

THE FORGOTTEN FREEDOM OF ASSEMBLY

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ABSTRACT

JOHN INAZU: The Forgotten Freedom of Assembly
(Under the direction of Jeff Spinner-Halev)

This thesis examines “the right of the people peaceably to assemble” and its gradual disappearance from American constitutional jurisprudence. I begin by exploring the English and colonial roots of the freedom of assembly and its adoption in the Bill of Rights. In doing so, I highlight the significance of political and religious assembly to the Framers and in the early Republic. I then examine the development of assembly in American constitutional law and the later emergence of the right of association in the context of mid-twentieth century liberalism. I argue throughout the thesis that assembly, unlike association, reminds us of the importance of protecting the physical act of people coming together, the value of allowing dissent, and the fundamental differences between state and non-state social practices. I conclude by positing how a recovery of the freedom of assembly might be employed within a contemporary legal framework to strengthen the constitutional protections for groups.

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Introduction

Anita Whitney is a name familiar to American lawyers. The daughter of a California state senator and niece of a Supreme Court justice, Whitney graduated from Wellesley College in 1889 and immersed herself in local civic activities. She eventually joined the Socialist Party and served as a delegate to the 1919 organizing convention of the Communist Labor Party of California. Her involvement in the latter led to her arrest, prosecution, and conviction under California's Criminal Syndicalism Act.¹ In 1927, a majority of the Supreme Court upheld her conviction over her objection that the California law violated her rights under the First Amendment.² The Court expressed particular concern that Whitney's actions were undertaken in concert with others, which "involve[d] even greater threat to the public peace and security than the isolated utterances and acts of individuals."³

Chaffing at this rationale, Justice Louis Brandeis penned one of the most famous concurrences in American jurisprudence. Brandeis wrote:

¹Vincent Blasi has written a fascinating account of these circumstances. See Vincent Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*," *William and Mary Law Review* 29 (1988).

²*Whitney v. California*, 274 U.S. 357, 371 (1927). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam).

³*Whitney v. California*, 511.

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁴

Legal scholars have written volumes about these words and those that followed, and Brandeis's concurrence has been praised for its eloquent defense of free speech. Vincent Blasi has called the opinion "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment."⁵ And Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis's *Whitney* concurrence the "classic formulation" of the fundamental principle underlying free speech.⁶ But a monolithic focus on *speech* obscures the textured nature of Brandeis's argument. He specified that California's statute reached beyond mere words.⁷ And eleven times throughout his relatively brief opinion, Brandeis invoked the union of the freedoms of speech and *assembly*.

⁴Ibid., 375 (Brandeis, J., concurring)

⁵Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*," 668. Blasi's article focused on free speech.

⁶*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Cf. H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press, 2002), 194.

⁷"The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it." 274 U.S. at 373 (Brandeis, J., concurring).

Brandeis's invocation of assembly pointed to something beyond the freedom of speech,⁸ to that right that Abraham Lincoln once describe as part of "the Constitutional substitute for revolution."⁹ Ten years after *Whitney*, the Court declared that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."¹⁰ And even as late as 1973, John Rawls's path breaking work, *A Theory of Justice*, characterized assembly as one of the "basic liberties."¹¹ But the "right of the people peaceably to assemble"¹² is now little more than an historical footnote in American jurisprudence. Why has assembly so utterly disappeared from our constitutional landscape?

⁸The phrase "speech and assembly" appears in only one Supreme Court opinion prior to *Whitney*. See *New York Ex Rel. Doyle v. Atwell*, 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the "rights of freedom of speech and assembly"). Subsequent to Brandeis's concurrence in *Whitney*, "speech and assembly" is found in over one hundred of the Court's opinions.

⁹Abraham Lincoln, *Uncollected Letters of Abraham Lincoln*, ed. Gilbert A. Tracy (New York: Houghton Mifflin Company, 1917), 127. In a January 19, 1860, letter to Alexander H. Stephens, Lincoln wrote that: "the right of peaceable assembly and of petition and by article Fifth of the Constitution, the right of amendment, is the Constitutional substitute for revolution. Here is our Magna Carta not wrested by Barons from King John, but the free gift of states to the nation they create . . ." Ibid.

¹⁰*De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Cf. Glenn Abernathy, *The Right of Assembly and Association* (Columbia: University of South Carolina Press, 1961), 4. ("a broad right of peaceable assembly is a vital element in the maintenance of the democratic process").

¹¹John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), 53. Rawls relies on association rather than assembly in his later work. See, e.g., John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 221 n.8.

¹²U.S. CONST. amend. I.

This thesis suggests that the right of assembly was largely supplanted by the judicially constructed right of association that emerged in the era of mid-twentieth century liberalism. But the move away from assembly was not merely a shift in terminology; rather, the modern neglect of assembly has obscured important historical and conceptual factors that informed its initial inclusion in the Bill of Rights. *Whitney* reminds us of three of these factors: the importance of protecting the physical act of people coming together, the value of allowing dissent—both spoken and lived—to democratic practice, and the fundamental differences between state and non-state social practices. My contention is that association (at least insofar as it has been doctrinally shaped in American jurisprudence) cannot properly account for these values inherent in the concept of assembly. This has opened the door for the hegemonic tendencies of the modern liberal state to demand “that the internal life and organization of associations mirror liberal democratic principles and practices.”¹³

My objective is to recover the freedom of assembly in an attempt to deepen the protections for group autonomy that now rest solely and precariously on the freedom of association (and, to some extent, on the freedom of speech and the freedom of religion¹⁴).

¹³Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, N.J.: Princeton University Press, 1998), 36

¹⁴Assembly may provide a partial solution to the Court’s troubled religious liberty jurisprudence. The religion jurisprudence of the past fifty years has increasingly conceived of religion as an individual or personal liberty. But most religions—and particularly the Western religions that occupy the majority of American religion jurisprudence—are corporate practices. This understanding of religion in America may lend itself to the notion of assembly. And historically, the freedom of assembly for religious purposes preceded the freedom of assembly for political purposes. There are thus both sociological and historical reasons for including assembly in a consideration of religious freedom.

While today's cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have at one time or another been silenced and stilled in the absence of meaningful constitutional protections cuts across political and ideological camps. African-Americans and racial bigots, conservative Christians and gay activists, all-male groups and women's rightists, Socialists and Jehovah's Witnesses all have a stake in limiting the influence of state and society on their ways of life. The freedom of assembly does not eliminate the challenges confronted by these corporate practices—the Supreme Court, after all, upheld Anita Whitney's conviction over her arguments of free assembly—but it offers historical, jurisprudential, and theoretical arguments unavailable to those who seek refuge exclusively in association.

I begin this thesis by exploring the English and colonial roots of the freedom of assembly and its adoption in the Bill of Rights. In doing so, I highlight the significance of political and religious assembly to the Framers and in the early Republic. Part II examines the development of assembly in American constitutional law. Parts III and IV trace the emergence of the right of association in the context of mid-twentieth century liberalism. I also draw attention to the Court's weakening of the protections afforded to groups through its hierarchical distinction between intimate and expressive association in *Roberts v. United States Jaycees*.¹⁵ I conclude the thesis in Part V by positing how a recovery of the freedom of assembly might be employed within a contemporary legal framework to strengthen the constitutional protections for groups.

¹⁵*Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

I. The Right Peaceably to Assemble

English Roots

The recognition of assembly as a political right began in England as a derivative of the right of petition and first appeared in English law with the signing of the Magna Charta in 1215. Chapter 61 of the Great Charter addressed breaches of the “articles of peace and security” and provided that four barons “shall repair to us . . . and laying open the grievance, shall petition to have it redressed without delay.”¹⁶ The term “assembly” didn’t enter the English legal vernacular for more than two centuries, and even then it was only defined negatively. In 1412, the statute of 13 Henry IV mandated enforcement of civil order “[i]f any riot, assembly, or rout of the people, against the law be made.”¹⁷ In 1549, Parliament passed a more pernicious act, declaring it “to be treason for any twelve persons to meet together on any matter of the state.”¹⁸ The breadth of this law,

¹⁶Quoted in George P. Smith, "The Development of the Right of Assembly: A Current Socio-Legal Investigation," *William and Mary Law Review* 9 (1967): 361 n.11. In one of the most oft-cited articles on the American right of assembly, James Jarrett and Vernon Mund contend that the act of protest that preceded the signing of the Magna Charta in which the barons “assembled in arms and presented their demands of the King at the Temple” was itself an act of assembly. James M. Jarrett and Vernon A. Mund, "The Right of Assembly," *New York University Law Quarterly Review* 9 (1931): 5. But while the barons’ protest may be similar to some forms of the classical Greco-Roman understanding of political assembly, it is misleading to imply a resemblance to contemporary notions of assembly that do not rely on armed insurrection.

¹⁷13 Hen. IV, c. 7 sec. 1 (1412), quoted in Mund, "The Right of Assembly," 7.

¹⁸Ibid. The act was followed by the statutes of I Mary c. 12 (1553) and I Eliz. c. 16 (1558), which likely provided “the first comprehensive regulation of unlawful

issued in response to “the tumults and insurrections of the common people throughout the various counties,”¹⁹ struck at the core of political assembly that existed apart from the state. Subsequent restrictions in 1553²⁰ and 1558²¹ were less draconian but appeared equally inhospitable to political dissent: justices of the peace were authorized to disperse a gathering if *in their opinion* it was or could lead to an unlawful assembly.²²

The Tumultuous Petition Act of 1661 reestablished a limited freedom of assembly for ten or fewer people “to present any publique or private grievance or complaint to any member or members of Parliament . . . or to the King’s Majesty.”²³ Twenty-eight years later, the English Bill of Rights declared “[t]hat it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal.”²⁴ But despite the guarantee of petition, the freedom of assembly remained weakly contingent: in 1715, an “Act for preventing Tumults and riotous Assemblies” made it a felony if

assemblies.” Smith, “The Development of the Right of Assembly: A Current Socio-Legal Investigation,” 363 n.19.

¹⁹Mund, “The Right of Assembly,” 7.

²⁰1 Mary c. 12.

²¹1 Eliz. c. 16.

²² Smith, “The Development of the Right of Assembly: A Current Socio-Legal Investigation,” 363 n.19. Mund, “The Right of Assembly,” 8. William Lambard offered the first comprehensive explanation of unlawful assembly in 1619: “An unlawful assembly, is of the companie of three or more persons, disorderly coming together, forcibly to commit an unlawful act, as to beat a man or to enter upon his possession or the like.” William Lambard, *Eirenarcha* (1619): 175-76, quoted in Mund, “The Right of Assembly,” 5.

²³13 Chas. 2, st. 1, c. 5 (1661).

²⁴1 Will. & Mar. sess. 2, c. 2 (1689).

twelve or more people unlawfully assembled failed to disperse within an hour after authorities read a proclamation.²⁵ The English right of assembly, then, created only a precariously limited forum for expressing political grievances.

Assembly in Colonial America

The gradual recognition of a limited right of assembly in England also had its influence in the American colonies. Gordon Wood has noted that eighteenth-century Americans were familiar with the ancient English term “convention,” which was “a meeting, an act of coming together, used to refer to all sorts of assemblies, especially formal assemblies, convened for deliberation on important matters, whether ecclesiastical, political or social.”²⁶ Although the colonists “generally regarded conventions as legally deficient bodies existing outside of the regularly constituted authority,” they were “closely allied in English thought with the people’s right to assemble and to present grievances to the government.”²⁷ And the nascent colonial freedoms went beyond their English roots. As David Fellman has observed, the deep roots of “the rights of peaceful assembly and petition . . . in the American experience

²⁵ Smith, "The Development of the Right of Assembly: A Current Socio-Legal Investigation," 363 n.22. This is the origin of the phrase “reading the Riot Act.” Ibid.

²⁶Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 310. Wood explains that “[t]he American colonists were familiar with the term convention and used it to denote all sorts of meetings for quasi-public purposes, whether of New England Congregational ministers in the early eighteenth century or of delegates discussing plans for continental union in 1754.” Ibid., 312.

²⁷Ibid.

[were] reflected in the frequency with which they were asserted in the formative period of American history.”²⁸

In 1774, the First Continental Congress resolved that “the inhabitants of the English colonies in North America . . . have a right peaceably to assemble, consider their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.”²⁹ Two years later, North Carolina and Pennsylvania decreed “[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances.”³⁰ When the State Conventions met in 1788, North Carolina and Virginia advanced identical amendments based largely on the 1776 North Carolina and Pennsylvania declarations:

That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.³¹

The state proposals inserted the disjunctive “or” before “to instruct their representatives.”

This eliminated (perhaps inadvertently) an ambiguity in the earlier declarations as to the

²⁸ David Fellman, *The Constitutional Right of Association* (Chicago: University of Chicago Press, 1963), 5.

²⁹ Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997), 143. This appears to be the first use of the phrase “peaceably to assemble.”

³⁰ *Ibid.*, 141. Vermont followed with similar language the following year. *Ibid.*, 142. Delaware and Maryland established a right to petition the legislature for redress of grievances but made no mention of assembly. *Ibid.*, 140.

³¹ *Ibid.*, 140.

purpose of assembly. Without the disjunctive, the right of assembly could have been interpreted as existing only for the purposes of instructing representatives or applying to the legislature for redress of grievances.³² But the addition of “or” in the two proposals clarified textually that assembly was not limited to these purposes.

Another slight language change worked in the opposite direction. The earlier declarations had placed the possessive pronoun “their” before the words “common good;” the proposals changed this to the definite article “the.”³³ Whether intended or accidental, this alteration was not insignificant: the difference between the common good as it is understood by the people who assemble *before* the state and the common good as it is articulated *by* the state may be the difference between permitting or prohibiting dissenting views. The point was not lost during the later House debates over the language of assembly in the Bill of Rights. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, “every thing that was not incompatible with the general good ought to be granted,”³⁴ Elbridge Gerry of Massachusetts replied that if Hartley “supposed that the people had a right to consult for the common good” but “could not consult unless they met for that purpose,” he was in fact “contend[ing] for nothing.”³⁵ In other words, if the right of assembly encompassed only a majoritarian

³²This appears to be the approach taken by Delaware and Maryland.

³³The word “their” is retained in the New York and Rhode Island proposals. *Ibid.*

³⁴Congressional Register, August 15, 1789, vol. 2, quoted in Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 145.

³⁵*Ibid.*

understanding of the common good, then its use as a means of protest or dissent would be eviscerated.³⁶

Assembly in the Bill of Rights

The First Congress convened in 1789 to draft amendments based upon the various state proposals. On June 8, 1789, James Madison proposed the following clause pertaining to assembly:

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.³⁷

A subsequent draft combined assembly with several other rights under consideration:

The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.³⁸

The House approved this language on August 24, 1789, and the Senate took it under consideration the following day.³⁹ Ten days later, the Senate defeated a motion to strike

³⁶Cf. Melvin Rische, "Freedom of Assembly," *DePaul Law Review* 15 (1965): 337 ("Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.").

³⁷Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 129. Madison's language reverted to the possessive pronoun "their" before "common good." It also retained a clear distinction between the right to assembly and the right to petition for grievances.

³⁸*Ibid.*, 143. This version also changed the semi-colon after "common good" to a comma.

³⁹*Ibid.*, 131.

the reference to the common good.⁴⁰ But the following week, the text inexplicably dropped out when the Senate merged language pertaining to religion into the Amendment:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.⁴¹

The removal of the language pertaining to the common good may have been intended to broaden the scope of the assembly clause, but it also reintroduced a textual ambiguity. With neither the disjunctive “or” of the earlier state declarations nor the prepositional “for their common good” following the reference to assembly, the text now described “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” This left unclear whether the amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition. In one of the only recent considerations of assembly in the First Amendment, Jason Mazzone argues in favor of the former.⁴² Mazzone suggests that:

⁴⁰Senate Journal. 1st Cong., 3 September 1789, 70. The following day the Senate adopted similar language: “That Congress shall make no law abridging the freedom of speech, or of the press, or the [r]ight of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.” *Ibid.*, 4 September 1789, 71.

⁴¹*Ibid.*, 9 September 1789, 77. The amendment took its final form on September 24, 1789: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 136.

⁴²Jason Mazzone, “Freedom’s Associations,” *Washington Law Review* 77 (2002). But see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale

There are two clues that we should understand assembly and petition to belong together. The first clue is the use of “and to petition,” which contrasts with the use of “or” in the remainder of the First Amendment’s language. The second clue is the use of “right,” in the singular (as in “the right of the people peaceably to assemble, and to petition”), rather than the plural “rights” (as in “the rights of the people peaceably to assemble, and to petition”). The prohibitions on Congress’ power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.⁴³

Mazzone’s interpretation is textually and contextually tenuous. The textual difficulty stems from the comma preceding the phrase “and to petition.” The comma is clearly residual of the earlier text which had described the “right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”⁴⁴ Whether left in deliberately or inadvertently,⁴⁵ it relates back to a distinction between a right to peaceable assembly and a right to petition.⁴⁶

University Press, 1998), 26 (referring to assembly and petition as separate clauses); William W. Van Alstyne, *First Amendment: Cases and Materials*, 2nd ed. (Westbury, NY: Foundation Press, 1995), 32 (referring to a distinct “‘peaceably to assemble’ clause”).

⁴³Mazzone, "Freedom's Associations," 712-13.

⁴⁴Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 143. The earlier version derived in turn from Madison’s draft. *Ibid.*, 129. Mazzone recognizes that “in Madison’s draft, assembly is separated from petitioning by a semi-colon, perhaps indicating that while the right of assembly is related to the right of petition, assembly is not necessarily limited to formulating petitions.” Mazzone, "Freedom's Associations," 715 n.409.

⁴⁵Caleb Nelson cautions against placing too much reliance on punctuation in the Constitution because at the time of the Founding “punctuation marks [were] thought to lack the legal status of words.” Caleb Nelson, "Preemption," *Virginia Law Review* 86 (2000): 258. He notes that “[t]he ratification of the Constitution by the states reflects this relatively casual attitude toward punctuation” because many states that incorporated a copy of the Constitution in the official form of ratification varied its punctuation.” *Ibid.*, 259, n.102. Nelson cites as an example the copy of the Constitution in the Pennsylvania form of ratification, which used “different punctuation marks than the Constitution engrossed at the Federal Convention” in roughly thirty-five places. *Ibid.* My reliance on

As an historical matter, the First Congress appeared to have conceived of a broader notion of assembly, as evidenced in an exchange between Theodore Sedgwick of Massachusetts and John Page of Virginia during the House debates over the language of the Bill of Rights. Sedgwick criticized the proposed right of assembly as redundant in light of the freedom of speech:

If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.⁴⁷

Page responded that Sedgwick:

. . . supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.⁴⁸

this particular comma is more forensic than substantive: it offers circumstantial evidence that the drafters envisioned a broader right of assembly.

⁴⁶Mazzone addresses the comma in a footnote and argues that because it “mirrors the comma” preceding the words “or prohibit the free exercise thereof” in the first half of the First Amendment, “[i]t does not therefore signal a right of petition separate from the right of assembly.” Mazzone, “Freedom’s Associations,” 713 n.392. The argument for textual parallelism doesn’t hold because the free exercise clause explicitly refers back to “religion” (before the comma) with the word “thereof.” A closer parallel—which illustrates Mazzone’s interpretive problem—is the suggestion that the comma separating speech and press connotes that they embody only a singular freedom.

⁴⁷Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 144.

⁴⁸Congressional Register, August 15, 1789, vol. 2, quoted in *Ibid.* Following Page’s comments, Sedgwick’s motion to strike assembly from the draft amendment was defeated by a “considerable majority.” *Ibid.*, 145.

Irving Brant notes that while Page's allusion to a man without a hat is lost on a contemporary audience, "[t]he mere reference to it was equivalent to half an hour of oratory" before the First Congress.⁴⁹ Page was referring to the trial of William Penn.⁵⁰

William Penn's story of assembly began in 1664, when Parliament passed the Conventicle Act forbidding "any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England."⁵¹ On August 14, 1670, Penn and other Quakers attempted to gather for worship at their meeting-house on Gracechurch Street, London.⁵² Prevented from entering by a company of soldiers, Penn began delivering a sermon to the Quakers assembled in the street.⁵³ Penn and a fellow Quaker, William Mead, were arrested and brought to trial in a dramatic sequence of events that included a contempt of court charge stemming from their wearing of hats in the courtroom.⁵⁴ A jury acquitted the two men on

⁴⁹Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs-Merrill, 1965), 55.

⁵⁰*Ibid.*, 61.

⁵¹16 Charles II c. 4 (1664). The act was renewed in 1667 and again in 1670. William Dixon, *William Penn: An Historical Biography* (Philadelphia: Blanchard and Lea, 1851), 75, 76.

⁵²*Ibid.*, 76.

⁵³*Ibid.*.

⁵⁴Brant, *The Bill of Rights: Its Origin and Meaning*, 57 (quoting Penn). Penn and Mead were fined for contempt of court for wearing their hats after being ordered by an officer of the court to put them on. *Ibid.*

the charge that their public worship constituted an unlawful assembly. The jurors were then themselves imprisoned for their verdict and later vindicated in habeas corpus proceedings.

The case became famous throughout Old and New England for its pronouncements on religious freedom, trial by jury, and the right of assembly: “Every Quaker in America knew of the ordeal suffered by the founder of Pennsylvania and its bearing on freedom of religion, of speech, and the right of assembly. Every American lawyer with a practice in the appellate courts was familiar with it, either directly or through its connection with its still more famous aftermath.”⁵⁵ According to Brant:

William Penn loomed large in American history, but even if he had never crossed the Atlantic, bringing the Quaker religion with him, Americans would have known about his ‘tumultuous assembly’ *and his hat*. Few pamphlets of the seventeenth century had more avid readers than the one entitled ‘The People’s Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves.’ Congressman Page had known the story from boyhood, reproduced in Emlyn’s *State Trials* to which his father subscribed in 1730. It was available, both in the *State Trials* and as a pamphlet, to the numerous congressmen who had used the facilities of the City Library of Philadelphia. Madison had an account of it written by Sir John Hawles, a libertarian lawyer who became Solicitor General after the overthrow of the Stuarts in 1688.⁵⁶

The act of protest that sparked Penn’s well-known ordeal had nothing to do with petitioning for a redress of grievances. It was an act of religious worship. When Congressman Page alluded to this act in the House debate over assembly, it was clear

⁵⁵Ibid., 61.

⁵⁶Ibid., 56.

both to him and to his audience that the right of assembly under discussion encompassed more than petition for redress of grievances.

The members of the House also knew the dangers of an unconstrained right of assembly. Madison reported that immediately prior to Page's allusion to Penn, Elbridge Gerry had described assembly as an "essential right."⁵⁷ Gerry contended that the right of assembly "had been abused in the year 1786 in Massachusetts,"⁵⁸ a reference to Shays's Rebellion. The rebellion had been an abuse of assembly precisely because it had relied on armed insurrection rather than peaceful protest. But in the wake of the unrest, "many common people felt that a new struggle was needed to preserve the cause of freedom for which they had fought during the revolutionary war."⁵⁹ Seven years later, this sentiment spawned the first test of the newly minted right of assembly: the Democratic-Republican societies.⁶⁰

Early American Assemblies

The popular societies known as Democratic-Republican societies consisted largely of farmers and laborers wary of the aristocratic leanings of Hamilton and other

⁵⁷Congressional Register, August 15, 1789, vol. 2, quoted in Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 144.

⁵⁸*Ibid.*

⁵⁹Philip Sheldon Foner, *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions, and Toasts* (Westport, CT: Greenwood Press, 1976), 5.

⁶⁰*Ibid.*

Federalists.⁶¹ Between 1793 and 1800, almost fifty societies emerged from Maine to Georgia; the largest of these was the Democratic Society of Pennsylvania, which boasted over 300 members.⁶² According to Philip Foner:

A great part of the activities of the popular societies consisted of creating public discussions; composing, adopting, and issuing circulars, memorials, resolutions, and addresses to the people; and remonstrances to the President and the Congress—all expressing the feelings of the assembled groups on current political issues.⁶³

The societies “invariably claimed the right of citizens to assemble.”⁶⁴ A 1794 resolution from a society in Washington, North Carolina asserted that: “It is the unalienable right of a free and independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern.”⁶⁵ That same year, the Boston *Independent Chronicle* declared that:

Under a Constitution which expressly provides ‘*That the people have a right in an orderly and peaceable manner to assemble and consult upon the common good,*’ there can be no necessity for an apology to the public for an Association of a number of citizens to promote and cherish the social virtues, the love of their country, and a respect for its Laws and Constitutions.⁶⁶

The societies were ultimately short-lived, due in part to their unsuccessful opposition to Jay’s Treaty and President Washington’s belief that they were linked to the Whiskey

⁶¹Ibid.

⁶²Ibid., 7.

⁶³Ibid., 10.

⁶⁴Ibid., 11.

⁶⁵Ibid., 11 (quoting *North-Carolina Gazette* (New Bern), April 19, 1794).

⁶⁶Ibid., 25 (quoting *Independent Chronicle* (Boston), January 16, 1794).

Rebellion of 1794.⁶⁷ But even though they had largely dissipated by the turn of the century, their influence was not inconsequential. According to Foner, “[a]s a center of Republican agitation and propaganda . . . the societies did much to forge the sword that defeated Federalism and put Jefferson in the presidency.”⁶⁸

The Democratic-Republican societies may have provided the first test of assembly in the new republic, but the constitutional freedom took its shape over the next century in the context two longer-lasting movements: abolitionism and women’s suffrage. Although an extended consideration of the importance of assembly to these movements is beyond the scope of this thesis, it is significant that both women and African-Americans repeatedly asserted and were denied the right of assembly. C. Peter Ripley notes that by 1835, “most southern states had outlawed the right of assembly and organization by free blacks, prohibited them from holding church services without a white clergyman present, required their adherence to slave curfews, and minimized their contact with slaves.”⁶⁹ In 1836, Theodore Dwight Weld drew attention to “‘the right of peaceably assembling’ violently wrested.”⁷⁰

⁶⁷Ibid., 27-38.

⁶⁸Ibid., 40.

⁶⁹C. Peter Ripley, *The Black Abolitionist Papers* (Chapel Hill: University of North Carolina Press, 1985), 443 n.9. See also Harry Kalven, *The Negro and the First Amendment* (Columbus: Ohio State University Press, 1965). Akhil Amar writes that the right of assembly for religious worship was “a core right that southern states had violated.” Amar, *The Bill of Rights: Creation and Reconstruction*, 245.

⁷⁰Theodore Dwight Weld, “The Power of Congress over Slavery in the District of Columbia,” reprinted in Jacobus Ten Broek, *Equal under Law* (New York: Collier Books, 1965), 271. Jacobus tenBroek has described Weld’s tract as “a restatement and

Because the abolitionists were themselves denied the rights of speech and assembly, and because many of these abolitionists were women, “freedom of assembly and freedom of speech were indelibly linked with the woman’s rights movement from its genesis in the abolition movement.”⁷¹ Abolitionist Angelina Grimké “sowed the seeds for nineteenth-century feminism” by insisting on a “right to act.”⁷² Suffragists like Elizabeth Cady Stanton and Susan B. Anthony organized their efforts around conventions “predicated upon the right to assemble peaceably.”⁷³ One scholar has suggested that “virtually the entire suffrage story can be told through the prism of the right of assembly.”⁷⁴

Both the abolitionist and women’s suffrage movements claimed the freedom of assembly in support of their enduring efforts toward equality and reform. As Akhil Amar has argued, these movements of the disenfranchised brought “a different lived experience” to the words of the First Amendment’s assembly clause.⁷⁵ They were political movements, to be sure, but they embodied and symbolized even larger societal

synthesis of abolitionist constitutional theory as of that time.” Ten Broek, *Equal under Law*, 243.

⁷¹Linda J. Lumsden, *Rampant Women: Suffragists and the Right of Assembly* (Knoxville: University of Tennessee Press, 1997), xxiii.

⁷²*Ibid.*, xxiv.

⁷³*Ibid.*, xxv.

⁷⁴*Ibid.*, 144.

⁷⁵Amar, *The Bill of Rights: Creation and Reconstruction*, 246.

and cultural challenges to the existing order than had the earlier Democratic-Republican societies. The freedom of assembly demanded by abolitionists and suffragists may have been instrumentally valuable for voicing their dissent, but it also protected the alternate modes of life represented in their acts of corporate gathering. The physical coming together of disfavored groups that encapsulated a politics different than the ruling hegemonic order was in some ways as “political” as the grievances that they raised.

II. Assembly in American Constitutional Law

Despite the early American experiments in assembly in the eighteenth century political societies, the abolitionist movement, and the women's suffrage movement, it took nearly a century for the first case on the freedom of assembly to reach the Supreme Court.⁷⁶

The Early Cases: Cruikshank and Presser

On Easter Sunday of 1873, white residents of Colfax, Louisiana and nearby parishes revolted against local black officeholders recently appointed by the governor. The ensuing riot and massacre left dozens of black citizens dead.⁷⁷ The federal government tried nearly one hundred white perpetrators for violations of the Enforcement Act of 1870,⁷⁸ which among other things, prohibited conspiracy “to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.”⁷⁹ Two counts of the indictments alleged that the defendants had

⁷⁶The reason for the delay owes largely to the relatively late recognition of the incorporation doctrine. See *infra*, note 91.

⁷⁷Aviam Soifer, *Law and the Company We Keep* (Cambridge, MA: Harvard University Press, 1995), 120-21.

⁷⁸16 Stat. 141.

⁷⁹*United States v. Cruikshank*, 92 U.S. 542, 548 (1876).

prevented black citizens from enjoying their “lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.”⁸⁰ The jury convicted only three defendants, William Cruikshank and two others. On appeal, Cruikshank and his co-defendants contended that the First Amendment did not guarantee the right of assembly against infringement by private citizens.⁸¹ In *United States v. Cruikshank*,⁸² the Court agreed, concluding that the First Amendment:

. . . assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, *the people must look to the States*. The power for that purpose was originally placed there, and it has never been surrendered to the United States.⁸³

Cruikshank is a straightforward legal decision: the Court simply concluded that private citizens could not be prosecuted for denying the First Amendment’s freedom of assembly to other citizens.⁸⁴ But *Cruikshank*’s dictum was more memorable than its holding. Reiterating that the First Amendment’s freedom of assembly established a narrow right enforceable only against the federal government, Chief Justice Waite wrote that:

⁸⁰*Ibid.*, 551.

⁸¹Although subsequent cases addressed whether the state could criminalize an assembly of citizens, the issue before the Court in *Cruikshank* was whether the state could criminalize the infringement of an assembly of one group of citizens by another.

⁸²92 U.S. 542 (1876).

⁸³*United States v. Cruikshank*, 552 (emphasis added).

⁸⁴The holding is consistent with a contemporary understanding of most of the provisions of the Bill of Rights.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.⁸⁵

In context, it is evident that Waite was merely listing petition as an *example* of the kind of assembly protected against infringement by the federal government; the Constitution also guaranteed assembly “for any thing else connected with the powers of the duties of the national government.”⁸⁶ But Waite’s reference to “[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances” closely resembled the text of the First Amendment. Read in isolation from the qualifying language in the rest of Waite’s paragraph and absent any recognition of the history and debates informing the constitutional text, Waite’s dictum could be erroneously construed as limiting assembly to the purpose of petition.

Ten years after *Cruikshank*, Justice Woods made this interpretive mistake in *Presser v. Illinois*.⁸⁷ Woods concluded that *Cruikshank* had announced that the First Amendment only protected the right peaceably to assemble if “the purpose of the assembly was to petition the government for a redress of grievances.”⁸⁸ This misreading

⁸⁵*United States v. Cruikshank*, 552.

⁸⁶Moreover, it is clear that Waite was not engaging in a careful exegesis of the assembly clause: a few paragraphs earlier, he misquoted the constitutional text by omitting the word “peaceably” and the residual comma between the phrases “to assemble” and “and to petition.” Waite had written that: “The first amendment to the Constitution prohibits Congress from abridging ‘the right of the people to assemble and to petition the government for a redress of grievances.’” *Ibid.*

⁸⁷*Presser v. Illinois*, 116 U.S. 252 (1886).

⁸⁸*Ibid.*, 267.

of *Cruikshank* is the only time that the Supreme Court has expressly limited the right of assembly to the purpose of petition.⁸⁹ But the constrained notion of assembly has persisted in recent scholarship.⁹⁰

Incorporation: Assembly Made Applicable to the States

There is another reason that neither *Presser* nor *Cruikshank* accurately conveys a contemporary understanding of the scope of the First Amendment's freedom of assembly: both cases preceded the Court's incorporation of assembly through the

⁸⁹The Court has contradicted this view in later cases. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to “the *rights* of the people peaceably to assemble and to petition for redress of grievances” (emphasis added)); Cf. *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (The First Amendment “has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances.”).

⁹⁰See Charles E. Rice, *Freedom of Association* (New York: New York University Press, 1962), 109 (citing *Cruikshank* for the view that the language in the First Amendment “constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition”); Abernathy, *The Right of Assembly and Association*, 152 (“It is important to note that the *Cruikshank* dictum *narrowed* the federal right from that of ‘the right of the people peaceably to assemble and petition for a redress of grievances’ to ‘the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government.’”) (emphasis added); Edward Samuel Corwin, Harold William Chase, and Craig R. Ducat, *Edwin S. Corwin's the Constitution and What It Means Today*, 14th ed. (Princeton, N.J.: Princeton University Press, 1978), 332 (citing *Cruikshank* for the view that historically “the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: ‘the right of the people peaceably to assemble’ *in order to* ‘petition the government’”). *Presser* has also been cited for the position that the freedom of assembly is limited to the purpose of petition. See Frank Easterbrook, “Implicit and Explicit Rights of Association,” *Harvard Journal of Law and Public Policy* 10 (1987): 91 (citing *Presser* for the view that the freedom of assembly is “the exercise by groups of the right to petition for redress of grievances”).

Fourteenth Amendment,⁹¹ which came in the 1937 case of *De Jonge v. Oregon*.⁹² Like *Whitney*, which had been decided ten years earlier, *De Jonge* involved an appeal from a conviction for criminal syndicalism. Chief Justice Hughes reasoned that:

The First Amendment of the Federal Constitution expressly guarantees that 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.⁹³

Hughes underscored the significance of incorporation by observing that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”⁹⁴ In words strikingly similar to Brandeis’s *Whitney* concurrence, he emphasized the need:

. . . to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.⁹⁵

⁹¹For most of our nation’s history, the provisions of the Bill of Rights have been considered enforceable only against the federal government, not against state and local government. As *Cruikshank* demonstrates, the Court construed quite literally the First Amendment’s prohibition that “Congress shall make no law . . .” The Court began to apply the provisions of the Bill of Rights against the states following the ratification of the Fourteenth Amendment, which provided that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.”

⁹²*De Jonge v. Oregon*, 299 U.S. 353 (1937).

⁹³*Ibid.*, 364.

⁹⁴*Ibid.* Brandeis had declared the right of assembly to be fundamental in his *Whitney* concurrence ten years earlier. *Whitney v. California*, 373.

⁹⁵*De Jonge v. Oregon*, 365.

The period from 1937 to 1958 included a number of rhetorical tributes to assembly in American jurisprudence. Shortly after *De Jonge*, the Court pronounced that “[t]he power of a state to abridge freedom of speech and of assembly is the exception rather than the rule”⁹⁶ and that “freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment.”⁹⁷ In 1943, the Court emphasized in *West Virginia v. Barnette*⁹⁸ that:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁹⁹

Seven years later, Chief Justice Vinson wrote for the Court in *American Communications Association v. Douds*¹⁰⁰ that:

The 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 indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of “conduct” has all too frequently

⁹⁶*Herndon v. Lowry*, 301 U.S. 242, 258 (1937).

⁹⁷*Hague v. Committee for Industrial Organization*, 307 U.S. 496, 519 (1939).

⁹⁸*West Virginia v. Barnette*, 319 U.S. 624 (1943).

⁹⁹*Ibid.*, 638. See also *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (the freedoms of speech, press, assembly, and petition are a “conjunction of liberties” that guard religious, political, and secular clauses).

¹⁰⁰*American Communications Association v. Douds*, 339 U.S. 382 (1950).

been employed by public authority as a cloak to hide censorship of unpopular ideas.¹⁰¹

A Right Without a Doctrine

Despite its rhetorical tributes, the Court made surprisingly few advances toward a coherent doctrinal approach to resolving cases brought under the freedom of assembly. The Court seldom addressed assembly in isolation, and frequent invocations of Brandeis's phrase "speech and assembly" usually meant that challenges to the latter were resolved within the doctrinal framework of the former. There was, in the end, no concerted jurisprudential effort to develop a freestanding freedom of assembly.

Assembly, moreover, was never an absolute freedom. In the 1949 case of *Cole v. Arkansas*,¹⁰² the Court observed that it was "no abridgment of free speech or assembly" when "one is convicted of promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence."¹⁰³ That same year, the Court rejected a challenge to state laws banning "closed shops" that restricted employment to union members.¹⁰⁴ In

¹⁰¹*Ibid.*, 399. 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.") Rutledge continued that "[W]hile not absolute, the enforced surrender of those rights must be justified by the existence and immediate impenency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly." *Ibid.*

¹⁰²*Cole v. Arkansas*, 338 U.S. 345 (1949).

¹⁰³*Ibid.*, 353.

language that foreshadowed future encroachments upon the rights of groups, the Court observed that:

The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. *For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.*¹⁰⁵

These kinds of understandings about the limits of assembly reflected the simplistic “no harm” approach of John Stuart Mill.¹⁰⁶ The problem, of course, is that the assessment of when conduct “affects the interests of other individuals and the general public” is usually made by those who hold political power. The threat to public harm can almost always be

¹⁰⁴*Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949).

¹⁰⁵*Ibid.*, 531 (emphasis added).

¹⁰⁶Mill famously applied his “no harm” principle to the context of speech and assembly through his example of a corn dealer:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.

John Stuart Mill, *On Liberty*, ed. Edward Alexander (Peterborough, Ont.: Broadview Press, 1999), 101.

construed to prevent the very gathering itself, and absent a robust conception of assembly, the right becomes exceedingly vulnerable to politicization.

The concern over a politically contingent right of assembly crystallized in 1953. In *Adler v. Board of Education*,¹⁰⁷ the Court addressed a speech and assembly challenge to a New York law that denied employment in the public schools to any person who advocated the violent overthrow of the government or who joined a society or group of persons knowing that they advanced such advocacy. The law took aim at “members of subversive groups, particularly of the Communist Party and its affiliated organizations” who had been “infiltrating into public employment in the public schools of the State.”¹⁰⁸ In passing the restrictive statute, the New York legislature had found that “the members of such groups use 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.”¹⁰⁹ Six justices were sufficiently swept up in the spirit of the times to reject the speech and assembly claim advanced by the petitioners, and 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.”¹¹⁰ Brandeis would have been appalled.

¹⁰⁷*Adler v. Board of Education*, 342 U.S. 485 (1952).

¹⁰⁸*Ibid.*, 489.

¹⁰⁹*Ibid.*, 489-90.

¹¹⁰*Ibid.*, 493.

The Adventitious Roots of Association

Nine months after *Adler*, the Court addressed the constitutionality of loyalty oaths for teachers in *Wieman v. Updegraff*.¹¹¹ *Wieman* involved 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.”¹¹² The Court distinguished *Adler* by emphasizing that the New York law required that an individual restricted from employment on the basis of association have *known* the purposes of the society or group that he or she had joined. In contrast, Oklahoma’s law mandated that “the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly.”¹¹³

Concurring in the Court’s decision, Justice Frankfurter added that:

Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, on pain of a teacher’s loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling.¹¹⁴

¹¹¹*Wieman v. Updegraff*, 344 U.S. 183 (1952).

¹¹²*Ibid.*, 186.

¹¹³*Ibid.*, 191. *Wieman* did not expressly mention the freedom of assembly because the Court resolved the case on due process grounds rather than First Amendment grounds.

¹¹⁴*Ibid.*, 195-95 (Frankfurter, J., concurring) (citation omitted).

Frankfurter's concurrence is intriguing both for its absence of a reference to the freedom of assembly and for its mention of "a right of association peculiarly characteristic of our people."¹¹⁵ Five years later, Justice Black's opinion for the Court in *Konigsberg v. State Bar of California*¹¹⁶ referred to "the freedom of political expression or association"¹¹⁷ and Chief Justice Warren's majority opinion in *Sweezy v. New Hampshire*¹¹⁸ noted "such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."¹¹⁹

¹¹⁵Until 1948, the Court's only reference to association had been a passing mention of "the rights of free speech, assembly, and association" in *Whitney*. *Whitney v. California*, 371. Four years prior to *Wieman*, the Court had commented in *Douss* 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." *American Communications Association v. Douss*, 409. Frankfurter quoted the language from *Douss* in his *Adler* dissent. *Adler v. Board of Education*, 505 (Frankfurter, J., dissenting).

¹¹⁶*Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

¹¹⁷*Ibid.*, 273.

¹¹⁸*Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

¹¹⁹*Ibid.*, 245. Warren elaborated that:

A fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. . . . History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 250-51.

These changes crystallized the following year in *NAACP v. Alabama*.¹²⁰ Two years earlier, Alabama’s Attorney General had initiated an action to enjoin the NAACP from operating within the state, and an Alabama state court had ordered the NAACP to produce its membership lists during the course of the litigation surrounding the injunction. The NAACP refused to produce the lists on constitutional grounds. Citing *De Jonge* and *Thomas*—two cases involving the freedom of assembly—Justice Harlan wrote that: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”¹²¹ *De Jonge* and *Thomas* had established that the freedom of assembly was applicable to the states by way of the Fourteenth Amendment,¹²² that it covered political, economic, religious, and secular matters,¹²³ and that it could only be restricted “to prevent grave and immediate danger to interests which the State may lawfully protect.”¹²⁴ Collectively, these precedents would have been sufficient for the Court to

¹²⁰*NAACP v. Alabama* 357 U.S. 449 (1958).

¹²¹*Ibid.*, 460.

¹²²*De Jonge v. Oregon*, 364.

¹²³*Thomas v. Collins*, 531 (“This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest. The idea is not sound therefore that the First Amendment’s safeguards are wholly inapplicable to business or economic activity.” (citations omitted)).

¹²⁴*Ibid.*, 528 n.12 (“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

have sided with the NAACP. But Harlan shifted his attention away from assembly, writing 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.”¹²⁵ As Thomas Emerson observed, Harlan:

. . . initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them. In the remainder of his opinion, however, he elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment.¹²⁶

With *NAACP v. Alabama*, then, the Court signaled a new right of association that appeared broader than the right of assembly as it had been construed in the decisions of the previous decade. But the Court’s weak and obfuscated link between assembly and association left the latter concept without a constitutional or historical heritage.

Two years after *NAACP v. Alabama*, the Court examined another challenge to the NAACP in *Bates v. City of Little Rock*.¹²⁷ With extreme brevity, Justice Stewart’s majority opinion initially linked the right of association to the right of assembly but quickly affirmed the freestanding nature of association:

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.” (citation omitted)).

¹²⁵*NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

¹²⁶Thomas I. Emerson, "Freedom of Association and Freedom of Expression," *Yale Law Journal* 74 (1964): 2.

¹²⁷*Bates v. Little Rock*, 361 U.S. 516 (1960).

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.¹²⁸

Ten months later, Stewart dispensed with assembly altogether in his opinion for the Court in *Shelton v. Tucker*.¹²⁹ Citing *De Jonge* and *Bates*—both of which had emphasized the importance of assembly—Stewart posited that the right of free association was “a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”¹³⁰

Although it was clear that the Court’s focus on association was quickly subsuming the freedom of assembly, the latter did not entirely disappear from the case law. During the 1960s, the Court relied on principles of speech and assembly in several cases to overturn convictions of African-Americans who had participated in peaceful civil rights demonstrations.¹³¹ But in 1966, the Court rejected these arguments in the context of a civil rights protest at a county jail in *Adderly v. Florida*.¹³² This drew a sharp though somewhat rambling dissent from Justice Douglas, who warned that:

¹²⁸*Ibid.*, 522-23 (citation omitted).

¹²⁹*Shelton v. Tucker*, 364 U.S. 479 (1960).

¹³⁰*Ibid.*, 486.

¹³¹See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); and *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

¹³²*Adderly v. Florida*, 385 U.S. 39 (1966).

Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach-of-the-peace statute, a vagrancy statute will be put to the same end. It is said that the sheriff did not make the arrests because of the views which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit. The charge against William Penn, who preached a nonconformist doctrine in a street in London, was that he caused “a great concourse and tumult of people” in contempt of the King and “to the great disturbance of his peace.” That was in 1670. In modern times, also, such arrests are usually sought to be justified by some legitimate function of government. Yet by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us.¹³³

But even though the justices disagreed over the limits that could be placed on the civil rights demonstrations pervasive in the 1960s, it was clear that these cases involved considerations of the freedoms of speech, assembly, and petition “in their most pristine and classic form.”¹³⁴ Any earlier intimations of a broadly construed right of assembly beyond these narrow circumstances were largely forgotten after *NAACP v. Alabama*.

The End of Assembly?

In 1983, the “classic form” of assembly was itself swept within the ambit of free speech jurisprudence¹³⁵ when the Court established the public forum doctrine in *Perry*

¹³³Ibid., 56 (Douglas, J., dissenting) (citation omitted).

¹³⁴*Edwards v. South Carolina*, 235.

¹³⁵The right of petition suffered a similar fate. See Stephen H. Higginson, “A Short History of the Right to Petition Government for a Redress of Grievances,” *Yale Law Journal* 96 (1986): 142 (“the right of petition was collapsed into the right of free speech and expression...”).

Education Association v. Perry Local Educators' Association.¹³⁶ Justice White reasoned that:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.¹³⁷

The doctrinal language came straight out of the Court's free speech cases,¹³⁸ and its application to public fora rendered the right of assembly practically irrelevant. *Perry's* effects can be seen in the Court's 1988 opinion in *Boos v. Berry*.¹³⁹ *Boos* involved a challenge to a District of Columbia law that prohibited, among other things, congregating "within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an

¹³⁶*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

¹³⁷*Ibid.*, 45 (citations and quotations omitted).

¹³⁸*Perry* cited *Carey v. Brown*, 447 U.S. 455, 461 (1980); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-536 (1980); *Grayned v. City of Rockford*, *supra*, at 115; *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Schneider v. State*, 308 U.S. 147 (1939).

¹³⁹*Boos v. Berry*, 485 U.S. 312 (1988).

embassy, legation, consulate, or for other official purposes.”¹⁴⁰ On its face, the challenge to the regulation appeared to involve the freedom of assembly. The petitioner challenged the “deprivation of First Amendment speech and assembly rights” and argued that “[t]he right to congregate is a component part of the ‘right of the people peaceably to assemble’ guaranteed by the First Amendment.”¹⁴¹ Justice O’Connor’s opinion for the Court cited *Perry* three times and resolved the case exclusively under free speech principles without reference to the freedom of assembly. The Court, in fact, *has not addressed a freedom of assembly claim in the last twenty years.*¹⁴²

¹⁴⁰Ibid., 315.

¹⁴¹Brief for Petitioner at *74, *64 (1987 U.S. S. Ct. Briefs LEXIS 417).

¹⁴²Justice Scalia has invoked the freedom of assembly (among others) in his dissents from the Court’s decisions upholding restrictions on the activities of antiabortion protesters. See *Madsen v. Women’s Health Center*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting) and *Hill v. Colorado*, 530 U.S. 703, 774, 79 (2000) (Scalia, J., dissenting).

III. Association After *Alabama*

While assembly was being relegated to the margins of constitutional significance, association garnered increased scholarly attention. The years following *NAACP v. Alabama* produced a stream of historical and doctrinal analyses that had never accompanied the Court's decisions on assembly. Book length treatments included Glenn Abernathy's *The Right of Assembly and Association* (1961), Charles Rice's *Freedom of Association* (1962), and David Fellman's *The Constitutional Right of Association* (1963). These works sought to narrate a history of association that had been absent from two centuries of constitutional jurisprudence. In some cases, they attempted to displace the historical relevance of assembly. Rice, for example, contended 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 have been formally ascribed to the application of other freedoms."¹⁴³ Abernathy, on the other hand, attempted to detail association's indebtedness to assembly, arguing that *NAACP v. Alabama* had placed the right of association within an "expanded meaning" of the right of assembly,¹⁴⁴ and that association was "clearly a right cognate to the right of assembly."¹⁴⁵

¹⁴³Rice, *Freedom of Association*, xvii-xviii.

¹⁴⁴Abernathy, *The Right of Assembly and Association*, 4.

¹⁴⁵*Ibid.*, 173. Abernathy commented that: "Freedom to assemble 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." *Ibid.* Unfortunately, rather than provide an integrated account

The Influence of Liberalism

The surge of interest in association in the early 1960s did not mean that the Court invented it out of whole cloth. Although association had not previously been referenced in American constitutional law, its theoretical importance could be traced to Locke, Rousseau, and Mill among others.¹⁴⁶ But among those canonical liberal theorists, association was intertwined with ideas of assembly and religious freedom. Proponents of association in the 1960s turned instead to a much later theoretical foundation: Alexis de Tocqueville, the Frenchman writing a half-century after the ratification of the Bill of Rights.

Tocqueville's words on association now grace the pages of almost every modern treatment of the constitutional protections for groups. As Mark Warren has written, Tocqueville "filled out the modern concept of association by providing it with a sociology."¹⁴⁷ But the Tocqueville who serves as the progenitor of the modern freedom of association is one who emerges from a distinctively liberal reading of *Democracy in*

of assembly and association, Abernathy divided his book into two distinct sections. His account of assembly ended somewhat abruptly and his discussion of association was almost entirely devoid of references to the Court's assembly cases. *Ibid.*, 145-67; 173-96; 235-39.

¹⁴⁶See generally Rice, *Freedom of Association*, 6-16.

¹⁴⁷Mark Warren, *Democracy and Association* (Princeton: Princeton University Press, 2001), 42.

America.¹⁴⁸ It is critical, therefore, to recognize the lens through which Tocqueville's theory of association was viewed.

The decade preceding the emergence of the right of association was an era characterized by interest group liberalism. It followed on the heels of the "new liberalism" of the early twentieth century, which had assumed that "the instruments of government provided the means for conscious inducement of social change."¹⁴⁹ According to Theodore Lowi, early twentieth century liberalism had seen a "dialogue between a private and a public view of society" that pitted a *laissez-faire* capitalist ideology (eighteenth-century liberalism recast as "conservatism") against an emerging progressivism that appealed to government intervention.¹⁵⁰ The New Deal decisively and irrevocably endorsed the latter. Once "an indeterminable but expanding political sphere was established,"¹⁵¹ the debate shifted from the appropriateness of government

¹⁴⁸Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87, no. 3 (1993).

¹⁴⁹Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2d ed. (New York: Norton, 1979), 42.

¹⁵⁰*Ibid.* The distinction between public and private can be seen in Locke and other classical liberals, but 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." Morton J. Horowitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1981): 1424. Horowitz elaborates 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." *Ibid.* That separation came under attack when early twentieth-century legal thinkers began to question the assumption that "private law could be neutral and apolitical," *Ibid.*, 1426.

¹⁵¹Lowi, *The End of Liberalism: The Second Republic of the United States*, 43.

intervention to arguing over the limits of that intervention. The Supreme Court's resistance to Roosevelt's New Deal legislation in the mid-1930s was spirited but short-lived, and a decade later the Court had fully embraced the new liberalism. Its 1948 decision of *Shelley v. Kraemer*,¹⁵² which placed private contracts and covenants within the scope of the Fourteenth Amendment, signaled that the Court's constitutional jurisdiction had made significant inroads into the domain of "private" economic activity.¹⁵³

The "new American public philosophy" that emerged from this context was interest group liberalism.¹⁵⁴ It highlighted the importance of organized private groups to counter growing concerns over an expanding federal government.¹⁵⁵ But because interest group liberalism assumed the new status quo of an enlarged "public sphere," its endorsement of group sovereignty was really epiphenomenal to a further legitimization of expanding state power. The primary focus of early interest group liberalism was

¹⁵²*Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁵³The Court concluded that state enforcement of property and contract laws qualified 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. *Ibid.*, 22-23.

¹⁵⁴_____, *The End of Liberalism: The Second Republic of the United States*, 50-51. Lowi explained: "It is liberalism because it is optimistic about government, expects to use government in a 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." *Ibid.*, 51.

¹⁵⁵*Ibid.*, 55.

decentralizing federal programs, not supporting grassroots nongovernmental associations, and the theoretical framework presupposed a certain alignment of associations with state interests. In Lowi's words, "pluralist theory became the handmaiden of interest-group liberalism, and interest-group liberalism became the handmaiden of modern American positive national statehood."¹⁵⁶

The degree to which interest group liberalism presupposed a certain harmony with the state was reflected in David Truman's description of a "balance wheel" resulting from Americans holding multiple memberships in unorganized groups "based on widely held and accepted interests."¹⁵⁷ Truman contended that "these unorganized interests are dominant with sufficient frequency in the behavior of enough important segments of the society so that, despite ambiguity and other restrictions, *both the activity and the methods of organized interest groups are kept within broad limits.*"¹⁵⁸ In other words, a sufficiently homogenous background consensus shared by all citizens not only sustained the public order (which, for Truman, included "reinforcing widely accepted norms of 'public morality'"¹⁵⁹), but also bounded the extent to which interests groups diverged from that shared consensus.¹⁶⁰

¹⁵⁶Ibid. In this sense, it "help[ed] create the sense that power need not be power at all, control need not be control, and government need not be coercive." Ibid.

¹⁵⁷David Bicknell Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: A. Knopf, 1951), 514.

¹⁵⁸Ibid., 515.

¹⁵⁹Ibid., 514.

¹⁶⁰This is not to suggest that interest groups posed no danger to the state. Importantly, the individualistic emphasis of interest group liberalism eschewed any notion of a "common

The perceived homogenization also reflected another dimension of the new liberalism that ushered in the New Deal. The progressive reforms of the early twentieth century were largely based on “a belief in the capacity of American abundance to smooth over questions of class and power by creating a nation of consumers.”¹⁶¹ Alan Brinkley has asserted that 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 redistributed wealth and economic power.”¹⁶² By the 1950s, the liberal endorsement of a welfare and labor system predicated on a fundamental belief in the capitalist state was pervasive enough for Daniel Bell to declare the “end of ideology.”¹⁶³

The social consensus that Truman and Bell observed in the 1950s was buttressed by historians like Louis Hartz, whose 1955 book *The Liberal Tradition in America*¹⁶⁴

good.” Robert Dahl warned that “[i]f unrestrained by external checks, any given individual or group of individuals will tyrannize over others.” Robert Alan Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), 6. But for Truman, the shared background consensus held by most Americans was sufficient to restrain individual interest.

¹⁶¹Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995), 226.

¹⁶²*Ibid.*, 271.

¹⁶³Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (Glencoe, IL: Free Press, 1960). Bell argued that the changing face of the American labor movement no longer evoked calls to Marxism or other ideologies.

¹⁶⁴Hartz’s book began with an epigram from *Democracy in America* and praised Tocqueville for “a series of deep insights into the American liberal community.” Louis

argued that the “moral unanimity” of Americans stemmed from a “nationalist articulation of Locke” that had been the only significant intellectual influence upon the American Founders.¹⁶⁵ The “liberal consensus” among historians proved relatively short-lived. It first came under fire with Bernard Bailyn’s *Ideological Origins of the American Revolution*¹⁶⁶ in 1967 and Gordon Wood’s *Creation of the American Republic*¹⁶⁷ two years later.¹⁶⁸ Bailyn and Wood emphasized the classical and republican influences upon colonial and early American thought.¹⁶⁹ Wood’s mention of the English term “convention,” in particular, offered an historical link to early notions of assembly that emphasized “an act of coming together” for “deliberation on important matters, whether

Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York: Harcourt, 1955), i and 31.

¹⁶⁵Ibid., 11.

¹⁶⁶Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press, 1967).

¹⁶⁷Wood, *The Creation of the American Republic, 1776-1787*.

¹⁶⁸Other important works included Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *The William and Mary Quarterly* 29 (1972). and J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

¹⁶⁹The republican challenge eventually proved to be more of a corrective than a reversal, and it is now generally acknowledged that neither liberal nor republican thought dominated the founding era. See, e.g., Michael Lienesch, *New Order of the Ages: Time, the Constitution, and the Making of Modern American Political Thought* (Princeton: Princeton University Press, 1988), 7 (“The truth lies somewhere in between. That is, in the late eighteenth century, American political thought was in transition, moving from classical republicanism to modern liberalism. Yet the transition was inconclusive, neither clear nor complete, and the result was a hybrid mixture that combined republican and liberal themes in a creative but uneasy collaboration.”). Cf. Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton: Princeton University Press, 1994), 4-18 (describing a similar hybrid).

ecclesiastical, political or social.”¹⁷⁰ But these republican sources, which might have provided a firmer conceptual and historical framework to navigate the relationship between associations and the state, were absent during the 1950s and early 1960s.

Hartz’s pronouncement of an “American Way of Life” reflected the social consensus assumed by Truman and Bell. But Hartz argued that the “submerged and absolute liberal faith”¹⁷¹ of his fellow citizens differed from the Lockean liberalism whose “most distinctive feature” was “its insistence 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.”¹⁷² New Deal liberalism had unmasked a “compulsive power” of liberalism that was now “so great that it has posed a threat to liberty itself.”¹⁷³

Hartz suggested that “[t]he decisive domestic issue of our time may well lie in the counter resources a liberal society can muster against this deep and unwritten tyrannical

¹⁷⁰Wood, *The Creation of the American Republic, 1776-1787*, 310.

¹⁷¹Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, 10.

¹⁷²Rogers M. Smith, *Liberalism and American Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1985), 14. The separation of the public and the private by Locke and other classical liberals is by no means an unqualified good for the freedoms of association and assembly. To the extent that the private realm has been construed as “not political,” the divide between public and private tacitly endorses a greater “political” legitimacy of the “public” (which is today synonymous with “the state”).

¹⁷³Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, 11.

compulsion it contains.”¹⁷⁴ But the “counter resources” invoked by 1950s interest group liberals were not rooted in a strong distinction between public and private. Rather, they emerged from a redefined liberalism that accepted the primacy of the state and the subordination of all interests to it. The only viable theory of associations was one that honored the state above all else and ensured that any dissenting interests would be contained within manageable boundaries.

Interest group liberalism thus transformed Madison’s faction—which might be “adverse to the right of other citizens, or to the permanent and aggregate interests of the community”¹⁷⁵—into a domesticated group whose interests were consistent with those of the modern liberal state.¹⁷⁶ Classical liberal theorists couldn’t be invoked to support this new theory of associations because they, like Madison, had viewed associations with trepidation, assuming that at least some of them would prove antithetical to the interests of government and civil peace.¹⁷⁷ But Tocqueville was a different story. He knew that an “unrestrained liberty of political association” was fraught with danger, but he

¹⁷⁴Ibid., 12.

¹⁷⁵James Madison, "Federalist #10," in *The Federalist*, ed. Benjamin F. Wright (New York: Barnes and Noble, 2004).

¹⁷⁶Cf. Lowi, *The End of Liberalism: The Second Republic of the United States*, 55 (making this distinction).

¹⁷⁷Rousseau asserted that: “[A]ny assembly of the people that has not been convened by the magistrates appointed for that task and in accordance with the prescribed forms should be regarded as illegitimate, and all that takes place there should be regarded as null, since the order to assemble ought to emanate from the law.” Jean-Jacques Rousseau, *The Basic Political Writings*, trans. Donald A. Cress (Indianapolis: Hackett, 1987), 196.

contended that it had “not hitherto produced, in the United States, those fatal consequences which might perhaps be expected from it elsewhere.”¹⁷⁸

Tocqueville’s optimism stemmed 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.¹⁷⁹

In other words, Tocqueville presupposed that associations in America 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.”¹⁸⁰ This sanguine characterization of associations was far removed from the dissenting assemblies of William Penn, Angelina Grimké, and Anita Whitney.

¹⁷⁸Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (New York: D. Appleton, 1899), 201. Cf. *Ibid.*, 202-03 (“It can not be denied that the unrestrained liberty of association for political purposes is the privilege which a people is longest in learning how to exercise. If it does not throw the nation into anarchy, it perpetually augments the chances of that calamity.”).

¹⁷⁹*Ibid.*, 203-04. Tocqueville’s conception of association also retained glimpses of assembly: association brought with it the “power of meeting” in which “men have the opportunity of seeing each other.” *Ibid.*, 198.

¹⁸⁰*Ibid.*, 204 (emphasis added).

There were two glaring problems with the appropriation of Tocqueville's account of associations by mid-twentieth century liberals. The first was that Tocqueville's case study of America in the 1830s had focused on an extraordinarily homogenous population.

Rogers Smith has noted that Tocqueville and later accounts that drew upon him:

. . . 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 political 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.¹⁸¹

But as Smith observes, the “relative egalitarianism that prevailed among white men” left unaddressed immense inequities pertaining to gender, race, culture, religion, and sexual orientation.¹⁸² 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 the contours of Tocqueville's ideal theory lost their descriptive purchase.

The second problem with the application of Tocqueville's theory of association to interest group liberalism was that Tocqueville had assumed a political order that was bifurcated between a relatively limited government (which exercised law, authority, and

¹⁸¹Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 17.

¹⁸²*Ibid.*

coercion),¹⁸³ and a larger sphere that consisted of nongovernmental social and economic relations. Because Tocqueville viewed the associations that comprised 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:

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. Reversing the Madisonian and Rousseauian suspicions that associations are the social basis of political factions and “conspiracies against the public interest,” Tocqueville argued that secondary associations draw individuals out of their primary associations, educating them about their dependence upon others. In this way, associations provoke a civic consciousness and displace narrow self-interest with a “self-interest rightly understood.” In addition, associations cultivate reciprocity and trust among individuals, enabling them to accomplish tasks together they could not manage alone. Thus, for Tocqueville, the qualities of representative democracy depend on the qualities of the society within which it is embedded, especially upon the cultivation of civic virtues via associational ties. Democracy is centered, as it were, in the self-rule manifested in associational life and in the civic culture resulting from associational experiences.¹⁸⁴

The difficulty in applying this framework to mid-twentieth century liberal thought was that what was now considered within the reach of “government” or “public” was far greater than Tocqueville had ever conceived.

¹⁸³Tocqueville recognized that government extended its reach to the local: “[W]ithin the pale of the great association of the nation, lesser associations have been established by law in every country, every city, and, indeed, in every village, for the purposes of local administration.” Tocqueville, *Democracy in America*, 600. But he viewed government as limited in the scope of its jurisdiction: “[i]n the American republics the activity of the central Government never as yet has been extended beyond a limited number of objects sufficiently prominent to call forth its attention” *Ibid.*, 290.

¹⁸⁴Warren, *Democracy and Association*, 30.

Tocqueville's twin assumptions of a relatively homogenous and benign realm of associations and a limited government that stayed out of that realm produced an inevitable tension when interest group liberalism appropriated his theory. On the one hand, by the middle of the twentieth century, some of those within the heterogeneous population that Tocqueville had overlooked were forming associations that increasingly demanded a voice in the democratic conversation. On the other hand, the expanded notion of the "public" realm meant that the state was now regulating social and economic relationships that had previously been beyond its reach. By the late 1950s and 1960s, the subset of the state embodied by the Warren Court confronted these tensions less than systematically. As Laura Kalman has argued, opinions of the Warren Court "emphasized the importance of individual dignity, the significant role of the modern state in creating and maintaining the good society, and the importance of shaping the relationship between the modern welfare state and the individual so that the state's powers are not imprudently diminished, and individual dignity is preserved."¹⁸⁵ The resulting patchwork doctrine—drawing from a Tocquevillian conception that didn't fit political realities—failed to articulate a coherent principle of group autonomy. It reflected, rather, the "jurisprudence of substantive values"¹⁸⁶ that characterized the opinions of the Court's chief proponent of the early freedom of association: William O. Douglas.

¹⁸⁵Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 43 (citation omitted).

¹⁸⁶Kenneth L. Karst, "William O. Douglas, 1898-1980," *UCLA Law Review* 27 (1980).

William Douglas and the Freedom of Association

Dissenting in a case handed down the same day as *NAACP v. Alabama*, 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.”¹⁸⁷ He initially located the freedom of association in the assembly clause, writing in a 1960 concurrence that “freedom of assembly, includes of course freedom of association.”¹⁸⁸ But the following year, writing for the Court in *Louisiana v. NAACP*,¹⁸⁹ Douglas located association in a more nebulous “bundle of First Amendment rights.”¹⁹⁰

Two years later, Douglas signaled an explicit break from assembly in his concurrence in *Gibson v. Florida Legislative Investigation Committee*.¹⁹¹ He began with the text of the assembly clause:

“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*

¹⁸⁷*Beilan v. Board of Public Education*, 357 U.S. 399, 412-13 (1958) (Douglas, J., dissenting).

¹⁸⁸*Bates v. Little Rock*, 528 (Black and Douglas, JJ., concurring).

¹⁸⁹*Louisiana v. NAACP*, 366 U.S. 293 (1961).

¹⁹⁰*Ibid.*, 296.

¹⁹¹*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

Jonge], “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”¹⁹²

But building upon the rationale of *NAACP v. Alabama*, Douglas hinted that a more expansive approach lay beyond the purview of assembly:

Joining a group is often as vital to freedom of expression as utterance itself. Registering as a student in a school or joining a faculty is as vital to freedom of expression as joining a church is to the free exercise of religion. Joining a political party may be as critical to expression of one’s views as hiring reporters is to the establishment of a free press. Some have thought that political and academic affiliations have a preferred position under the due process version of the First Amendment. But the associational rights protected by the First Amendment are in my view much broader and cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion.¹⁹³

Douglas expanded upon his arguments for association in a lecture that he delivered at Brown University and subsequently published in the *Columbia Law Review*.¹⁹⁴ Early in his lecture, Douglas asserted that “the right of association is part of the right of expression or of the right of belief.”¹⁹⁵ As in his *Gibson* concurrence, he acknowledged an ambiguous link to assembly.¹⁹⁶ But Douglas moved swiftly from assembly to *privacy*:

Assembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes, if desired,

¹⁹²*Ibid.*, 562. Douglas noted that “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.” *Ibid.*, 563.

¹⁹³*Ibid.*, 565.

¹⁹⁴William O. Douglas, “The Right of Association,” *Columbia Law Review* 63 (1963). Douglas’s lecture advanced similar and at times verbatim arguments as his *Gibson* concurrence.

¹⁹⁵*Ibid.*: 1363.

¹⁹⁶*Ibid.*: 1374.

may be obtained by peaceful means. The holding of meetings for peaceable political action cannot be proscribed. Unpopular groups like popular ones are protected. Unpopular groups, if forced to undergo extensive investigation or disclose their membership lists, will not only lose many adherents but may also 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.¹⁹⁷

Douglas's lecture thus attributed the constitutional source of association to no less than four rights that he identified in the First Amendment: assembly, privacy, expression, and belief. Of these, only assembly was actually in the text of the amendment. It is no wonder that Thomas Emerson would write a year later 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."¹⁹⁸ But the obfuscated constitutional roots of association would prove crucial to Douglas's opinion in *Griswold v. Connecticut*¹⁹⁹

Griswold addressed a Connecticut law that prohibited the use of contraceptives and the giving of medical advice about their use, and specifically, the application of this law to the use of contraceptives by married persons. Douglas's *draft* opinion relied exclusively on the right of association, describing the husband-wife relationship as at the

¹⁹⁷Ibid.

¹⁹⁸Emerson, "Freedom of Association and Freedom of Expression," 2.

¹⁹⁹*Griswold v. Connecticut* 381 U.S. 479 (1965).

core of protected forms of association.²⁰⁰ He made clear that the constitutional argument did not hinge upon substantive due process:

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that [*Lochner v. New York*] should be our guide. But we decline that invitation as we did in [previous cases]. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.²⁰¹

Rather, Douglas contended, the case would be resolved exclusively within the scope of the First Amendment. Although marriage did “not fit precisely any of the categories of First Amendment rights,” it was “a form of association as vital in the life of a man or woman as any other, and perhaps more so.”²⁰²

The day after he reviewed Douglas’s draft, Justice Brennan sent him a letter urging him to abandon his First Amendment associational argument.²⁰³ He suggested that Douglas instead analogize the Court’s recognition of association to a similar broadening of the notion of privacy. But this analytic approach required that Douglas

²⁰⁰Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985), 229.

²⁰¹*Ibid.*, 233 (quoting Douglas's draft opinion).

²⁰²*Ibid.*, 235 (quoting Douglas's draft opinion). Despite his reliance on the First Amendment throughout his argument, Douglas concluded his draft with broader references to privacy and the Constitution: “The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and of association that make up a goodly part of the penumbra of the Constitution and Bill of Rights.” Schwartz, *The Unpublished Opinions of the Warren Court*, 236 (quoting Douglas's draft opinion).

²⁰³Schwartz, *The Unpublished Opinions of the Warren Court*, 237. Brennan argued that Douglas’s expanded view of association would extend First Amendment protection to the Communist Party. *Ibid.*, 237-38.

make a clear distinction between those freedoms explicitly protected by the Constitution (like assembly) and those that were recognized only in later judicially constructed rights (like association). Just a month prior to *Griswold*, Douglas had alluded to a singular “right of assembly and association.”²⁰⁴ But in Douglas’s revised *Griswold* draft, the right of association became “more than the right of assembly.”²⁰⁵ He argued that:

The right of “association,” like the right of belief . . . , is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.²⁰⁶

Douglas’s rhetoric thus advanced an extraordinarily thin conception of assembly that encompassed only “the right to attend a meeting.” But this kind of reasoning belies the fact that the freedom of assembly, like the freedom of speech, necessarily extends to acts and associations that precede its actual manifestation. The government’s interference in group membership or affiliation is to assembly what prior restraint is to speech. In each case, the *a priori* state action restricts the speaker’s message prior to its enactment or delivery: “To regulate the membership of an organization is often to alter its speech and hence to regulate its speakers.”²⁰⁷ The Court had recognized this connection as early as

Thomas v. Collins:

²⁰⁴*Zemel v. Rusk*, 381 U.S. 1, 24 (1965) (Douglas J., dissenting) (quoting the Papal encyclical *Pacem in Terris*).

²⁰⁵*Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

²⁰⁶*Ibid.*, 483.

²⁰⁷George Kateb, “The Value of Association,” in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 54.

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.²⁰⁸

Douglas, in fact, had quoted the above language in a 1961 dissent,²⁰⁹ adding that “[t]he vices of registration [of an organization] may be not unlike those of licensing.”²¹⁰ Yet despite his repeated arguments against this kind of prior restraint in the area of free speech,²¹¹ he failed to articulate the logical connection to assembly. This opened the door for a right of association located in the “penumbra of the First Amendment”²¹² that drew its theoretical justification not from the importance of protecting group autonomy but from a heightened emphasis on privacy.

²⁰⁸*Thomas v. Collins*, 540.

²⁰⁹*Communist Party of the United States v. The Subversive Activities Control Board*, 367 U.S. 1 (1961).

²¹⁰*Ibid.*, 170 (Douglas, J., dissenting).

²¹¹See *Poulos v. New Hampshire*, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting) (“There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment.”); *Kingsley International Pictures Corp. v. New York*, 360 U.S. 684, 697-98 (1959) (Douglas J., dissenting) (“I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie.”); *New York Times v. United States*, 403 U.S. 713, 720-25 (1971) (Douglas, J., concurring).

²¹²*Griswold v. Connecticut* 514-15.

Seven years after *Griswold*, Douglas argued in dissent in *Moose Lodge No. 107 v.*

*Iris*²¹³ that:

[T]he First Amendment and the related guarantees of the Bill of Rights . . . create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.²¹⁴

But Douglas's views on association were less persuasive than his better known advocacy for unrestrained speech. With the latter he had a constitutional text behind him: Congress shall make *no* law. Assembly would have given him a similar premise, but his decision to pursue association at the expense of assembly left him without any constitutional provision, absolutist or otherwise. And a Court resistant to Douglas's free speech extremism proved even more skeptical of his absolutist views about the non-textual associational freedom.²¹⁵

The limits of Douglas's associational views were challenged most directly by the issue of racial discrimination. Although his rhetoric in *Moose Lodge* had asserted that the associational right permitted "all white clubs," Douglas's voting pattern suggested otherwise. In 1968, when the Court in *Jones v. Alfred H. Mayer*²¹⁶ held that the fair

²¹³*Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972).

²¹⁴*Ibid.*, 179-80.

²¹⁵Douglas biographer Bruce Murphy has noted that "[w]hen the Warren Court liberals turned to the freedom-of-association area, they did not side as easily with Douglas's views." Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003), 380.

²¹⁶*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

housing provisions of the Civil Rights Act of 1968²¹⁷ were applicable to the private sale or rental of property and thereby precluded a White homeowner from refusing to sell to a Black buyer solely on the basis of race, Douglas concurred in the result without mentioning the freedom of association.²¹⁸ The following year, the Court extended its reasoning to prohibit the denial of membership to a nonprofit community park and playground on the basis of race.²¹⁹ Douglas authored the majority opinion, again without reference to associational freedom. And in reasoning that seems hard to reconcile with his *Moose Lodge* dissent, he contended that the nonprofit could not be considered a private social club if its only selective element was race.²²⁰

In 1973, the Court directly addressed the conflict between association and discrimination in *Norwood v. Harrison*,²²¹ a case involving the propriety of state textbook loans to students attending racially discriminatory private schools. Chief Justice Burger reasoned that:

Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment;

²¹⁷42 U. S. C. § 1982.

²¹⁸*Jones v. Alfred H. Mayer Co.*, 444-49 (Douglas, J., concurring).

²¹⁹*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *See also Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

²²⁰*Sullivan v. Little Hunting Park, Inc.*, 236.

²²¹*Norwood v. Harrison*, 413 U.S. 455 (1973).

Congress has made such discrimination unlawful in other significant contexts.²²²

Douglas concurred in the result without comment.²²³

Despite his seemingly inconsistent application of associational principles in racial discrimination cases, Douglas's advocacy of association was not without effect, and the Court's growing fascination with non-textual freedoms ensured that the embryonic right of association took root amidst the Court's post-*Griswold* jurisprudence. In 1972, only fourteen years after its initial recognition of the right of association in *NAACP v. Alabama*, the Court announced in *Healy v. James*²²⁴ that: "While the freedom of association is not explicitly set out in the [First] Amendment, it has *long been held* to be implicit in the freedoms of speech, assembly, and petition."²²⁵

But the associational right was inherently constrained by its emergence within mid-twentieth century liberal thought. And as Douglas's opinions demonstrate, these same liberal impulses could not extend the associational right to its logical reach, which would include protecting the illiberal practices of racist groups. This tension between autonomy and equality was not a new one: it is evident throughout the canon of liberal political thought, from Locke to Rousseau to Mill. But theory is much different than constitutional doctrine. And the right of association—extracted from the historical

²²²*Ibid.*, 470.

²²³*Ibid.*, 471 (Douglas, J., concurring).

²²⁴*Healy v. James*, 408 U.S. 169 (1972).

²²⁵*Ibid.*, 181 (emphasis added).

context and constitutional debate that produced the right of assembly—too easily resolved the conflict of values without considering the consequences to the autonomy of groups out of step with and even anathema to the state and its public policy. These consequences would soon become even more pronounced.

IV. The Modern Right of Association

In 1976, a year after Douglas's departure, the Court examined *Runyon v. McCrary*²²⁶ the legality of racial discrimination by private schools in light of legislation enacted pursuant to the Thirteenth Amendment. Rejecting the suggestion that the legislation "[did] not reach private acts of racial discrimination,"²²⁷ Justice Stewart wrote that:

From [the principle of the freedom of association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the *belief* that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.²²⁸

Despite its moral appeal, Stewart's reasoning further undercut the freedom of association by curtailing the right to exclude. In *Norwood*, the Court had concluded that a state could not loan textbooks to students attending racially discriminatory private schools. That, in effect, prevented government subsidization of an odious social practice. *Runyon* now precluded the practice itself.

The distinction between advocacy (promoting the belief that racial segregation is desirable) and practice (excluding racial minorities from private schools) may have

²²⁶*Runyon v. McCrary*, 427 U.S. 160 (1976).

²²⁷*Ibid.*, 173.

²²⁸*Ibid.*, 176 (emphasis added).

produced a socially desirable result, but it confined the freedom of association to an instrumental role in support of free speech.²²⁹ This kind of reasoning differed markedly from Douglas's assertion in *Griswold* that the right of association "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."²³⁰ For Douglas, the act of association had itself been an intrinsically valuable form of expression; Stewart limited constitutional protection to association for the purpose of expression.

A Shifting Justification for Association

The tenuous grounding of association in the penumbra of the First Amendment took another curious turn in 1980. In an influential article published in the *Yale Law Journal*,²³¹ law professor Kenneth Karst returned to Douglas's associational argument in *Griswold*.²³² Karst noted that Douglas had emphasized the specific kind of association at

²²⁹ Stewart reiterated this narrow understanding of association in different contexts in *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate *for the purpose of advancing beliefs and ideas* is protected by the First and Fourteenth Amendments.") (emphasis added), and *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 121 (1981) ("First Amendment freedom to gather in association *for the purpose of advancing shared beliefs* is protected by the Fourteenth Amendment from infringement by any State.") (emphasis added).

²³⁰ *Griswold v. Connecticut*, 483. Cf. *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) ("Joining is one method of expression.").

²³¹ See Kenneth L. Karst, "The Freedom of Intimate Association," *Yale Law Journal* 89 (1979).

²³² Karst appears to have been writing very much from within the liberal tradition that formed the backdrop to the early development of association. Rogers Smith places him in a class of scholars who "still structure their accounts" on the premise that [i]lliberal, undemocratic beliefs and practices" are "seen only as expressions of ignorance and prejudice, destined to marginality by their lack of rational defenses." Smith, "Beyond

issue in that case: marriage. Douglas had concluded *Griswold* in characteristically dramatic fashion:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.²³³

Since *Griswold*, the Court had expanded its “notions of privacy” in a line of cases including *Eisenstadt v. Baird*²³⁴ and *Roe v. Wade*.²³⁵ But less attention had been given to Douglas’s associational argument, which had been relegated to the periphery of the opinion following Brennan’s suggestion to focus on privacy. Karst contended that *Griswold* had nonetheless established a freedom of “intimate association,” which he suggested was “a close and familiar personal relationship with another that is in some

Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," 549. Referring to Karst’s identification of “self-contradictory” elements in the American Creed that have tolerated practices that are antithetical to liberal values, Smith writes that “Karst does not explain why, given the contradictory elements of our ideology, only conformity with the egalitarian ones counts as consistency and only compliance with the creed’s non-liberal values constitutes hypocrisy.” *Ibid.*: 557 (discussing Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989)).

²³³*Griswold v. Connecticut*, 485-86. Douglas’s encomium to marriage was not without irony given his well-known “checkered marital history and extramarital dalliances.” Murphy, *Wild Bill: The Legend and Life of William O. Douglas*, 384.

²³⁴*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²³⁵*Roe v. Wade*, 410 U.S. 113 (1973).

significant way comparable to a marriage or family relationship.”²³⁶ The implicit corollary to Karst’s argument was that “non-intimate associations” must look elsewhere for constitutional protection.

The problem with Karst’s reasoning was that it rested on a sociological ideal rather than a legal reality. This was most evident in his assumption that all intimate associations were, in fact, intimate. At one point, he wrote that “[c]aring for an intimate requires taking the trouble to know him and deal with him as a whole person, not just as the occupant of a role.”²³⁷ For Karst, “[t]his fact alone limits the number of intimate associations any one person can have at any one time, or even in a lifetime.”²³⁸ But a legal understanding of intimate association makes distinctions based upon the form of a relationship, not its depth. Karst, in fact, acknowledged near the end of his article that “any constitutional protection of enduring sexual relationships can be effective only if it is extended to the choice to engage in casual ones.”²³⁹ But that concession called into question the special status that he assumed for intimate associations in the first place.

Karst’s other arguments for the unique value of intimate association were similarly dubious. He suggested, for example, that “[o]ne reason for extending constitutional protection to casual intimate associations is that they may ripen into

²³⁶Karst, "The Freedom of Intimate Association," 629.

²³⁷Ibid.: 634.

²³⁸Ibid.: 634-35.

²³⁹Ibid.: 688-89.

durable intimate associations.”²⁴⁰ But the same potential exists with non-intimate associations, and there is no plausible way to demarcate which among the diverse intimate and non-intimate associations are more likely to “ripen into durable intimate associations.” Some business relationships blossom into close friendships that last a lifetime; some marriages fail in a matter of months.

Karst also contended that “An intimate association may influence a person’s self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others.”²⁴¹ But here again, Karst’s observation is equally applicable to non-intimate associations. An individual’s decision to join the ACLU or to make a financial contribution to Greenpeace can speak volumes about his or her self-definition. Indeed, Karst acknowledged that “association-as-statement” in the form of political association in the 1960s “served not only to promote specific policy goals but also as an outlet for expressiveness, for self-identifying assertions.”²⁴²

Roberts v. Jaycees

In fairness to Karst, the objective of his article was to build a case for intimate associations, not to diminish the protections for non-intimate ones.²⁴³ But four years

²⁴⁰Ibid.: 633.

²⁴¹Ibid.: 636.

²⁴²Ibid.

²⁴³One of Karst’s primary aims appears to have been the decriminalization of homosexual conduct. Justice Blackmun cited Karst’s article twice in his dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

later, Justice Brennan's appropriation of Karst's arguments led to the latter.²⁴⁴ Concluding that a Minnesota law required the Jaycees to accept women members to their organization, Brennan announced in *Roberts v. United States Jaycees* that there were, in fact, "two distinct senses" of the freedom of association.²⁴⁵ The right of intimate association received protection "as a fundamental element of personal liberty."²⁴⁶ The right of expressive association, on the other hand, 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."²⁴⁷

Following Karst, Brennan recognized an intrinsic value to intimate association. He also declared that expressive association was merely instrumental to the advancement of other First Amendment freedoms.²⁴⁸ Brennan defined an intimate association as "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical

²⁴⁴ Although Brennan's opinion never cited Karst's article, the intellectual debt is apparent.

²⁴⁵ *Roberts v. United States Jaycees*, 617.

²⁴⁶ *Ibid.*, 618.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* Cf. Soifer, *Law and the Company We Keep*, 41 (contending that Brennan regarded expressive association "as instrumental and therefore subject to greater government intrusion"); Kateb, "The Value of Association," 46 ("Running through Brennan's opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones.").

aspects of the relationship.”²⁴⁹ Unsurprisingly, Brennan concluded that “several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection.”²⁵⁰ Brennan nonetheless appeared to recognize the significance of the consequences of the Minnesota law to the Jaycees:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.²⁵¹

But Brennan made short shrift of these concerns in light of the state’s compelling interest in eliminating discrimination.²⁵² Even more audaciously, he then claimed that the forced integration of women would have *no effect* on the expressive interests of the Jaycees.²⁵³ There was, according to Brennan, “no basis in the record for concluding that admission of women as full voting members [would] impede the organization’s ability to engage in . . . protected activities or to disseminate its preferred views.”²⁵⁴

²⁴⁹*Roberts v. United States Jaycees*, 620. Brennan continued that: “As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.” *Ibid.*

²⁵⁰*Ibid.*

²⁵¹*Ibid.*, 623.

²⁵²*Ibid.*

²⁵³Brennan wrote that “[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” *Ibid.*, 626.

²⁵⁴*Ibid.*, 627.

Brennan's associational typology also led him to conclude that intimate associations, unlike expressive associations, allowed individuals to draw "emotional enrichment from close ties with others" and provided "the ability independently to define one's identity that is central to any concept of liberty."²⁵⁵ It is unclear why this claim isn't equally applicable to non-intimate associations. As Nancy Rosenblum has observed: "the onus for cultivating the moral dispositions of liberal democratic citizens falls heavily on voluntary groups such as the Jaycees and their myriad counterparts."²⁵⁶ But even leaving aside the identity-shaping potential of large associations, a distinction based on size is misleading because most people interact with large *associations* through local *assemblies*. The Jaycees may have been a 295,000 member organization in 1981,²⁵⁷ but most of its individual members did not adopt its values and purposes by reading an organizational charter. More likely, they were influenced through personal interaction with other members. Brennan's observation that "the *local* chapters of the Jaycees are large and basically unselective groups,"²⁵⁸ also misses the point. Even if the Minneapolis chapter had "approximately 430 members,"²⁵⁹ it is probable that individual friendships formed within smaller circles. At least one of the early Democratic-Republican societies,

²⁵⁵Ibid., 619.

²⁵⁶Nancy L. Rosenblum, "Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion," in *Freedom of Association*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998), 76.

²⁵⁷*Roberts v. United States Jaycees*, 613 ("At the time of trial in August 1981, the Jaycees had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations.").

²⁵⁸Ibid., 621 (emphasis added).

²⁵⁹Ibid.

it will be recalled, had upwards of 300 members.²⁶⁰ Like these popular societies, the Jaycees at a local level likely exhibited some of Brennan's "intimate" characteristics.

Commentators have roundly criticized Brennan's reasoning. Rosenblum has observed that: "The Jaycees' 'voice' was undeniably altered once it was forced to admit young women as full members along with young men."²⁶¹ Aviam Soifer contested that: "Surely the Jaycees . . . will be a different organization. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."²⁶² And George Kateb suggested that: "Brennan's claim that young women may, after their compulsory admission, contribute to the allowable purpose of 'promoting the interests of young men' is absurd."²⁶³ Indeed, it is hard to take seriously Brennan's claim that the compelled admission of women did not infringe upon the Jaycees' associational freedom. But even more significantly, his bifurcation of a singular freedom of association into a hierarchical pair of associational freedoms weakened the constitutional protections of groups. Any group that the Court now classifies as an expressive non-intimate association—and this includes most of the associations that have been and will be subjected to antidiscrimination regulation—is automatically relegated to a lower constitutional status. The strict scrutiny that the Court applies to regulation of expressive association will be less than the strict scrutiny that it

²⁶⁰See *supra*, note 63.

²⁶¹Rosenblum, "Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion," 78.

²⁶²Soifer, *Law and the Company We Keep*, 40.

²⁶³Kateb, "The Value of Association," 55.

applies to regulation of intimate association; otherwise, there would be no purpose in distinguishing between the two kinds of association.

After Roberts

Roberts opened a gaping hole in the already attenuated freedom of association, and its framework produced predictable results in two subsequent cases involving private organizations that refused membership to women. In 1987, the Court held in *Board of Directors of Rotary International v. Rotary Club of Duarte*²⁶⁴ that the Rotary Club had no First Amendment right to exclude women. The following year, in *New York State Club Ass'n v. City of New York*,²⁶⁵ the Court upheld anti-discrimination laws applied to a consortium of New York City social clubs. The Court narrowed the scope of expressive association by announcing that a group must demonstrate that it was “organized for specific expressive purposes” and that “it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership” to certain classes of people.²⁶⁶ The Court emphasized that the right to associate was by no means absolute: it did not mean “that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.”²⁶⁷

²⁶⁴*Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

²⁶⁵*New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

²⁶⁶*Ibid.*, 13.

²⁶⁷*Ibid.*

Contemporaneous with the *Roberts* line of cases in the 1980s, the Court issued two important decisions pertaining to the associational boundaries of religious organizations. In 1983, the Court in *Bob Jones University v. United States*²⁶⁸ upheld the decision of the Internal Revenue Service to revoke the tax-exempt status of Christian educational institutions that discriminated on the basis of race. Four years later, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,²⁶⁹ the Court leaned in the other direction in concluding that it was permissible for the Mormon Church to deny a non-church member employment as a building engineer in a gymnasium operated by the church and open to the public. Although neither *Bob Jones* nor *Amos* directly addressed the freedom of association, both cases raised important issues about the relationship between religious associations and the state and the interplay of the freedom of association with the freedom of religion.

The association cases of the 1980s—both those like *Roberts* that expressly addressed the right of association and those like *Bob Jones* that did not—suggested that association still lacked a coherent doctrinal framework. In 1998, Amy Gutmann’s edited volume *Freedom of Association*,²⁷⁰ explored some of the theoretical tensions raised in these recent cases. Gutmann’s introductory essay attempted to locate the freedom of association within the American constitutional tradition. She began with Tocqueville,

²⁶⁸*Bob Jones University v. United States*, 461 U.S. 574 (1983).

²⁶⁹*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 327 (1987).

²⁷⁰Amy Gutmann, ed., *Freedom of Association* (Princeton: Princeton University Press, 1998).

and most of her historical attention focused on the Court's conception of association in *Roberts*. Gutmann argued nevertheless that the freedom of association "should not be contingent upon its furthering justice."²⁷¹ George Kateb offered an even stronger defense of association and an extended critique of *Roberts*, concluding that the Jaycees "were within their rights to associate on their own deplorable terms."²⁷² Kent Greenawalt's essay addressed the issues of religious association raised in *Bob Jones* and *Amos*, and suggested a "reasonably defensible" justification for treating claims of religious association more strongly than those from some other forms of association. Michael Walzer, Nancy Rosenblum, Will Kymlicka, Daniel Bell, and other prominent thinkers also contributed essays. None of the contributors, however, offered an historical treatment of the development of association or its relationship to assembly. And the volume ultimately raised more questions than answers. William Galston's review in the *American Political Science Review* summarized the tensions raised in the book:

[Gutmann's collection] is clearly the best introduction to issues raised by freedom of association in modern liberal democracies. It helps us understand why Alexis de Tocqueville is so much the man of the hour, and why fashionable neo-Tocquevillean enthusiasms must be tempered by uncomfortable economic, political, and even psychological facts. Voluntary groups are the source of much that is valuable, but they are not a silver-bullet cure for the characteristic ills of modern liberal democracy, and some of their practices are bound to trouble even dedicated defenders of free association who also care about the equal dignity of every citizen.²⁷³

²⁷¹Ibid., 31.

²⁷²Kateb, "The Value of Association," 61.

²⁷³William A. Galston, "Freedom of Association," *American Political Science Review* 94, no. 4 (2000): 929.

The difficulty left unaddressed in Gutmann's book and Galston's synopsis was that the 'neo-Tocquevillean enthusiasms' had led to a freedom of association that favored substantive policy outcomes over procedural protections built around a theoretical understanding of group autonomy.

Two years later, the Supreme Court issued its decision in *Boy Scouts of America v. Dale*.²⁷⁴ Because the Court sided with the association of the Boy Scouts, *Dale* seemed on the surface to represent a curtailment of the *Roberts* doctrine. But, as we shall see, *Dale* largely adopted the *Roberts* framework, making its outcome appear no less policy-driven than the one reached in *Roberts*.

Boy Scouts v. Dale

In *Dale*, the Court concluded in a 5-4 decision that the right of expressive association permitted the Boy Scouts to exclude from their membership a homosexual scoutmaster despite a New Jersey antidiscrimination law that prohibited such exclusions in places of public accommodation.²⁷⁵ Chief Justice Rehnquist's opinion for the Court began by placing the case within the framework of expressive association:

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come

²⁷⁴*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The facts of *Dale* are covered extensively in the literature. See, e.g., Mazzone, "Freedom's Associations," 666-74 Evelyn Brody, "Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association," *U.C. Davis Law Review* 35 (2002): 848-54.

²⁷⁵The Supreme Court deferred to the New Jersey Supreme Court's determination that the Boy Scouts were a public accommodation within the meaning of the statute.

within its ambit, a group must engage in some form of expression, whether it be public or private.²⁷⁶

Rehnquist distanced himself from some of the Court's earlier views on expressive association. Although *New York State Club Ass'n* appeared to have narrowed the right of expressive association to groups that were organized "for specific expressive purposes,"²⁷⁷ Rehnquist argued that:

[A]ssociations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.²⁷⁸

For Rehnquist, the proper inquiry was "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."²⁷⁹ And this inquiry required that the Court defer to an organization's purported views:

[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.²⁸⁰

²⁷⁶*Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The Boy Scouts did not argue that they should be classified as an intimate association.

²⁷⁷*New York State Club Ass'n v. City of New York*, 13.

²⁷⁸*Boy Scouts of America v. Dale*, 655. Justice Stevens challenged Rehnquist's reasoning: "to prevail on a claim of expressive association in the face of a State's antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity." *Ibid.*, 682 (Stevens, J. dissenting).

²⁷⁹*Ibid.*, 650.

²⁸⁰*Ibid.*, 651 (citations and quotations omitted).

These strong words echoed the sentiments of Brandeis and Douglas, but they hardly seemed credible after *Runyon* and *Roberts*. Justice Stevens's dissent highlighted the doctrinal tension that *Dale* created:

[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.²⁸¹

While *Dale* has been hailed by some as a victory for associations, Rehnquist's reasoning exposed a highly malleable judicial construct:

[I]n the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn.*, 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 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.²⁸²

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.²⁸³ But *Dale* was less of a doctrinal revelation than a confirmation of Thomas Emerson's admonition in 1964 that:

²⁸¹*Ibid.*, 679 (Stevens, J., dissenting).

²⁸²*Ibid.*, 658-59.

²⁸³John Hart Ely has 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," *Harvard Law Review* 88 (1975): 1501.

In its ultimate result, the use of the *ad hoc* balancing formula leaves “the right of association” with little concrete protection in effect subject to restriction by any “reasonable” regulation. It is true of course, that a majority of the [Warren] Court does employ the *ad hoc* balancing test in most first amendment cases, whether or not “the right of association” is involved. But the point is that “the right of association” concept is so broad, so undifferentiated, that its use effectively precludes any other approach. And the balancing process here is even less confined, and less subject to objective application, than where specific rights of freedom of speech, press, assembly or petition are subjected to that treatment.²⁸⁴

After Brennan’s dichotomy between intimate and expressive association and Rehnquist’s serious burden analysis, Emerson’s observation was more descriptive than ever.

²⁸⁴Emerson, "Freedom of Association and Freedom of Expression," 14.

V. Recovering the Freedom of Assembly

The preceding pages have traced the history of the constitutional protections accorded to groups, beginning with a freedom of assembly vigorously defended in the making of the Bill of Rights and culminating with what I have characterized as a weak right of association. The declension narrative that I have offered is not easily explained. If, as one commentator has suggested, “an association is merely an assembly dispersed over time and space,”²⁸⁵ then it would seem that the constitutional protections of groups would only have grown with an increased focus on the ostensibly broader right of association. But the critical difference between assembly and association is that the former is linked to a longstanding history that recognizes the political—and even more precisely, the *counter-political*—character of maintaining a means of communicating dissent toward the ruling political order *and* protecting the gathered people who embody that dissent. Association, in contrast, has drawn upon at least three distinct justifications during its development over the past fifty years: first a Tocquevillian liberalism that emphasized the importance of autonomy, then the penumbras of the First Amendment that linked association to privacy, and, most recently, a tenuous elevation of intimacy over expressivism. The result has been a highly malleable doctrine that somewhat arbitrarily extends constitutional protection to some groups and denies it to others.

²⁸⁵C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," *UCLA Law Review* 25 (1978): 1032.

One way to challenge this state of affairs is to return to the concept of assembly. The right of assembly—at least as it was originally conceived in the early part of our nation’s history—protects the members of a group based not upon their principles or politics but simply by virtue of their coming together in an alternative way of life.²⁸⁶ By itself, of course, this definition is as flimsy as that of association. Because the state determines the kinds of practices that are “inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,”²⁸⁷ the interests of the state always trump the right of assembly.²⁸⁸ But an emphasis on the right of assembly and the kinds of unpopular, renegade, and even dangerous gatherings that have sought refuge in that right reminds us of the importance of resisting all but the rarest of encroachments upon an assembled people. This caution is obscured in the shifting theoretical and jurisprudential justifications of association, which have too easily permitted incursions into group autonomy.

One practical way to counter the weakened right of association is to recover the freedom of assembly as a viable independent constitutional claim in First Amendment

²⁸⁶This understanding of assembly may have particular implications in light of the rapidly evolving changes in communication technology and the related sociological and philosophical questions that those changes bring. The proliferation of online dating, internet chat rooms, and virtual clubs and associations raises a number of important issues about the character of groups.

²⁸⁷*Whitney v. California*, 371.

²⁸⁸Even Brandeis’s response to the *Whitney* majority acknowledged this reality. He wrote that “[t]he fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression,” but he intimated that restraints will be warranted when there is “the probability of serious injury to the State.” *Ibid.*, 378.

litigation. Rather than rely simply on the freedom of association or an ambiguous conglomeration of other First Amendment freedoms, future litigants in appropriate cases might argue in the alternative the right of peaceable assembly. Although it is possible that courts would conclude that the freedom of assembly is an antiquated precursor to the freedom of association,²⁸⁹ it would be unprecedented for a judicially constructed right completely to subsume an explicitly constitutional right. Moreover, the Court's previous decisions maintain an ambiguous link between assembly and association that falls short of equating the two concepts. On the other hand, if courts were expressly to recognize the continued importance of the freedom of assembly, then they would need to craft a doctrinal framework and outline the relationship of assembly to other First Amendment freedoms.

A contemporary doctrinal approach to assembly might establish a tiered system in which a claim to free assembly is strongest for an actual gathering of people and weakens as a group's claim moves away from a physical assembly to more attenuated identity claims like intimacy. While this would be a plausible approach, it would be inconsistent with the Court's free speech doctrine, which recognizes that narrowly drawn time, place, and manner restrictions form the exception rather than the rule. It is one thing to debate and criticize a form of expression once it has been conveyed—whether through actual or symbolic speech or by the mere existence of a group. It is quite another to preclude expression altogether.

²⁸⁹Cf. Rische, "Freedom of Assembly," 317 ("To refer to [association] as a new freedom would be amiss for it is only a further development of the freedom of assembly so plainly stated in the first amendment.").

An express recognition of assembly does not come without a price. It jeopardizes the doctrinal soundness of cases like *Norwood* and *Runyon*, whose holdings are now almost universally regarded as morally commendable. It weakens *Roberts* and strengthens *Dale*, a consequence that many would view as unhealthy to a liberal society. But the right of the people to express together in both word and action beliefs and views that differ from those held by the majority may well be worth these costs. This is the case even if those views threaten or are morally repugnant to a liberal democratic vision. It is the risk that Brandeis confronted in *Whitney* when he faced a concrete social movement that advocated the violent overthrow of the existing government.²⁹⁰ Brandeis's insistence that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly"²⁹¹ points us toward a meaningful freedom of assembly that is essential to democracy even as it renders it more volatile and more vulnerable.

²⁹⁰Anita Whitney's real danger to the state did not stem from her individual adherence to a charter or set of rules but because she and her associates comprised a group of people ready to take physical action to advance their cause. Cf. Karl Marx and Friedrich Engels, *The Marx-Engels Reader*, ed. Robert C. Tucker, 2d ed. (New York: Norton, 1978), 500. ("The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains.").

²⁹¹*Whitney v. California*, 376 (Brandeis, J., concurring). Brandeis elaborated that "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State." *Ibid.*, 378.

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