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ABSTRACT

Our individual and collective identity is reflected in our desires, our affiliations, our political choices, and the social movements in which we participate. This identity plays a central role in the enterprise of collective meaning-making, the realization of self-determination, the creation of social capital and societal trust, and the bringing about of social change that overcomes subordination. The integrity of this form of identity is mostly protected through the cluster of phenomena that has come to be known as the right to privacy, but it is a particular type of privacy, what I call political privacy, where these notions are centered. While some legal scholarship addresses the role that privacy plays in promoting individual autonomy in democracies and recognizes that privacy has some public features generally, this article approaches the problem of political privacy from a different perspective. It brings a body of social-movement scholarship to bear to inform our understanding of the role this form of privacy—as manifest in the integrity of individual and collective identity—plays in liberal democracies. Informed by this body of social-movement scholarship, I will attempt to elevate the importance of the integrity of individual and group identity as a collective and public good itself, as a product of, and which is manifest in, our associational ties. While this political privacy is critical to political autonomy and democracy, it is also under considerable threat in the digital age. At a time when new technology makes the search for one's political identity easier, more expansive, and more liberating, it also creates a paradox: this search for identity and community is also one that is conducted with few protections; it is subject to exposure, sale, and distribution, often without our consent. Given the critical role that

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private, digital platforms play in fostering the exploration, creation, and maintenance of individual and collective identity today, and the growing role they are playing in social-movement mobilization, I argue here that the integrity of individual and collective identity deserves greater recognition and protection, especially in private-law settings where such interests are exposed at present and where the law is less robust than in public-law settings, where associational privacy is more commonly respected. This Article attempts to address, identify, and analyze not just the threats to the integrity of individual and associational identity that exist in the digital world but also the viability of the private-law tort of intrusion upon inclusion as a means through which we can preserve this integrity. My normative claim is this tort, while generally recognized as a negative right that protects us from certain intrusive behaviors, should also be conceptualized as a positive right, the protection of which makes the realization of our associational life possible and meaningful. It also presents strategies for strengthening the application of the tort to such associational life in more robust ways moving forward.

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INTRODUCTION

Our individual and collective identity is reflected in our desires, our affiliations, our political choices, and the social movements and actions of which we are a part. The cultivation, maintenance, and protection of the integrity of this individual and collective identity are critical to liberal democracy. This integrity plays a central role in the enterprise of collective meaning-making, the realization of self-determination, the creation of social capital and societal trust, and the bringing about of social change that overcomes subordination.[1] This notion—that the integrity of individual and collective identity deserves protection—finds itself realized mostly through that cluster of phenomena that has come to be known as the right to privacy. When this individual and collective identity is then directed toward the functioning of society and the realization of individual and collective self-determination, it takes on a particular character, what I will call here "political privacy." Whether it is a crackdown on protesters in Hong Kong through the review of activists' social media activity[2] or the monitoring of Black Lives Matter protesters in the United States,[3] when the inner workings of collective action directed toward social change is subject to disclosure, it violates this political privacy, harms personal dignity, and undermines democracy.

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1. Writing over 50 years ago, Thomas Emerson described the importance of associational activities as follows:

> More and more[,] the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.

Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1 (1964). For an argument that the practice of meaning-making is "collective or social," see Robert M. Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

2. *See* Vivian Wang & Alexandra Stevenson, *In Hong Kong, Arrests and Fear Mark First Day of New Security Law*, N.Y. TIMES (July 1, 2020), https://nyti.ms/3t8Atrg (describing the chilling effect of Chinese government crackdown on those perceived as dissidents in Hong Kong, including residents deleting social media posts for fear of reprisals).

3. *See* Jesse Marx, *Police Used Smart Streetlight Footage to Investigate Protesters*, VOICE OF SAN DIEGO (June 29, 2020), https://bit.ly/39yOpCV (noting that local police in San Diego, California accessed information from a private company to conduct surveillance of Black Lives Matter protesters).

While some legal scholarship addresses the role that privacy plays in promoting individual autonomy in democracies and recognizes the public nature of privacy generally,[4] this Article approaches the problem of political privacy from a different perspective. It brings a body of social-movement scholarship to bear to inform our understanding of the role this form of privacy, as manifest in the integrity of individual and collective identity, plays in liberal democracies. Informed by this body of social-movement scholarship, I will attempt to elevate the importance of the integrity of individual and group identity as a collective and public good itself and show that it is a product of, and is manifest in, our associational ties. The individual and group identities that reflect these associational ties become springboards for collective action and are at the center of social-movement activities and success, where true individual and collective self-determination are realized. These identities become a front of social change and social justice.[5] Recognizing the growing appreciation within social-movement scholarship—from the legal and social-science fields—for the critical role social movements play in social change and the centrality of identity to such movements, this Article strives to bring such scholarship to bear on the need for greater protections for political privacy.[6]

Political privacy, and the protection and respect it affords individual and associational political activities for both individuals and the associations of which they are a part, is critical to political autonomy and democracy.[7] And yet, political privacy and all it represents is under considerable threat in the digital age. At a time when new technology

4. *See* Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 834 (2000) (arguing that privacy protections are "constitutive" of society but not discussing the public goods that privacy generates or the role privacy plays in collective action); *see also* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1912 (2013) (describing the importance of privacy to democracy).

5. *See, e.g.*, William N. Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 425–42 (2001) [hereinafter Eskridge, *Channeling*] (describing the emergence of identity-based social movements in the late twentieth century).

6. I want to stress that the discussion of identity here is not to be confused with the somewhat derisive term "identity politics." *See, e.g.*, FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT 158 (2019) (criticizing identity politics as practiced on the left and the right as "deeply problematic" because it utilizes aspects of identity which are described as fixed); MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS 58–59 (2017) (decrying as divisive what is described as identity politics). For a response to the criticism of identity politics, which makes the point that "[b]y embracing identity and its prickly, uncomfortable contours, Americans will become more likely to grow as one," see Stacey Y. Abrams, *Identity Politics Strengthens Democracy*, 98 FOREIGN AFF. 160, 163 (2019).

7. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1521–37 (1988) (highlighting the critical role that privacy rights play in securing political autonomy and democracy).

makes the search for one's political identity easier, more expansive, and more liberating, it also creates a paradox. This search for identity and community is conducted with few protections and is subject to exposure, sale, and distribution without our consent.[8]

The citizens of authoritarian regimes have few privacy protections, especially in their digital communications.[9] However, in contemporary democracies, free-speech rights and privacy protections extended through public law tend to insulate citizens from government intrusion. In such democracies today, though, it is private entities—those to whom public-law protections do not apply and who can access and control much of this digital communication—that most threaten the privacy and integrity of identity in democratic societies.[10] At the same time, the lines between private and public are becoming blurred. As a result, the effects of privacy breaches have negative spillover effects on the functioning of democracy, reducing the public goods democracy generates.[11] Taking a functional approach to the protection of political privacy, I attempt to show that these threats to this particular form of privacy—grounded in a disregard for individual and collective identity—undermine democracy and curtail the ability of the members of groups to find each other, identify with each other, mobilize to pursue their collective rights, coordinate action, combat subordination, and further social change.[12]

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8. *See* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 93–96 (2019) (describing the function of data surveillance for profit through the internet and mobile technologies).

9. *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 223–61 (2016) (describing government censorship of contemporary social movements).

10. When I use the term "integrity" I do not mean to convey the notion that this could signify that one maintains a consistent set of personal values. Instead, integrity, as used here, means that a condition is complete and unimpeded or unimpaired. *See Integrity*, MERRIAM-WEBSTER.COM DICTIONARY, https://bit.ly/3rbOjYe (last visited Dec. 3, 2019); *cf.* Andrew B. Ayers, *The Half-Virtuous Integrity of Atticus Finch*, 86 MISS. L.J. 33, 34 (2017) (distinguishing between the integrity of identity, understood as the psychological coherence of the self, and moral integrity, understood as consistency with one's moral values).

11. Whether broader public goods emerge from the activities of associations, which, themselves, generate what are sometimes called collective goods for their members, is a question I will address throughout this piece, although public goods scholarship often combines the concepts of "public goods" and "collective goods." *See* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 227–31 (1995) (using these terms almost interchangeably).

12. *See* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1181–85 (2008) (describing structural harms, like threats to associational interests, associated with a loss of privacy); *cf.* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1890–98 (2019) (arguing that sexual privacy is critical for opposing subordination). On the instrumental or functional value of privacy—i.e., that it helps achieve other valued goals, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1145–46 (2002).

Private, digital platforms play a critical role in fostering the exploration, creation, and maintenance of individual and collective identity today.[13] They are also playing a growing role in social-movement mobilization.[14] For these reasons, I argue that the integrity of individual and collective identity deserves greater recognition and protection, especially in private-law settings, where such interests are exposed at present, where the law is less robust than in public-law settings, and where associational privacy is more commonly respected, at least within the American constitutional tradition.[15]

I hope to show in this Article that the collective goods associational ties create—like greater autonomy and individual and collective self-determination, societal trust, social capital, and social change[16]—are all enhanced by digital tools, particularly for subordinated groups, [17] but are also under threat through violations of privacy. This Article explores the importance of a vision of the self in the digital world—an associational self—that plays a central role in collective action on behalf of oppressed communities. Further, it highlights the ways that the associational self is also subject to exposure, manipulation, and oppression through the intrusion upon the private and collective domains of individuals' identities and their formal and informal associations that, together, make up the self. This intrusion can, in turn, chill and impede the exercise of the search for the self and the pursuit of individual and collective identity: that is, this intrusion can impede the development of the private and public goods that emerge from the preservation of the integrity of identity. While such concerns certainly animate the public-law treatment of associational rights and individual privacy, I argue, too, that they

13. *See, e.g.*, JEREMY HEIMANS & HENRY TIMMS, NEW POWER HOW POWER WORKS IN OUR HYPERCONNECTED WORLD—AND HOW TO MAKE IT WORK FOR YOU 54–79 (2018) (describing methods for digitally enhanced social activism).

14. *See* RAY BRESCIA, THE FUTURE OF CHANGE: HOW TECHNOLOGY SHAPES SOCIAL REVOLUTIONS 95–157 (2020) (describing the role of new technologies in social movements).

15. *See* NAACP v. Alabama *ex rel.* Patterson, 78 S. Ct. 1163, 1172 (1958) [hereinafter *NAACP v. Alabama*] (recognizing First Amendment right in associational privacy); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2335–36 (2002) [hereinafter Eskridge, *Some Effects*] (describing Court's recognition of associational right in *NAACP v. Alabama*); Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 93–95 (1987). *See generally* Anita L. Allen, *Associational Privacy and the First Amendment: NAACP v. Alabama, Privacy and Data Protection*, 1 ALA. C.R. & C.L. L. REV. 1, 8–12 (2011) (describing the legacy of *NAACP v. Alabama*).

16. *See infra* Part II.

17. *See generally* SARAH J. JACKSON ET AL., #HASHTAGACTIVISM: NETWORKS OF RACE AND GENDER JUSTICE (2020) (describing the role of social media in serving as an important platform for social justice on behalf of marginalized communities).

should inform our approach to private-law protections for the right to privacy, particularly political privacy.

This Article also highlights the fact that many threats to individual and collective identity in the digital world often emerge from private, commercial enterprises as opposed to government sources. As such, these threats are not amenable to challenge through public-law means. Instead, those who might object to such intrusions must rely on private-law mechanisms for redress. Efforts to address such threats through private-law means have faced stiff resistance from those entities maintaining the platforms where such threats occur; nonetheless, some strategies leveraging the tort of intrusion upon seclusion have begun to yield success in the courts.[18] This Article attempts to address, identify, and analyze not just the threats to the integrity of individual and associational identity that exist in the digital world but also the viability of the tort of intrusion upon seclusion for preserving this integrity. It also presents strategies for strengthening this tort's application moving forward. Additionally, I will draw from the public-law protections afforded to associational activities and different forms of speech to inform this discussion and to chart out a useful course for the protection of associational rights in private-law contexts.

With these goals in mind, this Article proceeds as follows. Part I explores the critical roles that identity formation and the integrity of identity play in democratic society. Part II then introduces what I describe as the "associational self," its relationship to the integrity of identity, and the common and public goods the associational self can generate. Part III describes the threats to the integrity of identity and democracy prevalent in the digital world. Part IV describes the protections afforded to the integrity of identity in public-law settings. In Part V, I describe the extent to which associational rights are, or are not, protected in private-law contexts. In doing so, I describe in detail recent judicial decisions related to digital privacy and the ways in which they have treated the tort of intrusion upon seclusion in such settings. Lastly, in Part VI, I identify ways to conceptualize and enhance the private tort of intrusion upon seclusion to provide maximum protection for the integrity of individual and collective identity in private-law settings.

I. IDENTITY AND DEMOCRACY

Self-determination—the essence of democracy—hinges on the formation and realization of one's identity.[19] Today, in a hyper-

18. *See infra* Section V.C.

19. *See, e.g.*, Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 439 (1998) (arguing that "democracy depends upon a social

connected world, access to the digital space helps form identity, and it is this identity that the individual taking part in a democracy seeks to actualize.[20] Since individual self-determination and autonomy are at the core of both the means and the *telos*, or goal, of democratic societies, the maintenance of the integrity of the self, which is constituted as one's identity, should be a paramount concern in any functioning democracy; to that end, the institutions of that democracy should strive to preserve this integrity of identity.[21] This Part explores the role that the integrity of identity plays in the realization of individual and collective self-determination, and, by extension, democracy.

A. Self-Determination, Autonomy, and Democracy

The centerpiece of liberal democracy is the notion of self-determination.[22] While the practice of democracy is a collective effort, democracies are collections of individuals, all acting in their individual capacities to realize their desired ends.[23] Ideally, what those ends are and the choices individuals make about them will be discovered through autonomous acts that flow from a process of self-discovery: not in the New Age sense, but rather through a self-directed process rooted in the choice of what information to consider; the application of one's faculties to that information; the decisions one makes in light of that information and through those faculties; and the paths one takes on his or her own which, ultimately, are a product of that individual's will.[24] The task for any democracy is to ensure its institutional arrangements do not unduly

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structure that sustains and nourishes the value of collective self-determination as constitutive of collective and individual identity").

20. *See, e.g.*, Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR.: FACT TANK (Oct. 11, 2018), https://pewrsr.ch/3jdKyhU (describing the emergence of the #MeToo movement on social media that provided a platform and channel for survivors of sexual harassment to self-identify as such and seek solidarity with others).

21. *See, e.g.*, Anne C. Dailey, *Cultivating Feminist Critical Inquiry*, 12 COL. J. GENDER. & L. 486, 487–89 (2003) (arguing that "[o]ur modern constitutional system of individual rights and democratic institutions is designed not simply to tolerate critical dissent, but to promote it as a fundamental principle of individual liberty and collective self-government in a pluralistic society[,]" that emerges from diverse institutions where individuals can identify with others who share common interests, backgrounds, and identities).

22. On the relationship between self-determination and liberal democracy, see Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352, 355–58 (1995).

23. On the tension between individual rights and group activities in a democracy, see Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 6–12. I will explore the role of associations in identity formation and social change later. *See infra* Part II.

24. *See* Maimon Schwarzschild, *Popular Initiatives and American Federalism, or Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 538 (2004) (arguing that insofar as democracy means liberalism, personal autonomy, and human rights, democracy must ensure some sphere, at least, of free choice).

interfere with the autonomous search for the self and the interests and desires that constitute it are free from undue interference.[25]

The term autonomy derives from the Greek words *autos* (self) and *nomos* (rule or law). It was first applied to the Greek city state that possessed "autonomia when its citizens made their own laws, as opposed to being under the control of some conquering power."[26] As Robert Post writes, "democracy attempts to reconcile individual autonomy with collective self-determination by subordinating governmental decision-making to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification."[27] For Kant, "enlightenment" itself was represented by the individual living independently and through reason, not under what he called the "tutelage"—the direction—of another.[28] As Bruce Ackerman has argued, it is not necessary for autonomy "to be the only good thing; it suffices for it to be the best thing that there is."[29] Indeed, just as Paul Romer has defined "meta-ideas" as ideas that generate other ideas,[30] individual autonomy is a "meta right": a right that makes so many other rights possible.[31]

Respect for the individual is at the center of this understanding of liberal democracy, and that respect translates into a recognition that

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25. The role of privacy in preserving this self-determination is a cornerstone of democracy, as subsequent sections will emphasize. *See infra* Parts IV–V. On the role that such privacy plays in the formation of an individual identity, and its constitutional dimensions, see Seth F. Kreimer, *Sunlight, Secrets, and Scarlett Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 67–72 (1991).

26. GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 12–13 (1988) [hereinafter G. DWORKIN, AUTONOMY]; *see also* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972) (describing autonomy as one seeing oneself as "sovereign in deciding what to believe and in weighing competing reasons for action").

27. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109, 1115 (1993) [hereinafter Post, *Meiklejohn's Mistake*]. For a discussion of the connection between individual autonomy, self-determination, and collective self-determination in the geo-political sense, see Daniel Philpott, *Self-Determination in Practice*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 79–81 (Margaret Moore ed., 1998) [hereinafter Philpott, *Self-Determination in Practice*] (arguing that self-determination is "a form of democracy, one that promotes the kind of individual autonomy that democracy promotes, and promotes it in the way that democracy promotes it").

28. *See* IMMANUEL KANT, WHAT IS ENLIGHTENMENT? 1 (Mary C. Smith trans.) (1784), https://bit.ly/36vRXUR.

29. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 69 (Yale U. Press 1980).

30. *See* Paul M. Romer, *Economic Growth*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 131 (David R. Henderson ed., 2007) (describing meta-ideas as "ideas about how to support the production and transmission of other ideas").

31. *See generally* Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855 (2014) (discussing the concept of meta rights).

individuals should play a part in the deliberations that generate the policies and laws that govern society.[32] This public deliberation "is expected both to produce policies that reflect public views and to encourage citizens—at least those who involve themselves in deliberation—to refine and enlarge their views of what policies should be pursued."[33] While we may not be able to select and approve every law that applies to us, a truly democratic system creates processes through which those laws and rules are chosen, and that type of democracy is one in which individuals and the groups they form consent to the rules about making the rules; it is in this way that there is a type of self-determination that maximizes autonomy.[34] As Robert Dahl posited: "Even when you are among the outvoted members whose preferred option is rejected by the majority of your fellow citizens, you may nonetheless decide that the process is fairer than any other that you can reasonably hope to achieve."[35]

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32. *See* C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381, 414 (1978) (arguing that "[f]or the community to expect individuals to respect its decisions, the community must itself respect the dignity or (equal) worth of its members"); *see also* Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 105, 106 (Ian Shapiro & Stephen Maedo eds., 2000) (arguing that democracy is "a set of rules under which government is selected and operates—whereby the governed people enjoy control over the governing authorities").

33. John Ferejohn, *Instituting Deliberative Democracy*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 75, 76 (Ian Shapiro & Stephen Maedo eds., 2000).

34. Philpott describes this as Rousseauian autonomy, "the kind that is realized through governing oneself, shaping one's own political context and fate—directly, through participation, and indirectly, through representation." Philpott, *Self-Determination in Practice*, *supra* note 27, at 81; *see also* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 26, 90 (1996) [hereinafter SANDEL, DEMOCRACY'S DISCONTENT] (arguing that in the republican view of government and the self, "liberty is understood as a consequence of self-government. I am free insofar as I am a member of a political community that controls its own fate, and a participant in the decisions that govern its affairs"); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech"*, 130 U. PA. L. REV. 646, 670 (1982) (arguing that in a democracy the political-legal order must respect the "autonomy and equality of worth of all of its members" in order to "expect individuals to accept collective practices and decisions with which they disagree").

35. ROBERT A DAHL, ON DEMOCRACY 54 (1998). A wide range of scholars agree that a system is more likely to be perceived as just if it includes the participation of those affected by that system in the making of the laws through which that system operates. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 127 (William Rehg trans., 1996) (1992); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 83 (1990); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (1990); Charles F. Sabel, *Constitutional Ordering in Historical Context*, *in* GAMES IN HIERARCHIES AND NETWORKS: ANALYTICAL AND EMPIRICAL APPROACHES TO THE STUDY OF GOVERNANCE INSTITUTIONS 92–94 (Fritz W. Scharpf ed., 1993). As Jane Mansbridge argues: "'[A]dversary democracy' is intended to do no more than aggregate conflicting

If collective self-determination reflects the political desires of individuals, in both process and substance, true self-determination means that the individuals making up a polity are free to come to such desires as individuals, enjoying individual autonomy.[36] As Michelman writes: "[I]f we are sincerely and consistently committed both to ruling ourselves and to being ruled by laws, there must be some sense in which we think of self-rule and law-rule (if not exactly of 'people' and 'laws') as amounting to the same thing."[37] For Gerald Dworkin, "[t]here is . . . a natural extension to persons as being autonomous when their decisions and actions are their own; when they are self-determining."[38] Autonomy is thus tied to the concept of self-government, and being autonomous means "being or doing what one freely, independently, and authentically chooses to be or do."[39] The very search for those choices—those desires—is the search for the self itself; in turn, those desires, realized through choices, make up the individual's identity.[40] Identity is the collection of those desires; it is both the product of those desires and a reflection of them.[41] However, if individuals do not have the freedom to act autonomously in choosing those desires and in choosing how to even investigate, explore, and think about those desires, the entire democratic

interests fairly. It comes into play as a default practice when the quest for a substantive common good fails. Yet it has its own intrinsic claims on legitimacy, based on each member of the polity having, in theory, equal power over the outcome." Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, *in* DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 124 (Samantha Besson & José Luis Martí eds., 2006).

36. *See, e.g.*, Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1526 (1997) (arguing that "[d]emocratic values are not realized unless there is a linkage of individual and collective autonomy, even if collective decisionmaking is fully informed"); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1653 (1999) [hereinafter Schwartz, *Cyberspace*] (arguing that "[t]he health of a democratic society depends both on the group-oriented process of democratic deliberation and the functioning of each person's capacity for self-governance").

37. Michelman, *supra* note 7, at 1501.

38. G. DWORKIN, AUTONOMY, *supra* note 26, at 13.

39. John Christman, *Feminism and Autonomy*, *in* "NAGGING" QUESTIONS: FEMINIST ETHICS IN EVERYDAY LIFE 18 (Dana E. Bushnell et al. eds., 1995). For a discussion of the relationship between First Amendment jurisprudence, the importance of independent opinion formation, autonomy, and self-government, see Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487–88 (2011).

40. *See, e.g.*, John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289, 388 (1997) (arguing that "self-identity and personal autonomy do not precede action; they are achieved through action").

41. On the tension between identity, choice, and reflection, see Milton C. Regan, Jr., *Community and Justice in Constitutional Theory*, 1985 WISC. L. REV. 1073, 1128 (1985).

edifice crumbles.[42] Robert Post calls the ideal of autonomy "foundational for the democratic project."[43] But what is true autonomy, and how does it relate to visions of the self in democratic thought? How autonomous are we, and how autonomous can we truly be? This debate has plagued theorists for millennia;[44] I will trace the most recent contours of this debate next.

B. Visions of the Political Self in Western Thought

Over the last 40 years of Western political thought,[45] different visions of what I will call the "political self"—the self as part of a polity—have emerged. On the one hand there is the unencumbered "rational" self espoused by John Rawls. On the other, there is a more complex version, one that recognizes the histories, communities, and embeddedness of the self promoted by Rawls's critics and others. Rawls imagined the ideal political self as the individual capable of stepping back from and distancing herself from the quotidian concerns, personal attachments, and affinities that might cloud her judgment and keep her from choosing a political system that would bring about the most good for the most people.[46] The ideal society is one that emerges from an objectively rational system that all would choose if they did not know where within this system they would find themselves.[47] For Rawls, individuals "share in primary goods on the principle that some can have more if they are acquired in ways which improve the situation of those who have less. Once the whole arrangement is set up and going no questions are asked about the totals of satisfaction or perfection."[48] This "original position," as he would call it, is one through which we could

42. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 177 (1998) (arguing that one of the fundamental goals in a democracy is "protecting free processes of preference formation").

43. Post, *Meiklejohn's Mistake*, *supra* note 27, at 1123.

44. *See* BERNARD BEROFSKY, LIBERATION FROM SELF: A THEORY OF PERSONAL AUTONOMY 9 (1995) (discussing ancient Greek views on autonomy).

45. My explicit emphasis on "Western" political thought is meant to serve as a foil for the discussion that follows, from which I will also draw from broader and "outsider" perspectives and critiques of such thought. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323–24 (1989) (describing "outsider jurisprudence").

46. *See* JOHN RAWLS, A THEORY OF JUSTICE 137–41 (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE] (arguing that unencumbered self can make better judgments about the good life and the ideal manner of organizing society).

47. Rawls describes the parties in the original position as autonomous in two respects: "[I]n their deliberations, they are not required to apply, or to be guided by, any prior and antecedent principles of right and justice" and they "are said to be moved solely by the highest-order interests in their moral powers and by their concern to advance their determinate but unknown final ends." *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 527–28 (1980).

48. RAWLS, A THEORY OF JUSTICE, *supra* note 46, at 81.

imagine from behind the "veil of ignorance," where the members of society would not know anything about their individual place in society or even their backgrounds, hopes, fears, or dreams.[49] Such an approach could help envision how a society would select the political, economic, and social arrangements that permit individuals to pursue their rational self-interest.[50] As Rawls would argue, "given the circumstances of a well-ordered society, a person's rational plan of life supports and affirms his sense of justice."[51] In such a society, "the moral conception adopted [by the individual] is independent of natural contingencies and accidental social circumstances."[52] As a result, "the psychological processes by which his moral sense has been acquired conform to principles that he himself would choose under conditions that he would concede are fair and undistorted by fortune and happenstance."[53] This vision of the self represents the realization of autonomy: "[B]y acting from these principles persons are acting autonomously: they are acting from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings."[54] Thus, for Rawls, the autonomous self was the person one would become, in the society one would choose, without any attachments.[55]

For Rawls's critics, this notion of the political self is not just impossible to achieve but also unwise to pursue or valorize. These critics argue that we cannot truly distance ourselves from these attachments and desires, rational or irrational as they might be. In this view, the self is not just connected to these relationships and ideas. The search for the authentic self does not seek to divorce oneself from these attachments; such attachments constitute the self itself.[56] Michael Sandel criticizes the

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49. For Rawls, "[t]he veil of ignorance prevents us from shaping our moral view to accord with our own particular attachments and interest . . . . [W]e look at our society and our place in it objectively: we share a common standpoint along with others and do not make our judgments from a personal slant." *Id.* at 453.

50. To be fair, Rawls would understand that the original position was a "purely hypothetical situation" and not "an actual historical state of affairs, much less as a primitive condition of culture." *See id.* at 11. As one of Rawls's critics would recognize, the original position is "in any case an admitted fiction, a heuristic device designed to constrain our reasoning about justice in certain ways." MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 41 (2d ed. 1998).

51. RAWLS, A THEORY OF JUSTICE, *supra* note 46, at 450.

52. *Id.* at 451.

53. *Id.*

54. *Id.* at 452.

55. *See id.* at 453.

56. *See* SANDEL, *supra* note 50, at 179. Sandel criticized the Rawlsian veil of ignorance as follows: "[T]he parties are assumed to be deprived of any knowledge of their place in society, their race, sex, or class, their wealth or fortune, their intelligence, strength, or other natural assets and abilities. Nor even do they know their conceptions of the good, their values, aims, or purposes in life." *Id.* at 23; *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 101–03 (1990) (arguing that the veil of

narrow Rawlsian vision of the self, arguing that our status as "members of this family or community or nation or people" is "inseparable from understanding ourselves as the particular persons we are."[57] These are "more or less enduring attachments and commitments which taken together partly define the person I am."[58] Sandel argues further: "To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."[59]

However, to realize the ideal of autonomy, we need a degree of personal freedom and choice that allows us to choose those attachments we wish to maintain, cultivate, pursue, and explore, and those we may wish to abandon.[60] Gerald Dworkin describes the relationship of these concepts in formulaic terms as follows: "[A]utonomy = authenticity + independence."[61] Indeed, for Dworkin, "[t]he idea of autonomy is not merely an evaluative or reflective notion, but includes as well some ability both to alter one's preferences and to make them effective in one's actions and, indeed, to make them effective because one has reflected upon them and adopted them as one's own."[62] This cannot happen in a sort of Rawlsian vacuum. As Will Kymlicka has argued: "[I]ndividuals must have the cultural conditions conducive to acquiring an awareness of different views about the good life, and to acquiring an

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ignorance prevents participants in the original position from discussing and bargaining over their interests, which "precludes any of the participants from listening to others' expression of their desires and interests and being influenced by them" and such an approach fails to fully grasp reality, which "must apprehend all the particular perspectives from their particular points of view" including "[f]eelings, desires and commitments," which do not "cease to exist").

57. SANDEL, *supra* note 50, at 179.

58. *Id.*

59. *Id.* In some ways, this view reflects what is sometimes considered humans' "bounded rationality": the limitations imposed on our knowledge and decision-making by a range of forces and heuristics, like the availability heuristic and various biases. On bounded rationality generally, see Joseph Henrich et al., *What is the Role of Culture in Bounded Rationality?*, *in* BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX 343–59 (Gerd Gigernzer & Reinhard Selten eds., 2001).

60. As Kwame Anthony Appiah asks: "Just how autonomous do you have to be to have true autonomy?" KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 37 (2005). For May, we say that a person has autonomy when "she does not simply react to her environment and other influences, but actively shapes her behavior in the context of them." Thomas May, *The Concept of Autonomy*, 31 AM. PHIL. QUART. 133, 141 (1994).

61. Gerald Dworkin, *Autonomy and Behavior Control*, 6 HASTINGS CTR. REP. 23, 24 (1976).

62. G. DWORKIN, AUTONOMY, *supra* note 26, at 17. As Joel Feinberg argues, "the most basic autonomy-right is the right to decide how one is to live one's life, in particular how to make the critical life-decisions—what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on." Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445, 454 (1983).

ability to intelligently examine and re-examine these views."[63] Establishing such cultural conditions requires what he would call "the equally traditional liberal concern for education, freedom of expression, freedom of the press, artistic freedom, etc."[64] In turn, "[t]hese liberties enable us to judge what is valuable in life in the only way we can judge such things—i.e., by exploring different aspects of our collective cultural heritage."[65] It is through this exploration that the individual may never fully abandon her history, experiences, emotions, connections to others, or ties to the community; in fact, one's identity is both a product as well as a reflection of this cluster of personal attributes.[66]

At the same time, these attributes and cultural encumbrances are not fixed or static.[67] We can change both our selves and the world around us. Through these processes of choice and change, we realize self-determination, both on the individual and societal levels. The individual is able to bring about change not only in herself but also to the world in

63. WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 13 (Oxford Univ. Press 1989); *see also* Cass R. Sunstein, *Preferences and Politics*, 20 PHIL & PUB. AFF. 3, 11 (1991) (describing autonomy as referring to the notion of "decisions reached with a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on the process of preference formation").

64. KYMLICKA, *supra* note 63, at 13; *see also* Seena Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENTARY 283, 294 (2001) (arguing that "it is essential to the appropriate development and regulation of the self, and of one's relation to others, that one have wide-ranging access to the opportunity to externalize one's mental contents, to have the opportunity to make one's mental contents known to others in an unscripted and authentic way").

65. KYMLICKA, *supra* note 63, at 13.

66. *See* Marilyn Friedman, *Autonomy and Social Relationships: Rethinking the Feminist Critique*, *in* FEMINISTS RETHINK THE SELF 55–59 (Diana Tietjens Myers ed., 1997) (offering a Feminist critique of traditional notions of autonomy and stressing the social aspects of autonomy and identity); Christman, *supra* note 39, at 33 (same); *see also* DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 6 (1993) (arguing that many choices made by individuals are not necessarily made purely by detachment, reason, and objectivity; many are the product of the embedded selves, a product of "ends and goals set for them by others (family, friends, community groups, the government, God)"); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 754 (1999) [hereinafter Allen, *Coercing*] (arguing that an "egalitarian and feminist" conception of privacy and private choice requires a "background of educational, economic, and sexual equality" as essential to making meaningful life choices); APPIAH, *supra* note 60, at 231 ("The interests that entrain the 'ethical self' are those of specific, encumbered human beings who are members of particular communities. To create a life . . . is to create a life out of the materials that history has given you. An identity is always articulated through concepts (and practices) made available to you by religion, society, school, and state, mediated by family, peers, friends.").

67. *See* Cohen, *supra* note 4, at 1910 (arguing that "[p]eople are born into networks of relationships, practices, and beliefs, and over time they encounter and experiment with others, engaging in a diverse and ad hoc mix of practices that defies neat theoretical simplification").

which she finds herself.[68] And it is this capacity for change that may make us human.[69] The individual may want to change the world around her when its features do not comport with her understanding of her notions of her self and the society in which she wants to live.[70] Who that individual is may also change and, even when the society may have once aligned with her interests and beliefs, that internal change may spark a desire for external change.[71] True autonomy requires this capacity for change, and if we cannot escape those identities and commitments imposed on us from forces exogenous to ourselves, we are not truly autonomous.[72]

Yet any such change one may undertake does not emerge automatically, through the individual working alone. The individual must come in contact with others when effectuating such change.[73] Indeed, both the search for the self and the realization of the self in society are done in association with others.[74] While the Rawlsian vision of the autonomous self may be impossible to achieve, the vision of the self embraced by many of Rawls's critics, who suggest that we may not be able to discard characteristics imposed on us by others and society, may

68. Psychologist Albert Bandura described the concept of individual and collective self-efficacy, which centers around feelings of independence and ability to change the surrounding environment. *See* Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 AM. PSYCHOLOGIST 122, 126, 137 (1982); *see also* May, *supra* note 60, at 141 (explaining that autonomy is exercised by the individual in an active sense when she engages with the influences and environment around her).

69. *See generally* YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 20–40 (2015) (noting humans' distinctive capacity for change and cooperation).

70. The survivors of the 2018 school shooting in Parkland, Florida are just one example of this sort of advocacy. *See* Cheryl Bratt, *Top-Down or From the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. F. 917, 937–38 (2018) (describing gun-control advocacy engaged in by the survivors of the Parkland, Florida, shooting).

71. An example of an individual's and society's capacity for change, recent protests around police misconduct have altered public opinion polling dramatically around the need for police reform. *See* Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), https://nyti.ms/39AY1NE (describing shifting public opinion on the Black Lives Matter movement and calls for police reform in the United States).

72. *See* G. DWORKIN, AUTONOMY, *supra* note 26, at 16 (arguing that autonomy requires the capacity to scrutinize and change one's preferences).

73. *See, e.g.*, Emerson, *supra* note 1, at 4 (arguing that "through the accumulation of resources, through the focusing of effort, and through the other results of organization, an association may be able to achieve objectives so far beyond individual effort as to be qualitatively different" from the results that can be achieved by an individual acting alone).

74. On the importance of privacy in the pursuit of associational ties, because such ties change over time, and people should not be restricted from loosening old ties and making new ones, see Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1149–50 (1992).

leave much to be desired as well.[75] With current technologies, the search for the self—the true self—is made easier, and the individual is not destined to become the person her immediate, geographic community decides she should be.[76]

For these reasons, both visions may not provide a complete picture of how we can, through autonomous acts, shed at least some of our attributes and embrace personal change, especially in the digital age, and then work through others to effectuate societal change. We can protect the individual as inviolate and still understand that that self is realized through our associational relationships. According to Durkheim: "[T]he human personality is a sacred thing; one dare not violate it nor infringe its bounds, while at the same time the greatest good is in communion with others."[77] Thus, individuals, often acting in association with others, can ensure that society reflects both the individual and the collective will to self-determination. This conclusion leads to a new approach for viewing the political self, in both the analog and digital worlds, as the following discussion shows.

II. THE ASSOCIATIONAL SELF

The competing visions of the individual, as either standing alone and objectively autonomous or encumbered by ties one cannot shed, does not reflect how the self can or should act within a democratic society in at least two ways.[78] First, the individual does not sheer elements of herself from the self when she strives to pursue her own self-determination within society. Second, when she wishes to change that

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75. *See* BRETT FRISCHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 209 (2018) ("Whether or not reality is naturally determined, we should live our lives and order society *as if* free will exists.").

76. In one Pew survey of experts on the benefits of the internet, one respondent described the ability to find others who are like-minded despite being physically distant as follows:

> The gay teenager in rural America; the handmade Japanese sword aficionado; the stay-at-home mom struggling with a rare disease; the LARPer [live-action roleplaying gamer] looking to connect with others; all of us now have the ability to find 'our people' – those who share our interests and passions and concerns – in ways that we couldn't when our connective avenues were limited by time and geography.

Janna Anderson & Lee Raine, *The Positives of Digital* Life, PEW RES. CTR. (July 3, 2018), https://pewrsr.ch/36L1yr5.

77. EMILE DURKHEIM, SOCIOLOGY AND PHILOSOPHY 37 (D. F. Pocock trans., Free Press 1974) (1953).

78. For Sandel, one should strive to recognize the ways the self may be encumbered by these attachments: "Unless we think of ourselves as encumbered selves, already claimed by certain projects and commitments, we cannot make sense of these indispensable aspects of our moral and political experience." *See* SANDEL, DEMOCRACY'S DISCONTENT, *supra* note 34, at 13–14.

society, she cannot operate alone and is constantly seeking fellowship and allies. Individual autonomy is thereby multiplied when we join with others to pursue collective self-determination. Such autonomy is pursued in fellowship with others and it is only through those associational activities that either individual or collective autonomy and self-determination is truly realized.[79]

Michelman describes American democracy as self-rule in associational terms: "[T]he American people are politically free insomuch as they are governed by themselves collectively."[80] Post argues that "[d]emocracy is achieved when those who are subject to law believe that they are also potential authors of law."[81] Again, we do not do this in a vacuum. When we exercise free expression and other rights, we do so in relation to others.[82] This drive for collective self-determination is often reflected in the associational ties we cultivate and promote because that

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79. *See* Philpott, *supra* note 27, at 81–82 ("[T]hose who realize autonomy share a common identity, ethnic, linguistic, or cultural, have determined that this identity is important to their political fate, and desire to shape this fate, to participate and be represented, with the other members of their group."). As Michelman argues, "political engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement." Michelman, *supra* note 7, at 1503. This he contrasts to what he calls the "pluralist" view of the self, in which "individuals appear as pre-political, and politics, accordingly, as a secondary instrumental medium for protecting or advancing those 'exogenous' interests." *Id.*

80. Michelman, *supra* note 7, at 1500. Self-determination is further embodied in democratic institutions by the notion of majority rule, which, itself, presumes the notion of a collective. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 285–87 (Anders Wedber trans., 1961).

81. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

82. For example, according to David Richards, "[f]reedom of expression . . . supports a mature individual's sovereign autonomy in deciding how to communicate with others . . . ." David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974). Indeed, even the notion of "self-expression" requires an expression of oneself *to others*. The self that one presents to the outside world is just that: what we project *to others* and that projection has an effect on others as well through assessments they make of the individual along a number of characterological factors. As Erving Goffman explained:

> When an individual enters the presence of others, they commonly seek to acquire information about him or to bring into play information about him already possessed. They will be interested in his general socio-economic status, his conception of self, his attitude toward them, his competence, his trustworthiness, etc. . . . . Information about the individual helps to define the situation, enabling others to know in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response from him.

ERVING GOFFMAN, THE PRESENTATION OF THE SELF IN EVERYDAY LIFE 1 (1959). Goffman would later assert that it is through others that the full picture of the individual emerges because the individual "must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts." ERVING GOFFMAN, INTERACTION RITUAL 84–85 (1967).

is often where our identity is reflected; through such groups and networks we strive to have authorship over the law, affect social change, and bring about the self-determination we seek.[83] Whether it is block or neighborhood associations or national political parties, we often collaborate with others and choose to associate with them to bring about the societal arrangements that best reflect our political preferences and choices, which are both the product and embodiment of self-determination in the political sense.[84] Through the formation and cultivation of this "associational self," autonomy has not just a process value but also generates important ends. The associational self is the self that can: (1) realize his or her identity; (2) build trust with others to help create cooperation, reciprocity, and mutual trust that can be leveraged to advance social change; and (3) serve as the lever of such change to effectuate the collective self-determination that shapes society into the collective self-image—the essence of collective self-determination. An exploration of each of these concepts follows.

A. The Associational Self and the Search for Identity

The associational self emerges to change society through associations and the movements made up of such associations. But the individual also realizes the self in such associations and movements. Social-movement theory has long recognized the importance of social movements to social change, and legal scholarship is beginning to take notice of this connection between legal change and social movements[85]

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83. As Glendon argues, such associational relations and their jurisgenerative potential is often overlooked:

> Lacking an adequate linguistic or conceptual apparatus to deal with the intermediate institutions that stand between the individual and the state, we regularly overlook the effects of laws and policies upon the environments within which sociality flourishes, and the settings upon which individuals depend for their full and free development.

MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 75 (1991).

84. This sort of view of associational activity is closely associated with Tocqueville's observations in the early-nineteenth century, a view that has a stubborn hold on American consciousness, as well as this author's. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 180–85 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (describing the role of associations in early American republic); *see also* MARK E. WARREN, DEMOCRACY AND ASSOCIATION 29–30 (2001) (describing Tocqueville's views on associations and democracy).

85. *See generally* DAVID COLE, ENGINES OF LIBERTY: HOW CITIZEN MOVEMENTS SUCCEED (2017) (describing the impact of social movements on legal doctrine in several contexts); LESLIE R. CRUTCHFIELD, HOW CHANGE HAPPENS: WHY SOME SOCIAL MOVEMENTS SUCCEED WHILE OTHERS DON'T (2018) (describing the role of social movements in social change); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006) (describing the role of social movements in changing legal culture).

through what has been described as the "Social Movement Turn in Law."[86] In more recent years, social-movement theorists have recognized the critical role that identity—which is often at the root of social-movement organizations—plays in the formation, mobilization, and activism that pulses through social groups.[87] This Part explores the role of identity in social-movement theory. According to such theory, individual identity becomes tied to "collective identity": the "shared definition of a group that derives from members' common interests, experiences, and solidarity."[88] The processes by which collective identities are formed are crucial to "grievance interpretation": the assessment of the injustices present in society through the lens of the collective identity.[89] In the social-change space, when individuals share an identity, that identity serves as a prism through which they refract that wrong as well as the change they want to see that will address it.[90] As

86. Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 360 (2018).

87. Social-movement theory can, at times, mirror some of the differences between these two visions of the political self. The Resource Mobilization school believes social-movement leaders must appeal to the rational, calculative side of potential movement actors and appeal to that side to show them that the benefits of participation in a movement outweigh the costs. *See, e.g.*, John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1214–17 (1977) (describing the Resource Mobilization perspective). Newer social-movement theories consider feelings of identity and solidarity with and toward each other and the extent to which these sentiments fuel social mobilization. *See* Pamela Oliver & Gerald Marwell, *Mobilizing Technologies for Collective Action*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 252 (Aldon Morris & Carol Mueller eds., 1992) (discussing the role of identity in social movements); *see also* Steven M. Buechler, *Beyond Resource Mobilization? Emerging Trends in Social Movement Theory*, 34 SOC. Q. 217, 228–31 (1993) (describing the role of identity, ideology, and culture in social movements).

88. Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 105 (Aldon D. Morris & Carol McClurg Mueller eds., 1992). They enable advocates to create a narrative of events and experiences that "hang together in a relatively unified and meaningful fashion." *Id.*

89. *See id.* The mix of identity and action often comes down to what are known as collective action frames, which conceptualize the situation as unjust, even if it was seen as tolerable before and help groups "make diagnostic and prognostic attributions." David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY (Aldon D. Morris & Carol McClurg Mueller, eds., 1992) 137–38 (citation omitted). Harari calls the capacity to envision a better world collectively as the "mythical glue" that holds communities together and allows them to cooperate. *See* HARARI, *supra* note 69, at 20–40. This capacity, he argues, may be what makes us human. *See id.*

90. *See generally* Judith M. Gerson & Kathy Peiss, *Boundaries, Negotiations, Consciousness: Reconceptualizing Gender Relations*, 32 SOC. PROBS. 317 (1985) (describing relationship between collective identities and social mobilization). At the same time, cultural constructions of identity through law can be both "oppressive and liberatory." Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 LAW & SOC'Y REV. 1231, 1232 (1994).

Steven Buechler argues: "For many mobilizations, the most central process [in social movements] is the social construction of a collective identity that is symbolically meaningful to participants."[91] These collective identities are both "essential outcomes of the mobilization process and crucial prerequisites to movement success."[92]

At the heart of collective-identity formation is the creation of the individual's identity. For Debra Friedman and Doug McAdam, the collective identity manifest in a social-movement organization "is a shorthand designation announcing a status—a set of attitudes, commitments, and rules for behavior—that those who assume the identity can be expected to subscribe to."[93] Such an identity is both "a public pronouncement of status" and an individual's "announcement of affiliation, of connection with others."[94] Indeed, for Friedman and McAdam, "[t]o partake of a collective identity is to reconstitute the individual self around a new and valued identity."[95] As Marshall Ganz's research into the migrant farmworker movement in California in the 1960s showed, when rival groups attempted to organize the farmworkers, whether it was the National Farm Worker Association (NFWA) or the Teamsters, the choice an individual worker made as to which union, if any, to join, said a lot about the identity that individual embraced and what he or she wanted others to know about him or her. As Ganz explains: "[S]igning an NFWA card meant taking a risk, expressing solidarity with one's fellows, making a claim, and asserting an ethnic identity. Signing a Teamster card meant protecting one's job, doing what the boss wanted, and, in the eyes of many, denying one's ethnic identity."[96] What is more, "[s]igning an NFWA card expressed anger or

91. Buechler, *supra* note 87, at 228.

92. *Id.* Alberto Melucci argues that the formation of collective identity is at the heart of social mobilizations, involving first, "formulating cognitive frameworks concerning the ends, means, and field of action"; second, "activating relationships between the actors, who interact, communicate, influence each other, negotiate, and make decisions"; and, third, "making emotional investments, which enable individuals to recognize themselves." Alberto Melucci, *Getting Involved: Identity and Mobilization in Social Movements*, *in* INTERNATIONAL SOCIAL MOVEMENT RESEARCH: ORGANIZING FOR CHANGE: SOCIAL MOVEMENT ORGANIZATIONS IN EUROPE AND THE UNITED STATES 343 (Bert Klandermans ed., 1988).

93. Debra Friedman & Doug McAdam, *Collective Identity and Activism: Networks, Choices, and the Life of a Social Movement*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 157 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

94. *Id.* This is just one of the ways through which individual identity becomes tied to the broader community. *See* GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY 162 (Charles W. Morris ed., 1982) (describing the process through which individual attitudes are not only shaped by, but also situate the individual within, a community).

95. Friedman & McAdam, *supra* note 93, at 157.

96. MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, STRATEGY, AND ORGANIZATION IN THE CALIFORNIA FARM WORKER MOVEMENT 193 (2009).

hopefulness; signing a Teamster card expressed fear or resignation."[97] In making this choice, the individual worker defined herself through the associational ties she formed, such ties signaling her desire (or lack of desire) to bring about broader social change. What we learn from this and many other examples of the role of identity and its manifestation in social movements is that these associational ties emerge as critical sources of trust and reciprocity and help individuals solve collective problems together.[98] These ties are often referred to as an individual's store of social capital. Such capital is one of the collective goods that comes from preserving the integrity of identity, as the following discussion shows.

B. Social Capital and the Associational Self

As Robert Putnam argues, social capital manifests itself in "networks of civic engagement [which] foster sturdy norms of generalized reciprocity and encourage the emergence of social trust."[99] This social trust and the behavioral norms that emerge in social-capital networks form the stock of social capital that an individual enjoys in a particular community.[100] As Putnam explains, where "physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them."[101]

Returning to the role that identity plays in social-capital formation, because trust and social capital are generally higher in more ethnically

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97. *Id.*

98. Many times, these expressions of identity, solidarity, and association have overt political connotations. As the Supreme Court found in *Anderson v. Celebrezze*, voting itself can serve as a means of self-expression and association: "[A]n election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (footnote omitted); *see also* Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 774–76 (describing the effect of decision in *Anderson*).

99. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995) [hereinafter Putnam, *America's Declining Social Capital*].

100. *See* Robert E. Lang & Steven P. Hornburg, *What Is Social Capital and Why Is It Important to Public Policy?*, 9 HOUSING POL'Y DEBATE 1, 4 (1998). Relatedly, Martha Nussbaum lists as one of the ten "Central Capabilities" required of a "life worthy of human dignity" to include the concept of "*Affiliation*," which she describes as "[b]eing able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction . . . ." MARTHA C. NUSSBAUM, CREATIVE CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33–34 (2011).

101. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000) [hereinafter PUTNAM, BOWLING ALONE]; *see also* Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 137–39 (2007) [hereinafter Putnam, *E Pluribus Unum*].

and racially homogeneous communities,[102] some research suggests that it is harder to build social capital in more heterogeneous communities.[103] However, when individuals live in less segregated communities, the creation of social capital is still possible.[104] Similar to the difference between the individuated self and the associational self, as I have described it, social capital often exists in the relations between individuals and the networks of which they are a part.[105] Social capital has also proven to have significant spillover effects on community life, economic performance,[106] and the functioning of government.[107] For example, research by Putnam and others on civic life in Italy showed that communities with dense and robust social-capital networks had more effective and responsive governments than those where social capital was weaker.[108]

Social capital performs the critical function of helping communities resolve collective-action problems.[109] Such problems are described as situations in which members of a group or community "find it difficult to coordinate their actions to secure their group interest."[110] As Putnam argues, social-capital networks "facilitate coordination and communication, amplify reputations, and thus allow dilemmas of collective action to be resolved."[111] Social capital can generate the trust that is required to solve collective-action problems that often hinge on what Dan Kahan calls the "logic of reciprocity," the idea that individuals can spur cooperation through repeated, trusting moves.[112] Social capital also does something else: not only does social capital exist in networks,

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102. *See* Edward L. Glaeser et al., *Measuring Trust*, 115 Q. J. ECON. 811, 814 (2000).

103. *See* Putnam, *E Pluribus Unum*, *supra* note 101, at 141–51.

104. *See* Eric M. Uslaner, *Segregation, Mistrust and Minorities*, 10 ETHNICITIES 415, 416 (2010).

105. In this way, social capital is akin to privacy protections themselves. *See infra* Section V.A.

106. *See* Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. ECON. 1251, 1275–77 (1997).

107. *See* Stephen Knack, *Social Capital and the Quality of Government: Evidence from the States*, 46 AM. J. POL. SCI. 772, 772 (2002).

108. *See* ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 119–51 (1993).

109. *See* Putnam, *America's Declining Social Capital*, *supra* note 99, at 67.

110. KEITH M. DOWDING, POWER 31 (1996).

111. Putnam, *America's Declining Social Capital*, *supra* note 99, at 67; *see also* Elinor Ostrom & T.K. Ahn, *The Meaning of Social Capital and Its Link to Collective Action*, *in* HANDBOOK OF SOCIAL CAPITAL 17, 22 (Gert T. Svendsen & Gunnar L. Svendsen eds., 2009) (arguing that "trust is the core link between social capital and collective action. Trust is enhanced when individuals are trustworthy, are networked with one another and are within institutions that reward honest behavior").

112. *See* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71–72 (2003).

but also those networks are often the well-springs of social change because they form into social-movement organizations.[113] Such social-movement organizations often face the problem of bringing about social change as a collective-action problem itself.[114] It is through these social-movement organizations that the individual within a collective strives to solve such problems and make a broader societal change, as the following discussion shows.

C. Social Change and the Associational Self

Returning to social movements, they are often the product of the search for and realization of collective identity, and have played a central role in social change throughout American history.[115] Sensitive to the shifts in popular opinion successful movements have often signaled, legal institutions were often altered by such movements and the organizations that constituted them. David Cole identifies these organizations and movements as "engines of liberty."[116]

In his recent work, *How Change Happens*,[117] Cass Sunstein argues that social change occurs when norm entrepreneurs create "norm cascades": phenomena in which individual norm change becomes group

113. On the role of trust and feelings of mutual obligations between individual members of a group as the well-spring of social movements, see CRUTCHFIELD, *supra* note 85, at 27–29.

114. For a discussion of social-movement struggles as addressing collective-action problems, see DENNIS CHONG, COLLECTIVE ACTION AND CIVIL RIGHTS 2–10 (1991).

115. *See, e.g.*, Balkin & Siegel, *supra* note 85, at 946 (arguing that social movements play a "key role" in the process of "disrupt[ing] public understandings" of constitutional principles, "contest[ing] received framings" of those principles, and helping to "reshape and reform public opinion" regarding such principles); *see also* SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 149–52 (3d ed. 2011) (describing role of identity in social movements). For a case study of the role of identity in the lesbian feminist movement in the United States, see Taylor & Whittier, *supra* note 88, at 104–29. Whether it is the organizations of the late-nineteenth and early-twentieth centuries that helped produce the structural political reforms of the progressive era—such as the suffragists who brought about the passage of the Nineteenth Amendment to the U.S. Constitution, the Civil Rights Movement of the mid-twentieth century, or the marriage equality movement of this century—such organizations and movements were often the product of individuals assuming collective identities, and then, in turn, changing society. *See, e.g.*, Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1068 (2012) (describing the concept "demosprudence" as "a philosophy, a methodology, and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive social movements that serve to make formal institutions, including those that regulate legal culture, more democratic"); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323–24 (2006) (describing the relationship between constitutional culture and social movements).

116. *See generally* COLE, *supra* note 85.

117. *See* CASS R. SUNSTEIN, HOW CHANGE HAPPENS 35–37 (2019) [hereinafter SUNSTEIN, HOW CHANGE HAPPENS].

norm change which, in turn, becomes societal change.[118] But those norms evolve and shift within small groups first through what Sunstein calls "enclave deliberation."[119] Social change spreads between different enclaves when an idea or demand, conceived in one enclave, is introduced to other, similar enclaves, many of which are organized around race or ethnicity.[120] Once the new idea is embraced by a new enclave, those enclaves merge, in a sense, and begin to form a movement.[121] Often, while these groups are made up of "like-minded" people, such enclaves may form along lines of identity: race, ethnicity, class, gender, sexual orientation, etc.[122]

While enclaves can be the location of norm development, they also can serve as the hub from which recruitment to groups occurs, usually a product of personal connections that individuals within the enclaves have to those outside of them; such personal connections often serve as the glue that brings new members into the enclaves.[123] Our sense of self and identity is activated by mobilization efforts as we identify with someone with whom we have a relationship and then see ourselves in the groups of which he or she is a member.[124] Two recent examples evince this phenomenon: the civil-rights movement of the 1950s and 1960s emerged

118. *See id.* at 4–10.

119. *See id.* at 20.

120. What is more, groups should be able to self-identify based on those common shared attributes or belief that they, themselves, define. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 938 (2002) (arguing for the right of communities to reach consensus about shared traits); *see also* IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST 174–80 (2019) (describing "space anti-racism" as that which recognizes the value of identity-based enclaves). I explore the role that constitutional protections attach to the expression of such identities and interests in Part IV.A. *See infra* Section IV.A; *cf.* Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 72 (2012) (arguing that, to deserve constitutional protection, among other features, "expressive associations must be based on identifiable beliefs to which all members subscribe in fact").

121. For a description of an effort to engage in community organizing in a series of meat-packing plants in North Carolina, where different pockets of workers, divided by ethnicity, began to work together within the workforce and then leveraged their individual members' connections to other community enclaves outside the plants, see JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 164–68 (2016).

122. *See* SUNSTEIN, HOW CHANGE HAPPENS, *supra* note 117, at 35–39; *see also* JOHN SIDES ET AL., IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 220 (2018) (arguing that during the presidential election of 2016, voter behavior often occurred along racial, ethnic, religious, gender, and partisan lines).

123. *See* TARROW, *supra* note 115, at 120–24 (describing the role of interpersonal networks in movement recruitment).

124. *See* DOUG MCADAM, NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY 43 (Enrique Laraña et al. eds., 1994).

from membership in African American churches,[125] and the women's movement of the 1960s and 1970s began in other, pre-existing community networks.[126]

In this understanding of social change as catalyzed by social groups, groups form and strive to effectuate social change, activated by notions of self and identity. The social change that emerges often generates wide public benefits and public goods.[127] Indeed, the civil-rights movement of the mid-twentieth century brought about wide-ranging benefits for not just the African-American community, but it also improved the stature of the United States on the global stage.[128] It also helped launch other movements, from the gay-rights movement to the feminist movement, both emerging in the late 1960s.[129] The marriage-equality movement that began toward the end of the twentieth century ultimately brought about the recognition of same-sex couples in the United States in 2015 and has generated public goods for the community due to the welcoming of such couples into the mainstream of American life, enriching all communities.[130] Much of this work materializes where social movements center *on* identity explicitly, or where supporters *identify with* either the movement itself or the cause it promotes.[131] Thus many social movements focus on the search for identity, an identity manifest not just in the collective identity it catalyzes, but also the collective goods that search produces.[132]

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125. *See* ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 35–38 (1984).

126. *See generally* Jo Freeman, *The Origins of the Women's Liberation Movement*, 78 AM. J. OF SOC. 792 (1973) (describing emergence of feminist advocacy groups from pre-existing networks, relationships, and organizations).

127. *See* Friedman & McAdam, *supra* note 93, at 157 (arguing that the success of social movements that emanate from collective identities results in the "transformation of these collective identities" into public goods "available to everyone"). For a description of these spillover benefits from associational activity as "associational surplus," see Lee Ann Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1240 (2006) (citations omitted).

128. *See, e.g.*, Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 118–19 (1988) (describing the role of international politics in influencing elite opinion on civil rights during the Cold War).

129. *See* Eskridge, *Channeling*, *supra* note 5, at 419–59 (describing the emergence of several social movements in the second half of the twentieth century).

130. There are certainly potential long-term effects of a legal backlash to the Supreme Court's marriage equality rulings. For a description of some of these potential effects, see Riva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA. L. REV. 1728, 1744–46 (2017).

131. *See* Eskridge, *Channeling*, *supra* note 5, at 425–26 (describing the role of identity in modern social movements).

132. *See* BERT KLANDERMANS, THE SOCIAL PSYCHOLOGY OF PROTEST 204–06 (1997) (describing the role of identity and identification with a social movement play in social mobilization).

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The pursuit of self-determination is often shaped and produced by choices, both of what to think and feel, but also with whom we will associate. Such a vision of the political self, the *associational* self, and its relationship to identity, autonomy, and democracy is different than the image of the individual sometimes described in Western political philosophy. Typically, scholarship has veered from viewing the individual and individual autonomy as unencumbered from associational ties, as in the work of John Rawls, or so encumbered by such ties that the individual finds it hard to define him- or herself apart from such ties, as in the work of Michael Sandel.[133] But drawing from social-movement scholarship in law and other disciplines, a different vision emerges, one of the self that acts autonomously to choose those associations he or she will make in the world and offers a better vision of the political, autonomous self. The actions of the associational self can generate common goods among other members of a group, which they can then leverage to bring about social change and the production of public goods enjoyed by all.[134]

Rawls saw the value of a disentangled, unencumbered, identity-less self capable of making effective choices in society. His critics claimed we could never truly shed our place in society in search of something new and more aligned with who we believe we are. Yet the process of seeking change and the realization of such changes that emerges from that process serve as better reflections of the self, as products of a richer individual autonomy that is manifest in collective action through institutions of one's own choice and which that individual helps to shape. Autonomy itself is reflected in these choices and the institutions where those choices are carried out. This richer vision of the self—the associational self that emerges from and arises within institutions—is a better reflection and embodiment of one's identity. Since this autonomy is critical to self-determination, preserving the integrity of that identity is central to the self-determination project. Strong protections are needed to ensure this integrity to preserve democracy itself. Today, as the following discussion shows, the search for identity is playing out in the digital world,[135] where it is also under threat.

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133. *See infra* Section I.B.

134. *See, e.g.*, ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 119–51 (1993) (describing the benefits of improved government functioning brought about by traditions and practices that foster social capital).

135. *See* Cohen, *supra* note 4, at 1913 (arguing that "[i]n the networked information society" the "practice of citizenship" is "mediated by search engines, social networking platforms, and content formats").

III. THREATS TO THE INTEGRITY OF IDENTITY IN THE DIGITAL WORLD

In the earliest days of the Internet, some believed that universal access to information and the possibility of connecting the planet in a global "information superhighway" would foster a fruitful and expansive search for identity and, once found, community.[136] Many hopeful prognosticators believed this connectivity would advance the cause of human flourishing.[137] In the roughly 25 years since the emergence of an array of new, digital technologies and communicative capacities, broad access to the Internet has become a reality for many, and greater computing power and more sophisticated mobile technologies have spawned even greater opportunities to realize the beneficial effects of near-universal access to the digital world.[138] Like never before, individuals are now capable of finding other individuals with whom they share interests or learning more about themselves through the range of information about the activities, interests, and identities of others. Indeed, the digital world has become a place where individuals can find and establish an identity of their own.[139] The heterogeneity of interests and identities one can pursue in this digital world encourages greater

136. For a description of views of the potential of the early days of the internet, see JOHN HARTLEY, COMMUNICATION, CULTURAL AND MEDIA STUDIES: THE KEY CONCEPTS 231 (2002). *See also* KEVIN KELLY, THE INEVITABLE: UNDERSTANDING THE 12 TECHNOLOGICAL FORCES THAT WILL SHAPE THE FUTURE 17–18 (2016). For the argument that new technologies make the search for identity and community easier, see CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 122–23 (2008). *See also* MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 15 (2003) (describing the promise of digital tools for restoring sense of community).

137. On the role of the Internet in promoting human flourishing, see Mirko Bagaric et al., *The Hardship That Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. 261, 275–78 (2017) (citations omitted). *See also* THE WILEY BLACKWELL HANDBOOK OF THE PSYCHOLOGY OF THE INTERNET AT WORK 3–6 (Guido Herdel et al. eds., 2017) (discussing how the internet provides access to information, that it allows for increased interaction and communication between people, and the psychological effects the internet has on individuals); Douglas Rushkoff, TEAM HUMAN 29–30 (2019) (on early, hopeful visions for the internet). On the perceived possibility that the Internet held for human creativity, see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 275–77 (2006).

138. Journalist Thomas Friedman identifies 2007 as a key inflection point in technological advancement because of the breakthroughs in mobile technologies, widespread adoption of social media, and dramatic expansion of computing and digital storage power that occurred in this year. *See* THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THE AGE OF ACCELERATIONS 20–22 (2016).

139. *See generally* John A. Bargh et al., *Can You See the Real Me? Activation and Expression of the "True Self" on the Internet*, 58 J. SOC. ISSUES 33 (2002) (describing the value of internet for helping individuals explore their identity through finding like-minded people online).

explorations of one's identity.[140] Through broader connectivity and digital reach, individuals can find the identities that most align with their understandings of their selves.[141] Once found, this identity can lead to the collective goods—social capital and the emergence of social movements—that then lead to public goods, like the recognition of new rights and the development of new institutions.[142]

A very dark side of this connectivity has emerged, however, and these new technological tools have also been harnessed to sow division, hatred, racism, anti-Semitism, authoritarianism, and misogyny while also promoting abuse, violence, and oppression: the opposite of democracy and human flourishing.[143] A range of phenomena center on activating personal identities and affinities in destructive ways.[144] Such destructive actions involve the spread of disinformation to fan ethnic tensions and spur violence[145] or the emergence of algorithms that manipulate emotions to lure individuals toward more extreme online content and more radical

140. Of course, this can also lead to information silos, confirmation bias, and a type of groupthink. *See* PAUL BERNAL, THE INTERNET, WARTS AND ALL: FREE SPEECH, PRIVACY AND TRUTH 240 (2018). *But cf.* SUNSTEIN, HOW CHANGE HAPPENS, *supra* note 117, at 35–37 (warning of the potential dangers of "enclave deliberation" but recognizing it has a value for social change).

141. On the ease with which one can explore one's potential identities online and find others with similar interests and identities, see Yair Amichai-Hamburger & Zach Hayat, *Personality and the Internet*, *in* THE SOCIAL NET: UNDERSTANDING OUR ONLINE BEHAVIOR 5–10 (Yair Amichai-Hamburger ed., 2d ed. 2013). Speaking in the early days of the internet, Paul Schwartz would describe this phenomenon as follows: "Information technology in general and the Internet in particular," can help individuals "form[] new links between people and marshal[] these connections to increase collaboration in democratic life." Schwartz, *Cyberspace*, supra note 36, at 1648.

142. Some scholarship describes "club goods" as the benefits that are derived from membership in a group. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 347–51 (2d ed. 1996). For a discussion of public goods, like civil rights, that are a product of collective action, see CHONG, *supra* note 114, at 2–4.

143. *See, e.g.*, LARRY DIAMOND, ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY 26–28 (2019) (describing norms such as tolerance, compromise, civility, and others that are necessary in functioning democracies and the fact that they are currently at risk).

144. *See, e.g.*, BRAD SMITH & CAROL ANN BROWNE, TOOLS AND WEAPONS: THE PROMISE AND PERIL OF THE DIGITAL AGE xix (arguing that "[w]hile sweeping digital transformation holds great promise, the world has turned information technology into both a powerful tool and a formidable weapon").

145. For a discussion of the role of hate speech on social media platforms and its contribution to ethnic violence in Myanmar, see UNITED NATIONS HUMAN RIGHTS COUNCIL, REPORT OF THE DETAILED FINDINGS OF THE INTERNATIONAL FACT-FINDING MISSION ON MYANMAR 130 (2018). *See also* Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), https://nyti.ms/3qAtFRs (describing Facebook's admission that the platform was used to foment ethnic and religious violence in Myanmar).

behavior.[146] These destructive actions could also entail using personal information contained on social media sites to profile users and micro-target political information to them,[147] or interfering with national elections in ways designed to stoke ethnic divisions and undermine democracy.[148] While acting in these ways may be a form of self-expression and self-determination for some, such expression and the actions that follow are inconsistent with democratic values and egalitarian and humanistic principles; they not only violate the human rights and the bodily integrity of others, they also threaten to chill identity-forming and associational activities that might help individuals and groups realize self-determination.[149] Thus, new technologies are both a blessing and a curse. They offer a means of connection and self-realization but also threaten the integrity of identity, and the ubiquity of new technologies can serve to undermine the self-determination and self-realization that furthers democracy.[150]

Threats to the integrity of individual and collective identity lie at the core of technology's growing potential for harm and are both a symptom and a cause of such harm. Individuals that use online-search functions, participate in social media, and have other forms of an online presence can be targeted for manipulation, mostly to promote commercial interests

146. *See* Kevin Roose, *The Making of a YouTube Radical*, N.Y. TIMES (June 8, 2019), https://nyti.ms/2ZAuyxK (describing content-feed algorithms and their channeling of users towards more extreme content).

147. *See* UK INFO. COMM'R'S OFF., INVESTIGATION INTO THE USE OF DATA ANALYTICS IN POLITICAL CAMPAIGNS: A REPORT TO CONGRESS 16, 30–33 (2018) (describing Cambridge Analytica's actions to harvest personal information of individuals on the social media site Facebook and use it for the distribution of political messaging).

148. *See* ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 4, 14, 29 (2019) (describing the type of election interference that took place in the lead up to the 2016 presidential election involving targeting mostly ethnic affinity groups).

149. *See, e.g.*, Christine Hauser & Julia Jacobs, *Three Men Sentenced to Prison for Violence at Charlottesville Rally*, N.Y. TIMES (Aug. 23, 2018), https://nyti.ms/3aACl4P (describing violence at the "Unite the Right" rally in Charlottesville, Virginia, in 2017). Writing in the early days of the internet, Paul Schwartz expressed concerns that breaches of privacy would reveal an individual's embarrassing private information, which could lead to a type of blackmail by norm entrepreneurs who gain access to such information. *See* Schwartz, *supra* note 4, at 840–43. While there does seem to be some degree of hacking and the installation of ransomware and other nefarious applications, we have not seen much of this taking place in the social change space by norm entrepreneurs. *See, e.g.*, J.D. Biersdorfer, *An Old Scam with a New Twist*, N.Y. TIMES (July 23, 2018), https://nyti.ms/2ZCJ3AS (describing blackmail techniques using details allegedly obtained through breach of private, online activities).

150. For several discussions of the ways in which digital technologies can enhance community organizing, see TUFEKCI, *supra* note 9, at 3–27. *See also* David B. Carter, *The Energizing Citizen Action with the Power of Digital Technology: The Amplified Effort of the Newark Residents Against the Power Plant* 51–72, *in* TECHNOLOGY, ACTIVISM, & SOCIAL JUSTICE (John G. McNutt ed., 2018).

but also in the pursuit of other, more politically charged ends.[151] Sometimes the two dovetail when, for example, a social-media company actively promotes a user's continued engagement with its site or application by feeding that user more outrageous and intriguing content, which can, in turn, begin to seep into the psyche of the user, impacting her very identity and directing her to more extreme and radical positions.[152] The internet user's online presence and activities become a new commodity to be bought and sold, and only the slimmest of protections surround that individual's privacy interests.[153] Indeed, loss of the integrity of identity has become the price many pay—willingly or unwillingly—for connectivity through and access to many contemporary technologies.[154] In turn, these threats to identity, through the unauthorized sharing of one's online activities and information about the digital self as well as the disclosure of that cluster of information that could constitute one's identity, threaten the integrity of the self in profound ways. Threats to integrity also affect the quest for self-determination and undermine democracy by chilling activities and associations that are directed toward achieving both.

As this section has shown, though, there is more: these threats often manifest as outside entities infiltrating our associational ties and interpersonal networks, which are, themselves, often embodiments of our identity. Our associational identities are under threat and subject to infiltration and manipulation because of the ubiquity of the information about our identity within the digital world. The threats to the associational self in society run the risk of undermining individual and collective autonomy. Individual and collective autonomy help a society's citizens realize the promise of democracy. When efforts to realize that autonomy are chilled, the individual and collective identity are undermined, and democracy itself is threatened. Thus, threats to the identity that are realized in our associational relationships also threaten democracy. In the next two Parts, I explore how these relationships are protected in, first, public-law settings, and then in private-law settings. I now turn to these questions.

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151. *See, e.g.*, ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE, 190–91 (2019) (describing Facebook's profit motive as the driving force behind political manipulation on the site).

152. *See* Jack Nicas, *How YouTube Drives People to the Internet's Darkest Corners*, WALL ST. J. (Feb. 7, 2018, 1:04 PM), https://on.wsj.com/2OX2WAJ (describing social media algorithms and their direction of users towards extremist content).

153. *See* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 259–60 (2016) (describing the functioning of online advertising); ZUBOFF, *supra* note 8, at 74–81 (describing Google's advertising capacities).

154. *See, e.g.*, United States v. Jones, 565 U.S. 400, 425–30 (2012) (Alito, J., concurring) (discussing the willingness of consumers to trade convenience for privacy).

IV. THE INTEGRITY OF IDENTITY IN PUBLIC-LAW SETTINGS

The protection of associational rights—which, in some ways, is the protection of the associational self and the maintenance of the integrity of both individual and associational identity—has a robust history in public-law settings. This Part traces the evolution of the protection of associational rights in such settings.

A. Associational Rights in Public-Law Settings

The law protects the integrity of identity in public-law settings in myriad ways, and there are several channels through which to recognize this right.[155] For example, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution protects certain aspects of identity, primarily individuals who are members of "discrete and insular minorities,"[156] although equal protection, especially for race, appears to extend to non-minority groups.[157] Famously, the first case to recognize the Equal Protection Clause as offering protections against negative treatment on account of gender was one in which a male faced discrimination "based on" his sex.[158] While there are certainly identity-based aspects of equal protection jurisprudence, it rarely touches upon the concept of the associational self as described above: in fact, the phrase "discrete and insular minorities" often misses the mark,

155. For a discussion of misconceptions of the public-private law divide and the role of private law in furthering self-determination and substantive equality, see Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1410–49 (2016).

156. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). For a discussion of the meaning of the term "discrete and insular minorities" as used by the Court in *Carolene Products*, see Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 217–19 (2004).

157. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1988) (striking down a municipality's affirmative action program that favored minority contractors as a violation of Equal Protection). For a critique of the Court's equal protection jurisprudence in *City of Richmond*, see Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context that Matters*, 82 WASH. L. REV. 897, 903 (2007).

158. *See* Moritz v. Comm'r of Internal Revenue, 469 F.2d 466, 470 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). For a description of the strategy behind presenting a sex discrimination claim based on the rights of a male, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 86 (2010). The statutory corollary to this protection in private law has been extended to cover the rights of members of the LGBTQ+ community in the employment context. *See generally* Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (finding that discrimination in the workplace based on sexual orientation or transgender identity violates the Civil Rights Act of 1964).

sometimes negating protections where they are most needed, where they can change over time.[159]

In terms of protecting the integrity of the associational self, the Supreme Court has long recognized the freedom of association as being integral to the protections afforded under the broad umbrella of free-speech rights.[160] In *NAACP v. State of Alabama*[161] and *NAACP v. Button*,[162] the Court protected the associational rights of individuals to join advocacy groups and to engage in particular forms of advocacy together.[163] In *NAACP v. Alabama*, the Court held that the state of Alabama's requirement that the NAACP turn over the membership lists of its local chapters to the state's Attorney General, pursuant to a statute requiring out-of-state organizations to register with the state's Secretary of State, was unconstitutional. In this opinion, the Court also recognized the right of the NAACP to pursue the interests of its members in preserving their anonymity.[164] The Court noted the following:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[165]

Indeed, the Court held that members of the NAACP faced legitimate fear of reprisal for the exercise of their First Amendment

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159. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724–31 (1985) (critiquing the application of discrete-and-insular-minorities as misplaced in certain settings).

160. On the relationship between the freedom of association and freedom of speech, see Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASSOCIATION 3–4 (Amy Gutmann ed., 1998). On the pre-*NAACP v. Alabama* origins of the freedom of association, see M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 173–96 (2d rev. ed. 1981).

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

162. *See* NAACP v. Button, 371 U.S. 415 (1963) (holding that rules preventing communication with respect to legal advocacy, which was the plaintiff-organization's frequent means of expression, are unconstitutional).

163. On the origins of the recognition of the Freedom of Association, see generally John D. Inazu, *The Strange Origins of the Constitutional Right to Association*, 77 TENN. L. REV. 485 (2010).

164. *See Patterson*, 357 U.S. at 460–61 (citations omitted).

165. *See id.*

rights if the state could force the organization to reveal the names of its members.[166] Such "compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[167] Such disclosure "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."[168]

Similarly, in *NAACP v. Button*, the Court concluded that "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity,"[169] including "the right 'to engage in association for the advancement of beliefs and ideas,'"[170] as well as "the efforts of a union official to organize workers."[171] The Court also noted that it had "refused to countenance compelled disclosure of a person's political associations."[172] While upholding the rights of the NAACP to engage in legal advocacy, the Court stressed the importance of "minority, dissident groups"[173]:

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166. *See generally* Allen, *supra* note 15 (describing the decision and its legacy).

167. *Patterson*, 357 U.S. at 462–63. In more recent jurisprudence, the Court has found that anonymity is not limitless: in a case involving public petitions, the Court found that the State of Washington could request the identity of individuals signing petitions to place items on the ballot as part of a public referendum. *See* Doe v. Reed, 561 U.S. 186 (2010). The question of whether the First Amendment prohibits the disclosure of the donors' lists of non-for-profit corporations is currently before the Court. *See generally* Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000 (9th Cir. 2019), *pet'n for cert. docketed*, No. 19-251 (U.S. 2019).

168. *See Patterson*, 357 U.S. at 463; *see also* Eskridge, *Some Effects*, *supra* note 15, 2335–36 (describing the Court's recognition of associational rights in *Patterson*); Easterbrook, *supra* note 15, at 93–95 (same).

169. NAACP v. Button, 371 U.S. 415, 430 (1963).

170. *Id.* (citing *Patterson*, 357 U.S. at 460).

171. *Id.* (citation omitted).

172. *Id.* at 431.

173. *Id.* at 431 (citation omitted). The Court's jurisprudence of the freedom of association and related rights often hinges on the extent to which such protections are necessary to ensure the rights of dissident, outsider voices. Even in the dated language of 1943, in *Martin v. City of Struthers*, the Court found as follows, when striking down a law banning door-to-door canvassing:

> [A]s every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (footnote omitted) (holding that restrictions on door-to-door leafletting are unconstitutional). Such preservation of the channels of dissent is critical to the maintenance of liberty and autonomy. As Laurence Tribe explains: "Our system of ordered liberty values individual autonomy, and, any regime that would value individuals must at least tolerate—if not celebrate—diversity among the myriad personalities who breathe life into the abstractions we call liberty and

> [T]he litigation [the NAACP] assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.[174]

Following these cases involving the freedom of association directly, in *Griswold v. Connecticut*[175]—a case involving, in part, the freedom of association as an element of the larger right to privacy—the Court relied on its previous decision in *NAACP v. Alabama* to discuss associational rights and hold that the "right of 'association,' like the right of belief, is more than the right to attend a meeting."[176] This right "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[177] This type of association "is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."[178]

B. Aspects of the Integrity of Identity in the Broader Right to Privacy

Apart from the explicit recognition of the freedom to associate, the Court's privacy jurisprudence has also recognized elements of individual identity within the broader right to privacy. The Court's first formal recognition of a right to privacy per se would come about through its holding in *Griswold*,[179] mentioned above, which involved access to contraceptives for married couples. There, the Court held that the challenged law "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[180] In this way, the Court considered the relations between the married couple

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community." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1435 (Foundation Press 2d ed., 1988) [hereinafter TRIBE, CONSTITUTIONAL LAW].

174. *Button*, 371 U.S. at 431.

175. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

176. *Id.* at 483 (citation omitted).

177. *Id.*

178. *Id.* (citation omitted). Within these associational-rights cases, we see a bit of a tension between private associations and public actors: the private NAACP deserved protection from governmental actors, and that protection emerged from First Amendment norms. At the same time, when public acts might result in disclosure of private information, the Supreme Court has not extended privacy or associational rights protections to such actions. *See, e.g.*, Doe v. Reed, 561 U.S. 186, 196–202 (2010) (holding that information related to individuals who had signed a petition in support of a ballot referendum was not immune from disclosure).

179. *See Griswold*, 381 U.S. 479 (1965).

180. *Id.* at 482.

as a unit, and their relations—their associations and dealings—with their physician when assessing whether to recognize a right to privacy. The Court admitted that "[t]he association of people is not mentioned in the Constitution nor in the Bill of Rights,"[181] but added that this omission did not prevent the Court from concluding that these relations and types of associations deserved special protection. Indeed, other rights, like the "right to educate a child in a school of the parents' choice"[182] or "the right to study any particular subject or any foreign language,"[183] were not explicitly mentioned in the Constitution, yet such rights deserved constitutional protection. The Court concluded that "the First Amendment has been construed to include certain of those rights."[184] Reading a range of cases that touched upon certain "peripheral rights,"[185] the Court in *Griswold* found, "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[186] The Court concluded that the First, Third, Fourth, Fifth, and Ninth Amendments, as interpreted by the Court in decisions over the years and read together, create "zones of privacy"[187] and "bear witness that the right of privacy which presses for recognition here is a legitimate one."[188]

The next landmark case addressing the freedom of association, *Roberts v. United States Jaycees*,[189] introduced a new approach to associational rights, one that divided such rights into those in which the individual enjoys *intimate* associational rights and *expressive* associational rights.[190] According to the majority opinion in *Roberts*, these two rights demand 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."[191] Such interests are protected through the right to intimate association, which "safeguards the ability independently to define one's identity that is central to any concept of liberty."[192] They also allow for the recognition of "certain kinds of personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 483.
186. *Id.*
187. *Id.* at 484.
188. *Griswold*, 381 U.S. at 485 (citations omitted).
189. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).
190. *See id.* at 617–18 (citations omitted).
191. *Id.*
192. *Id.* at 619 (citations omitted).

shared ideals and beliefs."[193] And, as a result, they "foster diversity and act as critical buffers between the individual and the power of the State."[194] At the same time, such associations "are 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."[195] On the other hand, with expressive associational rights, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[196] Such freedoms "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[197]

At the same time, these two types of associational interests can "coincide" according to the Court, "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor."[198] In such instances, "freedom of association in both of its forms may be implicated."[199] Different relationships can be found "on a spectrum from the most intimate to the most attenuated of personal attachments."[200] The Court found that the "factors that may be relevant" to drawing distinctions between intimate and expressive associational rights include "size, purpose, policies, selectivity, congeniality," and any other "pertinent" factors in a given case.[201] It is important to draw distinctions between intimate and expressive associational rights because, as we can discern from *Roberts*, the Court appears to treat the expressive associational rights as deserving somewhat less protection than intimate associational rights.[202]

In *Roberts*, the Court decided whether what was, essentially, a fraternal organization geared toward supporting the advancement of young men in their careers could properly exclude women from its ranks. After concluding that the Jaycees were not entitled to treatment as an

193. *Id.* at 618–19

194. *Id.* (citations omitted).

195. *Id.* at 620.

196. *Id.* at 618.

197. *Id.* at 622 (citations omitted). For a discussion of the Court's description of intimate associations, see Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 659–61 (2002).

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

199. *Id.*

200. *Id.* at 620 (citation omitted).

201. *Id.*

202. *See*, John D. Inazu, *The Unsettling 'Well-Settled' Law of Freedom of Association*, 43 CONN. L. REV. 149, 174–77 (2010) (describing the lower level of scrutiny under *Roberts* applied to actions impacting expressive institutions) [hereinafter Inazu, *Unsettling*].

intimate association because its local chapters were "large and basically unselective groups" and much of the activity carried out by these chapters involved non-members,[203] the Court found that, as an expressive association, the Jaycees' rights were not "absolute."[204] Indeed, according to the Court, infringement on the rights of expressive associations "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[205] Since the legislative enactment that required the Jaycees to admit women advanced the important goal of eliminating gender discrimination and was carried out through the "least restrictive means," the state could intervene to ensure the organization admitted women.[206]

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203. *Roberts*, 468 U.S. at 620–21.

204. *Id.* at 623. Of course, no rights are absolute, even intimate-association freedom. It, too, is subject to strict-scrutiny analysis. *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *Perspectives on Constitutional Exemptions to Civil Rights Laws:* Boy Scouts of America v. Dale*: The Expressive Interest of Associations*, 9 WM. & MARY BILL OF RTS. J. 595, 616 (2001) (citation omitted) (explaining that content-based restrictions on speech can be applied if they meet strict scrutiny).

205. *Roberts*, 468 U.S. at 623 (citations omitted). As noted above, this formulation of the test applied to restrictions on expressive associational rights is slightly less stringent than that which would implicate an intimate associational right. For a critique of arguments that attempt to draw a line between intimate associational rights and expressive associational rights, see Inazu, *Unsettling*, *supra* note 202, at 175–77. *See also id.* at 162 (explaining that these arguments fail because "all of the values, benefits, and attributes that [such arguments] assign to intimate associations are equally applicable to many, if not most, nonintimate associations" (citation omitted)). Sixteen years after *Roberts*, the Court would reverse course and find that the Boy Scouts could exclude a gay assistant scout master without running afoul of the right to freedom of association; rather, the Court viewed the right to exclude this individual as a realization of the freedom of association of the organization itself. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–61 (2000). This decision has attracted harsh criticism. *See* Mazzone, *supra* note 197, at 674–78 (criticizing *Dale* on a range of grounds); *see also* Stephen Clark, *Judicially Straight?* Boy Scouts v. Dale *and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 522–23 (2003) (critiquing Justice Scalia's vote in support of the majority opinion as inconsistent with his prior jurisprudence); *cf.* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001) (describing that the right affirmed in *Dale* and other cases "is better understood as a right not to be used or commandeered to do the state's ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the state's message, with one's voice or body or resources, on one's personal possessions, through the composition of the associations one joins or forms, or in their selection of teachers, exemplars, and leaders"). *But cf.* William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1073–81 (2004) (reviewing *Dale* in light of other decisions reached by the Court that were favorable towards gay and lesbian rights and describing Court's jurisprudence as having a moderating influence on otherwise heated political discourse).

206. *See* Chemerinsky & Fisk, *supra* note 204, at 623–26. For further analysis of the judicial philosophies reflected in the different opinions in Roberts, see George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35, 41–60 (Amy Gutmann ed., 1998).

In the nearly 60 years since *Griswold*, the Court has extended the right to privacy to protect a range of intimate relations and choices, including the right to terminate a pregnancy and the right of individuals of the same sex to marry.[207] But the formal right to expressive association appears mostly to take a back seat to associations that the Court might more readily recognize as of a more intimate nature, often blending notions of intimate association and decision making that is closely tied to one's identity. For example, in *Planned Parenthood of Southern Pennsylvania v. Casey*,[208] the majority concluded that decisions affecting marriage and procreation "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."[209] Such liberty includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[210] and, if such matters were "formed under compulsion of the state," the Court wrote, they "could not define the attributes of personhood."[211] Similarly, Justice Stevens, in a concurrence in *Casey*, recognized the "decisional autonomy" at the center of the right to privacy, which "must limit the State's power to inject into a woman's most personal deliberations its own views of what is best."[212] And Justice Blackmun argued that the Court's decisions on the right to privacy "embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."[213]

Finally, in the majority opinion in *Obergefell v. Hodges*,[214] the Court struck down state laws prohibiting same-sex marriage as unconstitutional, making explicit the connection between identity and the

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207. *See, e.g.*, Allen, *Coercing*, *supra* note 66, at 724 (footnote omitted) (describing the "liberal conception of private choice" as "the idea that government ought to promote interests in decisional privacy, chiefly by allowing individuals, families, and other nongovernmental entities to make many, though not all, of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association").

208. Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833 (1992).

209. *Id.* at 851. For a discussion of the Court's decision in *Casey* and its impact on expressions of sexual identity, see Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 169–71 (2002).

210. *Casey*, 505 U.S. at 851.

211. *Id.*

212. *Id.* at 916 (Stevens, J., concurring in part and dissenting in part). For a comparison of the differences between the Court's jurisprudence on decisional autonomy in *Casey* with its decision in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), where it upheld restrictions on so-called partial-birth abortion, see generally Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

213. *Casey*, 505 U.S. at 926–27 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted).

214. Obergefell v. Hodges, 576 U.S. 644 (2015).

substantive rights protected in the Constitution.[215] The liberty protected by the Constitution "includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[216] In *Obergefell*, the liberty—that identity—the plaintiffs pursued was the right to "marry someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex."[217] The Court concluded that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[218] Protected in this way, the government cannot suppress such "identity-constitutive" conduct undertaken by the LGBTQ community.[219] Though once again, the individual's identity was, in many ways, associational: inherent in the associations—the marital bonds with another—that individual wanted to nurture and have recognized, which, in turn, was a reflection of that individual's identity.[220]

C. *The Public-Law Right to Integrity of Identity and Self-Determination Through Associational Activities*

The Court's holdings regarding the public-law right to privacy as it relates to the integrity of identity, individual and collective self-determination, and associational rights, all recognize a core privacy right in certain interests intrinsic to the person's identity. Such a privacy right includes the individual's ability to make decisions about personal

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215. *See id.* at 675. For a discussion of the jurisprudence of Justice Kennedy, the author of *Obergefell*, in prior cases regarding decisional autonomy and identity, see Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 23 (2015).

216. *Obergefell*, 576 U.S. at 651–52.

217. *Id.* at 652.

218. *Id.* at 675.

219. *See* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1137–38 (2017). Similar to Ganz's description of the farmworkers' choice of association described earlier, intimate associations can make similar statements. As Kenneth Karst explained 40 years ago:

> An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others . . . . Transient or enduring, chosen or not, our intimate associations profoundly affect our personalities and our senses of self. When they are chosen, they take on expressive dimensions as statements defining ourselves.

Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636–37 (1980) (footnotes omitted).

220. *See* Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 945–46 (2014) (proposing a model for antidiscrimination law that protects individual identity formation and expression). On some of the ways in which other aspects of public law can affect identity, community, and culture, see Robert Post, *Law and Cultural Conflict*, 78 CHI-KENT L. REV. 485, 505–08 (2003).

identity and critical questions relating as to how to lead one's life—like whether to use and how to gain access to contraceptives,[221] to have an abortion,[222] how to think,[223] whom to marry,[224] and what information to access to educate oneself about political, religious, moral, and cultural beliefs.[225] Second, there is an extrinsic quality to these holdings as well. They preserve the ability of the individual to connect with others who have similar interests and to act in concert with them. It is thus a positive right. But it is also guarded from disclosure, as a negative right: that is, a freedom *from* exposure.[226] One rationale for this second component is that the ability to act in unison would be chilled if individuals were afraid to engage with others to pursue their common interests or to share an identity if the fact of such union were open to inspection.[227] This is particularly true of those associations that might meet with disfavor in the community at large because they are not a part of, and might resist, the dominant group or groups in the community.[228] Third, individuals have associational rights to act in unison to effectuate social change through overt acts designed to influence others.[229] What is more, the second and third components lend further protection to what must be

221. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965). In *Griswold*, the Court spoke about the right to access contraception in associational terms, both in terms of the relationship between a physician who would allow access to contraceptives and the marital relationship itself, which efforts to curtail the use of contraception would necessarily invade. *See id.* The Court in *Griswold* held that marriage "is an association that promotes a way of life, not causes; . . . . [I]t is an association for as noble a purpose as any involved in our prior decisions." *Id.*

222. *See* Roe v. Wade, 410 U.S. 113, 163–65 (1973).

223. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943).

224. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also* Obergefell v. Hodges, 576 U.S. 644, 674 (2015).

225. *See Griswold*, 381 U.S. at 482 (collecting cases).

226. *See* NAACP v. Button, 371 U.S. 415, 430–31 (1963). The forces of individual autonomy and democratic community can sometimes be at odds, however. *See, e.g.*, Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* NOMOS: XXXV, DEMOCRATIC COMMUNITY, 181–82 (Ian Shapiro & John W. Chapman eds., 1995) (describing the tension between individual identity, democracy, and community in constitutional doctrine).

227. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958). For a discussion of the potential chilling effect of disclosure of a group's membership list, see Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481–94 (2013).

228. *See Button*, 371 U.S. at 431; *see also Patterson*, 357 U.S. at 462 (holding that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs"). On the role of associational rights in protecting dissident groups, see Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2194–98 (2018).

229. *See Button*, 371 U.S. at 430; *see also* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (establishing the right to door-to-door canvassing).

seen as a fourth interest, whether that is a by-product of these components or operates on its own to further strengthen the other two components. This fourth component is the right to connect groups with other groups to pursue common interests collectively. If we are to believe society operates to a certain extent according to public-choice theory,[230] smaller groups of like-minded people can unite with others to create forceful movements for change.[231] If associational rights mean that an individual and group need such rights to effectuate change, they must recognize and accommodate the ability of groups not only to expand and to recruit new members but also to align with other groups to create larger blocs and a full-scale movement.[232] This is especially true of "outsider" groups, looking to harness collective power. [233]

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As the previous discussion shows, the right to the integrity of identity and all it entails enjoys fairly robust protection in public-law settings. At the same time, today, many of the activities that realize this right emerge in the digital world, where public-law protections do not mean much unless the government is, itself, engaged in surveillance of protected activities. Rather, the threats to the integrity of identity in the digital age, as more fully described above,[234] tend to emanate mostly from actors not covered by the reach of public law. To ensure the right to the integrity of identity and the associational self, there must be some means by which to protect this right through private-law means.[235] As the

230. For a description of public-choice theory generally, with its different strands, see Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 5–23 (1991).

231. While coalitions are central to public-choice theory, they can also face free-rider problems that grow as those coalitions grow in scale and size. *See* William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 877 (1975). On the free-rider problem in group activities, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 125–34 (1965).

232. One view of social change is that espoused by the late Derrick Bell, who explained the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), as one resulting from what he called "interest convergence": when seemingly disparate groups—there, the Civil Rights Movement leaders and white elites—found that racial desegregation in education was ultimately in the interests of both groups. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

233. *See, e.g.*, Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 806 (2008) (arguing that effective social-change efforts require coalition building, particularly among marginalized groups).

234. *See supra* Part III.

235. Of course, the line between the public and the private in the context of digital privacy is extremely blurry. When a political campaign uses private information to influence an election, or a foreign government accesses such information through private sources to influence that election, it is not always clear where the private-public

following discussion shows, the tort of invasion of the right to privacy is the best fit for such an approach.

V. PROTECTING IDENTITY THROUGH THE RIGHT TO PRIVACY IN PRIVATE-LAW SETTINGS

While the protection of associational rights has a robust history in public-law settings, in private-law settings, such protection is found mostly in tort law. This Part explores the evolution of the protection of the right to privacy in private-law settings, as well as recent judicial decisions addressing the right to privacy in cyberspace and their implications for protecting the political privacy and the integrity of identity.

A. The Origins of the Right to Privacy in Private-Law Settings and Its Social and Communal Aspects

Although the public-law recognition of the right to privacy owes much of its normative force from the same original text,[236] the private-law approach to privacy, based mostly in tort law, finds as its original "source code" a seminal article by Samuel Warren and Louis Brandeis entitled simply *The Right to Privacy*.[237] There, Warren and Brandeis identified the apparent emergence in the common law at the time of what they would call the "right to be let alone."[238] This right, "which protects personal writings and any other productions of the intellect or of the emotions," is what they would call "the right to privacy."[239] It also has relational, even associational, aspects to it. As Robert Post explains: "So conceived [by Warren and Brandeis], privacy does not refer to an objective physical space of secrecy, solitude, or anonymity, but rather to the forms of respect that we owe to each other as members of a common

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distinction lies. For a discussion of the emergence and critiques of the public-private law distinction, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425–28 (1982). For an argument that the modern system of government entitlements often blurs the distinction between the public and the private to create a "feudal system," see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 770 (1964).

236. Although the majority opinion in *Griswold* would not reference Warren and Brandeis's seminal article on the right to privacy, Justice Black would do so in his dissent in that case. *See* Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting) (citation omitted); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

237. Warren & Brandeis, *supra* note 236, at 193.

238. *Id.* at 195 (citing COOLEY ON TORTS 29 (2d ed. 1888)). For a critique of the conceptualization of the right to privacy as the right to be let alone, see Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1099–1102 (2002).

239. Warren & Brandeis, *supra* note 236, at 195.

community. Personality is violated when these forms of respect are transgressed."[240]

Similar to the concept of social capital, which adheres to the relations between people,[241] privacy protections are placed between people and, in some ways, define the boundaries of the self.[242] At the same time, the "territories of the self," as Goffman describes them, which deserve privacy protections, have a "socially determined variability."[243] As Robert Post explains, "[w]e indicate respect for a person by acknowledging his territory; conversely, we invite intimacy by waiving our claims to a territory and allowing others to draw close."[244] Thus privacy, as recognized in the territories of the self we acknowledge, is a "kind of language . . . through which persons communicate with one another."[245] As a language, then, privacy is essentially relational, contextual, dialogic, and discursive: any use of language is a communicative act between people and occurs in a particular setting, intended to convey a particular meaning, from a speaker to the audience.[246] One's identity is thus recognized as separate and different from the identity of others, though still defined in relation to others, by the fact that one is distinct, one is a person, and one is separate or "other" from all "others."[247]

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240. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991).

241. *See supra* Section II.B.

242. *See* Arnold Simmel, *Privacy Is Not an Isolated Freedom*, *in* NOMOS XII: PRIVACY 71, 72 (J. Roland Pennock & John W. Chapman eds., 1971) (arguing that privacy protections "define . . . a socially-agreed upon concept of the individual" but do so "in the course of social interaction" with others); *see also* Derek E. Bambauer, *Privacy Versus Security*, 103 J. CRIM. L. & CRIMINOLOGY 667, 673 (2013) (arguing that privacy rules are about "competing claims to information" between people). *See generally* ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 34–45 (2018) (describing the relational aspects of privacy as set forth in privacy scholarship).

243. Erving Goffman, *The Territories of the Self*, *in* RELATIONS IN PUBLIC MICROSTUDIES OF THE PUBLIC ORDER 28–29, 40 (1971).

244. Robert C. Post, *The Social Foundations of Privacy: Community and the Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 973 (1989) [hereinafter Post, *Social Foundations*].

245. *Id.*

246. On the discursive, relational, and contextual aspect of language and communication, see MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 22 (A. M. Sheridan Smith trans., 1972).

247. In this vein, Jeffrey Reiman argues that the right to privacy is a right to the protection of personhood. *See* Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS VIII: PRIVACY, 1, 7 (J. Ronald Pennock & W. Chapman eds. 1971); Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 300 (Ferdinand David Schoeman ed., 1984). *See also* ERVING GOFFMAN, INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 84–85 (noting the reliance of individuals on others to help map the contours of the self).

Given technological advances and the interconnectedness of what individuals do in the digital world, privacy itself is very much relational in many ways. First, we know the boundaries of the self by the lines that are drawn *between* people.[248] Second, we share intimacies and common identities with others and may wish to preserve such information as private within the group, as the NAACP wished to do in *NAACP v. Alabama* by protecting the identity of its members. Third, one's privacy can depend on the extent to which others with whom one connects are, themselves, careful about maintaining good privacy practices. That is, those with whom we share our intimate information must, in turn, be willing to share such information only with those to whom we have, ourselves, given access.[249] As Priscilla Regan argues, "[p]rivacy is becoming less an attribute of individuals and records and more an attribute of social relationships and information systems or communications systems."[250]

Similarly, cultural identity itself is not individual.[251] It is often found in the associations of which we are a part, the communities of which we are members. Like privacy, cultural identity is manifest in the relations to others, just as, to repeat Post's refrain, privacy is a "form[] of respect" owed one another because we are "members of a common community."[252] In other words, this form of privacy, like cultural identity, cannot exist outside of a community because it is through relationships in the community that the boundaries and contours of both are formed. Because of the bonds of trust and reciprocity that emerge

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248. As Jonathan Kahn explains:

> Invasions of privacy . . . affront dignity insofar as they undermine the integrity of one's identity by: forcing the manifestation of a partial or reductive version of one's individuality, more thoroughly effacing one's individuality, or otherwise rendering the individual as fungible and non-distinct.

Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 378 (2003) [hereinafter Kahn, *Identity Maintenance*].

249. *See* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 213 (1995) (describing the "collective value" that privacy has because "technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy").

250. *Id.* at 230. As Daniel Solove explains:

> Privacy is not merely a right possessed by individuals, but is a form of freedom built into the social structure. It is thus an issue about the common good as much as it is about individual rights. It is an issue about social architecture, about the relationships that form the structure of our society.

Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1116 (2002).

251. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1916 (1994) (arguing that "there is no individual cultural identity, for culture implies community").

252. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991).

from cooperation geared toward identity and privacy-maintenance, among other forms of cooperation, this communal respect can be a source of social capital.[253] Just as our sense of the political self, described earlier, can be defined in terms of our associations, so too our sense of privacy protections has a social component to it.[254] As Laurence Tribe argues: "[V]irtually every invasion of personhood is also an interference with association, just as virtually every intrusion upon association works a displacement of human personality."[255]

Writing 70 years after Warren and Brandeis, Prosser would argue the tort of invasion of privacy was "not one tort" but really "a complex of four,"[256] including: (1) *intrusion* "upon the plaintiff's seclusion or solitude, or into his private affairs"; (2) *public disclosure*, the "disclosure of embarrassing private facts about the plaintiff"; (3) *publicity*, "which places the plaintiff in a false light in the public eye"; and (4) *appropriation*, which effectively entails the conversion, "for the defendant's advantage, of the plaintiff's name or likeness."[257] Prosser's taxonomy would effectively find its way into the Second Restatement of the Law of Torts.[258] Intrusion into private affairs necessarily means there is something that is not public, to which the community should not have access. Disclosure must involve a release of information to another, to one or many to whom the individual has not consented to give access to his or her private information, and whether the release was, itself,

253. *See, e.g.*, PUTNAM, BOWLING ALONE, *supra* note 101, at 19 (describing the reciprocal nature of social capital).

254. One classic definition of privacy explicitly recognizes that the concept reaches beyond the protection of the individual alone: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967). Similarly, as Daniel Solove argues, privacy has what he calls "architectural" features that are essential to the functioning of society as a whole and exist separate and apart from the individuals privacy protects. *See* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 96–98 (2004).

255. TRIBE, CONSTITUTIONAL LAW, *supra* note 173, at 1400.

256. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (footnotes omitted). On the broader adoption of a right to privacy across the United States, see generally JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD, 45 (2018).

257. Prosser, *supra* note 256, at 389. On the right to privacy and the right of publicity with respect to the appropriation of one's name or likeness, see generally Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709 (1996); Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 223 (1999).

258. On the relationship between Prosser's taxonomy and the Restatement, see Vernon Valentine Palmer, *Three Milestones in the History of Privacy in the United States*, 26 TUL. EUR. & CIV. L. F. 67, 91–92 (2011) (describing the adoption of the Prosser privacy taxonomy by the Restatement and the broad acceptance of aspects of that taxonomy in most U.S. states).

offensive is assessed according to community norms.[259] Publicity entails putting private information into the "public eye."[260] And appropriation involves one individual or group using the likeness of another individual without his or her consent.[261]

Looking deeper into the tort of intrusion unveils that it is defined not so much by the individual, but by the community that upholds community norms. The intrusion tort only forbids those intrusions that are "highly offensive to a reasonable person"[262] as the community defines the reasonable person.[263] As Post explains, "[t]he common law tort purports to *speak for* a community."[264] An individual's identity itself is conferred through this community-based, socially embedded process.[265] As Jeffrey Reiman has argued:

> *Privacy is a social ritual by means of which an individual's moral title to his existence is conferred.* Privacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own. And this is a precondition of personhood.[266]

Post calls the protections afforded by privacy "rules of civility that in some significant measure constitute both individuals and community."[267] The tort of intrusion upon seclusion, for Post, "rests not upon a perceived opposition between persons and social life, but rather upon their interdependence."[268] These civility rules can form a sort of "social personality" and when such civility rules are "taken together, give normative shape and substance to the society that shares them."[269] Moreover, because violations of the tort are often measured against a reasonable person standard—that is, only intrusions that a reasonable person would find highly offensive are actionable—"these rules can be said to define the very 'community' which the 'reasonable person' inhabits." They thus "create for a community 'its distinctive shape, its unique identity.'"[270] Similarly, as Paul Schwartz has argued, "access to

259. *See* Post, *Social Foundations*, *supra* note 244, at 982.

260. Prosser, *supra* note 256, at 389.

261. *Id.*

262. RESTATEMENT (SECOND) OF TORTS § 625B (AM. LAW INST. 1977).

263. *See, e.g.*, Kahn, *Identity Maintenance*, *supra* note 248, at 382 (arguing "acts that are individually experienced and also socially and historically understood as threats to the integrity of one's identity begin to define the 'boundaries' of privacy").

264. Post, *Social Foundations*, *supra* note 244, at 978.

265. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976).

266. *Id.*

267. Post, *Social Foundations*, *supra* note 244, at 959.

268. *Id.*

269. *Id.* at 964.

270. *Id.* (citation omitted).

personal information and limits on it help form the society in which we live in and shape our individual identities."[271]

But, in some ways, this argument tends to reflect a degree of circularity. This argument also does not speak to the broader benefits that flow from political privacy, as described earlier. In this narrow view, privacy rights define a community because that community is one that protects privacy in a particular way. But the right to privacy creates more than a community that protects privacy.[272] Privacy is certainly this "freedom from" intrusion, and the boundaries that prevent that intrusion become a form of communication about what type of privacy protections we afford members of a common community; but privacy is also a "freedom to," a right to both find and shape the community in many more ways than simply how it defines the types of privacy protections it affords.[273] Privacy is one of the fonts from which self-determination and autonomy emanate. The self-determination that flows from privacy is manifest not only in the laws such self-determination generates but also in the very structure of democratic society that is a product of the affordances of privacy. And because of the critical role privacy plays in both preserving, in a negative way, and realizing, in an affirmative way, individual and collective self-determination, it is especially important to protect in a democratic society, not only from threats that come from the government but also those that come from the private sector, which is out of the reach of public-law protections.

Jürgen Habermas has noted that democracy first developed in Western Europe in egalitarian, private settings in which citizens could speak freely on public matters, and such private discussions had spillover effects on public ordering.[274] But those private fora became commoditized with the introduction of commercial interests in the delivery of news and the management of and influence over political debate, as such commercial interests attempted to shape and influence laws and society in furtherance of their own interests.[275] It takes no great leap to see the same forces at work in the operation of the seemingly private world of one's digital activities, where the combination of

271. Schwartz, *supra* note 4, at 834.

272. Or, to put it in Seinfeldian terms perhaps, it is more than a coffee-table book about coffee tables. *See Seinfeld: The Opposite* (NBC television broadcast May 19, 1994) (depicting character Cosmo Kramer's idea for a coffee-table book about coffee tables).

273. This freedom from and freedom to reflects the classic negative/positive rights distinction. *See* Allen, *Coercing*, *supra* note 66, at 738–40 (describing the positive right aspects of privacy); *see also* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1424–35 (2000).

274. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 14–59 (Thomas Burger & Frederick Lawrence trans., 1989) (1962).

275. *See id.* at 142–95.

surveillance, commodification of search, and manipulation of content is not only used to shape commercial activities, but also has been deployed to affect political discourse and other democratic activities. In authoritarian states, the lines between the private and public are often blurred. In democratic societies today, with the mediated space of the internet, private actors—"digital Pinkertons" if you will—can easily infiltrate this space. In turn, they can seek to manage private discourse for political ends—to chill speech they disfavor, which may undermine their profits explicitly or simply may not align with their private, commercial goals.[276]

In the American public-law setting, there appear to be fairly robust protections for this type of privacy; it is in the private-law setting where we must ask the common law to do much of the work. [277] For my purposes in this Article, to explore the ways that private-law protections might extend to our associational self and the privacy it requires in a democratic society, I will focus on the first of the four torts of the violation of privacy, intrusion, because it best lends itself to the protection of the associational self.[278] And it is this tort that is being

276. On the use of private security forces, like the Pinkerton National Detective Agency, which was often used to provide security to government officials and monitor and break up labor actions, often violently, see Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLOBAL LEGAL STUD. 357, 364–72 (2006). Recent reports indicate that Amazon has used the actual Pinkerton agency, which is still in existence, to monitor the activities of its workers, including their online activities. *See* Ari Shapiro: All Things Considered, *Amazon Purportedly Has Pinkerton Agents Surveil Workers Who Try to Form Unions*, NPR (Nov. 30, 2020, 3:51 PM), https://n.pr/3k7Cz6q.

277. Plaintiffs in many of the cases discussed below have attempted to assert a number of statutory claims, including challenging digital practices under the Video Privacy Protection Act, the Wiretap Act, and the Stored Communications Act, with limited success to date. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 271 (2016). The statutes, both federal and state, that a number of the lawsuits described herein have raised, mostly unsuccessfully, include the following: Stored Communications Act of 1986 18 U.S.C. § 2701 (2018); Computer Fraud and Abuse Act of 1984 18 U.S.C. § 1030 (2018); Video Privacy Protection Act 18 U.S.C. § 2710 (2018); Wiretap Act of 1968 18 U.S.C. § 2510 (2018); Telephone Consumer Protection Act 47 U.S.C.A § 227(b)(1)(c) (2019) (*declared unconstitutional by* Rosenberg v. LoanDepot.com LLC, WL 409634 (D. Mass. Jan. 24, 2020)); Unfair Competition Law of 1977, CAL. BUS. & PROF. CODE § 17200 (2020) (*limited on preemption ground by* Beasley v. Lucky Stores, Inc., 198 F. Supp. 3d. 1083 (N.D. Cal. Sep. 16, 2019)); Comprehensive Computer Data Access and Fraud Act of 1987, CAL. PENAL CODE § 502 (2020); Invasion of Privacy Act of 1967, CAL. PENAL CODE § 630 (2020); Consumer Legal Remedies Act of 1970, CAL. CIV. CODE §1750 (2020) (*limited on preemption grounds by In re* Apple iPhone 3G Prods. Liab. Litig., 728 F. Supp. 2d 1065 (N.D. Cal. Apr. 2, 2010)); Biometric Information Privacy Act 740 ILL. COMP. STAT. 14 / §15(a) (2008).

278. Admittedly, many states have codified the tort of intrusion upon seclusion in statute. *See* Kevin W. Chapman, *I Spy Something Read! Employer Monitoring of Personal Employee Webmail Accounts*, N.C. J. L. & TECH. 121, 127–28 (2003) (discussing the codification of the tort of intrusion upon seclusion in several states).

tested in the courts, particularly as it is applied to privacy in digital communications. Furthermore, the interest in being free of unwanted intrusions in private realms is that which is most at risk in the threat to the integrity of identity and the associational self in the current era. The following Section analyzes a string of relatively recent decisions that address the extent to which online tracking and the intrusion upon the integrity of individual and collective identity may trigger violations of the tort of intrusion upon seclusion.

B. The Application of the Tort of Intrusion upon Seclusion in Cyberspace

Since the dawn of the Internet age, litigants have attempted, in fits and starts, to use the courts to correct some of the worst abuses of companies with respect to their handling, or mishandling, of users' personal digital information stored on those companies' sites or their tracking of user behavior online. This is true regardless of whether those online activities involve those sites or relate to a particular users' general online activity. In many instances, opaque and confusing user agreements have hampered users' ability to sue over these companies' practices, and statutory challenges have proven mostly unsuccessful.[279] At the same time, a small number of these lawsuits have had some modicum of success, especially when the litigants have sought relief for the tort of intrusion upon seclusion. The following discussion reviews the outcomes of some of these lawsuits and helps to bring into focus the current trend of using this tort to rein in some of the worst private-company abuses of digital information. This focus helps to reveal the extent to which this private-law mechanism can help to preserve the integrity of identity with respect to our associational rights and interests on the Internet, allowing a private-law right to protect very public interests.

The black letter description of the tort of intrusion upon seclusion is that a tortious act occurs when someone "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another" or that person's "private affairs or concerns," and such intrusion is "highly offensive to a reasonable person."[280] When it comes to intrusions upon

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There certainly are other types of privacy torts that might offer relief to litigants seeking vindication for digital privacy breaches, but, to date, the litigation I will discuss here, to the extent it involves breaches of the privacy torts, has focused almost exclusively on the tort of intrusion upon seclusion.

279. As Anupam Chander explains, although many of these statutes seem to have titles that suggest they are protective of consumer safety, they rarely are. *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 648–49, 664–69 (2014).

280. RESTATEMENT (SECOND) OF TORTS § 625B (AM. LAW INST. 1977). Some might argue that any use of data by companies involves data that users have shared with the

internet activities that may constitute the tort, whether a particular practice may prove appropriately offensive often hinges on whether the end user consented to the intrusion.[281] Moreover, when an end user has a reasonable expectation of privacy in the information or the technology itself, courts are more likely to rule in favor of the plaintiffs and find a breach has occurred.[282] For example, one court has ruled that the plaintiffs could overcome a motion to dismiss when a reasonable jury could conclude that Google's tracking of end users after they had explicitly indicated that they did not want to be tracked, and the company's advertising that it respected such preferences, "constitute[d] the serious invasion of privacy" under state law.[283]

At the same time, when a practice has become so ubiquitous on the Internet that it is difficult to say that an end user has a reasonable expectation of privacy in the face of its deployment by websites, courts have tended to rule in favor of the companies that use it. One such example is the practice of tracking online user behavior through so-called cookies.[284] The issue of the propriety of the use of cookies was first litigated against DoubleClick,[285] a company ultimately purchased by Google.[286] At the time of the lawsuit, however, DoubleClick's reach was not as extensive as it is today through Google. Then, Doubleclick only used cookies to track user activities on websites affiliated with the company's advertising network, which, in 2001, was made up of just 11,000 websites.[287] Any users who accessed these sites while engaging in

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companies, and thus belongs to the companies; but just because information is shared with another does not necessarily mean that there cannot be an intrusion upon seclusion, if the information-sharer did not intend that information to be shared further. In the Facebook litigation described later, Facebook attempted to argue that if information is shared with a user's friends, it cannot be private information, a position the court rejected. *See In re* Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 776 (N.D. Cal. 2019). For an argument that companies that possess this data should be treated as "information fiduciaries," see generally Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

281. *See* DAVID A. ELDER, PRIVACY TORTS § 2:12 (2002) (discussing the role of consent in application of tort of intrusion upon seclusion).

282. *See* Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 79 (2007) (noting the role of the reasonable expectation of privacy in the tort of intrusion upon seclusion).

283. *See In re* Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 151 (3d Cir. 2015), *cert. denied sub. nom.*, C.A.F. v. Viacom, 137 S. Ct. 624 (2017).

284. *See* Jenna L. White, *The Search for a Viable Cause of Action Against Private Individuals Who Use Cookies to Obtain Personal Information*, 55 SYR. L. REV. 653, 655–56 (2005) (describing the use of cookies on the internet) (citations omitted).

285. *In re* DoubleClick Inc. Privacy Litigation, 154 F. Supp. 2d 497, 502 (S.D.N.Y. 2001).

286. Louise Story & Miguel Helft, *Google Buys DoubleClick for $3.1 Billion*, N.Y. TIMES (Apr. 4, 2007), https://nyti.ms/3s6YFIU.

287. *See In re DoubleClick*, 154 F. Supp. 2d. at 502.

internet browsing would have their activities tracked as they were doing so and banner advertisements might simultaneously appear.[288] The court in *Doubleclick* dismissed the state tort claims without prejudice once it dismissed the plaintiffs' federal statutory claims.[289] Nevertheless, the court's view of those state claims gives us some insights into how the court would have viewed them. Since the defendant company engaged in such practices with commercial intent, and it was quite transparent about such practices, the court opined that the defendant could not have had the requisite tortious intent for there to be liability for such practices.[290] The court found itself hard-pressed to conclude that the defendant's purpose was "to perpetuate torts on millions of Internet users."[291] Rather, its clear intent was "to make money by providing a valued service to commercial Web sites."[292] What is more, "[i]f any of its practices ultimately prove tortious, then DoubleClick may be held liable for the resulting damage," but the court concluded that the defendant did not have tortious intent in carrying out its business activities.[293] The court's ultimate conclusion hinged on the ubiquitous nature of the practice of using cookies to track user behavior; since so many companies engaged in this practice, it could not be tortious, otherwise "[w]eb sites would commit federal felonies every time they accessed cookies on users' hard drives, regardless of whether those cookies contained any sensitive information."[294]

Similarly, when a group of plaintiffs sued Facebook for "collecting detailed records of Plaintiffs' private web browsing history" by tracking the Uniform Resource Locators (URLs) that the plaintiffs had visited when such URLs included Facebook's own cookies,[295] even when such tracking occurred when users were not logged in to Facebook,[296] the court found that the plaintiffs could not establish "that they have a reasonable expectation of privacy in the URLs . . . they visit." The court reached this conclusion because it found that such users "could have taken steps to keep their browsing histories private" by adjusting their individual browser settings.[297] Moreover, echoing the court in *Doubleclick*, since this common industry practice is "part of routine internet functionality and can easily be blocked,"[298] it could not

288. *See id.*
289. *See id.* at 526.
290. *See id.* at 518–19.
291. *Id.* at 519.
292. *Id.*
293. *See id.*
294. *Id.* at 513.
295. *See In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 840 (N.D. Cal. 2017).
296. *See id.*
297. *See id.* at 846.
298. *Id.*

constitute a "'highly offensive' invasion of Plaintiffs' privacy interests."[299]

At the same time, when users do take actions designed to protect their online activities, and companies disregard those actions, courts have considered such company practices as tortious in nature. When Google ignored user preferences regarding online tracking,[300] having even advertised that it honored such preferences,[301] the Third Circuit held Google's acts were tortious because it "not only contravened the cookie blockers—it held itself out as respecting the cookie blockers."[302] The court held further that "[w]hether or not data-based targeting is the internet's pole star, users are entitled . . . to rely on the public promises of the companies they deal with."[303] Contrary to the way the court viewed the defendant's practices in *Doubleclick*, in this litigation, the court was not swayed by the ubiquity of Google's practices and did not consider ubiquity as grounds to consider such practices non-tortious: even though those practices "touch[ed] untold millions of internet users" they were also "surreptitious . . . [and] of indefinite duration."[304] As a result, the court found that "a reasonable factfinder could indeed deem Google's conduct 'highly offensive' or 'an egregious breach of social norms,'" overturning the district court's dismissal of the state-based privacy claims.[305]

In a similar case, also filed in the Third Circuit, the court did not find that tracking mechanisms were, themselves, representative of outrageous and tortious conduct, [306] even when such conduct was directed at children.[307] There, the defendant company falsely represented to the parents of such children that it would not track their children's online activities. When it did ultimately engage in such tracking, however, the promise that it would not "may have encouraged parents to permit their children to browse those websites under false pretenses."[308]

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299. *Id.*; *see also* Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1043–45 (9th Cir. 2017) (holding that no violation of law regarding contact through text messages occurs when plaintiffs consent to receipt of such messages).

300. *See In re* Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 151 (3d Cir. 2015).

301. *See id.* at 132–33.

302. *Id.* at 151.

303. *Id.* (quoting Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1073 (Cal. 2009)).

304. *Id.*

305. *See id.* at 151–53.

306. *See In re* Nickelodeon Consumer Privacy Litig., 827 F. 3d 262, 294 (3d Cir. 2016).

307. *See id.* at 294–95.

308. *Id.* at 295.

Under such circumstances, the court concluded that "a reasonable jury" could find such acts a tortious intrusion upon seclusion.[309]

But how does this litigation relate to the type of issues I have addressed so far in this piece: that is, issues of the integrity of identity and the associational self? In recent litigation brought against Facebook[310] over what has come to be known as the Cambridge Analytica scandal, we see a direct connection between the tort of intrusion upon seclusion and political activities, even in a private-law setting.[311] In that lawsuit, plaintiffs alleged that Facebook shared "substantive and revealing" private information with Cambridge Analytica and other third parties, including "photographs, videos they made, videos they watched, their religious and political views, their relationship information, and the actual words contained in their messages."[312] One of Facebook's first lines of defense was that since the plaintiffs had shared this private information with friends, they had no general expectation of privacy in it, and it could be shared by Facebook with anyone. The court rejected this argument, however, finding that "[w]hen you share sensitive information with a limited audience (especially when you've made clear that you intend your audience to be limited), you retain privacy rights and can sue someone for violating them."[313]

The plaintiffs challenged a range of Facebook's practices with regard to their personal information, including: sharing user data with groups like Cambridge Analytica; failing to monitor the use and abuse of such data by third parties who might have gained access to it; sharing a wide range of users' personal information with particular and preferred third parties; and giving third-party application ("app") developers access to not only the app user's information but also to the personal information of the members of the private network of that user.[314] This last aspect of Facebook's practices reveals the reach of this access: while the app developer who would ultimately share his information with Cambridge Analytica was able to gain access to the personal accounts of

309. *See id.*

310. Facebook is no stranger to this type of litigation and has faced challenges similar to those described above, in which it had to defend against allegations that it tracked its users' web-browsing activities even after the users left Facebook and defend its use of facial-recognition software and storage of facial-recognition data without users' consent. *See generally* Patel v. Facebook, 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020); *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836 (N.D. Cal. 2017).

311. *See In re* Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 776 (N.D. Cal. 2019).

312. *Id.* at 776.

313. *Id.*

314. *See id.* at 779–81.

just 300,000 Facebook users who interacted with his app, the consents he obtained from these users to access the personal information of the members of their networks enabled him to "compile a database with information on roughly 87 million Facebook users," by gaining access to the individuals on the networks of those initial 300,000 individual users.[315]

Looking at questions of the plaintiffs' reasonable expectations of privacy concerning Facebook's practices, the court assessed whether the plaintiffs had consented to any of the challenged practices and concluded that the plaintiffs had not agreed to let Facebook share private information with particular business partners of Facebook and that Facebook failed to prevent the misuse of this information.[316] However, with the most egregious example of misuse—allowing the app developer to gain access to the private information of the members of the networks of those who interacted with his app without gaining their prior consent to do so—the issue was not as clear. A provision in the 2009 update to Facebook's Data Use Policy provided that users consented to allow access to the private information of the friends in the network any time they used the site or its related applications,[317] although they could block such access, but doing so would mean that the user would "no longer be able to use any third-party Facebook-integrated games, applications, or websites."[318] For those plaintiffs who had joined Facebook after 2009, the court would conclude that they were subject to this provision and, unless they had taken the affirmative action of blocking such activities, they had, by default, consented to the release of the information at the heart of the litigation.[319] For those users who had joined the site before 2009, however, the court found they had not consented to such practices.[320]

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Based on this evolving strain of litigation, we see several themes emerge regarding digital privacy. In particular, this litigation gives us insight into how courts interpret the tort of intrusion upon seclusion as it relates to digital activities. While statutory claims have been mostly unavailing in much of this litigation, courts appear willing to entertain privacy claims under this tort. Such tort claims often hinge upon whether the plaintiffs have a reasonable expectation of privacy with respect to a particular type of information or whether a particular practice infringes

315. *See id.* at 780.
316. *See id.* at 792–95.
317. *See id.* at 792 (citing Appendix: Facebook's Data Use Policy).
318. *Id.* (citing Appendix: Facebook's Data Use Policy).
319. *See id.*
320. *See id.* at 793–94.

upon a reasonably protected space. Such infringement, consistent with the requirements of the tort, must also be particularly outrageous. Whether such conduct satisfies this requirement will often depend upon whether the victim has consented to the particular conduct. Courts tend to find that a particular practice is not sufficiently outrageous or does not infringe upon a reasonable expectation of privacy if it is widespread. At the same time, in the Cambridge Analytica litigation, the fact that tens of millions of users fell victim to Facebook's practices was not a basis, on its own, for the court to find that such conduct, just because it was so widespread, was not necessarily also outrageous. In the final Part, I discuss the implications of these rulings for digital privacy, what they may mean for the integrity of identity in private-law settings, and the directions courts should go, in a normative sense, toward protecting such integrity of identity in the private-law context through the tort of intrusion upon seclusion. Such recommendations are designed to expand these private-law protections to bring them more in line with the ways in which we protect associational rights and identity-revealing activities in public-law settings precisely because the effects of these breaches in private contexts are almost indistinguishable from the harms caused by a violation of associational rights protected through public-law means: that is, they may chill otherwise important expressive, identity-forming, and self-determination-seeking activities.

VI. STRENGTHENING THE TORT OF INTRUSION UPON SECLUSION TO PROTECT POLITICAL PRIVACY IN PRIVATE-LAW SETTINGS

The protections for the freedom of association in public-law settings are strong, but in private-law contexts, they are neither as well-defined nor as robust. Dramatic statutory interventions to protect the freedom to associate in private-law settings are certainly conceivable, like the Civil Rights Act of 1964[321] that utilized the Commerce Clause to protect private business interactions from discrimination.[322] As Paul Schwartz has argued, in order to protect this type of privacy, through what he calls the "participatory model of data protection," legal interventions "must organize the social application of personal information to preserve and encourage individual self-determination."[323] While federal privacy legislation that might protect digital privacy is certainly possible, it is also likely to be watered down by industry lobbying. While state

321. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000d et seq.).

322. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 301–05 (1964) (upholding the regulation of public accommodations for their connection to interstate commerce).

323. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 563 (1995).

initiatives may go farther than legislation that might emerge from the U.S. Congress, such efforts are incomplete and could be pre-empted by federal legislation; indeed, to the extent the industry even wants federal legislation, it is to achieve preemption of stronger state protections.[324]

As a result, it is more likely that, until a consensus builds for stronger federal protections, we will have to rely on common law protections, mainly through the tort of the intrusion upon seclusion, to maintain the integrity of identity in private-law settings. As the previous discussion showed, courts are beginning to grapple with how we can maintain our associational privacy in the digital world. The following discussion attempts to explore further how we can conceptualize the tort if we are to further inform its application through principles of the freedom of association borrowed from public-law contexts.

A. Raising Awareness and Improving Disclosures

As we see from the description of the litigation around digital privacy, strengthening the tort of intrusion upon seclusion will require that individuals become more aware of the threats to their digital privacy and that, once they are aware, they also are empowered to take action to provide greater protection to their online activities. One of the most important mechanisms for strengthening the ability of the tort of intrusion upon seclusion to protect the integrity of identity would be to raise awareness both about the scope and use of the information digital companies possess about those who engage in any activities online. Venture capitalist Roger McNamee, one of the first investors in Facebook, has described the information technology companies collect as "data voodoo dolls": the "digital profiles they develop for each user."[325] Farjad Manjoo, a technology reporter for the *New York Times*, recently engaged in an exercise in which he learned that his digital activities were tracked in "obscene detail," and proclaimed, "[t]his is happening every day, all the time, and the only reason we're O.K. with it is that it's happening behind the scenes, in the comfortable shadows."[326]

While Americans seem concerned about digital privacy, few seem to understand the extent to which the user agreements they enter into for all sorts of activities online and conducted through mobile technologies expose their most intimate details. In a recent study conducted by the

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324. *See* Lee Fang, *Silicon Valley-Funded Privacy Think Tanks Fight in D.C. to Unravel State-Level Consumer Privacy Protections*, INTERCEPT (Apr. 16, 2019, 8:39 AM), https://bit.ly/3j7pWYJ (describing industry efforts to promote a federal privacy law that would pre-empt stronger state protections).

325. Brian Barth, *Big Tech's Big Defector*, NEW YORKER (Nov. 25, 2019), https://bit.ly/3pDFyFK.

326. Farjad Manjoo, *I Visited 47 Sites. Hundreds of Trackers Followed Me*, N.Y. TIMES (Aug. 23, 2019), https://nyti.ms/36wcqbY.

Pew Research Center, researchers found that Americans are greatly concerned about privacy with respect to their digital activities,[327] yet "72% of Americans report feeling that all, almost all, or most of what they do online or while using their cellphone is being tracked by advertisers, technology firms, or other companies."[328] At the same time, when asked to accept policies affecting digital privacy, only 9% of those surveyed claim that they always read such policies and another 13% say that they often read such policies.[329] Thirty-six percent said they *never* read such policies before accepting them,[330] but even the researchers believed that number was low. Seventy-nine percent of those surveyed said that they were either "not too confident" or "not at all confident that companies will admit mistakes and take responsibility when they misuse or compromise data."[331] Knowing the full extent of the exposure of their personal information is a critical step in prompting people to take action to preserve such information.

Of course, an awareness of an intrusion upon one's seclusion is necessary to generate some of the harms associated with such a tortious act.[332] If I do not know such intrusion is occurring, or has occurred, it is unlikely to chill my activities or make me more cognizant that I might want to limit my conduct to only that which I do not mind becoming public.[333] Indeed, the more I learn about such intrusions, the greater the harm that is likely to come from such a breach because I am more likely to feel violated by such behavior, restrict my online presence, and curb my digital activities.[334] Nevertheless, the first step toward strengthening the tort of intrusion upon seclusion is raising awareness that much of

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327. Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RES. CTR. (Nov. 15, 2019), https://pewrsr.ch/2NZaTov.

328. *Id.*

329. *See id.*

330. *See id.*

331. *Id.*

332. TUFEKCI, *supra* note 9, at 224–26 (discussing the role that knowledge of privacy breach has to harms associated with that breach).

333. *But cf.* Berger v. New York, 388 U.S. 41, 65 (1967) (Douglas, J., concurring) (noting that intrusions of which the victim is unaware are potentially more harmful than intrusions of which that individual is aware).

334. *See* Dennis D. Hirsch, Response, *Privacy, Public Goods, and the Tragedy of the Trust Commons*, 65 DUKE L.J. ONLINE 67, 71–74 (2016) (describing some of the negative externalities of privacy violations); *cf.* Robert C. Post, *Data Privacy and Dignitary Privacy:* Google Spain, *the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1008-09 (2018) (noting the potential harmful role that "abusive and alienating" public speech can play in undermining democratic legitimation). *See generally* Ellsberg v. Mitchell, 709 F.2d 51, 67 n.71 (D.C. Cir. 1983), *cert. denied sub. nom.*, Russo v. Mitchell, 465 U.S. 1038 (1984) (holding that "awareness that one's conversations may be being overheard and recorded is likely to have a chilling effect on one's willingness to speak freely").

what individuals do online and through mobile technologies is subject to intrusion and is likely being utilized by those who maintain such information and still others to whom those entities sell and distribute such information.[335] Improved knowledge about the extent to which such information is accessed and routinely shared could, of course, end up being a double-edged sword. Once such knowledge about these practices is, itself, widespread, there is a risk that courts might determine that the increased awareness of such practices means they do not rise to the level of being so outrageous as to constitute a tortious act. Awareness of risk must go hand-in-hand with improved disclosures and clearer opt-out options at every step of the process through which a consumer becomes engaged with a platform, site, or service.

A review of the litigation around digital privacy shows that efforts to rein in intrusions upon such privacy will be stymied by the consents contained in most end-user agreements.[336] And many of those agreements contain opaque disclosure rules that mask and obscure how users grant permission to entities that have access to those users' personal information to use, sell, and distribute such information. There is no shortage of recommendations for improving such disclosures,[337] and both the European Union and the state of California have adopted new rules for digital privacy that strengthen disclosure rules.[338] What is more, any improvements to disclosures must include effective options for individuals to withhold their consent from entities that may wish to gain access to their digital information and track their digital activities. Time will tell whether protections adopted by the European Union and California, and potential future state and federal legislation, will help mitigate some of the worst intrusions upon our digital information. In the

335. Greater awareness of risk does not always result in improved decision-making with respect to consumer response to disclosures. *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 64–66 (2014) (describing shortcomings in disclosure regimes). For ways to improve such decision making with respect to consumer protection in disclosure-based regimes, see Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1330–45 (2015).

336. *See, e.g.*, LAWRENCE LESSIG, THEY DON'T REPRESENT US: RECLAIMING OUR DEMOCRACY 212 (2019) (describing consent practices).

337. *See, e.g.*, Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 579–89 (2014) (arguing for ways to improve disclosures to overcome information asymmetries between parties); John Kozup et al., *Sound Disclosures: Assessing When a Disclosure Is Worthwhile*, 31 J. PUB. POL'Y & MARKETING 313, 315–17 (2012) (same); Vanessa G. Perry & Pamela M. Blumenthal, *Understanding the Fine Print: The Need for Effective Testing of Mandatory Mortgage Loan Disclosures*, 31 J. PUB. POL'Y & MARKETING 305, 307 (2012) (same).

338. For an analysis of tort liability under the European Union's new privacy standards and the state of California's new privacy rules, see generally Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 365 (2019).

meantime, courts should review these user agreements strictly, as the court appeared to do in the Cambridge Analytica litigation against Facebook, so as to protect user privacy to the greatest extent possible.

Greater awareness of the risks associated with providing consent to share our digital information, improved disclosures related to consent to information use and sale, and more meaningful and timely mechanisms for individuals to opt out of default personal-information disclosure will only strengthen the effectiveness of the tort of intrusion upon seclusion as a means of protecting the integrity of identity in the digital world. Still, there are also other means by which we might strengthen the tort, drawing an approach more consistent with public-law settings, as the following discussion shows.

B. Making It Outrageous: Heightened Protection for Expressive Online Activity

Apart from raising awareness and improving disclosures, another approach that could strengthen privacy protections for expressive online activities related to associational action—from searches to explore ideas to the coordination of events and sustained organizing—is to provide heightened protection for such activities, similar to the familiar First Amendment framework that recognizes a higher form of scrutiny—that is, strict scrutiny—for content-based infringement on political speech.[339] Translating such an approach into the private-law context would require recognizing that intrusions upon such information and activities in the digital world would constitute conduct that is "highly offensive to the reasonable person."[340] It is one thing for an entity like Amazon to track behavior on its site to understand the habits and preferences of its users and attempt to steer their attention to choices that might be in Amazon's interest, like directing them to purchase its own products, products for which Amazon's profit margin is higher, or where its economies of scale allow it to offer such products at a lower price than other merchants. This is standard behavior for commercial entities in the digital and analog worlds. We anticipate and expect it.

However, when it comes to our expressive actions that may involve identity-forming or politically charged acts, our views are likely different. Given the political nature of such acts, public-law concepts should animate our private-law treatment of this conduct. If Cambridge Analytica used its personality-profiling approach to sell laundry detergent, it is hard to imagine the uproar would have been the same:

339. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 340 (2010) (citation omitted).

340. RESTATEMENT (SECOND) OF TORTS § 625B (AM. LAW INST. 1977).

there would have been no significant government investigations, hearings, or a $5 billion fine.[341] While courts would not have to apply a higher level of scrutiny as in the case of content-based First Amendment violations, they could consider such intrusions in private-law contexts as highly offensive, warranting liability-rule protection through the tort of intrusion upon seclusion.[342]

While the line between commercial activities and political speech has been blurred considerably in recent years, with billions spent on political advertising, Political Action Committees, consultants, lobbyists, and well-heeled corporations seeking considerable advantages through regulatory arbitrage,[343] the fact that commercial entities like Cambridge Analytica and social-media platforms can make a profit by peddling political information does not transmogrify such political activities into purely commercial action or speech that is worthy of less protection. Rather, the introduction of a commercial element, through private-law actors, into political speech warrants the application of principles more commonly found in political and public-law contexts to private-law settings, justifying the use and application of public-law principles to activities designed to have a—or are agnostic toward their potential for—political effect. Just as the government cannot outsource the police power to private entities without there being some degree of state action when such entities apply that power, private actors should not be immune from closer scrutiny when they attempt to enter the political arena in order to turn a profit and their rent-seeking in that arena has significant negative externalities.[344] Thus, with respect to private-law breaches of what amounts to political privacy, we could adopt something similar to the common framework for recognizing a higher level of scrutiny for government actions that curtail political speech as opposed to commercial speech. Thus, the infringement upon personal information designed to further political ends could raise the level of outrageousness of the act, thereby satisfying the tort standard.

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341. *See* Brian Fung, *Facebook Will Pay an Unprecedented $5 Billion Penalty Over Privacy Breaches*, CNN BUS. (July 25, 2019, 1:08 PM), https://cnn.it/3qIvYC3.

342. For the classic treatment of the difference between liability, property, and inalienability rules, see generally Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

343. For a discussion of the outsized influence and role of money in the American political ecosystem, see generally JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016).

344. For a discussion of the Court's holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), involving the sometimes unclear lines between private and public action, see generally Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

In some ways, this type of heightened protection could remind us of the importance of political speech in our national discourse and the role it assumes in achieving individual and collective self-determination. It could also help to further define the role that private information plays in the search for self-determination and democracy itself.

C. *Privacy, the Associational Self, and the Shape of Community Through the Positive Right of the Protection of Integrity of Identity*

As described above,[345] the tort of intrusion upon seclusion has been described as giving "normative shape and substance" to,[346] and is built upon the interdependence of, the individual and the community in which she finds herself.[347] For the most part, however, this view is limited. The right to privacy can be viewed as a negative right, a freedom from intrusion and from breaches of rules of civility that shape the community, and, in a way, define both the individual and the community itself. As imagined here, however, there are protections the tort can afford to positive rights: the freedom not just to engage in association with others but also to shape the very community in which we live. As such, it makes for a more muscular and active molding of that society. It does not just shape the privacy protections that preserve our dignity, but, what is more, it also helps us participate in community life to pursue and realize our individual and collective self-determination in the rules and laws that govern the functioning of society. In these ways, this type of privacy, whether protected by public-law mechanisms or through private-law means, is a more active privacy, a freedom to bring democracy itself to life.

This broader and richer understanding of privacy, as it respects the associational self and the integrity of identity—which deserves protection in both public and private law, in both the real and digital worlds—is a necessary element of self-determination and democracy. In the digital world today, this privacy is also under intense and constant threat. While American constitutional jurisprudence generally recognizes and enforces strong protections in public-law settings for this type of privacy, the extension of the tort of intrusion upon seclusion to this form of privacy is needed where legislative bodies have failed, to date, to ensure that private actors will also respect the actions and beliefs of individuals in their associational activities and capacities. In addition, through a recognition of the right of integrity of identity in such a way as

345. *See supra* Section V.B.
346. *See* Post, *Social Foundations*, *supra* note 244, at 964.
347. *See id.* at 959.

to preserve the associational self by means of the tort of intrusion upon seclusion, with some of the expanded protections described herein, we can begin a new dialogue around the normative shape and contours of not just the right to privacy, but also of the role privacy plays in constituting society itself.

CONCLUSION

There is no question that digital tools can enhance the collective goods associational ties create: greater autonomy and individual and collective self-determination, societal trust, social capital, and social change. Digital tools do this by strengthening individuals' capacity to find others who share interests and wish to advance social change together. Such tools can also be co-opted and infiltrated, and the benefits that such tools can generate are quickly lost or turned toward ends that undermine rather than further individual and collective identity. Today, activities—like the spread of propaganda or the surveillance of private communications—that citizens in a democracy would not tolerate from their governments are routinely undertaken by private actors and directed toward both commercial and political ends. While public-law rights offer some protections against such activities when the government carries them out, when private actors do so the law has not yet caught up to such infringements robustly or effectively. This Article has proposed ways to strengthen the private-law regime so that it might rein in the acts of commercial actors when they infringe upon the integrity of individual and collective identity and undermine self-determination, the rule of law, and democracy. I have argued that through a range of interventions, like public information, strengthened disclosures, and casting such actions as highly offensive, we can begin to curtail the slow and steady erosion and coarsening of democratic values and preserve the integrity of individual and collective identity.

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