VIRTUAL ASSEMBLY

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This Article provides one of the first scholarly considerations of the constitutional boundaries for online groups. It explores both why and how we should protect these groups by asking two related questions. The first question is theoretical: Do online groups implicate the kinds of values that warrant elevated constitutional protection? The second question is doctrinal: What is the best framework for providing constitutional protection to these groups?

This Article argues that we should protect online groups because they advance important First Amendment values and because the line between our offline and our online groups is collapsing. Turning to the doctrinal question, the Article draws from both historical sources and analogies to free speech doctrine to show that the First Amendment's right of assembly is capacious enough to protect online groups. The Article concludes with some tentative applications of "virtual assembly" to legal controversies: an online forum that excludes on the basis of gender, a state law that prohibits private Facebook communications between teachers and students, an online church that expels dissident members, and an online dating service that makes only opposite-sex matches.

This Article makes four contributions to emerging scholarship at the nexus of constitutional law, cyberlaw, sociology, and political theory. First, it demonstrates the normative and prudential reasons for protecting online groups. Second, it shows how expression includes the acts of exclusion, embrace, expulsion, and establishment (an observation that calls into question the Supreme Court's category of "expressive association"). Third, it explains how the First Amendment's right of assembly applies in online contexts. Finally, it introduces the concept of nested groups—online groups that exist within other structural frameworks, such as Facebook and Internet Service Providers.

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"The freedom to connect is like the freedom of assembly, only in cyberspace."[1]

INTRODUCTION

Many of us connect with others online. We interact through social networks, dating sites, e-mail, blogs, and videoconferencing. Fewer of us intuit that these activities often create online *groups*.[2] When we think of the groups that form the core of our relationships and shape our identity, we still tend to think of "real world" groups—

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1 Hillary Rodham Clinton, Sec'y of State, U.S. Dep't of State, Remarks on Internet Freedom (Jan. 21, 2010), *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm.

2 For purposes of this Article, I rely upon a broad definition of "group" requiring only that two or more people intentionally pursue a shared enterprise. This threshold definition covers a vast array of human activity but excludes: (1) groups consisting of only one individual (e.g., a company with one employee), and (2) collective expression that unfolds outside of a shared enterprise (e.g., multiple people who wear the same shirt but who lack any other shared connection). *Cf.* RUPERT BROWN, GROUP PROCESSES: DYNAMICS WITHIN AND BETWEEN GROUPS 2–3 (1988) ("[A] group exists when two or more people define themselves as members of it and when its existence is recognized by at least one other." (emphasis omitted)); DONELSON R. FORSYTH, GROUP DYNAMICS 3 (5th ed. 2010) (defining a group as "two or more individuals who are connected by and within social relationships" (emphasis omitted)); THEODORE M. MILLS, THE SOCIOLOGY OF SMALL GROUPS 2 (1967) ("[Groups] are units composed of two or more persons who come into contact for a purpose and who consider the contact meaningful." (emphasis omitted)).

those that form around the people with whom we live, work, play, and worship. But our online groups increasingly matter to our lives and our identities.

The boundaries of our online groups raise difficult questions at the intersection of constitutional law, cyberlaw, sociology, and political theory. They also highlight the very real potential for state interference. Consider the following four examples:

- An online forum for moms hosts discussion threads about parenting, playdates, husbands, breastfeeding, postpartum depression, and sex. Over two years, the site grows to several hundred members. Then a new member posts to the forum: "Hi all, I'm a dad." Can the forum of moms exclude the dad, or will antidiscrimination law require his admission to the group?[3]
- A public high school teacher invests in the lives of his students, knowing that he is forming mentoring ties that will last a lifetime. He finds it easiest to stay in touch with students over an online social network, sometimes communicating with them through private conversations so that life updates are not broadcast to the world. Can the state ban these private online relationships between teachers and students?[4]
- A virtual church discovers that some of its members are violating its membership policies and code of conduct. After several attempts to approach the dissident members through mediation, the church informs them that they are no longer welcome to participate in the online services and forums. Can the state prevent the virtual church from expelling these dissident members?[5]
- A conservative Christian businessman creates an online dating service that welcomes anyone to join for a fee, but the service only provides opposite-sex matches. A gay man sues the service for its failure to provide gay matches. Can the state require the online dating service to establish a service for gay matches?[6]

This Article suggests a framework for resolving these kinds of controversies. Part I lays the groundwork by exploring how we create and maintain the boundaries of groups through four expressive acts: exclusion, embrace, expulsion, and establishment. Part II addresses the theoretical question of whether online groups implicate the kinds of values that warrant elevated constitutional protections. In the offline world, we extend these protections to some groups (such as the Boy

3 *See infra* notes 178–80 and accompanying text (discussing Sonoma County Moms).

4 *See infra* notes 181–87 and accompanying text (discussing Missouri's "Facebook law").

5 *See infra* notes 202–07 and accompanying text (discussing St. Pixels).

6 *See infra* notes 215–18 and accompanying text (discussing eHarmony).

Scouts)[7] and deny them to others (such as commercial skating rinks).[8] It may be that most online groups are closer to skating rinks than the Boy Scouts. But I argue that we are better off extending constitutional protections to online groups for two reasons: the intrinsic worth of some of these groups to core First Amendment values, and our inability to disentangle our online groups from our offline ones.

Parts III and IV address the doctrinal question of how best to protect online groups. Part III identifies limitations in the presumptive starting point for constitutional protection, the right of association. It critiques the framework that the Supreme Court has developed over the past half century and identifies conceptual weaknesses in the online applications of the categories of intimate association (which protects certain small and selective groups) and expressive association (which protects certain groups that further a specific expressive purpose).[9] One of the primary shortcomings of expressive association—both online and offline—is its inability to account for the expression inherent in many acts of exclusion, embrace, expulsion, and establishment.

Part IV offers the alternative of *virtual assembly*.[10] Drawing from both historical sources and analogies to the free speech doctrine, Part IV argues that the First Amendment's right of assembly should protect most online groups. Part V concludes with some tentative applications of virtual assembly to the four examples raised at the beginning of the Article.[11] While the rights of intimate and expressive association would not protect the groups in these examples, virtual assembly recognizes that most of them should receive elevated constitutional protection.

I do not mean to suggest that the online world changes everything. It may turn out that we will resolve many of our online challenges through the analyses and doctrines that we have developed offline. Or we may find that some things really are different, as with the case of *nested* groups—online groups that exist within other structural frameworks, such as Facebook and Internet Service Providers. But whether our application of offline principles to online groups turns out to be more translation or reinvention, we will ultimately need to confront the constitutional challenges that await us.

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7 Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).

8 City of Dall. v. Stanglin, 490 U.S. 19, 24 (1989).

9 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19, 622 (1984) (creating the categories of intimate and expressive association).

10 The phrase "virtual assembly" does not identify a new constitutional right but rather signals the online application of the existing right of assembly.

11 Given the rapidly evolving technologies and platforms in the online world, these particular examples may well be dated in a few years. But the fundamental questions of political theory they raise will reemerge in different forms.

I
The Importance of Defining Groups

We value groups for many reasons, but we value them constitutionally—under the First Amendment—because we believe that they advance values like self-realization, self-governance, and dissent.[12] Because of these values, most of us believe that the groups we form (or at least some of them) are for us and not for the state to control—they are, in a sense, private. And we control our private groups by deciding for ourselves upon their meaning—both online and offline. We undertake at least four activities in defining the groups to which we belong: excluding, embracing, expelling, and establishing.

We *exclude* when we set formal or informal membership criteria that define the boundaries of our group. Our membership criteria may be good or bad, rational or emotive, objective or subjective. But they are *ours*. When the state commands that our membership must be open to certain people, it inhibits our ability to exclude.

We *embrace* when we pursue relationships with those whom we would like to be part of our group.[13] Sometimes those external to our group disapprove of the relationships that we would like to form. For example, they may not want us to gather as gays,[14] as blacks,[15] as Communists,[16] or as Mormons.[17] When the state inhibits our ability to form these relationships with others, we are unable to embrace in our private groups.[18]

We *expel* when we decide that someone who is presently a member of our group no longer fits with our group's purposes or plays by

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12 *See* discussion *infra* Part II.A–C.

13 My analysis of exclusion and embrace assumes that both are necessary to enable meaningful protections for group autonomy. *But see* Joseph Blocher, *Rights To and Not To*, 100 Calif. L. Rev. 761, 793 (2012) ("[I]t might be appealing to say, as many courts and commentators have, that the right to associate simply must include the right not to associate. But this is not true as a purely logical matter. The acts of associating and not-associating are neither identical nor interdependent. If the purpose of the associational right were solely to permit people to gather . . . then there would be nothing 'necessary' nor even logical about a right to exclude. . . . And if the purpose of the right were solely to permit groups protect 'certain intimate relationships'—intimacy, after all, is one of the primary interests served by the right of association—then there would be less need to protect the right *to* associate." (footnote omitted)).

14 *See, e.g.*, Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 663 (1st Cir. 1974).

15 *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 315 (1967).

16 *See, e.g.*, Dennis v. United States, 341 U.S. 494, 497, 516–17 (1951).

17 *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 44–46 (1890).

18 For example, the state may inhibit our ability to embrace through chilling effects that arise from monitoring and surveillance of our actual or potential groups. *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741, 744 (2008). Strandburg helpfully highlights how "relational surveillance" can chill "emergent association." *Id.* at 744, 745.

our group's rules. Expulsion reminds us that maintaining a group's meaning is an ongoing and dynamic activity. A key difference between expulsion and exclusion is that the former often involves a vested interest (relational, financial, or equitable) by the individual who is separated from the group. The expelled member incurs higher switching costs than someone who is excluded from a group. But the ability to expel remains critical to maintaining the internal integrity of a group, and when the state limits this ability, we are unable to retain control of our private groups.

Finally, we *establish* when we pursue our shared goals through our chosen activities. Establishment presupposes the ability to exclude, embrace, and expel—we can only freely establish when we do so with those whom we have chosen based on the terms that we have chosen. But establishment is also its own activity. Even if the state honors our preferences for excluding, embracing, and expelling, our ability to gather and exist as free groups is hindered if we cannot establish.[19]

We also *express* through our groups, but expression is larger than the previous four concepts. It is closer to a "metaconcept," capturing much of what we do in and through our groups. Exclusion, embrace, expulsion, and establishment are all forms of expression. So is existence.[20]

The Supreme Court has badly distorted these basic insights. Just over a quarter century ago, it introduced the constitutional category of expressive association.[21] According to the Court, some (and only some) private groups qualify as "expressive associations," which means that they benefit from heightened constitutional protections because they are organized for the purpose of engaging in some activity protected by the First Amendment.[22] Most groups that do not meet this

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19 On some level, the state will always limit our establishment, as with criminal prohibitions that restrict certain conduct within groups. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) (upholding the Utah Territory's bigamy statute); People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601–02, 608 (Cal. 1997) (upholding an injunction barring members of an alleged "criminal street gang" from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with one another (emphasis omitted)).

20 I have defined "group" for purposes of this Article as requiring intentionality by two or more people. *See supra* note 2. The intentionality requirement means that a group's mere existence is expressive (both in its initial creation and its ongoing vitality) as long as that existence is known by at least one person external to the group. The human agency required to form and maintain a group (and the intentional maintenance of the group that can be imputed in the absence of an overt end to the group) makes the group's existence expressive in a way that the existence of a rock or even a human being is not.

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

22 *Id.* ("[T]he 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. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

instrumental definition are left constitutionally unprotected.[23] Yet many "nonexpressive associations" are expressive. They exclude, embrace, expel, and establish.[24]

The Court has provided little meaningful guidance as to how we determine where to draw the line between expressive and nonexpressive associations. In one case, it explained that the right of expressive association is limited to groups organized "for specific expressive purposes."[25] In another case, it announced that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment" but "must merely engage in expressive activity that could be impaired in order to be entitled to protection."[26]

Expressive association is not the only confusion the Court has introduced when it comes to the constitutional protections for groups, as the Court has also created the category of "intimate association."[27] Intimate associations receive the highest level of constitutional protection.[28] The intuition makes sense: we ought to pay special attention to the small and selective groups that we form with those who are closest to us.[29] But like expressive association, the idea of intimate association brings with it an inherent need for line drawing, and the drawing of lines is awfully unworkable. Just how small and how selective must a group be to qualify as an intimate association? Precisely what are the values that intimate associations facilitate? Are they different in kind from those fostered by nonintimate associations? The Court has never sufficiently answered these questions.[30]

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23 A small number of nonexpressive groups might still be protected as intimate associations. *See infra* notes 27–29 and accompanying text.

24 Some groups may perform none of these functions. For example, a blog for runners that merely coordinates the times and locations of group runs and is open to anyone to join is not expressing through exclusion, embrace, expulsion, or establishment.

25 N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988).

26 Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000).

27 *See Roberts*, 468 U.S. at 617–18 ("[T]he Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.").

28 *See id.* at 618.

29 The category of intimate association likely originated in a 1980 article by Kenneth Karst. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980) ("By 'intimate association' I mean a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.").

30 The lack of guidance is evident in the lower courts and in subsequent Supreme Court cases. *See, e.g.*, FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 237 (1990) (holding that patrons of a motel which limited room rentals to ten hours did not have an intimate relationship protected by the Constitution), *overruled in part on other grounds by* City of Littleton v. Z.J. Gifts D–4, L.L.C., 541 U.S. 774 (2004); Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 96 (1st Cir. 2009) (refusing to extend protections of intimate association to "[t]he unmarried cohabitation of adults"); Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 173 (3d

The categories of intimate and expressive association cause us to lose sight of the values inherent in many private groups that exclude, embrace, expel, and establish. Consider how these four concepts play out in a simple example: Suppose that I have a group of friends who love beer and meet regularly in St. Louis (where I reside) to share beverages and life together.[31] I might limit the members of this group for any number of reasons on any number of bases: social class, profession, physical appearance, language, shared interests, political affiliation, race, religion, gender, or sexual orientation. I might do so deliberately or subconsciously.

Regardless of how I choose to limit my group, I would *embrace* the members whom I invite to join and *exclude* everyone else, even those who really wanted to join and who were truly hurt by their exclusion. If over time one of the members of the group drifted from our values, beliefs, or social norms—say, took a sudden liking to O'Doul's—our group might *expel* that member. Those of us who remained—through our pints but more importantly through the relationships that we gradually developed—would *establish* the St. Louis Beer Lovers. We might not give our group that formal name, but something like it could be said to exist.

Over time, we would define and redefine the purposes of the St. Louis Beer Lovers. And our purposes might grow beyond what we ever initially imagined. For example, we might discover not only a shared taste for the Schlafly Summer Lager but also a common pas-

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Cir. 2008) ("While the Supreme Court has held that the Constitution protects certain relationships, those protected relationships require a closeness that is not present between a high school football coach and his team."); Swanson v. City of Bruce, 105 F. App'x 540, 542 (5th Cir. 2004) ("The tight fellowship among police officers, precious though it may be, does not include such 'deep attachments and commitments of thoughts, experiences, and beliefs' or personal aspects of officers' lives sufficient to constitute an intimate relationship." (quoting *Roberts*, 468 U.S. at 620)); Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (assuming, for summary judgment purposes, that a dating relationship between two police officers qualified as an intimate association because the two were monogamous, had lived together, and were romantically and sexually involved); Akers v. McGinnis, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (concluding that some types of personal friendships may constitute intimate associations); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) (holding that a college fraternity is not an intimate association); La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497–98 (5th Cir. 1995) (extending the right of "private association" to a private club); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 198 (3d Cir. 1990) (holding that intimate association is unlikely to cover religious groups because "[m]ost religious groups do not exhibit the distinctive attributes the Court has identified as helpful in determining whether the freedom of association is implicated"); Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that a brother-in-law relationship is not protected as an intimate association).

31 The hypothetical group is not chosen at random. *See* Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593 *passim* (2012) (describing the central role of colonial taverns at the nation's founding).

sion about the politics of education in our community. Some members of our group might form deep friendships that lead to business ventures or world travel or social activism. Of course, we might do nothing more than drink beer together. The point is that we do not know what will develop out of our group and the relationships that form within it.

It might come as a surprise to learn that the St. Louis Beer Lovers lacks any meaningful constitutional protection. Under current Supreme Court doctrine, the group is neither an intimate nor an expressive association.[32] In other words, the state could, for any reason with a rational basis, limit the ability of the group's members to gather and pursue their shared interests.[33]

The hypothetical may at first appear a bit too alarmist. After all, the state rarely if ever curtails private groups like the St. Louis Beer Lovers.[34] This side of McCarthyism, most of us (though not all) assume that we can meet freely with our friends. Yet the fact remains that current doctrine permits the state to interfere. Owing largely to the categories of intimate and expressive association, private groups like the St. Louis Beer Lovers are left with only the protections of rational basis scrutiny.[35]

One of the reasons that the state usually does not interfere with groups like the St. Louis Beer Lovers is that many of these groups lack visible boundaries—there are often no membership lists or widely available indicia of who constitutes "the group." But what happens when the boundaries become more pronounced? That question

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32 *See supra* notes 25–30 and accompanying text.

33 *See* City of Dall. v. Stanglin, 490 U.S. 19, 23 (1989) ("Unless laws 'create suspect classifications or impinge upon constitutionally protected rights,' it need only be shown that they bear 'some rational relationship to a legitimate state purpose.'" (citations omitted)); *see also infra* text accompanying notes 188–93 (discussing *Stanglin*).

34 *See* Douglas O. Linder, Comment, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1886 (1984) (referencing the "implausible prospect" that the government might start to regulate "private bridge clubs").

35 *See infra* notes 113–20 and accompanying text (discussing the standard of review used to evaluate state regulation of intimate and expressive associations). The preceding claims do not mean that the state cannot differentiate at all among private groups when providing protections beyond rational basis scrutiny. For example, the state protects certain relationships through evidentiary privileges not available to all private groups. But these kinds of protections are only triggered by exceptional state action. In other words, private groups that cannot avail themselves of the protections of evidentiary privileges are only disadvantaged at the margins, when the state's interests are at their highest and the procedural protections are at their greatest. The member of a private group who is forced to testify against another member (and who is without recourse to an evidentiary privilege) does so within an elaborate system and a highly particularized state interest (when the state commands a particular individual to testify on a particular issue in a particular case). In contrast, the potential constraints on group activity (exclusion, embrace, expulsion, and establishment) that can be imposed on nonexpressive, nonintimate groups for any rational basis are far more generalizable and vague.

points toward one of the most important differences between our offline and our online groups: *some* of our offline groups have highly visible membership boundaries, but *most* of our online groups have these boundaries. A Facebook group clearly lets us know who is in and who is out. Even the most informal of Facebook groups—the St. Louis Beer Lovers Facebook Group—signals a more concrete form of exclusion and embrace than its offline counterpart. Our private line drawing is more publicly visible online.[36]

As more of our social interactions are mediated through online groups, we might wonder whether these more visible boundaries will remain outside of the state's gaze. Our worry might increase when we realize that our private online groups span a host of social networks, clubs, workplaces, interest groups, churches, and gaming communities. The next Part calls attention to some of these groups and the values that they embody.

II
The (Constitutional) Value of Online Groups

Our law has made clear that not all groups warrant constitutional protection. We do not permit criminal conspiracies, monopolies, or riotous gatherings to advance their purposes and values.[37] We do not give private commercial groups complete discretion in whom they serve or whom they hire.[38] But we do protect some private noncommercial groups, and before exploring *how* to protect those groups, we need to understand *why* we should protect them. Among the various values and goals suggested by First Amendment theorists, three of the most important are self-realization, self-governance, and dissent. As

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36 I do not mean to suggest that the greater visibility of the online boundaries increases a group's inherent expressiveness. Here I disagree with Eugene Volokh, who has argued that "[w]hen a club is forced to admit unwanted members, the danger is the *possibility* that 'admission of [the unwanted people] as voting members will change the message communicated by the group's speech,'" but "[w]hen a[n online] conference is forced to accept unwanted speakers, the danger is the *certainty* that admission of the speakers will change the message communicated within [that forum]." Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. Chi. Legal F. 377, 392 (emphasis added) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984)). Volokh's distinction elides the sociological reality that forcing a group—online or offline—to accept unwanted members inherently alters the message conveyed by the group's very existence.

37 *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 609 (Cal. 1997) (holding that a criminal gang was not an intimate or expressive association).

38 *See, e.g.*, Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(a) (2006) (forbidding places of public accommodation from discriminating against any individual "on the ground of race, color, religion, or national origin"); Civil Rights Act of 1964 § 703 (outlawing employment discrimination "because of [an] individual's race, color, religion, sex, or national origin"); Americans with Disabilities Act of 1990 § 302, 42 U.S.C. § 12182(a) (2006) (forbidding places of public accommodation from discriminating against any individual "on the basis of disability").

the following pages make clear, online groups advance all three of these goals.

A. Self-Realization and Identity Formation

The philosopher Charles Taylor has suggested that "I am a self only in relation to certain interlocutors: in one way in relation to those conversation partners who were essential to my achieving self-definition; in another in relation to those who are now crucial to my continuing grasp of languages of self-understanding."[39] In fact, Taylor claims, "[a] self exists only within" what he calls "webs of interlocution."[40] In the online world, almost all of our activities fall within relational webs of interlocution: We publish websites and post comments on blogs and virtual walls. We join multiplayer games and social networking sites. We share pictures and music and videos and ideas. These activities connect us with one another. Lawrence Lessig's observation at the dawn of the online era remains just as true today: we experience the virtual world "not as isolated individuals" but "in groups, in communities, among strangers, among people [we] come to know, and sometimes like."[41]

Online groups mediate many of our daily life activities.[42] They sustain relationships that would be difficult or impossible to form of-

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39 CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 36 (1989).

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

41 Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996); *see also* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 221 (3d ed. 2007) ("[T]he story of my life is always embedded in the story of those communities from which I derive my identity."); TAYLOR, *supra* note 39, at 35 ("A self can never be described without reference to those who surround it."); Susan P. Crawford, *Who's In Charge of Who I Am? Identity and Law Online*, *in* THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 198, 199 (Jack M. Balkin & Beth Simone Noveck eds., 2006) [hereinafter THE STATE OF PLAY] ("Identity is by definition a group project, something created by the context in which the identified operates."); Katelyn Y.A. McKenna & John A. Bargh, *Coming Out in the Age of the Internet: Identity "Demarginalization" Through Virtual Group Participation*, 75 J. PERSONALITY & SOC. PSYCHOL. 681, 692 (1998) ("Just as with nonelectronic group identities, virtual groups are important to the daily lives of their members, and virtual group identities become an important part of the self." (citation omitted)); Alan Jacobs, *Facing Facebook Lock-in*, NEW ATLANTIS (May 19, 2010, 6:33 AM), http://text-patterns.thenewatlantis.com/2010/05/facing-facebook-lock-in.html (observing that social networking sites like Facebook are "fundamentally social" because "the value of the service lies in the *relation* of your data to other people's data").

42 As Raymond Ku and Jacqueline Lipton have observed,

> Web 2.0 technologies . . . [facilitate] the more participatory, user-generated nature of much that happens on the modern Internet. From social networking sites like Facebook, to blogs, wikis, and sophisticated multiplayer online games, more people are interacting with one another globally in forums very different from those that characterized the early Internet.

RAYMOND S.R. KU & JACQUELINE LIPTON, CYBERSPACE LAW: CASES AND MATERIALS, at xix (3d ed. 2010). The Supreme Court recently noted that "the advent of electronic media and

fline. Indeed, we encounter people from the other side of the world—or even just the other side of the street—whom we would never meet offline.[43] Social networking sites foster relationships that range from the trivial to the intimate.[44] Comments on blogs and news articles forge serendipitous connections between people united by shared interests.[45] Virtual churches facilitate shared religious exper-

social-networking sites reduces the importance" of chalkboards and bulletin boards. Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2991 (2010).

43 The social networking site Nextdoor connects neighbors with one another. *See* Gracie Bonds Staples, *Social Network Unites Neighbors: Metro Atlantans Get to Know One Another, Give Advice on Free Website*, ATLANTA J.-CONST., Jan. 17, 2012, at D1. The site's founder notes: "Facebook connects us to friends and family, LinkedIn connects us to business associates and Twitter connects us to those with shared interests, . . . [b]ut there [was] no social network that connect[ed] us to one of the most important communities of them all: the neighborhood." *Id.* (internal quotation marks omitted).

44 Robin Wilson highlights popular sites that facilitate virtual sex like *RedLightCenter.com* and *Sociolotron.com*. Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127, 1131 (2009). I recognize that similar sites are now pervasive but will refrain from any string cites here.

45 Readers who post comments to stories and blog entries "help create the site's content through their comments," and in this way a kind of group forms around the initial author and the authors (known or anonymous) of subsequent commentary. Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 41 (2003); *cf.* HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER, at xx (MIT Press 2000) (1993) (defining a virtual community as a "social aggregation[ ] that emerge[s] from the Net when enough people carry on . . . public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace"). For this reason, blogs and online articles with "open" comments to which anyone can post a reply may actually decrease rather than increase what Cass Sunstein has called "[e]nclave [d]eliberation." *See* CASS SUNSTEIN, REPUBLIC.COM 2.0, at 76 (2007).

iences.[46] Online games,[47] wikis,[48] and virtual work sites[49] embed us in collective enterprises whose success depends upon our continued relationships with one another. And just like our offline groups, even some of our most trivial and leisurely online groups can foster deep and lasting relationships.[50]

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46 *See, e.g.*, VIRTUALCHURCH.COM, http://www.virtualchurch.com ("Church Wherever You Are") (last visited Apr. 12, 2013); CHURCH OF FOOLS, http://www.churchoffools.com (last visited Apr. 12, 2013) ("[T]he world's first 3D online church."); VIRTUAL CHURCH OF THE BLIND CHIHUAHUA, http://www.dogchurch.org/index.shtml (last visited Apr. 12, 2013). *See generally* JOHN R. BOWEN, RELIGIONS IN PRACTICE: AN APPROACH TO THE ANTHROPOLOGY OF RELIGION 210–26 (5th ed. 2011) (describing the current landscape of virtual churches). For a defense of the theological and ecclesiological significance of virtual churches, see generally DOUGLAS ESTES, SIMCHURCH: BEING THE CHURCH IN THE VIRTUAL WORLD (2009). Estes defines a virtual church "as a virtually localized assembly of the people of God dwelling in meaningful community with the task of building the kingdom." *Id.* at 37 (emphasis omitted).

47 *See* T.L. Taylor, *Pushing the Borders: Player Participation and Game Culture*, *in* STRUCTURES OF PARTICIPATION IN DIGITAL CULTURE 112, 120 (Joe Karaganis ed., 2007) ("Large persistent world games like *EverQuest* and *Star Wars Galaxies* are excellent examples of game spaces that cannot be mastered by single players. The design of the games themselves reward—and often require—sociality and reliance on others."). The explosion of online gaming has captured millions of players. In 2006, Gregory Lastowka and Dan Hunter reported millions of users on *The Sims Online*, *There*, *EverQuest*, *Earth & Beyond*, *Star Wars Galaxies*, *Ultima Online*, and *Dark Age of Camelot*. *See* F. Gregory Lastowka & Dan Hunter, *Virtual Worlds: A Primer*, *in* THE STATE OF PLAY, *supra* note 41, at 13, 14. They noted that "[i]n South Korea, the game *Lineage* is currently more popular than television, with some 4 million registered participants." *Id.* These figures have grown significantly in the four years since Lastowka and Hunter wrote. *World of Warcraft* recently reached over twelve million subscribers. Press Release, Blizzard Entertainment, World of Warcraft Subscriber Base Reaches 12 Million Worldwide (Oct. 7, 2010), http://eu.blizzard.com/en-gb/company/press/pressreleases.html?id=2443926; *see also Total MMORPG Subscriptions and Active Accounts Listed on This Site*, TELENET, http://users.telenet.be/mmodata/Charts/TotalSubs.png (last visited Apr. 12, 2013) (showing that over twenty million people subscribe to various online role-playing games known as "massively multiplayer online role-playing games," or MMORPGs).

48 The most well-known example today is Wikipedia. As of this writing, Wikipedia contains over twenty million articles (including over 4.1 million articles written in English) and claims to have about 100,000 regular contributors. *Wikipedia*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia (last visited Apr. 12, 2013). Wikis can do more than simply aggregate and convey information; for example, some educators use them to create collaborative learning environments. *See, e.g.*, Katherine Campbell & Dee Ann Ellingson, *Cooperative Learning at a Distance: An Experiment with Wikis*, 3 AM. J. BUS. EDUC. 83, 83–84 (2010); Martina A. Doolan, Blended Learning Unit, *Collaborative Working: Wiki and the Creation of a Sense of Community*, PROCEEDINGS OF THE SECOND INTERNATIONAL BLENDED LEARNING CONFERENCE 70 (2007), http://homepages.stca.herts.ac.uk/~ct07abf/comqmad/publications/download/2007/Doolan-2007-Collaborative%20working_Wiki_and_the_creation_of_a_sense_of_community.pdf.

49 *See* Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 962–71 (2011).

50 Lastowka and Hunter note that in the game *Everquest*, "individuals often discuss their real-world lives and identities" during "lulls in combat." *See* Lastowka & Hunter, *supra* note 47, at 23. These discussions can lead to "avatar bonds" that extend to offline relationships. *Id.*

Online connections are not without physical constraints. As Beth Simone Noveck notes, in cyberspace, "[t]he ritual of breaking bread (or beer), as a way to cultivate solidarity and belonging, does not exist."[51] But Noveck's premise does not lead inexorably to her conclusion that "it is *harder* to create the connections for 'the body politic' in a disembodied space."[52] Some people can foster deep connections without physical presence—for example, think of the proverbial love letters that join distant romantics. The proliferation of avatars and three-dimensional spaces also challenges Noveck's assessments that "[t]he inability to see self and others in relationship to a space problematizes group culture" and that "[t]he social rituals and visual totems that inculcate a culture within the group are also absent."[53]

Indeed, some people find their deepest relational connections online.[54] Furthermore, we know anecdotally that online relationships can help socially and geographically isolated people to feel more human rather than less. Online relationships can enrich even our most vulnerable moments, as evidenced by Howard Rheingold's powerful account of the ways in which members of one of the first "virtual communities" supported, reconciled with, and mourned those who confronted and succumbed to terminal illnesses.[55]

These ways of relating in life and in death have proliferated through myriad online support groups and blogs that form around shared experiences.[56] Jerry Kang has observed that in the online world,

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51 Beth Simone Noveck, *Democracy—The Video Game: Virtual Worlds and the Future of Collective Action*, *in* THE STATE OF PLAY, *supra* note 41, at 257, 264.

52 *Id.*

53 *Id.*

54 Early studies linked higher levels of depression to online relationships on the assumption that they displaced more intimate offline relationships. *See* Robert Kraut et al., *Internet Paradox: A Social Technology that Reduces Social Involvement and Psychological Well-Being?*, 53 AM. PSYCHOLOGIST 1017, 1017–31 (1998). Later scholars noted that other variables may influence the purported causal relationship, including whether the offline relationships of respondents were as strong as researchers had assumed. *See, e.g.*, Jennifer Bonds-Raacke & John Raacke, *MySpace and Facebook: Identifying Dimensions of Uses and Gratifications for Friend Networking Sites*, 8 INDIVIDUAL DIFFERENCES RES. 27, 28 (2010) (citing earlier research indicating "that friend networking sites may provide greater benefits for users with low self-esteem and low life satisfaction"); Robert LaRose et al., *Reformulating the Internet Paradox: Social Cognitive Explanations of Internet Use and Depression*, J. ONLINE BEHAV. (2001), http://old.behavior.net/JOB/v1n2/paradox.html (noting that earlier studies assume "that face-to-face relationships are inherently superior to online relationships and neglect the possibility of hyperpersonal online interactions that may be more intimate than their offline counterparts" (citations omitted)); *see also* Wilson, *supra* note 44, at 1152 ("Despite the lack of close physical proximity, for some players, virtual relationships are more real than real-world ones.").

55 RHEINGOLD, *supra* note 45, at 326–28.

56 *Id.*; *cf. id.* at 328 ("Although socializing in cyberspace is a shallow experience for many, others find there a place to share their most intimate feelings and seek support from invisible strangers.").

> pregnant women share experiences; the elderly console each other after losing loved ones; patients fighting cancer provide information and support; disabled children find friends who do not judge them immediately on their disability; users share stories about drug addiction; and gays and lesbians on the brink of coming out give each other emotional shelter.[57]

As Rheingold argues, "[i]t is dangerous to mindlessly invalidate the experiences of a person for whom Internet communication is not a luxury but a lifeline."[58]

B. Self-Governance

Online groups also further the First Amendment value of self-governance.[59] The virtual world brings efficiencies to otherwise labor-intensive and logistically complicated activities, including democratically oriented ones. We can announce a political rally with a single Evite, instantly provide political updates to all of our Facebook friends and Twitter followers, and we can join an online petition with the click of a button.[60]

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57 Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1171–72 (2000) (footnotes omitted).

58 RHEINGOLD, *supra* note 45, at 330. The opening pages of Rheingold's new eleventh chapter, "Rethinking Virtual Communities," offer a powerful argument against those who would discount these experiences. *Id.* at 323–30; *see also id.* at 329 ("For some who are rarely seen, a mediated life is a better life than the one they would have otherwise."). Rheingold also cautions against ignoring the degree to which our lack of connectedness preceded the virtual world. *See id.* at 347 ("If there is something disturbing about finding community through a computer screen . . . , we should also consider whether it is disturbing for hundreds of millions of people to drive for hours every day in our single-passenger automobiles to cities of inhuman scale, where we spend our days in front of screens inside cubicles within skyscrapers full of people who don't know each other. Yes, we should focus on the pitfalls of spending our days in front of screens, but we should not lose sight of those cubicles, skyscrapers, cities, and automobiles when we seek the sources of our alienation.").

59 By "self-governance" I mean the First Amendment theory advanced most famously by Alexander Meiklejohn. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 6 (1948); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 252; *see also* SUNSTEIN, *supra* note 45, at 37 (describing the relationship between self-expression and self-government); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204–05 (interpreting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as advancing a self-governance theory of the First Amendment). This meaning of self-governance differs from two other possibilities, neither of which I address here. The first involves the ways in which a group's politics govern its own internal practices. *See, e.g.*, James Grimmelmann, *Virtual Power Politics*, *in* THE STATE OF PLAY, *supra* note 41, at 146, 155. The second alternative meaning of self-governance is the libertarian use of that term in some of the cyberspace literature. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1212–16 (1998) (critiquing David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1387 (1996) (arguing that cyberspace should be self-regulated)).

60 Recognizing the importance of online petitions to democratic participation, the Obama Administration launched the "We the People" petition initiative to enable anyone

Online groups simplify logistics, eliminate the need for bodily presence, and remove the burdens long associated with physical distance and national borders. Instead of being physically present to participate in a protest, one can send an avatar to a virtual site to join a virtual protest.[61] This means of participation removes the risk of bodily harm or arrest and eliminates overhead for transportation, food, water, or shelter.[62]

Online space allows for presence without physicality, or what Rheingold has called the "decentering of place."[63] New conceptions of

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over thirteen to create or sign a petition asking the federal government to address an issue facing the American people. *We the People: Your Voice in Our Government*, WHITE HOUSE, https://petitions.whitehouse.gov (last visited Apr. 12, 2013). As of this writing, if a petition receives 100,000 signatures within thirty days, "it will be reviewed by the Administration and we will issue a response." *Id.* In 2012, the Obama Administration released official responses to citizen petitions on topics including "Changing How Wall Street Works," "Protecting the Health of Women While Accommodating Religious Liberty," and "Building a 21st Century Immigration System." *Featured Responses*, WHITE HOUSE, https://wwws.whitehouse.gov/petitions#!/responses (last visited Apr. 12, 2013) (follow "Show More Responses").

61 The virtual protest is complicated by government agencies with virtual sites on commercial platforms. For example, NASA, NOAA, DOD, and the CDC operate virtual sites in Second Life, which is privately owned and operated by a company called Linden Lab. Katy Human, *Science Web Pulls Curious into Playful Virtual World*, DENVER POST, Feb. 19, 2007, at A1; Cheryl Pellerin, *Air Force Eyes New Learning Systems in "Second Life,"* U.S. DEP'T DEF. (May 9, 2011), http://www.defense.gov/news/newsarticle.aspx?id=63873. These embedded relationships raise a host of interesting First Amendment questions: Can the federal government censor a protest in Second Life? Can Linden Lab censor a protest of a federal virtual site? Can Linden Lab censor the federal government's virtual site, or prevent the federal government from censoring a protest? Can the FBI serve a warrant on Linden Lab for the names of virtual protesters suspected of national security risks? What about non-U.S. citizens participating in the virtual protest but physically residing outside of U.S. jurisdiction? *Cf. infra* notes 168–77 and accompanying text (discussing the online phenomenon of nested groups).

62 The virtual protest is not just a thought experiment. In 2007, IBM employees in Italy protested a management decision through a virtual protest at IBM's Second Life headquarters. *See* Cherry, *supra* note 49, at 990–91. Nearly two thousand people from over thirty countries participated in the twelve-hour protest on IBM's virtual islands. Wendy Leung, *STRIKE!* (*Banana Suit Optional)*, GLOBE & MAIL (Toronto), Oct. 15, 2007, at L1. The protest included avatars who "raised placards and shouted demands through bullhorns." *Id.* Some time after the protest, the head of IBM Italy resigned, and IBM management reversed course. *On Strike, Virtually*, ECONOMIST, Mar. 15, 2008, *available at* http://www.economist.com/node/10853751.

63 RHEINGOLD, *supra* note 45, at 349; *see also* Noveck, *supra* note 45, at 26 ("[A]ll expressive activity is at the margin in the topography of cyberspace; there is no center."). The decentering of place is not the loss of place. As Dan Hunter has observed, our online presence unfolds in metaphorical places that bring with them attendant legal concerns. Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 472–75 (2003). Hunter summarizes earlier scholarly resistance to the metaphor of "cyberspace as place" but convincingly argues that scholars and courts have now embraced it (although not always with careful reflection about the consequences of doing so). *See id.* at 447–58.

space open possibilities for larger and more diverse audiences.[64] People with disabilities, the elderly, and others who are socially constrained to physical places have unprecedented opportunities to participate in social gatherings, protests, demonstrations, and other online activities.[65]

Of course, the potential for online self-governance does not ensure its realization. Drawing upon social movement theory, Molly Beutz Land has suggested that some mass online activities succeed precisely because they require so little commitment: although "the action or commitment required of each individual is small, . . . the aggregation of each of these individual's actions creates an overall effect that is significant."[66] Still, Land has cautioned that "[e]xisting online advocacy efforts reveal a de facto inverse relationship between broad mobilization and deep participation"[67] and warned of the challenge in "transforming that initial act of participation into a deep and sustained commitment to the work."[68] Beth Simone Noveck reached similar conclusions in a 2003 article that found only a handful of examples of the role that "Internet-based technology might someday play in enhancing democratic and public life."[69] Noveck suggested that "electronic democracy—both public participation online and the use of the Internet to prepare for public participation off-line—is an unfulfilled dream."[70]

Yet since the time that Noveck wrote, online social networks have inspired striking political action. Various groups have used social media to organize offline public participation, ranging from charitable activities[71] and trivial flash mobs[72] to more significant political action. Consider Barack Obama's 2008 presidential campaign, which effectively harnessed the power of online social networking to rally sup-

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64 Of course, these efficiencies benefit groups of all kinds. As Danielle Keats Citron observes, "[o]nline, bigots can aggregate their efforts even when they have insufficient numbers in any one location to form a conventional hate group." Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 63 (2009).

65 *See* Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. Pa. L. Rev. 119, 137 (2001).

66 Molly Beutz Land, *Networked Activism*, 22 Harv. Hum. Rts. J. 205, 218 (2009).

67 *Id.* at 205.

68 *Id.* at 220.

69 Noveck, *supra* note 45, at 4.

70 *Id.* at 4–5.

71 *See, e.g.*, Freerice, http://www.freerice.com (last visited Apr. 12, 2013) (online trivia game that donates ten grains of rice through the World Food Programme for each correct answer entered by a user).

72 *See* Rochelle Baker, *Abbotsford's Project G Flashes Shoppers: Mob Mentality Raises $600*, Abbotsford Times (Dec. 20, 2011), http://www.abbotsfordtimes.com/news/story.html?id=5889600 (reporting on a flash mob at a local mall's food court organized as a fundraising effort for a community organization).

port.[73] Campaign staffers created My.Barack.Obama.com, a social network that provided over 900,000 supporters with a platform to communicate with each other online and organize neighborhood events to meet each other in person.[74] Over two million Facebook users joined groups supporting the Obama campaign (compared to 600,000 users who joined groups supporting John McCain's campaign).[75] The Obama campaign provided real-time news updates to its numerous Facebook "friends" and mass-texted reminders to supporters about polling locations in upcoming primaries.[76] Using online groups to facilitate politics as a kind of self-governance may have far-reaching implications. As Jared Keller has suggested, "Barack Obama's media-centric 2008 presidential campaign was an early testing ground for new media as a means for political communication and organization, and the practices pioneered there quickly spread to other political movements around the globe."[77]

C. Dissent

A third value of online groups is their ability to foster and maintain resistance and dissent. These objectives are furthered not only by the kinds of efficiencies highlighted in the last subsection but also by the low cost of disseminating expression online.[78] The First Amendment has long recognized the importance of "cheap speech" for dissenters.[79] The Internet may represent the democratization of cheap

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73 *See* Matthew Fraser & Soumitra Dutta, *Barack Obama and the Facebook Election*, U.S. NEWS & WORLD REP. (Nov. 19, 2008), http://www.usnews.com/opinion/articles/2008/11/19/barack-obama-and-the-facebook-election.

74 Brian Stelter, *The Facebooker Who Friended Obama: A Company Founder Brings Social Networking to Politics*, N.Y. TIMES, July 7, 2008, at C1.

75 Fraser & Dutta, *supra* note 73. On Twitter, Obama's 112,000 followers dwarfed McCain's 4,600 followers. *Id.*

76 Frank Davies, *Web Politics Come of Age With Obama*, CONTRA COSTA TIMES (Feb. 24, 2008), http://www.contracostatimes.com/ci_8351967?source=rss.

77 Jared Keller, *Evaluating Iran's Twitter Revolution*, ATLANTIC (June 18, 2010, 8:00 AM), http://www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337/. South Korean liberal parties also used Twitter and social media to mobilize support for local elections in 2010. *Id.*; *see also* Dae Ryun Chang, *Twitter's Surprising Impact on the South Korean Election*, HARV. BUS. REV. BLOG NETWORK (June 11, 2010, 8:57 AM), http://blogs.hbr.org/cs/2010/06/twitters_new_role_in_south_kor.html (describing how liberal parties in South Korea gained political support from younger voters through Twitter campaigns).

78 As of this writing, the website GoDaddy.com is selling Internet domain names for as little as one dollar per month. GODADDY, http://www.godaddy.com (last visited Apr. 12, 2013).

79 *See* Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 OR. L. REV. 117, 128–31 (1996) (discussing the Court's historic concern for protecting various forms of "cheap speech"); *see also* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833–43 (1995) (discussing social consequences of changes in existing modes of communication).

speech[80] and the correlative benefits of what David Post has called "low-cost association building."[81] For example, in a 1996 article, Post described how even the most rudimentary online technology facilitated the first genuine dissent against Scientology:

> [U]ntil July 17, 1991, there was no truly organized opposition to the Scientologists' teachings and tactics, no true community of the disaffected. How could there be? Building an anti-church, after all, takes just about as much administrative and operational savvy, not to mention money, as building a church. But that feature of the landscape changed dramatically on the date mentioned, when a Scientology critic, Scott Goehring, formed a discussion group—alt.religion.scientology—on what is called the Usenet network portion of the Internet. . . . Suddenly, in the 30 seconds or so that it took Goehring to type out his request, and the $0.05 or so it cost him to transmit that message to the computers responsible for Usenet network configuration, there was a place where the disgruntled can meet to exchange ideas and information—a new community, one of the literally hundreds of thousands of such communities that have sprung into being on the Internet over the past few years.[82]

More recently, online groups have sparked or enabled political dissent around the globe. In 2009, Iranian citizens circumvented a government-imposed media blackout during the "Green Revolution" by posting pictures on Facebook and Twitter.[83] Facebook and Twitter also played an important role in helping spread the 2010–2011 Arab Spring, which saw major protests in most Middle Eastern countries and regime change in Tunisia, Egypt, and Libya.[84]

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80 *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870 (1997) ("[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.").

81 David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139, 162 n.51. Post elaborates:

> In the space of an afternoon, I can join a dozen (or a hundred) ongoing associations . . . , form a dozen new such associations myself with a few lines of code inserted in my Internet Service Provider's system, and set up a dozen aliases on my provider's mail system through which I can communicate (and invite friends and colleagues to help me formulate the messages that will go out under each of these aliases).

Id. at 162.

82 David G. Post, *New World War: Cancelbunny and Lazarus Battle It out on the Frontier of Cyberspace—and Suggest the Limits of Social Contracts*, REASON, Apr. 1996, at 28, 29. Post suggests that a Usenet group may "properly be considered a 'person' or an 'association' consisting of its members at any given time." Post, *supra* note 81, at 163 n.51.

83 Keller, *supra* note 77.

84 *See, e.g.*, Michiko Kakutani, *Upheaval and Hope in a Land of Turmoil*, N.Y. TIMES, Aug. 2, 2011, at C1. The use of online technology by the Occupy Movement is another rapidly evolving example of how online groups can facilitate dissent. *See, e.g.*, OCCUPYSTL.ORG,

D. The Dynamic Line Between Virtual and Nonvirtual

The First Amendment values furthered by online groups suggest multiple reasons to extend meaningful constitutional protections to these groups. Of course, not all online groups advance all of these values. Some groups do not advance any of them, and some groups harm these and other values. But a basic principle of First Amendment *speech* doctrine is that we do not let the state decide which expression is constitutionally valuable and which is not.[85] The same should be true for our online groups.

There is a more pragmatic reason for extending constitutional protections to online groups: the dynamic line between online and offline frustrates attempts to draw significant distinctions. Many of us use online connections to sustain relationships that begin offline.[86] We bridge physical separation and connect in emotionally rich ways with friends and family through social networking sites, blogs, and videoconferencing.[87] These technologies allow us to feel more fully present—more fully ourselves—in our online interactions. We share our images, voices, and movements in ways that feel increasingly lifelike through improvements to bandwidth, image quality, and audio feeds. The stilted first-generation videoconferencing once available only to governments and corporations has been eclipsed by broadband streaming available to doting grandmothers and forlorn lovers.[88]

Moreover, many relationships that begin online move offline. Online dating services lead to offline relationships.[89] Business relationships initially formed through social networking sites lead to in-

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http://www.occupystl.org (last visited Apr. 12, 2013). On the broader connections between Occupy and the kinds of ideas explored in this Article, see Jeremy Kessler, *The Closing of the Public Square*, NEW REPUBLIC (Jan. 12, 2012), http://www.tnr.com/book/review/the-closing-the-public-square-john-inazu-timothy-zick.

85 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *cf.* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting) ("I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.").

86 *See, e.g.*, Abigail Sullivan Moore, *A Long-Distance Affair*, N.Y. TIMES, Jan. 9, 2011, at ED22 (describing how college students use the Internet to maintain long-distance relationships that began in high school).

87 *See* John Raacke & Jennifer Bonds-Raacke, *MySpace and Facebook: Applying the Uses and Gratifications Theory to Exploring Friend-Networking Sites*, 11 CYBERPSYCHOL. & BEHAV. 169, 171 (2008).

88 *See* Amy Harmon, *Over the River? Not Anymore. Grandma's at Home on Screen*, N.Y. TIMES, Nov. 27, 2008, at A1.

89 *See* EHARMONY, http://www.eharmony.com (last visited Apr. 12, 2013) ("On average, 542 people get married every day in the United States because of eHarmony; that accounts for nearly 5% of new U.S. marriages.").

person meetings and partnerships.[90] Lawyers who find clients in online worlds represent them in offline proceedings.[91]

The permeability between our online and offline relationships also has negative consequences. Virtual marriages consume real marriages,[92] virtual babies doom real babies,[93] and virtual businesses close real businesses.[94] Online connections also facilitate harmful offline relationships: child molesters troll for victims,[95] conspirators plot crimes,[96] and unfaithful partners seek out adulterous connections.[97] The permeability of harm as well as benefit reinforces the view that we ought not conceive of our online and offline relationships as conceptually distinct.

The collapsing distinction between online and offline blurs not only our relationships but also our identities. Could the online moni-

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90 *See* Andrew Osterland, *Not Clued in About LinkedIn? Big Mistake, Advisers Say*, INVESTMENTNEWS (Feb. 3, 2012, 10:48 AM), http://www.investmentnews.com/article/20120203/FREE/120209976 (relating the story of a financial adviser who met a wealthy client through LinkedIn).

91 *See* Cherry, *supra* note 49, at 965–66 (noting that attorneys have met future clients in Second Life before taking their attorney-client relationship offline into the "real world").

92 *See generally* WENDY KAYS, GAME WIDOW (2008) (discussing "game widows" whose husbands are consumed by online games); Winda Benedetti, *Game Widows Grieve 'Lost' Spouses*, NBC NEWS (Aug. 22, 2007, 8:48 PM), http://www.nbcnews.com/id/20397322#.UUS1PKU1blJ (same); Sarah Boesveld & Zosia Bielski, *40, Married, Gaming Addict*, GLOBE & MAIL (Toronto), Oct. 31, 2008, at L1 (same); *see also infra* notes 122–25 and accompanying text (discussing a virtual relationship between Ric and Janet).

93 An extreme example is the story of a South Korean couple who tended to their virtual child for hours on end in one of these online worlds while their actual child died of malnourishment and neglect. *See* Choe Sang-Hun, *As Internet Swallows Adults, South Korea Expands Addiction Aid*, N.Y. TIMES, May 29, 2010, at A4; *South Korea: Fatal Addiction*, GUARDIAN (London), July 14, 2010, at 21. After returning home from a twelve-hour session at a 24-hour Internet café where the couple "fed, dressed and cuddled" their virtual daughter, they found their real-life, three-month-old daughter, dead. *Id.* Both parents were sentenced to two years in prison. *Id.*

94 *See, e.g.*, Julie Bosman, *Small Bookstores Struggle for Niche in Shifting Times*, N.Y. TIMES, Jan. 24, 2011, at B3 (noting that bricks-and-mortar bookstores, including both independent bookstores and "big-box" retailers Barnes & Noble and Borders, struggle to survive in the digital age where consumers increasingly shop on Amazon.com); Jessica E. Vascellaro & Sam Schechner, *Slow Fade-Out for Video Stores*, WALL ST. J., Sept. 30, 2010, at A6 (noting the impact of Netflix and on-demand video products on the recent demise of the movie rental industry).

95 *See* Marisa Taylor, *New York Removes Sex Offenders from Facebook and MySpace*, WALL ST. J. DIGITS BLOG (Dec. 4, 2009, 7:15 AM), http://blogs.wsj.com/digits/2009/12/04/new-york-removes-sex-offenders-from-facebook-and-myspace/ (describing efforts to prevent "sexual predators from trolling the Internet in search of unsuspecting children" (internal quotation marks omitted)).

96 *See* Kevin Helliker, *Toll of Online Plot May Rise to Three*, WALL ST. J. (Nov. 28, 2011), http://online.wsj.com/article/SB10001424052970203802204577064681523171946.html.

97 The online "dating" service Ashley Madison, for instance, matches people who are already in relationships. Its slogan is "Life is short. Have an Affair," and it boasts over eighteen million anonymous members. *See* ASHLEY MADISON, http://www.ashleymadison.com (last visited Apr. 12, 2013).

kers of the millions of people who spend dozens of hours a week in virtual worlds comprise a substantial part of their identities?[98] Could it be that "[u]nconstrained by the cold hard realities of a physical world, we can make our digital avatars into our truest vision of ourselves"?[99] Is the quadriplegic's avatar who can run, jump, and fly an artificial creation or a more authentic projection of his self? Even if we cannot wrap our minds around flying avatars, many of us create and shape aspects of our identities online. We develop deep attachments with others through the identities and relationships that we craft over time, and these attachments complicate our willingness and psychological ability to exit from online groups.[100]

In fact, in at least one sense, our online identities and relationships are inherently weightier than our offline ones: they secure a kind of immortality that most of us will never attain offline. Most of us will not inspire books, movies, or monuments to sustain our memory after we are gone. But the entrenchment of our online identities reconfigures our conception of finitude.[101] Offline, I am here today and gone tomorrow, except perhaps in the fading memories of my

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98 *See* Jack M. Balkin & Beth Simone Noveck, *Introduction* to THE STATE OF PLAY, *supra* note 41, at 3, 3 ("[M]any of the 20 to 30 million regular participants [in virtual worlds] now spend more time in virtual environments than they do at their real-world jobs or engaged with their real-world communities; according to one recent estimate, the average number of hours played is almost twenty-two per week."); Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life? The Regulatory Challenges of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1782 (2006) (suggesting that 9.4 million subscribers to a group of thirty-two virtual worlds are "'in-world' for about 22 hours per week"); Wagner James Au, *Second Life Marketing: Still Strong*, BUS. WK. (May 5, 2008), http://www.businessweek.com/technology/content/may2008/tc2008054_665274.htm (Second Life's "most active users" include "550,000 people who go 'in-world' an average of 40 hours a month"). In 2009, Linden Lab, the operator of Second Life, reported that in its first six years of existence, users had logged one billion hours in Second Life. *See* Press Release, Linden Lab, 1 Billion Hours, 1 Billion Dollars Served: Second Life Celebrates Major Milestones for Virtual Worlds (Sept. 22, 2009), http://lindenlab.com/releases/1-billion-hours-1-billion-dollars-served-second-life-celebrates-major-milestones-for-virtual-worlds.

99 Winda Benedetti, *I Can't Help It—I Wish I Were My Avatar*, NBC NEWS CITIZEN GAMER (Nov. 25, 2008, 6:56 AM), http://www.nbcnews.com/id/27897933/ns/technology_and_science-games/t/i-cant-help-it-i-wish-i-were-my-avatar/.

100 Facebook famously employs a form of "emotional blackmail" to retain users who attempted to deactivate their accounts. *See* Jessica Guynn, *How to Stop Networking with Facebook, Twitter, Google+*, L.A. TIMES, Aug. 7, 2011, at B1. During the deactivation process, Facebook displays pictures of "friends" who supposedly "will miss you" if you leave the social network. *Id.*

101 *See* Steve Eder, *Deaths Pose Test for Facebook*, WALL ST. J. (Feb. 11, 2012), http://online.wsj.com/article/SB10001424052970203315804577205122381359482.html (describing Facebook's policy of placing the profile page of a deceased person in a "memorialized state" that freezes the user's content but still allows friends to post on the deceased's profile).

friends and family. But online I am forever—online I have received "the praise which does not grow old."[102]

III
Toward a Constitutional Framework

Our common ventures, social experiences, and identity formation increasingly unfold within the groups that we create and join online. As a matter of social and political theory, we ought to be concerned with ensuring that adequate protections extend to these groups. As a matter of constitutional doctrine, we ought to aim for the most workable solution that still guards against our tendency to reinforce the familiar and castigate the unfamiliar. The presumptive starting point for addressing this doctrinal question is the judicially created right of association. However, the right of association is not only the wrong place to begin—it is also unworkable.

A. The Origins of the Right of Association

The constitutional right of association is a relatively late addition to our civil liberties. The Supreme Court first announced it just over fifty years ago in *NAACP v. Alabama ex rel. Patterson*.[103] Justice John Marshall Harlan II's opinion for a unanimous Court found it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[104] But Justice Harlan's firm assertion masked sig-

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102 Thucydides, The Peloponnesian War, II.43, at 94 (Martin Hammond trans., Oxford World's Classics 2009) (c. 431 B.C.E.). The immortality is a relative one. If the world ceases to exist, then so does the server space and other hardware that houses our online identities. In this sense, the permanence of online memory is inescapably tied to immanent physical structure, as opposed to transcendent appeals to the preservation of one's identity in the memory of an eternal deity. The contingent existential differences are not insignificant. Consider, for example, the information footprint of our great-great-grandparents compared to the information footprint of today's teenagers, many of whom memorialize their everyday experiences online through Facebook and other platforms.

103 357 U.S. 449 (1958). The case arose after the State of Alabama sought to compel the NAACP to disclose its membership list. Alabama's Attorney General John Patterson initiated an action to enjoin the NAACP from operating within the state, arguing that the group was a "business" that had failed to register under applicable state law. *Id.* at 452. The state court trial judge issued the injunction ex parte, explaining that he intended "to deal the NAACP a mortal blow from which they shall never recover." Lucas A. Powe, Jr., The Warren Court and American Politics 165 (2000) (internal quotation marks omitted). The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review. When the NAACP refused to comply, the judge responded with a $10,000 contempt fine, which he increased to $100,000 five days later. After the Alabama Supreme Court rejected the NAACP's appeal of the judge's order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court. *Id.* at 166.

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

nificant disagreement over the constitutional source of the new right—disagreement that would remain unresolved both on and off the Court.[105]

Owing in part to the lack of a clear constitutional anchor, the Supreme Court applied the right of association unevenly in the years following *Patterson*, a time that coincided with the height of the civil rights movement and the waning years of the second Red Scare.[106] The most significant divide in the Court's opinions emerged between associational claims brought by the NAACP and by Communist groups. The first four cases in which a majority of the Court explicitly relied on the constitutional right of association all invalidated regulations aimed at the NAACP.[107] Yet in the first cases after *Patterson* in which communist groups asserted a right of association, the Court refused even to acknowledge, let alone apply, the new right.[108]

In the words of ACLU legal director Mel Wulf, there were "red cases and black cases."[109] Harry Kalven phrased it more bluntly: "The Communists cannot win, the NAACP cannot lose."[110] Instead of setting forth a clear doctrinal framework that would have shaped the contours of the new right of association, the Court's early cases—in their reasoning and their results—appeared to limit the right along ideological rather than principled lines.[111]

B. Intimate and Expressive Association

The Supreme Court's failure to ground the new right of association opened the door to further manipulations of its boundaries following the NAACP decisions.[112] The most significant reformulation came in the Court's *Roberts v. U.S. Jaycees* decision in 1984.[113] The story behind *Roberts* began in 1974 and 1975, when the Minneapolis

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105 Internal memos and drafts of the opinion reveal that Harlan was caught in tension between Justice Felix Frankfurter (who wanted the new right located squarely in the Fourteenth Amendment) and Justices William O. Douglas and Hugo Black (who wanted the right located in the First Amendment). *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 82–84 (2012). Early commentators drew widely divergent conclusions about the source of the new right. *See id.* at 82, 84–85.

106 *See id.* at 63–96.

107 Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Shelton v. Tucker, 364 U.S. 479, 485–86 (1960); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); *Patterson*, 357 U.S. at 460.

108 Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

109 SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 240 (2d ed. 1999) (internal quotation marks omitted).

110 HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 259 (Jamie Kalven ed., 1988).

111 The clearest example of the ideological divide was *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

112 *See generally* INAZU, *supra* note 105, at 119–29 (discussing subsequent case law).

113 468 U.S. 609 (1984).

and St. Paul chapters of the Jaycees started admitting women as regular members in violation of the national organization's bylaws.[114] After the national organization threatened to revoke their charters, the two Minnesota chapters filed sex discrimination charges with the Minnesota Department of Human Rights. The charges were based on the Minnesota Human Rights Act, which declared that it was an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."[115] In response, members of the national organization filed suit alleging that the act violated their rights of speech and association.

The Supreme Court upheld the constitutionality of the act without a dissent.[116] Justice William Brennan's majority opinion asserted that previous decisions had identified two separate constitutional sources for the right of association. One line of decisions protected "intimate association" as "a fundamental element of personal liberty."[117] Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[118]

Justice Brennan contended that intimate and expressive association represented, respectively, the "intrinsic and instrumental features of constitutionally protected association."[119] This difference meant that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."[120]

Justice Brennan's category of expressive association also implied that some associations were "nonexpressive." This purported distinction fails because every association—and every associational act—has expressive potential. Exclusion, embrace, expulsion, and establishment can all be expressive. In fact, once a relational association is stipulated between two or more people, any act by those people—

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114 *Id.* at 612. According to the national organization, women could be "associate individual members," *id.* at 613, who were ineligible to vote, hold office, or "receive certain national awards" but could "otherwise participate fully in Jaycee activities," U.S. Jaycees v. McClure, 709 F.2d 1560, 1563 (8th Cir. 1983), *rev'd*, 468 U.S. 609 (1984).

115 *Roberts*, 468 U.S. at 615 (citation omitted) (internal quotation marks omitted).

116 *Id.* at 631. Justice Sandra Day O'Connor wrote a concurrence. *Id.* at 631–40 (O'Connor, J., concurring).

117 *Id.* at 617–18 (majority opinion).

118 *Id.* at 618.

119 *Id.*

120 *Id.*

when consciously undertaken as members of the association—has expressive potential reflective of that association.[121]

C. Online Association

The problems of the right of association and its intimate and expressive components do not disappear in the virtual world. Consider the challenges that Ric and Sue Hoogestraat and Janet Spielman pose for intimate association.[122] Ric and Sue are married (in the real world). Ric spends most of his nonworking waking hours (six hours each night and fourteen-hour stretches on the weekend) in Second Life, where he met Janet (or, more precisely, Ric's avatar met Janet's avatar). Ric and Janet have never met in person or spoken on the telephone and have no plans to do so, but in Second Life they own two dogs, share a mortgage, and shop together. In 2007, Janet became Ric's virtual wife, complete with a virtual wedding. Janet notes that "[t]here's a huge trust between" them and that they "tell each other everything." Sue, Ric's real-world wife, notes that it is "really devastating" when "[y]ou try to talk to someone or bring them a drink, and they'll be having sex with a cartoon."

How do the constitutional protections of intimate association apply to Ric, Sue, and Janet? Ric and Sue are an intimate association under the current framework of the right of association,[123] but what about Ric and Janet? Whatever one thinks of their online relationship, it is by almost any measure at least as "intimate" as Ric and Sue's offline one.[124] But Ric and Janet are unlikely to qualify as an intimate association.[125] Under current law, the government would need a compelling interest to disrupt or restrain Ric and Sue's intimate association but only a rational basis to regulate Ric and Janet's relationship.

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121 The "expressive" versus "nonexpressive" distinction is also complicated because its meaning is dynamic and subject to more than one interpretive gloss. *See* INAZU, *supra* note 105, at 160–62. That is one reason why expulsion is an integral part of group expression: without continued internal control over what constitutes the group, there would be no way to ensure that the traditions and practices of the group unfold on its own terms.

122 This example is taken from Alexandra Alter, *Is This Man Cheating on His Wife?*, WALL ST. J., Aug. 10, 2007, at W1. Alter reports that when Ric was home-bound for five weeks, "[s]ome days, he played from a quarter to six in the morning until two in the morning, eating in front of the computer and pausing only for bathroom breaks." *Id.*

123 They may in fact qualify as an intimate association even if they were not married. *See* Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (assuming, for summary judgment purposes, that a dating relationship between two police officers qualified as an intimate association because the two were monogamous, had lived together, and were romantically and sexually involved).

124 I do not mean to suggest that online relationships are generally more or less intimate than offline ones. The point is that we are unable to make these judgments categorically.

125 *See* cases cited *supra* note 30 (providing examples of lower court applications of intimate association).

So what exactly are the justifications underlying a constitutionally relevant distinction between Ric and Sue's association and Ric and Janet's association? Would Ric and Janet's association warrant greater constitutional protection if Ric and Sue were not married? What if Ric and Janet, in addition to their online interactions, met in person for occasional sexual encounters? What if Ric and Janet never left their homes and were bereft of meaningful relationships offline?

These are not merely academic inquiries. Countless variations of these questions unfold among the associations formed by the over 140 million Facebook users in the United States,[126] many of whom share status updates and personal stories with close friends and distant acquaintances alike. Do I form an intimate association with my Facebook friends? If so, do I lose the constitutional protections for this association if I add my college roommate or my brother-in-law to a group of family members?[127] What if I have only five Facebook friends and you have fifty or five hundred but we share similar information and experiences? What if you are more selective in choosing your fifty Facebook friends than I am in choosing my five?[128] Does it make a difference if we form a Facebook group around a shared hobby, a business connection, a religion, or a social club? Does it matter if the members of our group meet offline? How and why does the state determine which of these relationships qualify as intimate associations?[129]

The category of expressive association also raises conceptual difficulties online. What are we to make of the publicly accessible websites of groups that courts have concluded are "nonexpressive" associations?[130] Does not the very existence of these sites (which are not

126 *Facebook.com Traffic and Demographic Statistics*, QUANTCAST, http://www.quantcast.com/facebook.com (last visited Apr. 12, 2013) (estimating 146,034,160 unique U.S. visitors in December 2012).

127 *See* Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that a brother-in-law relationship is not protected as an intimate association).

128 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) (defining an intimate association as "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship").

129 We might ask whether qualifying as an intimate association brings with it any *meaningful* constitutional protection. Post-*Roberts* cases suggest intimate association offers little protection beyond that already established by the right of privacy. *See* Inazu, *supra* note 105, at 238 n.45 (collecting cases). But recognizing the category of intimate association is not without constitutional significance: it means that every group that does not qualify (including, in our online examples, everyone from Ric and Janet to the Facebook group of close friends to an online church) is relegated to a lower level of constitutional protection—something less than our most searching constitutional inquiry.

130 *See, e.g.*, City of Dall. v. Stanglin, 490 U.S. 19, 23, 25 (1989) (applying rational basis scrutiny to a city ordinance governing activity that "qualifie[d] neither as a form of 'intimate association' nor as a form of 'expressive association' as those terms were described in *Roberts*"); Swank v. Smart, 898 F.2d 1247, 1251–52 (7th Cir. 1990) (concluding that the

password protected or otherwise limited to the members of the group) suggest that part of the purpose of these groups is to express a message, to associate "for the purpose of engaging in those activities protected by the First Amendment"?[131]

What about a group that only exists online? Consider a blog whose members never gather in person but who form deep relationships through their online communication with one another. Do they count as an expressive association? If not, does this mean that the members of the group are not entitled to any constitutional protection for their association?

Consider the Top Hatters Motorcycle Club. In 2005, a California federal district court concluded that this group was not an expressive association.[132] Two years later, the Ninth Circuit upheld that conclusion.[133] But the website of the Top Hatters certainly looks like it is expressing all kinds of things[134]: The home page describes "a brotherhood of bikers that take riding and flying our colors very serious[ly]" and emphasizes that "[r]iding and strengthening our brotherhood in the biker community is our number one priority."[135] The "Photos" section displays pictures from past rides, parties, and picnics.[136] Click on "Jukebox," and you will hear the group's favorite songs, including

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First Amendment does not protect nonintimate, nonexpressive associations); Conti v. City of Fremont, 919 F.2d 1385, 1388 (9th Cir. 1990) ("[A]n activity receives no special first amendment protection if it 'qualifies neither as a form of "intimate association" nor as a form of "expressive association," as those terms were described in *Roberts*.'" (quoting *Stanglin*, 490 U.S. at 25)). For additional examples of nonexpressive associations, see Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 802–03 (9th Cir. 2011) (Christian sorority); Villegas v. City of Gilroy (*Villegas II*), 484 F.3d 1136, 1137 (9th Cir. 2007) (Top Hatters Motorcycle Club), *aff'd on other grounds on reh'g sub nom.* Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950 (9th Cir. 2008); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 n.2 (2d Cir. 2007) (noting that trial court had determined, for purposes of a preliminary injunction, that a fraternity was not an expressive association); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 438 (3d Cir. 2000) (fraternity); Semaphore Entm't Grp. Sports Corp. v. Gonzalez, 919 F. Supp. 543, 550 n.4 (D.P.R. 1996) (Ultimate Fighting Championship); Cent. Tex. Nudists v. Cnty. of Travis, No. 03-00-00024-CV, 2000 Tex. App. LEXIS 8136, at *12–13 (Dec. 7, 2000) (nudists). For examples of websites corresponding to some of these groups, see ALPHA EPSILON PI, http://www.aepi.org (last visited Apr. 12, 2013); CENTRAL TEXAS NUDISTS, http://www.codigest.org/ctn (last visited Apr. 12, 2013); TOP HATTERS MOTORCYCLE CLUB, http://www.tophatters-mc.com (last visited Apr. 12, 2013); ULTIMATE FIGHTING CHAMPIONSHIP, http://www.ufc.com (last visited Apr. 12, 2013).

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

132 Villegas v. City of Gilroy, 363 F. Supp. 2d 1207, 1219 (N.D. Cal. 2005) *aff'd*, *Villegas II*, 484 F.3d 1136 (9th Cir. 2007), *aff'd on other grounds on reh'g sub nom.* Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950 (9th Cir. 2008).

133 *Villegas II*, 484 F.3d at 1137.

134 *See* TOP HATTERS MOTORCYCLE CLUB, http://www.tophatters-mc.com/home.html (last visited Apr. 12, 2013).

135 *Id.*

136 *Photos*, TOP HATTERS MOTORCYCLE CLUB, http://www.tophatters-mc.com/photos.html (last visited Apr. 12, 2013).

the Stones' "Paint it Black" and the Doors' "Break On Through."[137] The "Memorial" page is a photo tribute to a deceased member, William H. Alnas, with the caption: "RIDE FOREVER FREE WILLIE! YOU WILL BE IN EVERYBODY'S HEART! TOP HATTERS BROTHER FOREVER!"[138]

If we were to try to evaluate whether this group was sufficiently "expressive," how would we know and whom would we ask? On what basis would we conclude that a memorial, pictures, and mission statements are not expressive? Determining the sufficiency of expressiveness introduces countless subjective and ideologically charged judgments—the kinds of inquiries most suspect under the First Amendment.[139] Even more perversely, courts and government officials could insist that they were simply deciding objectively that a certain group was not expressive or was not expressive enough. Ostensibly neutral criteria would elide ideological and political judgments. That is a disastrous recipe for First Amendment jurisprudence.[140]

IV
VIRTUAL ASSEMBLY

We find more workable protections for our online groups in a constitutional right that long predates the virtual world: the right of assembly. Some people today are unaware that the First Amendment even mentions assembly or that it has figured prominently in American debate and political action for much of our nation's history.[141] Those who are aware of the right of assembly are likely to think of it primarily or exclusively in its "most pristine and classic form"—an occasional protest or parade.[142] But protests, parades, and other public

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137 *Jukebox*, TOP HATTERS MOTORCYCLE CLUB, http://www.tophatters-mc.com/jukebox/jukebox.html (last visited Apr. 12, 2013).

138 *Memorial*, TOP HATTERS MOTORCYCLE CLUB, http://www.tophatters-mc.com/memorial.html (last visited Apr. 12, 2013).

139 *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 232 (1983) ("[J]ust as there is a danger of improper motivation in the formulation and adoption of viewpoint-based restrictions in the legislative and administrative processes, so too is there a danger of improper motivation in the interpretation and application of such restrictions in the judicial process.").

140 *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.").

141 *See* INAZU, *supra* note 105, at 20–62 (chronicling the prominence of the right of assembly in the Democratic-Republican Societies, abolitionist and suffragist movements, labor movements, and civil rights advocacy).

142 Edwards v. South Carolina, 372 U.S. 229, 235 (1963). Nor is the right of assembly textually limited to assembly for the purposes of petition. *See* INAZU, *supra* note 105, at 21–25; Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 990–91 (2011).

displays seldom occur spontaneously. They often depend on the relationships and ideas that emerge from within the groups that precede the moment of expression. These connections are evident in the right of assembly. As Michael McConnell has recently asserted:

> [F]reedom of assembly was understood to protect not only the assembly itself but also the right to organize assemblies through more or less continual associations and for those associations to select their own members by their own criteria. The Sons of Liberty's public meetings were not purely spontaneous gatherings; they were planned, plotted, and led by men who shared a certain vision and met over a period of time, often secretly, to organize them. In this respect, the freedom of assembly is preparatory to the freedom of speech. The freedom of speech presumably suffices to protect what is said at an assembly. Freedom of assembly or association is necessary to protect the seedbed of free speech: the group that plans and guides the speech.[143]

Most assemblies flow out of groups of people who gather to eat and talk and share and pray long before they protest or parade.[144]

If the idea that assembly might extend to groups as well as events seems unfamiliar, the possibility of *virtual* assembly is almost counterintuitive. Nonetheless, just as "speech," "press," and "religion" have evolved to encompass forms of expression unimaginable to the founders,[145] so too can assembly. In fact, construing broadly the freedom of assembly mirrors the way in which we have come to understand the freedom of speech.

The right to free speech extends in three ways, none of which is evident from the text of the First Amendment. First, it extends across time, preceding the actual moment of communication to guard against prior restraints that would inhibit the expression of that com-

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143 Michael W. McConnell, *Freedom by Association*, FIRST THINGS, Aug./Sept. 2012, at 39, 41 (reviewing INAZU, *supra* note 105).

144 *See id.* at 42.

145 *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 905–06 (2010) ("With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."); Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1353, 1359 (E.D. Va. 1995) ("Rather than publishing in a newspaper, Lerma has used the Internet, which is rapidly evolving into both a universal newspaper and public forum. And although the law has not yet decided how to deal with the Internet, it is certain that this form of communication will retain First Amendment protections."); Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 203 (2002) ("If one holds beliefs that are admittedly not religious in the traditional sense, in the sense the word religion was used by the Ratifiers and Framers of the First Amendment, the Court will still entitle those beliefs to the same protection as admittedly religious (or traditional) beliefs."); *see also* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)).

munication.[146] Second, it extends to even before the moment of prior restraint in order to protect the means through which the communication is formed in the realm of thought and ideas.[147] Third, it extends to modes of communication that are not speech but that function in some ways like speech, including symbolic expressions, virtual and otherwise.[148]

The freedom of assembly protects groups in three analogous ways. First, it prevents government from interfering with a group's membership before it gathers.[149] Second, it protects the right of individuals to pursue and form groups even before those groups formally exist.[150] Finally, assembly extends to nonphysical gatherings. Just as

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146 *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395, 426 (1953) (Douglas, J., dissenting) ("There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment."); *cf.* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication.").

147 The clearest characterization of this idea is "intellectual privacy." *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 *passim* (2008). Richards argues that

> [w]ithout free thought, the freedom to think for ourselves, to entertain ideas that others might find ridiculous or offensive, we would lack the ability to reason, much less the capacity to develop revolutionary or heretical ideas about (for instance) politics, culture, or religion. . . . Intellectual privacy thus permits us to experiment with ideas in relative seclusion without having to disclose them before we have developed them, considered them, and decided whether to adopt them as our own.

Id. at 425 (emphasis omitted).

148 *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002) (virtual child pornography); Reno v. ACLU, 521 U.S. 844, 868 (1997) (online pornography); Texas v. Johnson, 491 U.S. 397, 414–16 (1989) (burning flag); United States v. O'Brien, 391 U.S. 367, 376 (1968) (burning draft card).

149 *See* Bhagwat, *supra* note 142, at 984; McConnell, *supra* note 143, at 41.

150 Strandburg's notion of "emergent association" is extremely helpful here. *See* Strandburg, *supra* note 18, at 745. But Strandburg relies too heavily on expressive association to protect emergent association. *See id.* at 784, 801. The category of expressive association cannot logically encompass emergent association. Consider Strandburg's example of a bicycle club that "may be instantly transformed by its listserve into an advocacy group when local ordinances related to bicycle traffic or funding for bike lanes are up for consideration." *Id.* at 750. The bicycle club by itself—an emergent association—is not an expressive association. Under the Supreme Court's doctrinal framework, the state need only find the barest plausible restriction to hinder or prevent the club and its members from developing as a group. That club might have the potential to become the most politically effective group to challenge local cycling ordinances. Yet we may never know because, as Strandburg notes, "the only way to ensure that one is not mistakenly associated with an unpopular group is to confine one's communications to those well within the mainstream." *Id.* at 752.

These ideas can also be illustrated in an example taken from labor law. Section 7 of the National Labor Relations Act of 1935 (NLRA) protects "concerted activities" *prior to* the formation of a union. *See* 29 U.S.C. § 157 (2006) (codifying employees' "right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). The National Labor Relations Board (NLRB) has concluded that the NLRA protects an em-

actual speech is not a necessary condition for the protections of speech, a physical gathering is not a necessary condition for the protections of assembly.[151] One reason that we can intuit this result is that the right of assembly operates even when groups never physically assemble in full: many groups rarely if ever gather all of their members in one location, but subsets of members of these groups gather for myriad purposes in ever-changing compositions.[152]

The idea of the nonphysical assembly is reinforced by the modern public forum doctrine, first recognized in *Hague v. Committee for Industrial Organization*.[153] Justice Owen Roberts's opinion noted that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[154] We still require access to spaces "for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[155] but the nature of the forum has shifted. In Justice Anthony Kennedy's oft-quoted words: "Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant in-

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ployee's online discussions about the terms and conditions of her employment, discussions that could lead to further "concerted activit[ies]" among a group of co-workers. *See, e.g.*, OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 4–5 (2012) (noting that the NLRB's determination that a collections agency's rule that prohibited "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media" unlawfully restricted Section 7 activity and that a collection agent's Facebook comments that were critical of her employer and that initiated an online discussion with other employees about their working conditions constituted protected "concerted activity" (internal quotation marks omitted)).

151 *Cf.* GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 173 (1961) ("Freedom to assemble need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall . . . [but] can justifiably be extended to include as well those persons who are joined together through organizational affiliation."); Tien, *supra* note 79, at 176 ("Bulletin boards, mailing lists, and newsgroups are more than just talk. They are ways that people assemble in cyberspace.").

152 Consider the Boy Scouts of America, which claimed a membership of roughly 900,000 Boy Scouts in 2010. BOY SCOUTS AM., 2010 ANNUAL REPORT 18, *available at* http://www.scouting.org/About/AnnualReports/PreviousYears/2010.aspx. The 2010 National Scout Jamboree (the largest single location gathering of Boy Scouts) drew approximately 30,000 Scouts. *National Scout Jamboree*, BOY SCOUTS AM., http://www.scouting.org/About/FactSheets/2010_National_Jamboree.aspx (last visited Apr. 12, 2013). Large membership list organizations like AARP (formerly known as the American Association of Retired Persons) and the National Rifle Association function similarly.

153 307 U.S. 496 (1939). This pivotal case drew a much-heralded amicus brief from the American Bar Association's (ABA) Committee on the Bill of Rights, which emphasized that "the integrity of the right 'peaceably to assemble' is an essential element of the American democratic system." *See* Inazu, *supra* note 105, at 54–55 (internal quotation marks omitted) (discussing the ABA's amicus brief and its reception).

154 *Hague*, 307 U.S. at 515 (plurality opinion).

155 *Id.*

terchanges of ideas and shaping of public consciousness occur in mass and electronic media."[156] Justice Kennedy wrote in the context of a telecommunications case, but his observations are increasingly relevant to the entire online world. And as the Court has noted, public forum principles apply with equal force to fora that are "metaphysical," as opposed to "spatial or geographic."[157]

We do not invent new rights whenever we confront new modes of communication not envisioned by the Framers. We protect blogs and e-mail from government censorship under the right to free speech, not under a "right to blog" or a "right to e-mail." We may occasionally enlist new concepts and doctrines, but we do not rename the underlying right because doing so risks untethering it from the constitutional tradition from which it evolved and occluding the constitutional values upon which it depends. The right of association illustrates precisely this danger. But before the judicial turn to association, the right of assembly offered a different possibility.

Our constitutional tradition suggests that the right of assembly is and has always been a presumptive right of individuals to form and participate in private groups.[158] The protections of assembly encompass the kinds of groups that we intuit are among the most important to our private lives—groups like intimate associations and religious associations.[159] The right of assembly also extends beyond these "core" cases to cover more marginal and unfamiliar manifestations of private groups.

Yet while assembly avoids the difficult line drawing of expressive and intimate association, it does not obviate the need to draw any lines. The following subsections consider three complications: peaceability, commerciality, and nesting.

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156 Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part and dissenting in part).

157 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995); *cf.* Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842 (6th Cir. 2000) (applying public forum analysis to a website).

158 *See* Inazu, *supra* note 105, at 14–16 (proposing a similar definition); McConnell, *supra* note 143, at 39, 41. The presumptive right is not an absolute right. For example, I have argued elsewhere for an "anti-monopolistic" principle in the constitutional scrutiny applied to laws that burden the right of assembly. INAZU, *supra* note 105, at 166–75. That principle would limit the protections of assembly when a private noncommercial group "prospers under monopolistic or near-monopolistic conditions." *Id.* at 14 (emphasis omitted).

159 *See* Karst, *supra* note 29, at 629–37 (describing the values of intimate association); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (noting that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations"); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 528–29 (2007) (discussing the special constitutional status of churches).

A. Peaceability

Assembly is textually qualified in one important regard: the First Amendment protects "the right [of] the people *peaceably* to assemble."[160] The peaceability limitation suggests that although the right of assembly protects the formation, composition, expression, and gathering of a group, it does not justify anarchy by the group. Indeed, throughout our nation's history, the right of assembly has developed alongside the law of "unlawful assembly."[161] The right of assembly has thus not sheltered criminal conspiracies, violent uprisings, and even most forms of civil disobedience.

In most cases, assembly will not inhibit laws furthering the state's compelling interest in peaceability. Although this presumption risks being manipulated to eliminate any meaningful protections, we have managed to overcome a similar danger in our free speech jurisprudence, which prompted the Court to protect advocacy short of "imminent lawless action" in that area of the law.[162] An understanding of the peaceability constraint on assembly ought to operate with a similar deference—both online and offline.[163]

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160 U.S. CONST. amend. I (emphasis added).

161 The common law traditionally defined unlawful assembly—a criminal offense—as:

> (1) the assembling together of three or more persons, (2) with a common design or intent (3) to accomplish a lawful or unlawful purpose by means such as would give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.

J.P. Ludington, Annotation, *What Constitutes Offense of Unlawful Assembly*, 71 A.L.R. 2d 875, 878 (1960) (footnotes omitted). In *Cole v. Arkansas*, the Supreme Court upheld such a state criminal statute that outlawed "any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation" against a First Amendment challenge. 338 U.S. 345, 348 (1949) (internal quotation marks omitted). The Court first noted that the statute did not "penalize the promotion, encouragement, or furtherance of peaceful assembly" and then held that "it [was] no abridgment of free speech or assembly" for the state to ban "promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence." *Id.* at 353.

162 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . There must be reasonable ground to believe that the danger apprehended is imminent."), *overruled by Brandenburg*, 395 U.S. 444; Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) ("[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

163 *See Brandenburg*, 395 U.S. at 449 n.4 ("Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . . ."). For some preliminary considerations of the boundaries of peaceability in the context of assembly, see Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels? The Limits of the Right of Assembly*, 89

B. The Political Compromise of Commerciality

Almost all recent defenders of stronger constitutional protections for groups embrace a distinction between commercial and noncommercial groups.[164] The distinction is not a doctrinal one—like any other private group, a commercial group expresses itself through exclusion, embrace, expulsion, and establishment. Nevertheless, changing political realities support the compromise of regulating a commercial sphere while granting more latitude to a noncommercial sphere.[165]

The distinction between commercial and noncommercial is imperfect, and it is subject to challenge on a number of levels.[166] Even so, it provides a politically workable alternative that improves upon both a broad libertarianism that protects all groups and a consensus liberalism that protects only liberal groups.[167]

WASH. U. L. REV. 1381, 1388–99 (2012); John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1438–40 (2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 385–89 (2012) (reviewing INAZU, *supra* note 105).

164 For example, Michael McConnell, the lead counsel for the Boy Scouts in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and the Christian Legal Society in *Christian Legal Society Chapter of the University California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010), recently argued on behalf of the Christian Legal Society that "[a]ll noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles." Brief for Petitioner at 2, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08–1371), 2010 WL 711183 at *2. Andrew Koppelman has attributed a similar view to an array of scholars including Dale Carpenter, Richard Epstein, John McGinnis, Michael Paulsen, and Nancy Rosenblum. ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION, at xii, 72–75 (2009); *see also* INAZU, *supra* note 105, at 166–73 (adopting a modified version of the commercial vs. noncommercial distinction). Writing in the context of online gaming, Jack Balkin has proposed a similar approach. *See* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2087 (2004) (arguing that rather than impose a one-size-fits-all solution, we must instead look to "the nature and purposes of the game space, and its degree of commercialization").

165 *See* INAZU, *supra* note 105, at 167.

166 As James Boyle has argued, the process of marking these kinds of boundaries "is one of contentious moral and political decision making about the distribution of wealth, power, and information" and "[t]he supposedly settled landscape is in fact an ever-changing scene." JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 27 (1996). For critiques of my proposed line in the context of the right of assembly, see Richard A. Epstein, *Forgotten No More*, 13 ENGAGE 138, 157 (2012) (reviewing INAZU, *supra* note 105); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012) (same).

167 The libertarian alternative—a broad grasp for greater autonomy by all private groups—would threaten the totality of Title VII and public accommodations laws. The consensus liberal alternative demands what Nancy Rosenblum has called a "[l]ogic of [c]ongruence" requiring "that the internal life and organization of associations mirror liberal democratic principles and practices." NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 36 (1998).

C. The Peculiar Problem of Nested Online Groups

The commercial-versus-noncommercial distinction is more complicated online because, as Internet scholars have often noted, the vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities such as Internet Service Providers (ISPs).[168] Moreover, most of these providers enforce Terms of Service through which they exercise significant discretion to censor expression or terminate service altogether.[169] Yet as Mark Lemley has observed, "public accessibility of [the Internet's] key features is so deeply ingrained that we simply take it for granted."[170]

In some ways, ISPs and platforms like Facebook are the shopping malls, cable television companies, and newspapers of old—privately run businesses whose services place them at the nexus of our social, political, and economic interactions.[171] They take on the characteristics of a state actor providing avenues of communication that people rely upon to further their expressive purposes. However, under traditional state action doctrine, most ISPs and online platforms are not subject to First Amendment scrutiny (even though a few ISPs, like public universities, are public actors).

The threshold state action question is complicated enough, but the distinctions are even finer. Within the domain of private ISPs, some are commercial (like Time Warner) and some are noncommercial (like private universities). All commercial and *most* noncommercial private actors are subject to various regulatory schemes, including

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168 *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005).

169 *Id.* at 1121 (quoting the Terms of Service for America Online). Nunziato notes that "courts have rejected challenges to private Internet actors' speech restrictions on the grounds that such actors are not state actors, nor the functional equivalent of state actors, under applicable First Amendment doctrine." *Id.* at 1128.

170 Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 535 (2003). Lemley's observation is borne out by Danielle Keats Citron's assertion that "[t]he civil rights implications of ISPs charging women or African Americans higher monthly fee than men or Caucasians would be obvious." Citron, *supra* note 64, at 68.

171 *Cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (holding that constitutional rights of owners of a shopping center were not violated by preventing them from hindering the public's right of free expression); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319–20 (1968) (concluding that because a privately owned shopping center was open to the public, it could not prevent members of the public from exercising their First Amendment rights). For a nice analysis of the potential applicability of "quasi-municipality doctrine" to the virtual world, see Peter Sinclair, *Freedom of Speech in the Virtual World*, 19 ALB. L.J. SCI. & TECH. 231, 252–57 (2009). The quasi-public nature of ISPs and their indispensable importance to what we do online also counsels in favor of network neutrality, which holds that "network providers may not discriminate against content, sites, or applications." Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 429 (2009).

antidiscrimination laws.[172] But *some* noncommercial actors (including religious, political, and some social groups) are statutorily exempted from compliance with these laws; I will refer to this subset of noncommercial actors as *exempt* groups.

In the online world, many exempt groups are *nested* groups: they exist within a larger group. A simple illustration of nesting is the collection of student groups (mostly exempt groups) that exists within a state university (a public actor): groups like the College Republicans, the environmental club, the Jewish student group, the Catholic student group, or the gay and lesbian student group. These groups are neither officially endorsed nor controlled by the university. They are not subject to Title VII or other antidiscrimination laws; indeed, they generally retain First Amendment rights to control their message and membership.[173]

What happens when we nest exempt groups within online private commercial actors? Consider again the St. Louis Beer Lovers Facebook Group. The St. Louis Beer Lovers ought to be able to invite whomever they want to join. Suppose they decide to limit their membership to men. Facebook is subject to antidiscrimination law and could not do the same across its platform: it could not limit the use of Facebook to men.[174] Could the City of St. Louis, in the interest of eradicating gender discrimination, require that the St. Louis Beer Lovers Facebook Group either include women or be shut down based on the City's interest in eradicating gender discrimination?[175] Could Facebook, in accordance with its company's nondiscrimination policy, require that the St. Louis Beer Lover's Facebook Group include women, or is Facebook a quasi-public actor such that it may not impose these kinds of restrictions? What if the St. Louis Beer Lovers believed that a Facebook presence was the most effective method of communicating among existing members and reaching out to new members?

Offline, we have surprisingly few examples of this kind of nested arrangement in which exempt groups exist within (and are facilitated by) a private commercial actor. Forums of student organizations or alumni groups at for-profit universities may provide some examples, but these for-profit models are relative outliers in higher education.[176]

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172 *See, e.g.*, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

173 *But see* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2978 (2010).

174 *See supra* note 172 and accompanying text.

175 *Cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984) (upholding a state law that compelled a national nonprofit organization to admit women as full members).

176 Students enrolled at for-profit schools accounted for only 9.2% the post-secondary student population during the 2008–2009 academic year. Daniel L. Bennett et al., Ctr. for Coll. Affordability & Productivity, *For-Profit Higher Education: Growth, Innovation and Regulation* 10 (2010), http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/29010.pdf.

Sports fan clubs that are licensed and facilitated by professional sports teams may come close. But the millions of nested groups that we encounter online dwarf these scattered examples.[177]

V
APPLICATIONS

Having set out the doctrinal problems with the existing framework of intimate and expressive association and proposed the alternative of virtual assembly, I turn now to some examples of the differences that virtual assembly might make. To illustrate these differences, I return to the four examples that I raised earlier in this Article and use them to show how groups form and maintain meaning and expression through exclusion, embrace, expulsion, and establishment.

A. Exclusion: No Dads Allowed

An online forum for moms, Sonoma County Moms,[178] facilitated discussion threads for its 361 members over several years on topics ranging from pregnancy to breastfeeding to parenting.[179] Then Gary Traffanstedt attempted to join the discussion and made his inaugural post: "Hi all, I'm a dad." Gary later explained that he "just wanted to join a community of like-minded parents." The thirty-year-old, self-employed web programmer had learned of the site through his wife. In that initial post, he added, "I have a great recipe that I developed myself for Thanksgiving turkey if anyone is interested." The site's members responded with a barrage of messages expressing reactions ranging from discomfort to hostility. Gary left the forum within a day. He later asked: "If you're going to exclude someone simply because they're male, isn't that the definition of discrimination?" Not all of the moms were pleased with the outcome. One asked: "If we were all having a playdate and the guy joined in with his daughter, would you confront him that way verbally?"

Sonoma County Moms is neither an intimate nor an expressive association. Despite sharing personal details about some of the most intimate activities of life (breastfeeding, parenting, sex) and expres-

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177 The average Facebook user connects to eighty of the more than 900 million community pages, groups, and events on Facebook. *Infographic: Social Media Statistics for 2012*, DIGITAL BUZZ BLOG (Jan. 3, 2012), http://www.digitalbuzzblog.com/social-media-statistics-stats-2012-infographic/. As of March 2011, 17.8 million LinkedIn members were part of at least one LinkedIn group. Jeff Weiner, *100 Million Members and Counting*. . ., LINKEDIN BLOG (Mar. 22, 2011), http://blog.linkedin.com/2011/03/22/linkedin-100-million/.

178 SONOMA COUNTY MOM, http://sonomacountymom.com (last visited Apr. 12, 2013).

179 This example is taken from Derek J. Moore, *In World of Online Moms, Can Dads Come Out and Play?*, PRESS DEMOCRAT (May 14, 2008, 3:27 AM), http://www.pressdemocrat.com/article/20080514/NEWS/805140336.

sing a common interest and identity as mothers, the women of Sonoma County Moms do not qualify for elevated constitutional protection under the Supreme Court's categories of association. If the state applied existing antidiscrimination laws, the online group would be without any meaningful constitutional shield to exclude dads like Gary, even though the Court has noted that the "[f]reedom of association . . . plainly presupposes a freedom not to associate."[180]

Virtual assembly would protect the decision of Sonoma County Moms to limit their membership to women. The online forum is a private, noncommercial group. It should be able to exclude potential members for any reason. Gary Traffenstedt may well be hurt by that exclusion. He might feel lonely, marginalized, and insulted. But permitting the moms in Sonoma County to exclude unwanted members allows them the opportunity to foster their own values and goals.

B. Embrace: The Facebook Statute

In 2011, Missouri enacted a law that prohibited "exclusive access" between students and teachers in online social networks.[181] Nicknamed the "Facebook law,"[182] the statute was intended to protect students from teacher misconduct by prohibiting unmonitored private communications between teachers and students.[183] Within days, multiple lawsuits sought declaratory and injunctive relief.[184] One Mis-

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180 *Roberts*, 468 U.S. at 623; *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010) (same); Abood v. Detroit Bd. of Educ., 431 U.S. 290, 233–35 (1977) (same).

181 Amy Hestir Student Protection Act, S.B. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The law covered both current and some former students, including "any person who was at one time a student at the school at which the teacher is employed and who is eighteen years of age or less and who has not graduated." *Id.* at 15. The Act stipulated: "No teacher shall establish, maintain, or use a nonwork-related internet site which allows exclusive access with a current or former student. Nothing in this subsection shall be construed as prohibiting a teacher from establishing a nonwork related internet site, provided the site is used in accordance with this section." *Id.* As drafted, this provision appears to restrict any use of a site like Facebook, since Facebook "allows exclusive access." *Id.*

182 Jason Rosenbaum, *Missouri House Approves Fix in the State 'Facebook Law,'* ST. LOUIS BEACON (Sept. 23, 2011, 9:58 AM), http://www.stlbeacon.org/voices/blogs/political-blogs/beacon-backroom/113135-missouri-house-approves-fix-in-the-state-facebook-law.

183 *See* Tim Barker, *Teachers' Talk with Students Faces Limit*, ST. LOUIS POST-DISPATCH, Aug. 4, 2011, at A1.

184 Bilateral Class-Action Complaint for Declaratory and Injunctive Relief, Thomas v. Ladue Sch. Dist., No. 4:11-cv-1453 (E.D. Mo. Aug. 19, 2011); Petition for Injunctive Relief and Declaratory Judgment, Mo. State Teachers Ass'n v. State, No. 11AC-CC00553 (Mo. Cir. Ct. Cole Cnty. Aug. 19, 2011). The Missouri State Teachers Association raised myriad arguments, including the freedom of teachers to associate with both current and former students:

> In order to comply with the requirements of the Act, Plaintiffs [would] be required to stop using non-work-related websites and other social networking sites that allow[ed] exclusive access with current or former students, and absent the Act, Plaintiffs would continue to benefit from the use

souri teacher expressed dismay that "hundreds of teachers across the state who have effectively used Facebook and other social networking sites to communicate with students, and I am one of those, will have to trash years worth of work, because all teachers are potential criminals [in the eyes of the bill's sponsor]."[185] Others noted how social networking sites had facilitated mentoring relationships between teachers and students.[186]

The Missouri General Assembly quickly repealed the controversial Facebook law,[187] but future examples are not hard to imagine. And when it comes to protections against these kinds of laws, the Supreme Court's recent turn to the right of association offers little consolation. In fact, the Court's elision of the significance of embrace has only grown worse. In *City of Dallas v. Stanglin*, the Court upheld a Dallas city ordinance that restricted the age of admission to certain dance halls in order "to provide a place where teenagers could socialize with each other, but not be subject to the potentially detrimental influences of older teenagers and young adults."[188] The Twilight Skating Rink in Dallas had sued to enjoin the ordinance, asserting that it infringed upon the right of teenagers to associate with others outside of their age bracket.[189]

Stanglin involved a commercial group, a for-profit skating rink. But rather than focusing on its clear commercial nature, the Court took pains to depict the skating rink as neither an intimate nor an expressive association. It first asserted that dance hall patrons "are not engaged in the sort of 'intimate human relationships'" that give rise to the protections of intimate association.[190] It then claimed that the potential associations between teenagers and adults restricted by the ordinance "simply do not involve the sort of expressive association that the First Amendment has been held to protect" because "[t]he hundreds of teenagers who congregate each night at this particular

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of non-work-related sites that allow exclusive access with current or former students.

Petition for Injunctive Relief and Declaratory Judgment, *supra*, at 6. A Missouri state circuit judge issued a preliminary injunction against the Facebook law after concluding that the statute would have a chilling effect on speech. Order Entering Preliminary Injunction at 2, Mo. State Teachers Ass'n v. State, No. 11AC-CC00553 (Mo. Cir. Ct. Cole Cnty. Aug. 26, 2011).

185 Randy Turner, *Nixon Signs Bill Outlawing Teacher/Student Facebook Communication*, TURNER REP. (July 14, 2011, 12:37 PM), http://rturner229.blogspot.com/2011/07/nixon-signs-bill-outlawing.html; *see also* Tim Barker, *Backlash over Teacher 'Facebook Law,'* ST. LOUIS POST-DISPATCH, Aug. 10, 2011, at A1 (noting criticism of the "Facebook Law").

186 Barker, *supra* note 185.

187 Jason Hancock, *New 'Facebook Law' Signed: Nixon Grudgingly OKs Bill Requiring Schools to Create Online Media Policies*, ST. LOUIS POST-DISPATCH, Oct. 22, 2011, at A2.

188 490 U.S. 19, 21 (1989).

189 *Id.* at 22.

190 *Id.* at 24.

dance hall are not members of any organized association; they are patrons of the same business establishment."[191] The Court concluded that "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."[192] That kind of analysis neglects the importance of embrace to a group's expression and identity; even "recreational dancing" can foster social meaning.[193]

The breadth of potential social meaning arising out of private relationships points toward another problem underlying the Facebook statute: the interplay between the free speech doctrine and employment law.[194] Current law grants government employers broad discretion to regulate or restrict the private expression of their employees.[195] This area of the law draws a threshold distinction between expression that is a "matter of public concern" (which receives elevated constitutional protection that requires a balancing of interests) and "matters only of personal interest" (over which the government has nearly plenary control).[196] The key case demarcating the boundaries of the latter category is *City of San Diego v. Roe*, in which the Court upheld the decision of the San Diego Police Department to fire an officer who "made a video showing himself stripping off a police uni-

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191 *Id.*

192 *Id.* at 25.

193 In 1885, an Illinois court reviewed a village ordinance that restricted as nuisances "all public picnics and open air dances within the limits of the village." Poyer v. Vill. of Des Plaines, 18 Ill. App. 225, 229 (1885). Rejecting the ordinance, the court reasoned:

> The framers of the constitution inserted in that instrument a clause making inviolate the right of the people to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of their grievances. And it may well be supposed they would have added the right to assemble for open air amusements had any one imagined that the power to deny the exercise of such right would ever be asserted . . . .

Id. at 229–30.

194 *See* Eugene Volokh, *Judge Blocks Implementation of Missouri Law Banning Teachers from Facebook "Friendships" with Under-18 Current or Former Students*, VOLOKH CONSPIRACY (Aug. 26, 2011, 6:28 PM), http://volokh.com/2011/08/26/judge-blocks-implementation-of-missouri-law-banning-teachers-from-facebook-friendships-with-under-18-current-or-former-students.

195 The Supreme Court has held that public employee expression must relate to "matters of public concern" unrelated to "official duties" in order to receive First Amendment protection. Garcetti v. Ceballos, 547 U.S. 410, 420–21 (2006); *accord* Connick v. Myers, 461 U.S. 138, 147 (1983). Expression falling within this category is then subjected to a balancing of "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

196 *Connick*, 461 U.S. at 147; *cf.* City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) ("*Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'").

form and masturbating."[197] *Roe* offered a narrow definition of public concern and intimated that any private expression falling outside of its bounds would be subject to employer regulation.[198] But matters of public concern often germinate in the ordinariness of private communication.[199] Even accepting the holding of *Roe*, therefore, a great deal of space exists between the facts of that case and the ill-defined boundaries of the public concern test.[200]

The associational dimensions of the Facebook statute further complicate *Roe*'s implications for private expression. As Mary-Rose Papandrea has noted, "[s]ome courts have found it particularly difficult to apply [the] public concern test in cases involving the right of association."[201] The Facebook statute raises similar complications. A twenty-three-year-old college graduate who is teaching high school students may form perfectly legitimate relationships with her students that encompass a range of common interests and topics. Or consider the numerous teachers who also serve as coaches, mentors, club advisors, church youth leaders, and even parents to some of their students. *Roe*'s broad license to government employers to curb expression that falls outside of a narrowly defined "public concern"

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197 *Roe*, 543 U.S. at 78.

198 *Id.* at 83–84 (concluding that speech touches a matter of public concern when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public").

199 Consider online speech discussing the commonplace experiences of ordinary people—the type of speech one would expect to find in private conversations on Facebook and other social media. Normally such speech would not be "a subject of legitimate news interest" and thus would not be protected by the First Amendment. However, "people arrive at their political beliefs and are moved to political and social action largely through their personal experiences," Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37 (1990), and "stories they hear about others' personal experiences can have a similar effect," Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2143. *Cf.* INAZU, *supra* note 105, at 5 ("[A]lmost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity.").

200 *Cf.* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (noting that it "remains true today" that "'the boundaries of the public concern test are not well defined'" (quoting *Roe*, 543 U.S. at 83)).

201 Papandrea, *supra* note 199, at 2148. The Eleventh Circuit has concluded that the public concern test "is inapplicable to freedom of association claims." Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987). The Fifth Circuit has similarly held that freedom of association claims are "not subject to the threshold public concern requirement." Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991). At present, six other circuits have adopted the public concern requirement for freedom of association claims. *See* Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073, 1075 (10th Cir. 2011); Hudson v. Craven, 403 F.3d 691, 696 (9th Cir. 2005) (applying the public concern test to hybrid speech and association claims); Cobb v. Pozzi, 363 F.3d 89, 102–03 (2d Cir. 2004); Edwards v. City of Goldsboro, 178 F.3d 231, 249–50 (4th Cir. 1999); Griffin v. Thomas, 929 F.2d 1210, 1214 (7th Cir. 1991); Boals v. Gray, 775 F.2d 686, 691 (6th Cir. 1985).

could preclude most private online communication between these teachers and their students.

Under the framework of virtual assembly, the Missouri law would be a direct infringement of expression through embrace. Although the relationship between student and teacher is nested within Facebook, a commercial actor, the nesting of private online groups should not diminish their constitutional protections.

There are, of course, several meanings of the word "embrace," and it is easy to see why the state would be interested in preventing some kinds of embrace between teachers and students. Still, the peaceability constraint of virtual assembly helpfully illustrates the divide between these different meanings. Virtual assembly encourages a kind of social embrace through which participants form and maintain relationships, even between teachers and students. It does not sanction criminal conduct.

In fact, the state has long regulated illicit sexual conduct between teachers and students, and one can easily envision ways to discourage online communication that leads to this kind of conduct (for example, by making the online communication an aggravating factor to the underlying criminal offense). Virtual assembly shows that the law can accomplish these objectives without precluding all forms of online embrace, and the Missouri statute as drafted would not meet the standard of virtual assembly.

C. Expulsion: St. Pixels

St. Pixels is an online religious community that seeks "to create a sacred space and a welcoming and witnessing community on the Internet."[202] Sponsored by the Methodist Church, St. Pixels includes a Facebook application that offers virtual worship services and an integrated church chat room.[203] Its website hosts discussion blogs and

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202 Eryn Sun, *Church in Your Pocket? Facebook Multimedia Church to Launch*, CHRISTIAN POST TECH (Apr. 30, 2011, 8:23 AM), http://www.christianpost.com/news/church-in-your-pocket-facebook-multimedia-church-to-launch-50045 (internal quotation marks omitted).

203 *See* ST. PIXELS, http://www.stpixels.com/wp/ (last visited Apr. 12, 2013). Reverend Jonathan Kerry, Coordinating Secretary for Worship and Learning in the Methodist Church Connexional Team, explains that

> St. Pixels is one of these new ways of being church, allowing Christians to gather online to worship God, support each other and pray for the world. The Methodist Church is delighted to have been able to sponsor it, and we hope that it will continue to thrive as a place for Christians of all traditions to meet.

Michael Ireland, *Church of the Internet Clicks into High Gear*, ASSIST NEWS SERVICE, Mar. 29, 2007, *available at* http://www.assistnews.net/Stories/2007/s07030186.htm. On May 10, 2011, St. Pixels launched the first-ever interactive worship service on Facebook. Eryn Sun, *St. Pixels Breaks New Ground With Interactive Facebook Services*, CHRISTIAN TODAY (Apr. 30, 2011), http://www.christiantoday.com/article/st.pixels.breaks.new.ground.with.interactive.facebook.services/27917.htm. Worshippers could "listen to Bible readings and a ser-

other forums for members.[204] The site is governed by a set of "[c]ore [v]alues."[205] Members who fail to adhere to these values can be suspended or banned from particular forums or events.[206] St. Pixels, in other words, controls its group identity through the act of expulsion.[207]

Although St. Pixels' membership policy is not currently the subject of litigation, the potential exists. Online, like offline, people form vested interests in the groups that they join. They devote time and money to build infrastructure and pay staff. They invest themselves emotionally and interpersonally in the relationships they form. They craft an identity and a sense of belonging. So when a group informs a member that he or she is no longer welcome—and when the cost of disassociation may be financial as well as psychological—the possibility of a lawsuit is not far away.

Forced exit from a group—even an online one—can be devastating.[208] Drawing upon this intuition, Jack Balkin has argued that the investment of users of virtual worlds may lessen a group's ability to cast them out.[209] Yet Balkin's argument fails to recognize that diminishing a group's authority to cast out dissident members eviscerates

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mon, sing along to hymns and key in prayer requests." *Id.* Participants could also "weigh in with an 'amen' or 'zzzz' via a real-time feedback meter they [could] click." *Id.*

204 *See About Us*, ST. PIXELS, http://www.stpixels.com/wp/?page_id=34 (last visited Apr. 12, 2013). These means of communication facilitate new kinds of interaction. As Douglas Estes suggests in his study of virtual churches, "[t]he nature of the virtual medium encourages interactivity more than real-world churches probably could imagine (especially in light of the fear of public speaking)." ESTES, *supra* note 46, at 111.

205 *Core Values*, ST. PIXELS, http://www.stpixels.com/wp/?page_id=37 (last visited Apr. 12, 2013).

206 *See Terms of Service*, ST. PIXELS ON FACEBOOK, http://www.stpixapp.com/fbdir/canvas/tos.php (last visited Apr. 12, 2013) ("If we all stay within the spirit of these guidelines we should all have a good time. If you do not do this, we may ask you to change your behaviour, and reserve the right to remove your chatting rights for the remainder of an event.").

207 Similarly, i-church, a virtual church founded by Diocese of Oxford of the Church of England, may permanently ban from the Courtyard (the section of its site where the church houses its chapel services and forums for prayer requests and other discussions) any individual who violates the church's Terms of Use. *The Courtyard – i-church – Registration*, I-CHURCH, http://www.i-church.org/courtyard/ucp.php?mode=register (last visited Apr. 12, 2013). The Anglican Cathedral of Second Life reserves the right to eject or ban any avatar from Epiphany Island (where the church is located) "at the discretion of the Cathedral Officer present" when an avatar violates one or more of the Epiphany Rules of Behavior. *Epiphany Rules of Behavior*, ANGLICAN CATHEDRAL OF SECOND LIFE, http://slangcath.wordpress.com/about/visitors-guide-to-the-anglican-cathedral-of-second-life/epiphany-rules-of-behavior/ (last visited Apr. 12, 2013).

208 *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 426 (2000) ("Individuals may develop deep feelings of attachment and loyalty to virtual communities and may be devastated by perceived wrongs within those communities. In such instances, exit is far from costless." (footnote omitted)).

209 Balkin, *supra* note 164, at 2078.

the integrity of that group. If the state is concerned about the individual consequences of forced or voluntary exit from a group, it ought to focus on supporting former members rather than on limiting a group's authority to expel unwanted members.[210]

Suppose that a dissident member who had invested significant time and money in the church sued St. Pixels. Under current doctrine, St. Pixels is not an intimate association. It might, however, qualify as an expressive association as a group that associates for the purpose of advancing religion.[211] Nonetheless, even with the protections of expressive association, St. Pixels may have only a limited ability to expel members.[212] Moreover, one can easily envision offshoots of St. Pixels that would be unlikely to qualify as expressive associations—the St. Pixels' community youth forum or the St. Pixels' women's social group, for example.[213]

Virtual assembly suggests that St. Pixels (and any noncommercial offshoots) would qualify for the highest constitutional protection. St. Pixels would face no expressiveness or intimacy threshold. It could expel its members for any reason consistent with its membership standards (and the group could also alter those standards from the initial terms of membership). While dissident members who faced expulsion might confront loss, harm, and injustice, those are the costs of

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210 Jeff Spinner-Halev proposes this kind of approach to those who exit the Hutterites, an insular religious community that pools all assets and resources of its members. JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP 72–80 (2000). Noting the severe restrictions imposed by the lack of any personal financial resources, Spinner-Halev suggests that "the Hutterites should set aside a small fund for members who leave their community." *Id.* at 77. He notes that "[t]he Hutterites won't set up this fund voluntarily but they should be forced to do so." *Id.* A more preferable approach would put the onus to provide modest financial resources to dissident members on the state and not the insular group. For example, the state could provide free or low-cost counseling for people who suffer emotional and psychological harm from leaving online groups and virtual worlds.

211 St. Pixels would be unlikely to find protection under the free exercise clause. *See* Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2995 n.27 (2010) (rejecting free exercise challenge in light of *Employment Division v. Smith*, 494 U.S. 872 (1990)).

212 *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 613, 631 (1984) (denying protections to expressive association that places membership restrictions on women); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *20 (N.D. Cal. May 19, 2006) (denying protections to expressive association that limits membership on the basis of sexual orientation because the group "has not demonstrated that its ability to express its views would be significantly impaired by complying with [the school's nondiscrimination] requirement"), *aff'd*, 319 F. App'x 645 (9th Cir. 2009), *aff'd on other grounds sub nom.*, *Christian Legal Soc'y*, 130 S. Ct. 2971.

213 The precise contours of what qualifies as a church or church-like function for purposes of institutional protection remain unresolved. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705–06 (2012) (applying the "ministerial exception" to a church employee who taught at a school operated by the church).

allowing groups to shape their identity and purposes on their own terms.

D. Establishment: eHarmony

In 2000, Neil Clark Warren cofounded the online dating service eHarmony.[214] The site has had over twenty million members, and every day, over five hundred people who met on eHarmony marry.[215] In 2005, a gay man sued eHarmony under New Jersey's antidiscrimination law because eHarmony refused to make same-sex matches.[216] After an investigation by the New Jersey Attorney General's Office found probable cause that eHarmony's policy violated the state's antidiscrimination law, eHarmony settled the suit by agreeing to pay damages and to create CompatiblePartners.com, a site that offers same-sex matches.[217] The company subsequently settled a California class action lawsuit that had alleged that CompatibleParters.com "amounted to a 'separate but equal' policy."[218]

As a commercial group, eHarmony cannot avail itself of the protections of virtual assembly under the theory that I have proposed.[219] Still, a different version of an online dating service could easily fall on the other side of the commercial–noncommercial divide. This point illustrates yet another limit of the current framework of association: although the members of eHarmony are both expressing themselves and pursuing intimate relationships, even the noncommercial version of eHarmony would fall short of expressive or intimate association.

Nor is eHarmony's exclusionary practice an outlier in current online dating sites. Users of online dating services engage in pervasive discrimination, particularly along racial lines.[220] Many online dating services cater to people with shared characteristics or back-

214 *Company Overview*, EHARMONY, http://www.eharmony.com/about/eharmony/ (last visited Apr. 12, 2013).

215 EHARMONY, http://www.eharmony.com/ (last visited Apr. 12, 2013).

216 Charles Proctor, *Same-Sex Site Hits Sour Note for eHarmony: Evangelicals, Gays United in Displeasure*, L.A. BUS. J., Dec. 1, 2008, at 1.

217 Press Release, eHarmony, eHarmony, Inc. Settles with New Jersey Attorney General, Agrees to Launch Same-Sex Matching Service in 2009 (Nov. 19, 2008), http://www.eharmony.com/press/release/15.

218 Eric Bailey, *Sex, Lies, and Internet Dating Sites: eHarmony Bows to Same-Sex Couples in Class Action Settlement*, PROTECTCONSUMERJUSTICE.ORG (Jan. 26, 2010), http://www.protectconsumerjustice.org/sex-lies-and-internet-dating-sites-eharmony-bows-to-same-sex-couples-in-class-action-settlement.html; *see also* Rachel Gordon, *EHarmony Settles Suit, Will Display Gay Services*, S.F. CHRON., Jan. 27, 2010, at C7 (discussing the settlement agreement); Press Release, eHarmony, eHarmony, Inc. Settles Class Action Lawsuit over Same-Sex Matching (Jan. 26, 2010), http://www.eharmony.com/press/release/25 (same).

219 *See supra* Part IV.

220 *See, e.g.*, Cynthia Feliciano et al., *Gendered Racial Exclusion Among White Internet Daters*, 38 SOC. SCI. RES. 39, 49 (2009) ("Race is one of the main selection criteria for white internet daters—whites express racial preferences even more commonly than religious or educational preferences."); Kathryn A. Sweeney & Anne L. Borden, *Crossing the Line On-*

grounds: BlackPeopleMeet.com matches African Americans,[221] JDate matches Jews,[222] VeggieDate.org matches vegetarians,[223] Adam4Adam.com matches gay men,[224] and BeautifulPeople.com matches physically attractive people.[225]

Despite a formal openness by most of these groups to all comers, many dating sites establish norms at odds with formal notions of liberal equality. Consider BlackPeopleMeet.com, which draws almost a million unique visitors each month and bills itself as "a focused community dedicated to black dating."[226] As the site's founder, Ron Worthy, explains, "[u]ltimately, the black community is built on family

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line: Racial Preference of Internet Daters, 45 MARRIAGE & FAM. REV. 740, 754 (2009) (finding that "[m]ost singles were unwilling to date across the Black/White divide").

221 *See* BLACKPEOPLEMEET.COM, http://www.blackpeoplemeet.com (last visited Apr. 12, 2013); *infra* notes 226–29 and accompanying text.

222 *See* JDATE.COM, http://www.jdate.com (last visited Apr. 12, 2013) (stating that it is "the Premier Jewish Community Online for Dating Jewish Singles").

223 *See* VEGGIEDATE, http://www.veggiedate.org (last visited Apr. 12, 2013) ("Our free vegetarian personals allow you to meet veggie singles and share organic vegetarian and healthy vegetarian dishes.")

224 *See* ADAM4ADAM, http://www.adam4adam.com/?section=20&view[20]=1 (last visited Apr. 12, 2013) ("[W]e build a community for gay men looking for friendship, romance, dating or a hot hookup.").

225 *See* BEAUTIFULPEOPLE.COM, http://www.beautifulpeople.com/en-US (last visited Apr. 12, 2013). Unlike the preceding examples, BeautifulPeople.com engages in actual exclusion. It can make facial exclusions because physical appearance is not a protected class. The site also practices expulsion—purportedly dismissing formerly beautiful members who gain too much weight over the holidays. *See 5,000 Festive Fatties Expelled from BeautifulPeople.com*, PR NEWSWIRE, Jan. 4, 2010, *available at* http://www.prnewswire.com/news-releases/5000-festive-fatties-expelled-from-beautifulpeoplecom-80567702.html (announcing the removal of five thousand members who had gained weight over the holidays). *Bitch* reports that the online dating service *OkCupid* engages in a similar kind of discrimination. *See* Kelsey Wallace, *OkCupid Has Less-than-OK Policies. Especially If You're "Ugly,"* BITCH MEDIA (June 10, 2010 1:46 PM), http://bitchmagazine.org/post/okcupid-has-less-than-ok-policies-especially-if-youre-ugly (reporting e-mails sent by OkCupid to certain users stating, "We are very pleased to report that you are in the top half of OkCupid's most attractive users. . . . Your new elite status comes with one important privilege: You will now see more attractive people in your match results."). Discrimination based on physical appearance is not unchallenged. Commentators have adopted the term "lookism" to refer to "society's construction of a standard for beauty or attractiveness, and the resulting oppression that occurs through stereotypes and generalizations about those who do and do not meet society's standards." M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 65 (2003); *see also* Deborah L. Rhode, *Don't Hate Me Because I'm Beautiful. Just Promote Me.*, WASH. POST, May 23, 2010, at B1 (mentioning studies finding that "unattractive people are less likely than their attractive peers to be viewed as intelligent, likable and good," that "overweight individuals consistently suffer disadvantages at school, at work and beyond," that "[u]nattractive people are less likely to be hired and promoted, and they earn lower salaries, even in fields in which looks have no obvious relationship to professional duties," and that "unattractive plaintiffs receive lower damage awards").

226 *About Black Dating and Black People Meet*, BLACKPEOPLEMEET.COM, http://www.blackpeoplemeet.com/v3/aboutonlinedating (last visited Apr. 12, 2013). The "About" section of the website explains that "BlackPeopleMeet.com is the largest black dating site for black singles in the U.S." *Id.*

and family is built on relationships. So, this is my way of helping out the community; allowing people to have better and more effective ways of building a relationship."[227] According to Worthy, "the site is designed for black people looking for other black people."[228] But, he is quick to add, the site is "not going to be discriminatory to anyone who's interested in that community."[229] Worthy's comments reveal an odd tension: a group that is formally open to anyone but whose overwhelming purpose is at odds with an equality norm.

Virtual assembly would permit express exclusion in the noncommercial context. The noncommercial variant of eHarmony could establish its own values and purposes, including limiting its matches to heterosexual couples. The noncommercial variant of BlackPeopleMeet.com could limit its membership to African Americans.

Conclusion

Our groups, online and offline, are morally complex and deeply divisive. Groups formed by sexual libertarians, illiberal homeschoolers, pro-life feminists, pro-choice Christians, political dissidents, social conservatives, Palestinians, Jews, Muslims, and Mormons fill some of us with inspiration and some of us with dread.

A number of legal scholars have highlighted the dangers that online groups create. Neil Netanel has argued that the state should act to prevent some forms of discrimination by online groups "so long as [a] virtual community is of sufficient permanence and openness to new members to be more than a distinctly private conversation, and so long as the attribute discrimination in question is particularly egregious in light of its historical and social context."[230] Jack Balkin has suggested that "demanding exit as the price of free expression becomes less justified as people's social connections in [virtual] worlds become increasingly significant."[231] Danielle Keats Citron has called for a "fundamentally pro-regulatory" agenda that "clashes with [the] libertarian ideology that pervades online communities."[232] Cass Sun-

227 Kenya M. Yarbrough, *Computer Love: Black People Meet.com's Ron Worthy Talks Online Dating*, Electronic Urb. Rep. (Apr. 9, 2010), http://www.eurweb.com/2010/04/computer-love-blackpeoplemeet-coms-ron-worthy-talks-online-dating (internal quotation marks omitted).

228 *Id.*

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

230 Netanel, *supra* note 208, at 460. Netanel offers this example: "[I]f Rotary International established an all-white, all-Protestant, or all-male virtual network, that, in the context of American history, culture, and power relations, would properly be viewed as an instance of pernicious subordination." *Id.* at 455.

231 Balkin, *supra* note 164, at 2078.

232 Citron, *supra* note 64, at 66.

stein suggests that we limit insular online groups that produce a kind of unreflective groupthink that he calls "[e]nclave [d]eliberation."[233]

These scholars rightly highlight the costs of honoring group autonomy. Netanel observes that "[t]he concentration of private power and majority prejudice, self-regard, or indifference in civil society can also deprive minorities of the incidents and requisites of liberal citizenship."[234] Balkin argues that online game players "invest considerable time and effort in the game world and in their identities there, and this and various other network effects of virtual worlds may make exit more difficult over time."[235] Citron notes "the power of misogynistic, racist, or other bigoted mobs to strike under cloak of anonymity, without fear of consequences."[236] Sunstein cautions that enclave deliberation can lead to a "crippled epistemology"[237] and warns that "[i]n the extreme case, enclave deliberation may even put social stability at risk."[238]

Virtual assembly risks or enables all of these consequences. But this Article has argued that these costs are outweighed by the important values that defining our own private groups, online as well as offline, will enable.[239] Our private groups allow us to pursue identity formation, self-governance, and dissent from state norms. Protecting those values depends upon allowing our private groups to exclude, embrace, expel, and establish, and that is unlikely to happen through the right of association or its component parts of intimate and expressive association.

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233 SUNSTEIN, *supra* note 45, at 76. *But cf.* Kang, *supra* note 57, at 1173–74 ("[T]he same factors that make extremists comfortable launching hate speech will also embolden the more moderate to talk frankly about race. In real space, people avoid serious discussions about race, which is seen as a controversial subject. Cyberspace might promote more honest and uninhibited race talk, and such frank discussions could more accurately reveal the misunderstandings, divisions, and resentments that exist among us." (footnote omitted)).

234 Netanel, *supra* note 208, at 452.

235 Balkin, *supra* note 164, at 2051; *cf. id.* at 2066 ("[I]n virtual worlds, like real worlds, people may invest a great deal of time and effort in building up their identity and their reputation. The creation of a new identity, or exit from the virtual world altogether, may be quite costly."). James Grimmelmann notes a related concern with Facebook: "[P]eople invest a lot of time and effort in their Facebook personae; to lose one's profile can be a harsh blow." James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1198 (2009).

236 Citron, *supra* note 64, at 66.

237 SUNSTEIN, *supra* note 45, at 76 (citing Russell Hardin, *The Crippled Epistemology of Extremism*, *in* POLITICAL EXTREMISM AND RATIONALITY 3, 16 (Albert Breton et al. eds., 2002)).

238 *Id.* at 78. Sunstein's worry over online enclave deliberation calls to mind the longstanding debate in political theory over the ways in which insular groups reinforce their own norms. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 241–49 (1972) (Douglas, J., dissenting); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 153–54 (2000).

239 *Cf.* Balkin & Noveck, *supra* note 98, at 4 ("[L]egal scholars have increasingly been drawn to study [virtual] worlds, both for the legal problems arising within them and for what these worlds might tell us about law and social order in real space.").

Virtual assembly offers an alternative that is both rooted in our constitutional tradition and capable of meeting some of the challenges that lie ahead. It will not fully resolve the difficulties that await. In the virtual world—like the nonvirtual one—the law is an imperfect and limited resource. In fact, it may be that "our attention will increasingly shift to questions of design—both of institutions and technology—that are largely beyond judicial competence."[240] But recognizing that some ideals are largely beyond judicial competence should not cause us to surrender our normative aspirations. We should still pursue the best possible doctrinal frameworks. In the case of our online groups, the best way to meet the challenges that lie ahead is by looking back: to the right of the people peaceably to assemble.

240 Balkin, *supra* note 171, at 443–44.