

FREEDOM OF ASSOCIATION

INTRODUCTION

The First Amendment's provision for "the right of the people to peaceably assemble, and to petition the Government for a redress of grievances" provides the textual basis for the Supreme Court's recognition of a right of political association and associational privacy. But the Court also recognized that the freedom of association is implicit in the very structure of the First Amendment's guarantees for a "system of freedom of expression" and the Constitution's framework for the operation of free government. In *Sweezy v. New Hampshire* (1957), the Court observed that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights." The Court formally proclaimed a First Amendment right of association and associational privacy in *NAACP v. Alabama* (1958), when unanimously reversing a contempt citation for the NAACP's refusal to turn over lists of members to Alabama's state attorney general.

At this point, the protection accorded freedom of association extends to a broad range of groups, associations, and organizations, including public interest groups, unions, and political parties.

Rules:

Association for Speech Activities: At the core of the fundamental right of association is **association for political speech purposes** (such as political meetings, electioneering, protests and parades). Government cannot forbid politically unpopular groups or burden a person's right to belong to such groups. Any such government restrictions on such association must meet **strict scrutiny**.

Association for Illegal Activities: Nevertheless, government may entirely prohibit **association for illegal purposes** and punish membership in such a group. Association for illegal purposes may be prohibited (and membership in such a group punished) provided the government proves that the person: (1) **actively participated** in the group, (2) **knowing** of its illegal activities, and (3) **specifically intending** to further those illegal activities.

Anonymous Association: When a group is not engaged in illegal activities, the freedom of association includes the right to **anonymity**. Anonymous association is important because laws requiring **disclosure of group membership** may have a **chilling effect** on potential members who fear public identification. To be found constitutional, any such forced disclosure law must meet **strict scrutiny**. For example, state statutes passed in the 1940s and 1950s that forced the disclosure of the NAACP's membership list were held under strict scrutiny to violate the right of anonymous association.

In contrast, the Supreme Court recently determined that the right to anonymity will generally not extend to individuals who sign initiative and referendum petitions. The Court reasoned that, given the government's strong interest in protecting the integrity of the petition process, public disclosure of the identities of petition signers will be constitutional, as long as they cannot prove a reasonable probability of being subjected to harassment or intimidation.

Discriminatory Membership: Not only are members of a private association entitled to anonymity, but they are entitled to **discriminate in their membership** as well – as long as **the exclusion furthers the group's expressive purposes**. But the First Amendment does not require a government that funds the activities of non-discriminatory associations to subsidize discriminatory associations on the same terms.

For example, the discriminatory exclusion of lesbians, bisexuals, and gay men from participation in New York's St. Patrick's Day parade and in the Boy Scouts was upheld by the Supreme Court. In contrast, the Court ruled that a public university did not violate the associational rights of a Christian religious group that refused membership to self-identified lesbians, bisexuals, and gay men when the university refused to fund its activities on the same terms as it subsidized non-discriminatory student groups.