RETHINKING JUDICIAL ATTITUDES TOWARD FREEDOM OF ASSOCIATION CHALLENGES TO TEEN CURFEWS: THE FIRST AMENDMENT EXCEPTION EXPLORED

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Circuit court decisions in the cases of Qutb v. Strauss *and* Hutchins v. District of Columbia *signal a change in judicial attitude towards associational challenges to teen curfews: If a curfew contains an exception for activities protected by the First Amendment, then it will not be struck down as unconstitutional for infringing on a teenager's right to associate. At first blush, a First Amendment exception appears sufficiently protective of a teenager's right to associate. But as Todd Kaminsky demonstrates in this Note, the exception may in fact not go far enough. Certain activities that fall outside the scope of the exception—most notably, public discussion—are necessary antecedents for activities within the scope of the exception, such as protest. By examining sociological accounts of Freedom Summer, the Velvet Revolution, and other similar movements, he establishes the link between public discussion and protest and brings into sharp relief the negative First Amendment consequences of curtailing public discussion. In addition, he explores how a curfew, even with an exception, may make it more difficult for expressive teen organizations to recruit new members, by reducing the time available for teens to socialize and develop informal social networks. As such, Kaminsky concludes, courts should give due regard to associational challenges and scrutinize carefully teen curfews, despite the inclusion of First Amendment exceptions. Otherwise, courts may inadvertently erode teenagers' right to associate by choking off the conditions necessary for the vigorous exercise of that right.*

INTRODUCTION

The last three decades have seen vigorous challenges to the constitutionality of teen curfew laws. Although the Supreme Court never has entered the fray,[1] lower courts have had to determine whether these laws violate minors' First Amendment rights.[2] The key question

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[1] See, e.g., Bykovsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976).

[2] See, e.g., Hutchins v. District of Columbia, 188 F.3d 531, 534 (D.C. Cir. 1999) (challenging curfew on First Amendment grounds); Nunez v. City of San Diego, 114 F.3d 935,

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typically has been whether the law impermissibly infringes upon a minor's right to associate. Because many of the laws at issue were determined to have infringed on this right, they were struck down.[3] In two recently decided cases, *Qutb v. Strauss*[4] and *Hutchins v. District of Columbia*,[5] associational challenges to curfew ordinances were dismissed out of hand. The cursory manner in which these claims were rejected would have been unimaginable just a decade ago. The inclusion of a First Amendment exception was a key factor in the change in judicial attitude.[6] The exception places outside the scope of the curfew law those who are engaged in protected expressive activity. Because most curfew ordinances now will have First Amendment exceptions, how these exceptions are analyzed will determine the success of associational challenges. Therefore, *Qutb* and *Hutchins* are important because their approach to evaluating associational claims—which is really nothing more than their evaluation of the scope of the First Amendment exception—may foreshadow the end of serious associational challenges to modern teen curfews.

Unfortunately, neither scholars nor judges have analyzed carefully these exceptions to determine how they change the impact of curfews on teen rights. The issue of exactly what restrictions teens face under these new, modified curfew laws never has been explored adequately. This Note presents a more comprehensive picture of how curfews restrict teen rights.

After describing in detail some of the ways that curfews may weigh on teen freedoms (mainly through their effect on teens' ability to protest and to participate in expressive organizations), this Note argues that it is unwise for courts to continue to dismiss associational challenges without subjecting the ordinances to more searching review. First Amendment exceptions may not sufficiently preserve associational rights. Thus, it is inappropriate for judges to dismiss associational claims automatically when statutes include such exceptions. Even with an exception for expressive activity protected by the

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938 (9th Cir. 1997) (same); Qutb v. Strauss, 11 F.3d 488, 490 (5th Cir. 1993) (same), cert. denied, 511 U.S. 1127 (1994); Johnson v. City of Opelousas, 658 F.2d 1065, 1097 (5th Cir. 1981) (same); Waters v. Barry, 711 F. Supp. 1125, 1127-28 (D.D.C. 1989) (same).

[3] See, e.g., *Johnson*, 658 F.2d at 1072-73 (holding ordinance unconstitutional on, inter alia, associational grounds); *Waters*, 711 F. Supp. at 1134-37 (same); W.J.W. v. State, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978) (same).

[4] 11 F.3d at 495 n.9 (finding it "questionable whether a fundamental right of association is implicated" and determining that "curfew ordinance satisfies strict scrutiny").

[5] 188 F.3d at 548 ("Given that the First Amendment defense by definition provides full protection, any residual deterrent caused by the curfew would pose at most an incidental burden on juveniles' expressive activity or rights of association.").

[6] See id. (same); *Qutb*, 11 F.3d at 494 ("Most notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply.").

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First Amendment, curfews still may restrict significantly a teen's ability to associate. Because associational freedoms embody important values in our constitutional order, judges must acknowledge openly and analyze carefully a curfew's potential impact on association. Although this Note does not address the question of whether teen curfews are constitutional (and assumes that judges can find them to be constitutional), this Note argues that curfews at least should be subject to some form of higher scrutiny usually reserved for laws that are seen as a threat to First Amendment rights. It is unacceptable for judges to give short shrift to a fundamental constitutional value due to the presence of near-"boilerplate" statutory language. In short, if freedom of association is to retain the place in our society that it traditionally has held, judges must give due consideration to associational claims. Otherwise, they inadvertently may limit the scope of freedom of association.[7]

The first step in analyzing how teen curfews affect freedom of association is to articulate a contextual framework. To begin with, why do First Amendment exceptions play a critical role in determining the outcome of associational challenges? The answer appears to lie at the intersection of the appropriate tests, as defined by the Supreme Court's freedom of association jurisprudence and as applied by lower courts, with the operation of the curfew ordinances' First Amendment exceptions. Part I of this Note explores this intersection and its context. Part I also points out the main flaw in the *Qutb* and *Hutchins* test: The test does not acknowledge that certain forms of conduct that are not protected from a curfew's reach are necessary prerequisites to the exercise of conduct that *is* protected by a curfew's First Amendment exception. Public discussion is the most important example of such a prerequisite and is the focus of this Note. Part II argues that public discussion is necessary to the preservation of First Amendment rights and that its regulation likely diminishes protest, a fundamental First Amendment value. This argument is supported both by Supreme Court opinions and sociological accounts. Using a "case studies" approach, this Note looks at well-studied historical instances where individuals engaged in protest. These studies strongly suggest that the formation of protest and public discussion are closely linked.

These case studies also demonstrate the argument that the ability of curfews to restrict or diminish protected activities is not limited to

[7] A harder look at a curfew's impact on expressive freedoms also allows policymakers considering the implementation of a curfew to assess these burdens and decide whether they are too costly.

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protest; other protected forms of expression also may be curtailed because they arise under similar social conditions. Part III explores this possibility by focusing on sociological research that suggests that curfews might diminish the efficacy of teen expressive organizations. For example, by reducing time available to teens for socializing and developing informal social networks, curfews may make it more difficult for teen expressive organizations to recruit new members. The empirical evidence supporting such claims is limited; nevertheless, this Part identifies potentially fruitful areas of future research.

The *Qutb* and *Hutchins* courts assume that teens are sufficiently free to express themselves under curfews containing First Amendment exceptions. But by regulating public discussion and, indirectly, by limiting access to expressive organizations, teens are not as free as these courts may think. At bottom, the argument of this Note is that courts should scrutinize curfews closely because they may curtail sharply a teen's First Amendment rights.

I
FREEDOM OF ASSOCIATION AND THE MODERN CURFEW ORDINANCE

A. The Scope of an Individual's Right to Associate

For as long as the Court has recognized the freedom of association, it has emphasized that such a right is necessary to promote free expression.[8] Not only has the Court said that the freedom to espouse one's point of view through collective action is protected, but it also has said that collective action is necessary for effective advocacy, especially for dissident groups.[9] Early free association decisions also highlighted the important role that groups play in advancing unpopular ideas.[10] They emphasized that group dynamics facilitate the promulgation of political ideas: "Our form of government is built on the premise that every citizen shall have the right to engage in political

[8] "Freedom of association has traditionally been little more than a shorthand for safeguarding an individual's rights of speech and petition when he exercises them through a group." Reena Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1, 11 (1977). In *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), the Court said that "it is now beyond dispute that freedom of association for the purpose of advancing beliefs and ideas and airing grievances is protected."

[9] See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .").

[10] See, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.").

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expression and association."[11] Both the Court and scholars have acknowledged that freedom of association is so essential to the First Amendment that in its absence, the First Amendment would lose much of the protective force that it was intended to have. For example, in *Shelton v. Tucker*, the Court said that the right of association is "closely allied to freedom of speech . . . [which] lies at the foundation of a free society."[12]

In the early freedom of association cases, it was easy to see the First Amendment violation because the state was regulating individual expression. It was clear that the individuals in the group were exercising their First Amendment rights. The questions posed concerned the power of the state to regulate these activities because they assumed a group form. Yet, the cases failed to answer the question of how to treat a group activity that has an attenuated connection to core expressive freedoms. Assuming that no associative rights exist in the Constitution apart from the one that the Court has always found implicitly in the First Amendment,[13] a court must then ask: At what point is the connection between the associative behavior and the First Amendment too tenuous to maintain? The Court developed a test in *Roberts v. United States Jaycees*[14] in an attempt to answer this question. The test was developed further in *City of Dallas v. Stanglin*.[15]

Roberts involved an organization, the Jaycees, which refused to open its membership to women.[16] When this practice was challenged under Minnesota's anti-discrimination statute,[17] the Jaycees claimed that their right to exclude women was protected by freedom of association.[18] The Court did not agree.[19] In fleshing out the contours of the

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[11] Id. at 250.

[12] 364 U.S. 479, 486 (1960). And the late Professor Emerson once wrote, "[T]he purpose of a system of freedom of expression . . . cannot be effectively achieved in modern society unless free rein is given to association designed to enhance the scope and influence of communication." Thomas I. Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 22 (1964).

[13] See Raggi, supra note 8, at 1-11 (conceding that Court never has been committed to—or has not consistently recognized—independent right to associate outside of First Amendment).

[14] 468 U.S. 609 (1984).

[15] 490 U.S. 19 (1989).

[16] *Roberts*, 468 U.S. at 613 (noting that regular membership is limited to young men between eighteen and thirty-five).

[17] Id. at 614-15 (citing Minnesota Human Rights Act, Minn. Stat. § 360.3, subd. 3 (1982)).

[18] Id. at 618.

[19] Id. at 621, 627-28 (concluding that "the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women" and dismissing claim that allowing women members to vote would "change the content or impact of the organization's speech").

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right, the Court arrived at a framework that it thereafter would use to analyze freedom of association claims. After reviewing the cases in which it had recognized the right, the Court concluded that two distinct types of association are worthy of protection: expressive association and intimate association.[20] The freedom of expressive association safeguards individuals who 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."[21] The Court made it clear that the right to associate only serves an instrumental role. That is, it can only be invoked when individuals exercise their First Amendment rights through collective action.[22] In later cases, to help determine whether the regulated group was protected under the expressive association doctrine, the Court asked, among other things, whether the group in question took stands on public issues. If so, that was good evidence that the group was engaging in expression for political purposes—"the sort of expressive association that the First Amendment has been held to protect."[23] *Roberts* made clear that if associations were determined not to be "expressive" or "intimate," the state could regulate and prohibit their activities freely, all other things being equal.[24]

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[20] Id. at 617-18.

[21] Id. at 618.

[22] See David Cole, Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association, 1999 Sup. Ct. Rev. 203, 208 (2000) ("The theory underlying [*Roberts's*] approach is that association is only a means of protecting other rights—speech . . . ."); The Supreme Court 1983 Term Leading Cases: Freedom of Association, 98 Harv. L. Rev. 195, 201 ("Freedom of association . . . is protected only as a means of protecting expression.").

[23] City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989). Of course, even associations determined to be expressive can be regulated, but within limits. "Infringements . . . 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." *Roberts*, 486 U.S. at 623. In *Roberts*, the Jaycees were found to be an expressive organization. But the Court did not believe that admitting women members would unduly interfere with the organization's ability to express its views. Id. at 627-28. Accordingly, the law at issue was seen as serving a compelling interest and narrowly tailored. Id. at 624-26. This approach has been applied by the Court consistently, most notably in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). There, the Court found that a state law forcing the Scouts to accept an openly homosexual scoutmaster violated the organization's freedom of association. Id. at 656. The Court found that the Scouts are an expressive organization that seeks "[t]o instill values in young people," id. at 649-50, and that the forced inclusion of a member whom the organization did not accept would interfere impermissibly with its ability to espouse a message that it believed accurately reflected its creed, id. at 654.

[24] *Roberts*, 468 U.S. at 618 ("[T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."). The freedom of intimate association protects "choices to enter into and maintain certain inti-

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A few years after *Roberts*, the Court in *Stanglin* expanded the expressive-intimate test to cover simple conduct involving informal interaction between individuals (as opposed to determining whether formal organizations, like the Jaycees, were "expressive"). In this case, the Court said that the right to associate is protected only if the activity in which the group was engaging was itself considered "expressive" under the First Amendment.[25] *Stanglin* involved an ordinance that limited the use of dance halls to persons between the ages of fourteen and eighteen.[26] It prohibited persons either above or below that age group from associating with the young adults in the dance halls. The owner of one dance hall claimed that the law violated the minors' right to associate with others outside of their age bracket.[27] The Court disagreed. It held that the opportunity to dance with members of other age groups could not be considered expressive association.[28] "The hundreds of teenagers who congregate each night . . . are not members of any organized association . . . . Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons 'take positions on public questions' . . . ."[29] Even though all activity is to some degree expressive in nature, social dancing is not the type of expression with which the First Amendment is concerned.[30] Most importantly, the Court flatly stated, "[W]e do not think the Constitution recognizes a generalized right of '*social association*' that includes chance encounters in dance halls."[31]

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mate human relationships" from "undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id. at 617-18. The scope of conduct that constitutes intimate association is not at issue in this Note. The validity of curfew ordinances has turned solely on whether or not they curtail *expressive* association. For a more in-depth analysis of the right to intimate association, see generally Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980).

25 The Court in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), defined "expressive" conduct as "[a]n intent to convey a particularized message . . . [with] the likelihood . . . that the message would be understood by those who viewed it."

26 490 U.S. at 21.

27 Id. at 22.

28 Id. at 24-25.

29 Id. (citations omitted).

30 Id. at 25.

31 Id. (emphasis added). In a prior case the Court said, however, that "we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (citations omitted). This statement led some to believe that there is a right to "social" association. The Court in *Stanglin* attempted to dispel any notion that this quote had the significance some proclaimed it did: "[It] recognizes nothing more than that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics." 490 U.S. at 25.

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The *Stanglin* test is no more than a specific application of the general First Amendment test the Court applies when evaluating restrictions on conduct.[32] The Court asks, "[I]s the conduct in question expressive?" Associational conduct is protected only if at the moment the conduct occurs, it can be called "expressive"—otherwise, it is merely "social" and therefore unprotected. Should the conduct be deemed expressive, a court then decides if the regulation survives the traditional First Amendment tests.[33]

In sum, the Court defines "expressive association" literally: A group of individuals is associating to advance First Amendment rights only when the group physically exercises them. Therefore, the Court treats associative conduct the same as it does all other conduct. That some form of collective conduct is taking place has no bearing on whether that conduct deserves greater protection under the First Amendment.

B. The New and Untouchable Curfew Ordinance

Curfew ordinances vary from jurisdiction to jurisdiction, but most do not allow minors (usually those under seventeen or eighteen) to be out of their homes from around 11:00 P.M. to 6:00 A.M. on weeknights and 12:00 to 6:00 A.M. on weekends. The purposes behind most cur-

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[32] Not all regulated conduct implicates the First Amendment. The conduct must be "expressive." For a regulation of conduct to raise a First Amendment issue it must: 1) impose a disproportionate burden on those engaged in First Amendment activities; or 2) constitute governmental regulation of conduct with an expressive element. See Arcara v. Cloud Books, Inc., 478 U.S. 697, 703-04 (1986). If one of these prerequisites is met, the First Amendment is implicated (since expression is regulated), and the law is reviewed under heightened scrutiny. Id.

[33] If a law regulates the time during which expressive conduct may be carried out, the place where it may be carried out, or the manner in which it may be carried out, the courts determine whether such restrictions are "justified without reference to the content of the regulated speech[,] . . . they are narrowly tailored to serve a significant governmental interest[,] . . . and they leave open ample alternative channels for the communication of . . . information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Courts have struck down curfews after determining they did not pass the time, place, and manner test. See, e.g., Nunez v. City of San Diego, 114 F.3d 935, 951 (9th Cir. 1997) (invalidating curfew without First Amendment exception on narrow tailoring grounds). Another test courts may use is the *O'Brien* test. See United States v. O'Brien, 391 U.S. 367, 377 (1968). The *O'Brien* test applies to laws that regulate conduct having both expressive and non-expressive elements. It asks: 1) if the regulation is sufficiently within the constitutional power of the government; 2) if the regulation furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. The *O'Brien* test also has been applied to viewpoint-neutral regulations of conduct. Often, both the *O'Brien* test and the time, place, and manner test can be applied to the same regulation, and when this is so, there is no general reason for courts to apply one over the other. See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804-05, 808 (1984).

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fews are: 1) to reduce violence and crime within the city; 2) to protect juveniles themselves (from drugs or crime); and 3) to strengthen parental responsibility for children.[34] Curfews have grown in popularity of late and are used frequently in municipalities throughout the United States.[35] They are used even in large metropolitan cities such as Atlanta.[36]

Curfew statutes usually include a number of "defenses" or "exceptions" that permit minors to be outside of their homes during curfew hours.[37] This Note addresses the First Amendment exception, which typically says that one does not violate a curfew ordinance when exercising First Amendment rights. The ordinance at issue in *Qutb* is typical: "It is a defense to prosecution . . . that the minor was . . . exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly . . . ."[38] Often accompanying such exceptions are requirements that teens alert the city ahead of time and say when and where they will be exercising these rights.[39]

Legislatures began to include First Amendment exceptions after courts invalidated curfew ordinances on the ground that they restricted teenagers from exercising First Amendment rights during curfew hours.[40] For example, the court in *Waters* found that the curfew ordinance could not pass *O'Brien*'s requirement that restrictions be no broader than necessary to achieve important government

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[34] See, e.g., Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998).

[35] Scott A. Kizer, Note, Juvenile Curfew Laws: Is There a Standard?, 45 Drake L. Rev. 749, 749 (1997) (noting increase in use of curfews in United States).

[36] See Neela Banerjee, Curfews Spread, But Effects Are Still Not Clear, Wall St. J., Mar. 4, 1994, at B1 (noting that cities are implementing curfews with greater frequency).

[37] For an overview of curfews and how they operate, see generally Tona Trollinger, The Juvenile Curfew: Unconstitutional Imprisonment, 4 Wm. & Mary Bill Rts. J. 949 (1996).

[38] 11 F.3d 488, 498 (5th Cir. 1993); see also Jill A. Lichtenbaum, Note, Juvenile Curfews: Protection or Regulation?, 14 N.Y.L. Sch. J. Hum. Rts. 677, 691-95 (1998) (arguing that review of cases suggests that laws must contain such exceptions to meet narrow tailoring requirements).

[39] See, e.g., Bykovsky v. Borough of Middletown, 401 F. Supp. 1242, 1247 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir. 1976).

[40] See Nunez v. City of San Diego, 114 F.3d 935, 951 (9th Cir. 1997) (invalidating curfew without First Amendment exception on First Amendment grounds); Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981) (same); Waters v. Barry, 711 F. Supp. 1125, 1135-36 (D.D.C. 1989) (same); McCollester v. City of Keene, 514 F. Supp. 1046, 1053 (D.N.H. 1981) (same), rev'd on other grounds, 668 F.2d 617 (1st Cir. 1982). Aside from the First Amendment exception, curfew laws provide other defenses that exempt minors. For example, in one typical ordinance, a minor is exempted if "(1) the minor is accompanied by a parent; or (2) the minor is involved in an emergency; or (3) the minor is engaged in an employment activity, or is going to or returning home from such activity, without detour or stop." Schleifer v. City of Charlottesville, 159 F.3d 843, 857 (1998).

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interests.[41] In fact, some courts specifically noted the curfew's restrictions on associational rights. For example, the court in *Johnson v. City of Opelousas* found a curfew overbroad in part because "minors are prohibited from attending associational activities."[42] Because curfew ordinances without this exception did not fare well in the courts, it is almost inconceivable that future ordinances will not include it.[43]

Keeping in mind *Stanglin*'s holding, however, it becomes evident that new curfews will not suffer the same fate as their ill-equipped predecessors. *Stanglin* says that associative conduct is protected only so far as the First Amendment protects the underlying conduct at issue. First Amendment exceptions to teen curfew laws therefore exempt all expressive associative conduct recognized in First Amendment jurisprudence. By tying the right to associate to general definitions of First Amendment expression, a rule allowing all First Amendment activities essentially insulates curfew laws from associational challenges. To the extent that associative conduct is not covered by the exemption, it therefore must not be expressive.

Hutchins v. District of Columbia and *Qutb v. Strauss* are the two most recent circuit cases to have passed on associational challenges to curfews with First Amendment exceptions. Relying heavily on the First Amendment exception, the court in each case dismissed the teen's free association challenge. In *Qutb*, the Fifth Circuit held that once a curfew exempts protected expression, no further associational rights are implicated.[44] The only type of association that the curfew

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[41] See supra note 33 for discussion of the *O'Brien* test.

[42] 658 F.2d at 1072.

[43] Courts have found these exceptions necessary because the First Amendment applies to children. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (holding that minors have fundamental rights that state must respect); In re Gault, 387 U.S. 1, 13 (1967) (holding that minors are protected by Bill of Rights). But some courts have held that the constitutional interests of minors are less compelling than those of adults, e.g., *Bykofsky*, 401 F. Supp. at 1254, and that the state therefore has more leeway in regulating minors' constitutional rights. See *Schleifer*, 159 F.3d at 847 (applying intermediate scrutiny to curfew ordinance because children's rights are not coextensive with those of adults). Of course, if a curfew is reviewed under a lower level of scrutiny, it is more likely to be found constitutional. But the arguments advanced in this Note should have equal effect regardless of the level of scrutiny applied. The thrust of the arguments given here is to demonstrate that curfews *do* have a serious impact on associational rights. Finding that such restrictions are permissible (which courts may) is not the same thing as denying their existence. Once again, this Note simply hopes to show the extent to which curfews burden rights. The point is not to write a brief in support of striking down curfew laws. At any rate, the *Qutb* court applied strict scrutiny in reviewing the curfew ordinance in that case. 11 F.3d at 492.

[44] See *Qutb*, 11 F.3d at 495 n.9 ("Even in those instances when minors may, for example, associate for political or religious reasons, the majority of those situations will be exempted under one of the defenses to the curfew ordinance."). Applying strict scrutiny, the court also said that "[i]n any event, we have determined that this curfew . . . satisfies

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could impinge upon would be "social." Because the conduct regulated was not expressive, no protected form of association was regulated. The court, therefore, did not even seriously entertain the associational challenge.[45]

The D.C. Circuit accorded the same brusque treatment to the associational challenge in *Hutchins*. The court said that the curfew did not regulate or proscribe expression, regulate conduct with an expressive element, or impose a disproportionate burden on those engaging in expressive conduct.[46] The exception, the court said, covers all those who engage in constitutionally protected expressive conduct.[47] Finding that no expression was regulated in this case, the court ruled that "the curfew would pose at most an incidental burden on juveniles' . . . rights of association."[48] Taking its cue from *Stanglin*, the court simply said that if no expressive conduct was regulated, then there could not be a valid claim of associational infringement.

Given that several courts have found curfew statutes that lacked a First Amendment exception to be facially invalid,[49] the exception seems to immunize curfews from facial attack on associational

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strict scrutiny, and any negligible burden on the individual's right to associate is outweighed by the compelling interests of the state." Id.

[45] The dismissal of the associational claim was relegated to a footnote. See id. This means that the curfew was not subjected to any traditional First Amendment test such as time, place, or manner.

[46] This is a slight variation of the test articulated in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702-04 (1986). See supra note 32.

[47] Hutchins v. District of Columbia, 188 F.3d 531, 548 (D.C. Cir. 1999).

[48] Id.

[49] Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981) (finding curfew overbroad in part because "minors are prohibited from attending associational activities"); Waters v. Barry, 711 F. Supp. 1125, 1134-36 (D.D.C. 1989) (finding that curfew law could not pass *O'Brien*'s requirement that restrictions be no greater than necessary to achieve important government interests). A law is impermissibly overbroad if it "does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. Alabama, 310 U.S. 88, 97 (1940). For a law that regulates conduct to be declared facially invalid, the ordinance's overbreadth "must not only be real but substantial as well, judged in relation to [its] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The overbreadth doctrine was originally conceived as an equitable standing procedure whereby one was allowed to assert that the rights of those *not* before the court were violated by the law, despite the fact that the law legitimately regulated the conduct of the person before the court. See id. at 612. But some courts have permitted plaintiffs to raise facial overbreadth challenges even if their own rights have been violated. See Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) ("[When] a litigant has claimed that his own activity was protected by the First Amendment, . . . the Court has not limited itself to refining the law by preventing improper applications on a case-by-case basis."); Nunez v. City of San Diego, 114 F.3d 935, 949-50 (9th Cir. 1997) (allowing plaintiff to challenge curfew law as facially overbroad even though plaintiff's constitutional rights were at issue).

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grounds. The balance of this Note questions the doctrinal basis of this immunity and argues that the test that courts currently use prevents judges from appreciating the subtle impact that curfews have on minors' First Amendment rights.

The Court's approach to evaluating associative conduct (asking "is it expressive?") is problematic when applied in the context of teen curfews. If the point of recognizing association is to facilitate expression, perhaps the question courts should be asking is not whether teens are engaging in expression, but whether restricting associational conduct will diminish teenagers' ability to express themselves in the first place. This is congruent with the Court's other First Amendment jurisprudence. In past instances, the Court has recognized that protected expression can be jeopardized indirectly. In such situations, it has not asked whether the proscribed activity was itself protected expression. Rather, it asked if the law curtailed an activity "commonly associated with expression."[50]

Association has always been protected because it facilitates expression. As Part I demonstrates, freedom of expression would be a hollow guarantee without the ability to associate. So, in certain instances, when associative conduct is being regulated, courts should be wary that regulating this conduct may be just another means of regulating expression (or will at least produce the same effects). If it can be shown that regulating certain associative behavior is the equivalent of regulating protected expression, a court should make the government offer strong justifications in support of the regulation.[51]

Admittedly, not all associative conduct is intimately bound up with expression. It is difficult, then, to figure out when a court should refrain from asking the normal threshold question of whether "expres-

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[50] City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759-60 (1988) (holding that regulation of news racks endangered freedom of press because town's mayor had broad regulatory discretion). Because the "commonly associated with" doctrine is used so sparingly, it seems that the nexus between what is regulated and what is known definitely to be protected expression must be substantial.

The point of asking whether something is "commonly associated with expression" is to ascertain whether the government may achieve the same end of regulating expression, not by direct regulation, but by regulating conduct so necessary to the existence of expression that it effectively regulates the expression itself. Id.

[51] In *Nunez v. City of San Diego*, the court asked whether the curfew ordinance (which did not include a First Amendment exception) restricted activities "commonly associated with expression." 114 F.3d 935, 950-51 (9th Cir. 1997). Finding that it did restrict activities that are prerequisites to the exercise of First Amendment rights, it subjected the curfew to a time, place, and manner test. Id. at 951. The curfew was struck down because it was not narrowly tailored. Id. at 950-51.

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sion" is at stake and instead ask whether associative conduct is necessary to the existence of expression.

In the majority of instances, the *Stanglin* expressive/nonexpressive test accurately assumes that nonexpressive conduct has only the most remote relationship with protected expression. But if Supreme Court opinions and social research overwhelmingly support the proposition that a certain type of unprotected conduct is intimately related to expressive conduct, then *Stanglin*'s assumption may simply be wrong. When faced with good evidence, courts should alter the test. Courts should ask if the activity is a prerequisite to the exercise of protected expression. Part II considers one important way in which unprotected associative conduct undergirds protected expression. Public discussion—discussions taking place between at least two people in parks, or on streets, sidewalks, or corners—offers an instance where courts should adopt the new test described above.

II
PUBLIC DISCUSSION IS IMPORTANT TO THE FORMATION OF PROTECTED EXPRESSION

Conversing with another on a street corner may be considered merely "social"—an ordinary, run-of-the-mill conversation that does not call into play the greater protections usually reserved for a unique subset of associative behavior. Courts implicitly have adopted this sort of reasoning. In *Qutb*, for example, the court recognized that taking a walk would be prohibited during curfew hours.[52] If curfews prohibit taking a walk, then they surely prohibit conversing in public. Police cannot expect those engaged in discussion to stand still.[53]

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[52] Qutb v. Strauss, 11 F.3d 488, 495 (5th Cir. 1993).

[53] Because of the very nature of public conversations, they cannot claim the benefit of the First Amendment exception. There is no way for an officer to determine whether the content of one's conversation qualifies as exempt. So even if certain types of conversations are considered expressive, practical concerns make it nearly impossible to permit these conversations, because there is no way to distinguish them from unprotected conversations. How does an officer know the nature of the conversation? Better yet, how does she determine if its content is political or social? And if no distinction can be made, surely a curfew cannot simply permit *all* conversations, for then the curfew would be eviscerated if anyone could hang out in public and chat. This would also mean that people would have to be able to get to and from these conversations. Even if the police make a concerted effort to determine if a conversation is protected, this is dangerous. In *More Speech*, Paul Chevigny makes the argument that what is and is not political speech cannot be determined by one's fixed conception of what "political" means. Paul Chevigny, More Speech 108 (1988). The nature of language is such that only through understanding context and interpreting the speaker's meaning through discussion can one arrive at the conclusion that the substance of one's speech is political in nature. Id. at 105, 108. Chevigny provides examples of how given the right context, any word, even "liver sausage," can have political

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Courts should be concerned that regulating public discussion might diminish the ability of teens to engage in protected expression.

Given that courts currently believe that teenagers have the ability to protest—an important form of protected expression—during curfew hours, it is hard to see how curfews do not impinge on any of the mechanisms that enable teens to protest in the first place. This Part makes the argument that public discussion is so integral to protected expression that, should it be curtailed, an important form of expression—protest—would be suppressed as a result. Therefore, curfew laws should be made to satisfy the requirements of the tests traditionally applied to restrictions on expression.

A. Public Discussion in Free Speech Jurisprudence

More than once, the Court has said that associating for the purposes of public discussion is central to the formation of protected expression. The most important case articulating this principle is *Coates v. City of Cincinnati*.[54] *Coates* involved an ordinance that banned the assembly on city sidewalks of three or more persons who conducted themselves in an manner annoying to passersby.[55] The Court ruled that the ordinance violated "the constitutional right of free assembly and association."[56] By citing "the right of the people to gather in public places for social or political purposes,"[57] the Court intimated that the associative conduct at issue (defendants standing on the corner and conversing amongst themselves and with others) was central to fostering protected expression. The Court then approvingly cited a passage taken from a lower court ruling on a similar ordinance:

> Under [the ordinance at issue], arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoyance of Governor Dunsmore and his colonial constables.[58]

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connotations. Id. at 108. Clearly, state differentiation between political and non-political speech poses dangers of arbitrariness and ambiguity.

For these same reasons, challenges to curfews must proceed facially. If public discussion is protected, the result likely will be the evisceration of curfew ordinances. Therefore, an "as applied" challenge will in practice be nothing more than a facial challenge.

[54] 402 U.S. 611 (1971).

[55] Id. at 611.

[56] Id. at 615.

[57] Id.

[58] Id. (citing City of Toledo v. Sims, 169 N.E.2d 516, 520 (Tol. Mun. Ct. 1960)).

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Needless to say, the image of the Founders impresses upon readers the dangers of the law and its potential consequences for future political speech and action. By raising the specter of Jefferson never conversing with Washington, we are left to wonder how the political history of the eighteenth century might have played out.

Because the conversations taking place in these eighteenth-century informal congregations must have involved some topics that were apolitical, a court also would have to believe that some of these conversations were "social." Nevertheless, just because these group encounters were not technically "expressive" as defined by *Spence*, who can doubt their importance to future political speech and expression? Through the lens of this hypothetical, the courts in *Coates* and *Sims* acknowledged that by preventing public gathering and discussion by disparate individuals, political or other expressive types of speech actually were being regulated despite the fact that the group was only acting "socially." The courts recognized the importance of such associative behavior to future political speech and protected it accordingly.

Coates is not the only case in which the Court recognized the importance of discussion on public streets. In *Hague v. Committee Industries Organization*,[59] the Court made clear that public areas have played, and continue to play, a vital role in providing a forum for citizens to come together to share beliefs and ideas. Specifically, the Court said, "[Streets and parks] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, *communicating thoughts between citizens*, and discussing public questions."[60] Ten years later, in *Terminiello v. Chicago*,[61] the Court reaffirmed that spirit of *Hague*: "The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the people . . . ."[62] The Court acknowledged that discussion has political consequences because it leads to expression that influences the government.

Since *Coates*, the Court has not been confronted with a case where regulation of public discussion was explicitly at issue.[63]

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[59] 307 U.S. 496 (1939).

[60] Id. at 515 (emphasis added).

[61] 337 U.S. 1 (1949).

[62] Id. at 4.

[63] The Court consistently rules on whether restrictions on speech in parks and/or streets survive a time, place, and manner test. But these cases do not revolve around the regulation of only discussion but of all speech. Therefore, the fact that public discussion also is regulated is never brought to the fore, and its importance is never discussed.

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Although anti-loitering ordinances have been found constitutionally suspect, most of the statutes define loitering as "remaining in one place with no apparent purpose." The Court has not taken this definition to include necessarily conversations between individuals.[64]

In fact, the Court's uncertainty over whether or not conversations are considered loitering under these laws has been one of the reasons why anti-loitering laws have been voided for vagueness.[65] The Court's recent silence on public discussion, however, does not mean that public discussion no longer advances the important values that the Court once proclaimed it did. Although *Stanglin* came well after *Coates*, a simple reflexive extension of its test to public discussion would require some explanation as to why a court believes that public discussion no longer serves these important values. Academic work supports the Supreme Court's intuition that informal public discussion is instrumental in promoting future expression. Sociologists have studied critically the origins of protest over the last half-century. Their literature demonstrates that informal social ties are critical to the formation of protest and the attendant organizations that help create such protest.[66] The student-led democratic struggle in Tiananmen Square in 1989, the Velvet Revolution in Prague, also in 1989, and the Freedom Summer Movement of 1964 in Mississippi, are all models from which we can glean the processes by which individuals come to express themselves through protest in social movements.

First, a disclaimer: The point of these examples and others is not that suppressed teens would otherwise lead a revolutionary uprising in America. The references to George Washington and Tiananmen Square are hyperbolic and familiar examples of expressive conduct. Teens may not start a major coup, but there is a great deal of expres-

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[64] See City of Chicago v. Morales, 527 U.S. 41, 56-57 (1999). In invalidating a statute's definition of loitering—"to remain in any one place with no apparent purpose"—as too vague, the Court asked if "no purpose" would include "talking to another person." Finding that there was no way one could know if this was considered loitering, the Court found that the statute was unconstitutionally vague. Id.

[65] Id. This suggests that *Coates* and subsequent Supreme Court decisions have interpreted anti-loitering laws differently, with the former implying that they do curtail discussion, see supra notes 54-58 and accompanying text, and the latter admitting that the Court was not sure whether public discussion was regulated. Even if this is true, it only shows that since *Coates*, the Court has not addressed the issue of what happens when public discussion is regulated.

[66] See John D. McCarthy, Constraints and Opportunities in Adopting, Adapting and Inventing, in Comparative Perspectives on Social Movements 141, 143 (Doug McAdam et al. eds., 1996) ("The role of informal structures of everyday life has been widely linked with [social] movement mobilization."); David A. Snow et al., Social Networks and Social Movements: A Microstructural Approach to Differential Recruitment, 45 Am. Soc. Rev. 787, 789-96 (1980) (stating that friendship networks are central to understanding social movement recruitment).

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sive behavior of a lesser magnitude that still involves the airing of political and other views. There is no reason to believe that their views are formed or brought about any differently than the behavior in the foregoing examples. Political activism is also habit-forming. If the teen experience is devoid of activism, a good argument can be made that as adults they will not engage in the same level of activism in which we know adults are and have been capable of engaging. Lastly, it cannot be denied that teens have the right to engage in important and radical protests. It would be difficult to argue that their failure to exercise a right should lend validity to a law undercutting their ability to exercise that right in the first place. For example, a law that moves polling stations to the far reaches of a town—making the polls less accessible to certain groups—cannot be justified on the ground that a given group does not vote or will not likely vote in the future. The examples below show that certain preconditions need to be met in order for teens to exercise their rights. Whether or not teens actually will invoke their rights should not have any bearing on the force these examples provide.

B. Sociological Accounts

Sociologist Craig Calhoun carefully studied the Chinese student movement of 1989.[67] Rather than finding that the movement was planned and carried out by preexisting formal organizations, he found that informal personal networks and friendship circles were responsible for the widespread student protest.[68] Without these personal networks, the students never would have been able to take advantage of the opportunity to protest when it presented itself. Movements of this size do not simply happen, and they do not result from individuals spontaneously coming to believe the same thing and acting in concert. Social movements instead require some degree of ideological conformity and a communications network.[69] Personal networks were the vehicles through which the Chinese students met each of these requirements. Friendship circles formed at the universities provided the students with the opportunity to discuss beliefs and ideas with other students. This is where students formed their opinions, where "interests . . . were constructed through discussion and debate."[70]

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[67] See Craig Calhoun, Neither Gods Nor Emperors: Students and the Struggle for Democracy in China (1994).

[68] See id. at 170-73. This comports with the work of McCarthy, supra note 66, at 142, who, speaking of friendship networks and other informal organizations, says that "[i]t is upon these most basic structures . . . that much local dissent is built."

[69] See infra notes 77-85 and accompanying text.

[70] Calhoun, supra note 67, at 173.

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Informal personal connections also allowed students to pass news, orders, or instructions to each other.[71] And when conditions presented an opportunity for action, it was through these networks that students, who now were predisposed ideologically, acted.

Informal associations also played a key role in the Velvet Revolution in Prague. The opposition coalition, led by Vaclav Havel, coalesced around personal connections.[72] The leaders of the coalition gave journalist Timothy Garton Ash a front row seat from which to observe its inner workings and processes. He described the coalition's structure as follows:

> A political scientist would be hard pressed to find a term to describe [the coalition's] structure of decision-making, let alone the hierarchy of authority within it. Yet, the structure and hierarchy certainly [did] exist, like a chemist's instant crystals. . . . [It is] rather like a club. Individual membership is acquired by personal recommendation. You could draw a tree diagram starting from the inaugural meeting in the appropriately named Players' Club Theatre: X introduced Y who introduced Z.[73]

Here, the coalition consisted of everyone from students to former journalists to coal stokers.[74] They belonged to no formal organization from which they had a preexisting plan or manifesto. But, once again, when the time was ripe for action, personal networks provided a vehicle through which leaders like Havel could mobilize the citizenry and ultimately provide a communications structure through which the movement could be sustained.[75]

Lest one think that these informal ties play a prominent role solely in repressive regimes, because formal organizations have no chance to thrive,[76] one need only look to the student movements in

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[71] See id. at 172.

[72] See Timothy Garton Ash, The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague 79-90 (1990).

[73] Id. at 86.

[74] Id.

[75] Havel's organization is what sociologists would describe as a social movement community (SMC). An SMC is a social network that is not informal, but not exactly formal either, created specifically for the purpose of mobilizing a social movement. See McCarthy, supra note 66, at 143 (describing nature and importance of SMCs). An SMC is relevant to the argument in this Note because, as argued below, a curfew may make it more difficult for an SMC to get started, since more time indoors may make it more difficult for these social networks to form. Also, it is not clear if, even after formed, such a group would be permitted to carry on during a curfew.

[76] The fact that revolutions can occur despite repressive conditions may seem to undercut the argument that curfews (which are admittedly far less harsh than conditions which existed in China or Prague) will prevent political protest. There are two responses to this. First, brave individuals, if conditions get bad enough, will take matters into their hands, take large risks, and do what must be done. But the rest of the world needs the

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the United States in the 1960s to see that this is not so. In fact, without informal, social ties, many of the organizations and movements that characterize 1960s activism never would have gotten off the ground.

Sociologist Doug McAdam dedicated six years of research to studying Freedom Summer, the voter registration campaign where white college students went to Mississippi for the summer of 1964.[77] He wanted to know why some students chose to join the movement while others did not. In other words, he wanted to determine what characteristics were the best indicators of participation in the movement. He found that personal links among participants were one of the key factors in determining participation.[78] McAdam had access to all of the applications that students sent in to the Student Non-Violent Coordination Committee (SNCC) in hopes of gaining acceptance to the program. He found that "personal ties between the applicants were extensive."[79] Moreover, these ties were important in their decision to apply for the project.[80] But only when participants are compared with fellow applicants who chose not to join the program does the power of informal ties surface. Referring to personal ties among participants, McAdam found that "no other item of information on the applications proved to be a better predictor of participation in the project than this."[81]

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protection of the law to aid them in expressing themselves. Second, one should not assume that the conditions necessary for protest exist simply because one's society, even factoring in curfews, is less repressive than China or prerevolution Prague. The next Section argues that teen life with a curfew potentially can be devoid of these conditions (e.g., the ability to form friendship networks and discuss political matters freely) where, perhaps counterintuitively, this might not have been so in China and Prague. See, e.g., infra notes 87-88 and accompanying text.

77 See generally Doug McAdam, Freedom Summer (1988).

78 Id. at 52-53.

79 Id. at 52.

80 See id. at 64 ("Project participants listed [as friends] more than twice the number of volunteers as those applicants who withdrew from the project."). McAdam's work also suggests that personal ties developed among the Freedom Summer participants and that these ties actually provided the impetus for later movements such as the Free Speech movement and Anti-War movement, among others. Id. at 161-64, 172. The students who experienced the turmoil of the Freedom Summer went back to their respective colleges after the summer. Out of this common experience a network was formed among the most committed activists. Id. at 161. Many of the activists, such as Mario Savio, later came to be leaders of various other movements. Id. at 163-65. Many of the participants also helped coordinate and strategize a movement across university lines so that it had a more national base. Id. at 176-77. When the participants returned after the summer, they were treated as heroes on campus. Id. at 170. This in turn helped them meet and speak to other students, broadening the movements' scope. The personal networks formed the foundation of many movements. See id. at 170-71.

81 Id. at 64.

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McAdam's work shows, among other things, that despite the fact that there may be a number of organizations that are willing to accept new members, and despite the fact that prospective members may be aware of these organizations and ideologically in tune with them, individuals will not necessarily become participants in an organization or engage in protest. Something more is needed.

This observation is crucial to determining the constitutional status of curfews. Judges' belief that the First Amendment exception provides teens with sufficient freedom to exercise First Amendment rights may be predicated upon a conception of how expression originates—via protest—that is at odds with actual experience. Of course, a First Amendment exception should allow fully formed organizations to meet and protest during curfew hours. But if judges are not cognizant of the effects of curfews on teens' ability to form informal personal networks, a good argument can be made that the formation of protest and social movements will be seriously jeopardized.

The ability to form informal, personal associations is not by itself enough, however, to spawn protest and the formation of social movement organizations. "Free spaces"—areas where individuals can discuss and meet unfettered by state interference—are also required.[82] One of the most important functions served by informal associations is the forum they provide for the exchange of viewpoints. Only when groups of friends or acquaintances realize or come to realize that they share similar goals and worldviews can they decide to take appropriate action. If personal networks are to act as key ingredients in creating protest, they need sufficient breathing space. Calhoun found that the free spaces created by modern reforms in China provided a safe harbor in which social networks could operate.[83] The Velvet Revolution also showed much the same thing.[84]

The sociological studies discussed above show that expression that takes the form of protest normally requires certain social conditions. These preconditions are the ability to form personal networks and the ability to operate in free spaces.[85] For teens to be able to

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[82] See Calhoun, supra note 67, at 173.

[83] See id.

[84] See Ash, supra note 72, at 78-130. As the name "Velvet" suggests, the Czech government did not try to put down the rebellion by force once it started gaining momentum. As a result, almost all of Prague became a free space. This allowed different groups, which never would have been able to interact in more repressive times, to meet with one another.

[85] Universities, which have long been hotbeds of social activism, also demonstrate the importance of these two factors. See Philip G. Altbach, Students and Politics, in Protest, Reform, and Revolt: A Reader in Social Movements 225, 229-30 (Joseph Gusfield ed., 1970). Those analyzing the origins of this activism have come to attribute students' pro-

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engage in such expression, then, the First Amendment exception must not unduly prevent these preconditions from materializing. But it appears that curtailing public discussion can have this very effect. Teenagers are subject to outside control and supervision for a majority of their day. When they return home they are also likely to be subject to some supervision. But when students are outside amongst themselves they can attain the freedom necessary to engage in open debate. They can discuss and form those friendship networks that are so important. Furthermore, teens can run into other teens that they may or may not know. If they are familiar with the others they meet, they may exchange viewpoints. If they are unfamiliar, they can become familiar and thus expand their social networks. By placing an entire town's outdoor spaces off limits for a good part of the week, the state takes away one whole arena (out of only a few) in which teens can both form and solidify their social networks and exchange beliefs and ideas. Such social control dramatically lessens the likelihood that teens will engage in protest. That a municipality's ordinance has a First Amendment exception does not mean it is likely that the municipality's teens can or will exercise their First Amendment rights through protest.

C. Social Theory

Besides Supreme Court opinions and sociological literature, two prominent social scholars—Richard Sennett and Robert Putnam—have articulated theories that show that a significant reduction in public discussion lowers the chances that teens will express themselves through protest.

Sennett and Putnam point out and explain the phenomenon of the dramatic increase in political apathy and decrease in public-spiritedness in modern American society. Putnam found that Americans, who used to be prodigious joiners of organizations of all kinds, and who took an interest in civic affairs, left these social institutions to take a comfortable seat in front of the television.[86] Sennett also found a citizenry of individuals withdrawn into themselves, where the per-

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pensity to engage in social movements in part to their ability to form communications networks and their freedom from outside control. See id. Students who have certain ideas have ready access to scores of others with whom these ideas can be shared. See id. And when associations make political decisions about taking action one way or another, there is an already-established network of students that can spread these messages. See id.

[86] See Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 221-23 (2000).

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sonality of each person has become the focal point of everyday life, eschewing larger, less self-centered concerns.[87]

Teen curfews may exacerbate these problems. Curfews have the potential to leave teens isolated each night, vegetating in front of the television.[88] This isolation can only demoralize public-mindedness and make it less likely that teens will exercise their First Amendment rights. The result is that teens will not become joiners, and this, in conjunction with political apathy, reduces the likelihood of teen protest. Important forms of expression, therefore, are bound up with a certain mindset, and also with certain social habits. A less civic-minded teenage population means that the chances of teens taking advantage of the First Amendment exception are not high. But if teenagers can spend time with others in public, these effects may be alleviated. If isolation can lead to apathy, courts should be more concerned about curfews than they currently are.

This Section has demonstrated that a curtailment of public discussion may be tantamount to a curtailment of protected expression. Curfews raise a First Amendment issue, then, because they regulate conduct "commonly associated with expression." This observation should cause no great uproar. This does not mean that curfews are invalid, but merely that they should be subject to traditional First Amendment tests rather than given blanket immunity. Public discussion is important enough that courts should be cognizant that its regulation endangers First Amendment values.

By subjecting curfews to traditional First Amendment tests, judges will be forced to assess critically how curfews impact teenagers' ability to engage in protected First Amendment activities. This is something that the current "expressive or not" test prevents courts from doing. And once courts realize that curfews raise First Amendment issues, they then can explore the extent to which curfews are justified by the government interests that they purport to serve.

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[87] Richard Sennett, The Fall of Public Man 3-6 (1976). Sennet argues that modern-day self-absorption is reflected in the lack of "public space" in modern architecture. Id. at 12-16. Public squares are no longer designed for the purposes of allowing the public to mingle and meet, but rather are used for movement, to get from one point to the next. Squares are now made uncomfortable to sit in and are used largely as thoroughfares. This point is quite salient for the purposes of this Note. Curfews aim to change public squares into these new architectural forms that Sennett believes are so representative of a demoralized public spirit.

[88] The proliferation of the Internet should mitigate this effect. Even so, it is still likely that teens are more isolated in a curfew regime. Since these works show a correlation between isolation and apathy, this effect would still be important.

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III

AN ADDITIONAL ARGUMENT AND A CALL FOR FUTURE ARGUMENTS AND RESEARCH

When evaluating curfews, judges need not only look to see if the ability to protest is constrained. After all, the First Amendment clearly protects far more than just the right to protest. There is no reason to believe that other persuasive arguments cannot be made to show that the same factors that may lead to a decrease in protest also may lead to a decrease in the ability to exercise other fundamental First Amendment rights. The remainder of this Note outlines one such argument in the hope of showing how existing sociological evidence may be used or built upon. Because the empirical evidence supporting this illustrative claim is not strong, this Part also points the way to potentially fruitful areas of future research.

The anecdotal examples in the previous Section mainly show that protest movements form in a particular way. Although the examples speak specifically to protest, all of the discussed sociological work is concerned with social movements more generally.[89] Formal organizations committed to advocacy are also important vehicles for propelling these movements. The ability of teens to join expressive organizations is as protected as the right to protest.[90] One therefore may want to argue that curfews interfere with this right. Although a good deal more evidence is needed to support this point, there is no obvious reason to think that the factors that are crucial to the creation of protest are not equally crucial to the existence of protected advocacy organizations. In fact, the opposite seems true.[91] This being so, there may be good reason to believe that curfews will prevent teens from using organizations as instruments of advocacy.

If a given teen's informal social networks are smaller and the number of free spaces in which she can operate are fewer, it is less

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[89] All of the examples in supra notes 67-85 and accompanying text are taken from works about the formation of particular social movements. See, e.g., McAdam, supra note 77, at 7 (describing Freedom Summer as "movement").

[90] See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (evaluating young men's organization within standard freedom of association analysis).

[91] Citing to his own work, McCarthy says that friendship networks are central to understanding the "formation of emergent local movement groups." See McCarthy, supra note 66, at 142. Also, we must not forget that the applicants in Freedom Summer sought to join an expressive association—the wing of the SNCC that was planning to head to Mississippi. See McAdam, supra note 77, at 50-53. McAdam's work importantly bears on the efficacy of organizations since it concerns their ability to recruit. See supra notes 77-81 and accompanying text. Recruitment is one of the paramount functions an organization must undertake, for if people will not join organizations, there will be fewer of them and existing ones will be weakened. To this extent, McAdam's work is very telling about how the proliferation of social networks can lead to the flourishing of an expressive organization.

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likely that a teen will join an organization and less likely that teen organizations will retain the level of robustness needed for effective advocacy. Organizational membership may shrink, remaining members may not be as committed, and the ability to establish a public presence and make beliefs heard may be diminished.

One can argue that curfews make it far more difficult for organizations to recruit new members.[92] A teenager who plays a sport or participates in other extracurricular activities, does her homework, and eats a normal dinner has a busy day. By cutting four or five more hours out of a day, curfews may make it even less likely that teens will come into contact with those trying to recruit them for a given organization. In other words, the increased isolation will stunt the growth of one's informal social network.[93] Even if a student is sympathetic to a movement's cause, it may be unlikely that that student will become a participant if an activist does not contact that person. If the universe of those with whom we come into contact becomes smaller, the universe of movements and organizations to join becomes smaller as well, along with the likelihood of joining one.

Curfews reduce the amount of free space available for discussion of beliefs and ideas. The word "recruitment" connotes a process whereby one is convinced to deviate from a normal routine. Discussion is therefore usually a prerequisite to recruitment, a point that the Freedom Summer story implicitly supports. Evening hours are likely to be ideal times for these discussions because they can take place outside of adult supervision. With the exception of weekend nights, students may not be able to use evening hours. Curfews forbid students from simply "hanging out," and even though students interact with each other every day at school, it is not certain that such a structured environment provides ample "free spaces" for discussion. If one defines "free space" as an area where students can meet unfettered from government control, it is ironic that one of the only free spaces really left to students is a state-run institution (their high schools).

The work of Putnam and Sennett suggests that the more teens are isolated, the greater is the likelihood that they will become apathetic and self-absorbed.[94] Taking as a given the fact that a curfew will further isolate teens, one may hypothesize that they may lose the desire to join organizations and that those within organizations will care less

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[92] See supra note 88 and accompanying text.

[93] David Snow et al. found that one of the most important factors in determining whether or not outsiders join a social movement is whether outsiders are linked to organizational members through informal social networks. This increases the chance of "being contacted and recruited into [the] movement." Snow et al., supra note 66, at 792.

[94] See supra notes 86-88 and accompanying text.

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about them. Although this point is speculative, Putnam's work suggests that teens likely will develop a habit of watching television each evening rather than socializing with peers.

It is also worth noting that certain organizations may find their ability to advocate diminished because a teen audience will be lacking during curfew hours. If an organization wishes to address teens, it will not have the same access to this audience that it otherwise would have.

The most powerful argument involves the burdens faced by unpopular, nonconformist groups. Quite apart from the problem of recruitment, these organizations may not be able even to take advantage of the First Amendment exception at all. If the state requires advance notice before gathering,[95] one cannot expect that these groups will register at the local city hall. They will probably recoil at the idea of letting the state know of their whereabouts during curfew hours. This is especially true if the reason for the group's existence is to decry the local government.[96] The group's members also will want to remain anonymous instead of opening themselves up to possible harassment, surveillance, or derision.[97] And because members of such groups may not want to be singled out for their alternative views, it is not an answer to say that these groups have ample time to meet during non-curfew hours, which is often when they will be visible to

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[95] See, e.g., Bykovsky v. Borough of Middletown, 401 F. Supp. 1242, 1247 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir. 1976).

[96] Professor Edwin Baker has written about mandatory parade permit requirements that require member registration: "[The ordinance] requires that those assembling and parading must practically bow to the very authorities that the paraders may strongly believe are . . . unacceptable or even illegitimate. . . . This requirement is very close to compelled symbolic affirmation or allegiance." C. Edwin Baker, 78 Nw. U. L. Rev. 937, 1016 (1983).

[97] Interestingly, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), centered around the state's mandate that the NAACP turn over its membership list. As a response, the NAACP said it was protected under freedom of association; the Court agreed, stating, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly when a group espouses dissident beliefs.*" Id. at 462 (emphasis added). Thus far, a group-privacy challenge has not been made to a curfew's notice requirement, but the above quotes suggest that such an argument has some merit. Either way, this language supports the notion that group privacy, especially for unpopular groups, is vital to their survival. "Local authorities consistently have used and continue to use the permit requirement as a means to harass those whom they wish to harass." Baker, supra note 96, at 1018. One way in which authorities can harass is by selectively enforcing the curfew law against those who do not give the city advance notice. See id.

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the public or involved in other activities.[98] Curfews will limit severely an unpopular organization's ability to advocate its views effectively by dramatically lessening its ability both to recruit and associate as a group.[99]

The increased use of the Internet may, however, mitigate these trends by facilitating more social contact. But such a claim is speculative. The above examples provide strong evidence that personal contact is a key ingredient in the formation and mobilization of social movements. There is little available evidence showing that great movements have been formed and sustained by members connected to each other only or mainly through the Internet. There is no doubt that the Internet enables students to stay in contact with each other. To what extent students use the Internet to join expressive organizations and meet new people is, however, an open question and will be for some time. Either way, it is a grand claim to say that the Internet will make face-to-face contact obsolete or irrelevant, or that the diminishment of face-to-face contact is unimportant to social movement formation. For this reason, courts still should be concerned with the effects of curfew laws.

It must also be conceded that, even in curfew regimes, there are many hours during the week when teens can meet and communicate with each other. These are certainly factors a court should take into consideration when weighing the sufficiency of government interests against the expressive restrictions. Yet, the fact that teens are left with some ability to exercise their First Amendment rights does not mean that these rights are not being curtailed unduly. So far as expressive organizations are concerned, curfews impact the ability to recruit, the

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[98] Not only will these groups be unable to meet, but they also will have serious trouble recruiting others. Many of the exceptions to curfews involve state sponsorship of some kind, such as school-sponsored cultural events. But unpopular groups are marked by their aversion to the state and therefore cannot depend on these opportunities for their very existence. It is fanciful indeed to expect a teen-gay or a teen-communist organization to recruit its members at school-sponsored events. It is just as unlikely that these groups will be able to recruit during school hours. Not exactly known as a fertile breeding ground for dissident ideology, high schools will not likely permit students who share views and lifestyles different from the mainstream to recruit other students openly. The same holds true for extracurricular activities. Assuming a fair number of these "alternative" students also partake in afterschool activities, when will these students exchange ideas and hope to attract others if they will not do so in front of other mainstream students? It seems that nighttime hours are perfect for this recruitment.

[99] Even if a municipality has no advance notice requirement, the simple existence of a curfew raises similar concerns. Just being outside at night, whether meeting or traveling, immediately places individuals under police suspicion. For those trying to avoid interaction with police, it may not be comforting to tell them that they can dissuade the police from issuing them a ticket or hauling them into jail by claiming the protection of the First Amendment exception.

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availability of a teen audience, the motivation of group members, and the proliferation of nonconformist groups to the point that the efficacy of these expressive organizations can be said to be diminished unduly. This might raise a First Amendment concern warranting greater scrutiny.

CONCLUSION

This Note has argued that curfews should be subject to greater scrutiny because they hamper teens' ability to express beliefs and ideas. Because the point of protecting association is to facilitate expression, courts should ask whether teen curfews inhibit expression. Instead, a disturbing trend is emerging in which the encroachment of important freedoms is going unnoticed. The short shrift afforded to teen expressive rights is inconsistent with fundamental constitutional tenets.

American teenagers deserve a frank and open discussion about curfews from our courts. A long time ago it was recognized that teenagers have constitutional rights. These rights must be taken seriously. Although it is an open question as to whether curfews will survive more rigorous judicial tests, their impact on teen expression must be scrutinized, more closely. Finally, a more complete understanding of the effects of curfews may be valuable to policymakers faced with the choice of implementing a curfew as one of a number of possible solutions to local problems.

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