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The Strange Origins of the Constitutional Right of Association

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THE STRANGE ORIGINS OF THE CONSTITUTIONAL RIGHT OF ASSOCIATION

JOHN D. INAZU*

Although much has been written about the freedom of association and its ongoing importance to American constitutionalism, much recent scholarship mistakenly relies on a truncated history that begins with Roberts v. United States Jaycees, 468 U.S. 609 (1984), the case that divided constitutional association into intimate and expressive components. Roberts’s doctrinal framework has been rightly criticized. However, neither the right of association nor all of its doctrinal problems start there. The Supreme Court’s foray into the constitutional right of association began a generation earlier with NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

This article offers a new look at the Court’s initial approach to the right of association. It highlights three factors that influenced the development of the right of association: (1) the conflation of rampant anti-communist sentiment with the rise of the Civil Rights Movement—a political factor; (2) infighting on the Court over the proper Constitutional grounding of the right of association and the relationship between association and assembly—a jurisprudential factor; and (3) the pluralist political theory of mid-twentieth century liberalism, which emphasized the importance of consensus, balance, and stability—a theoretical factor. It explores these factors, their relationship to one another, and the ways in which they influenced the right of association’s ambiguous constitutional anchor and ill-defined doctrinal framework. These early contours of the right of association paved the way for its reformulation in Roberts. If today’s freedom of association is inadequate, the roots of that inadequacy may lie in the political, jurisprudential, and theoretical factors that were present at its inception.

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I. INTRODUCTION

Although much has been written about the freedom of association and its ongoing importance to American constitutionalism, much recent scholarship mistakenly relies on a truncated history that begins with *Roberts v. United States Jaycees*,¹ the 1984 case that divided the right of association into intimate and expressive components and introduced the constitutional paradigm that continues today. *Roberts*'s doctrinal framework has been rightly criticized.² But neither the right of association nor its doctrinal problems began with *Roberts*, as the Court first recognized a constitutional right of association just over fifty years ago in its 1958 decision, *NAACP v. Alabama ex rel. Patterson*.³

1. 468 U.S. 609 (1984).

2. See, e.g., AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 40–42 (1995) [hereinafter SOIFER, COMPANY]; George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 53, 55 (Amy Gutmann ed., 1998); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 75, 78–79 (Amy Gutmann ed., 1998).

3. 357 U.S. 449 (1958). Constitutional protections for group autonomy predate the constitutional right of association. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 606–11 (2010). For most of our nation's history, the right of *assembly* has guarded against incursions by the state. *Id.* at 568.

This article offers a new look at the Court's initial approach to the right of association in *NAACP v. Alabama* and the cases that followed. It highlights three factors that influenced the shaping of the right:

(1) The historical coincidence of the Second Red Scare and the Civil Rights Movement (a *political* factor). From the late 1940s to the early 1960s, the government's response to the communist threat pitted national security interests against expressive freedoms. These tensions arose in the South when segregationists analogized the unrest stirred by the NAACP to the threats posed by communist organizations; segregationists also charged that communists had infiltrated the NAACP itself. The Supreme Court responded unevenly, denying constitutional protections to communist organizations in the name of order and stability but protecting civil rights associations.

(2) The Court's disagreement as to the constitutional source of association (a *jurisprudential* factor). This disagreement was most evident when the Court sought to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that the right of association constrained state action because it, like other rights, could be derived from the "liberty" of the Due Process Clause of the Fourteenth Amendment. I refer to this as the *liberty argument*. Chief Justice Warren and Justices Black, Douglas, and Brennan insisted that association could be located in some aspect of the First Amendment and urged that it be given the same "preferred position" as other First Amendment rights. In their view, association applied to the states because the Fourteenth Amendment had incorporated the provisions of the First Amendment. I call this the *incorporation argument*. At times, Black and Douglas also argued that the right of association was part of the right of assembly. I call this the *assembly argument*. Although the assembly argument received only minimal attention from the Court, it may have offered the least complicated path for grounding the right of association in the Constitution. Instead, the Justices' disagreement over the liberty and incorporation arguments framed the legal discussion, in turn shaping the right of association.

(3) The pluralism popularized by David Truman and Robert Dahl in the 1950s and 1960s (a *theoretical* factor). Earlier pluralists advanced

the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.⁴

By the mid-twentieth century, pluralism merged these insights with currents from Arthur Bentley's "science of politics" and Louis Hartz's "liberal

4. Mark DeWolfe Howe, *The Supreme Court, 1952 Term — Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953) (describing "[t]he heart of the pluralistic thesis" advanced by "Gierke, Maitland, Figgis, [and] Laski").

consensus.” The resulting political theory emphasized balance, stability, and consensus among groups rather than juxtaposing groups against the state. These assumptions laid the foundation for the freedom of association in two ways. First, they established a normative expectation that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises and, conversely, that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because this normative expectation excluded groups beyond the margins of consensus, pluralists saw the possibility of harmony and balance among groups that remained. Truman and Dahl supported these views by appealing to the two great theorists of association in the American context: James Madison and Alexis de Tocqueville. Truman and Dahl’s pluralist claims and their attendant interpretations of Madison and Tocqueville helped establish a theoretical background that qualified group autonomy with the interests of the democratic state.⁵

These three factors—one political, one jurisprudential, and one theoretical—contributed to the right of association’s ambiguous constitutional anchor and ill-defined doctrinal framework. *Roberts* certainly compounded these problems a generation later, and the Court’s subsequent development of the right of association has done nothing to remedy them.⁶ Nonetheless, some of the problems with the Court’s current approach to the right of association are linked to the factors that were present at its inception.

This article explores the political, jurisprudential, and theoretical factors described above, their relationship to one another, and their lingering influence on today’s unsatisfactory framework for protecting group autonomy. Part II explores the communist threat that led to the imposition of associational restrictions during the 1940s and 1950s before the Supreme Court recognized a constitutional right to association. Part III focuses on the seminal case of *NAACP v. Alabama*. Part IV examines the right of association cases in the years immediately following *NAACP v. Alabama* and the Court’s continued struggle with surrounding political and jurisprudential factors. Parts V and VI turn to the pluralist political theory lurking in the background of some of these tensions and struggles. Finally, Part VII sketches some connections between the right of association that emerged out of this era and the right of association that exists today.

5. This attenuated understanding of group autonomy continues in contemporary debates. See, e.g., ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 106 (2009) (“[T]here is an interest in ensuring that a major institution of civil society adapts to the cultural norms of the place where it operates.”).

6. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

II. THE POSTWAR POLITICAL CONTEXT AND THE COMMUNIST THREAT

The constitutional right of association emerged out of a political context dominated by the growing paranoia over the threat of domestic communism in the late 1940s and early 1950s. The ubiquity of the communist scare across the branches of state and federal government compromised many of the safeguards of American civil liberties. This was not the first time that the American experiment faltered under such pressures, and as recent reactions to the threat of domestic terrorism attest, it would not be the last.⁷ But peculiar to the right of association's emergence in the midst of the Second Red Scare—perhaps in a way paralleled only by the Democratic–Republican Societies' assertion of the right of assembly in the 1790s—was the claim by a group outside of the political mainstream to an untested constitutional right of group autonomy during a politically tumultuous time.⁸

A. *Executive and Legislative Measures*

The federal government had actively pursued the threat of domestic communism since formation of the House Committee on Un-American Activities (“HUAC”) in 1938.⁹ Concern over “subversive” government employees prompted the Hatch Act in 1939, the Civil Service Commission's War Service Regulations in 1942, and formation of the Attorney General's Interdepartmental Committee on Investigations in 1942.¹⁰ In 1947, the President's Committee on Civil Rights reported that while “the government has the obligation to have in its employ only citizens of unquestioned loyalty, .

7. A concise account of some of the more egregious episodes in our nation's history is provided in Brief for Fred Korematsu as Amicus Curiae Supporting Petitioners at 4–24, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343). Korematsu was the petitioner in *Korematsu v. United States*, 323 U.S. 214 (1944).

8. See *infra* Part II.C. The Democratic-Republican Societies were some of the first groups to invoke the right of assembly in the years following the enactment of the Bill of Rights. See Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1549–50 (2004). Chesney thoughtfully examines the struggle between the Democratic-Republican Societies and the federal government. See *id.* at 1536–72. For a discussion of the importance of the freedom of assembly to the Societies, see Inazu, *supra* note 3, at 577–81.

9. Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 124–25 (2005). Formed at the urging of Congressman Martin Dies of Texas, the investigative body was popularly known as the “Dies Committee” from 1938 to 1945. *Id.* From 1945 to 1957, the HUAC conducted over 230 public hearings and examined over 3,000 witnesses, 135 of whom were cited for contempt. CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945–1957, at 181 (1959).

10. See Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 14, 16–17 (1948) (discussing the development of federal government's loyalty program).

. . . 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.”¹¹ The Committee specifically cautioned of the dangers posed by “any standard which permits condemnation of persons or groups because of ‘association.’”¹²

That same year, President Truman established the Federal Employee Loyalty Program, allowing the federal government to deny employment to “disloyal” individuals.¹³ Over the next twelve months, the FBI examined over two million federal employees and conducted full investigations on over 6,300 of them.¹⁴ The government’s loyalty determination considered “[a]ctivities and associations of an applicant or employee,” including “[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.”¹⁵ Attorney General Tom Clark generated a list of 123 “subversive” organizations.¹⁶ He testified before a HUAC subcommittee that the government intended to “isolate subversive movements in this country from effective interference in the body politic.”¹⁷ In a speech delivered shortly before his testimony, Clark declared that “[t]hose who do not believe in the ideology of the United States should not be allowed to stay in the United States.”¹⁸

Constitutional scholars Thomas Emerson and David Helfeld attacked the loyalty program in a 1948 article in the *Yale Law Journal*, contending that the investigations encompassed “not only membership and activity in organizations, including labor unions, but private beliefs, reading habits, receipts of mail, associations, and personal affairs.”¹⁹ They charged that the program was “based upon the legal premise that Federal employees are

11. PRESIDENT’S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 49–50 (1947).

12. *Id.* at 50.

13. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 176 (1990) (quoting Exec. Order No. 9835, 12 Fed. Reg. 1935, 1938 (Mar. 25, 1947)).

14. Emerson & Helfeld, *supra* note 10, at 32. By 1951, the FBI had conducted full-scale investigations of 14,000 federal employees, leading to the resignation of 2,000 of those employees. MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 107 (1991).

15. Exec. Order No. 9835, 12 Fed. Reg. at 1938.

16. Emerson & Helfeld, *supra* note 10, at 32. The story of the Attorney General’s List of Subversive Organizations (“AGLOSO”) is chronicled in ROBERT JUSTIN GOLDSTEIN, AMERICAN BLACKLIST: THE ATTORNEY GENERAL’S LIST OF SUBVERSIVE ORGANIZATIONS (2008). By 1955, the list included almost 300 organizations. *Id.* at 62. The “AGLOSO designation was ‘usually a kiss of death to an organization.’” *Id.* (quoting ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 47 (Bedford/St. Martin’s 2002) (1994)).

17. GOLDSTEIN, *supra* note 16, at 64.

18. *Id.*

19. Emerson & Helfeld, *supra* note 10, at 70.

entitled to no constitutional protection”²⁰ and ignored “the right to freedom of political expression embodied in the First Amendment.”²¹ To Emerson and Helfeld, this “concept of the right to freedom in 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.”²² This right of political expression is “basic, in the deepest sense, for it underlies the whole theory of democracy.”²³

Although Emerson and Helfeld did not explicitly reference a “freedom of association,” they cited a speech delivered earlier in the year to the state bar of California by the powerful federal judge, Charles Wyzanski Jr.²⁴ In his speech, Judge Wyzanski offered “[a]n inquiry [i]nto freedom of association,” suggesting that despite the “verbal kinship of the phrases freedom of speech, freedom of assembly[,] and freedom of association[,] . . . the triad represented an ascending order of complexity.”²⁵ “The term ‘association’ implie[d] a body of persons who have assembled not on an *ad hoc*, but on a more or less permanent, basis and who are likely to seek to advance their common purposes not merely by debate but often in the long run by overt action.”²⁶ The “freedom of association is peculiarly complicated” and “cuts underneath the visible law to the core of our political science and our philosophy.”²⁷ Wyzanski contended that by the time of Gunnar Myrdal’s 1944 book, *An American Dilemma*, “freedom of association was considered a deeply rooted characteristic of American society.”²⁸

But the “deeply rooted characteristic” was not evident in 1947. As the executive branch embarked on its loyalty investigations of government employees, the HUAC began to subpoena movie producers, screenwriters, and directors to examine alleged communist affiliations.²⁹ In response, Hollywood personalities including Humphrey Bogart, Lauren Bacall, Groucho Marx, and

20. *Id.* at 79.

21. *Id.* at 81.

22. *Id.* at 83.

23. *Id.* Emerson’s article drew a fiery response from J. Edgar Hoover, whose comments were printed in the next issue of the *Yale Law Journal*. See J. Edgar Hoover, Response, *A Comment on the Article “Loyalty Among Government Employees,”* 58 *YALE L.J.* 401 (1948).

24. Emerson & Helfeld, *supra* note 10, at 83 n.309 (citing Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 *CAL. L. REV.* 336 (1947)). President Roosevelt appointed Judge Wyzanski to the federal bench in 1941. Eric Pace, *Charles E. Wyzanski, 80, Is Dead; Judge on U.S. Court for 45 Years*, *N.Y. TIMES*, Sept. 5, 1986, at A20. He served as a federal judge for 45 years, presided over the Harvard University Board of Overseers, and served as a trustee of the Ford Foundation. *Id.* Justice Felix Frankfurter mentored Judge Wyzanski at Harvard Law School and spoke of him as “one of the most brilliant students [he] ever had.” *Id.*

25. Wyzanski, *supra* note 24, at 336–37.

26. *Id.* at 337.

27. *Id.* at 337, 338.

28. *Id.* at 346 (citing GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 952 (1944)).

29. VICTOR S. NAVASKY, *NAMING NAMES* 79 (1980).

Frank Sinatra, formed the Committee for the First Amendment and flew to Washington, D.C. to support those called to testify.³⁰ In October of 1947, ten Hollywood witnesses refused, on First Amendment grounds, to answer questions from the HUAC.³¹ But after Congress cited the “Hollywood Ten” for contempt, Hollywood largely abandoned its support.³² Within a month, top Hollywood executives agreed to blacklist them, and the Committee for the First Amendment “folded almost as fast as it had formed.”³³

One of the earliest attempts to challenge the HUAC inquiries based upon a “right of association” came after Dr. Edward Barsky refused to answer a records request by the HUAC.³⁴ Barsky, a surgeon and national chairman of the Joint Anti-Fascist Refugee Committee, appealed his conviction to the U.S. Court of Appeals for the District of Columbia.³⁵ The ACLU filed a brief on his behalf, arguing that the First Amendment prohibited “general inquiry into matters relating to opinion or affecting freedom of association.”³⁶ Barsky lost at the court of appeals, and the Supreme Court declined to hear his case.³⁷

In their investigative hearings, the HUAC and the Senate Internal Security Subcommittee (“SISS”) routinely asked witnesses whether they were presently or had ever been a member of the Communist Party.³⁸ The question posed a Catch-22. Witnesses who denied any affiliation could be charged with perjury based on contradictory circumstantial evidence.³⁹ But those who admitted a communist affiliation usually suffered adverse economic and social

30. *Id.* at 80.

31. *Id.* at 82.

32. *Id.* at 83.

33. *Id.* Hollywood executives issued the Waldorf-Astoria Policy Statement, which announced that producers would “not knowingly employ a Communist.” *Movies Will Oust Ten Cited for Contempt of Congress*, N.Y. TIMES, Nov. 26, 1947, at 1. The *New York Times* called the statement “an action unprecedented in American industrial fields.” *Id.*

34. *See* Barsky v. United States, 167 F.2d 241, 243 (D.C. Cir. 1948).

35. *Id.*

36. WALKER, *supra* note 13, at 181.

37. *Barsky*, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948). Following his six month prison sentence for contempt, Barsky returned to the Supreme Court to challenge New York’s suspension of his medical license; the Court took the case but concluded that New York’s suspension did not violate Barsky’s due process rights under the Fourteenth Amendment. *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954). Justices Douglas, Black, and Frankfurter dissented. Justice Douglas expressed incredulity over the purported connection of Barsky’s refusal to comply with the HUAC and his ability to practice medicine. *Id.* at 472–74 (Douglas, J., dissenting). Justice Black argued that the Attorney General’s list of subversive groups amounted to a bill of attainder and that New York’s reliance on the list in suspending Barsky’s license violated his constitutional rights. *Id.* at 460–61 (Black, J., dissenting). Justice Frankfurter alleged that the suspension violated due process by unreasonably depriving Barsky of his right to earn a living. *Id.* at 471 (Frankfurter, J., dissenting). *See also* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 80–82 (2000).

38. POWE, *supra* note 37, at 77.

39. *Id.*

consequences.⁴⁰ As a result, a growing number of witnesses refused on constitutional grounds to answer questions. Initially, most of these witnesses invoked the Fifth Amendment right against self-incrimination, but observers increasingly saw this as an admission of guilt by those they labeled “Fifth Amendment Communists.”⁴¹ Accordingly, witnesses began turning to the First Amendment. As with the Hollywood Ten, reliance on the First Amendment usually resulted in contempt of Congress citations.

B. The Perceived Threat Grows

Executive and legislative actions to curtail communist activity took on added urgency in light of global events including the Berlin blockade, the first Soviet test of an atomic bomb, and Mao Tse-tung’s overthrow of Chiang Kai-Shek’s government in China.⁴² Fears of an ongoing domestic communist threat were also reinforced by Alger Hiss’s 1950 perjury conviction and the espionage convictions of Julius and Ethel Rosenberg the following year.⁴³ As Lucas Powe has written: “Americans, very much including Supreme Court Justices, viewed these trials against the backdrop of communist expansion in Europe and Asia, and an aggressive anticommunism became a staple of American politics and society.”⁴⁴ In light of the unsettling domestic and global developments, citizens across the political spectrum viewed the Smith Act prosecutions as a necessary defense against the spread of communism.⁴⁵

Sidney Hook captured the heightened fears and the growing tensions within liberalism in a popular 1950 article published in the *New York Times Magazine* titled *Heresy, Yes—But Conspiracy, No*.⁴⁶ Hook warned that while “[t]he liberal stands ready to defend the honest heretic no matter what his views against any attempt to curb him,” “[t]he failure to recognize the distinction between heresy and conspiracy is fatal to a liberal civilization.”⁴⁷

40. *Id.* at 78.

41. *Id.* at 77–78.

42. In 1950, with these events in mind, Congress passed the McCarran Internal Security Act, Pub. L. No. 81-831, 64 Stat. 987 (repealed 1993), authorizing concentration camps for subversives, § 103–04, 64 Stat. at 1021–23, and requiring communists to register with the Subversive Activities Control Board, § 7–9, 64 Stat. at 993–96. Title one of the Act was also known as the Subversive Activities Control Act of 1950. § 1(a), 64 Stat. at 987. Registered individuals were denied employment in government, defense and labor unions. § 5, 64 Stat. at 992–93; *see also* POWE, *supra* note 37, at 77; WALKER, *supra* note 13, at 198.

43. POWE, *supra* note 37, at 15.

44. *Id.*

45. *See id.*

46. Sidney Hook, *Heresy, Yes—But Conspiracy, No*, N.Y. TIMES MAG., July 9, 1950, at 12. Hook’s similarly titled book, SIDNEY HOOK, *HERESY, YES CONSPIRACY, NO* (1953), became “one of the most prominent mid-century works reflecting seriously on questions relating to the freedom of association.” Ken I. Kersch, “*Guilt By Association*” and the Postwar Civil Libertarians, SOC. PHIL. & POL’Y, Summer 2008, at 53, 65.

47. Hook, *supra* note 46, at 12.

Hook drew a sharp distinction between “Communist ideas” and the “Communist movement.”⁴⁸ “Communist ideas [we]re [merely] heresies, and liberals need have no fear of them where they are freely and openly expressed.”⁴⁹ But the communist movement was “something much more than a heresy.”⁵⁰ It included “native elements who by secrecy and stratagem serve the interests of a foreign power.”⁵¹ Hook saw the communist plot at work particularly in labor organizations and schools.⁵² In language that foreshadowed rhetoric of the Supreme Court, he maintained: “It is not his beliefs, right or wrong; it is not his heresies, which disqualify the Communist party teacher but his declaration of intention, as evidenced by official statements of his party, to practice educational fraud.”⁵³ Policing the schools against communists was “a matter of ethical hygiene, not of politics or of persecution.”⁵⁴

C. *The Supreme Court Speaks*

The Supreme Court joined the fracas of the communist scare in its 1950 decision, *American Communications Ass’n v. Douds*.⁵⁵ *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 Communist Party before a union could receive the NLRA’s protections.⁵⁶ The Court upheld the affidavit requirement, and Chief Justice Vinson’s majority opinion reasoned that the Act protected the country from “the so-called ‘political strike.’”⁵⁷ Vinson referred to “[s]ubstantial amounts of evidence . . . presented to . . . Congress . . . that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government.”⁵⁸ Although recognizing that “[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,” he concluded that the Act reflected “legitimate attempts to protect the

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.*

54. *Id.* Christopher Phelps suggests that Hook’s writing “became perhaps the most influential justification for firing Communists and suspected Communists from universities and schools in the early 1950s.” CHRISTOPHER PHELPS, *YOUNG SIDNEY HOOK: MARXIST AND PRAGMATIST* 227 (1997).

55. 339 U.S. 382 (1950).

56. *Id.* at 385–86.

57. *Id.* at 388.

58. *Id.*

public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct.”⁵⁹

Just five years earlier, the Court had noted the “preferred place” of the freedom of assembly in *Thomas v. Collins*.⁶⁰ In that case, Justice Rutledge concluded that “the great, the indispensable democratic freedoms secured by the First Amendment” meant that “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”⁶¹ *Douds* made no mention of *Thomas*’s preferred place doctrine but referred instead to “[t]he deference due to the legislative determination of the need for restriction upon particular forms of conduct.”⁶²

The Court’s weakening of associational protections continued in *Dennis v. United States*,⁶³ a decision that ACLU national chairman Roger Baldwin later called “the worst single blow to civil liberties in all our history.”⁶⁴ *Dennis* came to the Court after FBI Director J. Edgar Hoover initiated Smith Act prosecutions of twelve senior leaders of the Communist Party of the United States of America (“CPUSA”).⁶⁵ The government charged the defendants with violating the Act’s membership clause, which made it unlawful

to organize[] . . . any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government [in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof.⁶⁶

In arguing its case, the government construed the Act so broadly that it “made no effort to prove that this attempted overthrow was in any sense imminent, or

59. *Id.* at 399.

60. 323 U.S. 516, 530 (1945); *cf.* *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring) (“[Legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment . . .”).

61. *Thomas*, 323 U.S. at 530. Justice Rutledge’s opinion also noted that the right of assembly guarded “not solely religious or political” causes but also “secular causes,” great and small. *Id.* at 531.

62. *Douds*, 339 U.S. at 401.

63. 341 U.S. 494 (1951).

64. WALKER, *supra* note 13, at 187; *see also* MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 81 (2005) (calling *Dennis* “one of the most troubling free speech decisions ever handed down by the United States Supreme Court”).

65. REDISH, *supra* note 64, at 81.

66. 18 U.S.C. §§ 10, 11 (1946) (current version at 18 U.S.C. § 2385 (2006)).

even in the concrete planning stages.”⁶⁷ Following a nine month trial,⁶⁸ the jury deliberated less than a day before convicting all twelve defendants.⁶⁹

Chief Justice Vinson’s plurality opinion in *Dennis* recounted the speech-protective views of Justices Holmes and Brandeis⁷⁰ and conceded that “there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.”⁷¹ But Vinson completely refashioned Justice Holmes’s clear and present danger standard, concluding that with respect to the CPUSA, “[i]t is the existence of the conspiracy which creates the danger.”⁷² Milton Konvitz later quipped that Vinson’s interpretation of the Holmes-Brandeis rationale was “[d]octrine [r]educd to a [p]hrase.”⁷³

Justice Black’s dissent lamented:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.⁷⁴

Dennis generated little public outcry, and even liberals like Norman Thomas and Arthur Schlesinger supported the decision.⁷⁵ One of the lone openly critical voices was Eleanor Roosevelt, who wrote the day after the decision: “I am not sure our forefathers—so careful to guard our rights of freedom of speech, freedom of thought and freedom of assembly—would not feel that the Supreme Court had perhaps a higher obligation.”⁷⁶ Roosevelt spent the following two summers touring with Justice Douglas to criticize *Dennis* in public forums, an endeavor that at times met with hostility.⁷⁷

D. The Second Red Scare

Dennis opened the floodgates for additional FBI investigations and prosecutions. The Justice Department began pursuing “second-string” CPUSA leadership and charged 126 communists with conspiracy under the Smith Act

67. REDISH, *supra* note 64, at 83.

68. *Id.* at 82.

69. *Id.* at 87.

70. *See* *Dennis v. United States*, 341 U.S. 494, 502–08 (1951).

71. *Id.* at 507.

72. *Id.* at 511.

73. MILTON R. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY* 307 (1957).

74. *Dennis*, 341 U.S. at 581 (Black, J., dissenting).

75. ALLIDA M. BLACK, *CASTING HER OWN SHADOW: ELEANOR ROOSEVELT AND THE SHAPING OF POSTWAR LIBERALISM* 155 (1996).

76. *Id.* at 154.

77. *Id.* at 155. Black reports that “the furor [Roosevelt’s] stance generated cut into her lecture tour and deprived her of income she needed.” *Id.*

over the next few years.⁷⁸ Paul Robeson, W.E.B. Du Bois, Lewis Mumford, Eleanor Roosevelt, and Henry Steele Commager launched sporadic efforts to halt the prosecutions or else obtain amnesty for the defendants.⁷⁹ Albert Einstein also figured prominently in these efforts. When the SISS subpoenaed a high school English teacher named William Frauenglass to testify about possible communist affiliations in May of 1953, Frauenglass wrote Einstein requesting a letter of support.⁸⁰ Einstein's response, which appeared as part of a front page story in the *New York Times*, counseled that despite the inevitable consequences, "[e]very intellectual who is called before the committees ought to refuse to testify."⁸¹

Six months later, electrical engineer Al Shadowitz drove to Princeton to see Einstein after receiving a subpoena from the SISS.⁸² Shadowitz informed Einstein that he intended to rely on the First Amendment rights of speech and association rather than the Fifth Amendment in refusing to answer the Committee's questions, a position that Einstein supported.⁸³ At his public hearing, Shadowitz invoked the First Amendment and noted that "Professor Einstein advised me not to answer."⁸⁴ Despite the efforts of Einstein and others, widespread public concern for those accused never materialized, and the government routinely won even its weakest cases.⁸⁵

Anti-communist concerns also pervaded state legislation. In 1952, the Court considered *Adler v. Board of Education*,⁸⁶ a speech and assembly challenge to a New York law that denied employment in its public schools to any person who advocated the violent overthrow of the government or who

78. MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 156 (1977).

79. *Id.* at 157.

80. FRED JEROME, *THE EINSTEIN FILE: J. EDGAR HOOVER'S SECRET WAR AGAINST THE WORLD'S MOST FAMOUS SCIENTIST* 238–39 (2002).

81. Leonard Buder, 'Refuse to Testify,' *Einstein Advises Intellectuals Called In by Congress*, N.Y. TIMES, June 12, 1953, at 1. "Senator McCarthy immediately labeled Einstein 'an enemy of America.'" JEROME, *supra* note 80, at 240 (quoting *Einstein Criticized: M'Carthy Says Giver of Such Advice Is 'Enemy of America'*, N.Y. TIMES, June 14, 1953, at 30).

82. JEROME, *supra* note 80, at 245.

83. *Id.* at 246.

84. *Id.* at 247. Einstein advised educators to refuse answering questions about association based on the First Amendment rights of "free speech and free association" as well. *Balky Teacher Cites Dr. Einstein's Advice*, N.Y. TIMES, Dec. 19, 1953, at 8. Einstein remained inflamed by the rampant McCarthyism. A few months before his death, Einstein professed: "If I were a young man again . . . I would not try to become a scientist or scholar or teacher, I would rather choose to be a plumber or a peddler, in the hope of finding that modest degree of independence still available under present circumstances." Bernard T. Feld, *Einstein and the Politics of Nuclear Weapons*, THE BULLETIN OF THE ATOMIC SCIENTISTS, March 1979, at 5, 14 (quoting Einstein); JEROME, *supra* note 80, at 255.

85. BELKNAP, *supra* note 78, at 157–58.

86. 342 U.S. 485 (1952).

joined a society or group of persons knowing that it advanced such advocacy.⁸⁷ The law took aim at “members of subversive groups, particularly of the Communist Party and its affiliated organizations [who] ha[d] been infiltrating into public employment in the public schools of the State.”⁸⁸ Findings that “the members of such groups use[d] their positions to advocate and teach their doctrines . . . without regard to truth or free inquiry” in ways “sufficiently subtle to escape detection in the classroom” led the New York legislature to pass the restrictive statute.⁸⁹ A 6–3 majority of the Court concluded that New York had acted “in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.”⁹⁰

Nine months after *Adler*, the Court finally acted to set limits on anti-communist legislation. Justice Clark’s majority opinion in *Wieman v. Updegraff*⁹¹ struck down an Oklahoma statute that required state employees to affirm, among other things, that they had not, within the last five years, “been a member of . . . any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization.”⁹² Distinguishing *Adler*, Clark emphasized that the New York law required a person to have *known* the purposes of the society or group that he or she had joined.⁹³ In contrast, Oklahoma’s law mandated that “the fact of association alone determines disloyalty and disqualification; it matter[ed] not whether association existed innocently or knowingly.”⁹⁴

Justice Frankfurter’s concurrence in *Wieman* referred to “a right of association peculiarly characteristic of our people.”⁹⁵ That same year, Thomas

87. *Id.* at 490–92.

88. *Id.* at 489.

89. *Id.* at 489–90.

90. *Id.* at 493. The Court’s rhetoric is astounding. Justices Black, Douglas, and Frankfurter filed separate dissents. Justice Black protested the Court’s endorsement of a law “which effectively penalizes school teachers for their thoughts and their associates.” *Id.* at 497 (Black, J., dissenting). Justice Douglas refused “to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights.” *Id.* at 508 (Douglas, J., dissenting). Justice Frankfurter’s lengthy dissent rested largely on procedural grounds. *Id.* at 497 (Frankfurter, J., dissenting).

91. 344 U.S. 183 (1952).

92. *Id.* at 186 (quoting OKLA. STAT. tit. 51, §§ 37.1–37.8 (repealed 1953)).

93. *Id.* at 189.

94. *Id.* at 191.

95. *Id.* at 195 (Frankfurter, J., concurring). In *American Communications Association v. Douds*, 339 U.S. 382, 409 (1950), the Court had referenced a “freedom of association” when it stated that “the effect of [a] statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution.” The Court’s only mention of a right of association prior to *Douds* had been a passing reference to “the rights of free speech, assembly, and association” in *Whitney v. California*, 274 U.S. 357, 371 (1927).

Emerson and David Haber's treatise *Political and Civil Rights in the United States* contended that the "right of association is basic to a democratic society."⁹⁶ Emerson and Haber asserted that association "embraces not only the right to form political associations but also the right to organize business, labor, agricultural, cultural, recreational and numerous other groups that represent the manifold activities and interests of a democratic people."⁹⁷

E. Harlan and Brennan Join the Court

In the midst of the Second Red Scare and early hints of a constitutional right of association, two men who would deeply influence the development of that right arrived at the Supreme Court: John Harlan and William Brennan. Justice Brennan, who succeeded Sherman Minton in 1956, became the chief intellectual architect of the Warren Court's civil liberties activism and was arguably "the most important jurist of the second half of the century."⁹⁸ His tenure on the Court included not only the right of association's first official recognition in *NAACP v. Alabama ex rel. Patterson*⁹⁹ but also its transformation twenty-six years later in his opinion in *Roberts v. United States Jaycees*.¹⁰⁰ Justice Harlan, who replaced Justice Robert Jackson in 1955, authored the Court's opinion in *NAACP v. Alabama*.¹⁰¹ His judicial philosophy is often cast as "conservative" based on his close relationship with Justice Felix Frankfurter, his predilection for judicial restraint and deference to national security decisions of government officials, and his constant sparring with the Warren Court liberals. But this label obscures the complexity of his thought.¹⁰² Within his first few months on the Court, Harlan expressed discomfort over the Smith Act prosecutions and associational restrictions on communists and let slip that he had little patience for "McCarthyite garbage."¹⁰³

96. THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 248 (1952).

97. *Id.* Emerson and Haber also wrote that "it is generally accepted that the rights in the First Amendment to freedom of speech, press and assembly, and to petition the government for redress of grievances, taken in combination, establish a broader guarantee to the right of political association." *Id.*

98. POWE, *supra* note 37, at 90.

99. 357 U.S. 449 (1958).

100. 468 U.S. 609 (1984).

101. 357 U.S. 449 (1958).

102. At a 1972 memorial service for Justice Harlan, Justice Stewart quipped: "I can assure you that a very interesting law review article could someday be written on 'The Liberal Opinions of Mr. Justice Harlan.'" Norman Dorsen, *John Marshall Harlan, in THE WARREN COURT: A RETROSPECTIVE* 236, 241 (Bernard Schwartz ed., 1996).

103. TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* 338 (1992) (quoting Charles Fried, Law Clerk to Justice John M. Harlan). Justice Frankfurter, too, "privately deplored the excesses of McCarthyism and the witch-hunts conducted in the name of national security, and . . . risked personal opprobrium in his defense of

With respect to the right of association, Harlan's constitutional hermeneutic proved even more important than his concerns about the prosecution of communists. He believed that the "full scope" of the liberty in the Fourteenth Amendment's Due Process Clause could not be "found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."¹⁰⁴ For Harlan, the meaning of constitutional law was "one not of words, but of history and purposes."¹⁰⁵ This approach required an appropriate balancing of past tradition and present reform:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.¹⁰⁶

These views about liberty and tradition gave Harlan an openness to the kind of arguments that would later be advanced to ground the right of association in the Constitution.

F. Red Monday

On Monday, June 17, 1957, with Brennan and Harlan now in place, the Court released a quartet of decisions curtailing the government's anti-communist efforts in what became known as "Red Monday."¹⁰⁷ Three of the decisions checked actions of the federal government. In *Service v. Dulles*, the Court ordered the reinstatement of a federal government employee who had been dismissed based on loyalty concerns.¹⁰⁸ In *Watkins v. United States*, the Court reversed John Watkins's contempt conviction following his refusal on First Amendment grounds to answer the HUAC's questions about his alleged communist affiliations.¹⁰⁹ *Yates v. United States*, the most important of the three decisions against the federal government, involved the appeal of fourteen leaders of the Communist Party in California convicted under the Smith Act.¹¹⁰ Justice Harlan's majority opinion distinguished advocacy of forcible

some of the accused." UROFSKY, *supra* note 14, at 105.

104. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

105. *Id.* at 542-43.

106. *Id.* at 542.

107. Following the decisions, outraged conservatives in the Senate led by William Jenner of Indiana introduced a "court-stripping" bill to deprive the Court of certain subject matter jurisdiction. WALKER, *supra* note 13, at 243.

108. 354 U.S. 363, 388-89 (1957).

109. 354 U.S. 178, 215-16 (1957). The Court noted that the First Amendment could be invoked against investigating committees, *id.* at 188, but resolved the case as a violation of procedural due process under the Fifth Amendment. *Id.* at 215. *Watkins* "amounted to little more than the imposition of a rather minimal constitutional restraint." REDISH, *supra* note 64, at 41.

110. 354 U.S. 298, 300-03 (1957).

overthrow of the government as an “abstract principle” on the one hand and “advocacy or teaching of action” on the other.¹¹¹ Following this standard, the Court directed that five of the convictions be overturned outright and the other nine be remanded for retrial.¹¹² More importantly, Harlan’s statutory interpretation effectively ended further Smith Act prosecutions.¹¹³

The fourth decision, *Sweezy v. New Hampshire*, involved a state rather than a federal action.¹¹⁴ The New Hampshire Attorney General had subpoenaed Paul Sweezy, the well-known Marxist economist and founder of the *Monthly Review*, to testify about alleged communist affiliations pursuant to the New Hampshire Subversive Activities Act of 1951.¹¹⁵ Like Watkins, Sweezy refused to answer certain questions on First Amendment grounds.¹¹⁶ Sweezy was found in contempt and imprisoned.¹¹⁷ The New Hampshire Supreme Court upheld his conviction despite its assertion that “the right to associate with others for a common purpose, be it political or otherwise, [was one of the] individual liberties guaranteed to every citizen by the State and Federal Constitutions.”¹¹⁸ Chief Justice Warren’s plurality opinion reversed Sweezy’s conviction, concluding that New Hampshire’s statute impermissibly “extend[ed] to conduct which is only remotely related to actual subversion.”¹¹⁹

G. Sweezy, Liberty, and Penumbras

Sweezy also brought to the foreground an important legal question about the right of association: its constitutional source. Thomas Emerson, who represented Sweezy before the Court, noted that the New Hampshire Supreme Court had referred to “speech and association” rights in its review of Sweezy’s conviction.¹²⁰ Emerson offered two possibilities for the source of that right. First, he argued that New Hampshire’s law deprived Sweezy “of liberty and property without due process of law, contrary to the Fourteenth Amendment of

111. *Id.* at 318–20. *See also* POWE, *supra* note 37, at 94–95; WALKER, *supra* note 13, at 243; YARBROUGH, *supra* note 103, at 191.

112. *Yates*, 354 U.S. at 328–29.

113. *See* WALKER, *supra* note 13, at 243 (“*Yates* . . . halted further Smith Act prosecutions.”); YARBROUGH, *supra* note 103, at 191 (“Following [*Yates*], Smith Act prosecutions were drastically curtailed, then abandoned entirely.”).

114. 354 U.S. 234, 235 (1957) (plurality opinion).

115. *Id.* at 236–38.

116. *Id.* at 238–42, 243–45.

117. *Id.* at 244–45.

118. *Wyman v. Sweezy*, 121 A.2d 783, 792 (N.H. 1956).

119. *Sweezy*, 354 U.S. at 247. Chief Justice Warren paid particular attention to Sweezy’s role as a university professor, noting that “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust” and that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Id.* at 250.

120. Jurisdictional Statement at 18, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (No. 175).

the Constitution of the United States.”¹²¹ Second, he argued that “it can hardly be doubted that the requirements of the First Amendment, made applicable to the states through the Fourteenth Amendment, impose comparable or identical limits on state power.”¹²²

The differences between these arguments complicated the Court’s efforts to settle on a jurisprudential framework for the right of association.¹²³ The issue centered on how the rights that the New Hampshire court had located in “the Federal Constitution” could limit *state* action. The Supreme Court had long ago concluded that the substantive provisions of the Bill of Rights limited only the federal government and did not apply to the states.¹²⁴ But the Fourteenth Amendment’s Due Process Clause subsequently pronounced—in language remarkably similar to the Fifth Amendment—that states could not “deprive any person of life, liberty, or property, without due process of law.”¹²⁵

Whether the liberty of the Fourteenth Amendment encompassed specific provisions in the Bill of Rights remained unclear at the time of *Sweezy*. In 1922, Justice Pitney had written for a majority of the Court that “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about the ‘freedom of speech.’”¹²⁶ But three years later, Justice Sanford concluded in *Gitlow v. New York* that “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”¹²⁷

Although *Gitlow* made clear that states, like the federal government, could not “impair” the freedoms of speech and press, the decision did not identify the source of those restrictions. Twelve years later, Justice Cardozo suggested

121. *Id.* at 4.

122. *Id.* at 19.

123. These arguments were not at issue in *Watkins*, *Yates*, or *Dulles*, all of which involved federal rather than state action.

124. *See* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247–48 (1833).

125. U.S. CONST. amend. XIV, § 1. This clause restricted state action that deprived “liberty” without due process, but it remained to be seen what exactly that encompassed. Soon after the Fourteenth Amendment’s passage, the Court focused on a different provision of the Bill of Rights, the Privileges or Immunities Clause. In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 54 (1873), the Court intimated that the Bill of Rights might be applicable to the states through the Fourteenth Amendment as “privileges and immunities” of citizenship. *Id.* This is the theory that Justice Roberts relied upon in holding that Mayor Hague’s actions were subject to the freedom of assembly in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 512 (1939). But outside of *Hague*, the Court has cited the Due Process Clause, rather than the Privileges or Immunities Clause, in applying the rights of the First Amendment to state action. *See, e.g., De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

126. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922).

127. 268 U.S. 652, 666 (1925).

two possibilities in *Palko v. Connecticut*: (1) that certain provisions contained in the Bill of Rights were “brought within the Fourteenth Amendment by a process of absorption;”¹²⁸ and (2) that restrictions against the federal government from “the specific pledges of particular amendments” were “implicit in the concept of ordered liberty” and thereby valid against the states through the Fourteenth Amendment.¹²⁹ Restating Cardozo’s alternatives suggests the following two possibilities:

- (1) The *incorporation argument*, which holds that the Due Process Clause of the Fourteenth Amendment incorporated the specific rights enumerated in the First Amendment, thereby making those rights applicable to the states; or
- (2) The *liberty argument*, which holds that rights similar to those in the First Amendment were implicit in the liberty protected by the Due Process Clause of the Fourteenth Amendment and could thus be derived independently of the First Amendment.

Justices Douglas, Black, and Frankfurter had previously sparred over the differences between the incorporation and liberty arguments. In 1943, Douglas’s majority opinion in *Murdock v. Pennsylvania* referred without elaboration to “[t]he First Amendment, which the Fourteenth makes applicable to the states.”¹³⁰ Four years later, Black’s majority opinion in *Everson v. Board of Education* echoed the same language.¹³¹ Frankfurter dissented in both *Murdock* and *Everson*. Two years later, his majority opinion in *Wolf v. Colorado* rebuffed Douglas and Black: “The notion that the ‘due process of law’ guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been

128. 302 U.S. 319, 326 (1937). Justice Cardozo continued: “These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.” *Id.*

129. *Id.* at 324–25. Earlier that year, Chief Justice Hughes reached a similar conclusion about the right of assembly in *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937):

The First Amendment of the Federal Constitution expressly guarantees [the right of assembly] against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that 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.

Id.

130. 319 U.S. 105, 108 (1943).

131. 330 U.S. 1, 8 (1947). Justices Black and Douglas did not share identical views about incorporation. Justice Douglas joined Justice Black’s dissent in *Adamson v. California*, which argued that the Fourteenth Amendment had incorporated *all* of the civil liberties provisions of the Bill of Rights. 332 U.S. 46, 71–72 (1947) (Black, J., dissenting). But elsewhere Justice Douglas backed away from Justice Black’s “total incorporation” theory. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 515–18 (1961) (Douglas, J., dissenting).

rejected by this Court again and again, after impressive consideration. . . . The issue is closed.”¹³² Frankfurter could not find anything in the text of the Fourteenth Amendment that applied the Bill of Rights to the states.¹³³

Black and Douglas disagreed with Frankfurter not only about the *source* of the constitutional limits on state action but also about the *extent* of those limits. For Black, the rights in the First Amendment were “absolute” and could not be restricted by state action.¹³⁴ Although Douglas did not always go as far as Black, he did argue in *Murdock* that the freedoms of the First Amendment held a “preferred position.”¹³⁵ Frankfurter considered the preferred position language a “mischievous phrase”¹³⁶ that “expresses a complicated process of constitutional adjudication by a deceptive formula”¹³⁷ and “impl[ies] that any law touching communication is infected with presumptive invalidity.”¹³⁸ He argued instead that the interests of the government must be weighed against the liberty of the Fourteenth Amendment.¹³⁹ On this view, Frankfurter would defer to a legislative judgment if a restriction of speech or assembly had a “rational basis.” Justice Jackson described the tension between the two positions in *West Virginia State Board of Education v. Barnette*:

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the

132. 338 U.S. 25, 26 (1949) (citations omitted). Justices Black and Douglas argued that the entirety of the Fourth Amendment applied to the states. *Id.* at 40 (Black, J., concurring); *Id.* at 40 (Douglas, J., dissenting) (on grounds that improperly admitted evidence required reversal). Justice Frankfurter wanted to place some federal limits on state action, but he could not find those limits in the First Amendment. *Id.* at 26 (majority opinion). He turned instead to the “liberty” provision of the Fourteenth Amendment’s Due Process Clause, *id.* at 27–28, a move that harkened back to the maligned substantive due process of the *Lochner* era.

133. *Id.* at 26 (majority opinion).

134. See, e.g., *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“[T]he First Amendment’s language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press.’ I read ‘no law . . . abridging’ to mean *no law abridging*.”); *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring) (“Some constitutional provisions are stated in absolute and unqualified language such, for illustration, as the First Amendment . . .”).

135. 319 U.S. at 115. In *Thomas v. Collins*, 323 U.S. 516, 530 (1945), Justice Rutledge had used the same language with respect to the freedom of assembly.

136. *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

137. *Id.* at 96.

138. *Id.* at 90.

139. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring); *Dennis v. United States*, 341 U.S. 494, 524–25, 542 (1951) (Frankfurter, J., concurring).

Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a “rational basis” for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.¹⁴⁰

The upshot of these two perspectives was that the Court would be more likely to uphold a state law restricting expressive freedom if it followed the liberty argument and more likely to strike down the law if it followed the incorporation argument.¹⁴¹

The Court’s decision in *Sweezy v. New Hampshire* added a new wrinkle: unlike the rights of speech, press, assembly, and religion at issue in earlier cases, the right of association appeared nowhere in the Constitution.¹⁴² Under the liberty argument, association (like any other right enforced against the states) was implicit in the liberty of the Fourteenth Amendment.¹⁴³ But the incorporation argument, which claimed that the Fourteenth Amendment incorporated provisions found in the First Amendment,¹⁴⁴ faced a greater hurdle. The only possible explanation to support the incorporation argument was that a right implicit in the First Amendment implicitly applied to states through the Fourteenth Amendment. That was one more degree of inference than the liberty argument. Penumbras formed by emanations, as Douglas would later characterize it.¹⁴⁵

Chief Justice Warren’s plurality opinion, joined by Justices Black, Douglas, and Brennan, relied on the incorporation argument: “[T]he right to engage in political expression and association . . . was enshrined in the First Amendment of the Bill of Rights.”¹⁴⁶ Justice Frankfurter, joined by Justice Harlan, concurred only in the result.¹⁴⁷ In Frankfurter’s view, the Court was confined to “the limited power to review the action of the States conferred upon the Court by the Fourteenth Amendment.”¹⁴⁸ The Court had to undertake “the narrowly circumscribed but exceedingly difficult task of making the final

140. 319 U.S. 624, 639 (1943).

141. There were, of course, phrasings ambiguous enough to be consistent with both alternatives. *See, e.g.,* *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958) (“[The] fundamental right [of speech] is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action.”).

142. 354 U.S. 234 (1957) (plurality opinion).

143. *See Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

144. *See id.* at 326.

145. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

146. *Sweezy*, 354 U.S. at 250.

147. *Id.* at 255 (Frankfurter, J., concurring).

148. *Id.* at 255–56.

judicial accommodation between the competing weighty claims that underlie all such questions of due process.”¹⁴⁹ Frankfurter made no reference to the First Amendment but relied instead upon “‘the concept of ordered liberty’ implicit in the Due Process Clause of the Fourteenth Amendment.”¹⁵⁰ His concurrence rested on “a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection.”¹⁵¹

III. *NAACP V. ALABAMA*

The divide between the liberty argument and the incorporation argument persisted the following year when the Court formally recognized a constitutional right of association in *NAACP v. Alabama*, a case that shifted the Court’s focus on group autonomy from the government’s anti-communist efforts to the Civil Rights Movement in the South.¹⁵²

A. *The Growing Civil Rights Movement*

The proximity between a waning but still active concern over domestic communism and the expanding Civil Rights Movement led to widely divergent claims about the relationship between the two. On the one hand, the federal government increasingly viewed segregation as undercutting its stance against communist ideology. Its amicus brief in *Brown v. Board of Education* argued that “[t]he United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man”¹⁵³ and that segregation “jeopardize[d] the effective maintenance of our moral leadership of the free and democratic nations of the world.”¹⁵⁴ This view prevailed in the northern media as well. The *New York Times* quoted John Gange’s assertion that “the decision ‘will immensely enhance our role as a leader of the democracies of the world.’”¹⁵⁵ The *Washington Post* hailed that with *Brown*,

149. *Id.* at 256.

150. *Id.* at 266 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

151. *Id.* at 266–267. Justice Clark’s dissent erroneously concludes that Justice Frankfurter concurred “on the ground that Sweezy’s rights under the First Amendment ha[d] been violated.” *Id.* at 268 (Clark, J., dissenting). Powe writes that Justice Frankfurter’s concurrence “introduced for the first time the concept that Brennan would subsequently perfect, that to sustain a law entrenching on a constitutional right, a state must be acting because of a compelling state interest.” POWE, *supra* note 37, at 97.

152. 357 U.S. 450 (1958).

153. Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448).

154. *Id.* at 8.

155. *Court Said to End ‘A Sense of Guilt’: Virginia School Head Asserts U.S. Prestige Will Rise as Result of Anti-Bias Ruling*, N.Y. TIMES, May 18, 1954, at 18 (quoting John Gange, Dir., Woodrow Wilson Sch. of Foreign Affairs, Univ. of Va.).

“America is rid of an incubus which impeded and embarrassed it in all of its relations with the world.”¹⁵⁶

In contrast to these efforts to link integration with democracy, southern conservatives argued that integration advocates were controlled by communist forces.¹⁵⁷ The link between “red” and “black” solidified in the minds of many southerners during the 1930s when the Communist Party’s legal arm, the International Labor Defense, undertook the celebrated defenses of Angelo Herndon and the “Scottsboro Boys.”¹⁵⁸ But it was the “southern red scare” of the 1950s that pressed the connections between these two “radical” movements beyond the realm of plausibility.¹⁵⁹ Although segregationists “never found any good evidence that Communists had a perceptible influence in the NAACP,”¹⁶⁰ they nevertheless perpetuated a link “to discredit the civil rights movement by associating it with the nation’s greatest enemy.”¹⁶¹

Chief Justice Warren’s opinion in *Brown* fueled efforts to steer anti-communist sentiment toward civil rights activists. His famous footnote eleven cited four non-legal sources—including Myrdal and two other authors who “had what passed for communist leanings during that era.”¹⁶² In response to the decision, Georgia’s lieutenant governor denounced “[t]he meddlers, demagogues, race baiters and Communists in the United States [who] are determined to destroy every vestige of states’ rights.”¹⁶³ Mississippi Senator James Eastland, who at the time chaired both the Senate Judiciary Committee

156. *Equal Education for All*, WASH. POST, May 19, 1954, at 14.

157. JEFF WOODS, *BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH, 1948–1968*, at 5 (2004).

158. See CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* xii (1976).

159. See NEIL R. McMILLEN, *THE CITIZENS’ COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954–64*, at 193 (1971) (“[T]he region had virtually no Communists.”); WOODS, *supra* note 157, at 49–50. *But see* *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 580 (1963) (Harlan, J., dissenting) (“[I]t is not amiss to recall that government evidence in Smith Act prosecutions has shown that the sensitive area of race relations has long been a prime target of Communist efforts at infiltration.”). In 1950, the NAACP adopted an “Anti-Communism” resolution, acknowledging that “certain branches of the National Association for the Advancement of Colored People are being rocked by internal conflicts between groups who follow the Communist line and those who do not, which threaten to destroy the confidence of the public in the Association and which will inevitably result in its eventual disruption.” *Anti-Communism Resolution, Forty-First Convention, NAACP (1950)*, reprinted in *Gibson*, 372 U.S. at 580. The resolution went on to say that “there is a well-organized, nationwide conspiracy by Communists either to capture or split and wreck the NAACP.” *Id.*, reprinted in *Gibson*, 372 U.S. at 581.

160. WOODS, *supra* note 157, at 53.

161. *Id.* at 5.

162. POWE, *supra* note 37, at 42. Powe writes that the footnote “reduced both the legal and moral force of the opinion.” *Id.* at 44.

163. John N. Popham, *Reaction of South: ‘Breathing Spell’ for Adjustment Tempers Region’s Feelings*, N.Y. TIMES, May 18, 1954, at 1, quoted in POWE, *supra* note 37, at 39.

and the SISS, argued that the Court in *Brown* had “responded to a radical, pro-Communist political movement in this country.”¹⁶⁴ Eastland, Senator John McClellan of Arkansas, and Representative Edwin Willis of Louisiana used their positions on the SISS, HUAC, and other investigative subcommittees to hold public hearings on “Communist influence in civil rights protests.”¹⁶⁵

One of the most forceful advocates of the link between communism and civil rights in the South was Mississippi Circuit Court Judge Tom P. Brady. Lucas Powe has written that “Brady saw *Brown* as a virtual communist plot to mandate the amalgamation of the races.”¹⁶⁶ The summer after the Court’s decision, Brady spearheaded the creation of the Citizens’ Councils, which purported to be a “nonviolent alternative to the Ku Klux Klan” that would ensure financial and economic consequences to anyone supporting integration.¹⁶⁷ According to Neil McMillen, “the nexus between the NAACP and the international Communist apparatus was the central motif of literally hundreds of Council speeches and publications.”¹⁶⁸

In late 1954 and early 1955, Citizens’ Councils sprang up across Alabama. From October to December 1955 alone, “membership in the Alabama Citizens’ Councils grew from a few hundred to twenty thousand.”¹⁶⁹ The Councils made clear their intentions to bury Alabama civil rights advocates under economic and social pressures:

The white population in this country controls the money, and this is an advantage that the council will use in a fight to legally maintain complete segregation of the races. We intend to make it difficult, if not impossible, for

164. Senator James O. Eastland, Address at the Association of Citizens’ Councils of Mississippi Statewide Convention: We’ve Reached Era of Judicial Tyranny (Dec. 1, 1955), quoted in MCMILLEN, *supra* note 159, at 195. Eastland followed this with a frontal assault in a publication called *Is the Supreme Court Pro-Communist?* MCMILLEN, *supra* note 159, at 195. Another segregationist, Medford Evans, wrote an article titled *Forced Integration Is Communism in Action*. *Id.* at 196–97 & n.19.

165. WOODS, *supra* note 157, at 5. Eastland was “one of the era’s leading racists” and dubbed by *Time* magazine as “the nation’s most dangerous demagogue.” ROBERT SHERRILL, FIRST AMENDMENT FELON: THE STORY OF FRANK WILKINSON, HIS 132,000-PAGE FBI FILE, AND HIS EPIC FIGHT FOR CIVIL RIGHTS AND LIBERTIES 157 (2005).

166. POWE, *supra* note 37, at 68.

167. *Id.* Brady was careful to make a clear distinction between the councils and “the nefarious Ku Klux Klans.” MCMILLEN, *supra* note 159, at 18.

168. MCMILLEN, *supra* note 159, at 198. “Judge Brady told a White Citizens Council in Dallas County that the NAACP ‘was a willing and ready tool in the hands of Communist front organizations.’” Petition for Writ of Certiorari at 21 n.20, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (No. 91) (quoting *Alabama Senate Unanimously Votes School Assignment Bill*, S. SCH. NEWS, July 6, 1955, at 2).

169. POWE, *supra* note 37, at 68.

any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage.¹⁷⁰

This background highlights the importance of the membership list that would be at issue in *NAACP v. Alabama*. Once the names of NAACP members became public, the Citizens' Councils would ensure dire consequences.¹⁷¹

B. Membership Lists and the Right of Association

The controversy leading up to *NAACP v. Alabama* began in June of 1956 when Alabama Attorney General John Patterson initiated an action to enjoin the NAACP from operating within the state.¹⁷² The state trial court judge, who had once stated in a campaign speech that he “intend[ed] to deal the NAACP . . . a mortal blow from which they shall never recover,”¹⁷³ issued the injunction *ex parte*.¹⁷⁴ The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review.¹⁷⁵ Knowing what this disclosure would mean given the activity of the Citizens' Councils, the NAACP refused.¹⁷⁶ The judge responded with a \$10,000 contempt fine, which he increased to \$100,000 after five days.¹⁷⁷ The Alabama Supreme Court rejected the NAACP's appeal of the judge's order through a series of disingenuous procedural rulings.¹⁷⁸ The NAACP then appealed to the U.S. Supreme Court.¹⁷⁹

In its petition for certiorari, the NAACP implicitly made the incorporation argument. It contended that the actions of Patterson and the Alabama courts amounted to “a serious interference with essential freedom of speech, freedom of assembly, freedom of association, and the right to petition,”¹⁸⁰ that they

170. *Alabama*, S. SCH. NEWS, Jan. 6, 1955, at 2, *quoted in* Petition for Writ of Certiorari at 20, *Patterson*, 357 U.S. 449 (No. 91).

171. *See* POWE, *supra* note 37, at 68, 165. The Montgomery bus boycotts began in December 1955. *See* McMILLEN, *supra* note 159, at 43–44. The Citizens' Councils were largely dissolved by the mid-1960s. *See id.* at 126.

172. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958). Patterson argued that the NAACP was a “business” that had failed to register under applicable state law. *See id.*; Petition for Writ of Certiorari at 5 n.3, *Patterson*, 357 U.S. 449 (No. 91) (listing the State of Alabama's complaint allegations).

173. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 283 (1994) (quoting Judge Walter Jones).

174. *Patterson*, 357 U.S. at 452–53.

175. *Id.* at 453.

176. *Id.*

177. *Id.* at 453–54.

178. *See Ex parte NAACP*, 91 So. 2d 214, *motion to stay execution of judgment denied*, 91 So. 2d 220, *cert. denied*, 91 So. 2d 221 (Ala. 1956) (per curiam).

179. *NAACP v. Alabama ex rel. Patterson*, 91 So. 2d 214 (Ala. 1956), *cert. granted*, 353 U.S. 972 (1957).

180. Petition for Writ of Certiorari at 17, *Patterson*, 357 U.S. 449 (No. 91).

represented “an unlawful restraint by the State of Alabama of First Amendment rights,”¹⁸¹ and that “[t]here can be no doubt that First Amendment rights are protected by the Fourteenth Amendment.”¹⁸² In contrast, the NAACP’s brief endorsed the liberty argument: the organization and its members were “merely invoking their constitutionally protected rights of free speech and free association guaranteed under the due process clause of the Fourteenth Amendment.”¹⁸³ The brief elaborated that “[t]he unimpaired maintenance of freedom of association and free speech is considered essential to our political integrity”¹⁸⁴ and quoted from Justice Frankfurter’s *Wieman* concurrence that the right of association was “peculiarly characteristic of our people.”¹⁸⁵

In its reply brief, the State of Alabama conceded that the NAACP, as a corporation, held rights of free speech and free press that were safeguarded by the Fourteenth Amendment.¹⁸⁶ However, the State argued that a corporation’s rights “do not include freedom of association, a right of privacy, or the right to assert the privilege of others, including members.”¹⁸⁷ Thus, even if its members held a right of free association, the NAACP, as a corporation, could not assert that right.¹⁸⁸

First Amendment scholar Leo Pfeffer submitted an amicus brief on behalf of a number of organizations, including among others, the American Jewish Congress, American Baptist Convention, Commission on Christian Social Progress, ACLU, and American Veterans Committee.¹⁸⁹ Although the Court refused to consider the brief,¹⁹⁰ Pfeffer’s arguments are preserved in the record and illuminate the conflation of the constitutional and doctrinal concepts in the case.

Pfeffer was best known for his work on the First Amendment’s religion clauses, but his 1956 book, *The Liberties of an American*, included a section

181. *Id.* at 18.

182. *See id.* at 27 (“There can be no doubt that First Amendment rights are protected by the Fourteenth Amendment . . .”).

183. Brief for Petitioner at 21, *Patterson*, 357 U.S. 449 (No. 91).

184. *Id.* at 22.

185. *Id.* at 24 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)). Although Robert L. Carter, Thurgood Marshall, and Arthur D. Shores signed the brief for the NAACP, Walker reports that lawyers from the ACLU and American Jewish Congress “wrote major sections” of the brief. WALKER, *supra* note 13, at 239.

186. Brief and Argument for Respondent at 26, *Patterson*, 357 U.S. 449 (No. 91).

187. *Id.*

188. *Id.* Alabama further insisted that the only harm articulated by the NAACP and its members was “the mere speculation of injury by private persons to its members.” *Id.* at 12. The State contended that “[p]rivate action is not state action” and did not constitute a violation of constitutional rights. *Id.* (citing *United States v. Cruikshank*, 92 U.S. 542 (1875)).

189. Motion and Brief of Amici Curiae, *Patterson*, 357 U.S. 449 (No. 91).

190. *NAACP v. Alabama ex rel. Patterson*, 355 U.S. 860 (1957) (denying motion for leave to file amicus brief).

on assembly and association.¹⁹¹ In the book, he asserted that despite the absence of any mention of association in the Bill of Rights, “there can be little doubt that [the Founding Fathers] recognized the right to associate as a liberty of Americans.”¹⁹² He elaborated by drawing a distinction between association and assembly:

When men band together for a single public demonstration of feeling or expression of a grievance they exercise their right of assembly; when they continue banding and acting together until the grievance is redressed they exercise their right of association. Freedom of indefinite or permanent association is as fundamental to democracy and as much a liberty of Americans as freedom of temporary assembly, and no less entitled to constitutional protection.¹⁹³

But a few sentences later, Pfeffer collapsed the distinction, referring to “the right of assembly (i.e., association).”¹⁹⁴

In his amicus brief, Pfeffer opened by appealing to both the liberty argument and the incorporation argument:

Freedom of association is a liberty guaranteed against Federal infringement by the Fifth Amendment to the United States Constitution and against state infringement by the Fourteenth. In addition it is one of the co-equal guarantees of the First Amendment applied to the states by the Fourteenth.¹⁹⁵

In support of the liberty argument, Pfeffer contended that “[a] constitutional provision protecting liberty against arbitrary governmental deprivation would have little meaning if it did not encompass the freedom of men to associate with each other.”¹⁹⁶ Turning to the incorporation argument, Pfeffer revealed the same blurring between association and assembly that he had exhibited in *The Liberties of an American*. He argued on the one hand that “‘freedom of association’ may be viewed as a right to conduct indefinitely continuing assemblies.”¹⁹⁷ However, he asserted on the other hand that “freedom of assembly is not limited to occasional meetings but *includes* the organization of associations on a permanent basis.”¹⁹⁸ This latter argument suggested a third way to ground association in the Constitution:

191. LEO PFEFFER, *THE LIBERTIES OF AN AMERICAN: THE SUPREME COURT SPEAKS* 97–123 (1956).

192. *Id.* at 111.

193. *Id.*

194. *Id.*

195. Motion and Brief of Amici Curiae at 8, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91).

196. *Id.* at 10–11.

197. *Id.* at 15.

198. *Id.* at 14 (emphasis added).

(3) The *assembly argument*, which holds that the right of association is part of the right of assembly and is therefore accorded the same deference and applicable to the states to the same extent as the right of assembly.

Although the assembly argument garnered little attention from the Court (other than from Justices Black and Douglas, who raised it infrequently in later cases),¹⁹⁹ it could have provided a stronger grounding for the right of association in the right of assembly.²⁰⁰ This is not to suggest that the right of assembly was immune to political pressure—as previously noted, its “preferred place” had already been attenuated by some of the early communist cases of the 1950s.²⁰¹ Nonetheless, connecting a new right of association to the existing right of assembly would have provided a more direct constitutional link than either the incorporation argument or the liberty argument.

Oral argument in *NAACP v. Alabama* focused almost entirely on procedural and jurisdictional questions related to Alabama state law.²⁰² The Justices showed little interest in the freedom of association and asked no questions about its constitutional basis.²⁰³ NAACP attorney Robert L. Carter, who had advanced the incorporation argument in his petition for certiorari and the liberty argument in his brief, now reverted back to the incorporation argument: the denial of “free speech and freedom of association” infringed upon a right “protected by the First Amendment.”²⁰⁴ Alabama Assistant Attorney General Edmon L. Rinehart made no argument regarding the constitutional source of association but implicitly conceded its status as an individual right.²⁰⁵

The Justices agreed that Alabama had infringed upon the associational rights of the members of the NAACP.²⁰⁶ After they met in conference, Chief

199. See *infra* notes 276, 335 and accompanying text.

200. See generally Inazu, *supra* note 3 (describing the right of assembly’s history).

201. See *supra* Part II.B–C.

202. See Recording of Oral Argument, Parts 1 & 2, *Patterson*, 357 U.S. 449 (No. 91), http://www.oyez.org/cases/1950-1959/1957/1957_91.

203. See *id.*

204. Recording of Oral Argument, Part 1 at 00:32:15, *Patterson*, 357 U.S. 449 (No. 91), http://www.oyez.org/cases/1950-1959/1957/1957_91.

205. *Id.* at 00:51:16–1:01:20. Rinehart instead challenged the NAACP’s attempt to assert the right as a corporation or on behalf of its members, arguing that *Watkins* and *Sweezy* had addressed assertions of individual rights, not the rights of a group. *Id.* at 00:51:45. He intimated only once that the state could constrain an individual’s right of association, arguing unconvincingly that a member of the NAACP would be required to confirm his or her membership if asked to do so during a judicial hearing. *Id.* at 1:00:11–1:01:15. Rinehart also argued vehemently that the right of association was not implicated because the case involved no state action: any adverse treatment following disclosure of membership would come from private persons or businesses, not the state. *Id.* at 00:54:30–00:58:15. For good measure, Rinehart implausibly contended that the possibility of these private actions was “pure speculation.” *Id.* at 00:54:45, 00:58:07.

206. *Patterson*, 357 U.S. at 460–63, 466.

Justice Warren assigned the opinion to Justice Harlan with the understanding that it would be unsigned or per curiam, in keeping with the Court's practice in post-*Brown* race cases.²⁰⁷ But Harlan soon realized that "it would reflect adversely on the Court were [it] to dispose of the case without a fully reasoned opinion" and convinced his colleagues that he should write a full opinion.²⁰⁸

Harlan's opinion for the unanimous Court framed the constitutional question in terms of the "fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."²⁰⁹ He began his constitutional analysis by citing *De Jonge v. Oregon*²¹⁰ and *Thomas v. Collins*²¹¹ to support the principle that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as th[e] Court ha[d] more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."²¹² *De Jonge* and *Thomas* had established that the freedom of *assembly* applied to the states through the Fourteenth Amendment,²¹³ that it covered political, economic, religious, and secular matters,²¹⁴ and that it could only be restricted if "justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."²¹⁵ Based on these precedents, Harlan could have resolved the case entirely on the freedom of assembly. He instead shifted his attention away from assembly, writing in the next sentence that "[i]t 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."²¹⁶ Harlan recognized that the NAACP members had a "constitutionally protected right of association"²¹⁷ that meant they could "pursue their lawful private interests privately and . . . associate freely with others in so doing."²¹⁸ He concluded

207. YARBROUGH, *supra* note 103, at 161. Yarbrough explains that these opinions "contained little explication of their rationale for a particular ruling and thus permitted various facets of the segregation issue to jell in the lower courts with limited Supreme Court intervention." *Id.*

208. Memorandum for the Conference from John M. Harlan, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Apr. 22, 1958) (John Marshall Harlan Papers, Box 495, Seeley G. Mudd Manuscript Library, Princeton Univ., Princeton, N.J. [hereinafter Harlan Papers]), *quoted in* YARBROUGH, *supra* note 103, at 161.

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

210. 299 U.S. 353, 364 (1937).

211. 323 U.S. 516, 530 (1945).

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

213. *De Jonge*, 299 U.S. at 364.

214. *Thomas*, 323 U.S. at 531.

215. *Id.* at 530.

216. *Patterson*, 357 U.S. at 460. Justice Harlan then proceeded to discuss the "protected liberties" of speech and press that were "assured under the Fourteenth Amendment." *Id.* at 461.

217. *Id.* at 463.

218. *Id.* at 466.

that the Alabama courts had substantially restrained these members' "right to freedom of association."²¹⁹

Writing a few years after *NAACP v. Alabama*, Thomas Emerson suggested that Harlan "initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them" but later "elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment."²²⁰ But Harlan's opinion is more ambiguous than Emerson suggests, and it is not clear that he relied on the First Amendment to ground association—the opinion, in fact, never mentions the First Amendment.

C. Unanimity Masking Division?

Justice Harlan's vagueness about the source of the right of association may explain how he marshaled a unanimous opinion.²²¹ In an earlier draft opinion that he circulated to the other members of the Court, Harlan had written: "It is of course firmly established that the protection given by the First Amendment against federal invasion of such rights is afforded by the Due Process Clause of the Fourteenth Amendment against state action."²²² Justices Douglas and Frankfurter were both troubled by the draft language, but for opposite reasons. Frankfurter pushed for Harlan to rely expressly on the liberty argument and avoid any mention of the First Amendment:

Why in heaven's name must we, whenever some discussion under the Due Process Clause is involved, get off speeches about the First Amendment? Why can't you . . . state in two or three sentences that to ask disclosure of membership . . . is, in the light of prior decisions, merely citing them, an invasion of the free area of activity under the Fourteenth Amendment not overcome by any solid, as against a very tenuous, interest of the state in prying into such freedom of action by individuals.²²³

219. *Id.* at 462.

220. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 2 (1964). *Cf.* KOPPELMANN, *supra* note 5, at 18 ("*NAACP v. Alabama* made clear that freedom of association was firmly rooted in the First Amendment . . .").

221. See Letter from Edward S. Corwin, McCormick Professor of Jurisprudence, Princeton Univ., to John M. Harlan, Justice, U.S. Supreme Court (July 7, 1958) (Harlan Papers, Box 511), *cited in* YARBROUGH, *supra* note 103, at 165; Letter from Erwin Griswold, Dean, Harvard Law Sch., to John M. Harlan, Associate Justice, U.S. Supreme Court (July 8, 1958) (Harlan Papers, Box 538), *quoted in* YARBROUGH, *supra* note 103, at 165.

222. John M. Harlan, Draft Opinion, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan Papers, Box 533), *quoted in* YARBROUGH, *supra* note 103, at 125.

223. Letter from Felix Frankfurter, Associate Justice, U.S. Supreme Court to John M. Harlan, Associate Justice, U.S. Supreme Court (Apr. 23, 1958) (Harlan Papers, Box 46), *quoted in* YARBROUGH, *supra* note 103, at 125.

Douglas, on the other hand, feared that Harlan's due process analysis diluted the First Amendment as applied to the states:

[I]f the right of free speech is watered down by the Due Process clause of the Fourteenth Amendment and made subject to state regulation, then the police power of the state has a pretty broad area for application. If we are dealing here with something that can be regulated then I think we are in very deep water in this case, as for the life of me I do not see why a state could not have a rational judgment for believing that an organization like the NAACP was a source of a lot of trouble, friction, and unrest.²²⁴

Douglas expressed particular concern over Frankfurter's proposed balancing approach (which Harlan had endorsed in earlier opinions): "I thought that when we dealt with these racial problems and with free speech and free assembly and religious problems we were dealing with something that is right close to the absolute."²²⁵

Harlan had no affinity for Douglas's argument, but he also expressed "the most serious misgivings about" Frankfurter's advice.²²⁶ Nonetheless, Harlan eliminated any reference to the First Amendment in his revised draft.²²⁷ This concerned Justice Black, who thought that the opinion now read "as though the First Amendment did not exist."²²⁸ Black notified Harlan that he planned to submit a brief concurring opinion to specify "that the state has here violated the basic freedoms of press, speech and assembly, immunized from federal abridgement by the First Amendment, and made applica[ble] as a prohibition against the states by the Fourteenth Amendment."²²⁹ But he relented six days

224. Letter from William O. Douglas, Associate Justice, U.S. Supreme Court, to John M. Harlan, Associate Justice, U.S. Supreme Court (Apr. 22, 1958), *reprinted in* THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 198 (Melvin I. Urofsky ed., 1987). Justice Black also expressed initial concerns to Justice Harlan. *See* YARBROUGH, *supra* note 103, at 126.

225. UROFSKY, *supra* note 224, at 198. Dissenting from an opinion handed down the same day as *NAACP v. Alabama ex rel. Patterson*, Justice Douglas wrote that the liberties contained in the First Amendment

include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation.

Beilan v. Bd. of Pub. Educ., 357 U.S. 399, 412–13 (1958) (Douglas, J., dissenting).

226. YARBROUGH, *supra* note 103, at 126 (quoting Letter from John M. Harlan, Associate Justice, U.S. Supreme Court, to Felix Frankfurter, Associate Justice, U.S. Supreme Court (Apr. 24, 1958) (Harlan Papers, Box 46).

227. *See id.*

228. *Id.* at 126 (quoting Letter from Hugo L. Black, Associate Justice, U.S. Supreme Court, to John M. Harlan, Associate Justice, U.S. Supreme Court (May 2, 1958) (Harlan Papers, Box 46).

229. *Id.* (quoting Letter from Hugo L. Black to John M. Harlan, *supra* note 228) (alteration

later, writing to Harlan that although he “would prefer [the Court’s] holding be supported by different reasoning,” he realized that doing so would prevent the unanimous decision that was so important to the Court in cases involving questions of race.²³⁰

In the midst of satisfying Frankfurter, Douglas, and Black, Harlan had one other hurdle to clear with his opinion. The State of Alabama had argued that the Court was bound by its 1928 opinion in *Bryant v. Zimmerman*, in which an 8–1 majority had upheld a New York registration and membership disclosure law against a challenge from a member of the Ku Klux Klan.²³¹ The *Bryant* Court dismissed the Klan member’s assertion of a Fourteenth Amendment due process liberty “right of membership in the association,” concluding that this right “must yield to the rightful exertion of the police power.”²³² The Court noted:

There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. . . . [R]equiring [membership lists] to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required.²³³

This broad deference to the police power, with explicit approval of publicly disclosing the Klan’s membership list, may have prompted Douglas’s concern that it would be difficult to account for *Bryant* if Harlan resolved *NAACP v. Alabama* under the liberty argument.

Distinguishing the NAACP from the Klan, Harlan concluded that *Bryant* “was based on the particular character of the Klan’s activities, involving acts of unlawful intimidation and violence.”²³⁴ Thus, by relying on the “markedly different considerations in terms of the interest of the State in obtaining

in original).

230. *Id.* at 162 (quoting Handwritten Note from Hugo L. Black, Associate Justice, U.S. Supreme Court, to John M. Harlan, Associate Justice, U.S. Supreme Court (May 8, 1958). Clark threatened to dissent on procedural grounds, but Frankfurter persuaded him to join the majority on the merits. *Id.* at 162–163. The Justices realized that “unanimity was considered crucial in racial cases.” *Id.* at 162.

231. 278 U.S. 63 (1928).

232. *Id.* at 72.

233. *Id.*

234. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465 (1958). Harlan also attempted a less plausible distinction, noting that “the situation before [the Court was] significantly different from that in *Bryant*, because the organization there had made no effort to comply with any of the requirements of New York’s statute but rather had refused to furnish the State with *any* information as to its local activities.” *Id.* at 465–66.

disclosure,” he was able to distinguish *Bryant* without overruling it.²³⁵ This distinction—based on the nature of the group rather than the nature of the restriction—combined with Harlan’s nebulous final wording which towed an ambiguous middle line to appease the concerns raised by Frankfurter, Douglas and Black, left uncertain both the right of association’s constitutional source and its applicability in other contexts.

IV. ASSOCIATION AFTER *NAACP V. ALABAMA*

It was clear that the Court had broken new constitutional ground in *NAACP v. Alabama*, but specifying exactly what had taken place proved elusive. The *Washington Post* editorialized that the Court had “cut through the flummery of Alabama’s treatment of the NAACP and dealt with it as an outright violation of the freedom of *assembly*.”²³⁶ The *New York Times* suggested that the Court had relied on the liberty argument, writing that the decision rested upon “one of the ‘fundamental freedoms’ guaranteed by the due process clauses of the Fourteenth Amendment.”²³⁷ Meanwhile, the first round of law review commentary endorsed the incorporation argument, contending that Justice Harlan’s opinion had located the freedom of association in the First Amendment. The *Ohio State Law Journal* tied the new freedom of association to the freedom of assembly and suggested that the decision reinforced that “First amendment rights occupy a high position in the hierarchy of constitutional freedoms and may be limited only when the state has a compelling interest.”²³⁸ The *Brooklyn Law Review* concluded that the “[f]reedom of association, although not mentioned in the first amendment, was included therein.”²³⁹ The *George Washington Law Review* suggested that “the new freedom of association is a cognate of . . . first amendment freedoms and enjoys coordinately their preferred status.”²⁴⁰ The only thing clear from these initial reactions was that nobody was clear about the source or scope of the new right of association.

235. *Id.* at 465.

236. *Freedom of Association*, WASH. POST, July 3, 1958, at A12 (emphasis added).

237. *Freedom to Associate*, N.Y. TIMES, July 2, 1958, at 28.

238. Frank M. Hays, Recent Development, *State May Not Compel Association to Disclose Names of Members*, 20 OHIO ST. L.J. 123, 124–25, 124 n.8 (1959); *cf. id.* at 126 (“[T]he Court follow[ed] quite closely its previous holdings in the area of free speech and assembly.”).

239. Case Comment, 25 BROOK. L. REV. 122, 123 (1958) (footnotes omitted).

240. Myron W. Solter, Editorial Note, *Freedom of Association—A New and Fundamental Civil Right*, 27 GEO. WASH. L. REV. 653, 672 (1959). The *Harvard Law Review*’s summary of *NAACP v. Alabama* noted that the holding rested on “freedom of association” but did not elaborate on the nature or source of that freedom. *The Supreme Court, 1957 Term—Constitutional Law*, 72 HARV. L. REV. 193, 194 (1958).

A. Uphaus and Barenblatt: *Ducking the Hard Question*

The Court's first opportunities to apply *NAACP v. Alabama* came the following term in *Uphaus v. Wyman*²⁴¹ and *Barenblatt v. United States*,²⁴² two cases involving inquiries into alleged communist affiliations. The newly declared freedom of association could have muted the overzealous investigations that occurred during the waning days of the McCarthy era.²⁴³ In the *New York Times*, Anthony Lewis characterized *NAACP v. Alabama* as "an illustration of the [C]ourt's concern for the Constitutional right to express beliefs and ideas, however unpopular, through effective means."²⁴⁴ But when the Court turned from the NAACP to the Communist Party, it became clear that not all associations were created equal.

Uphaus involved another inquiry by New Hampshire's Attorney General Louis Wyman, who had been on the losing end of the Court's *Sweezy* decision two years earlier.²⁴⁵ Without mentioning the freedom of association, Justice Clark suggested that the case turned on "the single question of whether New Hampshire, under the facts here, is precluded from compelling the production of the documents by the Due Process Clause of the Fourteenth Amendment."²⁴⁶ Justice Clark concluded that the "governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy."²⁴⁷ Justice Brennan filed a lengthy dissent premised on "the constitutionally protected rights of speech and assembly."²⁴⁸ Because Brennan saw "no valid legislative interest" behind Wyman's inquiry, he did not see the need for any balancing of interests.²⁴⁹ He thought that the "Court's

241. 360 U.S. 72 (1959).

242. 360 U.S. 109 (1959).

243. It is important to keep in mind that the Supreme Court's application of *Patterson* to communist cases occurred after the height of McCarthyism had already come and gone. See generally GOLDSTEIN, *supra* note 16, at 205 (noting the U.S. Senate's censure of McCarthy in late 1954 and the "increasingly withering and sustained attack from broad sectors of American society" on the government's loyalty program by 1955). This timing makes the Court's disparate treatment of communists all the more remarkable. For a more recent comparison, we might contrast the broad bipartisan support for the USA PATRIOT Act in the months following the September 11, 2001, terrorist attacks with more critical views that emerged just a few years later.

244. Anthony Lewis, *High Court Term a Significant One*, N.Y. TIMES, July 6, 1958, at 29.

245. See *Uphaus*, 360 U.S. at 73-74.

246. *Id.* at 77.

247. *Id.* at 81.

248. *Id.* at 82 (Brennan, J., dissenting). Justice Brennan's dissent conflated speech, expression, assembly, association, and privacy, referring at times to the "rights of association and expression," *id.* at 106, and "the interest in privacy as it relates to freedom of speech and assembly." *Id.* at 107-08. But he made his most frequent appeals to the constitutional rights of "speech and assembly." *Id.* at 82, 83, 105, 108. Chief Justice Warren, Justice Black, and Justice Douglas joined Justice Brennan's dissent.

249. *Id.* at 106. Justice Brennan wrote:

approach to a very similar problem in *NAACP v. Alabama* should furnish a guide to the proper course of decision here.²⁵⁰

Barenblatt, which unlike *NAACP v. Alabama* and *Uphaus* involved a congressional action, gave the Court its first opportunity to explain how the new right of association applied to the federal government.²⁵¹ There were two possibilities. If association were a First Amendment right, then it would apply directly to actions of Congress.²⁵² If, on the other hand, association were rooted in liberty, it presumably would apply to the federal government through the Due Process Clause of the Fifth Amendment.²⁵³ Justice Harlan's opinion for the Court unambiguously accepted the former view, stating that "[t]he precise constitutional issue confronting us is whether the Subcommittee's inquiry into [Barenblatt]'s past or present membership in the Communist Party transgressed the provisions of the First Amendment."²⁵⁴

Barenblatt presented facts similar to those in *Watkins v. United States*, one of the Court's 1957 "Red Monday" decisions.²⁵⁵ The HUAC had summoned Barenblatt, who had been a psychology instructor at Vassar College, to question him about his alleged affiliation with the Communist Party while he had been a graduate student at the University of Michigan.²⁵⁶ Like *Watkins*, Barenblatt refused to answer on First Amendment grounds.²⁵⁷ Writing for the majority in *Watkins*, Chief Justice Warren had skirted the First Amendment challenge, instead concluding in general due process terms that *Watkins* could not reasonably have been expected to know which questions from the HUAC

The Court describes the inquiry we must make in this matter as a balancing of interests. I think I have indicated that there has been no valid legislative interest of the State actually defined and shown in the investigation as it operated, so that there is really nothing against which the appellant's rights of association and expression can be balanced.

Id.

250. *Id.* at 103 (citation omitted).

251. *See* *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

252. *See* U.S. CONST. amend. I ("Congress shall make no law . . .").

253. The right of association could not be applied to the federal government through the Due Process Clause of the Fourteenth Amendment because that provision applies only to "State[s]." *See* U.S. CONST. amend. XIV, § 1. The Fifth Amendment restricts the federal government's "depriv[ation] of . . . liberty . . . without due process of law." U.S. CONST. amend. V.

254. *Barenblatt*, 360 U.S. at 126 (footnotes omitted); *see also id.* ("Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships."). Justice Harlan's conclusion that the right of association's limitation on the federal government was found in the First Amendment is not inconsistent with his view that the right of association's limitation on state action was in the Fourteenth Amendment. *See* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). That was, in essence, how he viewed rights specifically enumerated in the First Amendment.

255. *See supra* Part II.F.

256. *Barenblatt*, 360 U.S. at 113–114.

257. *Id.* at 114.

were pertinent to its legitimate inquiry.²⁵⁸ Justice Harlan, writing for the Court in *Barenblatt*, distinguished *Watkins* on the basis that the HUAC's questions to Barenblatt were pertinent to its inquiry.²⁵⁹

Like Clark in *Uphaus*, Harlan largely eschewed the language of a right of association and instead used a "balancing of interests" analysis.²⁶⁰ Justice Frankfurter had been pushing for this approach for some time, first in his *Dennis* concurrence²⁶¹ and more recently in his *Sweezy* concurrence.²⁶² When Harlan circulated a draft of his *Barenblatt* opinion, Frankfurter responded with the suggestion that Harlan include "a few pungent paragraphs putting the case in its setting."²⁶³ This should happen "[b]efore the reader gets involved in the details of balancing."²⁶⁴ Harlan's revised opinion incorporated Frankfurter's suggestions and emphasized "the close nexus between the Communist Party and violent overthrow of government."²⁶⁵

However, as Lucas Powe notes, Harlan never explained how the government's "right of self preservation"²⁶⁶ related to "asking a former psychology instructor at Vassar about meetings when he was a graduate student."²⁶⁷ Moreover, Harlan failed to articulate a single interest of Barenblatt's which could be balanced against the government's interests, noting only that "the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state."²⁶⁸ Justice Black's dissent quipped

258. See *Watkins*, 354 U.S. at 215. Frankfurter later "refer[red] often to Warren's efforts as that 'god-awful *Watkins* opinion.'" YARBROUGH, *supra* note 103, at 201 (quoting Frankfurter).

259. *Barenblatt*, 360 U.S. at 123–25.

260. See *id.* at 126–34.

261. See *Dennis v. United States*, 341 U.S. 494, 518–19 (1951) (Frankfurter, J., concurring) ("Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.").

262. See *Sweezy v. New Hampshire*, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring) ("[T]his is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court.").

263. Letter from Felix Frankfurter, Associate Justice, U.S. Supreme Court, to John M. Harlan, Associate Justice, U.S. Supreme Court (June 3, 1959) (Harlan Papers, Box 533), *quoted in* YARBROUGH, *supra* note 103, at 202.

264. Letter from Felix Frankfurter to John M. Harlan, *supra* note 263, *quoted in* YARBROUGH, *supra* note 103, at 202.

265. *Barenblatt*, 360 U.S. at 128.

266. See *id.* at 128.

267. POWE, *supra* note 37, at 144.

268. *Barenblatt*, 360 U.S. at 134.

that Harlan had rewritten the First Amendment to read that “Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.”²⁶⁹ In a poignant passage, Black added:

The fact is that once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men’s minds because some of its members are bad and some of its tenets are illegal, no group is safe. . . . History should teach us . . . that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time.²⁷⁰

Neither Clark’s opinion in *Uphaus* nor Harlan’s opinion in *Barenblatt* elaborated on the constitutional right of association that the Court had recognized its previous term. Harlan referred only once to “rights of association assured by the Due Process Clause of the Fourteenth Amendment.”²⁷¹ Clark mentioned “associational privacy” made applicable through “the Due Process Clause of the Fourteenth Amendment.”²⁷² Even though both of these communist cases squarely implicated associational freedoms, the Court would not revisit the new right until *Bates v. City of Little Rock*,²⁷³ a case with facts remarkably similar to those in *NAACP v. Alabama*.

B. Applying the Right of Association

In *Bates*, the Court reviewed the convictions of two NAACP records custodians who had refused to produce local membership lists as required by ordinances in two Arkansas cities.²⁷⁴ Like the disclosure order that had led to the Alabama litigation, the Arkansas ordinances were designed to cripple the NAACP.²⁷⁵ Relying on the freedom of association, Justice Stewart’s majority

269. *Id.* at 143 (Black, J., dissenting). Justices Douglas and Warren joined the dissent. Justice Brennan dissented separately.

270. *Id.* at 150–51. Justice Black rested his dissent, in part, on the First Amendment rights of speech and association. *Id.* at 140–53.

271. *Id.* at 127.

272. *Uphaus*, 360 U.S. at 78, 77.

273. 361 U.S. 516 (1960).

274. *Id.* at 516–21.

275. See Joseph B. Robison, *Protection of Associations from Compulsory Disclosure of*

opinion cited *De Jonge* and *NAACP v. Alabama* to link association with assembly:

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.²⁷⁶

As with Justice Harlan's wording in *NAACP v. Alabama*, Justice Stewart's language could be read to support either the incorporation argument or the liberty argument. To confuse matters further, Justices Black and Douglas raised the assembly argument in a joint concurrence:

We concur in the judgment and substantially with the opinion because we think the facts show that the ordinances as here applied violate freedom of speech and assembly guaranteed by the First Amendment which this Court has many times held was made applicable to the States by the Fourteenth Amendment One of those rights, *freedom of assembly, includes of course freedom of association*; and it is entitled to no less protection than any other First Amendment right.²⁷⁷

Ten months after *Bates*, Justice Stewart again wrote for the majority in *Shelton v. Tucker*.²⁷⁸ *Shelton* involved a challenge to an Arkansas statute that required every teacher at a state-supported school or college to file an annual affidavit disclosing all organizations to which the teacher had belonged or regularly contributed in the previous five years.²⁷⁹ Although the Arkansas statute was not overtly aimed at the NAACP, the affidavit requirement clearly targeted the group.²⁸⁰ In *Bates*, Stewart had cited *De Jonge* to link association

Membership, 58 COLUM. L. REV. 614, 615 (1958). Similar statutory efforts unfolded in Virginia, Texas, and Tennessee. *Id.* at 616. Louisiana attacked the NAACP through an existing state law that had originally been drafted to combat the Ku Klux Klan. *Id.* at 617.

276. 361 U.S. at 522–23 (citations omitted).

277. *Id.* at 527–28 (Black and Douglas, JJ., concurring) (emphasis added). A note in the *Virginia Law Review* published after *Bates* suggested that “the concept of ‘freedom of association’ illustrates the development of a judicial technique for dealing with [the particular kind of situation at issue in *NAACP v. Alabama* and *Bates*] rather than the enunciation of an independent constitutional right.” Peter R. Fisher, Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730 (1960).

278. 364 U.S. 479 (1960).

279. *Id.* at 480–81.

280. *See id.* at 486–87 & n.7. B. T. Shelton refused to file the affidavit due to his membership in the NAACP. *Id.* at 483. He had originally challenged both the affidavit requirement and a separate Arkansas statute making it unlawful for any member of the NAACP to be employed by the state of Arkansas. *Id.* at 484 n.2.

and assembly.²⁸¹ In *Shelton*, he again cited *De Jonge* but omitted any reference to assembly, referring instead to a “right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”²⁸² Unlike the unanimous decisions in *NAACP v. Alabama* and *Bates*, the Court split 5–4 in *Shelton*, with Frankfurter and Harlan joined by Clark and Whittaker in dissent. Harlan’s dissent asserted that “[t]he rights of free speech and association embodied in the ‘liberty’ assured against state action by the Fourteenth Amendment are not absolute,” reiterating his endorsement of both the liberty argument and a kind of balancing.²⁸³

In 1961, a year after *Shelton*, Justice Douglas wrote the majority opinion in *Louisiana ex rel. Gremlion v. NAACP*.²⁸⁴ The case arose in 1956, after Louisiana sought to enjoin the NAACP from doing business within its borders.²⁸⁵ The State asserted that the NAACP had violated two state statutes—the first prohibited associations from doing business in Louisiana if affiliated with out-of-state communist or subversive organizations, and the second required “benevolent” associations to disclose the names and addresses of all officers and members.²⁸⁶ The Court struck down both statutes.²⁸⁷ Douglas dispensed with the first provision on vagueness grounds without referring to the right of association.²⁸⁸ Turning to the second provision, he wrote that “freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.”²⁸⁹ He interpreted *Shelton* to have emphasized that “any regulation must be highly selective in order to survive challenge under the First Amendment”²⁹⁰ and punctuated his opinion with several other references to the First Amendment.²⁹¹ The four dissenting Justices in *Shelton* refused to join Douglas’s reasoning,²⁹²

C. Red Cases and Black Cases

The first four cases in which a majority of the Court had explicitly relied on the constitutional right of association (*NAACP v. Alabama*, *Bates*, *Shelton*, and *Louisiana v. NAACP*) all invalidated regulations aimed at the NAACP. On

281. 361 U.S. at 522–23.

282. 364 U.S. at 486.

283. *Id.* at 497 (Harlan, J., dissenting) (citations omitted).

284. 366 U.S. 293 (1961).

285. *Id.* at 294.

286. *Id.* at 294–95.

287. *Id.* at 297.

288. *Id.* at 295.

289. *Id.* at 296.

290. *Id.*

291. *See id.* at 296, 297.

292. *Id.* at 297.

a practical level, these decisions were crucial to the Civil Rights Movement. As Samuel Walker has argued, “[t]he NAACP could not have survived in the South, and the civil rights movement would have been set back for years, without the new freedom of association protections.”²⁹³ But if upholding a right of association for members of the NAACP sustained that organization’s existence, the failure to uphold that same right for members of the CPUSA almost certainly contributed to its demise.²⁹⁴

A majority of the Court had already shown a reluctance to apply or even acknowledge a right of association for communists in *Uphaus* and *Barenblatt*. This trend intensified in 1961. In *Communist Party of the United States v. Subversive Activities Control Board (SACB)*,²⁹⁵ the Court reviewed the Subversive Activities Control Act, which imposed registration and disclosure requirements on “subversive” organizations. Harry Kalven has suggested that “*SACB* should have been the architectonic case for freedom of association” because the statute at issue “aimed at sanctioning association and thus openly posed the issue that had been disguised as a speech problem in *Dennis*.”²⁹⁶ Instead, in the same 5–4 split as *Uphaus* and *Barenblatt*, the Court upheld the entire Act.²⁹⁷ Justice Frankfurter wrote the lengthy majority opinion, distinguishing the case from *NAACP v. Alabama*, *Bates*, and *Shelton* based on “the magnitude of the public interests which the registration and disclosure provisions are designed to protect and . . . the pertinence which registration and disclosure bear to the protection of those interests.”²⁹⁸ Although the Justices split on the outcome, they all agreed that the right of association applied to the federal government through the First Amendment.²⁹⁹

293. WALKER, *supra* note 13, at 241. NAACP membership in the South had fallen from 128,000 in 1955 to 80,000 in 1957, and almost 250 branches had closed. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 383 (2004). In Louisiana, membership plummeted from 13,000 to 1,700, and in South Carolina it fell from 8,200 to 2,000. *Id.* The litigation that led to *NAACP v. Alabama ex rel. Patterson* effectively shut down the NAACP in that state from the time of the 1956 injunction until the case was finally resolved through additional litigation in 1964. *See id.*

294. *See generally* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 369 (1978) (“The most dramatic and easily documentable effect of the Truman-McCarthy period was the virtual annihilation of the Communist Party . . .”).

295. 367 U.S. 1 (1961).

296. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 264 (1988). Kalven contends the 212 pages of opinions by the Justices and the belief that the case involved legislation limited in scope to the Communist Party has led *SACB* to be “treated as outside the mainstream of First Amendment precedent.” *Id.* Kalven argues that despite its verbosity, *SACB* “is quite possibly the precedent which carries the greatest threat to political freedoms in the future” and deserves a “central place” in First Amendment case law. *Id.* at 265.

297. *SACB*, 367 U.S. at 115.

298. *Id.* at 93.

299. Justice Frankfurter titled a section of his opinion “*The Freedoms of Expression and Association Protected by the First Amendment*.” *Id.* at 88. He asserted that “the power of

On the same day that it decided *SACB*, the Court issued its 5–4 decision in *Scales v. United States*.³⁰⁰ Writing for the majority, Justice Harlan upheld the petitioner’s conviction under the Smith Act’s membership clause, which he construed as requiring proof of “active” rather than merely “passive” membership in the Communist Party.³⁰¹ He insisted that a conviction under the act required the government to establish more than mere membership, “but active and purposive membership, purposive that is as to the organization’s criminal ends.”³⁰²

All nine Justices had backed the right of association for the NAACP in *NAACP v. Alabama*, *Bates*, and *Louisiana v. NAACP*, and Justice Stewart’s vote ensured a similar outcome in *Shelton*. But in *Uphaus*, *Barenblatt*, *SACB*, and *Scales*, Justice Stewart joined Justices Frankfurter, Harlan, Whittaker, and Clark to deny these same associational protections to the CPUSA. In the words of ACLU legal director Mel Wulf, “[t]here were red cases and black cases.”³⁰³ Kalven phrased it even more to the point: “The Communists cannot win, the NAACP cannot lose.”³⁰⁴

Although there was certainly a kind of double standard at work, the judicial landscape was more complicated than Wulf and Kalven suggested. Justice Harlan’s judicial restraint and deference to government officials on

Congress to regulate Communist organizations [subject to foreign control] is extensive,” but that power was “limited by the First Amendment.” *Id.* at 95, 96. Justice Frankfurter concluded that the Act’s registration provisions were “not repugnant to the First Amendment” and that certain accounting provisions did not “violate[] First Amendment rights.” *Id.* at 103. Justice Douglas’s dissent noted that “[f]reedom of association is included in the bundle of First Amendment rights.” *Id.* at 171 (Douglas, J., dissenting) (citing *NAACP v. Alabama ex rel. Patterson*, 354 U.S. 449, 460 (1958)). Justice Brennan’s partial dissent, which Chief Justice Warren joined, referred to “the rights of freedom of advocacy and association guaranteed by the First Amendment.” *Id.* at 191 (Brennan, J., dissenting in part). Justice Black’s dissent never explicitly referenced a “First Amendment right of association,” but his opinion made clear that he accepted the First Amendment argument. *See, e.g., id.* at 148 (Black, J., dissenting) (“The freedom to advocate ideas about public matters through associations of the nature of political parties and societies was contemplated and protected by the First Amendment.”). Although *SACB* suggested that all nine Justices accepted the First Amendment as the source of the right of association’s constraint on federal action, the source of the right of association’s constraint on state action remained unclear.

300. 367 U.S. 203 (1961). The Court also issued *Noto v. United States*, 367 U.S. 290 (1961), unanimously reversing a conviction under the Smith Act’s membership clause. However, *Noto* relied exclusively on a sufficiency of the evidence analysis. *Id.* at 291 (“The only one of petitioner’s points we need consider is his attack on the sufficiency of the evidence, since his statutory and constitutional challenges to the conviction are disposed of by our opinion in *Scales*; and consideration of his other contentions is rendered unnecessary by the view we take of his evidentiary challenge.”).

301. *Scales*, 367 U.S. at 222.

302. *Id.* at 209.

303. WALKER, *supra* note 13, at 240. Walker identifies the Court’s treatment of the NAACP and CPUSA as a “double standard for political groups.” *Id.*

304. KALVEN, *supra* note 296, at 259.

national security matters made him less than eager to join the Warren Court's curtailment of government inquiries in the name of civil liberties.³⁰⁵ *NAACP v. Alabama* had been an easy case for Harlan because he believed that Alabama had not shown a legitimate interest in obtaining the NAACP's membership list.³⁰⁶ *Bates* differed from *NAACP v. Alabama* in that regard, and the Court's analysis required a balancing of interests.³⁰⁷ Although the Court's final decision was unanimous, Harlan had originally drafted a dissent.³⁰⁸ According to Justice Brennan's conference notes for *Bates*, Harlan believed that while "[t]here can be little doubt that much of the associational information called for by the statute will be of little or no use whatever to the school authorities," he could "not understand how those authorities can be expected to fix in advance the terms of their inquiry so that it will yield only relevant information."³⁰⁹ *Shelton* had been an even closer case than *Bates*,³¹⁰ and the Court's decision hinged on Justice Stewart's vote. The four dissenters—Frankfurter, Harlan, Whittaker, and Clark—believed that the government had shown a rational relationship between its articulated interest and the nature of the regulation.³¹¹ And although Stewart upheld the right of association in *Shelton*, his position in the communist cases left open the possibility that a better articulated governmental interest could prevail over the right of association in a case involving the NAACP.

D. Gibson v. Florida Legislative Investigation Committee

The Court's dismissive treatment of communists meant that a case connecting the NAACP to communism "was every segregationist's dream" and "offer[ed] the South the chance to take out the NAACP by painting the organization red."³¹² That case, *Gibson v. Florida Legislative Investigation Committee*,³¹³ began in 1956 when the Florida legislature began an investigation of alleged communist influence on the NAACP. As part of its inquiry, the legislative investigation committee subpoenaed the membership

305. See YARBROUGH, *supra* note 103, at 339.

306. See *NAACP v. Alabama ex rel. Patterson*, 354 U.S. 449, 463–65 (1958).

307. See *Bates v. City of Little Rock*, 361 U.S. 516, 524–27 (1960).

308. See YARBROUGH, *supra* note 103, at 212.

309. William Brennan, Notes from the Conference, *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (William J. Brennan, Jr. Papers, Box 407, Manuscript Div., Library of Congress, Washington, D.C. [hereinafter Brennan Papers]), *quoted in* YARBROUGH, *supra* note 103, at 212.

310. The Court noted that *Bates* involved "no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership list involved." *Shelton v. Tucker*, 364 U.S. 479, 485 (1960). *Shelton* presented a more difficult issue for the Court because "there [was] no question of the relevance of a State's inquiry into the fitness and competence of its teachers." *Id.*

311. See *id.* at 494–96 (Frankfurter, J., dissenting); *id.* at 497–98 (Harlan, J., dissenting).

312. POWE, *supra* note 37, at 155.

313. 372 U.S. 539, 540 (1963).

list of the NAACP's Miami branch.³¹⁴ Theodore Gibson, the custodian of the list, refused to produce it, asserting that doing so would violate the associational rights of NAACP members.³¹⁵ The committee cited Gibson for contempt, and he was fined \$1,200 and sentenced to six months' imprisonment.³¹⁶ The Florida Supreme Court upheld his conviction, and Gibson appealed to the U.S. Supreme Court.³¹⁷

At the conference following oral argument, Chief Justice Warren protested that affirming *Gibson* would mean overruling *NAACP v. Alabama* because "even under [the] balancing theory, [the] state ha[d] shown no adequate interest."³¹⁸ But Justice Harlan viewed the investigation as "a bona fide inquiry into Communism" rather than "a plot to destroy [the] NAACP."³¹⁹ The Justices voted in conference to uphold the conviction, and it appeared that the government's national security interests would prevail over the NAACP's right of association.³²⁰ Frankfurter, the senior Justice in the majority, assigned the opinion to Harlan.³²¹

Five months later, before Harlan circulated a draft of his opinion, Justice Whittaker retired from the Court.³²² The case, now deadlocked at 4–4, was held over for reargument.³²³ Then Frankfurter suffered a stroke and left the Court. When *Gibson* was reargued the following term, Byron White had replaced Whittaker and Arthur Goldberg had succeeded Frankfurter. Justice Goldberg provided the fifth vote for the NAACP. He authored the majority opinion, distinguishing the case from earlier legislative investigation cases on the basis that Gibson had not been asked about his own associations with the Communist Party.³²⁴ Samuel Walker suggests that this result "was the clearest

314. *Id.*

315. *Id.* at 542–43. Gibson instead offered to testify according to his personal knowledge. *Id.* at 543. After the committee presented him with the names and pictures of fourteen individuals with suspected communist affiliations, Gibson testified that none were NAACP members. *Id.*

316. *Id.*

317. *Id.*

318. William Brennan, Notes from the Conference, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (Brennan Papers, Box 409), *quoted in* YARBROUGH, *supra* note 103, at 210.

319. *Id.*

320. POWE, *supra* note 37, at 155.

321. YARBROUGH, *supra* note 103, at 210.

322. *See* POWE, *supra* note 37, at 156.

323. *Id.*

324. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 547–48 (1963). Powe writes that Justice Goldberg was "looking for a way to protect the NAACP without having to overrule all the legislative-investigation cases." POWE, *supra* note 37, at 221. Justice Harlan's dissent argued that the Court's decision forced the Florida legislative committee "to prove in advance the very things it [wa]s trying to find out." *Gibson*, 372 U.S. at 580 (Harlan, J., dissenting).

indication of the extent to which the Court granted to the NAACP the protections it had refused to extend to the Communists.”³²⁵

Justices Black and Douglas wrote separate concurrences. In Black’s view, “the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular.”³²⁶ Douglas’s concurrence read more like a college essay than a legal opinion.³²⁷ He quoted or cited eight law review articles (including one written by Justice Brennan), Yale President A. Whitney Griswold’s 1958 baccalaureate address, Edwin Corwin’s *The Constitution and What it Means Today*, Hannah Arendt’s *On Revolution*, various works and personal letters of Thomas Jefferson, Arthur Schlesinger’s *The Rise of the City*, James Madison’s *Federalist No. 51*, Robert Bolt’s play *A Man for All Seasons*, and George Orwell’s *Nineteen Eighty-Four*.³²⁸

Douglas’s *Gibson* concurrence posited three distinct possibilities for the constitutional source of association. First advancing the incorporation argument, he recognized “the authority of a State to investigate people, their ideas, their activities” and asserted that “[b]y virtue of the Fourteenth Amendment the State is now subject to the same restrictions in making the investigation as the First Amendment places on the Federal Government.”³²⁹ Taking direct aim at Justice Harlan, Douglas stated in a footnote:

Some have believed that these restraints as applied to the States through the Due Process Clause of the Fourteenth Amendment are less restrictive on them than they are on the Federal Government. That is the view of my Brother Harlan. . . . But that view has not prevailed. The Court has indeed applied the same First Amendment requirements to the States as to the Federal Government.³³⁰

He then hinted at the assembly argument with a lengthy tribute to the right of assembly:

325. WALKER, *supra* note 13, at 241. The Court acknowledged its attenuated application of the right of association in communist cases in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Justice Clark’s dissent, joined by Justices Harlan, Stewart, and White, lamented that “the majority has, by its broadside swept away one of our most precious rights, namely, the right of self-preservation.” *Id.* at 628 (Clark, J., dissenting).

326. *Gibson*, 372 U.S. at 559 (Black, J., concurring).

327. Justice Douglas, who had a propensity for writing his opinions quickly, may have drafted his concurrence as a dissent before the case was held over, and Justice Goldberg’s replacement of Justice Frankfurter reversed the outcome. *Cf.* L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENT. 267, 271 (1989) (“[Douglas] wrote his dissents before the author of the majority had put pen to paper.”).

328. *Gibson*, 372 U.S. at 559 (Douglas, J., concurring).

329. *Id.* (footnotes omitted).

330. *Id.* at 560 n.2 (citations omitted).

Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment, which provides in relevant part: “Congress shall make no law . . . 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.” “Peaceably to assemble” as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. Historically the right to assemble was secondary to the right to petition, the latter being the primary right. But today, as the Court stated in *De Jonge v. Oregon*, “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” Assembly, like speech, is indeed essential “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.” “The holding of meetings for peaceable political action cannot be proscribed. A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.”³³¹

Finally, Douglas revisited the “bundle of rights” language that had appeared in his *Louisiana v. NAACP* majority opinion³³² and his *Communist Party of the United States v. SACB* dissent.³³³ He connected this bundle to a “right of privacy”:

The right of association has become a part of the bundle of rights protected by the First Amendment, and the need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves. Unpopular groups like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.³³⁴

According to Douglas, then, not only was the right of association somehow derivative of the First Amendment right of assembly, it was also “part of the bundle of rights protected by the First Amendment” and related to “the right of privacy implicit in the First Amendment.”³³⁵

331. *Id.* at 562–63 (internal citations and quotations omitted).

332. *See* 366 U.S. 293, 296 (1961) (“We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.”).

333. *See* 367 U.S. 1, 171 (1960) (Douglas, J., dissenting) (“Freedom of association is included in the bundle of First Amendment rights.”).

334. *Gibson*, 372 U.S. at 569–70 (citations and footnote omitted).

335. Justice Douglas reiterated his arguments for association (some of which were taken verbatim from his *Gibson* concurrence) in a lecture that he delivered at Brown University that was published subsequently in the *Columbia Law Review*. *See* William O. Douglas, *The Right of*

E. Confusion in the Academy

The new right of association first announced in *NAACP v. Alabama* produced a stream of historical and doctrinal analyses. Book-length treatments included Glenn Abernathy's *The Right of Assembly and Association*,³³⁶ Charles Rice's *Freedom of Association*,³³⁷ and David Fellman's *The Constitutional Right of Association*.³³⁸ These works attempted to narrate a history of association that had been absent from nearly two centuries of American constitutional law. Fellman, for example, suggested that "however ill-defined they may be, the rights of association have a definite place in American constitutional law."³³⁹ Rice argued that "[t]he right to associate for the advancement of ideas ha[d] been recognized implicitly in the past, and it ha[d] underlain important decisions which ha[d] been formally ascribed to the application of other freedoms."³⁴⁰ Carl Beck's *Contempt of Congress* took the most creative route, referring to a nonexistent "freedom of political affiliation clause[]" of the First Amendment.³⁴¹

Abernathy provided the most comprehensive account of association. He had first speculated about a right of association in a 1953 article published in the *South Carolina Law Quarterly*.³⁴² Quoting extensively from Alexis de Tocqueville and Arthur Schlesinger, Abernathy suggested that the "importance [of freedom of association] in a democratic society cannot be overestimated."³⁴³ Noting that the Supreme Court had, at that time, yet to recognize a right of association,³⁴⁴ he argued that it was nonetheless "a right cognate to those of free speech and free assembly."³⁴⁵ Abernathy expressed concern that Congress's anti-communist legislation and the Court's *Adler*

Association, 63 COLUM. L. REV. 1361 (1963). Justice Harlan's dissent in *Gibson*, which was joined by Justices Clark, Stewart, and White, ignored Douglas's attacks on the liberty argument for association. See 372 U.S. at 376 (Harlan, J., dissenting). Because Gibson had been willing to testify from memory about individual members and because the committee had sought the membership records, which would have been known only to him, for the limited purpose of refreshing Gibson's own recollection, Harlan "[found] it difficult to see how this case really present[ed] any serious question as to interference with freedom of association." *Id.* at 582 (Harlan, J., dissenting).

336. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961).

337. CHARLES E. RICE, *FREEDOM OF ASSOCIATION* (1962).

338. DAVID FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* (1963).

339. *Id.* at 1-2.

340. RICE, *supra* note 337, at xvii-xviii.

341. BECK, *supra* note 9, at viii. Beck is not alone in making such a claim. "[A]t least twenty-five federal district and appellate court opinions have referred to a nonexistent 'freedom of association clause' in the United States Constitution." See Inazu, *supra* note 3, at 568 & n.11 (collecting cases).

342. Glenn Abernathy, *The Right of Association*, 6 S.C.L.Q. 32 (1953).

343. *Id.* at 33.

344. *Id.* at 34.

345. *Id.* at 33, 75.

decision hindered Americans from joining all but the most “ultra-acceptable” associations.³⁴⁶ He decried “shotgun legislation which endangers the whole institution of voluntary association” and argued for a “broad freedom to associate.”³⁴⁷ But Abernathy’s principal concern for free association had little to do with protecting unpopular or dissenting groups. Rather, his instrumental view of association contended:

[Associations] serve as a training ground for group participation, organization and management of people and programs, and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems.³⁴⁸

From this perspective, Abernathy concluded that “political parties are our most important associations.”³⁴⁹

Abernathy’s book-length treatment eight years later underscored the themes of his article:

[E]xperience in various associations is virtually a guarantee of respect for the majority view. It does not necessarily lead to complete acceptance of the majority will, but it does lead usually to a sufficient respect for that will to enable the group to act in concert once a decision has been made. This acquiescence in the decisions of the majority, based in large part on experience in associations of various types, is an important explanation of the fact that Americans can close ranks and function as a strongly united nation after an election which is preceded by almost violent contests between the two major political parties.³⁵⁰

This characterization contained two implicit assumptions. The first was that a kind of bounded consensus across groups ensured stability in the midst of disagreement. The second was that the internal practices of associations mirrored democratic practices in which majority will prevails. Neither of these assumptions is inherent in the nature of groups, but both were consistent with

346. *Id.* at 72.

347. *Id.* at 77.

348. *Id.* at 75–76. These comments also reflected Alexis de Tocqueville’s pluralist interpretation that emphasized the Frenchman’s comments on the educational value of association. Cf. Aviam Soifer, “*Toward a Generalized Notion of the Right to Form or Join an Association*”: *An Essay for Tom Emerson*, 38 CASE W. RES. L. REV. 641, 651 & n.33 (1988) (suggesting Tocqueville emphasized that “associations help teach us how to define ourselves as individuals”).

349. Abernathy, *supra* note 342, at 76.

350. ABERNATHY, *supra* note 336, at 240.

the pluralist political thought of the time (which is addressed in the next section).

Abernathy intimated that *NAACP v. Alabama* had relied on the assembly argument. He argued that the decision had placed the right of association within an “expanded meaning” of the right of assembly,³⁵¹ and that association was “clearly a right cognate to the right of assembly.”³⁵² The right of assembly “need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall. It can justifiably be extended to include as well those persons who are joined together through organizational affiliation.”³⁵³

Abernathy also noted a constraint inherent in the Court’s articulation of the right of association:

It must be noted that [*NAACP v. Alabama*] does not clearly extend the First Amendment protection to *all* lawful affiliations or organizations. What Justice Harlan discusses is the association “for the advancement of beliefs and ideas.” Clearly a vast number of existing associations would fall within this description, but it is questionable whether the characterization would fit the purely social club, the garden club, or perhaps even some kinds of trade or professional unions. No such distinction has been drawn in the cases squarely involving freedom of assembly questions. The latter cases emphasize that the right extends to any lawful assembly, without a specific requirement that there be an intention to advance beliefs and ideas.³⁵⁴

In observing this limitation in scope, Abernathy detected an important distinction in Justice Harlan’s opinion between the right of assembly and the right of association. He quickly brushed it aside, asserting that “[t]he practical effect, of course, may be unimportant, since fairly obviously the Court would be inclined to scrutinize restrictions on social clubs less closely than those on organizations identifying themselves more intimately with the political process.”³⁵⁵ But the real danger is greater than Abernathy surmised—it becomes apparent when we consider who decides whether an organization exists “for the advancement of beliefs or ideas” or is involved “intimately with the political process.” As a practical matter, these kind of legal distinctions are always made by some representative of government, which means that the right of association’s protections are limited by the subjective political judgment of those who exercise coercive power. And, as Abernathy noted, this limitation is absent in the right of assembly.³⁵⁶

351. *Id.* at 4.

352. *Id.* at 173; *see also id.* at 252 (“With the increasing emphasis on the right of association as a cognate to the right of assembly, it appears that this least-discussed of the First Amendment rights is at last acquiring an independent status.”).

353. *Id.* at 173.

354. *Id.* at 236–37.

355. *Id.* at 237.

356. *Id.* The right of *peaceable* assembly, of course, draws its own lines by limiting its protections to groups that do not pose a threat of imminent harm to the state. That judgment is

It is not entirely surprising that the early scholarly treatment of the right of association reflected the Court's own lack of clarity. Writing in 1964, Thomas Emerson observed that "the constitutional source of 'the right of association,' the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth."³⁵⁷ He further observed that "the various justices have differed among themselves on all these matters."³⁵⁸ Emerson warned that "a general 'right of association' does not carry us very far in the solution of concrete issues" and "current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines."³⁵⁹ But the right of association was, in large part, a right without a constitutional history. Its contours were more likely to be shaped by the intellectual context in which it emerged.

V. PLURALIST POLITICAL THEORY

I have addressed above two factors that contributed to the constitutional framework for the right of association: (1) a *political* factor (the conflation of anti-communist sentiment and the rise of the Civil Rights Movement); and (2) a *jurisprudential* factor (the infighting on the Court over the proper way to ground the right of association and the relationship between association and assembly). I turn now to a *theoretical* factor: the pluralist political theory of the mid-twentieth century. Pluralist assumptions exacerbated the political and jurisprudential factors affecting the right of association and helped that right gain traction in legal and political discourse.

The pluralist tradition that began in the early twentieth century changed the way American political theorists conceived of the relationship between groups and the state.³⁶⁰ But unlike some of its British antecedents, American pluralism replaced the narrative of state theory with an equally dogmatic claim that politics relocated among groups achieved a harmonious balance within a broad consensus that supported American democracy. The balance assumption sprang from the pluralist need to attribute the relative stability in democratic society to something other than centralized state power.³⁶¹ The consensus assumption perpetuated an exaggerated claim of homogeneity in American history and political culture that downplayed fundamental differences between

also a subjective and political one made by the state. But it is no less present in the right of association.

357. Emerson, *supra* note 220, at 2.

358. *Id.*

359. *Id.* at 3.

360. See John G. Gunnell, *The Genealogy of American Pluralism: From Madison to Behavioralism*, 17 INT. POL. SCI. REV. 253, 254 (1996) ("The recession of the traditional theory of the state raised questions about the nature of democracy, and it was accompanied by a growing, if often critical, focus on groups and group interests as the moving forces in politics.") [hereinafter Gunnell, *Genealogy*].

361. See *infra* Part V.A.

groups.³⁶² As the following discussion will reveal, these two assumptions were present in early American pluralists like Arthur Bentley and became even more pronounced in postwar pluralists like David Truman and Robert Dahl.

Truman and Dahl invoked familiar authorities to support their assumptions of balance and consensus: Tocqueville's *Democracy in America* and Madison's *Federalist* No. 10.³⁶³ But their interpretive efforts misread Madison and decontextualized Tocqueville. They converted Madison's negative "faction" into an inherently valuable and implicitly benign "interest."³⁶⁴ And they applied Tocqueville's observations of a homogenous segment of the population in preindustrial America to the diverse interests existing in an increasingly fractured industrial society.³⁶⁵ Perhaps most ironically, pluralist adaptations of Madison and Tocqueville jettisoned both theorists' warnings about the tyranny of the majority.³⁶⁶ Because pluralist thinkers presupposed that associational autonomy conformed to what they perceived as basic conceptions of democracy, they were blind to the very majoritarian dangers against which Madison and Tocqueville had warned. These pluralist views—and their consequences—set the theoretical context for the constitutional right of association that emerged in the 1950s and 1960s.

A. Power, Balance, and Stability

Early pluralists challenged the modern state's claim to complete sovereignty, an idea that had gained prominence in German idealism and entered American political thought through Francis Lieber.³⁶⁷ While Lieber and others had located the locus of power in the state, pluralists looked instead at the various groups that comprised society.³⁶⁸ The pluralist argument ran contrary not only to the tenets of German idealism³⁶⁹ but also to those of classical liberalism, which in its own way assumed the primacy of the state.³⁷⁰

362. See *infra* Part V.B.

363. See *infra* Part V.C.

364. See *infra* text accompanying notes 466–483.

365. See *infra* text accompanying notes 484–507.

366. See *infra* Part VI.

367. Gunnell, *Genealogy*, *supra* note 360. For a more detailed account of Lieber's role in the development of American political theory, see JOHN GUNNELL, THE DESCENT OF POLITICAL THEORY: THE GENEALOGY OF AN AMERICAN VOCATION 24–32 (1993) [hereinafter Gunnell, DESCENT]. Gunnell writes that Lieber's *Manual of Political Ethics* sought "to distinguish the state from the family, the church, and other social entities and to establish the primacy of the state." *Id.* at 28. By "the 1880s, the theory of the state, . . . constituted . . . a distinct and influential paradigm" in American political thought. *Id.* at 36.

368. Gunnell, *Genealogy*, *supra* note 360.

369. *Id.*

370. This is evident not only in Hobbes's *Leviathan* but also in Locke's more familiar liberal thought. For example, even while Locke discusses a freedom of religious association in his *Letter On Toleration*, he makes clear that when minority practices collide with majority will, the latter prevails. JOHN LOCKE, A LETTER ON TOLERATION 131 (Raymond Klibansky, ed., J. W.

As these pluralist ideas gained traction, the state-centered theory “began to lose ground as an account of political reality.”³⁷¹ But pluralists were not anarchists, and without Leviathan they needed something else to account for the relative peace that they observed in American society. They concluded that in the absence of state coercion (which they downplayed), stability came from the balancing of interests and power among the various groups that comprised the political life of society.³⁷²

The pluralist view of balanced power began with Arthur Bentley’s *The Process of Government*,³⁷³ which also provided one of the earliest systematic attempts to challenge state-centered theory.³⁷⁴ Bentley’s “group basis of politics”³⁷⁵ focused on interests expressed through group activity.³⁷⁶ He described “the push and resistance between groups” as “pressure” and suggested that “[t]he balance of the group pressures is the existing state of society.”³⁷⁷ For Bentley, groups formed the fundamental ontology of politics: “When the groups are adequately stated, everything is stated.”³⁷⁸

Despite its frontal attack on the notion of state sovereignty, *The Process of Government* received scant attention in its first printing in 1908.³⁷⁹ It would, in fact, take a generation before political scientists embraced it for its theory and methodology.³⁸⁰ In the intervening years, the monist account of state sovereignty that Bentley challenged suffered a further setback when German idealism fell out of favor after the First World War.³⁸¹ The alternative theory of politics that emerged in American political thought during this period arrived through the British pluralist Harold Laski.³⁸²

Gough, trans., Oxford Univ. Press 1968) (1689) (“no doctrines incompatible with human society, and contrary to the good morals which are necessary for the preservation of civil society, are to be tolerated by the magistrate.”).

371. Gunnell, *Genealogy*, *supra* note 360, at 256.

372. See *infra* notes 374–427 and accompanying text.

373. ARTHUR BENTLEY, *THE PROCESS OF GOVERNMENT* (Peter H. Odegard, ed., Harvard Univ. Press 1967) (1908). Some strands of pluralism also draw from work by the American pragmatists William James and John Dewey. See AVIGAIL I. EISENBERG, *RECONSTRUCTING POLITICAL PLURALISM* 27–53 (1995) (discussing the pluralism of James and Dewey).

374. Gunnell, *Genealogy*, *supra* note 360, at 256.

375. BENTLEY, *supra* note 373, at xxxiv.

376. *Id.* at 258.

377. *Id.* at 258–59. Bentley does not develop the concept of “balance” to the degree of later pluralists. He describes law as “the pressures being assumed to have worked themselves through to a conclusion or balance” but notes that “the pressures never do as a matter of fact work themselves through to a final balance, and law, stated as a completed balance, is therefore highly abstract.” *Id.* at 299.

378. *Id.* at 208.

379. Gunnell, *Genealogy*, *supra* note 360, at 256 (discussing *The Process of Government*: “[It] had minimal direct and immediate impact on the discourse of political science.”).

380. *Id.* at 256–57.

381. *Id.* at 254.

382. See *id.* Laski drew from other British pluralists including John Figgis and Frederic

Laski and other British pluralists challenged the assumption that individual loyalties within a community lay solely with the state.³⁸³ In Herbert Deane's words, Laski's early political writings were a "constant polemic" against "the conception that the state is to political theory what the Absolute is to metaphysics, that it is mysteriously One above all other human groupings, and that, because of its superior position and higher purpose, it is entitled to the undivided allegiance of each of its citizens."³⁸⁴

Laski also attacked legal positivists like Jeremy Bentham and John Austin,³⁸⁵ who maintained that the state was sovereign and that law itself was nothing more than the sovereign's command.³⁸⁶ Laski asserted that "the state is only one among many forms of human associations,"³⁸⁷ and advocated a functional decentralization of power in which individuals increasingly turned to private groups to meet their interests and needs.³⁸⁸ He believed the transfer of governmental functions to private entities divided political power.³⁸⁹ In John Gunnell's characterization, Laski "turned to pluralism as both a 'realistic' account of politics and as the basis of a new democratic theory."³⁹⁰

For Laski and the other British pluralists, the relationship between groups and the state was as polarized as it was metaphysical.³⁹¹ But in the United States, a more blunted strand of pluralism gained influence in the 1930s through the circulation of "mutually reinforcing empirical studies of group activity and accounts of the new image of democracy which were contrasted with totalitarianism."³⁹² By the end of the 1930s, "liberalism in political

Maitland. HERBERT A. DEANE, *THE POLITICAL IDEAS OF HAROLD J. LASKI* 17, 25–27 (Archon Books 1972) (1955).

383. See Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AMER. POL. SCI. REV. 376, 379 (1952).

384. DEANE, *supra* note 382, at 13.

385. See *id.* at 14–15.

386. See *id.*; see also EISENBERG, *supra* note 373, at 76–77.

387. HAROLD LASKI, *AUTHORITY IN THE MODERN STATE* 65 (Yale Univ. Press 1919).

388. See *id.* at 75–81, 384–85. Laski's theory posited "a series of coordinate groups the purpose of which may well be antithetic [to one another]." *Id.* at 84.

389. See *id.*; see also DEANE, *supra* note 382, at 30–31. Herbert Deane writes that Laski's distrust of consolidated political power led him to desire "to see power split up, divided, set against itself, and thrown widespread among men by various devices of decentralization." *Id.* at 17; cf. GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 119 (1966) ("[T]he private association . . . has been linked with the values of decentralization and federalism. It has also been pictured as the source of stability in politics and held up as the medium of the public interest.").

390. Gunnell, *Genealogy*, *supra* note 360, at 257.

391. See *id.*

392. *Id.* at 260. Other important works building on Laski's pluralist concepts included A HISTORY OF POLITICAL THEORIES: RECENT TIMES (Charles Meriam and Henry Elmer Barnes eds., The MacMillan Co. 1935) and PENDLETON HERRING, *GROUP REPRESENTATION BEFORE CONGRESS* (Russell & Russell 1967) (1929). Deane writes that by the early 1930s, Laski found "the essence of the state to be its power to enforce its norms upon all who live within its

science largely meant pluralism, and pluralism was both a descriptive and a normative thesis.³⁹³ According to Gunnell, Pendleton Herring's 1940 book *The Politics of Democracy*, "claimed that along with party integration and governmental accountability, political rationality was to be found in the conflict and adjustment between interest groups."³⁹⁴ This meant that "[d]emocracy was not a matter of theology and creeds, but the practice of tolerance and compromise."³⁹⁵

The pluralist notion of balance extended to economic descriptions with John Kenneth Galbraith's ideas of "countervailing power."³⁹⁶ Meanwhile, David Riesman argued that power was distributed among "veto groups" that displayed a "necessary mutual tolerance" and "mirror[ed] each other in their style of political action, including their interest in public relations and their emphasis on internal harmony of feelings."³⁹⁷ Godfrey Hodgson recalled the fusion of balance and stability that permeated the pluralist era with his observation that "the businessman and the unskilled laborer, the writer and the housewife, Harvard University and the Strategic Air Command, International Business Machines and the labor movement, all had their parts to play in one harmonious political, intellectual, and economic system."³⁹⁸

David Truman's *The Governmental Process* described "the vast multiplication of interests and organized groups in recent decades"³⁹⁹ whose activities "imply controversy and conflict, the essence of politics."⁴⁰⁰ Truman asserted that "the behaviors that constitute the process of government cannot be adequately understood apart from the groups."⁴⁰¹ For Truman, these interests held each other in equilibrium: multiple memberships in "potential groups" collectively formed a "balance wheel" in politics.⁴⁰² Truman argued that "[w]ithout the notion of multiple memberships in potential groups it is literally impossible to account for the existence of a viable polity such as that in the United States or to develop a coherent conception of the political process."⁴⁰³

boundaries and its supremacy over all other forms of social grouping." DEANE, *supra* note 382, at 84.

393. GUNNELL, DESCENT, *supra* note 367, at 204.

394. Gunnell, *Genealogy*, *supra* note 360, at 259.

395. *Id.*

396. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM 118 (1952).

397. DAVID RIESMAN, THE LONELY CROWD 215 (Yale Univ. Press, abr. ed. 1976).

398. STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 119 (2000) (quoting GODFREY HODGSON, AMERICA IN OUR TIME (1976)).

399. DAVID BICKNELL TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 502 (2nd ed. 1971).

400. *Id.* at 502–03.

401. *Id.* at 502.

402. *Id.* at 514.

403. *Id.*

The most important theorist of postwar pluralism was Robert Dahl.⁴⁰⁴ Although Dahl drew upon early pluralists like Laski,⁴⁰⁵ his outlook was defined by the “behavioral approach” that manifested “a strong sense of dissatisfaction with the achievements of conventional political science, particularly through historical, philosophical, and the descriptive-institutional approaches.”⁴⁰⁶ Under Dahl’s influence, “[t]he mid-1960s marked the apotheosis of pluralism as the substance of the vision of both domestic and comparative politics accepted by behavioralism, and it was embedded in most of the conceptual schemes for political analysis.”⁴⁰⁷ Over time, Dahl muted some of his more strident assertions, but his initial claims shaped a generation of political science scholarship.⁴⁰⁸

Dahl sought to provide an account of how power was exercised in political decision-making.⁴⁰⁹ He started with the premise that the United States was a “mixture of elite rule and democracy,”⁴¹⁰ or a “polyarchy.”⁴¹¹ Against the “ruling-elite model” advanced by sociologists like C. Wright Mills,⁴¹² Dahl argued that power was diffused among a wide diversity of groups.⁴¹³ In other words, Dahl believed that democracy was a “government by minorities.”⁴¹⁴ Avigail Eisenberg explains the conclusions that flow from this premise:

The direction that public policy follows depends on the nature of the coalition of minorities that dominates the policy-making scene at any given

404. See EISENBERG, *supra* note 373, at 139 (“Dahl’s theory contains the clearest and most comprehensive treatment of postwar pluralism.”); cf. GUNNELL, DESCENT, *supra* note 367, at 241 (“Few would suggest that Dahl’s descriptive study of New Haven’s politics, published the same year as his essay on the behavioral approach, was less than an implicit endorsement of pluralism as a normative theory of liberal democracy.”).

405. See EISENBERG, *supra* note 373, at 96; see also ROBERT DAHL, DEMOCRACY, LIBERTY, AND EQUALITY 281–82 n.11 (1986).

406. GUNNELL, DESCENT, *supra* note 367, at 221–22 (quoting Robert Dahl, *The Behavioral Approach in Political Science: An Epitaph for a Monument to a Successful Protest*, 55 AM. POL. SCI. REV. 763, 763–72).

407. GUNNELL, DESCENT, *supra* note 367, at 265.

408. Richard Merelman suggests that Dahl’s 1956 A PREFACE TO DEMOCRATIC THEORY and his 1970 AFTER THE REVOLUTION? serve as “bookends” for the era of postwar pluralist dominance. RICHARD M. MERELMAN, PLURALISM AT YALE: THE CULTURE OF POLITICAL SCIENCE IN AMERICA 17 (2003). Merelman observes that the claims that Dahl considers as “settled” in the former are “up for grabs” in the latter. *Id.* at 18.

409. Gunnell, *Genealogy*, *supra* note 360, at 260–61.

410. ROBERT DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 35 (2nd ed. 1972) [hereinafter DAHL, PROMISE].

411. *Id.*

412. See *id.*; see generally C. WRIGHT MILLS, THE POWER ELITE (1956) (study of the structure and distribution of power in the United States).

413. See ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 23 (1967) [hereinafter DAHL, CONFLICT].

414. ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956) (italics omitted) [hereinafter DAHL, PREFACE].

instant. The groups' reliance on each other creates an informal system of checks and balances in which no group is able to dominate the others. There is no chance for a minority to dominate a coalition because other minorities within the coalition will defect. Similarly, majorities are unable to pose a threat, since they are comprised of small groups, any of which may defect from the coalition if the policy direction changes.⁴¹⁵

Paradoxically, the lack of widespread agreement produced stability and prevented discord. For Dahl, the American political system was "a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace."⁴¹⁶

Dahl's most explicit endorsement of pluralism is found in his 1967 text, *Pluralist Democracy in the United States: Conflict and Consent*.⁴¹⁷ He believed that "multiple centers of power, none of which is or can be wholly sovereign" were "[t]he fundamental axiom in the theory and practise of American pluralism."⁴¹⁸ Under this premise, "[b]ecause one center of power is set against another, power itself will be tamed, civilized, controlled, and limited to decent human purposes, while coercion, the most evil form of power, will be reduced to a minimum."⁴¹⁹

Dahl recognized that in polyarchies, "a great many questions of policy are placed in the hands of private, semipublic, and local governmental organizations such as churches, families, business firms, trade unions, towns, cities, provinces, and the like."⁴²⁰ But he left unspecified criteria for evaluating whether an entity was "private" or "semipublic."⁴²¹ Further, Dahl seemed

415. EISENBERG, *supra* note 373, at 141.

416. DAHL, PREFACE, *supra* note 414, at 151. Eisenberg suggests that stability became the motivation behind Dahl's research program: "Pluralist politics did not interest Dahl because it provided the highest ideals of democracy. Rather, pluralism was prized because it stabilizes what might otherwise be an unstable and conflict-ridden environment." EISENBERG, *supra* note 373, at 158.

417. DAHL, CONFLICT, *supra* note 413. Dahl republished this work five years later under the new title *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE*. DAHL, PROMISE, *supra* note 410, at vii. In his preface to the substantially revised second edition with the new title, Dahl wrote that "it has become more and more clear to me that the words *pluralist democracy* in the original title caused more readers than I had expected to misunderstand some aspects of that book." *Id.* This was at best a partial explanation for the title change, as Dahl retreated significantly from some of his earlier pluralist claims. *See generally id.* ("[I]t has become more and more clear to me that the words *pluralist democracy* in the original title caused more readers than I had expected to misunderstand some aspects of that book. I had intended the term *pluralist* to have a narrower and more definite sense than some readers imputed to it. I have since come to realize that 'pluralism' has so many different meanings and to many people carries so many connotations and assumptions I do not share that using it only obscures my own particular intentions and assumptions.").

418. DAHL, CONFLICT, *supra* note 413, at 24.

419. *Id.*

420. DAHL, PROMISE, *supra* note 410, at 41–42.

421. *Id.*

overly sanguine in his assessment that “whenever a group of people believe that they are adversely affected by national policies or are about to be, they generally have extensive opportunities for presenting their case and for negotiations that may produce a more acceptable alternative.”⁴²² Like earlier pluralists, he generally failed to account for the kinds of public power now dissipated among private groups. For example, he contended that most conflict between groups would be resolved not by coercion but by “peaceful adjustment.”⁴²³

Some of Dahl’s claims about the “extensive opportunities” for negotiations and prospects for “peaceful adjustment” seemed terribly at odds with events unfolding in American society at that time, like civil rights sit-ins, campus activism, and protests against the Vietnam War. John Gunnell attributes this disconnect to the behavioralism popularized by Dahl: “At the very historical moment that events such as [these] were taking place, political science research seemed to ignore these matters in favor of the study of such things as voting.”⁴²⁴ Further, the pluralist narrative, that power dispersed among groups led to a balanced equilibrium, resonated with the rhetoric of objectivity that had entered the discipline of political science.⁴²⁵ Pluralists, like some of their quantitative successors in contemporary political science, believed that by identifying the proper data and methodology, politics could be reduced to a system of solvable equations.⁴²⁶ Because equations could be balanced and followed logical patterns, then so must the forms of power that pluralists observed in groups.⁴²⁷

422. *Id.* at 42.

423. ROBERT DAHL, *MODERN POLITICAL ANALYSIS* 73 (1963).

424. GUNNELL, *DESCENT*, *supra* note 367, at 263; *cf. id.* at 106 (the controversy about “state and pluralism” was “in the end, one about the identity of political theory and political science”). In some ways, these trends continue today, with graduate work in political science increasingly focusing on mastering statistical techniques and formal modeling, to the detriment of a deep familiarity with contemporary political practices and institutions. *See* POWE, *supra* note 37, at xii (“There was a time when political scientists had as much interest in the Court as did academic lawyers and when the major journals of political science regularly published articles in this genre. . . . Today a nonquantitative article on the Supreme Court and politics in a political science journal would stick out like an article on physics in a law journal.”).

425. *See* POWE, *supra* note 37, at xii (for political science in the 1950s and 1960s: “First came quantification and its lure of precision. Then, for those less enamored with statistics, came theory.”).

426. *See* Sheldon S. Wolin, *Political Theory as a Vocation*, 63 *AMER. POL. SCI. REV.* 1062, 1081–82 (1969).

427. *See id.* at 1063 (“Like all technique-oriented activity, the behavioral movement presupposes that the fundamental purposes and arrangements served by its techniques have been settled and that, accordingly, it reinforces, tacitly or explicitly, those purposes and arrangements and operates according to a notion of alternatives tightly restricted by these same purposes and arrangements.”).

B. The Pluralist Consensus

Even more pronounced than the pluralist gloss on balance was its assumed consensus of democratic beliefs and values. The beginnings of this consensus narrative emerged in the era of industrialization.⁴²⁸ The economic focus of progressive reforms of the early twentieth century had led to “a belief in the capacity of American abundance to smooth over questions of class and power by creating a nation of consumers.”⁴²⁹ In Alan Brinkley’s assessment, liberal reformers were confident “that their new consumer-oriented approach to political economy had freed them at last from the need to reform capitalist institutions and from the pressure to redistribute wealth and economic power.”⁴³⁰

The pluralist consensus can be traced to Arthur Bentley, who asserted that all struggles between groups proceeded within a “habit background.”⁴³¹ Bentley believed there were “rules of the game” that formed “the background of the group activity.”⁴³² These constraints limit “the technique of the struggle” employed by groups.⁴³³ Because of these limits, “when the struggle proceeds too harshly at any point there will become insistent in the society a group more powerful than either of those involved which tends to suppress the extreme and annoying methods of the groups in the primary struggle.”⁴³⁴ These background assumptions had important implications for the pluralist consensus theory: “It is within the embrace of these great lines of activity that the smaller struggles proceed, and the very word struggle has meaning only with reference to its limitations.”⁴³⁵ As Myron Hale concluded: “Bentley’s science of politics ended in a science of control within a closed system.”⁴³⁶

Bentley’s early hints at a consensus narrative were only later adopted by postwar pluralists.⁴³⁷ But the idea of consensus had been in the air throughout American intellectual thought. In 1939 John Dewey concluded that American culture had produced “a basic consensus and community of beliefs.”⁴³⁸ Fourteen years later, Daniel Boorstin echoed Dewey by heralding the national consensus of liberal values as part of the “Genius of American Politics.”⁴³⁹ The

428. See Gunnell, *Genealogy*, *supra* note 360, at 260.

429. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 226 (1995).

430. *Id.* at 271.

431. BENTLEY, *supra* note 373, at 372.

432. *Id.* at 218.

433. *Id.* at 372.

434. *Id.*

435. *Id.*

436. Myron Hale, *The Cosmology of Arthur F. Bentley*, in *THE BIAS OF PLURALISM* 35, 45 (William Connolly ed., Atherton Press 1969).

437. *Id.* at 37.

438. JOHN DEWEY, *FREEDOM AND CULTURE* 134 (G.P. Putnam’s Sons 1939).

439. DANIEL BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* (1953). Boorstin claimed that “we all actually have a common belief, have glossed over sectarian differences in religion and

consensus narrative was also buttressed by historians like Louis Hartz, whose 1955 *The Liberal Tradition in America* argued that the moral unanimity of Americans stemmed from the only significant intellectual influence upon the American Founders—a “nationalist articulation of Locke.”⁴⁴⁰ While earlier historians like Charles Beard had focused on tensions arising from class distinctions,⁴⁴¹ mid-twentieth century scholarship heralded “the consensus, rather than the conflict, between Americans.”⁴⁴² By the late 1950s, the liberal endorsement of a welfare and labor system predicated on a fundamental belief in the integrity of the capitalist state prompted Daniel Bell to declare the “End of Ideology.”⁴⁴³

Against this background, David Truman suggested that while organized groups were important, “potential” groups that reflected “those interests or expectations that are so widely held in the society and are so reflected in the behavior of almost all citizens that they are, so to speak, taken for granted” were also vital.⁴⁴⁴ These “widely held but largely unorganized interests” gave content to “the rules of the game.”⁴⁴⁵ And the rules of the game, when enforced by unorganized interests, constrained the practices of organized interests.⁴⁴⁶ In other words, a sufficiently homogenous background consensus of all citizens not only sustained the public order (which, for Truman, included “reinforcing widely accepted norms of ‘public morality’”), but also bounded the extent to which groups diverged from that shared consensus.⁴⁴⁷ Broad compliance was critical because “the existence of the state, of the polity, depends on widespread, frequent recognition and conformity to the claims of these unorganized interests and on activity condemning marked deviations

produced a kind of generalized, non-denominational faith” and “this kind of faith, taken together with the lack of distinctions in our political philosophy, has tended to break down the boundaries between religious and political thought.” *Id.* at 162.

440. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 11 (1955). Hartz’s book began with an epigram from Alexis de Tocqueville’s *Democracy in America* and praised Tocqueville for “a series of deep insights into the American liberal community.” *Id.* at i, 31.

441. CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1st ed. MacMillan Co.1913).

442. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 23 (1996).

443. DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 16 (5th ed. 2001) (arguing that the changing face of the American labor movement no longer evoked calls to Marxism or other ideologies).

444. TRUMAN, *supra* note 399, at 512. Potential groups did not require a physical association because “[i]f the claims implied by the interests of these potential groups are quickly and adequately represented, interaction among those people who share the underlying interests or attitudes is unnecessary.” *Id.* at 506.

445. *Id.* at 506–07.

446. *Id.* at 514–15. The rules of the game were “dominant with sufficient frequency in the behavior of enough important segments of the society” that “both the activity and the methods of organized interest groups are kept within broad limits.” *Id.* at 515.

447. *Id.* at 514.

from them.”⁴⁴⁸ The rules of the game gave politics a “sense of justice,”⁴⁴⁹ and Truman posited that violating them would “normally . . . weaken a group’s cohesion, reduce its status in the community, and expose it to the claims of other groups.”⁴⁵⁰

Truman also recognized that the balance wheel would encounter friction based on differences in group experiences, frames of reference, and “rationalizations.”⁴⁵¹ He posited that a particular group’s principles or collective beliefs could cause its members to develop beliefs outside of the mainstream that they would not otherwise have held. Truman offered the example of military training:

A group of professional military officers, recruited at an early age, trained outside of civilian institutions, and practising the profession of arms in comparative isolation from other segments of the society, easily may develop the characteristics of a caste. Such a group not only will generate its own peculiar interests but also may arrive at interpretations of the “rules of the game” that are at great variance with those held by most of the civilian population. In such a case multiple membership in other organized groups is slight and that in potential widespread groups is unlikely.⁴⁵²

For Truman, this unattended divergence from the rules of the game threatened the health of democracy,⁴⁵³ and he saw it advancing within groups far less innocuous than the U.S. military. Communist organizations provided one example of worrisome groups falling outside of the consensus. The rising Civil Rights Movement in the South provided another example:

The emergence in the disadvantaged classes of groups that reflect materially different interpretations of the widespread interests may encourage conflict and at the same time provide an inadequate basis for peaceful settlement. The appearance of groups representing Negroes, especially in the South, groups whose interpretations of the “rules of the game” are divergent from those of the previously organized and privileged segments of the community, are a case in point.⁴⁵⁴

Truman believed that widespread divergence could be mitigated because the rules of the game could be “acquired by most individuals in their early experiences in the family, in the public schools (probably less effectively in the private and parochial schools), and in similar institutionalized groups that

448. *Id.* at 515.

449. *Id.* at 515 (quoting HAROLD LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 246 (Univ. of Chicago Press 1977) (1930)).

450. *Id.* at 513.

451. *Id.* at 520.

452. *Id.* at 521.

453. *Id.* at 521–22.

454. *Id.* at 523.

are also expected to conform in some measure to the ‘democratic mold.’⁴⁵⁵ He did not expressly acknowledge it, but the imposition of a “democratic mold” collapsed pluralism into a position similar to the state-centered idealism that pluralism had originally challenged: lurking behind a seemingly benign agreement of values was the coercive power of the state. As Earl Latham observed in 1952, the state was the “custodian of the consensus” and “help[ed] to formulate and to promote normative goals, as well as to police the agreed rules.”⁴⁵⁶ Reflecting the degree to which pluralism had diverged from its initial anti-statist philosophy, Latham suggested, “[i]n the exercise of its normative functions,” the state “may even require the abolition of groups or a radical revision of their internal structure.”⁴⁵⁷

Like Hartz, Bell, and Truman, Robert Dahl placed American politics within a broad consensus:

Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members. Without such a consensus no democratic system would long survive the endless irritations and frustrations of elections and party competition. With such a consensus the disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement.⁴⁵⁸

For Dahl, this consensus was not a normative aspiration but an empirical fact.⁴⁵⁹ Under this theory, consensus assumptions set the boundaries of what could properly be considered “politics” and what could be considered valid scholarship on politics.⁴⁶⁰ In this way, the dominance of research paradigms buttressed normative claims, and consensus about methodology uncritically reinforced consensus about substance.

Dahl argued that the pluralist consensus included “a belief in democracy as the best form of government, in the desirability of rights and procedures insuring a goodly measure of majority rule and minority freedom, and in a

455. *Id.* at 513.

456. Latham, *supra* note 383, at 384.

457. *Id.* Consider, for example, Robert Goldstein’s assertion that actual or proposed inclusion on the Attorney General’s List of Subversive Organizations likely triggered the dissolution of many groups, including the Abraham Lincoln School of Chicago, American Poles for Peace, the American Committee for Yugoslav Relief, the Benjamin Davis Freedom Committee, the China Welfare Appeal, the Committee for the Negro in the Arts, Everybody’s Committee to End War, the Maritime Committee to Defend Al Lannon, and the National Association of Mexican Americans. GOLDSTEIN, *supra* note 16, at 67.

458. DAHL, PREFACE, *supra* note 414, at 132–33.

459. Behavioralism convinced Dahl and other pluralists that their functionalist account of democracy honored the fact/value distinction exalted by positivist thought.

460. *Id.*

wide but not necessarily comprehensive electorate.”⁴⁶¹ In 1961, he asserted: “To reject the democratic creed is in effect to refuse to be an American. As a nation we have taken great pains to insure that few citizens will ever want to do anything so rash, so preposterous—in fact, so wholly un-American.”⁴⁶²

Dahl also believed that the “ideological convergence reflecting a wide acceptance by Americans of their institutions [made] it extraordinarily difficult (and, up to now, impossible) to gain a big public following for a movement that openly seeks comprehensive, radical, or revolutionary changes in a large number of American institutions.”⁴⁶³ As a result, “radical movements” had been wholly ineffective in American politics:

Throughout the history of the United States, political life has been almost completely blanketed by parties, movements, programs, proposals, opinions, ideas, and an ideology directed toward a large mass of convergent “moderate” voters. The history of radical movements, whether of right or left, and of antisystem parties, as they are sometimes called, is a record of unrelieved failure to win control over the government.⁴⁶⁴

Dahl believed that as long as groups operated within the boundaries of consensus, the American political system provided “a high probability that any active and legitimate group will make itself heard effectively at some state in the process of decision.”⁴⁶⁵

The consensus assumption of pluralism reflected in Dahl’s views laid the foundation for the freedom of association in two ways. First, it established an expectation that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises and, conversely, that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because this expectation excluded groups beyond the margins, the pluralist gloss on the groups that remained within its bounded consensus was unqualifiedly positive. For the pluralists, groups were not only fundamental to American politics, but they created harmony and balance through reasoned and appropriately constrained disagreement. But this idea, that groups were only valuable to democracy to the extent that they supported it, was bereft of either authority or tradition in American political thought. And because pluralists were attempting to define themselves in opposition to the oppressive tendencies they observed in European politics, they needed to appeal to the American context to substantiate their views. On the subject of groups and associations, Madison and Tocqueville were the obvious candidates to support their ideas.

461. ROBERT DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* 316 (2nd ed. 2005) [hereinafter DAHL, *WHO GOVERNS*].

462. *Id.* at 317.

463. DAHL, *PROMISE*, *supra* note 410, at 52.

464. *Id.* at 50.

465. DAHL, *PREFACE*, *supra* note 414, at 150.

C. *Pluralist Interpretations of Madison and Tocqueville*

James Madison argued in *Federalist* No. 10 that one of the most important advantages of “a well constructed Union” was its “tendency to break and control the violence of faction.”⁴⁶⁶ The “latent causes of faction” were “sown in the nature of man.”⁴⁶⁷ As Madison elaborated:

A zeal for different opinions concerning religion, concerning Government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for preeminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good.⁴⁶⁸

Factions, by Madison’s definition, were adverse “to the permanent and aggregate interests of the community.”⁴⁶⁹

Pluralists, looking back at Madison through the lens of the presumed consensus of mid-twentieth century America, read his negative connotations regarding factions out of the *Federalist*. Truman, for example, suggested that Madison’s factions “carry with them none of the overtones of corruption and selfishness associated with modern political groups.”⁴⁷⁰ Theodore Lowi observed that Truman’s reasoning turned Madison on his head:

Note, for example, the contrast between the traditional and the modern definition of the group: Madison in *Federalist 10* defined the group (“faction”) as “a number of citizens, whether amounting to a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, *adverse to the right of other citizens, or to the permanent and aggregate interests of the community*” (emphasis added). Modern political science usage took that definition and cut the quotation just before the emphasized part. In such a manner, pluralist theory became the

466. THE FEDERALIST No. 10, at 50 (James Madison) (Bantam Classic Ed. 1982).

467. *Id.* at 52.

468. *Id.*

469. *Id.* at 51; cf. Bernard Brown, *Tocqueville and Publius*, in RECONSIDERING TOCQUEVILLE’S DEMOCRACY IN AMERICA 43, 48 (Abraham S. Eisenstadt ed., 1988) (Madison “postulates a critical difference between faction [even when it is embodied by a majority] on the one hand and justice or the public good on the other. Throughout *The Federalist* the warning is sounded that the immediate interests of individuals as well as of majorities may not further the long-term good of the collectivity.”).

470. TRUMAN, *supra* note 399, at 6; see also Paul F. Bourke, *The Pluralist Reading of James Madison’s Tenth Federalist*, 9 PERSP. IN AM. HIST. 271, 272 (1975) (“Madison’s discussion of faction and interest establishes the close fit of modern pluralist theory and the wider American political culture.”).

handmaiden of interest-group liberalism, and interest-group liberalism became the handmaiden of modern American positive national statehood.⁴⁷¹

Unlike Truman, Dahl recognized that Madison believed “that a faction will produce tyranny if unrestrained by external checks.”⁴⁷² But Dahl misread Madison’s apprehension, believing it pertained solely to “majority factions.”⁴⁷³ Dahl contended that “no political group has ever admitted to being hostile to” the “permanent and aggregate interests of the community.”⁴⁷⁴ Rather, the “numerous, extended, and diverse” minority interests were part of “the restraints on the effectiveness of majorities imposed by the facts of a pluralistic society.”⁴⁷⁵ For Dahl, these varied interests operated within the defined boundaries set by a broad consensus and posed no inherent danger to democracy.⁴⁷⁶ Dahl thought that Madison had “underestimate[d] the importance of the inherent social checks and balances existing in every pluralistic society” that restrained factions.⁴⁷⁷ He also argued that Madison had not appreciated “the role of social indoctrination and habituation in creating attitudes, habits, and even personality types requisite to a given political system.”⁴⁷⁸

Lance Banning has argued that the “pluralist misreading” of *Federalist* No. 10 attained its “widest influence” through Dahl.⁴⁷⁹ According to Banning, the “cruder forms” of this misreading suggested “that Madison delighted in the clash of special interests and identified the outcome of such clashes with the public good.”⁴⁸⁰ Quoting Daniel Walker Howe, Banning notes that “[f]action” was not a value-free concept for Publius; a faction was by definition evil.⁴⁸¹ Madison biographer Ralph Ketcham also dissents “from the view that sees Madison, especially in his tenth *Federalist Paper*, as validating modern conflict-of-interest politics.”⁴⁸² By disregarding the dangers inherent in

471. THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 55 (2nd ed. 1979) (quoting Madison, *supra* note 466) [hereinafter LOWI, *THE END*]; *see also id.* at 36 (describing contemporary pluralism: “Groups became virtuous; they must be accommodated, not regulated.”).

472. Robert Dahl, *Madisonian Democracy*, in *THE DEMOCRACY SOURCEBOOK* 207, 212 (Robert Dahl, Ian Shapiro, & José Anotonio Cheibub eds., 2003).

473. DAHL, *PREFACE*, *supra* note 414, at 26.

474. *Id.* (quoting Madison, *supra* note 466, at 51).

475. *Id.* at 29.

476. *Id.* at 132–33.

477. *Id.* at 22.

478. *Id.* at 17–18.

479. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 205 (1995).

480. *Id.*; *see also* Brown, *supra* note 469, at 45–46 (arguing that twentieth-century political scientists read *The Federalist* to reflect “the ideology of a wealthy and advantaged elite”).

481. BANNING, *supra* note 479 (quoting Daniel Walker Howe, *The Political Psychology of The Federalist*, WM. & MARY Q. 44 (1987)).

482. RALPH KETCHAM, *JAMES MADISON*, at ix (1st paperback ed. 1990). Ketcham makes

minority factions, pluralism transformed Madison's "factions" into domesticated "groups" whose interests were broadly aligned with those of the modern liberal state.⁴⁸³

Unlike Madison, Tocqueville drew no negative conclusions about voluntary associations.⁴⁸⁴ He instead "subverted" Madison's analysis of factions and "regarded associations as a valuable way of connecting people by overcoming some effects of individualism."⁴⁸⁵ Tocqueville's optimism stemmed in part from his idealized view of associations in America:

In America the citizens who form the minority associate, in order, in the first place, to show their numerical strength, and so to diminish the moral authority of the majority; and, in the second place, to stimulate competition, and to discover those arguments which are most fitted to act upon the majority; for they always entertain hopes of drawing over their opponents to their own side, and of afterward disposing of the supreme power in their name. Political associations in the United States are therefore peaceable in their intentions, and strictly legal in the means which they employ; and they assert with perfect truth that they only aim at success by lawful expedients.⁴⁸⁶

this assertion in the preface to the first paperback edition of his monumental biography of Madison, elaborating that "[p]recisely because Madison was so firmly grounded in classical and Augustan thought, he saw faction (and its eighteenth-century synonym, party) as a malignant opposite to 'the permanent and aggregate interests of the community,' a concept foreign to modern conflict-of-interest theory." *Id.*

483. Cf. LOWI, *THE END*, *supra* note 471 (describing the difference between Madison's conception of a "faction" and modern pluralists conception of a "group").

484. See SHELDON WOLIN, *TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE* 240 (2001). Tocqueville had carefully studied both *The Federalist* and Story's *Commentaries on the Constitution*, which reproduced *Federalist* No. 10 in its entirety. Brown, *supra* note 469, at 43–46. Early in Book I of *Democracy in America*, he commented in a footnote that he would "often have occasion to quote 'The Federalist' in this work." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 134 n.g (Henry Reeve, trans. The Colonial Press 1900) (1835). He wrote, "'The Federalist' is an excellent book which ought to be familiar to the statemen of all countries, although it especially concerns America." *Id.*

485. WOLIN, *TOCQUEVILLE*, *supra* note 484. Tocqueville thought that "men of virtue would filter the raw passions and demands of the people," and "[t]hus would egoistic individualism (Madison's factionalism) be transcended and an era of enlightened self-interest (Madison's public good) ushered in." Brown, *supra* note 469, at 53, 54; see also George Kateb, *Some Remarks on Tocqueville's View of Voluntary Associations*, in *VOLUNTARY ASSOCIATIONS: NOMOS XI*, at 138, 142 (J. Roland Pennock and John W. Chapman eds., 1969) ("The Madisonian vision of democratic politics as the struggle of potentially transgressive factions is absent from Tocqueville's account.").

486. TOCQUEVILLE, *supra* note 484, at 196–97. Tocqueville's conception of association also retained glimpses of the importance of face-to-face communication: association brought with it the "power of meeting" in which "men have the opportunity of seeing each other." *Id.* at 192.

In other words, Tocqueville assumed that associations would never seriously threaten the stability of government in America. He elaborated, tellingly, that “[i]n a country like the United States, *in which the differences of opinion are mere differences of hue*, the right of association may remain unrestrained without evil consequences.”⁴⁸⁷

Dahl believed that Tocqueville was “struck by the degree of political, social, and economic equality among Americans”⁴⁸⁸ and “made this observation the very kernel of his famous analysis of American democracy.”⁴⁸⁹ He agreed with Tocqueville that “Americans almost unanimously agree on a number of general propositions about democracy,”⁴⁹⁰ Writing in 1961, Dahl contended:

Throughout the country then the political stratum has seen to it that new citizens, young and old, have been properly trained in “American” principles and beliefs. Everywhere, too, the pupils have been highly motivated to talk, look and believe as Americans should. The result was as astonishing an act of voluntary political and cultural assimilation and speedy elimination of regional, ethnic, and cultural dissimilarities as history can provide. The extent to which Americans agree today on key propositions about democracy is a measure of the almost unbelievable success of this deliberate attempt to create a seemingly uncoerced nation-wide consensus.⁴⁹¹

Importantly, Dahl recognized that Tocqueville had written in a preindustrial era, much different than the modern landscape:

The America that Tocqueville saw . . . was the America of Andrew Jackson. It was an agrarian democracy, remarkably close to the ideal often articulated by Jefferson.

Commerce, finance, and industry erupted into this agrarian society in a gigantic explosion. By the time the [nineteenth] century approached its last decade, . . . the America of Tocqueville had already passed away.⁴⁹²

But Dahl insisted that despite the growing economic inequality following the changes in the early twentieth century, a “universal creed of democracy and equality” persisted in mid-twentieth century America.⁴⁹³

487. *Id.* at 197 (emphasis added).

488. DAHL, PROMISE, *supra* note 410, at 87.

489. *Id.* Dahl notes that African-Americans were an exception but maintains that there was otherwise immense equality among the “free white population.” *Id.*

490. DAHL, WHO GOVERNS, *supra* note 461, at 253. Dahl criticized Tocqueville’s argument “that the stability of the American democratic system depends . . . on an almost universal belief in the basic rules of the democratic game.” *Id.*

491. *Id.* at 318.

492. *Id.* at 2; *cf.* DAHL, PROMISE, *supra* note 410, at 89 (“The vast private corporations created by industrial capitalism had not yet arrived; the giant factories, the great financiers, the urban proletariat, the army of clerks and white-collar workers—these were still unknown.”).

493. DAHL, WHO GOVERNS, *supra* note 461, at 3.

This pluralist interpretation of Tocqueville's account of associations overlooked two complications. The first was that Tocqueville's case study of America in the 1830s had focused on an extraordinarily culturally homogenous population, thus giving him an overly sanguine view of harmony amidst difference.⁴⁹⁴ Rogers Smith has argued:

All these Tocquevillian accounts falter because they center on relationships among a minority of Americans—white men, largely of northern European ancestry—analyzed in terms of categories derived from the hierarchy of political and economic status such men held in Europe: monarchs and aristocrats, financial and commercial burghers, farmers, industrial and rural laborers, indigents. Because most European observers and most white American men regarded these categories as politically basic, it is understandable that from America's inception they thought that the most striking fact about the new nation was the absence of one specific type of fixed, ascriptive hierarchy. There was no hereditary monarchy or nobility native to British America itself, and the Revolution rejected both the authority of the British king and aristocracy and the creation of any new American substitutes. Those genuinely momentous features of American political life made the United States appear remarkably egalitarian in comparison to Europe.⁴⁹⁵

However, as Smith observes, the “relative egalitarianism that prevailed among white men” left unaddressed immense inequities pertaining to gender, race, culture, religion, and sexual orientation.⁴⁹⁶ When associations expanded to these interests—as they increasingly did by the mid-twentieth century—differences of opinion were no longer merely differences of hue, and Tocqueville's ideal theory lost its descriptive purchase. Pluralists to a large degree failed to recognize the limits of Tocqueville's understanding of equality and, as a result, adopted an understanding of balance and consensus that excluded significant classes of people from its description of the political process. As pluralist critic Grant McConnell argued: “farm workers, Negroes, and the urban poor have not been included in the system of ‘pluralist’ representation so celebrated in recent years.”⁴⁹⁷ McConnell insisted that: “However much these groups may be regarded as ‘potential interest groups,’ the important fact is that political organization for their protection within the pluralist framework can scarcely be said to exist.”⁴⁹⁸

494. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 17 (1997).

495. *Id.*

496. *Id.*

497. MCCONNELL, *supra* note 389, at 349.

498. *Id.*; *cf. id.* at 358 (“Federalism and interest group ‘pluralism’ with which it is associated today are instruments of conservatism and particularism. The ideology of ‘grass roots democracy’ and the gradual growth of power in small units by the institutional processes of accommodation have probably betrayed us into yielding too much of the republic’s essential

Relying on Tocqueville to buttress pluralist accounts of mid-twentieth century America posed a second problem: the degree to which the relationship between public and private had shifted in the years since *Democracy in America*. Tocqueville had assumed a bifurcated political order consisting of a relatively limited government (which exercised law, authority, and coercion), and a larger sphere that consisted of nongovernmental social and economic relations.⁴⁹⁹ The theoretical foundation for this split came from a distinctive aspect of Lockean liberalism that “insist[ed] that government should be limited so as to free individuals to undertake private as well as public pursuits of happiness, even if this option erodes public spiritedness in practice.”⁵⁰⁰ In effect, the separation of public and private by Locke and other classical liberals created a sphere autonomous from government control.⁵⁰¹ It also tacitly granted greater political legitimacy to the public realm, a realm that soon became synonymous with the state.

This conceptual framework was not especially problematic at the framing of the First Amendment, when the state was relatively limited in scope and left a broad, non-public realm free from coercive regulation.⁵⁰² Although the extent to which early American citizens viewed this non-public realm as “private” is difficult to pinpoint, it is clear that they believed it fell outside of the relatively limited public realm controlled by government. Yet groups that assembled outside of government sanction were nonetheless “public” in the sense of being visible to others and “political” in the sense of demonstrating and advocating an alternative way of life.⁵⁰³ The Democratic-Republican Societies gathered and feasted and paraded; suffragist groups formed conventions and marches; abolitionists rallied citizens to awareness and action.⁵⁰⁴

The early American understanding of public and private for the most part endured at the time of Tocqueville’s visit to the United States.⁵⁰⁵ Tocqueville believed that citizens in Jacksonian democracy conceived of a narrow public realm confined to governmental functions: “In the American republics the activity of the central Government never as yet has been extended beyond a

values of liberty and equality.”).

499. See MARK WARREN, *DEMOCRACY AND ASSOCIATION* 32 (2001) (“[B]ecause [Tocqueville’s] bipolar state-civil society model fails to conceive economic and social power effects, it produces a limited conception of what counts as ‘political.’”).

500. ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 14 (1985) [hereinafter SMITH, *LIBERALISM*].

501. See *id.* at 14–15 (“Liberalism’s most distinctive feature is thus its insistence that government should be limited so as to free individuals to undertake private as well as public pursuits of happiness.”).

502. An important exception to the separation of public and private that I am describing was the role of state-sponsored churches in some areas of the country.

503. See Inazu, *Forgotten*, *supra* note 3, at 570 (“[G]roups invoking the right of assembly have inherently been those that dissent from the majority and consensus standards endorsed by government”).

504. See generally *id.* at 577–88.

505. See TOCQUEVILLE, *supra* note 484, at 275.

limited number of objects sufficiently prominent to call forth its attention.”⁵⁰⁶ Because he viewed the nongovernmental sphere as more determinative in shaping the lives and values of citizens than the more narrowly defined “government,” he saw associations as necessary to maintaining democratic order through civic virtue.⁵⁰⁷

The difficulty in applying Tocqueville’s framework to pluralist thought was that the reach of “government” or “public” in mid-twentieth century America was far greater than he had ever conceived. The growth of the market economy had initially reinforced Lockean understandings of public and private.⁵⁰⁸ But unprecedented advances in industrialization and bureaucracy that led to quasi-public corporations eventually rendered obsolete simplistic dualisms of public and private.⁵⁰⁹ Early twentieth-century legal thinkers began to question the assumption that “private law could be neutral and apolitical” amidst “a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.”⁵¹⁰ Legal realists characterized “the distinction in classical liberalism between private and public law as arbitrary, demonstrating that all private transactions involved the state and that all law was, in an important sense, public law.”⁵¹¹

Following these realist premises, New Deal reformers invaded the private realm with governmental programs, regulations, and bureaucrats.⁵¹² The New Dealers assumed that “the instruments of government provided the means for conscious inducement of social change” and that these instruments established “an indeterminable but expanding political sphere.”⁵¹³ The Supreme Court

506. *Id.* For example, the nation that Tocqueville observed in 1830 had fewer than 12,000 federal employees (almost 9,000 of whom worked for the Post Office) out of a population of over thirteen million. DAHL, *CONFLICT*, *supra* note 413, at 60–61.

507. WARREN, *supra* note 499, at 30. Warren wrote, “Tocqueville linked capacities for mediation and representation to civic habits developed within the associational fabric of civil society, which he in turn related to a strong meaning of democracy located in associational capacities for collective action.” *Id.*

508. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423, 1424–27 (1981). Horwitz suggested that it was “[t]he emergence of the market as a central legitimating institution” that “brought the public/private distinction into the core of legal discourse during the nineteenth century.” *Id.* at 1424. Horwitz elaborated that “[o]ne of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.” *Id.*

509. *See generally id.* at 1424–28 (“The contemporary erosion of the public/private distinction . . . is but another symptom of the passing of that world of nineteenth-century decentralized competitive capitalism that once made that distinction a rough approximation of reality.”).

510. *Id.* at 1426, 1428.

511. KALMAN, *supra* note 442, at 17.

512. *Id.*

513. LOWI, *THE END*, *supra* note 471, at 42, 43; *see also* Theodore Lowi, *The Public Philosophy: Interest-Group Liberalism*, 61 AMER. POL. SCI. REV. 5, 6 (1967) (“Once the

mounted a spirited but short-lived resistance to this ideology in the mid-1930s, and a decade later the Court embraced the new liberalism.⁵¹⁴ In 1948, the Court evidenced its acceptance of regulation of economic activity in *Shelley v. Kraemer*, which placed private contracts and covenants within the scope of the Fourteenth Amendment.⁵¹⁵

As the government expanded its reach into previously private domains, corporations, universities, and unions grew in number and size and increasingly assumed quasi-governmental functions.⁵¹⁶ In Henry Kariel's astute observation, "[o]rganizational giants such as General Motors, the Teamsters Union, the Farm Bureau, and the American Medical Association . . . emerged as full-fledged political regimes" and blurred "the formerly useful distinction between the public and the private."⁵¹⁷ Even as the pluralist critique of monist, state-centered theory redirected the study of politics toward the group, "the discovery that precious little in human life is immune to bureaucratization . . . dispelled some of the magic of the group."⁵¹⁸ The giant private bureaucracies were not akin to "that wonderful and wholly legitimate conglomeration of little groups which visitors from abroad [had] traditionally identified with Americanism."⁵¹⁹ They were rather "a newer set of large-scale organizational power blocs" that had come to "comprise most of the public order and occupy much of the public mind."⁵²⁰ John Dewey suggested an "eclipse of the public" had created "many publics."⁵²¹

Tocqueville had seen only one public, and its influence had been overshadowed by the private associations that he observed. By the middle of the twentieth century, this was no longer the case.⁵²² The conception of "public" had moved in two directions. First, the increased role of government as welfare provider had expanded the governmental realm into previously private domains.⁵²³ Second, private organizations had grown closer to coercive

principle of positive government in a growing and indeterminable political sphere was established, criteria arising out of the very issue of *whether* such a principle should be established became extinguished. They were extinguished by the total victory of one side of the old dialogue over the other.").

514. KALMAN, *supra* note 442, at 17–20.

515. 334 U.S. 1, 19–23 (1948). The Court concluded that state enforcement of property and contract laws qualifies as "state action" for the purposes of the Fourteenth Amendment, thereby requiring states to outlaw any "private" act of racial discrimination that relied on these market laws for its enforceability. *Id.*

516. HENRY S. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 1–4 (1961).

517. *Id.* at 1, 10.

518. SHELDON WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 374 (2nd ed. 2004) [hereinafter WOLIN, *POLITICS*].

519. KARIEL, *supra* note 516, at 2.

520. *Id.*

521. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 126 (1927).

522. See KARIEL, *supra* note 516, at 1–4.

523. See generally SMITH, *LIBERALISM*, *supra* note 500, at 138–65 (discussing the development of economic welfare and the abandonment of "Lockean economic views

government in form and substance as they grew in scope and size.⁵²⁴ Lost in this mix was a subtle transformation of the understanding of the “political,” which pluralist thought confined to those interests and pressure groups directly engaged with governmental processes. That characterization was doubly problematic: it kept hidden groups exerting economic coercion in the private sector but at the same time depoliticized groups that were neither government nor economic. Truman and Dahl recognized the changing roles of public and private, but they largely embraced them as a favorable dissipation of public power.⁵²⁵

Critics soon exposed the pluralist oversights. In 1966, Grant McConnell challenged the “comfortable assumption that interest groups will balance each other in their struggles and produce policies of moderation” in his book, *Private Power and American Democracy*.⁵²⁶ McConnell questioned the pluralist assumption that “private associations” were, in fact, private.⁵²⁷ He argued that the simplistic distinction between “public” and “private” had “been seriously blurred in recent years,”⁵²⁸ and suggested that this infusion of quasi-public authority into private associations could not be ignored: “When, under the guise of serving an ideal of democracy as the self-government of small units, the coercive power of public authority is given to these groups, their internal government becomes a matter of serious concern.”⁵²⁹

McConnell also challenged the pluralist balance assumption “that private associations are mutually countervailing,” an assumption which he viewed as a “a modern gloss on the argument of Madison and his colleagues in the

support[ing] . . . fixed limits on the government’s powers over property. . . . Indeed the course of modern commerce clause adjudication suggests that . . . no real boundaries remain on the activities and purposes that may be encompassed by the commerce power”).

524. See MCCONNELL, *supra* note 389, at 147 (“A more perplexing question arises when a private association called into being by actions of government officials acquires the power to exert great influence over policy and administration.”).

525. See generally TRUMAN, *supra* note 399, at 106–08 (explaining how “the increasing complexity of our society and the rapidity with which changes have occurred . . . have made the association the most characteristic and pervasive sort of political interest group”); DAHL, PREFACE, *supra* note 414, at 124–51 (Chapter 5, “An American Hybrid”).

526. MCCONNELL, *supra* note 389, at 362.

527. *Id.* at 146.

528. *Id.*; *cf. id.* at 362. McConnell writes, “[o]ften it is assumed that the role of the government is that of arbiter or mediator Neither role is possible where the distinction between public and private is lost.” *Id.* For example, the 1933 National Industrial Recovery Act and the 1935 Wagner Act bestowed upon labor unions “a substantial measure of public power.” *Id.* at 146. Professional and trade associations had been “given the power to nominate personnel, virtually as a form of representation, to official licensing boards” and “on occasion, to policy-making boards.” *Id.* at 147. And “private” associations like the American Farm Bureau Federation and the Chamber of Commerce of the United States had “direct government encouragement in their formation.” *Id.*

529. *Id.* at 341–42.

Federalist Papers.”⁵³⁰ The pluralist account suggested that “by opposing each other, private associations supposedly check any overly greedy attempts by particular associations to extend their power” such that “in the large community, democracy is insured.”⁵³¹ McConnell responded to this argument with the proposition that in practice, “private associations tend to be jealous of rivals.”⁵³² These associations “seek to prevent the rise of competitors in the fields they have marked as their own” and “[o]ften, when such rivals do exist, there is bitter conflict between them, conflict that has as its object the destruction of one or the other.”⁵³³

Other challenges to pluralist arguments came from Michael Rogin,⁵³⁴ Theodore Lowi,⁵³⁵ and William Connolly.⁵³⁶ Rogin argued that the pluralist theory of group politics had reintroduced “social cohesion in a constitutional, industrial society.”⁵³⁷ He believed the underlying “[s]ocial consensus plays an overwhelming role in the pluralist vision”⁵³⁸ leading some pluralists to “define out of existence any conflict between groups and the public interest.”⁵³⁹ Lowi contended that Dahl’s conception “relie[d] on an extremely narrow definition of coercion, giving one to believe that coercion is not involved if physical force is absent.”⁵⁴⁰ He argued that Dahl’s conception “depend[ed] on an incredibly broad and idealized notion of what is peaceful about peaceful adjustment.”⁵⁴¹ Lowi charged that ignoring these complexities meant that “interest group liberalism” helped create “the sense that power need not be power at all, control need not be control, and government need not be coercive.”⁵⁴² Connolly similarly asserted that pluralists like Dahl had

530. *Id.* at 123.

531. *Id.*

532. *Id.* at 124.

533. *Id.*

534. *See* MICHAEL PAUL ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* (1967).

535. *See* LOWI, *THE END*, *supra* note 471.

536. *See* William Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM* 3 (William Connolly ed., 1971) [hereinafter Connolly, *Challenge*].

537. ROGIN, *supra* note 534, at 10. For Rogin, pluralism was “not simply a defense of shared power or a sympathy for diverse values” but also a “theory of history in which industrialization is the major actor.” *Id.* Further, industrialization had destroyed “traditional stability,” but its success “enable[d] group politics to dominate a society.” *Id.*

538. *Id.* at 271.

539. *Id.* at 16. Rogin elaborated: “Since groups are ‘shared attitudes,’ all political actors can be called groups. Since versions of the public interest can only be rationalizations for group goals, the public interest cannot exist apart from group interests.” *Id.* But the consensus was markedly circular: pluralist theory recognized as legitimate only those group leaders “socialized into the dominant values and associations of industrial society.” *Id.* at 10.

540. LOWI, *THE END*, *supra* note 471, at 38.

541. *Id.*

542. *Id.* at 55. Lowi defined “interest group liberalism”:

It is liberalism because it is optimistic about government, expects to use government in a

disregarded “notable discontinuities” between the conditions of postwar American society and the “basic preconditions to the successful operation of pluralist politics” that Tocqueville had stipulated.⁵⁴³ For example, Connolly suggested that “the emergence of the large-scale, hierarchical organization has significantly altered the character of the voluntary association” since the time of Tocqueville’s writing.⁵⁴⁴

As the critics intimated, because pluralist theory of the 1950s assumed the status quo of an enlarged public sphere, its endorsement of group sovereignty was really epiphenomenal to a further legitimization of the public welfare function of the state and the increasingly bureaucratized corporations and universities that mimicked state functions and organization.⁵⁴⁵ This blending of public and private fundamentally altered the political arrangements about which Tocqueville and Madison had theorized. Dispersed power did not disappear or dissipate; it just became less visible.

VI. THE TYRANNY OF THE MAJORITY

It is important to note that while Madison and Tocqueville held different views about the inherent characteristics of the group—Madison’s factions were essentially bad and Tocqueville’s associations were essentially good—both theorists viewed groups as a check against majority rule. Madison wrote that majorities could be “unjust and interested”⁵⁴⁶ and sacrifice “both the public good and the rights of other citizens” to their “ruling passion or interest.”⁵⁴⁷ He thought that factions could ensure that a majority would be “unable to concert and carry into effect schemes of oppression.”⁵⁴⁸

Tocqueville warned similarly of the “tyranny of the majority.”⁵⁴⁹ He contended that the “omnipotence of the majority” posed “extreme perils to the American Republics.”⁵⁵⁰ Sheldon Wolin has suggested that by the second

positive and expansive role, is motivated by the highest sentiments, and possesses a strong faith that what is good for government is good for the society. It is interest-group liberalism because it sees as both necessary and good a policy agenda that is accessible to all organized interests and makes no independent judgment of their claims. It is interest-group liberalism because it defines the public interest as a result of the amalgamation of various claims.

Id. at 51.

543. Connolly, *Challenge*, *supra* note 536, at 4–5 (noting that Madison and Tocqueville provided the “intellectual springboard” for many pluralist thinkers).

544. *Id.* at 5.

545. *Cf.* WOLIN, *POLITICS*, *supra* note 518, at 374–75.

546. Madison, *supra* note 466, at 57.

547. *Id.* at 54; *see also* WOLIN, *TOCQUEVILLE*, *supra* note 484, at 248 (quoting Madison, *supra* note 466, at 57).

548. Madison, *supra* note 466, at 54.

549. *TOCQUEVILLE*, *supra* note 484, at 195.

550. *Id.* Sheldon Wolin wrote that Tocqueville “concluded that in America there were insufficient legal safeguards against the tyranny of the majority.” WOLIN, *supra* note 484, at

volume of *Democracy in America*, Tocqueville shifted his concern from an explicitly legislative imposition of majority will to a more nuanced form of cultural hegemony.⁵⁵¹ Wolin surmises that for Tocqueville,

The danger was not that a legislative majority might ride roughshod over minority rights but a strange lack of opposition to the dominant set of values—and this despite an unprecedented degree of liberty and fully guaranteed rights of expression. He insisted that there was no country in which there was less intellectual independence and freedom of discussion than in America. His explanation was that in a democracy the majority combined physical, moral, and legal authority. Democracy’s vaunted inclusiveness did not extend to the critic who espoused unorthodox views; he would eventually feel the whole weight of the community against him.⁵⁵²

Madison and Tocqueville both implicitly recognized that the capacity for groups to maintain autonomous practices, detached from and even antithetical to the will of the majority, was in some ways a destabilizing freedom. Mid-twentieth century pluralism never acquiesced in this description, but it is exactly right: group autonomy poses risk rather than stability for the democratic experiment.

The pluralist political thought that provided the background for the constitutional freedom of association largely failed to acknowledge that risk. The pluralist consensus assumption established boundaries within which measured disagreement could unfold but through which dissenting voices were marginalized or silenced.⁵⁵³ The pluralist balance assumption asserted a harmonious stability between those associations that remained within the consensus boundaries.⁵⁵⁴ Together, consensus and balance depoliticized political dissidents and disguised political power, yielding a skewed explanation for a stable democratic polity. Pluralists exalted associational autonomy because the associations accepted by the consensus neither threatened democratic stability nor diverged from democratic values.

VII. A NEW ERA OF ASSOCIATION

Initially, the consensus held. Civil rights groups advocating equality fell within the kinds of groups protected by the state.⁵⁵⁵ Communist groups (soon to be followed by segregationists) that stood outside of the consensus found

250.

551. WOLIN, *supra* note 484, at 250–51.

552. *Id.*

553. *See supra* Part V.B.

554. *See supra* Part V.A.

555. WALKER, *supra* note 13, at 240–42 (discussing protections given to the NAACP); *see also* POWE, *supra* note 37, at 490 (arguing that the Warren Court’s legal regime of racial equality was “directed exclusively at the South and was designed to force the South to conform to northern—that is, national—norms”).

themselves without recourse to the right of association.⁵⁵⁶ But tensions inherent within the democratic creed eventually rose to the surface. In 1984, when the liberal value of autonomy collided with the liberal value of equality in *Roberts v. United States Jaycees*,⁵⁵⁷ the democratic consensus became the consensus of Rawlsian liberalism.⁵⁵⁸

At the same time, the right of association continued to be shaped by the jurisprudential arguments that had complicated its initial arrival. The divide between the liberty argument and the incorporation argument continued seven years after *NAACP v. Alabama*⁵⁵⁹ when the Court recognized the right of privacy in *Griswold v. Connecticut*.⁵⁶⁰ Justice Douglas initially connected privacy with association and located both in the First Amendment, but Justice Brennan counseled him toward a more expansive approach that tied privacy to the liberty of the Fourteenth Amendment.⁵⁶¹ Fifteen years later, Kenneth Karst revisited *Griswold's* connection between privacy and association in an influential article published in the *Yale Law Journal*.⁵⁶² Karst contended that *Griswold* established a freedom of "intimate association," which was "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."⁵⁶³ The unstated corollary to Karst's argument was that "non-intimate" associations would not benefit from the same constitutional protection.

The implicit split between intimate and non-intimate associations in Karst's analysis became explicit in *Roberts*, which denied the right of the Jaycees to exclude women from full membership in its organization.⁵⁶⁴ In his opinion, Justice Brennan asserted that previous decisions had identified two separate constitutional sources for the right of association.⁵⁶⁵ One line of decisions protected the right of intimate association as "a fundamental element of personal liberty."⁵⁶⁶ Another set of decisions guarded expressive

556. See WALKER, *supra* note 13, at 240.

557. 468 U.S. 609 (1984).

558. See generally JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard Univ. Press 1973) (1971). My use of the term "consensus" in this paragraph is meant to describe the boundaries that the "democratic creed" places on the right of association as opposed to the more general "liberal consensus." In this narrower sense, the consensus assumptions underlying the Court's doctrine of the right of association held until *Roberts*. In the 1960s and 1970s, segregationists and communists were denied associational rights because they fell outside of that consensus. The broader liberal consensus, in contrast, was under attack by the late 1960s. See generally MCCONNELL, *supra* note 389.

559. 357 U.S. 449 (1959).

560. 381 U.S. 479, 485-86 (1965).

561. BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 237-38 (1985).

562. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

563. *Id.* at 629.

564. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629-31 (1984).

565. *Id.* at 618.

566. *Id.* at 617-18.

association, which was “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”⁵⁶⁷ According to Justice Brennan, expressive association to pursue “a wide variety of political, social, economic, educational, religious, and cultural ends” was “implicit in the right to engage in activities protected by the First Amendment.”⁵⁶⁸

Brennan’s categories of intimate and expressive association roughly tracked the liberty argument and the incorporation argument, respectively. But in a bizarre doctrinal twist (the kind that usually unfolds only when doctrine is not particularly relevant), the intimate association corresponding to the liberty argument began to command greater constitutional protections than the expressive association corresponding to the incorporation argument.⁵⁶⁹ This development in *Roberts* reflected a reversal of the debate in the Court illustrated by *Sweezy v. New Hampshire*⁵⁷⁰ and *NAACP v. Alabama*.⁵⁷¹ The kind of First Amendment argument that Black and Douglas had relied upon for strong associational protections was rendered subservient to a more nebulous intimate association grounded in liberty arguments.⁵⁷²

567. *Id.* at 618.

568. *Id.* at 622.

569. *Id.* at 623 (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. . . . We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”).

570. *See generally* *Sweezy v. New Hampshire*, 354 U.S. 234 (1956). One example of this reasoning: “Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association.” *Id.* at 250.

571. *See generally* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Court held that, “the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.” *Id.* at 466. Justice Harlan opined that, “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 the freedom of speech.” *Id.* at 460.

572. *See Roberts*, 468 U.S. at 618, 623. Brennan contended that intimate and expressive association represented, respectively, the “intrinsic and instrumental features of constitutionally protected association.” *Id.* at 618. These differences meant that the two forms of association warranted different levels of constitutional safeguards: “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.” *Id.*; *cf.* Kateb, *The Value of Association*, *supra* note 2, at 46 (“Running through Brennan’s opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones.”); SOIFER, COMPANY, *supra* note 2, at 41 (contending that Brennan regarded expressive association “as instrumental and therefore subject to greater government intrusion”). *See also* John D. Inazu,

The *Roberts* framework led to similar results in *Board of Directors of Rotary International v. Rotary Club of Duarte*⁵⁷³ and *New York State Club Ass'n v. City of New York*.⁵⁷⁴ And while some see the Court's more recent 5–4 decision in *Boy Scouts of America v. Dale*⁵⁷⁵ as a curtailment of *Roberts*, *Dale* largely adopted the analytical framework of *Roberts*.⁵⁷⁶ Chief Justice Rehnquist's majority opinion provided:

[I]n the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Ass'n*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in

The Unsettling 'Well-Settled' Law of Freedom of Association, 43 Conn. L. Rev. -- (2010, forthcoming).

573. 481 U.S. 537 (1987) (upholding anti-discrimination laws applied to the Rotary Club).

574. 487 U.S. 1 (1988) (upholding anti-discrimination laws applied to a consortium of New York City social clubs). Two other cases merit mentioning. First, in *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), the Court denied the expressive association claim of the owner of a skating rink who challenged a Dallas ordinance restricting admission to "dance halls" to people between the ages of 14 and 18. *Id.* at 20. The case is interesting because it involved an associational challenge to the state's efforts to enforce a discriminatory law rather than the more typical challenge to state efforts to enforce anti-discrimination laws seen in *Duarte* and *New York State Club Ass'n*. *See id.* at 20–23. *City of Dallas* is also distinguishable from cases like *Roberts*, *Duarte*, and *New York State Club Ass'n* because it involved a for-profit enterprise and no coherently definable membership. *See id.* at 24 ("The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment."). The second case worth noting is the Court's 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) in which a gay, lesbian, and bisexual group challenged its exclusion from a Boston parade under Massachusetts's public accommodations law. *Id.* at 566. In rejecting the group's claim, Justice Souter relied on free speech rather than free association principles. *Id.* at 568–70. Souter argued that "whatever the reason" the parade organizers had for excluding the group, their decision "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575. The free speech analysis seemed fairly straightforward, but it was difficult to reconcile with the Court's approach to association in *Roberts*, *Duarte* and *New York State Club Ass'n*.

575. 530 U.S. 640 (2000).

576. *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 125 (2000) ("The Supreme Court's decision in *Dale* did not overtly challenge the conceptual framework established in *Roberts*; indeed, it self-consciously purported to build on it."); Seana Valentine Shiffirin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 841 (2005) ("The Court's framing of the issues [in *Dale*] grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*."). *But see* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 297–298 (2001) (arguing that *Dale* eschewed "functional analysis following in the path of *Roberts*").

these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.⁵⁷⁷

Far from signaling a robust associational freedom, *Dale*'s "serious burden" test revealed an arbitrariness as problematic as the balancing found elsewhere in the Court's First Amendment jurisprudence.⁵⁷⁸ Thus, *Dale*'s holding should not be mistaken as a deepening of the right of association. Rather, the Court's reasoning reaffirmed the fundamental division between intimate and expressive association in *Roberts*, and there is little cause to believe that victory for the Boy Scouts reflects a deepening concern for associational freedom generally.⁵⁷⁹

VIII. CONCLUSION

Roberts and *Dale* are full of problems, and most commentators have expressed befuddlement at one or both of these decisions.⁵⁸⁰ But what has not been fully recognized about the current vulnerability of the right of association is the degree to which the doctrinal shortcomings in *Roberts* and *Dale* can be linked to the original recognition of the right of association a half century ago. The three factors that shaped the right of association in *NAACP v. Alabama* and subsequent cases in the 1960s in many ways paved the way for the transformation that occurred in *Roberts*. First, the largely unquestioned pluralist consensus in the late 1950s and early 1960s opened the door for the Rawlsian consensus that emerged in the 1970s and placed certain associations beyond its contours. Second, the Court's disparate treatment of communist and

577. *Dale*, 530 U.S. at 658–59.

578. *Id.* at 658. John Hart Ely long ago cautioned that the First Amendment's "balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it—and we must build barriers as secure as words are able to make them." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

579. For indications that *Dale* might represent a pyrrhic victory for group autonomy under the current doctrinal framework of association, see *Christian Legal Soc'y v. Kane*, 319 F. App'x 645, 645 (9th Cir. 2009) (upholding Hasting Law School's denial of recognition of a Christian Legal Society Student Chapter for its refusal to accept openly gay members); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026, 1041 (D. Mont. 2009) (applying *Kane*); *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *vacated*, *Beta Upsilon Chi v. Machen*, 586 F.3d 908 (11th Cir. 2009) (district court upheld University of Florida's denial of recognition to a Christian fraternity for its refusal to accept openly gay members, 11th Circuit held case was moot when the University recognized the fraternity). *Kane*, since restyled as *Christian Legal Soc'y v. Martinez*, is now before the Supreme Court. See *Christian Legal Soc'y v. Kane*, 319 F. App'x 645 (9th Cir. 2009), *cert. granted sub nom.*, *Christian Legal Society v. Martinez*, No. 08-1371, 1009 WL 1269076, at *1 (U.S. Dec. 7, 2009).

580. See, e.g., Kateb, *The Value of Association*, *supra* note 2; KOPPELMAN, *supra* note 5; Rosenblum, *supra* note 2; SOIFER, *COMPANY supra* note 2.

civil rights associations in the 1950s and 1960s carved a path for later cases like *Roberts* to deny associational protections to certain kinds of groups even in the absence of any imminent threat to security or stability. Finally, the early jurisprudential arguments over the constitutional source of association facilitated Justice Brennan's later distinction between a right of expressive association (connected to the First Amendment) and a right of intimate association (tied to personal liberty under the Fourteenth Amendment).⁵⁸¹

These developments have weakened the constitutional protections for group autonomy. Much of the current vulnerability of the right of association stems from the Court's reformulation of that right in *Roberts*. But *Roberts* cannot bear all of the blame. If today's freedom of association is less protected than some might like it to be, the roots of its problems may lie in the political, jurisprudential, and theoretical factors present at its inception.

581. I have been careful not to attribute a direct doctrinal link between the *Roberts* categories of intimate and expressive association and the Court's first articulation of a constitutional right of association in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Court's arguments in *Roberts* in support of distinct categories of intimate and expressive association are for the most part novel claims unconnected to earlier case law. See Inazu, *Unsettling*, *supra* note 572 (critiquing the *Roberts* framework). For the reasons that I identify here, however, I do maintain that the political, doctrinal, and theoretical factors surrounding *NAACP v. Alabama ex rel. Patterson* and the ways in which the Court responded to those factors in its early case law on association paved the way for the reformulation of the right of association in *Roberts*.