose includes the expression of certain points of view?

The Court's other threshold inquiry asks whether an association is sufficiently "intimate" to warrant protection of the Due Process Clause. Here again, the lines are extremely difficult to draw. What gives a heterosexual couple a right of intimate association but not a homosexual couple, for example? Here the threshold inquiry is identical to the question of whether there is a substantive right. This category, however, is less susceptible to the critique that it is incoherent in all settings. It is relatively noncontroversial, for example, to claim that joining the Rotary Club is not an act of "intimate" association. While the location of the line between "intimate" and "nonintimate" can never be precise, it at least operates as a rough principle of exclusion. The problem with the limitation to "intimate" association is less its manageability than its normative justification, a point to which I turn in the following sections.

The government's proposal that the Court distinguish regulation of mere association from regulation of associational conduct is also incoherent. The government's suggestions would resurrect in the jurisprudence of association the approach Justice Black sought to take with respect to speech. Justice Black believed that speech should be protected absolutely, but in order to render this principle acceptable he drew a sharp distinction between "speech" and "action."[31] Professor Thomas Emerson advocated a variant of that approach,[32] but no one else on the Court has ever been convinced, and for good reason. The attempt to distinguish speech from action is futile. As Louis Henkin wrote, "Speech *is* conduct,

[31] See, e.g., *Konigsberg v State Bar*, 366 US 36, 60–76 (1961) (Black dissenting); *Barenblatt v United States*, 360 US 109, 134, 140–53 (1958) (Black dissenting); Hugo Black, *The Bill of Rights*, 35 NYU L Rev 865, 874–81 (1960).

[32] Thomas I. Emerson, *The System of Freedom of Expression* 8–9 (1970).

and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols."[33] Similarly, John Hart Ely has pointed out that the inquiry is incoherent because expressive conduct is simultaneously 100 percent conduct and 100 percent expressive.[34]

The same is true of association. All association takes the form of conduct, even if the conduct is simply showing up at a meeting, obtaining a membership card, paying dues, siguing onto a mailing list, or clicking a mouse. One cannot associate with others without taking action. There is no association without conduct. Drawing a distinction between pure association and conduct undertaken for associative purposes, therefore, is as futile as distinguishing between speech and conduct.[35]

B. BEYOND EXPRESSIVE AND INTIMATE ASSOCIATION — GUILT BY ASSOCIATION

Even if one could overcome the incoherence problems with limiting protection to expressive, intimate, or "pure" association, these bright-line rules fail the more important test of normative fit. First, they cannot be squared with the doctrine's bedrock principle—namely, that guilt must be personal, and that guilt by association is forbidden.

A simple example illustrates the point. Under modern doctrine, one has no constitutional right to be a member of a social country club, because the club would likely be treated as neither expressive nor intimate, and there is no right of social association.[36] Yet a statute making it a crime to be a member of any country club that obtains illegal kickbacks from a vendor would plainly be unconstitutional, absent a requirement that the prosecutor prove that the

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[33] Louis Henkin, *Foreword: On Drawing Lines*, 82 Harv L Rev 63, 79–80 (1968).

[34] John Hart Ely, *Flag Desecration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis*, 88 Harv L Rev 1482, 1494–96 (1975).

[35] This is not to suggest that no distinctions can be made between regulation of the associational and the nonassociational aspects of conduct. As I will maintain later, courts can and should ask whether the government's regulation of conduct derives from the associational character of the conduct, or derives from an interest in regulating the conduct irrespective of its associational character. But that is very different from asking whether a given action is conduct or association, when it will almost always assuredly be both.

[36] *Dallas v Stanglin*, 490 US 19, 25 (1989); *City of Chicago v Morales*, 119 S Ct at 1857.

individual member specifically intended to further the club's illegal conduct. Such a statute would violate the right of association in the most direct sense of the term, by imposing guilt by association. Similarly, while it is surely constitutional to criminalize the use of legitimate business activities as a cover or laundering operation to further illegal activity, as the Racketeer Influenced and Corrupt Organizations Act (RICO) does,[37] it would surely be unconstitutional to prohibit mere association with the Mafia.

The principle of individual culpability, captured doctrinally in the "specific intent" requirement, was developed at a time when the right of association was most at risk in this country—during the McCarthy era, when thousands of Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or fellow travelers with the Communist Party. The Court's early treatments of anti-Communist initiatives did not demonstrate much backbone,[38] but in time the Court developed a bright-line rule that effectively halted such efforts: the government may not impose criminal or civil disabilities on an individual because of his association with a group that engages in legal as well as illegal activities unless it proves that he specifically intended to further the group's illegal ends.

Anti-Communist initiatives almost by definition took the form of guilt by association: they punished Communist Party members and supporters because the Communist Party had engaged in illegal activities, regardless of whether the individual had supported those illegal activities. In a series of cases, the Court consistently rejected that rationale as a basis for imposing either civil or criminal disabilities, and instead required a showing of individual specific intent to further the Party's illegal ends.[39]

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[37] Racketeer Influenced and Corrupt Organizations Act, 18 USC §§ 1961–68.

[38] See, e.g., *Dennis v United States*, 341 US 494 (1951); *Communist Party v Subversive Activities Control Bd.*, 367 US 1 (1961).

[39] See *United States v Robel*, 389 US 258, 262 (1967) (invalidating ban on Communist Party members working in defense facilities absent showing of "specific intent"); *Keyishian v Board of Regents*, 385 US 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v Russell*, 384 US 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party because "[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Scales v United States*, 367 US 203, 221–22 (1961) (construing Smith Act, which

The Court's most extensive discussion of the principle came in its first assessment of the Smith Act's membership provisions, which made it a crime to be a member of the Communist Party. In *Scales v United States*, the Court interpreted that statute narrowly in order to avoid the imposition of guilt by association, which it said would violate both the Fifth Amendment Due Process Clause and the First Amendment. With respect to the Fifth Amendment, the Court reasoned:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[40]

The due process principle recognized here is substantive, not procedural. It forbids the imposition of guilt by association no matter how clear the notice and no matter how fair the hearing. The point is that guilt must be "personal" in order to be consistent with due process. To punish A for the acts of B, without showing any connection between A and the illegal acts of B other than A's general connection to B, is fundamentally unfair. It is to punish a moral innocent. The "specific intent" requirement that the Court read into the Smith Act, and which it has subsequently held must be satisfied whenever the government seeks to penalize an individual for the acts of his associates, responds to the substantive due process problem by tying the imposition of guilt to an individually culpable act.

The guilt-by-association principle, and its doctrinal corollary, the requirement of "specific intent," also rest on the First Amendment. The Court in *Scales* noted that "[i]f there were a similar

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barred membership in organization advocating violent overthrow of government, to require showing of "specific intent"); *Noto v United States*, 367 US 290, 299–300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

[40] *Scales*, 367 US at 224–25: Long before *Scales*, Justice Murphy made the same point, concurring in *Bridges v Wixon*, 326 US 135, 163 (1945):

> The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. . . . It prevents the persecution of the innocent for the beliefs and actions of others.

blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired."[41] Thus, in order to save the Smith Act, the Court interpreted it to require a showing of specific intent to further the illegal ends of the Communist Party.[42] When interpreted to require "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence,'" the Court reasoned, the statute did not unnecessarily infringe on lawful associational activity.[43]

Significantly, the Court in the Communist Party cases never questioned Congress's findings that the Party was engaged in illegal activity, including terrorism and espionage, toward the end of overthrowing the United States by force and violence. Nor did the Court ever question that protecting the nation against such threats was a compelling interest. But even accepting that government interest, the Court insisted that "[a] law which applies without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and relies on "'guilt by association,' which has no place here."[44] Under the First Amendment, then, the "specific intent" standard is necessary to tailor the government's regulation to the harms it may legitimately regulate and to minimize the infringement of lawful association. It is, in effect, the result of the application of strict scrutiny to a regulation of association: it identifies the only narrowly tailored way to punish individuals for group wrongdoing (essentially by requiring evidence of *individual* wrongdoing), just as the *Brandenburg* test sets forth the narrowly tailored way to respond to advocacy of illegal conduct.

In the wake of *Scales*, the Court consistently applied the "specific intent" standard to a range of anti-Communist statutes, including many that imposed only a civil disability.[45] While the principle of individual culpability is strongest where criminal sanctions are sought, it plainly extends to civil disabilities as well. The point is

[41] *Scales*, 367 US at 229.

[42] Id at 221–30.

[43] Id at 229 (quoting *Noto v United States*, 367 US at 299).

[44] *Elfbrandt v Russell*, 384 US 11, 19 (1966).

[45] Note, *Civil Disabilities and the First Amendment*, 78 Yale L J 842 (1969).

that individuals should not be sanctioned for the bad acts of others, but only for their own bad acts. Whether the sanction is criminal or civil in nature is not determinative.[46]

The guilt-by-association principle quite plainly does not turn on the association being expressive, intimate, or "pure." Its twin rationales are that guilt must be personal, and that legitimate associations should not be sacrificed in the name of deterring illegitimate associations. Both rationales would apply to the hypothetical country club statute noted above. To punish a member who had no connection to the illegal kickbacks would be to punish a moral innocent, and therefore would contravene the due process principle that guilt must be personal. And to punish a member who had no intent to further the club's illegal conduct would be to deter legitimate association. Nor would the analysis be different if the statute punished the payment of dues to the country club as opposed to membership; it would still be imposing a penalty not for the culpable acts of the individual but for his or her wholly legitimate associational activity. Thus, the guilt-by-association principle, the cornerstone of the right of association, cannot be squared with the Court's limitation of the right to expressive and intimate association, nor with the federal government's suggestion that the right protects only membership itself.

While today's Court has never explicitly questioned its holdings in the Communist Party cases, its swift dismissal of the right-of-association claim in *Morales* suggests that the Court has lost sight of this principal feature of the right. The Chicago ordinance at issue imposed a criminal disability on gang members that did not apply to other citizens. Other citizens were free to stand on street

[46] The Court has continued to adhere to the prohibition on guilt by association, and to extend it to noncriminal settings. In *Healy v James*, 408 US 169 (1972), the Court held that a public university could not deny use of meeting rooms to a student group on the ground that it was affiliated with a national organization, Students for a Democratic Society, that had engaged in illegal violent activity. The Court stated that "[i]t has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." Id at 186 (quoting *United States v Robel*, 389 US at 265). Similarly, in *NAACP v Claiborne Hardware*, 458 US 886 (1982), the Court held that civil liability could not constitutionally be imposed on leaders of the NAACP on the ground that a boycott led by the NAACP had resulted in violence, absent evidence that the leaders specifically intended the violence. The Court stated that "guilt by association is a philosophy alien to the traditions of a free society and the First Amendment itself." Id at 932 (internal citations omitted).

corners with no apparent purpose to their hearts' content. But gang members who engaged in the same activity (and those who did so with them) could be ordered to move on and arrested. The definition of "gang member," moreover, required no evidence that an individual had engaged in or sought to further any illegal activity, but only that the *gang* engaged in illegal activity.[47] The ordinance was a classic instance of guilt by association.

The Court's one-sentence response to the associational claim—that the right of association does not encompass "social contact between gang members and others"[48]—misses the point altogether. The associational problem with the Chicago ordinance was that it hinged criminal disability on gang *membership* without any showing that the individual sought to further the gang's illegal activities. Such a law might not violate the right of association if the gang engaged in exclusively illegal activity, but few if any gangs do, and in any event that was neither an allegation in the case nor a prerequisite to application of the ordinance.

The Court's failure to recognize the guilt-by-association feature of the *Morales* case went even further, as the Court affirmatively suggested that the ordinance's infirmity might have been cured had Chicago adopted a more extreme version of guilt by association. Justice Stevens, speaking for the majority, invalidated as unconstitutionally vague the ordinance's definition of loitering as standing with "no apparent purpose," but added in dicta that the ordinance would "possibly" be constitutional "if it only applied to loitering by persons reasonably believed to be criminal gang members."[49] Justices O'Connor and Breyer, concurring, agreed that "no appar-

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[47] The Chicago ordinance provided in relevant part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such person to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section. Gang Congregation Ordinance, Chicago Municipal Code § 8-4-015(a), quoted in *Morales*, 119 S Ct at 1854 n 2.

The ordinance defines "loiter" to mean "to remain in any one place with no apparent purpose." Id at § (c)(1). And it defines "criminal street gang" to mean any group "having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Id at § (c)(2).

[48] *Morales*, 119 S Ct at 1857.

[49] Id at 1862.

ent purpose" was vague, but twice said that if the law were limited to gang members, it "would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court."[50]

This suggestion is a non sequitur. Limiting the scope of persons subject to the law would do nothing whatsoever to respond to the vagueness of the term "no apparent purpose." The term is equally vague whether it applies to a million citizens or a single citizen. As Justice Scalia explained:

> if "remain[ing] in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.[51]

Justice Thomas echoed that critique in a separate dissent.[52]

That the majority did not even offer a response to Justices Scalia and Thomas on this point only reveals how blind the majority was to the guilt-by-association problem. But beyond the logical fallacy pointed out by the dissenters, the majority had it exactly backward. Narrowing the ordinance to gang members would make the statute worse, not better, for it would exacerbate the law's reliance on guilt by association. The Court's suggestion that what cannot be done constitutionally to ordinary citizens might be done constitutionally to gang members, simply by virtue of their gang membership, is directly contrary to the lessons of the Court's Communist Party cases.

The majority was evidently motivated by concern about gangs, which undeniably pose a serious threat to the health and well-being of inner-city communities across the country. Gangs engage in criminal activity, fight over turf, and intimidate law-abiding citizens. They enforce antisocial norms, encouraging youth to engage in crime. And many young people growing up in poverty-stricken high-crime neighborhoods report that they feel compelled to join gangs for protection. Gangs play a particularly destructive role be-

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[50] Id at 1865 (O'Connor concurring); see also id at 1864.

[51] Id at 1879 (Scalia dissenting).

[52] Id at 1885 (Thomas dissenting) (challenging logic of suggestion that ordinance might be cured by limiting it to gang members).

cause they often provide one of the few sources of peer support and guidance in communities decimated by poverty and crime.

But it is undoubtedly the rare gang that engages exclusively in illegal behavior. Gangs also provide social activities and networks of support to their members. For better or worse, peer groups are a central part of virtually every young person's upbringing; gangs are simply one particularly urban and usually lower class form of peer group. They provide for their members much as fraternities, sororities, basketball leagues, the Boy Scouts, and the Moose Lodge do.[53] Some gangs engage in political activity, working for community development, voter registration, and civil rights.[54]

Accordingly, for analytical purposes, most gangs are like the Communist Party—they engage in both legal and illegal activity. Antigang laws impermissibly impose guilt by association to the extent that they hinge adverse treatment of individuals (criminal or civil) on their gang membership, without evidence that the individual specifically intended to further the illegal ends of the gang.

This becomes clear in the Chicago case if one simply substitutes Communist Party for gang. If the Chicago ordinance had selectively authorized police to order loitering Communist Party members and their associates to move under penalty of arrest, the law's infirmity on associational grounds would have been self-evident, and it would certainly have been no response to assert that the right to social encounters on street corners is not protected by the First Amendment. There is no need to prove that the "activity" targeted is constitutionally protected where the law discriminates on its face on the basis of association. A law that criminalized gum chewing by Communist Party members would not be saved from constitutional attack by the fact that the Constitution does not protect the chewing of gum. There is no constitutional right to

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[53] Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 Harv CR-CL L Rev 477, 487–88 (1994); Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 Wake Forest L Rev 943, 949 (1993) ("Gangs are, and always have been, groups of youths formed for many of the same motives that youths have always organized themselves—friendship and social identity as well as the pursuit of delinquent or criminal activities"); Felix M. Padilla, *The Gang as an American Enterprise* 9–10, 91–117 (1992).

[54] See, e.g., Don Terry, *Chicago Gangs, Extending Turf, Turn to Politics*, NY Times (Oct 25, 1993), at A12 (gang involvement with health care, education, voter registration, and supporting of candidates); *Gang Summit Ends with Call for Jobs*, LA Times (May 3, 1993), at A13 (noting gang summit policy positions on employment and civil rights); George Papajohn, *Gangs Aren't Rookies in City Politics*, Chicago Tribune (March 31, 1995), sec 1 at 1.

work in defense facilities, yet in *United States v Robel*[55] the Court recognized that when the government denied the opportunity to work on the basis of Communist Party membership, without the requisite showing of specific intent, it violated the right of association. Thus, even if there is no right to hang out on a street corner, a law that selectively bars gang members from hanging out while permitting all others to do so imposes guilt by association.

The Court's insensitivity to guilt by association is also reflected in its offhand treatment of the associational claim in *Reno v American-Arab Anti-Discrimination Comm.*[56] The lower courts in that case had found that the government had selectively targeted eight aliens for deportation on the basis of their alleged political associations with the Popular Front for the Liberation of Palestine (PFLP), a constituent group within the Palestine Liberation Organization. The government called the PFLP a "terrorist organization," but did not dispute that it engaged in a wide range of perfectly legitimate and lawful activity, from the provision of health care and day care to political and cultural activities. Nor did the government ever allege that the eight aliens had intended to support any of the PFLP's unlawful activities. The lower courts enjoined the deportations on a showing that the INS had not sought to deport similarly situated aliens, and had targeted these aliens for deportation based on their political associations without any evidence of specific intent to further the PFLP's illegal ends.[57]

The Supreme Court's principal holding in *American-Arab Anti-Discrimination Comm.* involved a jurisdictional issue. It concluded that a provision of the Illegal Immigration and Inmigrant Responsibility Act of 1996 had effectively stripped the federal courts of jurisdiction to consider the aliens' selective-enforcement claims. It then confronted the question whether this interpretation raised constitutional concerns by depriving the federal courts of jurisdiction to hear a constitutional claim. The Court concluded that it did not, essentially because the Constitution does not recognize selective enforcement as a defense to deportation. The Court's analysis studiously avoided discussion of the First Amendment, fo-

[55] 389 US 258 (1967).

[56] 119 S Ct 936 (1999).

[57] *American-Arab Anti-Discrimination Comm. v Reno*, 70 F3d 1045 (9th Cir 1995), 119 F3d 1367 (9th Cir 1998), rev'd, 119 S Ct 936 (1999).

cusing instead on the problems that any selective-enforcement claim would present, and thus the decision can be read as having little or no implications for the doctrinal question of whether aliens have First Amendment rights.[58] But the Court did expressly leave open the possibility that *some* "outrageous" grounds for selective deportation might violate the Constitution, while asserting without explanation that selective deportation for being a "member of an organization that supports terrorist activity" was not sufficiently outrageous.[59]

The fact that the Court felt no need to explain why the grounds for selection in *Reno v American-Arab Anti-Discrimination Comm.* were not outrageous again illustrates its blindness to guilt by association.[60] In other contexts, the Court has stated that guilt by association "has no place here"[61] and "is a philosophy alien to the traditions of a free society and the First Amendment itself."[62] Infringements on the right of association generally trigger as stringent scrutiny as infringements on the freedom of speech or violations of equal protection. Thus, it is not clear why a selective deportation motivated by race would be more "outrageous" than one motivated by association. Nor, if the guilt-by-association principle stands, is it clear why selective deportation triggered by association with the Democratic Party would be more "outrageous" than one motivated by association with the PFLP. Yet the Court evidently felt the point to be so obvious that it needed no explanation.

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[58] See Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v AADC*, forthcoming Georgetown Immig L J (2000); David Cole, *Damage Control? A Comment on Professor Neuman's Reading of Reno v AADC*, forthcoming Georgetown Immig L J (2000).

[59] 119 S Ct at 946–47.

[60] Justice Stevens, concurring, implied that the guilt-by-association principle was not triggered here because the government was not "punishing" innocent members, but merely selecting whom to deport among otherwise deportable aliens. 119 S Ct at 952 (Stevens concurring in part). But that view requires a rejection of the legion of cases applying the guilt-by-association principle to the imposition of civil disabilities and civil liabilities. See notes 45 and 46. If it violates guilt by association to deny a student group access to university meeting rooms on the basis of their association, surely it violates guilt by association to target an alien for deportation on that basis. On Justice Stevens's view, it would presumably be constitutional for the Internal Revenue Service to announce a policy of targeting for tax fraud investigations and prosecutions members of the Democratic Party, because it would not be "punishing" innocent members, but only those guilty of tax fraud.

[61] *Elfbrandt v Russell*, 384 US at 19.

[62] *NAACP v Claiborne Hardware*, 458 US at 932 (internal citations omitted).

The problem may be that it is always easier to recognize guilt by association in hindsight. It is no accident that the Court's approach to anti-Communist laws developed as the Communist threat waned. Our fears today are directed not at Communists but at "gangs" and "terrorists." The Court's inability to recognize the guilt-by-association problem in *Morales* and *American-Arab Anti-Discrimination Comm.* may be attributed to the blinders of today's hysteria. But it is precisely when those fears are greatest that constitutional protection is most needed.

The Court's early right-of-association decisions make clear that the constitutional right of association cannot be limited, as the Court's more recent decisions suggest, to expressive and intimate association. The right extends to all associations, including the nonexpressive and nonintimate, at least inasmuch as it forbids the imposition of disabilities on individuals merely because of their ties to a group, absent proof of specific intent to further some illegal activity. The specific intent standard distinguishes individual culpability from guilt by association, and because it serves that independent purpose, applies even if the association charged is neither intimate nor expressive.

C. ASSOCIATION AS AN END, NOT A MEANS — THE RIGHT TO WEAR A HAT

In addition to ignoring the lessons of its own decisions condemning guilt by association, the Court's modern jurisprudence of association also fails adequately to reflect the normative reasons for protecting the right of association. It treats the right of association as derivative, protected only to the extent that it serves other constitutional rights. But the constitutional case for protecting association extends beyond the right's derivative functions, and supports protecting association not merely as a means to protecting other rights, but as an independent right in itself. The guilt-by-association cases discussed in the preceding section demonstrate one way in which the right warrants protection independent of the concern for expression or privacy. But the normative case for constitutionally protecting association is even stronger, and ultimately justifies an independent jurisprudence of association, modeled on free speech jurisprudence, but not limited to expressive instances of association.

First, while the right of association is not literally mentioned in the Constitution, it nonetheless finds solid textual support in the First Amendment as the modern-day manifestation of the right of assembly. One of the Court's early right-of-association cases, *Bates v City of Little Rock*,[63] treated the rights of assembly and association interchangeably, albeit without explanation,[64] and the Court's right-of-association cases have relied on *De Jonge v Oregon*, an early right-of-assembly case.[65] That intuitive connection between the rights of assembly and association deserves more explicit recognition.

When the Constitution was drafted, association and assembly were virtually synonymous. In the absence of modern communications, it was difficult, if not entirely impossible, to associate effectively without physically assembling. While correspondence by messenger and primitive mail delivery made association and coordinated action marginally conceivable without physical assembly, the shortcomings of such avenues in a period without a national postal service or telephones were self-evident. If one asks why the Framers protected the right of assembly, the reasons would have little to do with the physical act of gathering together in a single place, and everything to do with the significance of coordinated action to a republican political process. Today we are connected by telephones, faxes, modems, and the internet, and association can and more often than not does take place without any physical "assembly." This is not to denigrate the value of face-to-face encounters and public demonstrations and meetings, but simply to acknowledge that what was sought to be furthered by protecting assembly was not assembly for its physical sake, but for the *association* and collective action that it made possible. Thus, just as the

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[63] 361 US 516 (1960).

[64] The Court stated:

> Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

Id at 522 (internal citations omitted).

[65] See, e.g., *NAACP v Claiborne Hardware*, 458 US at 908; *NAACP v Alabama*, 357 US at 460.

Court famously adapted the Fourth Amendment to the modern era by interpreting it to protect against searches by electronic wiretaps despite the absence of a physical invasion of property,[66] so the First Amendment "right of assembly" is best understood today as protecting the right of association irrespective of whether a physical meeting actually takes place.[67]

The right of association also finds support in the intent of the Framers of the Constitution. The centrality of collective action to a republican government was so accepted by the Framers that the only objection to including the right to assemble in the First Amendment was that the right was so obvious that it did not need to be mentioned. Representative Theodore Sedgwick proposed deleting the reference to the right to assemble on the ground that "it is a self-evident, inalienable right which the people possess; it is certainly a thing that never would be called in question."[68] He argued that "[i]f people freely converse together, they must assemble for that purpose," and sarcastically likened protecting the right to assemble to declaring that "a man should have the right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he pleased."[69] John Page of Virginia replied, however, that precisely because the right of assembly was so fundamental, it needed to be expressly protected: "If the people could be deprived of the power of assembly under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."[70] Sedgwick's motion "lost by a considerable majority."[71] Thus, everyone agreed on the importance and purpose of the right of assembly; the only disagreement was whether something so fundamental as to be obvious needed to be mentioned in the Bill of Rights.

In its first extensive discussion of the right to assembly, the Su-

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[66] *Katz v United States*, 389 US 347 (1967).

[67] As Glenn Abernathy has argued:

> Freedom to assemble need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall. It can justifiably be extended to include as well those persons who are joined together through organizational affiliation.

M. Glenn Abernathy, *The Right of Assembly and Association* 173 (2d ed 1981)

[68] 1 *Annals of Congress* 731–32 (1789).

[69] Id.

[70] Id.

[71] Id.

preme Court in effect agreed that the right was so basic that it did not need to be mentioned in the Constitution. In *United States v Cruikshank*, the Court stated that the right of assembly was implicit in the structure of our government, and that the First Amendment merely confirmed a pre-existing right: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[72] If the right of assembly is implicit in a republican government, so too is the right of association, since the very reason assembly was considered implicit was that it made association possible.

Thus, the right of association finds textual and historical support in the right of assembly, a right considered so fundamental that it would find constitutional protection even if never mentioned in the Bill of Rights, and a right that was protected not for its physical attributes but because without it collective action would be largely impossible. The right of association is simply the modern-day manifestation of the right to assembly.

An independent constitutional right of association also finds strong normative support. Indeed, all of the arguments traditionally advanced to justify protecting speech also apply to association, and not only to expressive association. As the Supreme Court acknowledged in *Cruikshank*, the freedom to associate, no less than the freedom to speak, is a critical element of a democratic government. Just as speech is critical to self-government,[73] so is association. Indeed, the central metaphor in Alexander Meiklejohn's famous argument for protecting speech is a town meeting, a simultaneous confluence of speech, assembly, and association. There can be no politics without association. Politics in a democratic society requires collective action. If the government were free to restrict association, it could effectively close off the avenues for political change. As the Supreme Court recognized in *De Jonge v Oregon*,

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[72] 92 US 542, 552 (1876). The Court elaborated:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, none of the attributes of citizenship under a free government. . . . It is found wherever civilization exists.

Id at 551.

[73] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Supreme Court Review 245.

free assembly is critical "in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[74]

Like the freedom of speech, the freedom of association also performs a checking function on the power of the state.[75] Voluntary associations can and often have become important independent sources of authority that mediate and limit the effective power of the state. Indeed, in today's world of "interest group politics," the state in a very real sense must be responsive to private groups, rather than vice versa. Our tax code encourages the creation of such mediating institutions, and these institutions play a very important role in society. As Arthur Schlesinger has described, "[t]raditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations."[76] It was this feature of associations as mediating structures of authority that led Alexis de Tocqueville, the philosophical father of the right of association, to call association "a necessary guarantee against the tyranny of the majority."[77] Laurence Tribe has similarly warned that "to destroy the authority of intermediate communities and groups . . . destroys the only buffer between the individual and the state."[78]

A defender of the Court's "labeling" theory of the right of association might respond to the link between association and democratic self-governance and the checking function of mediating institutions by maintaining that protecting association when undertaken *for expressive purposes* fully serves these normative goals. And, indeed, the centrality of association to the democratic process does justify extending heightened protection to association for political purposes, just as speech doctrine accords extra scrutiny to regulation of political speech. But even if the link between association and the democratic process were the only normative justifica-

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[74] 299 US 353, 364–65 (1876).

[75] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am Bar Found Res J 521.

[76] Arthur M. Schlesinger, *Paths to the Present* 23 (1949).

[77] 1 Alexis de Tocqueville, *Democracy in America* 194–95 (Bradley ed 1948) (cited below as "Tocqueville").

[78] Laurence H. Tribe, *American Constitutional Law* 1313 (2d ed 1988).

tion for protecting speech and association, and it is not, protection for association should extend beyond expressive association. First, it is difficult and perhaps impossible to draw a clear line between political and nonpolitical association, just as it is difficult to distinguish political from nonpolitical speech.[79] Are fraternities, sororities, country clubs, or corporations nonpolitical? Many of their most adamant critics would certainly argue otherwise. Second, nonpolitical association plays a critical role in making political association possible, by forging links that are then used to unite individuals and groups around issues of governance. Friendships forged on street corners and golf courses, and in dance halls and country clubs, are essential to making political association possible. Social ties often provide the seeds for more overtly political association.

In addition, as with speech, the reasons for protecting association are not limited to its political uses. Choosing with whom to associate is as central to personal development and self-realization as are the freedoms of speech and belief.[80] We define ourselves in relation to others, and our associations simultaneously shape and reflect our sense of self. The freedom to choose one's associates is therefore fundamental to self-realization. Again, Tocqueville writes:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.[81]

On this view, mediating institutions are important not only for their checking function, but because they foster civic virtue in indi-

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[79] See Chafee, *Book Review*, 62 Harv L Rev 891, 899–900 (1949) (arguing that the most serious weakness in Meiklejohn's defense of political speech is the difficulty of drawing lines between public and private speech); Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Supreme Court Review 1, 15–16 (same).

[80] Martin Redish, *Freedom of Expression: A Critical Analysis* 11 (1984) (arguing that protection of free speech serves "individual self-realization," encompassing both an individual's development of his or her abilities, and an individual's control over his or her own destiny by making "life-affecting decisions"). Thomas Emerson, *The System of Freedom of Expression* 6 (1970) (speech is necessary to "assuring individual self-fulfillment").

[81] Tocqueville at 196.

viduals.[82] Association's role in furthering self-realization, self-fulfillment, and civic virtue is not limited to expressive or intimate association. Membership in a country club or sorority, or social association at the local bar, can and often will play a role in defining who we are and how we act as much as membership in the Republican or Communist parties. As Amy Gutmann writes:

> Freedom of association is valuable for far more than its instrumental relationship to free speech. . . . Freedom of association is increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, and recreation and sports. . . . associational freedom is not merely a means to other valuable ends. It is also valuable for the many qualities of human life that the diverse activities of association routinely entail. By associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others. In addition, we often simply enjoy the company.[83]

Finally, like the freedom of speech, the right of association serves as a safety valve; allowing persons to join with like-minded others makes it less likely that individuals and groups will go underground and adopt violent means.[84] Thus, the Supreme Court in *DeJonge v Oregon*,[85] unanimously reversing a conviction for participation in a Communist Party meeting, stated that "the security of the Republic, the very foundation of constitutional government" lies in preserving the right of assembly "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[86] Again, Tocqueville concurs: "In countries where associations are free, secret soci-

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[82] See, for example, Robert Bellah, Richard Madsen, William Sullivan, Ann Swidler, and Steven Tipton, *Habits of the Heart* (1984); Ernest Gellner, *Conditions of Liberty: Civil Society and its Rivals* (1994); Robert Putnam, *Bowling Alone Revisited*, 5 Resp Comm 18 (Spring 1995); Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996).

[83] Amy Gutmann, *Freedom of Association: An Introductory Essay*, in Amy Gutmann, ed, *Freedom of Association* 3–4 (1998).

[84] *Whitney v California*, 274 US 357, 375 (1927) (Brandeis concurring) ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies"); Thomas Emerson, *The System of Freedom of Expression* 7 (1970) (same).

[85] 299 US 353 (1937).

[86] Id at 364–65.

eties are unknown. In America there are factions, but no conspiracies."[87] Here, too, social associations that are not explicitly expressive in the Court's sense of the term serve an important function in allowing otherwise alienated persons to find social support.

Thus, the reasons for protecting association closely parallel those for protecting free speech. Moreover, they are in no way dependent upon association as a mere instrument to speech or privacy, but rest on the independent significance of association as a mechanism for participating in democratic politics, checking state power, achieving self-realization, and providing a safety valve for individuals unhappy with the status quo.[88] If these normative claims are persuasive, the right of association should receive constitutional protection on its own terms, without a threshold inquiry into whether it is expressive or intimate.

The Court's efforts to cabin the right of association are understandable, even if they are ultimately unsatisfactory. The right of association is potentially limitless. Virtually everything we do in society involves some degree of association with someone else. Only the mythical self-supporting hermit could go through life without associations with others. At the same time, society must impose limits on associational freedom: the state enforces obligations to children and family, imposes restraints on association in workplace environments and public accommodations, assigns children to schools and classrooms, and establishes voting districts, all of which affect our freedom of association. The very act of governing a society requires the regulation of individuals' ability to associate. The Court's efforts to limit the right, then, can be seen as efforts to avoid constitutionalizing all social regulation. More specifically, the right of association, and particularly its negative corollary, the right not to associate, have been advanced as objections to some of the nation's most important goals, in particular, desegregation.[89]

But much the same can be said of speech. Like association, ex-

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[87] Tocqueville at 202–03.

[88] See George Kateb, *The Value of Association*, in Amy Gutmann, ed, *Freedom of Association* 35 (1998).

[89] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959); Robert Bork, *Civil Rights—A Challenge*, New Republic (Aug 31, 1963).

pression can be found in virtually everything that a person does, particularly once it is accepted that conduct can be as expressive as verbal or written speech. At the same time, for a society to operate, it must limit speech in many settings—a teacher in a classroom, a judge in a courtroom, an employer in a workplace, and a police officer on a street corner all have to exercise the authority to limit speech, and could not effectively do their jobs without that power. And the right of free speech, like the right of association, can be used to hinder important social goals.[90]

What is needed is a more coherent approach to association. The Court's current approach—ignoring guilt by association, treating association as a second cousin to expression and privacy, and denying any protection for nonintimate and nonexpressive association—fails adequately to reflect the normative reasons for protecting association under our Constitution, and requires the drawing of incoherent and unpersuasive lines. In the following section, I propose an alternative framework.

III. An Alternative Framework

A jurisprudence of association is conceptually challenging for some of the same reasons that a jurisprudence of "symbolic speech" is challenging. As we have seen, just as virtually all conduct can be expressive, so virtually all conduct can be associational. Even a murderer may be expressing a point of view or acting in association with others. Thus, extending constitutional protection to association or symbolic speech potentially brings all conduct within the ambit of the First Amendment, much of it unworthy of protection and obviously subject to regulation. Yet a great deal of valuable expression takes the form of conduct other than speech, including music, dance, sculpture, photography, and marching, and accordingly it is unacceptable to hold that the First Amendment protects only verbal and written speech. Similarly, association would be an empty formality without the conduct that brings people together—meeting, raising funds, engaging in volunteer work, and the like—and therefore to limit the right of association to the formal act of joining a group would eviscerate the right.

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[90] See Charles Lawrence, Mari Matsuda, et al, *Words That Wound* (1993).

As I have sought to demonstrate above, the Court's attempt to limit the scope of the right by protecting association only when it is expressive or intimate does not solve the problem. Nor does the federal government's attempt to classify human action as "association" or "conduct," and to treat regulation of anything but membership per se as a regulation of conduct only indirectly affecting associational rights. The alternative approach I propose here abjures the unrealistically rigid categories of "expressive," "intimate," "conduct," and "association," at least as threshold inquiries, and instead maintains that heightened scrutiny should be triggered whenever the governmental interest in regulating particular activity arises in some measure from the activity's associational character. This approach finds strong precedent in the Court's treatment of symbolic speech, and therefore I will first describe that jurisprudence.

It is now well accepted that drawing a line between unprotected conduct and protected speech does not solve the dilemma of how to provide limited protection to symbolic speech without simultaneously constitutionalizing all regulation of human conduct.[91] There is no such line, because so much is expressed through conduct. Accordingly, in reviewing regulation of symbolic speech, the Court does not ask whether the *activity* regulated is speech or conduct, but instead focuses on the *government's purpose* in regulating the activity.[92] The Court has acknowledged that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[93] This necessarily follows once one admits that virtually all conduct is potentially expressive. The mere fact that the government has prohibited conduct that is potentially expressive does not trigger heightened First Amendment scrutiny, because all conduct is potentially expressive. But where the government regulates conduct *because* it has expressive elements, its regulation is subjected to the same scrutiny accorded the regulation of speech itself. In the latter situation, the government does *not* have a "freer hand" in restricting expressive

[91] See text at notes 31–34.

[92] Purpose as used here is distinct from motive. It refers to the purposes evident from the face of the statute and the interests asserted by the government, but does not authorize an inquiry into the motives of legislators. *United States v O'Brien*, 391 US 367, 382–84 (1968); John Hart Ely, 88 Harv L Rev at 1496–97 (cited in note 34).

[93] *Texas v Johnson*, 491 US 397, 406 (1989).

conduct than it does in restricting speech itself; rather, its regulation must satisfy the same scrutiny applied to regulations of pure speech.

For example, an environmental ordinance banning all public burning would be subjected to mimimal scrutiny, even though it would have the effect of barring persons from burning flags or crosses to express their point of view. On the other hand, a law selectively prohibiting cross-burning or flag-burning is subject to strict scrutiny, because the governmental purpose in narrowly regulating such conduct is necessarily to restrict what those types of burnings express.

This approach is captured in the familiar cases of *Texas v Johnson*[94] and *United States v O'Brien*.[95] In *O'Brien*, the Court subjected a law banning the destruction of draft cards to mimimal scrutiny because it accepted as legitimate the government's objective of preserving all draft cards for purposes of administering the draft. On its face, the law prohibited the destruction of draft cards irrespective of any message such destruction might send; it applied to private as well as public destruction, for example. The government's purpose in preserving draft cards, the Court reasoned, would be undermined whether a draft card was destroyed for expressive or nonexpressive purposes. Thus, the provision regulated conduct—draft card destruction—without regard to its communicative effect, and was subject only to lenient review.[96]

The Court in *O'Brien* contrasted the draft card regulation it upheld to "one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful," which it illustrated with a cite to *Stromberg v California*.[97] In *Stromberg*, the Court struck down a ban on flag displays that expressed "opposition to organized government." By its terms, the law regulated

[94] 491 US 397.

[95] 391 US 367 (1968).

[96] *O'Brien* states that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v O'Brien*, 391 US at 377. This test sounds more stringent than it really is. In practice, the application of *O'Brien* nearly always leads to a decision upholding the statute.

[97] 283 US 359 (1931).

conduct only when it expressed a particular message. In *Texas v Johnson*, the 1989 decision invalidating a Texas flag-burning statute, the Court reaffirmed that "we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression.' "[98] The *Johnson* Court held *O'Brien* inapplicable because the government's interest in banning flag-burning could not be attributed to anything other than the message thought to be communicated by flag-burning.

The conclusion that a statute is targeted at the communicative impact of particular conduct is not necessarily fatal. It simply means that the law will be treated as a content-based regulation of speech and subjected to heightened scrutiny. If the government is able to identify a compelling state interest and means narrowly tailored to further that end, the regulation will be upheld.[99] Indeed, while the Court's First Amendment jurisprudence generally applies strict scrutiny to content-based regulation of speech,[100] the doctrine nonetheless permits a great deal of content-based regulation. The Court has in many settings applied strict scrutiny in categorical rather than case-by-case fashion, leading to doctrine that does not consistently use the strict scrutiny rubric but can often be understood as reflecting the end result of such analysis on a categorical level. Thus, the Court permits the regulation of speech advocating illegal conduct only where the speech is likely and intended to produce imminent lawless action, a test that identifies a narrowly tailored way to further the state's compelling interest in forestalling the illegal conduct.[101] Similarly, the "fighting words" doctrine, which permits the regulation only of direct face-to-face insults likely to provoke a fight, identifies a narrowly tailored way to further the government's interest in forestalling violence.[102]

In other areas, such as obscenity, commercial speech, and regu-

[98] *Texas v Johnson*, 491 US at 407 (quoting *O'Brien*, 391 US at 377).

[99] See, e.g., *Burson v Freeman*, 504 US 191 (1992) (upholding law prohibiting solicitation of voters within 100 feet of polling place); *Buckley v Valeo*, 424 US 1 (1976) (upholding limits on contributions to candidates for federal office).

[100] See *R.A.V. v City of St. Paul*, 505 US 377, 382 (1992); *Boos v Barry*, 485 US 312, 321 (1988).

[101] *Brandenburg v Ohio*, 395 US 444 (1969).

[102] *Texas v Johnson*, 491 US at 409; *Gooding v Wilson*, 405 US 518 (1972); *Cohen v California*, 403 US 15, 20 (1971).

lation of cable television, the Court permits regulation of speech on showings that are less than compelling and through means that are less than narrowly tailored.[103] But in all of its modern speech jurisprudence, the Court's categorical rules are the result of a careful balancing of government interests against private rights, rather than a simple denial that any speech interests exist. When the Court, for example, says that obscenity is "unprotected," it does not mean that obscene speech is not *speech*, but that as a categorical matter, the interests in regulating obscene speech outweigh its value.[104] Similarly, "fighting words" and "advocacy of imminent illegal conduct" are sometimes said to be unprotected, but that conclusion is not the result of a threshold determination that such expression is not speech, but the end result of a careful balancing of interests between the freedom of expression and the state's interest in forestalling imminent violence.

A similar inquiry should guide analysis of laws regulating association. Instead of attempting to characterize associations as categorically protected (expressive and intimate) or unprotected (nonintimate and nonexpressive) as a threshold matter, the Court should ask instead whether the government's purpose in regulating arises in some measure from the conduct's associational character, and whether the regulation is neutral or selective. If the state regulates conduct generally, the fact that the regulation may incidentally impede some conduct engaged in for associational purposes should not trigger heightened scrutiny. For example, while a juvenile curfew has the effect of impeding associational activity by juveniles during curfew hours, it is not targeted at association as such, but at the heightened risk of juvenile crime at night, whether engaged in individually or in groups. By contrast, a curfew imposed only on gang members would be targeted at gang membership, an act of association. Under the latter law, the same conduct—being out after hours—would be permitted when engaged in by non-gang-members, but prohibited when engaged in by members. As the law's trigger would be association, it would properly be reviewed as a direct regulation of association and "subject to the closest

[103] See, e.g., *Miller v California*, 413 US 15 (1973) (obscenity); *Central Hudson Gas v Public Service Comm'n*, 447 US 557 (1980) (commercial speech); *Denver Area Educational Telecommunications Consortium, Inc. v FCC*, 116 S Ct 2374 (1996) (cable television).

[104] See *R.A.V. v City of St. Paul*, 505 US at 386.

scrutiny,"[105] whether or not the gang were found to be "expressive" or "intimate."

On this analysis, the Chicago ordinance in *Morales* directly infringed First Amendment associational rights. The law regulated conduct—hanging out in public places without an apparent purpose—only when done in association with gang members. As such, the governmental interest in regulating "ar[ose] in some measure" from the associational character of the conduct; in fact, the government demonstrated no interest whatsoever in regulating loitering unless it was done in association with a gang member. As a result, the ordinance should have been treated as a regulation of association. Because it imposed a disability on an act of association with a gang member without any showing that the individual or the gang member specifically intended to further any illegal ends of the gang, the ordinance would not survive such First Amendment review.[106] In this setting, namely, where government seeks to impose a disability on an individual because of his association with a group, narrow tailoring requires proof of individual specific intent to further the illegal ends of the group.

The above analysis does not compel a case-by-case application of strict scrutiny. Regulation of association, like regulation of speech, comes in many forms, some more deserving of skepticism than others, and the regulation of association may be subject to categorical rules analogous to those that govern a great deal of speech regulation. In the speech setting, content-based regulations are more suspicious than content-neutral regulations, and viewpoint-based laws are the most dubious. So in the associational setting, regulations that selectively target particular associations are more suspicious than laws generally regulating association, particularly when the selectivity is based on the political identity of the group. Thus, a law generally limiting political campaign contributions is more problematic than a tax law regulating all gifts across the board, because the campaign finance law singles out political association. But a law selectively limiting contributions only to particular political parties would be even more problematic. The former campaign regulation would be, in associational terms, analo-

[105] *NAACP v Alabama*, 357 US at 461.

[106] *Elfbrandt v Russell*, 384 US at 19.

gous to a content-based regulation of speech, while the latter would be analogous to a viewpoint-based speech restriction.

Similarly, regulation of economic associations, such as corporations, is properly subject to less stringent scrutiny, much as commercial speech regulation triggers less stringent scrutiny under speech doctrine. Reasonable regulations of business associations and corporations designed to deter fraud and to protect consumers, shareholders, and employees would generally be acceptable, just as reasonable regulations requiring financial disclosures, constraining speech in the workplace, and prohibiting deceptive advertising generally pass First Amendment muster without the heightened justifications necessary for other sorts of regulation.

Thus, the fact that a law is targeted at association does not necessarily mean that it should be invalidated; like the right of free speech, the right of association is not absolute. I do not propose here to identify all of the rationales that might justify infringements on association. My purpose is more limited—to identify when associational rights have been infringed, and therefore when First and Fifth Amendment interests must be weighed in the balance. My principal claim is that given the centrality of association to both a democratic system of government and self-realization, the regulation of association should be subject to scrutiny akin to that accorded the regulation of speech, without regard to whether the association is itself expressive or intimate.[107]

On the approach I have outlined here, it may be that certain types of association, like certain types of speech, could be said to be "unprotected." But as in the speech area, such a categorical determination would have to be justified by an explicit balancing of interests after recognizing that associational interests have been infringed, rather than by a mere assertion that the right of association is not implicated ab initio. The Court has unfortunately

[107] On this view, constitutional protection is not limited to expressive and intimate association, but the presence of an expressive or intimate element in the governmental purpose may trigger additional constitutional concerns. A regulation that targets association because of its expressive nature, like a regulation that targets any conduct because of its expressive nature, would be treated as a regulation of speech, wholly apart from the right of association. And, similarly, a regulation targeted at intimate association would raise privacy concerns in addition to associational issues. Thus, the regulation of expressive and intimate association may raise *additional* constitutional objections, but the right of association is implicated simply by the targeting of association, whether or not the association targeted is expressive or intimate.

sought to carve out categories of unprotected association simply by definitional fiat, without a careful weighing of the state's interests against associational freedoms. In *Dallas v Stanglin*, for example, the Court upheld a Dallas law limiting entry to certain youth dance halls to persons between the ages of fourteen and eighteen. The Court reasoned that while dance hall congregations "might be described as 'associational' in common parlance," they have no First Amendment protection because "this activity qualifies neither as a form of 'intimate association' nor as a form of 'expressive association.'"[108] To support its conclusion, the Court noted that the dance halls held as many as 1,000 persons on any given night, that the youth who came together there were not members of any particular "organized association," and that the patrons did not "take positions or public questions."[109]

If, as I have argued, association should be protected in its own right, not merely incident to the protection of speech and privacy, this analysis is wrong.[110] It would be difficult to imagine a more concrete example of assembly or association than the decision by a number of citizens to gather together in a large hall for an evening. The dance hall is not an assembly for the purpose of petitioning for the redress of grievances, of course, but the Court has long since rejected such a narrow reading of the right.[111]

This is not to say that the Court should have reached a different bottom line in *Dallas v Stanglin*. But a more sound basis for the result would have been to acknowledge that the regulation infringed on association as such, and then to uphold it as the associational equivalent of a content-neutral time, place, and manner re-

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[108] *Dallas v Stanglin*, 490 US 19, 25 (1989).

[109] Id at 24–25.

[110] Indeed, even accepting the Court's limitation of association to intimate and expressive associations, its reasoning is unpersuasive. Many intimate associations are initiated on the floors of dance halls. Dance itself is a traditional form of expression. And the exchange of ideas that takes place in a social setting may be just as valuable from a speech perspective as that which takes place on the floor of a political convention or academic conference.

[111] Compare *NAACP v Alabama*, 357 US at 460–61 ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters") with *United States v Cruikshank*, 92 US at 552 (noting that the right of the people to assemble "for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such, under the protection of, and guaranteed by, the United States").

striction on speech.[112] The Dallas ordinance did not prohibit association between youth and adults, but merely reserved certain times and places for youth to associate among themselves, much as states commonly do in the context of schools, organized youth activities, and organized adult activities. The city's interest in maintaining a safe environment for children was indisputably reasonable. The Dallas ordinance did not target any particular organizations, group identities, or ideologies. And it left youth and adults with plenty of other opportunities to associate with each other. The Court's simple assertion that "social association" is unprotected, however, does not adequately explain the result, for had Dallas forbade entry to the dance hall only to adult members *of certain gangs*, the law plainly would have violated the right of association.

The law in *Morales* could not similarly be viewed as a time, place, and manner restriction. Most importantly, it was not content-neutral, for it prohibited loitering *with gang members*. A law that forbade loitering by anyone in certain prescribed areas would be content-neutral, but this law selectively applied only to persons engaging in particular disfavored associations. Moreover, the ordinance barred loitering in any public place, and accordingly did not leave open ample alternative channels for association and assembly. Those who sought to loiter with gang members were effectively instructed to do so only in private.

The approach urged here might also require a different analysis, although not necessarily a different result, in the cases challenging the application of nondiscrimination laws to private groups. In *Roberts v United States Jaycees* and its progeny, the Court upheld the application of nondiscrimination provisions to private men-only clubs by finding that the expressive rights of members would not be undermined significantly by a requirement that they accept women. Applying its threshold analysis, the Court first concluded that the groups were not intimate because they were too large. The Court then acknowledged that the groups were expressive, but determined that the state's mandate that they include women

[112] See, e.g., *Ward v Rock Against Racism*, 491 US 781, 791 (1989); see also *Roberts v United States Jaycees*, 468 US at 634 (O'Connor concurring) (noting that expressive association may be subject to content-neutral time, place, and manner restrictions).

would not significantly affect their expressive rights. As many commentators have pointed out, this treatment is unsatisfactory; whatever else one might say about it, a state law dictating the terms of a private association's membership criteria clearly infringes on association.[113] Indeed, the Court admitted as much, stating in *Roberts* that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regnlation that forces the group to accept members it does not desire."[114] But in turning to whether the state's interest in nondiscrimination justified the regulation, the Court asked only whether the group's *expressive* abilities would be affected, wholly ignoring any associational infringement that did not affect expression. A better account would have acknowledged that the nondiscrimination requirement infringed directly on members' rights of nonassociation, and would have forced the Court to confront more directly the competing interests at stake: when is it appropriate for the state to regulate private association in the name of furthering equality norms? Instead, the Court avoided that question by ignoring all associational rights not directly linked to expression.

The Court's prior treatment of the conflict between nondiscrimination principles and the right of association is no more satisfying. The Court has repeatedly rejected associational arguments as defenses to nondiscrimination laws in the business setting, albeit without much discussion.[115] In *Railway Mail Assn v Corsi*, for example, the Court upheld a New York civil rights law barring unions from discriminating on the basis of race. It did so principally because such a result "would be a distortion of the policy manifested in [the Fourteenth A]mendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis

[113] See, e.g., William P. Marshall, *Discrimination and the Right of Association*, 81 Nw U L Rev 68 (1987); Douglas Linder, *Freedom of Association After Roberts v United States Jaycees*, 82 Mich L Rev 1878 (1984). George Kateb, *The Value of Association*, in Amy Gutmann, ed, *Freedom of Association* 35 (1998); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect and the Dynamics of Exclusion*, in Amy Gutmann, ed, *Freedom of Association* 75 (1998).

[114] *Roberts*, 468 US at 623.

[115] *Hishon v King & Spalding*, 467 US 69, 78 (1984) (rejecting freedom-of-association objection to application of Title VII sex discrimination prohibition to law firm); *Runyon v McCrary*, 427 US 160, 175–76 (1976) (rejecting freedom-of-association objection to application of 42 USC § 1981 prohibiting discrimination in contracting to racially discriminatory private schools); *Railway Mail Assn v Corsi*, 326 US 88, 93–94 (1945) (rejecting freedom-of-association objection to New York antidiscrimination provision as applied to labor union).

of race or color."[116] It also reasoned that labor unions "function under the protection of the state," and that excluding minority employees from the union might deprive them of all means of protection from unfair treatment because the union's bargaining terms would apply to all employees.[117] Later cases simply assert that "'the Court . . . places no value on discrimination,'" and that while "'invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection.'"[118]

But these rationales do not explain so much as announce a result. The Court has never fully confronted the tension between the nondiscrimination principle and the right of association, but has instead sought to deny the conflict. As Herbert Wechsler noted many years ago, nondiscrimination laws conflict with associational rights.[119] As anyone who has had a dinner party knows, the act of associating is an act of discrimination; to choose to associate with some is almost always a choice not to associate with others. The right of association would mean little if the right to choose one's associates could be overridden every time the state decides that a set of criteria are discriminatory. Yet the norm of equality would also mean little if all private entities were free to discriminate on the basis of race, sex, or any other criteria. How to balance these concerns is a difficult question, one beyond the scope of this article, and one not fully worked out by the Court itself. My only point is that the Court should not avoid the question by ignoring the associational interests at stake.[120]

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[116] 326 US at 94.

[117] Id.

[118] *Runyon v McCrary*, 427 US at 176 (quoting *Norwood v Harrison*, 413 US 455, 470 (1973)).

[119] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959).

[120] Justice O'Connor's concurrence in *Roberts* may come closer to confronting the issue, although her answer is also not ultimately satisfactory. She insists that associational rigbts are at stake, but suggests that associations organized essentially for commercial purposes are part of the public marketplace and thus more susceptible to regulation than noncommercial organizations. While the line between commercial and noncommercial is not an easy one to draw, it at least seeks to identify a public-private divide. The world of commerce is an inherently public and deeply regulated world, and government has a strong interest in ensuring nondiscriminatory access to that world, much as it has a strong interest in ensuring nondiscriminatory access to the vote. In both instances, that interest may justify the regulation of certain private entities that play a critical role in regulating such access. See *Terry v Adams*, 345 US 461 (1953) (invalidating as violation of the Fifteenth Amendment white-only preprimary election of private Democratic club, because of role it played as step toward

The federal government's proposed approach to associational rights cases is even more problematic than the Court's. It would draw a sharp dichotomy between conduct and association, maintaining that regulations of conduct, no matter how associational, should be subject only to lenient review, while reserving stringent review for regulations of association per se. Thus, it has argued that restrictions on financial contributions to political campaign candidates and foreign terrorist organizations should be treated as the regulation of conduct, subject to relaxed scrutiny, not the regulation of association, subject to stringent review. On this view, the right of association would demand stringent scrutiny only when a law expressly regulated membership or affiliation per se, leaving the government a free hand to regulate all other associational conduct.

The Solicitor General pressed this argument before the Supreme Court in *Nixon v Shrink Missouri Government PAC*,[121] a case revisiting the constitutionality of campaign contribution limits. In that case, the court of appeals struck down state campaign contribution limits virtually identical to the federal contribution limits upheld in *Buckley v Valeo*.[122] The Solicitor General, in an amicus brief supporting the state statute, invited the Supreme Court to reconsider *Buckley*, arguing that it had "applied an unduly stringent standard of review" to contribution limits, and that "[d]irect contributions of money to political candidates might be regarded as a form of expressive conduct subject (under *O'Brien* analysis) to significant regulation, so long as the regulation serves to advance governmental interests unrelated to suppression of the contributor's 'message.'"[123] This argument essentially resurrects the argument accepted by the court of appeals but rejected by the Supreme Court in *Buckley*, namely, that restrictions on political campaign contributions limit conduct—the giving and spending of money—rather than speech or association per se, and therefore should be subject only to lenient review.[124]

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general public election); *Smith v Allwright*, 321 US 649 (1944) (same). But it does not follow that nondiscrimination principles are not also important in noncommercial settings, such as private schools

[121] 68 USLW 4102 (US Jan 24, 2000).

[122] 424 US 1 (1976).

[123] Brief Amicus Curiae of the United States in *Nixon v Shrink Missouri Government PAC*, No 98-963 (S Ct), 1998 US Briefs (LEXIS) 963, *25 n 12.

[124] See *Buckley v Valeo*, 424 US at 16–18 (discussing and rejecting court of appeals's reliance on *O'Brien*).

The Court in *Shrink Missouri Government PAC* correctly declined the Solicitor General's invitation, and reaffirmed that heightened scrutiny applies to regulation of political campaign contributions.[125] As the Supreme Court correctly noted in *Buckley* itself, distinctions between the expenditure of money and speech or association are inherently problematic, given the virtual impossibility of speaking or associating effectively without spending money. More importantly, however, the *Buckley* Court concluded that even if one could draw such a distinction in theory, campaign finance regulation would be subject to stringent scrutiny because the government's purpose in regnlating campaign contributions and expenditures is necessarily related to the communicative effects of the expenditures and contributions.[126] The Court explained:

> The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subjected to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike [the situation in *O'Brien*], it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."[127]

Accordingly, the Court in *Buckley* applied heightened scrutiny to the regnlation of both contributions and expenditures, upholding the former but invalidating the latter.

The decision to apply heightened scrutiny, reaffirmed in *Shrink Missouri Government PAC*, recognizes that the critical question is whether the government's regulation arises in some measure from the regulated conduct's communicative or associational character. This analysis sidesteps the impossible inquiry advanced by the gov-

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[125] 68 USLW at 4104–05. The Court did suggest that contributions limits are subject to somewhat less rigorous scrutiny than expenditure limits, but nonetheless demanded that contribution limits be "'closely drawn' to match a 'sufficiently important interest.'" Id at 4105 (quoting *Buckley v Valeo*, 424 US at 30). Moreover, even this slightly less stringent scrutiny was justified by the fact that the regulation only placed a cap on, and did not prohibit altogether, contributions.

[126] *Buckley v Valeo*, 424 US at 16–17, 44–45; see also 68 USLW at 4104.

[127] Id at 17.

ernment, which would require dividing actions into "conduct" categories on the one hand and "speech" or "association" categories on the other, where virtually all actions are simultaneously both. Instead, the Court's inquiry focuses not on the objective or subjective character of the action, which is almost always going to be multifaceted, but on the government's purpose in regulating the action. When regulation is triggered by the action's communicative character, it is treated as a regulation of speech; when regulation is triggered by an action's associational character, it should be treated as a regulation of association.

On this view, lenient *O'Brien* scrutiny would apply to a general tax that regulated spending or contributions across the board and only incidentally affected spending and contributions for particular political or associational purposes. But campaign finance regulations by definition restrict spending and contributions only in association with a political campaign. A citizen is free to give money to his children, his church, or his local charity without restraint, but if he contributes money to a political candidate, the restrictions kick in. Similarly, citizens are generally free to spend money, subject only to general sales taxes, but their expenditures are limited when in furtherance of the election of a candidate. Such a law regulates the "conduct" of giving or spending money only when done in association with political candidates, and is therefore not a regulation of the general conduct of financial contributions or expenditures irrespective of their associational character.

The federal government makes a similar argument in defending the 1996 Antiterrorism and Effective Death Penalty (AEDPA) provisions criminalizing material support to "foreign terrorist organizations."[128] These provisions make it a crime, punishable by up to ten years in prison, to provide material support to the *lawful* activities of designated "foreign terrorist organizations."[129] Under the law, the Secretary of State is empowered to designate as a "foreign terrorist organization" virtually any foreign organization that has

[128] Pub L No 104-132, 110 Stat 1214, §§ 301–02 (1996), codified at 8 USC § 1189 and 18 USC § 2339A.

[129] "Material support or resources" is broadly defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 USC § 2339A(b).

used or threatened illegal force, and it then becomes a crime to support the group's otherwise legal activities.[130] Under this law, it is a crime to send crayons to a day-care center or blankets to a health care facility run by a designated group, even if the donor can prove that he intended the crayons or blankets to be used for lawful purposes and that they were in fact so used. The law was designed to punish support of lawful activities, for pre-existing laws already made it a crime to support terrorist activity by foreign terrorist organizations.[131] AEDPA's proponents claimed that the law was necessary to cut off all support to terrorist groups because support is fungible; money that a terrorist group saves on donated crayons could be used to purchase bombs.

The federal government has defended this statute with argnments that parallel those it advanced in *Shrink Missouri Government PAC*. It claims that the statute targets the conduct of giving material support, not association with terrorist groups per se. Individuals are free to join the designated terrorist groups; they simply cannot offer the group any material support. As a result, the government contends, lenient *O'Brien* scrutiny ought to apply, and the interest in forestalling terrorism certainly justifies the limit on associational support.[132]

The government's argument rests on an insupportable distinction between association and material support. It distinguishes the many cases invalidating penalties imposed on Communist Party membership on the ground that they involved penalties imposed on association itself, while AEDPA permits association (i.e., mem-

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[130] Under 8 USC § 1189(a)(1), "[t]he Secretary is authorized to designate an organization as a foreign terrorist organization . . . if the Secretary finds that—(*a*) the organization is a foreign organization; (*b*) the organization engages in terrorist activity (as defined at [8 USC § 1182(a)(3)(B)]); and (*c*) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." Id. The term "terrorist activity" is broadly defined in 8 USC § 1182(a)(3)(B) to include, inter alia, the unlawful use of, or threat to use, an explosive or firearm against person or property, unless for mere personal monetary gain. "National security" is broadly defined in 8 USC § 1189(c)(2) to mean "national defense, foreign relations, or economic interests of the United States." Thus, the Secretary has broad discretion to designate any foreign group that has used or has threatened to use force, and whose activities the Secretary deems to be contrary to our national defense, foreign relations, or economic interests.

[131] See 18 USC § 2339A (1995) (making it a crime to provide material support or resources to any organization or individual for the purpose of furthering a comprehensive list of specified terrorist crimes, such as hostage taking and the killing of foreign officials).

[132] Brief for the Appellees/Cross-Appellants in *Humanitarian Law Project v Reno*, No 98-56062 (9th Cir pending), at 30–54.

bership) and bans only "material support." But just as speech and association cannot be meaningfully distinguished from expenditures and contributions in the political campaign setting,[133] so association with and support of a political group cannot be meaningfully distinguished. If the right of association did not include the right to contribute, it would be a meaningless formality. Groups cannot survive without the concrete support of their members. As the Supreme Court has said, "[t]he right to join together 'for the advancement of beliefs and ideas' . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"[134] Moreover, if laws penalizing support of particular political groups are permissible where laws penalizing membership are not, all of the anti-Communist statutes the Supreme Court struck down could have been reenacted simply by rewriting them to target the payment of dues rather than membership itself. The government's attempt to draw this distinction exalts form over substance, and only underscores the futility of categorically dividing association from conduct.

In 1998, a district court agreed with the government and upheld AEDPA in major part.[135] While acknowledging that contribution of funds is a direct exercise of speech and association, the court nonetheless subjected the law to lenient scrutiny under *O'Brien*. It reasoned that the law was "content-neutral" because it proscribed aid to foreign groups "not . . . because the government disfavors the political speech" they promote, but because "the Secretary has determined that these organizations engage in terrorist activity that threatens the 'national defense, foreign relations, or economic interests of the United States.'"[136]

But this reasoning confuses the protection of association with the protection of speech. A law that imposes guilt by association is not saved simply because the government disapproves of the group for its illegal conduct rather than for its political ideas. If

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[133] *Buckley v Valeo*, 424 US at 19.

[134] Id at 65–66 (quoting *NAACP v Alabama*, 357 US at 460).

[135] *Humanitarian Law Project, Inc. v Reno*, 9 F Supp 2d 1176 (CD Cal 1998), appeal pending (9th Cir). The district court struck down bans on the provision of "training" and "personnel" to foreign terrorist groups as unconstitutionally vague, but upheld the remainder of the challenged statute.

[136] 9 F Supp 2d at 1188.

that were the rule, the Communist Party cases would all have come out differently, because in those cases, as noted above, the Supreme Court accepted Congress's findings that the Party was engaged in terrorism, espionage, and other illegal conduct to the end of overthrowing the United States by force.[137] Yet the Court nonetheless applied heightened scrutiny and held that the only narrowly tailored way to further the compelling interest of national security was through application of the "specific intent" test. The pertinent question where the government seeks to punish an individual is not why did the government single out the *group*, but why did it single out the *individual* facing the sanction. If it has done so not for individual wrongdoing, but for the wrongdoing of those with whom he is associated, the guilt-by-association standard applies, and the government must prove individual specific intent.

Some restrictions on foreign-directed aid might be properly treated as the regulation of conduct subject to at most *O'Brien* scrutiny. Across-the-board currency or arms export restrictions, for example, would no doubt be constitutional, even as applied to a person who claimed that his export was an act of associational support. But this is because the governmental interest in such regulation would likely be unrelated to the associational character of the export. The same is true of restrictions on travel to particular countries; the fact that they may incidentally affect the ability of U.S. citizens to associate with persons or groups in the embargoed countries does not trigger stringent scrutiny, because the law on its face is directed at a nation, not a political association.[138]

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[137] Act of September 23, 1950, Ch 1024, Title I, § 2, 64 Stat 987 (repealed 1993) (originally codified at 50 USC § 781).

[138] See, for example, *Regan v Wald*, 468 US 222 (1984) (upholding restriction on travel to Cuba); *Zemel v Rusk*, 381 US 1 (1965) (same). The Supreme Court has consistently struck down travel laws that target association with foreign political *organizations*. Thus, in *Regan v Wald*, the Court expressly distinguished two prior decisions, *Aptheker v Secretary of State*, 378 US 500 (1964), and *Kent v Dulles*, 357 US 116 (1958), in which it had invalidated decisions to deny passports to memhers of the Communist Party. As the *Regan* Court explained, the "Secretary of State in *Zemel*, as here, made no effort selectively to deny passports on the hasis of political . . . affiliation, but simply imposed a general ban on travel to Cuba." *Regan*, 468 US at 241. In *Regan* and *Zemel*, the challenged laws were held not to implicate the "First Amendment rights of the sort that controlled in *Kent* and *Aptheker*" precisely because they were "across-the-board restriction[s]" not targeted at association with a political group. 468 US at 241. By contrast, AEDPA does not impose any across-the-board restriction, but selectively criminalizes "material support" *only when done in association with particular political groups.*

As a nation, our government routinely engages in nation-to-nation diplomacy, and must often take action specific to certain nations that limits what U.S. citizens may do. Targeting

AEDPA, however, is not an across-the-board regulation. The statute does not punish material support (or even arms export) generally, but only when it is provided to particular political organizations. Thus, AEDPA's very object is the suppression of associational activity with particular groups. Indeed, the case for treating AEDPA as an impermissible restriction on association is even stronger than the case for treating the Federal Election Campaign Act's contribution limits as restrictions on association. The Court in *Buckley* viewed the federal campaign law, as we have seen, as targeting association because it restricted financial contributions only when provided in connection with a political campaign. But AEDPA goes further and restricts contributions only when provided to particular political groups. A campaign finance law that limited contributions only to specific groups, to be designated annually by the commissioner of the FEC, would indisputably be invalid as an unconstitutional infringement of the right of association. AEDPA is of the same character.

Thus, a better approach to associational freedom would recognize that the right exists independently of privacy and expression, and would focus on the government's purpose in regulating. On this view, laws like AEDPA or the Chicago loitering ordinance in *Morales*, which selectively criminalize conduct only when done in association with certain identified groups, should receive the Court's most skeptical review. Laws like the campaign finance statute in *Buckley* sweep more broadly, and do not single out association with particular disfavored groups, but nonetheless target conduct for its associational character, and therefore also deserve heightened review.

IV. Conclusion

Few rights have garnered the encomiums that the right of association has. The Court has called it so fundamental to the structure of a republican government that it did not even need to be mentioned in the Bill of Rights.[139] Quoting Tocqueville, the Court has called the right of association "almost as inalienable in

a nation does not target political association as such. But the same is not true of targeting political organizations.

[139] *United States v Cruikshank*, 92 US at 552.

its nature as the right of personal liberty."[140] Without the right of association, politics itself would be impossible. And without freedom of association we would not be free to forge our own identities, identities that are necessarily formed in relation to fellow human beings. At the same time, however, few rights are as potentially limitless as the right of association. Again because we are social beings, virtually everything we do is in association with someone else. The problem, then, is how to protect the right without turning it into a veto power over all government regulation.

The solution the Court has adopted, at least for the moment, is to categorically define associations as protected or unprotected, depending on whether they further other rights, specifically the First Amendment right of free speech or the Fifth Amendment right of privacy.

This approach, which echoes Justice Black's ill-fated efforts to distinguish between protected "speech" and unprotected "action," should be abandoned, for much the same reasons that Justice Black's approach was rejected. It directs judges to conduct an incoherent inquiry, since all associations are likely expressive, and in any event there is no meaningful yardstick for distinguishing nonexpressive from expressive association. It fails to accord with the Court's own precedents, which have prohibited guilt by association for reasons wholly unrelated to whether the association is expressive or intimate. And most importantly, it fails to reflect the central role that association qua association plays in our daily lives and our constitutional structure.

I have proposed a different approach, one that draws heavily from the Court's approach to another important but potentially limitless right—the right of symbolic expression. In that setting, the Court has successfully distinguished those regulations of conduct that should raise heightened speech concerns from those that need not trigger skeptical review. The approach avoids the impossible task of dividing symbolic speech at the threshold into protected speech and unprotected conduct, and instead looks to the governmental purpose in regulating. If a regulation's purpose arises from the expressive character of the conduct, it is treated as a regulation of speech, and subjected to the same scrutiny that

[140] *NAACP v Claiborne Hardware*, 458 US at 933 n 80 (quoting 1 Alexis de Tocqueville, *Democracy in America* 203 (P. Bradley ed 1954)).

applies to regulations of "pure speech." So, too, I have argued, where the regulation of conduct arises from its associational character, it should be treated as a regulation of association and subjected to the same stringent scrutiny that generally governs regulations of "pure association."

This approach does not purport to answer all of the difficult questions presented by official regulation of association. It seeks only to get the inquiry off on the right foot, by identifying when the right of association is implicated. But that at least starts us down the road to a rational jurisprudence of association. And as recent anti-gang and anti-terrorist initiatives demonstrate, such a jurisprudence is sorely needed. If we are to learn from the lessons of the McCarthy era, we need to recognize guilt by association not only in hindsight, but at the moment that it is imposed.