


2009

The Forgotten Freedom of Assembly

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The Forgotten Freedom of Assembly

John D. Inazu*

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women’s suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the second Red Scare of 1950s’ McCarthyism. Abraham Lincoln once called “the right of peaceable assembly” part of “the Constitutional substitute for revolution.” In 1939, the popular press heralded it as one of the “four freedoms” at the core of the Bill of Rights. And even as late as 1973, John Rawls characterized it as one of the “basic liberties.” But in the past thirty years, assembly has been reduced to a historical footnote in American law and political theory. Why has assembly so utterly disappeared from our democratic fabric? This Article explores the history of the freedom of assembly and what we may have lost in losing sight of that history.

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I. INTRODUCTION

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the second Red Scare of 1950s' McCarthyism. Abraham Lincoln once called "the right of peaceable assembly" part of "the Constitutional substitute for revolution."¹ In 1939, the popular press heralded it as one of the "four freedoms" at the core of the Bill of Rights. And even as late as 1973, John Rawls characterized it as one of the "basic liberties."² But in the past thirty years, the freedom of assembly has been reduced to a historical footnote in American political theory and law. Why has assembly so utterly disappeared from our democratic fabric?

One might, with good reason, contend that the right of assembly has been subsumed into the rights of speech and association and that these two rights provide adequate protection for the people gathered. On this account, contemporary free speech doctrine protects the "most pristine and classic form" of assembly—the occasional gathering of temporary duration that often takes the form of a protest, parade, or demonstration.³ Meanwhile, the judicially recognized right of association shelters forms of assembly that extend across time and place—groups like clubs, churches, and social organizations.

This characterization of the rights of speech and association is not implausible. Indeed, it appears to be the approach assumed by a

1. Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), *in* UNCOLLECTED LETTERS OF ABRAHAM LINCOLN 127 (Gilbert A. Tracy ed., 1917). In the same letter, Lincoln also wrote: "[T]he right of peaceable assembly and of petition and by article Fifth of the Constitution, the right of amendment, is the Constitutional substitute for revolution. Here is our *Magna Carta* not *wrested* by Barons from King John, but the free gift of states to the nation they create . . ." *Id.*

2. JOHN RAWLS, A THEORY OF JUSTICE 53 (1971). Rawls relies primarily on association rather than assembly in his later work. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 221 n.8, 291, 338, 418 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. *But cf. id.* at 335 (mentioning assembly).

3. *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) ("most pristine and classic form").

number of contemporary political theorists.⁴ Nevertheless, I want to suggest that something is lost when assembly is dichotomously construed as either a moment of expression (when it is viewed as speech) or an expressionless group (when it is viewed as association). Many group expressions are only made intelligible by the practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than that which would be ascribed to them by an outside observer. The political significance of a women's pageant in the 1920s would be lost without an understanding of why these women gathered or what they were doing with the rest of their lives. And the creeds and songs recited by members of hundreds of diverse associations, from Alcoholics Anonymous to the Boy Scouts, during their gatherings may reflect a way of living and system of beliefs that cannot be captured by a text or its utterance at any one event.⁵

The United States Supreme Court has partially recognized these connections in the category of "expressive association" that it introduced in *Roberts v. United States Jaycees*.⁶ But by privileging "intimate" over expressive association and declaring the latter merely instrumentally valuable to other modes of communication, the Court has obfuscated the critical role that a group's practices and identity play in its expression. Even worse, the attenuated protections of expressive association underwrite a political theory whose espoused tolerance ends with those groups that challenge the fundamental assumptions of the liberal state. These changes open the door for the state to demand what Nancy Rosenblum has called a "logic of congruence" requiring "that the internal life and organization of associations mirror liberal democratic principles and practices."⁷

William Galston intimates that this result undermines liberalism itself: "Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their

4. See, e.g., STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); *FREEDOM OF ASSOCIATION* (Amy Gutmann ed., 1998); RAWLS, *POLITICAL LIBERALISM*, *supra* note 2.

5. This argument is not meant to be universal. Some assemblies that gather in single instances of fixed duration may present a relatively coherent message absent any collective background identity. A group of strangers that gathers in front of a prison to protest an execution is one example.

6. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 622 (1984).

7. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 37 (1998).

own understanding of what gives life meaning and value.”⁸ We do not live under Galston’s “rebuttable presumption.” If we did, we might hear more about polygamist Mormons, communist schoolteachers, all-male Jaycees, and peyote-consuming Native Americans. And while today’s cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have at one time or another been silenced and stilled by the state cuts across political and ideological boundaries. The freedom of assembly has opposed these incursions throughout our nation’s history. As C. Edwin Baker has argued, “[T]he function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms.”⁹ This core role of assembly and its broad appeal to groups of markedly different ideologies makes it a better “fit” than the right of association within our nation’s legal and political heritage.¹⁰

Recognizing this fit requires learning the story of the right of assembly. This is no easy task. The right of association is now firmly entrenched in our legal and political vernacular. Consider the following: (1) at least twenty-five federal district and appellate court opinions have referred to a nonexistent “freedom of association clause” in the United States Constitution;¹¹ (2) a federal appellate court has denied associational protections to an all-male Jewish fraternity after intimating that the fraternity was neither an intimate nor an

8. WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 3 (2002).

9. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 134 (1989).

10. By “fit,” I mean to suggest the coherence with an ongoing tradition and social practice intimated in different ways by both Ronald Dworkin and Alasdair MacIntyre. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed., Univ. Notre Dame Press 2007) (1981).

11. See, e.g., *Swanson v. City of Bruce*, No. 03-60541, 2004 WL 1491594, at *3 (5th Cir. July 1, 2004) (referring to “the freedom of association clause”); *Boyle v. County of Allegheny*, 139 F.3d 386, 394 (3d Cir. 1998) (asserting that the plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976), “held that the discharge of a government employee because of his political affiliation violates the freedom of association clause of the First Amendment”); *Darnell v. Campbell County Fiscal Court*, No. 90-5453, 1991 WL 11255 (6th Cir. Feb. 1, 1991) (discussing the requirements for a prima facie case under “the freedom of association clause of the first amendment”); *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1203 (D. Wyo. 2006) (“The First Amendment’s Free Speech Clause and Freedom of Association Clauses apply to the states through the Fourteenth Amendment.”); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 543 (W.D. Ky. 2001) (“The Supreme Court has interpreted the First Amendment to provide little protection under the Freedom of Association Clause to commercial enterprises.”).

expressive association;¹² and (3) a well-respected commentator has argued that in sixteen years, *Roberts* came to represent “a well-settled law of freedom of association,” an “ancien regime.”¹³ In this context, it takes effort to envision an alternative understanding of the constitutional protections for groups. Accordingly, part of my task is to cast a vision for recovering the freedom of assembly. Doing so requires creative engagement with regnant legal doctrine and political theory, particularly that espoused by the Supreme Court and its commentators over the past half-century. But this is a task worth doing. Constitutional language—and the ways in which we use it or ignore it—matters to the views we form about the law. Words like “assembly” and “association” by themselves convey little of the values that underlie the inevitable line-drawing that takes place around our civil liberties,¹⁴ but in our constitutional story, these words come to represent the values that helped to shape them and give them constitutional salience.¹⁵ Forgetting words may represent the final stage of forgetting values; reclaiming words can be a first step to reclaiming those values.

12. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007). The fraternity was located at the College of Staten Island, which is “primarily a commuter campus,” and it never had more than twenty members. *Id.* at 140, 145.

13. ANDREW KOPPELMAN, *A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION*, at xi (2009) (arguing that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), “disrupted” the law of freedom of association). Koppelman acknowledges the “germinal case” of the right of association in *NAACP v. Alabama*, 357 U.S. 449 (1958), see KOPPELMAN, *supra*, at 18-22, but it is clear that *Roberts* rather than *NAACP v. Alabama* does most of the work that he wants to embrace as the “well-settled law of freedom of association.”

14. I do not presume that *unbounded* group autonomy is either preferable or possible. To borrow from Stanley Fish, there is “no such thing as free assembly.” The state always constrains. The pertinent inquiry is therefore not whether the state can constrain group autonomy, but the conditions under which those constraints will be imposed. See STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH, AND IT’S A GOOD THING, TOO* 104 (1994) (“Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict.”); cf. Peter de Marneffe, *Rights, Reasons, and Freedom of Association*, in *FREEDOM OF ASSOCIATION*, *supra* note 4, at 146 (“Some may think of rights as ‘absolute,’ believing that to say that there is a *right* to some liberty is to say that the government may not interfere with this liberty for *any* reason. But if this is how rights are understood, there are virtually no rights to liberty—because for virtually every liberty there will be *some* morally sufficient reason for the government to interfere with it.”).

15. Frederick Schauer uses the phrase “constitutional salience” to refer to “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

In the pages that follow, I take this first step by tracing the story of the freedom of assembly. This is the right of assembly “violently wrested” from enslaved and free African Americans in the South and denied to abolitionist William Lloyd Garrison in the North. It is the freedom recognized in public celebrations across the nation as America entered the Second World War—at the very time it was denied to 120,000 Japanese Americans. It is the right placed at the core of democracy by eminent twentieth-century Americans, including Dorothy Thompson, Zechariah Chafee, Louis Brandeis, Orson Welles, and Eleanor Roosevelt.

I begin by examining the constitutional grounding of assembly in the Bill of Rights. I then explore the use of assembly in legal and political discourse in six periods of American history: (1) the closing years of the eighteenth century that brought the first test of assembly through the Democratic-Republican Societies; (2) the appeals to assembly in the suffragist and abolitionist movements of the antebellum era; (3) the narrowing of the constitutional right of assembly by the Supreme Court following the Civil War; (4) the claims of assembly by suffragists, civil rights activists, and organized labor during the Progressive Era; (5) the rhetorical high point of assembly between the two World Wars; and (6) the end of assembly amidst mid-twentieth century liberalism and the rise of the freedom of association.

As I recount the role of assembly in the political history of the United States, I pay particular attention to three of its characteristics. First, groups invoking the right of assembly have inherently been those that dissent from the majority and consensus standards endorsed by government. Second, claims of assembly have been public claims that advocate for a visible political space distinguishable from government. Finally, manifestations of assembly have themselves been forms of expression—parades, strikes, and demonstrations, but also more creative forms of engagement like pageants, religious worship, and the sharing of meals. These three themes—the dissenting assembly, the public assembly, and the expressive assembly—emerge from the groups that have gathered throughout our nation’s history. Theirs is the story of the forgotten freedom of assembly.¹⁶

16. My characterization of dissenting, public, and expressive assembly bears some resemblance to Timothy Zick’s emphasis on the relationship between expression and physical space. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009). Zick observes, “In First Amendment doctrine and scholarship, place has generally been treated as a background principle, not a *fundamental* aspect of assembly, expression, and other public liberties.” *Id.* at 8. He responds that “places ground and give meaning to lives, activities, and cultures.” *Id.* at 10. My argument for

II. THE CONSTITUTIONAL RIGHT OF ASSEMBLY

I begin with the text of the First Amendment and with a textual observation. As a historical matter, we should not make too much of slight variations in wording, grammar, and punctuation in constitutional clauses.¹⁷ There is little indication that the Framers applied our level of exegetical scrutiny to the texts that they considered and created. But because modern constitutional law parses wording so carefully, our current arguments are in many ways constrained by the precise text handed down to us. And so it is for this reason a useful exercise to consider forensically the text that has survived, as well as the text that did not.

A. *The Common Good*

The most important aspect of the clause containing the constitutional right of assembly may be three words missing from its final formulation: *the common good*. Had antecedent versions of the assembly clause prevailed in the debates over the Bill of Rights and lawful assembly been limited to purposes serving the common good, the kinds of marginalized and disfavored groups that have sought refuge in its protections may have met with little success. Assembly for the common good would have endorsed the consensus narrative advanced by mid-twentieth century pluralism: we tolerate groups only to the extent that they serve the common good and thereby strengthen the stability and vitality of democracy.¹⁸ The Framers decided otherwise.

When the First Congress convened in 1789 to draft amendments to the Constitution, it considered proposals submitted by the various states. Virginia and North Carolina proposed identical amendments covering the rights of assembly and petition: “That the people have a

assembly builds upon Zick’s theoretical approach by considering practices as well as places in the background that gives coherence to meaning.

17. Caleb Nelson cautions against placing too much reliance on punctuation in the Constitution because at the time of the Founding “punctuation marks [were] thought to lack the legal status of words.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 (2000). He notes that “[t]he ratification of the Constitution by the states reflects this relatively casual attitude toward punctuation” because many states that incorporated a copy of the Constitution in the official form of ratification varied its punctuation. *Id.* at 258 n.102. Nelson cites as an example the copy of the Constitution in the Pennsylvania form of ratification, which used “different punctuation marks than the Constitution engrossed at the Federal Convention” in roughly thirty-five places. *Id.*

18. For a critique of the consensus narrative and its relationship to the constitutional right of association, see John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. (forthcoming 2010).

right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.”¹⁹

New York and Rhode Island offered slightly different wording, emphasizing that the people assembled for “their” common good rather than “the” common good: “That the people have a right peaceably to assemble together to consult for the common good, or to instruct their Representatives; and that every [person] has a right to petition or apply to the legislature for redress of grievances.”²⁰

On June 8, 1789, James Madison’s proposal to the House favored the possessive pronoun over the definite article: “The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.”²¹

Whether intentional or not, the endorsement of the common good of the people who assemble rather than the common good of the state signaled the possibility that the interests of the people assembled need not be coterminous with the interests of those in power.

The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, “every thing that was not incompatible with the general good ought to be granted,”²² Elbridge Gerry of Massachusetts replied that if Hartley “supposed that the people had a right to consult for the common good” but “could not consult unless they met for the purpose,” he was in fact “contend[ing] for nothing.”²³ In other words, if the right of assembly encompassed only the common good from the perspective of the state, then its use as a means of protest or dissent would be eviscerated.²⁴

On August 19, 1789, the House approved a version of the amendment that retained the reference to “their common good” and also incorporated the rights of speech and press: “The freedom of

19. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 140 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]. This language is substantially similar to declarations in North Carolina and Pennsylvania in 1776 that “the People have a Right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances.” *Id.* at 141.

20. *Id.* at 140.

21. *Id.* at 129.

22. *Id.* at 145 (quoting 1 ANNALS OF CONG. 760 (Joseph Gales ed., 1834)).

23. *Id.* (quoting 1 ANNALS OF CONG. 760-61 (Joseph Gales ed., 1834)).

24. *Cf.* Melvin Rische, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 337 (1965) (“Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.”).

speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.”²⁵

Eleven days later, the Senate defeated a motion to strike the reference to the common good.²⁶ But the following week, the text inexplicably dropped out when the Senate merged language pertaining to religion into the draft amendment: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.”²⁷

B. Assembly and Petition

The striking of the reference to the common good may have been intended to broaden the scope of the assembly clause, but it also introduced a textual ambiguity. Without the prepositional “for their common good” following the reference to assembly, the text now described “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²⁸ This left ambiguous whether the amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition.

In one of the only recent considerations of assembly in the First Amendment, Jason Mazzone argues in favor of the former.²⁹ Mazzone suggests:

25. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143 (internal quotation marks omitted). This version also changed the semicolon after “common good” to a comma.

26. S. Journal, 1st Cong., 70 (Sept. 3, 1789). The following day the Senate adopted similar language: “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.” *Id.* at 70-71 (Sept. 4, 1789) (internal quotation marks omitted).

27. *Id.* at 77 (Sept. 9, 1789). The amendment took its final form on September 24, 1789: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 136 (internal quotation marks omitted).

28. Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639 (2002) (internal quotation marks omitted).

29. *Id.* The only recent article to address the history of free assembly other than Mazzone’s is Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

There are two clues that we should understand assembly and petition to belong together. The first clue is the use of “and to petition,” which contrasts with the use of “or” in the remainder of the First Amendment’s language. The second clue is the use of “right,” in the singular (as in “the right of the people peaceably to assemble, and to petition”), rather than the plural “rights” (as in “the rights of the people peaceably to assemble, and to petition”). The prohibitions on Congress’ power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.³⁰

Mazzone’s interpretation is problematic because the comma preceding the phrase “and to petition” appears to be residual from the earlier text that had described the “right of the people peaceably to assemble and consult for their common good, and to apply to the government for a redress of grievances.”³¹ Whether left in deliberately or inadvertently, it relates back to a distinction between a right to peaceable assembly and a right to petition.³² Moreover, at least some members of the First Congress appeared to have conceived of a broader notion of assembly, as evidenced in an exchange between Theodore Sedgwick of Massachusetts and John Page of Virginia.

30. Mazzone, *supra* note 29, at 712-13 (internal citations omitted). *But see* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 26 (1998) (referring to assembly and petition as separate clauses); WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 32 (2d ed. 1995) (referring to a distinct “‘peaceably to assemble’ clause”); JAMES E. LEAHY, *THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM* 202 (1991) (“The final wording of the First Amendment indicates that the first Congress intended to protect the right of the people to assemble for whatever purposes and at the same time to be assured of a separate right to petition the government if they chose to do so.”).

31. *THE COMPLETE BILL OF RIGHTS*, *supra* note 19, at 143. The earlier version derived in turn from Madison’s draft. *Id.* at 129. Mazzone recognizes that “in Madison’s draft, assembly is separated from petitioning by a semi-colon, perhaps indicating that while the right of assembly is related to the right of petition, assembly is not necessarily limited to formulating petitions.” Mazzone, *supra* note 29, at 715 n.409.

32. Mazzone addresses the comma in a footnote and argues that because it “mirrors the comma” preceding the words “or prohibit the free exercise thereof” in the first half of the First Amendment, “[i]t does not therefore signal a right of petition separate from the right of assembly.” *Id.* at 713 n.392 (internal quotation marks omitted). The argument for textual parallelism does not hold because the free exercise clause explicitly refers back to “religion” (before the comma) with the word “thereof.” A closer parallel—which illustrates Mazzone’s interpretive problem—is the suggestion that the comma separating speech and press connotes that they embody only a singular freedom. My quibbles with Mazzone do not diminish my appreciation for his work. Mazzone is one of the few scholars in recent years to notice the relationship between assembly and association, and his thoughtful article posits a number of ideas with which I am highly sympathetic. *See, e.g., id.* at 646 (arguing that assembly and petition provide “a much firmer constitutional basis for protecting the rights of citizens to come together in collective activities” than “expressive association”).

During the House debates over the language of the Bill of Rights, Sedgwick criticized the proposed right of assembly as redundant in light of the freedom of speech: “If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.”³³

Page responded:

[Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.³⁴

Irving Brant notes that while Page’s allusion to a man without a hat is lost on a contemporary audience, “[t]he mere reference to it was equivalent to half an hour of oratory” before the First Congress.³⁵ Page was referring to the trial of William Penn.³⁶

On August 14, 1670, Penn and other Quakers had attempted to gather for worship at their meeting-house on Gracechurch Street, London, in violation of the 1664 Conventicle Act that forbade any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England.³⁷ Prevented from entering by a company of soldiers, Penn began delivering a sermon to the Quakers assembled in the street. Penn and a fellow Quaker, William Mead, were arrested and brought to trial in a dramatic sequence of events that included a contempt of court charge stemming from their wearing of hats in the courtroom.³⁸ A jury acquitted the two men on the charge

33. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143-44.

34. *Id.* at 144 (quoting 1 ANNALS OF CONG. 760 (Joseph Gales ed., 1834)).

35. IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55 (1965).

36. *Id.* at 54-61.

37. Conventicle Act, 1664, 16 Car. 2, c. 4 (Eng.).

38. BRANT, *supra* note 35, at 57 (quoting Penn’s journal). Penn and Mead were fined for contempt of court for wearing their hats after being ordered by an officer of the court to put them on. *Id.*

that their public worship constituted an unlawful assembly. The case gained renown throughout England and the American colonies.³⁹ According to Brant:

William Penn loomed large in American history, but even if he had never crossed the Atlantic, bringing the Quaker religion with him, Americans would have known about his “tumultuous assembly” and his hat. Few pamphlets of the seventeenth century had more avid readers than the one entitled “The People’s Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves.” Congressman Page had known the story from boyhood, reproduced in Emlyn’s *State Trials* to which his father subscribed in 1730. It was available, both in the *State Trials* and as a pamphlet, to the numerous congressmen who had used the facilities of the City Library of Philadelphia. Madison had an account of it written by Sir John Hawles, a libertarian lawyer who became Solicitor General after the overthrow of the Stuarts in 1688.⁴⁰

Congressman Page’s allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for redress of grievances: Penn’s ordeal had nothing to do with petition; it was an act of religious worship. After Page spoke, the House defeated Sedgwick’s motion to strike assembly from the draft amendment by a “considerable majority.”⁴¹ On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted “the right of the people peaceably to assemble.”⁴²

The text handed down to us thus conveys a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good, thereby implicitly allowing assembly for purposes that might be antithetical to that good (although constraining assembly to peaceable means). Second, it does not limit assembly to the purposes of petitioning the government, which means that the constitutional expression of assembly may take many forms for many

39. In addition to its pronouncement on the right of assembly, the case became an important precedent for the independence of juries. Following their verdict of acquittal, the trial judge had imprisoned the jurors, who were later vindicated in habeas corpus proceedings.

40. BRANT, *supra* note 35, at 55-56 (emphasis omitted).

41. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 145 (quoting 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1834)).

42. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.” *Id.* at 136 (internal quotation marks omitted).

purposes. Neither of these broad interpretations of the right to assembly has been readily acknowledged in legal and political discourse. But the larger vision of assembly can be found in the practices of people who have gathered throughout American history. It is to these practices that I now turn.

III. THE FIRST TEST OF ASSEMBLY: THE DEMOCRATIC-REPUBLICAN SOCIETIES

The nascent freedom of assembly faced an early challenge when the first sustained political dissent in the new republic emerged out of the increasingly partisan divide between Federalists and Republicans. By the summer of 1792, Republican concern over the Federalist administration and its perceived support of the British in their conflict with the French had reached new levels of agitation. The Republican-leaning *National Gazette* began calling for the creation of voluntary “constitutional” and “political” societies to critique the Washington administration.⁴³

The first society was organized in Philadelphia in March of 1793.⁴⁴ Over the next three years, dozens more emerged throughout most of the major cities in the United States.⁴⁵ These “Democratic-Republican” societies consisted largely of farmers and laborers wary of the aristocratic leanings of Hamilton and other Federalists, but they also included lawyers, doctors, publishers, and government employees.⁴⁶ The largest society—the Democratic Society of Pennsylvania—boasted over three hundred members.⁴⁷

The societies “invariably proclaimed the right of citizens to assemble.”⁴⁸ A 1794 resolution from a society in Washington, North Carolina, asserted: “It is the unalienable right of a free and

43. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1536 n.46 (2004). Mazzone also highlights the importance of the Democratic-Republican Societies to early interpretations of assembly and association. Mazzone, *supra* note 29, at 734-42.

44. Philip S. Foner, *The Democratic-Republican Societies: An Introduction, in THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESS, RESOLUTIONS AND TOASTS* 6 (Philip S. Foner ed., 1976).

45. Although the exact number is disputed, there were probably around forty societies. Chesney, *supra* note 43, at 1537 n.52.

46. Foner, *supra* note 44, at 7; EUGENE PERRY LINK, *DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800*, at 71-74 (Octagon Books 1965) (1942); Chesney, *supra* note 43, at 1538 n.54. The term “Democratic-Republican Societies” comes from historians. Chesney, *supra* note 43, at 1527 n.5.

47. Foner, *supra* note 44, at 7.

48. *Id.* at 11.

independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern.”⁴⁹ That same year, Boston’s *Independent Chronicle* declared:

Under a Constitution which expressly provides “*That the people have a right in an orderly and peaceable manner to assemble and consult upon the common good;*” there can be no necessity for an apology to the public for an Association of a number of citizens to promote and cherish the social virtues, the love of their country and a respect for its Laws and Constitutions.⁵⁰

The societies usually met monthly, although more frequently during elections or times of political crisis.⁵¹ According to Philip Foner, a large part of their activities consisted of “creating public discussions; composing, adopting, and issuing circulars, memorials, resolutions, and addresses to the people; and remonstrances to the President and the Congress—all expressing the feelings of the assembled groups on current political issues.”⁵² But in addition to meeting to discuss political issues, the societies also joined in the “extraordinarily diverse array of . . . feasts, festivals, and parades” that unfolded in the streets and public places of American cities.⁵³ Collectively, the activities of the societies “embodied an understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life.”⁵⁴ As Simon Newman’s study of popular celebrations of this era observes, these kinds of gatherings were self-consciously political expressions:

Festive culture required both participants and an audience, and by printing and reprinting accounts of July Fourth celebrations and the like newspapers contributed to a greatly enlarged sense of audience: by the

49. *Id.* (quoting NORTH-CAROLINA GAZETTE (New Bern), Apr. 19, 1794).

50. *Id.* at 25 (quoting INDEPENDENT CHRONICLE (Boston), Jan. 16, 1794). It is unclear what authority the paper is quoting—the italicized text is not from the Constitution.

51. *Id.* at 10. El-Haj notes that “the centrality of large gatherings of people in public spaces as part of the election festivities—to eat, drink, and parade and by implication to affirm their role as participants in the new nation.” El-Haj, *supra* note 29, at 555.

52. Foner, *supra* note 44, at 10.

53. SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC 2 (1997). These rituals were “vital elements of political life” practiced by ordinary Americans in the early republic. *Id.* at 5. While Newman cautions that some participants may have been interested only in “the festive aspects of public occasions and holidays,” he writes that it was “all but impossible for these people, whatever their original motives for taking part, to avoid making public political statements by and through their participation: both their presence and their participation involve some degree of politicization and an expression of political identity and power in a public setting.” *Id.* at 8-9.

54. Chesney, *supra* note 43, at 1539.

end of the 1790s those who participated in these events knew that their actions were quite likely going to be read about and interpreted by citizens far beyond the confines of their own community.⁵⁵

Celebrations of the French Revolution took on an especially partisan character when members and supporters of the emerging Federalist party refused to participate in them.⁵⁶ Without the endorsement of the Federalist government, Republicans “were forced to foster alternative ways of validating celebrations that were often explicitly oppositional.”⁵⁷ In doing so, they characterized their tributes as representing the unified views of the entire community rather than just political elites. Newman writes:

The result of the Democratic Republican stratagem was that members of subordinate groups—including women, the poor, and black Americans, all of whom were excluded from or had strictly circumscribed roles in the white male contests over July Fourth and Washington’s birthday celebrations—found a larger role for themselves in French Revolutionary celebrations than in any of the other rites and festivals of the early American republic.⁵⁸

The relatively egalitarian gestures of these celebrations were not well received by Federalists, who berated the women who participated in them with sarcasm and derision and raised fears about black participation.⁵⁹

Federalists became increasingly agitated with the growing popular appeal of the societies. The pages of the pro-Federalist *Gazette of the United States* repeatedly warned that the societies were fostering disruptive tendencies and instigating rebellion.⁶⁰ And while there was little basis in fact to suggest that the societies were behind the Whiskey Rebellion, the Federalist press was quick to highlight that several members of societies in western Pennsylvania had been actively involved in the insurrection.⁶¹

President Washington came to believe that the widespread public condemnation of the rebellion had created a political opportunity for

55. NEWMAN, *supra* note 53, at 3.

56. *Id.* at 120.

57. *Id.*

58. *Id.* at 122. It is important not to overstate these egalitarian glimpses. The officers of the societies were “virtually without exception men of considerable substance.” STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 458 (1993).

59. NEWMAN, *supra* note 53, at 128-30.

60. Chesney, *supra* note 43, at 1546.

61. *Id.* at 1557-58.

the “annihilation” of the societies.⁶² He had been incensed by their organized opposition to the whiskey tax, writing in a personal letter that while “no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature,” nothing could be “more absurd, more arrogant, or more pernicious to the peace of Society, than for . . . a self created *permanent* body” that would pass judgment on such acts.⁶³ Washington took clear aim at the societies in his annual address to Congress on November 19, 1794, asserting that “associations of men” and “certain self-created societies” had fostered the violent rebellion.⁶⁴ Robert Chesney suggests that “[t]he speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent.”⁶⁵ And Irving Brant observes that “[t]he damning epithet ‘self-created’ indorsed the current notion that ordinary people had no right to come together for political purposes.”⁶⁶

The Federalist-controlled Senate quickly censured the societies in response to Washington’s address. The House, in contrast, began an extended debate about the wording of its response, and assigned James Madison, Theodore Sedgwick, and Thomas Scott to draft a reply. The Federalist Sedgwick, who years earlier had suggested that the freedom of assembly was so “self-evident” and “unalienable” that its inclusion in the constitutional amendments was unnecessary,⁶⁷ now argued in spite of the First Amendment that the societies’ efforts to organize were effectively illegal.⁶⁸ After four days of debate, Madison contended that a House censure would be a “severe punishment” and would have dire consequences for the future of free expression.⁶⁹ The final language in the House response was substantially more muted than that issued by the Senate.

Following Washington’s address and the congressional response, “[s]pirited debates concerning the legitimacy of the societies were

62. *Id.* at 1559 (quoting Letter from President George Washington to Governor Henry Lee (Aug. 26, 1794), in *THE WRITINGS OF GEORGE WASHINGTON* 475 (John C. Fitzpatrick ed., 1940)).

63. *Id.* at 1526 (quoting Letter from President George Washington to Burges Ball (Sept. 25, 1794), in *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 62, at 506).

64. 4 *ANNALS OF CONG.* 788 (1794) (statement of President George Washington).

65. Chesney, *supra* note 43, at 1561.

66. IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800*, 417 (1950).

67. *THE COMPLETE BILL OF RIGHTS*, *supra* note 19, at 143-44.

68. Chesney, *supra* note 43, at 1562-63.

69. 4 *ANNALS OF CONG.* 934 (1794) (statement of Rep. Madison).

conducted in every community where a society existed.”⁷⁰ Due in part to Washington’s wide popularity, public opinion turned the corner against the societies. Many of them folded completely within a year of the President’s speech, and by the end of the decade, all had been driven out of existence.⁷¹ Yet despite their relatively short duration, the societies’ influence was not inconsequential. According to Foner, “As a center of Republican agitation and propaganda . . . the societies did much to forge the sword that defeated Federalism and put Jefferson in the presidency.”⁷² They did so through public and political activities, physical and communal gatherings that displayed their enthusiasm and sought to sway public opinion. But as significant as these first assertions of assembly were the heavy handed political attacks against them. The vigorous resistance to the claims of the people assembled from those in power demonstrated the precarious nature of dissenting groups in the new republic.

IV. ASSEMBLY IN THE ANTEBELLUM ERA

In spite of the government’s response to the Democratic-Republican societies, the idea that the people could assemble apart from the sanction of the state continued to take hold in early American political life. Benjamin Oliver’s 1832 treatise, *The Rights of an American Citizen*, called the right of assembly “one of the strongest safeguards, against any usurpation or tyrannical abuse of power, so long as the people collectively have sufficient discernment to perceive what is best for the public interest, and *individually* have independence enough, to express an opinion in opposition to a popular but designing leader.”⁷³ Writing in 1838, the state theorist Francis Lieber described “those many extra-constitutional, not unconstitutional, meetings, in which the citizens either unite their scattered means for the obtaining of some common end, social in general, or political in particular, or express their opinion in definite resolutions upon some important

70. Foner, *supra* note 44, at 33.

71. Chesney, *supra* note 43, at 1528.

72. Foner, *supra* note 44, at 40.

73. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 187 (1832). Oliver limited his conception of assembly to discussions of “public measures.” *Id.* at 195. His lukewarm description warned that assemblies “called on the most unexceptionable business” to serve “chiefly as occasions for haranguing the people, and exciting their passions by loud and florid declamation, delivered with the regulated and precise gesture of the academy, and with all the generous and glowing ardor of holiday patriotism” but are nevertheless “a great improvement on the affrays, tumults, riots and public disturbances, which in many countries invariably attend numerous and irregular assemblies of the people.” *Id.*

point before the people.”⁷⁴ These “public meetings” were undertaken for a variety of purposes:

[T]hey are of great importance in order to direct public attention to subjects of magnitude, to test the opinion of the community, to inform persons at a distance, representatives or the administration, for instance, of the state of public opinion on certain measures, whether yet depending or adopted; to resolve upon and adopt petitions; to encourage individuals or bodies of men in arduous undertakings requiring the moral support of well-expressed public approbation; to effect a union with others, striving for the same ends; to disseminate knowledge by way of reports of committees; to form societies for charitable purposes or the melioration of laws or institutions; to sanction by the spontaneous expression of the opinion of the community measures not strictly agreeing with the letter of the law, but enforced by necessity; to call upon the services of individuals who otherwise would not feel warranted to appear before the public and invite its attention, or feel authorized to interfere with a subject not strictly lying within their proper sphere of action; to concert upon more or less extensive measures of public utility, and whatever else their object may be.⁷⁵

A generation later, John Alexander Jameson referred to “wholly unofficial” gatherings and “spontaneous assemblages” that were protected by the right of peaceable assembly, a “common and most invaluable provision of our constitutions, State and Federal.”⁷⁶ These assemblies were “at once the effects and the causes of social life and activity, doing for the state what the waves do for the sea: they prevent stagnation, the precursor of decay and death.”⁷⁷ They were “public opinion in the making—public opinion fit to be the basis of political action, because sound and wise, and not a mere echo of party cries and platforms.”⁷⁸

The significance of free assembly to public opinion was not lost on policymakers in southern states, who routinely prohibited its exercise among slaves and free blacks. A 1792 Georgia law restricted

74. 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS: DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW* 295 (2d ed. 1881).

75. *Id.* at 296. Lieber refers to “public meetings” at 471.

76. JOHN ALEXANDER JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING* 4-5, 104 (4th ed. 1887). Jameson also refers to “spontaneous conventions” and “spontaneous assemblages.” *Id.* at 4.

77. *Id.*

78. *Id.*

slaves from assembling “on pretense of feasting.”⁷⁹ In South Carolina, an 1800 law forbade “slaves, free negroes, mulattoes, and mestizoes” from assembling for “mental instruction or religious worship.”⁸⁰ An 1804 Virginia statute made any meeting of slaves at night an unlawful assembly.⁸¹ In 1831, the Virginia Legislature declared “[a]ll meetings of free Negroes or mulattoes at any school house, church, meeting house or other place for teaching them reading or writing, either in the day or the night” to be an unlawful assembly.⁸²

The restrictions on assembly intensified following Nat Turner’s 1831 rebellion in Southampton County, Virginia, which resulted in the deaths of fifty-seven white men, women, and children. Turner’s insurrection sent Virginia and other southern states into a panic.⁸³ Virginia Governor John Floyd made the rebellion the central theme of his December 5, 1831, address to the Legislature.⁸⁴ Floyd thought that black preachers were behind a broader conspiracy for insurrection and had acquired “great ascendancy over the minds of their fellows.”⁸⁵ He argued that these preachers had to be silenced “because, full of ignorance, they were incapable of inculcating anything but notions of the wildest superstition, thus preparing fit instruments in the hands of crafty agitators, to destroy the public tranquility.”⁸⁶ In response, the Legislature strengthened Virginia’s black code by imposing additional restrictions on assembly for religious worship.⁸⁷

79. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (3d ed. 1853).

80. *Id.* (emphasis omitted).

81. JUNE PURCELL GUILD, *BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM EARLIEST TIMES TO THE PRESENT* 71 (1936).

82. *Id.* at 175-76 (citing *VIRGINIA LAWS* 1831, ch. XXXIX).

83. *See generally* John W. Cromwell, *The Aftermath of Nat Turner’s Insurrection*, 5 J. NEGRO HIST. 208 (1920).

84. *Id.* at 218, 223.

85. *Id.* at 218.

86. *Id.* at 219 (quoting *The Journal of the House of Delegates* 9, 10 (1831)).

87. *Id.* at 230; *see* GUILD, *supra* note 81, at 106-07 (“[N]o slave, free Negro or mulatto shall preach, or hold any meeting for religious purposes either day or night.” (internal quotation marks omitted)). In 1848, chapter 120 of the Criminal Code decreed: “It is an unlawful assembly of slaves, free Negroes or mulattoes for the purpose of religious worship when such worship is conducted by a slave, free Negro, or mulatto, and every such assembly for the purpose of instruction in reading and writing, by whomsoever conducted, and every such assembly in the night time, under whatsoever pretext.” *Id.* at 178-79. The law also stated that “[a]ny white person assembly with slaves or free Negroes for purpose of instructing them to read or write, or associating with them in any unlawful assembly, shall be confined in jail not exceeding six months and fined not exceeding \$100.00.” *Id.* at 179.

Concern over Turner's rebellion also spawned additional restrictions on the assembly of slaves and free blacks in Maryland, Tennessee, Georgia, North Carolina, and Alabama.⁸⁸ By 1835, "most southern states had outlawed the right of assembly and organization by free blacks, prohibited them from holding church services without a white clergyman present, required their adherence to slave curfews, and minimized their contact with slaves."⁸⁹ In 1836, Theodore Dwight Weld aptly referred to the oppressive restrictions on blacks as "the right of peaceably assembling" violently wrested."⁹⁰

James Smith's slave narrative highlights the importance of assembly for religious worship and the felt impact of its loss:

The way in which we worshiped is almost indescribable. The singing was accompanied by a certain ecstasy of motion, clapping of hands, tossing of heads, which would continue without cessation about half an hour; one would lead off in a kind of recitative style, others joining in the chorus. The old house partook of the ecstasy; it rang with their jubilant shouts, and shook in all its joints. . . . When Nat. Turner's insurrection broke out, the colored people were forbidden to hold meetings among themselves.⁹¹

The collective restrictions on assembly did not simply silence political dissent in a narrow sense: they were an assault on an entire way of life, suppressing worship, education, and community among slave and free African Americans.⁹²

While southern states increased their efforts to suppress the freedom of assembly for African Americans, abolitionists in the North expanded their reliance on the constitutional right to spread their message. And because many abolitionists were women, freedom of assembly was "indelibly linked with the woman's rights movement

88. Cromwell, *supra* note 83, at 231-33.

89. 1 C. PETER RIPLEY, *THE BLACK ABOLITIONIST PAPERS* 443 n.9 (1985).

90. Theodore Dwight Weld, *The Power of Congress over Slavery in the District of Columbia* (1838), reprinted in JACOBUS TENBROEK, *EQUAL UNDER LAW* 271 (Collier Books 1965) (1951). Jacobus tenBroek has described Weld's tract as "a restatement and synthesis of abolitionist constitutional theory as of that time." *Id.* at 243 (emphasis omitted); see also HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965). Akhil Amar writes that the right of assembly for religious worship was "a core right that southern states had violated." AMAR, *supra* note 30, at 245.

91. NAT TURNER 74 (Eric Foner ed., 1971) (quoting JAMES L. SMITH, *AUTOBIOGRAPHY OF JAMES L. SMITH* 27-30 (1881)).

92. William Goodell's 1853 book, *The American Slave Code*, observed that "[r]eligious liberty is the precursor of civil and political liberty and enfranchisement." GOODSELL, *supra* note 79, at 328.

from its genesis in the abolition movement.⁹³ Female abolitionists and suffragists organized their efforts around a particular form of assembly: the convention. The turn to the convention was not accidental. Between 1830 and 1860, official conventions accompanied revisions to constitutions in almost every state.⁹⁴ The focus of these official conventions on rights and freedoms provided a natural springboard for “spontaneous conventions” to criticize the blatant racial and gender inequalities perpetuated by the state constitutions.⁹⁵

Women held antislavery conventions in New York in 1837 and in Philadelphia in 1838 and 1839.⁹⁶ Two years after the 1848 Woman’s Rights Convention in Seneca Falls, New York, and less than a month before the official convention to revise the Ohio Constitution, a group of women assembled in Salem, Ohio, to call for equal rights to all people ““without distinction of sex or color.””⁹⁷ As Nancy Isenberg describes:

[T]he Salem forum stood apart from the American political tradition. Activists used the meeting to critique politics as usual. Women occupied the floor and debated resolutions and gave speeches, while the men sat quietly in the gallery. Through a poignant reversal of gender roles, the women engaged in constitutional deliberation, and the men were relegated to the sidelines of political action.⁹⁸

In other words, the very form of the convention conveyed the suffragist message of equality and disruption of the existing order.

Women’s conventions often met with harsh resistance. When Angelina and Sarah Grimké toured New England on a campaign for the American Anti Slavery Society in 1837, they were rebuked for lecturing before “promiscuous audiences.”⁹⁹ The following year, Philadelphia newspapers helped inspire a riotous disruption of the Convention of American Women Against Slavery that ended in the burning of Pennsylvania Hall.¹⁰⁰ The participants of the 1850 Salem

93. LINDA J. LUMSDEN, *RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY*, at xxiii (1997). Lumsden has suggested that “virtually the entire suffrage story can be told through the prism of the right of assembly.” *Id.* at 144.

94. NANCY ISENBERG, *SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA* 16 (1998).

95. *Id.*

96. *THE ABOLITIONIST SISTERHOOD: WOMEN’S POLITICAL CULTURE IN ANTEBELLUM AMERICA*, at ix (Jean Fagan Yellin & John C. VanHorne eds., 1994).

97. ISENBERG, *supra* note 94, at 15 (quoting “*To the Women of Ohio*,” *ANTI-SLAVERY BUGLE*, Mar. 30, 1850, at 114).

98. *Id.*

99. *Id.* at 46 (internal quotation marks omitted).

100. *Id.*

convention were denied the use of the local school and church.¹⁰¹ An 1853 women's rights convention at the Broadway Tabernacle in New York degenerated into a shouting match when hecklers interrupted the speakers. Rather than criticize the disruptive crowd, the *New York Herald* sardonically characterized the gathering as the "Women's Wrong Convention" and quipped that "[t]he assemblage of rampant women which convened at the Tabernacle yesterday was an interesting phase in the comic history of the nineteenth century."¹⁰² The following year, the *Sunday Times* published an editorial that used racial and sexual slurs to describe the national women's rights convention in Philadelphia.¹⁰³ Isenberg intimates that proponents of these attacks believed that "women's unchecked freedom of assembly mocked all the restraints of civilized society."¹⁰⁴

A striking example of the importance of free assembly to politically unpopular causes in the antebellum area occurred in 1835, when the Boston Female Anti-Slavery Society invited William Lloyd Garrison and the British abolitionist George Thompson to speak at its annual meeting. Antiabolitionists reviled Thompson, calling him an "artful, cowardly fellow" who "always throws himself under the protection of the female portion of his audience when in danger."¹⁰⁵ The Society originally scheduled its meeting to take place in Congress Hall, but the lessee rescinded his offer after concluding that "not the rabble" but "the most influential and respectable men in the community" intended to "make trouble" if Thompson spoke.¹⁰⁶ The Society responded to the lessee's rescission with a letter to the editor of the *Boston Courier* asserting:

This association does firmly and respectfully declare, that it is our right, and we will maintain it in Christian meekness, but with Christian constancy, to hold meetings, and to employ such lecturers as we judge best calculated to advance the holy cause of human rights; even though such lecturers should chance to be foreigners. It comes with an ill grace from those who boast an English ancestry, to object to our choice on this occasion: still less should the sons of the pilgrim fathers invoke the spirit of outrageous violence on the daughters of the noble female band

101. LUMSDEN, *supra* note 93, at xxvi.

102. *Id.* at xxvii (internal quotation marks omitted).

103. ISENBURG, *supra* note 94, at 46.

104. *Id.*

105. REPORT OF THE BOSTON FEMALE ANTI SLAVERY SOCIETY 12 (1836) (quoting BOSTON COM. GAZETTE).

106. *Id.* at 11.

who shared their conflict with public opinion;—their struggle with difficulty and danger. The cause of freedom is the same in all ages.

. . . We must meet together, to strengthen ourselves to discharge our duty as the mothers of the next generation—as the wives and sisters of this.¹⁰⁷

The editor of the *Boston Courier* appended his own comments to the Society's letter:

When before, in this city, or in any other, did a benevolent association of ladies, publicly invite an itinerant vagabond—a hired foreign incendiary—to insult their countrymen and fellow-citizens, and to kindle the flames of discord between different members of the Union? Would not our friends of the Female Anti Slavery Society do well to cast the beams out of their own eyes, before they waste their pathos upon a justly indignant public?¹⁰⁸

The Society rescheduled its meeting for October 21, 1835, a week after its initial meeting date. The meeting would now take place at the offices of Garrison's *The Liberator*. Anti-abolitionists circulated a handbill that was duly printed in the *Boston Commercial Gazette*:

That infamous foreign scoundrel THOMPSON, will hold forth *this afternoon*, at the Liberator Office, No. 46 Washington street. The present is a fair opportunity for the friends of the Union to *snake Thompson out!* It will be a contest between the abolitionists and the friends of the Union. A purse of \$100 has been raised by a number of patriotic citizens to reward the individual who shall first lay violent hands on Thompson, so that he may be brought to the tar kettle before dark. Friends of the Union, be vigilant!¹⁰⁹

The Society went forward with its meeting in spite of the threat. A large crowd gathered and soon turned riotous. Unable to find Thompson, some of them called for Garrison's lynching. Garrison fled through a back entrance and barely escaped with his life.¹¹⁰

Reflecting on the harrowing experience in the November 7, 1835 edition of *The Liberator*, Garrison lambasted the instigators of the riot in an editorial entitled *Triumph of Mobocracy in Boston*:

Yes, to accommodate their selfishness, they declared that the liberty of speech, and the right to assemble in an associated capacity peaceably together, should be unlawfully and forcibly taken away from an

107. *Id.* at 24-25 (quoting BOSTON COURIER).

108. *Id.* at 27.

109. *Id.* at 27-28 (quoting BOSTON COM. GAZETTE (internal quotation marks omitted)).

110. *See generally* JOHN L. THOMAS, *THE LIBERATOR: WILLIAM LLOYD GARRISON* (1963).

estimable portion of the community, by the officers of our city—the humble servants of the people! Benedict Arnold’s treachery to the cause of liberty and his bleeding country was no worse than this.¹¹¹

The Boston mob “became a cause célèbre among abolitionists who defended their right to free speech and assembly.”¹¹² But fifteen years later, when Thompson returned to Boston to address the Massachusetts Anti-Slavery Society in Faneuil Hall, he was again driven away by a mob.¹¹³ Frederick Douglass referred to the latter incident as the “mobocratic violence” that had “disgraced the city of Boston.”¹¹⁴ In an 1850 address delivered in Rochester, New York, Douglass decried “[t]hese violent demonstrations, these outrageous invasions of human rights” and argued:

It is a significant fact, that while meetings for almost any purpose under heaven may be held unmolested in the city of Boston, that in the same city, a meeting cannot be peaceably held for the purpose of preaching the doctrine of the American Declaration of Independence, “that all men are created equal.”¹¹⁵

As Akhil Amar has observed, the nineteenth century movements of the disenfranchised brought “a different lived experience” to the words of the First Amendment’s assembly clause.¹¹⁶ They were political movements, to be sure, but they embodied and symbolized even larger societal and cultural challenges. They met with slanderous media coverage, blatant racial and sexual slurs, and even outright violence, visceral reminders of the importance of protecting free assembly from those who would seek to deny it.

V. ASSEMBLY MISCONSTRUED

Courts and commentators lost sight of the lived history of assembly, due in part to a judicial misreading of the text of the First Amendment’s assembly clause. The interpretive problem began in the 1876 decision, *United States v. Cruikshank*.¹¹⁷ The primary legal

111. WILLIAM LLOYD GARRISON, SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON 377 (1852).

112. 3 THE BLACK ABOLITIONIST PAPERS 166 n.17 (C. Peter Ripley ed., 1991).

113. FREDERICK DOUGLASS SERIES ONE: SPEECHES, DEBATES AND INTERVIEWS, in 2 THE FREDERICK DOUGLASS PAPERS, 1847-54, at 268 n.14 (John W. Blassingame ed., 1982).

114. *Id.* at 267.

115. *Id.* at 268-67.

116. AMAR, *supra* note 30, at 246.

117. 92 U.S. 542 (1875). *Cruikshank* unfolded in the aftermath of the 1873 Colfax Massacre in Grant Parish, Louisiana. See CHARLES LANE, THE DAY FREEDOM DIED: THE

principle articulated in *Cruikshank* was that private citizens could not be prosecuted for denying the First Amendment's freedom of assembly to other citizens.¹¹⁸ But *Cruikshank*'s dictum proved more significant than its holding. Reiterating that the First Amendment established a narrow right enforceable only against the federal government, Chief Justice Waite wrote:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.¹¹⁹

In context, it is likely that Waite was merely listing petition as an *example* of the kind of assembly protected against infringement by the federal government. The Constitution also guaranteed assembly "for any thing else connected with the powers or the duties of the national government," which was as broadly as the right of assembly could be applied prior to its incorporation through the Fourteenth Amendment.¹²⁰ But Waite's reference to "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances" came close to the text of the First Amendment. Read in isolation from his qualifying language, the dictum could be erroneously construed as limiting assembly to the purpose of petitioning Congress for a redress of grievances.¹²¹

Ten years after *Cruikshank*, Justice William Woods made precisely this interpretive mistake in *Presser v. Illinois*.¹²² Woods concluded that *Cruikshank* had announced that the First Amendment protected the right to assemble only if "the purpose of the assembly was to petition the government for a redress of grievances."¹²³ *Presser*

COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (chronicling the horrific events of the massacre).

118. The holding is consistent with a contemporary understanding of most of the provisions of the Bill of Rights.

119. *Cruikshank*, 92 U.S. at 552.

120. *Id.* at 542. It is, of course, possible to read the text so that the additional clause modifies "petitioning" rather than "assemble," as if Waite were referring to "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for any thing else connected with the powers or the duties of the national government" rather than "[t]he right of the people peaceably to assemble for any thing else connected with the powers or the duties of the national government." Either way, the sentence cannot be read as limiting assembly to petitioning Congress for a redress of grievances.

121. *Id.*

122. 116 U.S. 252 (1886).

123. *Id.* at 267.

is the only time that the Supreme Court has expressly limited the right of assembly in this way.¹²⁴ But Woods's interpretation has persisted in decades of scholarship.¹²⁵

VI. ASSEMBLY IN THE PROGRESSIVE ERA

In spite of the Court's misconstrual of assembly, the people claiming the right to assemble insisted on a broader purpose and meaning. This thicker sense of assembly is most evident during the Progressive Era in three emerging political movements: a revitalized women's movement, a surge in political activity among African Americans, and an increasingly agitated labor movement. In the early decades of the twentieth century, these groups turned to the freedom of assembly as an important guarantee of their ability to dissent and advocate for change. In doing so, they insisted that their public gatherings were no less political than the institutional structures they criticized. They brought together people in physical forms that both displayed and symbolized a unified purpose. Their histories are

124. Justice Fuller made a passing reference to "the right of the people to assemble and petition the government for a redress of grievances" in *United States ex rel Turner v. Williams*, 194 U.S. 279, 292 (1904). The Court has since contradicted the view that assembly and petition comprise one right. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to "the rights of the people peaceably to assemble and to petition for redress of grievances" (emphasis added)); cf. *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (The First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances.").

125. See, e.g., Note, *Freedom of Association: Constitutional Right or Judicial Technique*, 46 VA. L. REV. 730, 736 (1960) ("[Cruikshank was the] first case to construe . . . freedom of assembly to mean the right to assemble *in order to* petition the government."); CHARLES E. RICE, FREEDOM OF ASSOCIATION 109 (1962) (citing *Cruikshank* for the view that the language in the First Amendment "constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition"); M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 152 (2d ed. 1981) ("It is important to note that the *Cruikshank* dictum *narrowed* the federal right from that of 'the right to peaceably assemble and petition for redress of grievances' to 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government.'" (emphasis added)); EDWARD S. CORWIN, HAROLD W. CHASE & CRAIG R. DUCAT, EDWIN S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 332 (14th ed. 1978) (citing *Cruikshank* for the view that "historically, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: 'the right of the people peaceably to assemble' *in order to* 'petition the government'"). *Presser* has also been cited for the view that the freedom of assembly is limited to the purpose of petition. See Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91 (1987) (citing *Presser* for the view that the freedom of assembly is "the exercise by groups of the right to petition for redress of grievances").

storied and complex, and even the most elementary treatment of them is beyond the scope of this Article. Yet we can nevertheless glean insights into the importance of assembly through snapshots of each.

A. *Suffragists*

The new women's movement began at the end of the nineteenth century, when "[h]undreds of thousands of women joined the thousands of clubs united under the auspices of the General Federation of Women's Clubs and the National Association of Colored Women."¹²⁶ According to Linda Lumsden, these clubs "served as training grounds for the activist, articulate reformers who steered the suffrage movement in the 1910s."¹²⁷ In 1908, various women's clubs began holding "open-air" campaigns to draw attention to their interests:

The success of the open-air campaigns helped prompt the organization of the first American suffrage parades, a more visible and assertive form of assembly. The spectacle of women marching shoulder to shoulder achieved many ends. One was that because of the press coverage parades attracted, suffrage became a nationwide issue. Women also acquired organizational and executive skills in the course of orchestrating extravaganzas featuring tens of thousands of marchers, floats, and bands. Better yet, parades showcased women's skills in those areas and emphasized their numbers and determination. Finally, and most crucially, marching together imbued women with a sense of solidarity that lifted the movement to the status of a crusade for many participants.¹²⁸

As is often the case, the growth of local assemblies corresponded to the growth of the larger institutional structures that operated on a national level.¹²⁹ The National American Woman Suffrage Association grew from 45,000 in 1907, to 100,000 in 1915, to almost two million in 1917.¹³⁰ But the core of assembly in the women's movement came through networking and personal connections at the local level. Women's assemblies were not confined to traditional deliberative meetings but included banner meetings, balls, swimming races, potato sack races, baby shows, sharing of meals, pageants, and teatimes.¹³¹

126. LUMSDEN, *supra* note 93, at 3.

127. *Id.* at 3.

128. *Id.* at 146.

129. *See generally* THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003) (discussing the relationship between grassroots movements and larger institutional structures).

130. LUMSDEN, *supra* note 93, at 3.

131. *Id.* at 17-19.

Just as the Democratic-Republican Societies had earlier refused to limit their gatherings to formal meetings, the women's movement capitalized on an expanded conception of public political life built upon an array of physical gatherings. These gatherings appealed not only to reason but also to the emotions of those before whom they assembled. As Harriot Stanton Blatch affirmed in 1912, men and women "are moved by seeing marching groups of people and by hearing music far more than by listening to the most careful argument."¹³²

B. Civil Rights Activism

A second manifestation of the right of assembly during the Progressive Era involved political organizing among African Americans. These efforts repeatedly met with mob violence by white citizens largely unrestrained by state and federal authorities. The first decade of the twentieth century saw "savage race riots" around the country, including significant violence in Atlanta in 1906 and Springfield, Illinois, in 1908.¹³³ Stirred by observing first-hand the carnage resulting from these riots, Mary White Ovington joined Jane Addams, William Lloyd Garrison, John Dewey, W.E.B. Du Bois and other prominent Americans in calling for a conference to discuss "present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty."¹³⁴ The first National Negro Conference that ensued led to the formation of the National Association for the Advancement of Colored People (NAACP).¹³⁵

Based partly on the proximity between labor unrest and racial violence, government officials linked the increasing political activity among African Americans to the influence of communism, a connection that foreshadowed even greater problems for civil liberties a generation later. Theodore Kornweibel reports that J. Edgar Hoover "fixated on the belief that racial militants were seeking to break down social barriers separating blacks from whites, and that they were

132. Quoted in Jennifer L. Borda, *The Woman Suffrage Parades of 1910-1913: Possibilities and Limitations of an Early Feminist Rhetorical Strategy*, 66 W. J. COMM. 25 (2002) (internal quotation marks omitted).

133. John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 119 (1963).

134. LANGSTON HUGHES, *FIGHT FOR FREEDOM: THE STORY OF THE NAACP* 22 (1962) (quoting Oswald Garrison Villard's "Call for a Conference").

135. GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969*, at 13-15 (2005).

inspired by communists or were the pawns of communists.”¹³⁶ In a report to Congress, Attorney General A. Mitchell Palmer described “‘a well-concerted movement among a certain class of Negro leaders of thought and action to constitute themselves a determined and persistent source of radical opposition to the Government’ . . . who proclaimed ‘an outspoken advocacy of the Bolsheviki or Soviet doctrines.’”¹³⁷

Armed with these suspicions of communist influences, agents from the Bureau of Investigation carefully monitored and constrained the efforts of African Americans to organize through blatant violations of the right of assembly. When A. Philip Randolph and Chandler Owen, the editors of the black publication *The Messenger*, arrived to address a large crowd in Cleveland on August 4, 1918, two Bureau agents confiscated their publications and took them into custody for interrogation.¹³⁸ Undercover informants and the first black agents of the Bureau infiltrated local gatherings of the NAACP and other African-American organizations.¹³⁹ An agent attending a Du Bois lecture in Toledo reported that the audience consisted of “‘mostly radicals.’”¹⁴⁰ In Boston, an agent reported that Du Bois’ editorials were urging that supporters “‘incite riots and cause bloodshed.’”¹⁴¹ The Bureau also kept tabs on whites associated with the NAACP, including Jane Addams and Anita Whitney.¹⁴²

C. Organized Labor

The most frequent articulations of the right of assembly during the Progressive Era came from an increasingly vocal labor movement. Widespread labor unrest had emerged at the end of the nineteenth century with the increase in industrialization and immigration.¹⁴³ The “Great Strike” of 1877 had involved over 100,000 workers throughout the country and brought to a halt most of the nation’s transportation system.¹⁴⁴ By the early 1880s, the Knights of Labor had organized

136. THEODORE KORNWEIBEL, JR., “SEEING RED”: FEDERAL CAMPAIGNS AGAINST BLACK MILITANCY, 1919-1925 xii (1998).

137. *Id.* at xv.

138. *Id.* at 77.

139. *Id.* at 62, 102.

140. *Id.* at 64-66.

141. *Id.* at 65 (internal quotation marks omitted). According to Kornweibel, this was an “outrageously exaggerated charge.” *Id.*

142. *Id.*

143. Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56, 58 (1980).

144. PHILIP S. FONER, *THE GREAT LABOR UPRISING OF 1877*, at 8, 10, 27 (1977).

hundreds of thousands of workers.¹⁴⁵ The Haymarket Riot of 1886 and the Pullman Strike of 1894 sandwiched “almost a decade of labor unrest punctuated by episodes of spectacular violence” which included “the strike of the Homestead Steel workers against the Carnegie Corporation, the miners’ strikes in the coal mining regions of the East and hardrock states in the West, a longshoremen’s strike in New Orleans that united black and white workers, and numerous railroad strikes.”¹⁴⁶ But these labor efforts remained largely unorganized, and direct appeals to the freedom of assembly by the labor movement did not begin in earnest until the formation of the Industrial Workers of the World (IWW) in 1905.

The IWW (nicknamed the “Wobblies”) formed out of a conglomeration of labor interests dissatisfied with the reform efforts of the American Federation of Labor. Led by William Haywood, Daniel De Leon, and Eugene Debs, the Wobblies employed provocative words and actions. The preamble to their Constitution declared that “the working class and the employing class have nothing in common,” and the IWW advocated this message in gatherings and demonstrations throughout the country.¹⁴⁷

The freedom of assembly figured prominently in the IWW’s appeals to constitutional protections during organized strikes in major industries including steel, textiles, rubber, and automobiles from 1909 to 1913. In 1910, Wobblies highlighted the denial of the right to assemble at a demonstration in Spokane, Washington.¹⁴⁸ When members of the IWW invoked the rights of speech and assembly during the Paterson Silk Strike of 1913, Paterson Mayor H.G. McBride responded that these protections extended to the striking silk workers but not to the Wobblies:

I cannot stand for seeing Paterson flooded with persons who have no interest in Paterson, who can only give us a bad name, who can despoil

145. Louis Adamic reported that by May of 1886, the Knights of Labor had surpassed one million members. LOUIS ADAMIC, *DYNAMITE: THE STORY OF CLASS VIOLENCE IN AMERICA* 86 (1931). Despite these numbers, the Knights of Labor were “anything but effectual” throughout their history. *Id.* at 58-59, 87.

146. Richard Schneirov, Shelton Stromquist & Nick Salvatore, *Introduction to THE PULLMAN STRIKE AND THE CRISIS OF THE 1890S*, at 4 (Shelton Stromquist & Nick Salvatore eds., 1999).

147. *Fiske v. Kansas*, 274 U.S. 380, 383 (1927) (quoting *INDUSTRIAL WORKERS OF THE WORLD CONST.* pmb., available at <http://www.iww.org/culture/official/preamble.shtml>) (internal quotation marks omitted).

148. David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1076 (1994) (citing *A Call to Action*, *INDUSTRIAL WORKER* (Seattle), Feb. 26, 1910, at 2).

in a few hours a good name we have been years in building up, and I propose to continue my policy of locking these outside agitators up on sight.¹⁴⁹

True to his word, Mayor McBride arrested a number of IWW leaders, including Elizabeth Gurley Flynn.¹⁵⁰ Later that year, the IWW publication *Solidarity* protested that “America today has abandoned her heroic traditions of the Revolution and the War of 1812 and has turned to hoodlumism and a denial of free speech and assembly to a large and growing body of citizens.”¹⁵¹

VII. THE INTER-WAR YEARS AND THE RISE OF THE FREEDOM OF ASSEMBLY

The growing fear of communism facilitated gross incursions on the freedom of assembly across progressive movements. As Irwin Marcus has observed: “Unrest associated with the assertiveness of women, African Americans, and immigrant workers could be ascribed to the influence of the Communists and inoculating Americans with a vaccine of 100 percent Americanism was offered as a cure for national problems.”¹⁵² The rising Americanism was on the verge of claiming the freedom of assembly as one of its casualties. On the eve of America’s entry into the First World War, President Wilson predicted to *New York World* editor Frank Cobb that “the Constitution would not survive” the war and “free speech and the right of assembly would go.”¹⁵³ Seven months later, Wilson’s words seemed ominously prescient when the Bolshevik Revolution in Russia triggered the First Red Scare. Over the next few years, the freedom of assembly was constrained by shortsighted legislation like the Espionage Act of 1917 (and its 1918 amendments) and the Immigration Act of 1918, and the Justice Department’s infamous Palmer Raids in 1920, which “effectively torpedoed most notions of freedom of expression and freedom of

149. *Paterson Checks Weavers’ Strike*, N.Y. TIMES, Feb. 27, 1927, at 22.

150. *Id.*

151. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 84-85 (1997) (quoting *Heroic Contrasts*, SOLIDARITY, July 26, 1913, at 2 (internal quotation marks omitted)).

152. Irwin M. Marcus, *The Johnstown Steel Strike of 1919: The Struggle for Unionism and Civil Liberties*, 63 PENN. HIST. 96, 100 (1996). A variant of these views resurfaced during the “liberal consensus” of mid-twentieth century pluralism, just as the Court first recognized a constitutional right of association. See Inazu, *supra* note 18.

153. JOHN L. HEATON, COBB OF “THE WORLD:” A LEADER IN LIBERALISM 269-70 (1924) (internal quotation marks omitted). There has been some debate as to when or even whether the conversation occurred. See Jerold S. Auerbach, *Woodrow Wilson’s “Prediction” to Frank Cobb: Words Historians Should Doubt Ever Got Spoken*, 54 J. AM. HIST. 608 (1967); Arthur S. Link, *That Cobb Interview*, 72 J. AM. HIST. 7 (1985).

association that survived the war fought to make the world safe for democracy.”¹⁵⁴

A. *A New Conception of the First Amendment*

Despite the Red Scare, and probably because of some of the flagrant abuses of civil liberties that occurred during it, libertarian interpretations of the First Amendment that had surfaced prior to the First World War began to take shape shortly into the inter-war period.¹⁵⁵ Meanwhile, Samuel Gompers repeatedly invoked the freedoms of speech and assembly in his battle against labor injunctions.¹⁵⁶

The growing importance of assembly in political and legal discourse during the 1920s is strikingly evident in Justice Brandeis’s famous opinion in *Whitney v. California*.¹⁵⁷ Anita Whitney’s appeal stemmed from her conviction under California’s Criminal Syndicalism Act for having served as a delegate to the 1919 organizing convention

154. AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 57 (1995).

155. Harvard law professor Zechariah Chafee, Jr., led the doctrinal synthesis with his 1919 article “Freedom of Speech in War Time” and his book *Freedom of Speech in War Time*, DUNSTER HOUSE PAPERS, July 1917, at 1; ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920)); see also John Wertheimer, *Freedom of Speech: Zechariah Chafee and Free-Speech History*, 22 REVS. AM. HIST. 365, 374 (1994). Although Chafee’s scholarship was shaky, it “provided intellectual cover for Justices Holmes and Brandeis when they began to dissent in First Amendment cases in the fall of 1919.” RABBAN, *supra* note 151, at 7. On the problems with Chafee’s scholarship, see Wertheimer, *supra* at 374-75 (noting that Chafee’s “record as a scholar rightly gives us pause”). Wertheimer also notes that Chafee’s advocacy was not without personal risk: “A group of conservative Harvard Law School alumni, with behind-the-scenes help from J. Edgar Hoover and the Justice Department, launched a campaign to have Chafee fired from Harvard on the grounds that his free-speech writings rendered him unfit to continue teaching there.” *Id.* at 368.

156. *Gompers Fights Sedition Bill*, N.Y. TIMES, Jan. 19, 1920, at 15 (Sterling-Graham sedition bill “can be used to kill free speech and free assembly”); *Labor Will Fight for Every Right, Gompers Asserts*, N.Y. TIMES, June 13, 1922, at 1 (arguing against the denial of “freedom of expression, freedom of press, and the freedom of assembly”); *Gompers Assails Harding on Unions*, N.Y. TIMES, July 1, 1923, at 3 (“[T]he Daugherty injunction . . . sought to deny the constitutional rights of freedom of speech, freedom of assembly, and freedom of the press to railroad workers.”). In 1951, President Truman, speaking at the dedication of a memorial to Gompers, said, “[A]bove all, he fought the labor injunction because it was used to violate the constitutional rights to free speech and freedom of assembly.” President Harry S. Truman, Address at the Dedication of a Square in Washington to the Memory of Samuel Gompers (Oct. 27, 1951) (transcript available at the American Presidency Project, <http://www.presidency.ucsb.edu>).

157. 274 U.S. 357 (1927) (Brandeis, J., concurring). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). Brandeis concurred rather than dissented in *Whitney* on procedural grounds, but his opinion strongly rebuked of the majority’s reasoning. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 306 (1984).

of the Communist Labor Party of California.¹⁵⁸ The Court rejected her argument that the California law violated her rights under the First Amendment, expressing particular concern that her actions had been undertaken in concert with others, which “involve[d] even greater danger to the public peace and security than the isolated utterances and acts of individuals.”¹⁵⁹

Chafing at this rationale, Brandeis penned some of the most well-known words in American jurisprudence:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹⁶⁰

The freedoms of “speech and assembly” lie at the heart of Brandeis’s argument—the phrase appears eleven times in his brief concurrence. The two freedoms had been linked only once before; after *Whitney*, the nexus occurs in over one hundred of the Court’s opinions.¹⁶¹ The connection between assembly and speech highlights that a group expresses itself not only through spoken words but also through its very act of gathering. As the Court itself recognized, group expression was far more worrisome than “the isolated utterances and acts of individuals.”¹⁶²

158. Vincent Blasi has written a fascinating account of these circumstances. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

159. 274 U.S. at 372.

160. *Id.* at 375 (Brandeis, J., concurring). Legal scholars have written volumes about these words and those that followed, and Brandeis’s concurrence has been praised for its eloquent defense of free speech. Vincent Blasi has called the opinion “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.” Blasi, *supra* note 158, at 668. And Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis’s *Whitney* concurrence the “classic formulation” of the fundamental principle underlying free speech. 376 U.S. 254, 270 (1964); cf. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 194 (2002); Robert M. Cover, *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 371 (1981) (asserting that Brandeis’s concurrence is a “classic statement of free speech”).

161. *E.g.*, *New York ex rel. Doyle v. Atwell*, 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the “rights of freedom of speech and assembly”).

162. 274 U.S. at 372.

B. *New Challenges to Labor*

In the early 1920s, the conservative wing of the Supreme Court issued a series of antilabor decisions aimed at stopping picketing and union organizing.¹⁶³ But by 1933, workers had successfully obtained legislative relief through the National Industrial Recovery Act, which provided the first guarantee to workers of the right to organize in associations. Two years later, the Wagner Act sought to strengthen the associational rights of workers even further.

The relationship between the right of assembly and the interests of labor took on a more public dimension on April 10, 1936, when Congress held hearings on legislation to authorize the Committee on Education and Labor to investigate “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”¹⁶⁴ National Labor Relations Board chairman J. Warren Madden testified that “[t]he right of workmen to organize themselves into unions has become an important civil liberty” and that workers could not organize without exercising the rights of free speech and assembly.¹⁶⁵ Following the hearings and subsequent approval of the Senate measure, Committee Chair Hugo Black named Senator Robert La Follette, Jr. of Wisconsin to chair a subcommittee to investigate these concerns. The La Follette Committee embarked with “the zeal of missionaries” in an exhaustive investigation that spanned five years.¹⁶⁶ When it concluded, La Follette reported to Congress that “[t]he most spectacular violations of civil liberty . . . [have] their roots in economic conflicts of interest” and emphasized that “[a]ssociation and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly.”¹⁶⁷

Rhetoric across the political spectrum during the mid-1930s echoed the importance of assembly in the labor context. In a 1935 speech on Constitution Day, former President Hebert Hoover listed assembly among the core freedoms that guarded liberty.¹⁶⁸ That same year, President Roosevelt’s Interior Secretary Harold Ickes referred to the freedoms of speech, press, and assembly as “the three musketeers

163. Cover, *supra* note 160, at 354.

164. Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, 51 J. AM. HIST. 435, 440 (1964) (citing 74 CONG. REC. 4151 (1936) (internal quotation marks omitted)).

165. *Id.* at 440 n.30 (internal quotation marks omitted).

166. *Id.* at 442.

167. *Id.* at 442 n.40 (quoting 77 CONG. REC. 3311 (1942)) (internal quotation marks omitted).

168. *Hoover’s Warning of the Perils to Liberty*, N.Y. TIMES, Sept. 18, 1935, at 10.

of our constitutional forces” during an address before an annual luncheon of the Associated Press.¹⁶⁹ Ickes asserted: “We might give up all the rest of our Constitution, if occasion required it . . . [a]nd yet have sure anchorage for the mooring of our good ship America, if these rights remained to us unimpaired.”¹⁷⁰

C. *Assembly Made Applicable to the States*

In 1937, the Supreme Court made the freedom of assembly applicable to state as well as federal action in *De Jonge v. Oregon*.¹⁷¹ Chief Justice Hughes asserted that the right of assembly “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”¹⁷² In words strikingly similar to Brandeis’s *Whitney* concurrence, he emphasized:

[The need] to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.¹⁷³

Hughes underscored the significance of applying the right of assembly to state action by observing that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”¹⁷⁴

D. *Hague v. Committee for Industrial Organization*

At the end of 1938, the American Bar Association’s Committee on the Bill of Rights advocated the importance of the right of assembly in an amicus brief to the United States Court of Appeals for the Third Circuit in *Hague v. Committee for Industrial Organization*.¹⁷⁵ The appeal addressed Mayor Frank Hague’s repeated denials of a permit to

169. *Long and Coughlin Classed by Ickes as ‘Contemptible,’* N.Y. TIMES, Apr. 23, 1935, at 1 (internal quotation marks omitted).

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

171. 299 U.S. 353 (1937).

172. *Id.* at 364.

173. *Id.* at 365.

174. *Id.* at 364. Brandeis had called the right of assembly fundamental in his *Whitney* concurrence ten years earlier. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

175. *Hague v. Comm. Indus. Org.*, 101 F.2d 774 (3d Cir. 1939).

the Committee for Industrial Organization to hold a public meeting in Jersey City. The ABA's lengthy brief emphasized that "the integrity of the right 'peaceably to assemble' is an essential element of the American democratic system" involving "the citizen's right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social"; that "assemblies face to face perform a function of vital significance in the American system"; and that public officials had the "duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so."¹⁷⁶

The amicus brief garnered an unusual amount of attention. The American Bar Association wrote:

The filing of the brief was widely hailed as a great step in the defense of liberty and the American traditions of free speech and free assembly as basic institutions of democratic government. The clear and earnest argument of the brief was attested as an admirable exposition of the fundamental American faith. Hardly any action in the name of the American Bar Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief.¹⁷⁷

The *New York Times* reviewed the brief with similarly effusive language:

This brief ought to stand as a landmark in American legal history. It ought to be multiplied and spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty. It ought to be on file in every police station. It ought to be in every public library, in every school library, and certainly in the home of every voter in Jersey City.¹⁷⁸

176. Brief for the Committee on the Bill of Rights, of the American Bar Association as Amicus Curiae, *Hague v. Comm. Indus. Org.*, 307 U.S. 496 (1939) (No. 651) [hereinafter Brief for the Committee].

177. *Association's Committee Intervenes To Defend Right of Public Assembly*, 25 A.B.A. J. 7 (1939).

178. Editorial, *A Brief for Free Speech*, N.Y. TIMES, Dec. 23, 1938, at 18. The *Times* later wrote that the brief "was received all over the country with approval as a lucid exposition and defense of the fundamental guarantee of American liberty." Editorial, *Bar and Civil Liberties*, N.Y. TIMES, July 17, 1939, at 10. Zechariah Chafee had a substantial role in drafting the brief. When he published *Free Speech in the United States* two years later, his thirty-page discussion of the freedom of assembly consisted almost entirely of verbatim sections of the brief. See ZECARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 409-38 (1941).

The Third Circuit ruled in favor of the C.I.O., but Hague appealed to the Supreme Court, setting the stage for an even broader judicial endorsement of the freedom of assembly.¹⁷⁹

E. The Four Freedoms

In 1939, assembly joined religion, speech, and press as one of the “Four Freedoms” celebrated in the New York World’s Fair. Fair organizers commissioned Leo Friedlander to design a group of statues commemorating each of the four freedoms.¹⁸⁰ Grover Whalen, the president of the fair corporation, credited *New York Times* president and publisher Arthur Sulzberger with the idea:

Mr. Sulzberger pointed out that if we portrayed four of the constitutional guarantees of liberty in the “freedom group” we could teach the millions of visitors to the fair a lesson in history with a moral. The lesson is that freedom of press, freedom of religion, freedom of assembly and freedom of speech, firmly fixed in the cornerstone of our government since the days of Washington, have enabled us to build the most successful democracy in the world. And the moral is that as long as these freedoms remain a part of our constitutional set-up we can face the problems of tomorrow, a nation of people calm, united and unafraid.¹⁸¹

The buildup to the opening of the Fair began with New Year’s Day speeches celebrating each of the four freedoms that were broadcast internationally from Radio City Music Hall. Dorothy Thompson, the “First Lady of American Journalism,” delivered the speech on the freedom of assembly.¹⁸² Calling assembly “the most essential right of the four,” Thompson elaborated:

The right to meet together for one purpose or another is actually the guaranty of the three other rights. Because what good is free speech if it impossible to assemble people to listen to it? How are you going to have discussion at all unless you can hire a hall? How are you going to

179. The Committee on the Bill of Rights had submitted a revised version of its amicus brief when the case had reached the Supreme Court. Brief for the Committee, *supra* note 176.

180. *Mile-Long Mall Feature of Fair*, N.Y. TIMES, Dec. 12, 1937, at 57.

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

182. *Fair To Broadcast to World Today*, N.Y. TIMES, Jan. 1, 1939, at 13. Thompson was at the time a news commentator for the New York Herald Tribune. She was considered by some to be “the most influential woman in the United States after Eleanor Roosevelt,” and her syndicated column, “On the Record,” reached an estimated eight to ten million readers three times a week. SUSAN WARE, LETTER TO THE WORLD: SEVEN WOMEN WHO SHAPED THE AMERICAN CENTURY 45 (1998). Thompson’s portrait made the cover of *Time* on June 13, 1939. *Id.* at 47.

practice your religion, unless you can meet with a community of people who feel the same way? How can you even get out a newspaper, or any publication, without assembling some people to do it?"¹⁸³

Three months later, Columbia University president Nicholas Butler penned a *New York Times* editorial on "The Four Freedoms."¹⁸⁴ With the European conflict in mind, Butler warned of the "millions upon millions of human beings living under governments which not only do not accept the Four Freedoms, but frankly and openly deny them all."¹⁸⁵ The following month, the *Times* ran an editorial by Henry Steele Commager. Commager decried the assaults on the "four fundamental freedoms" and concluded his essay by asserting: "The careful safeguards which our forefathers set up around freedom of religion, speech, press and assembly prove that these freedoms were thought to be basic to the effective functioning of democratic and republican government. The truth of that conviction was never more apparent than it is now."¹⁸⁶

On April 30, 1939, the opening day of the World's Fair, New York Mayor Fiorello la Guardia called the site of Friedlander's four statues the "heart of the fair."¹⁸⁷ Before an audience of fifteen to twenty thousand, la Guardia proclaimed that the right of assembly "must be given to any group who desire to meet and there discuss any problem that they desire."¹⁸⁸

Barely a month after the opening of the World's Fair, the Supreme Court issued its *Hague* decision, noting that streets and parks were publicly available "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁸⁹ The *New York Times*' coverage of *Hague* pronounced: "With Right of Assembly Reasserted, All 'Four Freedoms' of Constitution Are Well Established."¹⁹⁰

Hague's words on the heels of the tribute to the four freedoms at the World's Fair seemed to anchor the freedom of assembly in political

183. Dorothy Thompson, *Democracy 1* (Jan. 1, 1939) (transcript available in the Syracuse University Library, Dorothy Thompson Papers, ser. VII, box 6). Thompson's speech pitted the free assembly of democracy against the abuses of fascism.

184. Nicholas Murray Butler, *The Four Freedoms*, N.Y. TIMES, Mar. 5, 1939, at AS5.

185. *Id.* Pictures of Friedlander's statues accompanied the editorial.

186. Henry Steele Commager, "To Secure the Blessings of Liberty," N.Y. TIMES, Apr. 9, 1939, at SM3.

187. *Mayor Dedicates Plaza of Freedom*, N.Y. TIMES, May 1, 1939, at 4.

188. *Id.*

189. 307 U.S. 496, 515 (1939).

190. Dean Dinwoodey, *A Fundamental Liberty Upheld in Hague Case*, N.Y. TIMES, June 11, 1939, at E7.

discourse. Indeed, a poll by Elmo Roper's organization at the end of 1940 reported that 89.9% of respondents thought their personal liberties would be decreased by restrictions on freedom of assembly (compared to 81.5% who expressed concern over restrictions on "freedom of speech by press and radio").¹⁹¹ Americans appeared resolute in their belief of the indispensability of free assembly to democracy, and the importance of assembly seemed secure.

Politics and history decided otherwise. On January 6, 1941, President Roosevelt proclaimed "four essential human freedoms" in his State of the Union Address.¹⁹² Rather than refer to the freedoms of speech, religion, assembly and press that had formed the centerpiece of the World's Fair, Roosevelt's "Four Freedoms Speech" called upon freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. The new formulation—absent assembly—quickly overtook the old. Seven months later, Roosevelt and Winston Churchill incorporated the new four freedoms into the Atlantic Charter. In 1943, Norman Rockwell created four paintings inspired by Roosevelt's Four Freedoms. The *Saturday Evening Post* printed the paintings in successive editions, accompanied by matching essays expounding upon each of the freedoms. And like the earlier four freedoms, the new ones were also set in stone. Roosevelt commissioned Walter Russell to create the Four Freedoms Monument, which was dedicated at Madison Square Garden. Today, the Franklin and Eleanor Roosevelt Institute honors well-known individuals with the "Four Freedoms Award."¹⁹³

VIII. THE RHETORIC OF ASSEMBLY

Despite its absence from Roosevelt's formulation of the Four Freedoms, the freedom of assembly did not disappear from political and legal discourse overnight. In 1941, an illustrious group called "The Free Company" penned a series of radio dramas about the First Amendment. Attorney General Robert Jackson and Solicitor General Francis Biddle helped shape the group, which included Robert Sherwood (then Roosevelt's speechwriter), William Saroyan, Maxwell Anderson, Ernest Hemingway, and James Boyd.¹⁹⁴ The group operated

191. Editorial, *Public Mind in Good Health*, WALL ST. J., Jan. 7, 1941, at 4.

192. President Franklin Delano Roosevelt, Annual Message to Congress, The "Four Freedoms" Speech (Jan. 6, 1941).

193. See The Franklin D. Roosevelt Four Freedoms Awards Home Page, <http://www.FourFreedoms.nl> (last visited Nov. 3, 2009).

194. *Radio Broadcast: Of Thee They Sing*, TIME, Feb. 24, 1941.

under what was “virtually a Government charter” to spread a message of democracy.¹⁹⁵

Orson Welles wrote *The Free Company's* play on the freedom of assembly. “His Honor, the Mayor” portrayed the dilemma of Bill Knaggs, a fictional mayor confronted with an impending rally of a group called the “White Crusaders.” After deciding to allow the rally, the mayor addressed the crowd that had gathered in protest:

[D]on't start forbiddin' anybody the right to assemble. Democracy's a rare precious thing and once you start that—you've finished democracy! Democracy guarantees freedom of assembly unconditionally to the worst lice that want it. . . . All of you've read the history books. You know what the right to assemble and worship God meant to most of those folks that first came here, the ones that couldn't pray the way they wanted to in the old country?¹⁹⁶

The play concluded with music followed by the voice of the narrator:

Like his honor, the Mayor, then, let us stand fast by the right of lawful assembly. Let us say with that great fighter for freedom, Voltaire, “I disapprove of what you say but I will defend to the death your right to say it.” Thus one of our ancient, hard-won liberties will be made secure and we, differing though we may at times among ourselves, will stand together on a principle to make sure that government of the people, by the people, for the people shall not perish from the earth.¹⁹⁷

Not everyone shared these sentiments. Following the broadcast of “His Honor, The Mayor,” the Hearst newspaper chain and the American Legion attacked it as “un-American and tending to encourage communism and other subversive groups” and “cleverly designed to poison the minds of young Americans.”¹⁹⁸ The next week, J. Edgar Hoover drafted a Justice Department memorandum “concerning the alleged Communist activities and connections of Orson Welles.”¹⁹⁹

Later in 1941, festivities around the country marked the sesquicentennial anniversary of the Bill of Rights. In Washington D.C.'s Post Square, organizers of a celebration displayed an enormous

195. *Radio Broadcast: Freely Criticized Company*, TIME, Apr. 28, 1941.

196. Orson Welles, *His Honor, The Mayor*, in THE FREE COMPANY PRESENTS: A COLLECTION OF PLAYS ABOUT THE MEANING OF AMERICA 143 (1941).

197. *Id.*

198. CHARLES HIGHAM, ORSON WELLES: THE RISE AND FALL OF AN AMERICAN GENIUS 175 (1985); *Freely Criticized Company*, *supra* note 195.

199. Memorandum from J. Edgar Hoover, Director, Fed. Bureau of Investigation, to Matthew F. McGuire, Assistant to the Attorney Gen. (Apr. 24, 1941), *available at* <http://www.wellesnet.com/?p=186>.

copy of the Bill of Rights next to the four phrases: “Freedom of Speech, Freedom of Assembly, Freedom of Religion, Freedom of the Press.”²⁰⁰ The Sesquicentennial Committee, with President Roosevelt as its chair, issued a proclamation describing the original four freedoms as “the pillars which sustain the temple of liberty under law.”²⁰¹ Days before the attack on Pearl Harbor, Roosevelt declared that December 15, 1941, would be “Bill of Rights Day.” Roosevelt heralded the “immeasurable privileges” of the First Amendment and signed the proclamation for Bill of Rights Day against the backdrop of a mural listing the original four freedoms.²⁰² The photo op was not without irony; less than three months later he signed Executive Order 9066, authorizing the internment of Japanese Americans.

Although the Supreme Court endorsed the President’s restrictions on the civil liberties of Japanese Americans in *Hirabayashi v. United States*²⁰³ and *Korematsu v. United States*,²⁰⁴ it elsewhere affirmed a core commitment to the Bill of Rights generally and the freedom of assembly in particular. In 1943, Justice Jackson wrote in *West Virginia v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁰⁵

Two years later, the Court emphasized in *Thomas v. Collins* that restrictions of assembly could only be justified under the “clear and present danger” standard that the Court had adopted in its free speech cases.²⁰⁶ By a 5-4 majority, the Court overturned the contempt conviction of a labor spokesman who had given a speech in Houston despite a restraining order prohibiting him from doing so. Because of the “*preferred place* given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment,” the Court

200. Scott Hart, *America Celebrates 150th Anniversary of Bill of Rights*, WASH. POST, Dec. 15, 1941, at 19.

201. Henry Steele Commager, *Charter of Our Way of Life*, N.Y. TIMES, Dec. 14, 1941, at SM6.

202. *Day Will Honor Bill of Rights*, N.Y. TIMES, Nov. 29, 1941, at 19.

203. 320 U.S. 81 (1943).

204. 323 U.S. 214 (1944).

205. 319 U.S. 624, 638 (1943).

206. 323 U.S. 516, 527 (1945).

concluded that only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”²⁰⁷ Justice Rutledge’s opinion noted that the right of assembly guarded “not solely religious or political” causes but also “secular causes,” great and small.²⁰⁸ And Rutledge recognized the expressive nature of assembly by noting that the rights of the speaker and the audience were “necessarily correlative.”²⁰⁹ As Aviam Soifer has suggested, Rutledge’s “dynamic, relational language” emphasized that the right of assembly was “broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements.”²¹⁰

A further endorsement of assembly came by way of the executive branch in the 1947 Report of the President’s Committee on Civil Rights.²¹¹ The Report indicated that the “great freedoms” of religion, speech, press, and assembly were “relatively secure” and that citizens were “normally free . . . to assemble for unlimited public discussions.”²¹² Noting growing concerns about “Communists and Fascists,” the Committee asserted that it “unqualifiedly opposes any attempt to impose special limitations on the rights of these people to speak and assemble” and cautioned that while “the government has the obligation to have in its employ only citizens of unquestioned loyalty,” our “whole civil liberties history provides us with a clear warning against the possible misuse of loyalty checks to inhibit freedom of opinion and expression.”²¹³

IX. THE RISE OF ASSOCIATION AND THE END OF ASSEMBLY

With an irony that rivaled President Roosevelt’s Bill of Rights Day proclamation, President Truman established the Federal Employee Loyalty Program the same year that his committee issued its civil

207. *Id.* at 530-31 (emphasis added).

208. *Id.* The “preferred place” language originated in Justice Douglas’s opinion for the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

209. 323 U.S. at 534.

210. SOIFER, *supra* note 154, at 77-78. Soifer argues that the principles articulated in *Thomas* “starkly contrast with the instrumental focus of more recent freedom of association decisions.” *Id.* at 78.

211. THE PRESIDENT’S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS (1947). President Truman established the Committee with Executive Order 9808. Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 5, 1946).

212. THE PRESIDENT’S COMM. ON CIVIL RIGHTS, *supra* note 211, at 47.

213. *Id.* at 48, 50 (emphasis omitted).

rights report. The loyalty program empowered the federal government to deny employment to “disloyal” individuals.²¹⁴ The government’s loyalty determination could consider “activities and associations” that included “[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive.”²¹⁵ Attorney General Tom Clark quickly generated a list of 123 “subversive” organizations.²¹⁶ Within a year, the FBI had examined over two million federal employees and conducted over 6300 full investigations.²¹⁷

The restrictions imposed by the loyalty program prompted some of the earliest articulations of a previously unseen defense of group autonomy: a constitutional right of association.²¹⁸ Constitutional scholar Thomas Emerson attacked the loyalty program in a 1947 article in the *Yale Law Journal*, contending that the investigations infringed upon the “concept of the right to freedom [of] political expression” emerged from “the specific guarantees of freedom of speech, freedom of the press, the right of assembly and the right to petition the government.”²¹⁹ This right of political expression was “basic, in the deepest sense, for it underlies the whole theory of democracy.”²²⁰ Emerson cited a recent speech by Charles Wyzanski, Jr., who had argued that the “peculiarly complicated” freedom of association “cuts underneath the visible law to the core of our political science and our philosophy.”²²¹

These nascent references to a right of association emerged just as the Supreme Court entered the fray of the Communist Scare with its 1950 decision, *American Communications Ass’n v. Douds*.²²² *Douds* involved a challenge to the Taft-Hartley amendments to the National Labor Relations Act (NLRA), which required that union officers submit affidavits disavowing membership in or support of the

214. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 176 (1990) (quoting Exec. Order No. 9835, 3 C.F.R. 627 (1947)).

215. Exec. Order No. 9835, *supra* note 214.

216. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 32 (1948).

217. *Id.*

218. What follows in this Part is a much abbreviated version of my account of the emergence of the right of association in Inazu, *supra* note 18.

219. *Id.* at 83.

220. *Id.*

221. Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 CAL. L. REV. 336, 337-38 (1947).

222. 339 U.S. 382 (1950).

Communist Party before a union could receive the NLRA's protections.²²³ Although recognizing "[t]he high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end," Chief Justice Vinson concluded that the Act reflected "legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct."²²⁴ The denial of associational protections continued in *Dennis v. United States*²²⁵ and *Adler v. Board of Education*²²⁶ before the Court finally imposed some limits on anticommunist legislation in *Wieman v. Updegraff*.²²⁷

Despite hints of greater associational protections in *Wieman*—Justice Frankfurter's concurrence described "a right of association peculiarly characteristic of our people"²²⁸—the communist cases proved inadequate for elaborating upon the right of association toward which Emerson and others had gestured. Instead, the first explicit recognition of a constitutional right of association came in the civil rights context, with the Supreme Court's 1958 decision in *NAACP v. Alabama ex rel. Patterson*.²²⁹ By this time, the distinction between assembly and association was sufficiently muddled. Justice Harlan's opinion for a unanimous Court framed the constitutional question in terms of the "fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."²³⁰ He began his constitutional analysis by citing *De Jonge v. Oregon*²³¹ and *Thomas v. Collins*²³² for the following principle: "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."²³³ *De Jonge* and *Thomas* had established that the freedom

223. Taft-Hartley Act, 29 U.S.C. §§ 141, 159(h) (1947) (amending National Labor Relations Act, 29 U.S.C. §§ 151-166 (1935)).

224. 339 U.S. at 399.

225. 341 U.S. 494 (1951).

226. 342 U.S. 485 (1952).

227. 344 U.S. 183 (1952).

228. *Id.* at 195 (Frankfurter, J., concurring).

229. 357 U.S. 449 (1958). I explore the doctrinal tensions of the right of association that resulted from the Court's differing treatment of communist and civil rights cases in Inazu, *supra* note 18.

230. 357 U.S. at 460.

231. 299 U.S. 353 (1937).

232. 323 U.S. 516 (1945).

233. *NAACP*, 357 U.S. at 460.

of assembly applied to the states through the Fourteenth Amendment; that it covered political, economic, religious, and secular matters; and that it could only be restricted “to prevent grave and immediate danger to interests which the State may lawfully protect.”²³⁴ Based on these precedents, Justice Harlan could have grounded his decision in the freedom of assembly. But he instead shifted away from assembly, writing in the next sentence, “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.”²³⁵ The Alabama courts had constrained the “right to freedom of association” of members of the NAACP.²³⁶ These members had a “constitutionally protected right of association” that meant they could “pursue their lawful private interests privately” and “associate freely with others in so doing.”²³⁷ Writing a few years after *NAACP v. Alabama ex rel. Patterson*, Emerson suggested that Justice Harlan “initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them” and then “elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment.”²³⁸

Despite its adventitious roots, the new right of association gained traction in a series of civil rights cases challenging state attacks on the NAACP.²³⁹ By the mid-1960s, the only cases addressing the freedom of assembly (as distinct from the freedom of association) were those overturning convictions of African Americans who had participated in

234. *De Jonge*, 299 U.S. at 364; *Thomas*, 323 U.S. at 528 n.12 (internal quotation marks omitted).

235. 357 U.S. at 460 (emphasis added). He then proceeded to discuss the “protected liberties” of speech and press that were “assured under the Fourteenth Amendment.” *Id.* at 461.

236. *Id.* at 462.

237. *Id.* at 463, 466.

238. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964). Justice Harlan’s opinion is more ambiguous than Emerson suggests: it is not clear that he relied at all on the First Amendment to ground association—the opinion, in fact, never mentions the First Amendment.

239. *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963). During this same era, the Court either ignored or downplayed similar freedom of association cases involving suspected communists. *See, e.g.*, *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Scales v. United States*, 367 U.S. 203 (1961).

peaceful civil rights demonstrations.²⁴⁰ In political discourse, Martin Luther King, Jr., appealed to assembly in his *Letter from a Birmingham Jail* and in his speech, *I've Been to the Mountaintop*, delivered just prior to his assassination.²⁴¹ But by the end of the 1960s, the right of assembly in law and politics was limited almost entirely to public gatherings like protests and demonstrations. Earlier intimations of a broadly construed right beyond these narrow circumstances were largely forgotten.

In 1983, the Court swept the remnants of freedom of assembly within the ambit of free speech law in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.²⁴² Justice White reasoned:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 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. In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.²⁴³

The doctrinal language came straight out of the Court's free speech cases and made no mention of the right of assembly.²⁴⁴ With *Perry*,

240. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) ("The First [Amendment] does not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people.").

241. See MARTIN LUTHER KING, JR., *LETTER FROM THE BIRMINGHAM JAIL* 14 (Harper Collins 1944) (1963) (asserting that the Birmingham ordinance denied "citizens the First Amendment privilege of peaceful assembly and peaceful protest"); MARTIN LUTHER KING, JR., *I'VE BEEN TO THE MOUNTAINTOP* 12-13 (Harper Collins 1994) (1968) ("But somewhere I read of the freedom of assembly.").

242. 460 U.S. 37 (1983); cf. BAKER, *supra* note 9, at 316 n.18 ("An interesting, and [perhaps] ideologically telling, practice of the Supreme Court is its focus on 'speech' and expression in cases in which it has the option of using either a speech or an assembly analysis.").

243. 460 U.S. at 45 (internal citations and quotation marks omitted).

244. *Perry* cited *Carey v. Brown*, 447 U.S. 455, 461 (1980), *U.S. Postal Service v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v.*

even cases involving protests or demonstrations could now be resolved without reference to assembly. The Court's 1988 opinion in *Boos v. Barry* exemplifies this change.²⁴⁵ *Boos* involved a challenge to a District of Columbia law that prohibited, among other things, congregating "within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes."²⁴⁶ On its face, the challenge to the regulation appeared to rest on the right of assembly. The petitioner challenged the deprivation of First Amendment speech and assembly rights and argued that "[t]he right to congregate is a component part of the 'right of the people peaceably to assemble' guaranteed by the First Amendment."²⁴⁷ Justice O'Connor's opinion for the Court cited *Perry* three times and resolved the case under a free speech analysis without reference to the freedom of assembly. The Court, in fact, has not addressed a freedom of assembly claim in the last twenty years.²⁴⁸

X. CONCLUSION

The disappearance of the freedom of assembly from legal and political discourse is intriguing in a country that attaches so much importance to the Bill of Rights in general and the First Amendment in particular. It may be that the principles encapsulated in the constitutional right of association embrace a kind of group autonomy that broadens the conception of assembly. But I suspect otherwise. I have detailed elsewhere the doctrinal problems with the freedom of association, both in its original form that emerged in *NAACP v.*

Public Service Commission, 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Schneider v. State*, 308 U.S. 147 (1939).

245. 485 U.S. 312 (1988).

246. *Id.* at 315 (internal quotation marks omitted).

247. Brief for Petitioners at 64, 74, *Boos*, 485 U.S. 312 (No. 86-803).

248. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Court addressed the constitutionality of a Chicago ordinance that prohibited "criminal street gang members" from loitering in public places. But while the lower court had relied on the freedom of assembly to hold the ordinance unconstitutional, the Supreme Court cited "the First Amendment 'right of association' that our cases have recognized." *Id.* at 53. Justice Scalia has invoked the freedom of assembly (among others) in his dissents from the Court's decisions upholding restrictions on the activities of antiabortion protesters. See *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting); *Hill v. Colorado*, 530 U.S. 703, 774, 779 (2000) (Scalia, J., dissenting). The language of assembly reappeared in the text of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc1-5 (limiting government restrictions on "the religious exercise of a person, including a religious assembly or institution").

Alabama and its transformation in the Court's 1984 decision, *Roberts v. United States Jaycees*.²⁴⁹ These cases and others have converted the right of association into an instrument of control rather than a protection for the people. In doing so, they have lost sight of the dissenting, public, and expressive groups that once sought refuge under the right of assembly.²⁵⁰ They have ignored the wise counsel of C. Edwin Baker that "[c]hallenges to existing values and decisions to embody and express dissident values are precisely the choices and activities that cannot be properly evaluated by summations of existing preferences" and that "the constitutional right of assembly ought to protect activities that are *unreasonable* from the perspective of the existing order."²⁵¹ By losing touch with our past recognition of the freedom of assembly and the groups that embodied it, we risk embracing too easily an attenuated framework that cedes to the state authority over what kinds of groups are acceptable in the democratic experiment. Democracy and stability may be easier in the short term, but in forgetting the freedom of assembly, we forget the kind of politics that has brought us this far.

249. 468 U.S. 609 (1984). For my critiques of the freedom of association, see Inazu, *supra* note 18, and John D. Inazu, *The Forgotten Freedom of Assembly* (2009) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file in the University of North Carolina thesis database). See also Mazzone, *supra* note 29, at 645-46 ("[E]xpressive association has shifted the focus away from associating and to the more familiar First Amendment territory of speech . . . and the like," and "the modern notion of 'expression' is a dubious peg on which to hang a constitutional right of free association."); El-Haj, *supra* note 29, at 589 ("[T]he right of assembly should not be collapsed into the right of free expression.").

250. *Cf.* El-Haj, *supra* note 29, at 588 ("We seem to have forgotten that the right of assembly, like the right to petition, was originally considered central to securing democratic responsiveness and active democratic citizens. We now view it instead as simply another facet of the individual's right of free expression, focusing almost exclusively on the question of whether the group's message will be heard."); ZICK, *supra* note 16, at 325 ("Our long tradition of public expression, dissent, and contention, from the earliest activities in the colonies to present-day peace activists, agitators, and dissenters, has been possible owing to relatively open access to embodied, contested, inscribed, and other places on the expressive topography.").

251. BAKER, *supra* note 9, at 134. I expand upon these concepts in INAZU, *supra* note 249.