"We the People": Self-Governance and the Evolving Treatment of Freedom of Assembly in the United States

Josephine Savaria-Watson

Follow this and additional works at: https://scholarship.claremont.edu/cmc_theses

Part of the American Politics Commons, and the Legal Studies Commons

Recommended Citation

This Open Access Senior Thesis is brought to you by Scholarship@Claremont. It has been accepted for inclusion in this collection by an authorized administrator. For more information, please contact scholarship@cuc.claremont.edu.
“We the People”: Self-Governance and the Evolving Treatment of Freedom of Assembly in the United States

submitted to
Professor George Thomas

by
Josie Savaria-Watson

for
Senior Thesis
Fall 2020-Spring 2021
May 3rd 2021
Acknowledgments

First and foremost, thank you to Professor Thomas. Because of your feedback, support, and patience, I was able to dive into the world of assembly and come out with this thesis. Even in the eleventh hour, you were willing to provide guidance and help me refine my ideas.

Thank you to Anna Green, for the numerous pep talks and the innumerable hours on Zoom. I could not have written this without you.

Thank you to Koss Klobucher for being my rock in this process. You got me through my lowest lows and celebrated with me at my highest highs. (And you brought me donuts!)

Thank you to my roommates Emily Howard, Daniela Finkel, and Amelia Ayala for being my cheerleaders over these last months. To Emily especially—thanks for holding me down when I needed it.

Thank you to my parents, my sister, and the rest of my family. I would not be here without you. The love, support, wisdom and dog pictures you provide me cannot be repaid, only treasured.

Thank you to the countless other friends and professors who have supported me, made me laugh, and taught me so much over the last four years.

Writing a thesis in a pandemic is hard. This is my original work, but it was not written alone.
# Table of Contents

I. Introduction ............................................................................................................................. 4

II. The History of Assembly ....................................................................................................... 19
   Structure of assembly ........................................................................................................... 23
   Assembly in the Founding Era ............................................................................................... 29
   Assembly in the Early 19th Century ....................................................................................... 31
   Assembly Post-Civil War ....................................................................................................... 34
   Assembly in the 20th Century ............................................................................................... 38
   Assembly on the Decline ....................................................................................................... 47
   Conclusion ............................................................................................................................. 53

III. History of Association .......................................................................................................... 57
   Tocqueville on Association .................................................................................................. 62
   Pre-1958 Association ........................................................................................................... 64
   Establishing Association ...................................................................................................... 69
   Right to Privacy ................................................................................................................... 80
   *Roberts v. United States Jaycees* and its Impact ............................................................... 82
   The Disappearance of Association ...................................................................................... 87
   Conclusion ............................................................................................................................. 89

IV. Modern Theories of Assembly ............................................................................................ 92
   El-Haj’s Criticism of Permit Requirements and Other Regulations .................................. 94
   Brod’s Assembly as Physical Gatherings .............................................................................. 100
   John Inazu’s Assembly as Protecting Group Autonomy .................................................... 104
   Ashutosh Bhagwat’s Associational Speech ......................................................................... 111
   Conclusion ............................................................................................................................. 116

V. Assembly in 2020 .................................................................................................................. 118
   The Rise of the Black Lives Matter Movement .................................................................. 121
   DeRay McKesson v. John Doe ............................................................................................. 130
   January 6th Insurrection ....................................................................................................... 133
   Anti-Protest Laws ............................................................................................................... 138
   Conclusion ............................................................................................................................. 140

   Conclusion ............................................................................................................................. 144

Bibliography ............................................................................................................................. 148
I. Introduction

What does it mean to have the right to peaceably assemble?

Though treated second in recent years in favor of the right to free speech, the significance of assembly in American life has never been clearer, or more fraught. In 2020, a national civil rights movement broke out, inspiring an estimated 15 to 26 million people to take to the streets for the Black Lives Matter movement.¹ Many of these assemblies were then dispersed through brutal means: tear gas, pepper spray, and “less-lethal” rounds were commonly used across the country to break up protests, while reports from Portland detailed a policy that required detainees to relinquish their assembly right in their release agreement.² And the Attorney General set members of the National Guard against peaceful protesters in Lafayette Square, so that the President could walk to St. John’s Church.³

It’s difficult to reconcile these two realities. At the same time that protests are becoming a key part of political activism in American life, they are also being violently repressed.

All of these events come with an important pretext: The Supreme Court of the United States has not decided a case on the grounds of the right to assemble in over 30

---

¹ Buchanan, Bui, and Patel, “Black Lives Matter May Be the Largest Movement in U.S. History.”
² Gabbatt, Thomas, and Barr, “Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests.”
³ Allen, “Trump and Tear Gas in Lafayette Square: A Memo from the Protest Front Lines.”
years. Rather, freedoms of speech and expressive association have been the mechanism by which American's freedom to gather has been defended.\textsuperscript{4}

What does this absence of a constitutional decision mean? Is something lost by the failure to invoke the freedom to assembly, or is something gained by deferring to freedom of speech? Is it time for a new approach by the Supreme Court or is the current system working? How do we understand a right that is so alive and so restricted at the same time?

Throughout this paper, I will seek to answer these questions. To do so, I will begin by examining the history of assembly, from how it was understood when it was first written into the Bill of Rights to its eventual collapse into free speech. Then, I will consider the history of the nontextual right made independent from assembly in 1958: association. Association emerged at the beginning of the Civil Rights Movement as a key protection but has been subsumed by freedom of speech in the intervening years. With this perspective, I will then compare the several theories posited by different assembly and association experts. These theories highlight the important role that assembly plays in self-governance and offer a new perspective on how to understand the events of 2020, which I will delve into during Chapter V. The chilling-effect the last year has had on assembly and timeliness for the Court to reinvigorate this right will be my central conclusion.

The freedom to peaceable assembly is tucked into the second to last clause of the First Amendment. The text of the entire Amendment reads:

\begin{flushright}
\textsuperscript{4} Inazu, \textit{Liberty's Refuge}. 7.
\end{flushright}
“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

The right to peacefully assemble is in good company. It is proceeded by some of the most famous and closely-held rights in the United States: freedom of speech, freedom of the press, and freedom of religion. It was an extremely valuable right to the Founders, both because of the importance assembly had in British life and its importance to self-governance. Both British statutory and common included the right to assemble.

The famous case of the Quaker William Penn kept the right to assemble in the forefront of minds throughout England and the new American colonies. Penn and his fellow Quakers had gathered to worship in violation of the 1664 Conventicle Act. Unable to enter their meeting-house because of soldiers, Penn sermonized on the street and was arrested. What proceeded was a sensational trial—heightened by Penn’s insistence on wearing a hat in the courtroom—which ended with his acquittal from unlawful assembly. It was an event that captured the importance of assembly in the minds of the American colonists and would come to be referenced at debates in the First Congress.

In Chapter II, I will begin where this introduction left off: the founding. In 1791, the First Congress of the United States the Bill of Rights, amending the Constitution that had created their new system of government four years earlier. At the time, there was

---

5 “The Constitution of the United States.”
6 Brod, “Rethinking a Reinvigorated Right to Assembly.”
7 Inazu, Liberty’s Refuge. 24.
8 Whipple, Our Ancient Liberties.
exceedingly little debate over the right. It was taken to be so fundamental, so obvious, that some representatives felt it was not even worthy of inclusion. Despite these disagreements, it was still added.9

There are several noteworthy features of the text itself, which I will delve into further. First, the language of the amendment differs from the language of any other assembly right in state constitutions of the time.10 It also differs from the original draft. Assembly is not constrained by the common good in the Bill of Rights: people may gather for whatever reason they wish, and not only to consult for their or the “common good.” Assembly also is not limited by the right to petition, the fifth and final right in the First Amendment.11

Beyond the text, I'll consider the role that assembly played in everyday life. Gatherings, at taverns, in the streets, and elsewhere, were a common part of life in the late 1700s and early 1800s. Both political and non-political, neither permission nor permits were required for gatherings. Whether these groups be discussion groups, political parades, or tavern gatherings they were respected as free assemblies.12 This understanding was reflected in the political writing and state court rulings of the time. State courts continually defended broad assembly rights: striking down ordinances that required permits to gather and respecting the rights of groups to determine their

9 Whipple. 101.
11 Inazu, Liberty’s Refuge. 22-23.
membership. In this way, people in the Founding era used their unimpeded assembly right as a critical tool in self-governance.

In the Antebellum South, a very different story was unfolding. White governments passed extreme restrictions on how their Black citizens could assemble. These regulations initially targeted religious services but were extended to schools and other gathering places. They diluted the religious and political life of Black Americans to great and damaging, effect. After the Civil War and passage of the Fourteenth Amendment, the first Enforcement Act was passed to protect Black Southerners from infringements on their constitutional rights to some success.

The Supreme Court made its first ruling on the right to peaceably assemble in 1875. The case was *US v. Cruikshank*. After the Colfax Massacre, in which armed white men killed over 100 Black men during a governorship controversy, three white men were arrested for violating the constitutional rights of other citizens. In this opinion, Justice Waite argues that the equal protection of the laws promised in the Fourteenth Amendment does not apply to private actors or state governments. Specifically, the right to peaceably assembly constrains the actions of the federal government, but not those of state or private actors. This decision effectively gutted the Enforcement Act.

The Supreme Court made another ruling at the end of the 19th century which legalized permit requirements for assembly. In *Davis v. Massachusetts* (1897), the Court reviewed a Massachusetts Supreme Court decision which held that legislatures were

---

15 Inazu. 38.
entitled to place whatever restrictions they wished on public land. While the Court later changed their treatment of public spaces, the permit requirements in Davis were never overruled.\textsuperscript{17}

In the 20th century, the right to assembly became more tightly regulated, more celebrated, and finally, more neglected. While permit requirements were becoming more common across the United States and World War I related legislation was placing new restrictions on group memberships, labor, women’s equality, and black rights movements were also utilizing assembly to pursue their agendas.

Assembly was especially important to the Suffragettes, who won women the right to vote with the Nineteenth Amendment. By forming associations that stretched across the country and organizing assemblies on streets that won public attention, women used the power of assembly to leverage political influence for themselves.\textsuperscript{18}

In Whitney v. California (1927), communist organizations and the right to assembly came before the Supreme Court for the first, though certainly not the last time. Ms. Whitney was being prosecuted for her association with a communist organization that advocated for violence, though she had never done so herself. Despite this, the Court still choose to focus its reasoning primarily on speech rights. This choice was both odd and prophetic. Notably, in his concurrence, Justice Brandeis linked speech and assembly as coequal rights for the first time.\textsuperscript{19}

The language used by Brandeis in his Whitney concurrence was echoed in the Court’s decision in DeJonge v. Oregon (1937). DeJonge brought the Communist Party

\begin{itemize}
\item \textsuperscript{17} Davis v. Massachusetts, 167 U.S.
\item \textsuperscript{18} Lumsden, \textit{Rampant Women}.
\item \textsuperscript{19} Whitney v. California, 274 U.S. 357 (1927).
\end{itemize}
and the right to assemble before the Court once more. In ruling that Oregon’s criminal
syndicalism law violated the due process clause of the Fourteenth Amendment and
freedom to assemble, the Court reversed course from their Whitney decision. Most
importantly, the right to assemble was applied to states through the Fourteenth
Amendment.20

The Court made this ruling at a point when assembly was growing as a popular
talking point in the United States. As the labor movement grew momentum, support for
assembly became more politically popular. It worked its way into the rhetoric of political
figures like President Roosevelt’s interior secretary, Harold Ickes, and former president
Herbert Hoover. At the New York World Fair in 1939, assembly was part of the four
fundamental rights at the center of the celebration. And polling found in 1941 that 89.9%
of Americans felt their personal liberties would be infringed by restrictions on
assembly—nearly eight points higher than restrictions on speech by press and radio.21

The same year as the World Fair, the Court ruled on Hague v CIO (1939). Hague
is widely seen as establishing the public forum doctrine in the Supreme Court, a
philosophy that treats public spaces as protected areas for free speech and assembly and
overturning Davis. Notably, the Court did not take issue with permit requirements in
Hague.22 This decision captures the push and pulls surrounding assembly at the time. It
was being expanded to the states, celebrated on the world state, and defended in public
spaces. But it existed in a manner more restricted than the Founders had anticipated
because of permit requirements.

21 Inazu, Liberty’s Refuge, 52, 57.
Assembly began to move out of the spotlight as the 1940s continued. In President Roosevelt's State of the Union Address, freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear were invoked as the “four essential human freedoms,” while assembly was absent. The Court then released their decision in *Cox v. New Hampshire*, which confirmed that despite the emergence of the public forum doctrine two years prior, regulations were constitutional on assemblies in public.23

Assembly was still an important part of social movements. It was especially prominent in the Civil Rights Movement of the 1960s. One of the most famous marches stretched from Selma to Montgomery, Alabama, in response to voter suppression and police brutality against protesters. The case which granted the marchers a permit to use the public highway, *Williams v Wallace*, demonstrates an attempt to reconcile the importance of assembly with the prioritization of convenience in public forum doctrine. During this time, the Court also continually struck down convictions of protesters but avoided ever expanding on the right to assemble.24

In 1983, the Court released their decision in *Perry Education Association v. Perry Local Educators’ Association* (1983), which diminished assembly to a “communicative activity.” This phrasing made assembly entirely subordinate to speech. As a result, no case has been decided on the grounds of assembly in the intervening years.25

In Chapter III, I will focus on the direction the right to assembly went in the latter half of the 20th century: association. The two words were taken to refer to different kinds

---

23 *Cox v. New Hampshire*, 312 U.S.
24 Krotoszynski, “Celebrating Selma.”
of gatherings: assemblies were more ad hoc, while associations were more permanent. However, both fit under the umbrella of association.

I begin with an examination of Alexis de Tocqueville’s theory of association in the United States. Tocqueville argues that association is uniquely suited to American life. His observations are useful for how they both do and do not reflect modern realities.\(^\text{26}\)

Though it was formalized as an independent right in 1958, the word “association” had been used in Supreme Court decisions interchangeably with assembly for the first 150 years.\(^\text{27}\) Most prominently, in 1928, the Court ruled in *Bryant v. Zimmerman* (1928) that a New York statute requiring KKK members to register with the state was not a violation of any rights.\(^\text{28}\) *Whitney v. California* (1927) and *Bridges v. Wixon* (1945) also center on association.\(^\text{29}\)

Like in *Bryant*, membership lists were at the center of *NAACP v. Alabama* (1958), although this time they belonged to the civil rights organization the National Association for the Advancement of Colored People (NAACP) rather than the KKK. The Court ruled that the NAACP was not obliged to share member lists to the State of Alabama because of their right to association, which stemmed from “the close nexus between” assembly and speech. This case marked the first formalization of the independent right to associate.\(^\text{30}\)

It also was the beginning of the Court using the right to association to protect the blossoming Civil Rights Movement, adding yet more complexity to the history of

\(^{26}\) Tocqueville and Reeve, *Democracy in America. Volumes I & II.*  
\(^{27}\) Bhagwat, “Associational Speech.”  
\(^{28}\) New York ex Rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)  
\(^{29}\) Whitney v. California, 274 U.S.; Bridges v. Wixon, 326 U.S.  
\(^{30}\) NAACP v. Patterson, 357 U.S.
assembly and systemic racism in the United States. The Court protected the NAACP in a series of cases, including Bates v. City of Little Rock, Shelton v. Tucker, and Louisiana v. NAACP, from sharing their membership lists. These rulings were crucial to the success of the NAACP in organizing throughout the Civil Rights Movement.31

Communist organizations were not given the same protection. In the proceeding Cold War cases Uphaus v. Wyman and Barenblatt v. United States, the Court deemed that communist organizations were not protected by association rights.32 When the two interests came into conflict in Gibson v. Florida Legislative Investigation Committee, the Court’s commitment to the NAACP prevailed over their opposition to communist organizations. The Florida Legislative Investigative Communities’ inquiries into the presence of the Communist party may be legitimate, but any connection to the NAACP was insubstantial, and thus could not justify a violation of associational rights.33

Seven years after the Court presented association as a standalone right, it created a new nontextual right in Griswold v. Connecticut (1965). The right to privacy, established by drawing on the First, Third, Fourth, Fifth, and Ninth Amendments, was fashioned to a married couple’s access to contraception.34 At the time, the existence of a second nontextual right buoyed the legitimacy of association. In the long term, this decision came to restrict association. While the early 20th century Court showed hints of prioritizing speech over assembly, the focus on intimate interactions in Griswold laid the groundwork to limit association to only expressive and intimate interactions.35

---

31 Inazu, Liberty’s Refuge. 89.
32 Inazu.
35 Inazu, Liberty’s Refuge. 126.
This distinction was formalized in *Roberts v. United States Jaycees* (1984). The Court ruled that an all-male legal organization must accept female members because their organization was not adequately intimate or expressive to be afforded association protections. This approach meant that simply being an association was no longer enough to warrant associative protections—the expressive value also mattered. This standard was used to strike down two more men-only acceptance policies in the cases *Board of Directors of Rotary International v. Rotary Club of Duarte* and *New York State Club Ass’n v. City of New York.*

The Court used this doctrine again in *Boy Scouts of America v. Dale* (2000), which found that the Boy Scouts were a sufficiently expressive association to justify the firing of a gay assistant scoutmaster. In his dissent, Justice Stevens condemns the Court for their ruling, pointing out that no anti-gay message is clearly expressed from the Boy Scouts. This contradiction highlights the fallibility of depending on content, rather than conduct, in creating tests for freedom of association and assembly.

By limiting association in this manner, it quickly became eclipsed by the right to free speech. The case *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), which centered on the right of a parade to exclude other groups, was decided solely on the ground of expressive content. In *Christian Legal Society v. Martinez* discussion of a Christian group’s right to exclude tied association entirely to speech.

---

37 Bhagwat, “Associational Speech.” 988.
39 Inazu, *Liberty’s Refuge*. 
The history of association captures a troubling tension that exists in assembly as well: just as association was used to protect the NAACP during the Civil Rights Movement, it can be used to exclude minorities from preexisting organizations. The Court has attempted to avoid this issue by limiting associational rights to expressive and intimate groups, but in doing so, they have restricted association to near non-existence. So how does the Court salvage the right to assemble and associate? Should they be treated interchangeably?

In Chapter IV, I will examine several theories from modern scholars on how, exactly, we should resuscitate these rights. I'll begin with Nicholas Brod and Tabatha Abu El-Haj, who both focus on assembly as in-person gatherings. Abu El-Haj is primarily concerned with tracing the history of permit requirements in the United States. She argues that the modern permit requirements and assembly restrictions are repressive far beyond the norms of the first century in the United States. El-Haj illustrates how assembly contributed to a richer political culture, arguing that unrestricted assembly is important for democratic governance.40

Brod shares her concerns over the limitations placed on in-person gatherings. He uses the 2010 Occupy Movement as an example of protest that would have been constitutionally acceptable 200 years ago but was obstructed by modern regulations. He posits that means-end scrutiny should be applied to assemblies, which should be identifiable as physical gatherings, not expressive conduct. He emphasizes that with this

40 Abu El-Haj, “The Neglected Right of Assembly.”
approach, time and place requirements are often incompatible with the right to assemble because so much of the impact of an assembly comes from its time and place.\textsuperscript{41}

I will then consider John Inazu’s theory of assembly, which defends the right as a means to protect a group’s autonomy, including dissident and nonphysical groups. Inazu suggests that freedom of association is no longer sufficient to safeguard group autonomy because of its collapse into expression. Instead, Inazu uses the history of assembly and association to demonstrate that assembly can reinvigorate both rights. He criticizes the influence of 1960s popularism and Rawlsian liberalism on the Court’s freedom of association doctrine for excluding dissident groups. Thus, he argues that assembly must be understood as protecting peaceable, noncommercial groups.

Finally, I consider Ashutosh Bhagwhad’s theory of associational speech. He echoes Brod and Inazu’s concern that freedom of association is too tied to speech in current Supreme Court doctrine. He argues that the six First Amendment freedoms (including assembly) are interdependent in providing true self-governance. Deference to speech damages our democratic norms by failing to uphold the other rights. Unlike Inazu, Bhagwhad does not see a reinvigorated assembly right as the solution. Instead, he argues for an expanded protection of democratic associations, rather than expressive ones.\textsuperscript{42}

In Chapter V, I consider the recent events of 2020 and 2021 and place them in the context of the broader history of assembly and association in the United States. I focus on four main events.

\textsuperscript{41} Brod, “Rethinking a Reinvigorated Right to Assembly.”
\textsuperscript{42} Bhagwat, “Associational Speech.”
First, in 2020, the Black Lives Matter movement brought hundreds of thousands of Americans to the streets in protest of systemic racism. In response, many of these protests were brutally repressed.\textsuperscript{43} The most public display of assembly suppression came from the highest level of government at the Lafayette Square incident on June 1st.\textsuperscript{44} On rare occasions, protests also resulted in property damage, looting, and injury to officers.\textsuperscript{45} Drawing on El-Haj's theory, I explore how police violence and curfews served to suffocate the free exercise of assembly. I also relate these protests to the long history between racial inequality and assembly. Finally, I consider how violent assemblies should be prevented.

Second, I examine the recent decision by the Court in \textit{DeRay McKesson v. John Doe}, in which a police officer sued an organizer for an injury sustained by a protester. I point out that the Fifth Circuit’s holding has dangerous implications for guilt-by-association, while the Supreme Court’s decision matches a pattern of neglect when it comes to assembly issues.\textsuperscript{46}

In the third section, I discuss the January 6\textsuperscript{th} siege on the Capitol. I emphasize the role white privilege played in protecting the rioter’s assembly rights beyond reason and use it as an example of the dangers that assemblies can pose. I also consider how organizations that operate against democratic principles but believe they are right would be treated under the group autonomy theories in Chapter IV.\textsuperscript{47}

\textsuperscript{43} Buford et al., “We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found.”
\textsuperscript{44} Parker, Dawsey, and Tan, “Inside the Push to Tear-Gas Protesters Ahead of a Trump Photo Op.”
\textsuperscript{45} Conger and Bogel-Burroughs, “Fact Check.”
\textsuperscript{47} Mazzetti et al., “Inside a Deadly Siege.”
Finally, I describe the wave of anti-protest legislation being passed across the country and highlight the danger these pose to freedom of assembly. I argue that the Court must reinvigorate the right as soon as possible to make sure Americans can still freely engage in their own self-governance.\footnote{Epstein and Mazzei, “G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them).”}

In sum, this thesis seeks to offer a comprehensive summation of assembly rights in the United States up to 2020 to demonstrate the importance of a robust right to assemble physically and associate freely in democratic governance. In Chapter II, I begin by examining the history of assembly, from the First Congress's debate over the incorporation of the right in the First Amendment to the disappearance of the right in judicial opinions at the end of the 20\textsuperscript{th} century. I turn to the right to associate in Chapter III, which became distinct from assembly in \textit{NAACP v. Alabama}, but has been subsumed into speech. This historical context is used to prop up the different modern theories of assembly and association that I survey in Chapter IV. By Chapter V, I can consider the events of 2020 and 2021 from the scope of the history of assembly. I argue that the right has become too restricted and thus cannot play the role it should in self-governance. As a result, I argue that assembly must be reinvigorated by the Supreme Court.
II. The History of Assembly

At the time of the founding, the right to assembly was regarded as essential and fundamental. It was a right that had belonged to English freeman and traveled across the Atlantic with the first settlers. It was considered so fundamental that some felt it was unnecessary to include in the Constitution at all. At the First Congress, Theodore Sedgwick argued that the right was so obvious that it was unnecessary to elaborate: “If people freely converse together they must assemble for that purpose. It is a self-evident, inalienable right that the people possess. It is derogatory to the dignity of the House to descend to such minutiae.”

President Edmund Pendleton referred to the right of assembly in his remarks at the Virginia ratifying convention of 1788, before the Bill of Rights was created. It is worth including the quote in its entirety to emphasize how much Pendleton saw the right to assemble as implicitly guaranteed to the people:

“We, the people, possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say

---

49 Whipple, Our Ancient Liberties. 101.
gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? . . . Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse. . . .”

In assuaging the fears of a cautious public, Pendleton invokes assembly as the “easy and quiet method” of reform. He recognizes the intrinsic power in a gathering of people to incite change. The ability to assemble is crucial to real self-governance. Indeed, it was such a gathering of people that constructed the system of government Pendleton is introducing. By referring to “We, the people,” he suggests that assembly belongs naturally to the citizens of any form of government by the people.

Assembly was present in American life beyond just the Constitutional Convention. Baylen Linnekin identifies taverns as one of the original assembly places in American life. He argues that as British acts began to crack down on American freedoms, the colonists used formal and informal gatherings to express their grievances. Taverns became an ideal gathering place, for both the accessibility of alcohol and the “egalitarian context”—they were one of the only spaces that allowed guests of all social classes. Treated as a semi-public space, they allowed colonists to assemble and debate regularly, including the Founding Fathers.

In this chapter, I will trace the history of assembly in the United States. I begin by examining the structure of the clause itself. Looking to state constitutions of the time and

---

52 Linnekin, 603.
53 Linnekin, 607.
earlier drafts of the First Amendment reveals how assembly should be understood: as a right unhindered by expressive requirements.\textsuperscript{54} I then turn to assembly in the Founding Era. Assembly manifested in both spontaneous parades and Democratic-Republican societies. It was generally an egalitarian, unrestrained affair.\textsuperscript{55}

This culture of assembly proceeded into the 19\textsuperscript{th} century, with an important caveat. In the Antebellum South, suffocating restrictions were placed on African American’s assembly rights—a pattern repeated throughout history.\textsuperscript{56} After the Civil War, the Enforcement Acts were passed in an effort to protect black citizen’s civil liberties from white supremacists.\textsuperscript{57} In the Supreme Court’s first ruling on assembly, \textit{United States v. Cruikshank}, the first Enforcement Act was gutted: the Court ruled that the Fourteenth Amendment did not apply the right to assemble to state governments or individual actors, reversing a lower court’s holding in \textit{United States v. Hall} years earlier.\textsuperscript{58} Similarly, while the majority of state courts were striking down ordinances that placed restrictions on assembly, the Supreme Court upheld a decision by the only outlier state court to allow permit requirements in \textit{Davis v. Massachusetts}.\textsuperscript{59}

In the 20\textsuperscript{th} century, assembly rights began to be expanded once more by the Supreme Court. Women’s suffrage, the NAACP, and the labor movement all used

\begin{flushright}
\begin{itemize}
\item \textsuperscript{54} Thorpe and United States., \textit{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now or Heretofore Forming the United States of America}.
\item \textsuperscript{55} Abu El-Haj, “The Neglected Right of Assembly”; Inazu, \textit{Liberty’s Refuge}.
\item \textsuperscript{56} Inazu, \textit{Liberty’s Refuge}, 31; Guild, \textit{Black Laws of Virginia}, 175–76.
\item \textsuperscript{57} Inazu, \textit{Liberty’s Refuge}.
\item \textsuperscript{58} United States v. Cruikshank, 92 U.S. 542.; Pope, “Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon.”
\item \textsuperscript{59} Davis v. Massachusetts, 167 U.S. 43.
\end{itemize}
\end{flushright}
assembly to further their causes, actualizing the democratic ideals behind the right.\textsuperscript{60} Whitney v. California confronted the Court with balancing anti-communist fears and assembly rights. It resulted in Justice Brandeis’s famous concurrence in which he connected speech and assembly as fundamental, coequal rights.\textsuperscript{61} Much of this language was used in DeJonge v. Oregon ten years later. DeJonge changed the precedence set in Cruikshank, applying the First Amendment to state governments. It also recognized the important role assembly plays in self-governance, as the Court once more confronted the civil liberties of communist organizations.\textsuperscript{62}

Two years later, the Supreme Court changed its doctrine once more in Hague v. CIO. Hague established the public forum doctrine used today, which reserves public spaces as protected areas for speech and assembly. In doing so, it changed course from Davis. However, it did not hold permit requirements as unconstitutional, which laid the groundwork for Cox v. New Hampshire to allow assembly restrictions on the basis of public convenience a short while later.\textsuperscript{63}

Between the rulings of Hague and Cox, assembly hit its peak of cultural relevancy. It was heralded as one of the four essential freedoms at the New York World Fair in 1940, only to be replaced in President Roosevelt’s “Four Freedoms” speech a year later.\textsuperscript{64}

Despite its diminishing popularity, assembly was still an important tool in the Civil Rights Movement of the 1960s, and was recognized as such in speeches by Dr.

\textsuperscript{60}\textit{Inazu, Liberty’s Refuge}, 44–48.
\textsuperscript{61} Whitney v. California, 274 U.S. 357.
\textsuperscript{62} De Jonge v. Oregon, 299 U.S.
\textsuperscript{64}\textit{Inazu, Liberty’s Refuge}, 52.
Martin Luther King Jr. The Court protected protesters repeatedly but chose to never decide cases on the grounds of broader principles, thus leaving the right to assemble largely ignored.65 By the 1980s, assembly was almost completely subsumed by speech. Despite the treatment of the two rights as coequal years earlier, the Court limited public assembly to expressive conduct in *Perry Education Association v. Perry Local Educators’ Association*. With this change, it became unnecessary to invoke assembly, even in cases that centered around a gathering of people.66 As a result, the Court has not decided a case on the grounds of assembly in the last thirty years.

**Structure of assembly**

Five different state constitutions included explicit protections for assembly when the Bill of Rights was ratified by the First Congress.67 The prevalence of assembly protections demonstrates how important it was in the political and social lives of the Founding generation. The different text of each constitution provides a new perspective on how to think about the text of the First Amendment—the most notable difference being the inclusion of "common good" as a purpose for assembly in each.

Article XIX of the Massachusetts Constitution of 1780 guaranteed the “right, in an orderly and peaceable manner, to assemble to consult upon the common good.”68 The

---

65 Krotoszynski, “Celebrating Selma.”
66 Perry Education Association v. Perry Local Educators’ Association, 460 U.S.
67 Brod, Nicholas. “Rethinking a Reinvigorated Right to Assembly.” 177.
New Hampshire Constitution of 1784 repeated the Massachusetts Constitution nearly verbatim, replacing “assemble to consult” with “assemble and consult”\(^{69}\) This is a small difference with potentially large consequences: whether the right to assemble should be constrained by the need to consult for the common good was up for debate at the time. The phrasing of the Massachusetts Constitution necessitates this limitation, while the New Hampshire phrasing leaves slightly more leeway. The common good is not necessarily a suffocating restriction and largely did not act that way in the Founding era. Nonetheless, narrow construction of the "common good" has the potential to become limiting to assembly.

Both clauses are followed by similar petition rights. The Massachusetts Constitution uses a semi-colon to separate the assembly right from the right to, “give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”\(^{70}\) The New Hampshire Constitution uses the same language, except it separates assembly from the rest with just a comma. The difference in punctuation is the difference between limiting assembly to petition, or keeping it separate. The Massachusetts 1780 Constitution seems to limit assembly to the pursuit of the good but leaves it open to contexts outside of petition. New Hampshire does the opposite. However, both ultimately reflect a deep commitment to government by the people, with assembly as an essential component of that commitment.

\(^{69}\) Thorpe and United States. 2457. 
\(^{70}\) Thorpe and United States. 1892.
The North Carolina Constitution of 1776 and the Pennsylvania Constitution of 1776 separate assembly and the common good in a list. Both assert the right of the people, "to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."\(^71\) This approach limits assembly in neither of the ways discussed above.

The final state constitution including assembly at the time was the Vermont Constitution of 1776. It used all the same language as North Carolina and Pennsylvania but differed in its punctuation, separating “to consult for their common good” and “to instruct their representatives” with an em dash.\(^72\) This choice could be interpreted as limiting the right to consult on public good solely to the means of petition. Unlike the other four approaches, the freedom of assembly is left unconstrained in this phrasing, while petition is limited.

With these approaches in mind, we can turn to the language in the United States Bill of Rights. The entire First Amendment reads:

“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.”\(^73\)

Notably, the language in the Bill of Rights excludes any reference to the common good, unlike the state constitutions of the time. It also is a much briefer description of petition.

\(^71\) Thorpe and United States. 2788, 3081.
\(^72\) Thorpe and United States. 3741-2.
\(^73\) "The Bill of Rights."
Jason Mazzone argues in *Freedom’s Association* that the text of the First Amendment ties together assembly and petition. In other words, the Founders intended to limit one's freedom to assemble to petitioning the government. He makes two arguments in pursuit of this conclusion. First, the two rights are connected by, “and to petition,” while all the prior freedoms are separated by “or.” Second, it is the singular “right” of the people to assemble and petition, not the “rights” of the people.\(^74\)

John Inazu responds to both these criticisms in *Liberty’s Refuge*. He argues that the comma and “and” before petition can be explained by an earlier draft of the First Amendment.

When the First Congress was originally drafting the Bill of Rights, proposals from Virginia, North Carolina, New York, and Rhode Island all included assembly for consulting for the common good. The proposal James Madison presented to the House of Representatives on June 8\(^{th}\), 1789 read, “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.”\(^75\) The use of the possessive “their” differed from the proposals by Virginia and North Carolina, which both referred to “the common good.”

The possessive “their” is notable because it prevents the government from restricting assembly that might operate against their interests. Pendleton’s 1788 speech underscored how assembly is key to self-governance because it allows for organization against dysfunctional governments. Gatherings, especially those that have revolutionary

---

\(^{74}\) Mazzone, “Freedom’s Associations.”

\(^{75}\) Inazu, *Liberty’s Refuge*. 22. (emphasis added)
intent, are valuable precisely because they are not bound by what the government believes is the common good. The use of “their,” places power into the hands of the people, allowing them to assemble even if it is against the interest of other institutions.

This concern was reflected in House debates. On the topic of assembly, Thomas Hartley of Pennsylvania argued that anything compatible “with the general good ought to be granted.”\textsuperscript{76} Elbridge Gerry of Massachusetts sharply disagreed, responding that if “the people had a right to consult for the common good” but “could not consult unless they met for that purpose,” then Hartley was really “contend[ing] for nothing.”\textsuperscript{77} In other words, the common good could be defined so narrowly by law enforcement and the courts that it would prevent the people from being able to meet at all.

“Their common good” remained in the version of the amendment approved by the House in late August of 1789. By then, the text read: “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.”\textsuperscript{78} Eleven days later, the common good qualifier survived a motion to strike it in the Senate. It was not until the next week, when the freedom of religion was added into the amendment, that it was dropped without explanation.

The absence of the common good clause can be taken to have two significant impacts. First, its elimination explains the extra comma in the First Amendment. It demonstrates the assembly was intended to be separate from petition, and not constrained

\textsuperscript{76} Inazu. 22.
\textsuperscript{77} Inazu. 22.
\textsuperscript{78} Inazu. 23.
by it. Second, it shows that assembly should not be constrained by its content. Groups are permitted to consult for whatever they wish: it does not need to be in the interest of the common good of the United States or the common good of a group of people. This distinction leaves room for dissident or unpopular groups to gather despite their views.

There is still one qualifier to assembly in the First Amendment: the word “peaceably.” Dictionaries at the time of the founding define “peaceably” as meaning, “without disturbance,” “opposite to war or strife,” and “quietly.” Typically, it has been interpreted as placing a limit on assembly, by leaving rowdy or violent gatherings without constitutional protection. Peaceful assemblies are protected, those causing disturbances are not.

Nicholas Brod offers an alternative interpretation. He suggests that “peaceably” may qualify assembly as both a negative and a positive right. It prevents the right from extending to violent, out-of-control assemblies. But it also could be read as protecting non-violent assemblies from being disrupted. A group of protesters has the right to assemble in a park, so long as they are peaceful. At the same time, a group of protesters has the right to assemble in a park without disturbance from law enforcement. They may assemble in peace. Brod argues that this interpretation may require the government to protect certain spaces for assembly, making it a positive right by requiring action from the government.

79 Brod, "Rethinking a Reinvigorated Right to Assembly." 167.
80 Brod. 168.
81 Brod.
Assembly in the Founding Era

Beyond the social life in taverns, assembly manifested itself in Founding-Era life in a variety of ways. Festive politics emerged around elections, national holidays, and other celebratory events. The merriment included spontaneous parades, bonfires, feasts, public meetings, and more.82 Boston’s “biggest public political event” took place in celebration of the Battle of Valmy in France on January 24th, 1793.83 Multiple processions made their way through town. One was led by carts loaded with food, with men, women, and children of all races joining to follow from the rear. Picking up thousands of Bostonians, the parade traversed a new route that ended near the State House and dissolved into a feast.

These gatherings took place without prior permission from the government. Rather, they were spontaneous expressions of political celebration. They transcended social, racial, and gender lines.84

The Philadelphia Independence Day Celebration in 1795 illustrates the outer limits of assembly at the time. A counter-procession was organized in protest of the Federalist government. Made up of regular citizens, the group proceeded carefully through the streets—going so far as to cover wagon wheels to muffle the noise. Despite attempts by a militia to disperse them, the procession continued peacefully. The marchers understood their assembly could be restricted by its noise and violence, leading to

---

84 Newman. 123-125.
measures like covering the wagon wheel. However, there was no thought that being on the streets themselves could constitute an unlawful assembly.\textsuperscript{85}

Not all assemblies took the form of celebrations on the street. Democratic-Republican Societies organized and met privately to criticize the Washington administration. The societies explicitly invoked the freedom to assembly to justify their creation. For example, the Boston \textit{Independent Chronicle} argued in 1794 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.”\textsuperscript{86}

Notably, the \textit{Independent} refers to the right to assemble but applies it to associations. Assembly, by their definition, can apply to more permanent organizations, as well as public gatherings. Democratic-Republican Societies also illustrated the role that assembly played from the very beginning in self-governance. Assembly provided cover for dissident groups to gather and critique the government, free of fear and without necessitating “apology.”

\textsuperscript{85} Abu El-Haj, “The Neglected Right of Assembly.” 565-566
Assembly in the Early 19th Century

The festive politics of the late 1700s continued into the 19th century. The spontaneous and inclusive revelry in 1793 Boston was mirrored by the celebration in Philadelphia in 1830 after the French Revolution.\textsuperscript{87} Public meetings, to discuss anything from local politics to holiday planning, were such a common occurrence that papers in New York City included a “Public Meetings” column by the 1840s.\textsuperscript{88}

Scholarly writing reflected an understanding of assembly as essential and minimally restricted. Benjamin Oliver’s treatise \textit{The Rights of an American Citizen}, published in 1832, describes assembly as “one of the strongest safeguards, against any usurpation or tyrannical abuse of power.”\textsuperscript{89} This assertion underlines how important assembly is for democratic self-governance.

An article from 1844 in \textit{American Law Magazine} argues that assembly could only be regulated once it became unlawful. Quoting from a British case, in which the judge ruled that, "the constitution of this country does not (God be thanked) punish persons who, meaning to do that which is right in a peaceable and orderly manner” meet “under irresponsible presidency,” the author argues that the US legal system has the same doctrine with one difference.\textsuperscript{90} No permission is required from authorities to gather in the United States.\textsuperscript{91}

\textsuperscript{87} Abu El-Haj, “The Neglected Right of Assembly.” 558.
\textsuperscript{88} Abu El-Haj. 561.
\textsuperscript{89} Inazu, \textit{Liberty’s Refuge}. 29.
\textsuperscript{90} Abu El-Haj, “The Neglected Right of Assembly.” 567.
\textsuperscript{91} Abu El-Haj.
The complicated relationship between black civil rights and assembly began to take shape in the 19th century as well. The inclusiveness of street politics offered an opportunity to free Black citizens in the North. For example, an annual holiday marking the abolition of slavery in the United States was established by Black communities in Philadelphia and New York in 1808. This holiday was marked by celebratory parades that often ended at a communal meeting place.\textsuperscript{92}

In the Antebellum South, something very different was happening. Citizens and state legislatures placed severe restrictions on the rights of African Americans to assemble. In North Carolina, an 1818 petition requested for legislation to either prevent Black Americans from “assembling at musters or to punish them for so doing.”\textsuperscript{93} Two years later, two different petitions in South Carolina sought to ban church services for the “exclusive worship” of Black Americans.\textsuperscript{94} Similar petitions appeared in Mississippi, Virginia, and Delaware in subsequent years, all reflecting a desire by white Southerners to prevent assembly between Black individuals.\textsuperscript{95}

Legislatures passed a variety of restrictions on assembly across the South. Laws specifically preventing the gathering of slaves or free Black people existed in Georgia, South Carolina, Virginia, Maryland, Tennessee, Georgia, North Carolina, and Alabama.\textsuperscript{96} For example, an 1831 law in Virginia makes “All meetings of free Negroes or mulattoes

\textsuperscript{92} Abu El-Haj, 559.
\textsuperscript{93} “Petition to the General Assembly of the State of North Carolina.”
\textsuperscript{94} “Petition to South Carolina General Assembly.”
\textsuperscript{95} Inazu, \textit{Liberty’s Refuge}. 31.
\textsuperscript{96} Inazu.
at any school house, church, meeting house or other place for teaching them reading or writing, either in the day or the night [...] unlawful assembly.  

Abolitionist Thomas Dwight Weld might have put it best when he wrote in 1836 that “the right of peaceably assembling” had been “violently wrested—the right of minorities, rights no longer” from Black Americans by Southern governments. Beyond politics, these restrictions served to suffocate the social, cultural, and religious lives of the Black Americans who lived in the South.

There two key takeaways: first, white Southerners restricted the right to assemble and thus the right to associate because the two were treated as the same. Associations are more permanent groups whereas assemblies tend to gather on an ad-hoc basis. The gatherings that happen at schools and churches are thus associations by definition. For the first 150 years, associations were understood as being protected under the right to assemble. In the next chapter, I will discuss what happened after the Supreme Court officially separated the two in 1958.

Second, restrictions on assembly, beyond limiting expression, can diminish a way of life. The assembly restrictions in the Antebellum South were not just insidious because they prevented Black citizens from gathering to advocate for certain policies. Instead, the limits on assemblies prevented that rituals and meetings that build a community. Assemblies and associations, like church gatherings or marches, help citizens learn from each other, develop an identity and create ties to their community. This civic education is

---

crucial to an informed citizenry in democratic governance. It occurs through assemblies, regardless of expressive quality.

Assembly Post-Civil War

In 1870, Congress passed the first Enforcement Act in response to the violence of the Ku Klux Klan, using the authority given to them by the Fourteenth and Fifteen amendments. Along with reaffirming voting rights, the Act criminalizes the two or more persons acting "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."\(99\)

In *United States v. Hall* (1871), several Klansmen were convicted under the Enforcement Act for conspiring to violate the speech and assembly rights of Republicans after they killed and wounded attendees of a Republican campaign meeting. The Fifth Circuit court ruled that the due process clause of the Fourteenth Amendment expanded the application of First Amendment rights to the states because they were rights intrinsic to due process. Furthermore, the equal protection clause of the Fourteenth Amendment meant that failure to take state action was just as punishable as discriminatory legislation. Because the national government cannot infringe on the powers of an inactive state government, it instead must prosecute the actions of individuals.\(100\)

As a result of *Hall*, the federal government “had the power to protect freedmen not only from discriminatory state legislation but also from ‘state inaction, or

---

100 United States v. Hall et al, 26 F. Cas. 79.
incompetency.”  

101 This broad conception of assembly and state power was a valuable tool in fighting back against the suppression of the KKK.  

The Supreme Court reversed the Hall ruling in *United States v. Cruikshank* (1875). After a voting controversy in Louisiana, white perpetrators attacked and killed between 30 to 50 black citizens. Of the 98 white supremacists indicted under the Enforcement Act, only 9 were located and arrested. Of those, only three were convicted.  

103 The majority opinion limited assembly in two ways. First, by referring 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 duties or national government,” the Court implied that assembly was limited just to petition.  It is possible that the Court only intended petition as an example in a list. However, this phrasing was used later in *Presser v. Illinois* when Justice Woods argued that assembly was only protected for the purpose of petition—the only time in history that the Court has made this limitation explicit. In later cases, the Court has indirectly contradicted this assertion.  

105 Second, the Court severely limited who could be punished for violating First Amendment rights. The majority argued that the First Amendment, “like the other amendments proposed and adopted at the same time, was not intended to limit the powers

102 Inazu. 37-38.  
104 United States v. Cruikshank, 92 U.S. 542 (1875). 544. (emphasis added)  
of the State governments in respect to their own citizens, but to operate upon the National Government alone.”

106 Judicial theories like those in Hall were overturned—state governments were not to be constrained by the Bill of Rights through the Fourteenth Amendment.

Neither were private citizens. The Court used the due process clause of the Fourteenth Amendment to form their argument, suggesting that its mandate only applied to state governments, not interactions between citizens—a change from Hall’s invocation of the equal protection clause. Asserting that “the only obligation resting upon the United States is to see that the States do not deny” the “equality of the rights of citizens,” the Court dismissed the argument that the national government could prosecute individuals in response to state inaction.107

Cruikshank had long-reaching and devasting consequences in the Reconstruction South. One historian referred to it as a “green light to acts of terror.”108 Prosecution on the grounds of the Enforcement Act was made nearly impossible, which left it largely in the hands of white Southerners. It also significantly limited the reach of the Civil War amendments, slowing the momentum of Reconstruction.109

While the Supreme Court confronted few assembly-related cases, state courts were rife with activity in the latter half of the 1800s. In the wake of the Civil War, cities

109 Inazu, Liberty’s Refuge. 39.
began to regulate public spaces more heavily. Legal objections arose in response. Among such cases were conflicts over the legality of requiring advanced permission for parades.

Of the first seven state supreme courts states to confront such cases, all except the Massachusetts Supreme Court found such requirements to be unconstitutional. Some allowed for the possibility of time, place, and manner restrictions—but none found the conduct at issue to be disruptive enough to justify the overstep of municipal power. A running theme in these court decisions was that the strength of US “free and democratic institutions” is that “they allow great latitude when the people demonstrate in the street for political, religious, and social purposes,” a strength so important that it eclipses the inconvenience felt by a passerby.

The Massachusetts Supreme Court’s precedence wound up being the most influential on the Supreme Court of the United States. In 1897, the Supreme Court reviewed *Davis v. Massachusetts*. The Massachusetts court had argued that municipal governments may regulate public places however they please because they belong to the government. The Court reaffirmed this, writing, “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement on the rights of a member of the public than for the owner of a private house to forbid it in his house.” While they would later overturn this definition of

---

110 Notably, state courts did not take the same issue with city ordinances limiting the playing of instruments in the streets, as such an act did not fit with their conception of assembly.
112 Abu El-Haj, 575.
113 *Davis v. Massachusetts*, 167 U.S. 43.
Assembly in the 20th Century

The 20th century is marked by contradiction in the treatment of assembly. Permit requirements became a given, but public spaces were made more accessible. Social justice and labor movements utilized assembly to fight for their causes, but the US government passed restrictive wartime legislation. Assembly became extremely popular in political rhetoric and then disappeared from the public consciousness and Supreme Court opinions altogether.

Assembly was key in the women’s movement of the early 1900s. The National American Woman Suffrage Association (NAWSA) expanded from 45,000 members in 1907 to almost 2 million in a decade. Associations like this were key to developing and organizing the movement. They also helped develop a civic culture between women. Previously, women had been largely isolated to their homes. Meeting together offered them an opportunity to develop intellectually and form their own identities.115

Much of the movement’s growth came from public demonstrations which garnered national attention. The Suffragettes began an open-air campaign in 1908 that used street meetings, soap-box oration, and picketing to spread their message. Because women lacked political power, they were seen as less threatening than other social movements, like labor. As a result, they encountered less trouble with obtaining

---

115 Lumsden, Rampant Women. xix.
permission to use public spaces in the wake of the *Davis* decision.\textsuperscript{116} The movement also did not limit itself to traditional demonstrations: "banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes" were all used to further the cause.\textsuperscript{117}

The Nineteenth Amendment was passed on August 26\textsuperscript{th}, 1920 after Tennessee became the thirty-sixth state to ratify it, enshrining women's right to vote in the US Constitution. Both the assemblies and associations of the Suffragettes were key in its passage. The National Women's Party used picketing and dramatic protests in 1919 to make national news and place pressure on politicians in Washington. Many of the picketers were arrested, which only gave the movement more publicity. The NAWSA focused its efforts on lobbying, using its cordial relationship with President Woodrow Wilson to exert pressure on undecided Congresspeople.\textsuperscript{118}

Linda Lumsden argues that the “suffrage movement exemplified how the right of assembly can effect change in a democracy.”\textsuperscript{119} Women did not have the right to vote, so they could not influence all-male assemblies by traditional means. Instead, they used assemblies in public forums to agitate an indifferent public.\textsuperscript{120} Because assemblies were considered political activity, the use of them by women was revolutionary in and of itself.\textsuperscript{121} She argues that assembly was not just important to suffragettes, but rather is “the prism” through which the whole movement can be understood.\textsuperscript{122}

\begin{footnotes}
\item[116] Lumsden, 37–38.
\item[118] Lumsden, *Rampant Women*. 130-139.
\item[119] Lumsden. xiv.
\item[120] Lumsden.
\item[121] Lumsden, xvii.
\item[122] Lumsden, 144.
\end{footnotes}
The use of assembly by the suffragettes is instructive in understanding assembly as a tool for self-governance. Their ability to access public spaces to disrupt social norms and spread their message was essential. The fact that permit requirements were not used to stifle movement suggests more about the importance of free access to public forums rather than the effectiveness of such regulations. Tactics like this show how the conduct of assemblies is just as critical to their end goal and their message.

Civil rights activists were also able to use assembly to their benefit. The National Association for the Advancement of Colored People (NAACP) emerged from the first National Negro Conference in 1909 and the Universal Negro Improvement Association (UNIA) was formed shortly after. Both grew rapidly. Associations were not the only form of assembly used in this movement—The Harlem Renaissance was marked by collaboration between artists and writers in the same community. Free to associate together, interactions between the creatives in Harlem resulted in, “a cohesive force in the efforts of the group.”

The Industrial Workers of the World (IWW) formed in 1905 as part of the labor movement. In the demonstrations and strikes that occurred across the country afterward, the organizers repeatedly invoked speech and assembly to defend their actions. After several IWW leaders were arrested during a silk strike, the IWW publication Solidarity warned that America “has turned to hoodlumism and a denial of free speech and assembly to a large and growing body of citizens.”

---

124 Inazu. 47.
125 Inazu. 48.
As the eve of World War I approached and fear of communism spread across the country, new restrictions on assembly emerged. The Espionage Act of 1917, the Immigration Act of 1918, and the Palmer Raids in 1920 all diminished American's ability to freely assemble.

Communist organizations and assembly came before the Court for the first time in Whitney v. California (1927). Anita Whitney was prosecuted for her association with the Communist party under the California Criminal Syndicalism Act. There is an important distinction here: the prosecution’s argument was not that Ms. Whitney herself had advocated for violence, but that the organization with which she associated engaged in syndicalism.\(^\text{126}\) Despite this, the majority and concurring opinions focused their arguments on speech first and assembly (which is used interchangeably with association in both) second. Ultimately, the Court held that the California Act did not violate the Fourteenth Amendment.\(^\text{127}\)

Justice Brandeis’s concurrence is seen as one of the most important Court opinions on free speech ever. It employs his self-governance argument and is part of the series of opinions created with Justice Holmes that established the “clear and present danger” test.\(^\text{128}\) However, assembly also plays an important role in the Whitney concurrence. Justice Brandeis treats speech and assembly as coequal, arguing:

“Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the

\(^{126}\) Bhagwat, “Associational Speech.” 984.
\(^{127}\) Whitney v. California, 274 U.S. 357.
\(^{128}\) Bhagwat, “Associational Speech.” 983.
deliberative forces should prevail over the arbitrary. [...] that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.”

Before \textit{Whitney}, speech and assembly had only been tied to each other in two previous cases. Afterward, the two would be connected hundreds of times.\footnote{Whitney v. California, 274 U.S. 357.} What is worth emphasizing here is that both are treated with equal importance. Assembly is not a means to free speech, but rather a separate entity that is essential to self-governance, the two rights being mutually strengthened by each other. Both freedoms contribute to the development of citizen's faculties. Men may exchange ideas and form communities in a way that transcend just speaking because of assembles.

A decade later, the Court was confronted once more with a case featuring communist organizations and the right to assemble: \textit{De Jonge v. Oregon} (1937). Dirk De Jonge had been convicted under the Oregon criminal syndicalism law for assisting “in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party”\footnote{De Jonge v. Oregon, 299 U.S. 353.}. The opinion sided with DeJonge and struck down the Oregon statute. Most importantly, it applied the right to assembly to the states through the due process clause of the Fourteenth Amendment, changing the precedent set by \textit{Cruikshank}.\footnote{De Jonge v. Oregon, 299 U.S. 353.}

\textit{De Jonge} echoed much of Brandeis's language from \textit{Whitney}. Chief Justice Hughes argues in the opinion that the Oregon statute’s limitations upon free speech and
assembly are too broad to be acceptable. Like Brandies, he treats the rights as equivalent, describing assembly as “cognate” and “equally fundamental” to free speech and press.\[^{133}\] Finally, he invokes self-governance to drive home the importance of these rights. Just as Pendleton gestured to assembly as a peaceful means to change government 150 years earlier, Chief Justice Hughes argues that “the very foundation of constitutional government” comes from the preservation of free speech, press, and assembly because they “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,” rather than violent ones.\[^{134}\]

Another landmark case for assembly was decided just two years later. The conflict in *Hague v. CIO* (1939) arose from the New Jersey mayor refusing to issue permits to labor groups—like the Committee for Industrial Organization—to speak and disseminate information in public parks. The permit denials were part of a larger effort by the Mayor to prevent union organizing, though limiting assembly and speech in public spaces was one of his best tools.\[^{135}\]

*Hague* brought the precedence set in *Davis v. Massachusetts* before the Court. Forty years earlier, the Court had held that a preacher was only allowed to use a public park for sermons “in such mode and subject to such regulations as the legislature, in its wisdom may have deemed proper to prescribe.”\[^{136}\] In *Hague*, they changed course. The Court distinguishes the case from *Davis* by pointing out that the city ordinance in the

\[^{136}\] Davis v. Massachusetts, 167 U.S. 47.
latter prohibited activities unrelated to speech and assembly, unlike the New Jersey statute. Thus, they have “no occasion to determine whether, on the facts disclosed, the Davis case was rightly decided.”

The amicus brief sent by the American Bar Association for Hague “contributed significantly” to the Court’s decision. It repeatedly emphasized the importance of assembly, calling it “an essential element of the American democratic system,” which allows citizens to meet for “the discussion of their ideas and problems—religious, political, economic or social.” It also asserted that protecting assembly should take large precedence over public disorder, stating that public officials have the “duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.”

The American Bar Association’s brief extended beyond the arguments made by the CIO. They emphasized how the New Jersey mayor’s actions violated the principle of peaceable assembly, and thus one of the central tenets of American governance. The CIO chose to limit their arguments to the discrimination they suffered during permitting. But it is the broad principle of assembly on which the Hague decision is based.

The decision argues that “use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” They acknowledge that assembly is not an absolute right, but insist that “it must not, under the

guise of regulation, be abridge or denied."\textsuperscript{142} The \textit{Hague} decision also created the public forum doctrine. It protected public areas as places of speech and assembly which may not be irrationally denied from citizens. To do so, the Court invoked the history of the United States, describing how “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly.”\textsuperscript{143}

Around the time \textit{Hague} was decided, assembly was hitting a cultural high point. The labor movement in the United States was becoming more popular, and as a result, so was the freedom to assemble. In 1936, Congress held hearings on the “violations of the rights of free speech and assembly” against unions. The La Follette Committee was created to investigate these concerns. Five years later, the committee concluded, tying economic conflict to extreme violations of civil liberties and referring to association as “the result of the exercise of the fundamental rights of free speech and assembly”—not just assembly, as the Court had been.\textsuperscript{144}

Conflict in Europe before World War II also brought assembly into political rhetoric. Herbert Hoover included assembly as one of the “invisible sentinels which guard the door of every home from invasion of coercion, of intimidation and fear” in opposition to “Fascist Italy, Nazi Germany, Communist Russia” and others in a 1935 speech.\textsuperscript{145} Meanwhile, Harold Ickes, the interior secretary to President Roosevelt, 

\begin{footnotes}
\item\textsuperscript{142} Hague v. CIO, 307 U.S. 516.
\item\textsuperscript{143} Hague v. CIO, 307 U.S. 515.
\item\textsuperscript{144} Inazu, \textit{Liberty’s Refuge}, 52.
\item\textsuperscript{145} Associated Press, “Hoover’s Warning of the Perils to Liberty.”
\end{footnotes}
suggested that freedom of speech, press, and assembly were the only rights essential to ensuring, “anchorage for the mooring of our good ship America.”146

At the 1939 World Fair in New York, assembly took center stage as one of “Four Freedoms.” Celebrating the freedoms of assembly, religion, speech, and press was the idea of Arthur Sulzberger, president and publisher of the New York Times. The president of the fair later described Salzberger’s vision:

“[W]e could teach the millions of visitors to the fair a lesson in history with a moral. The lesson is that freedom of press, freedom of religion, freedom of assembly and freedom of speech, firmly fixed in the cornerstone of our government since the days of Washington, have enabled us to build the most successful democracy in the world. And the moral is that as long as these freedoms remain a part of our constitutional set-up we can face the problems of tomorrow, a nation of people calm, united and unafraid.”147

Salzberger’s vision underscores the connection between democratic governance and assembly. From the beginning of the American experiment, assembly was an essential component. Including it among the four freedoms acknowledges this importance.

In the lead up to the World Fair, some went so far as to call assembly the most crucial of the four. Dorothy Thompson, the “First Lady of American journalism” whose tri-weekly syndicated column had eight to ten million readers, dubbed it the most essential.148 On her New Year’s Day radio broadcast, she argued that assembly is “the

---

146 Inazu, Liberty’s Refuge. 52.
147 “MILE-LONG MALL FEATURE OF FAIR.” 58.
148 Inazu, Liberty’s Refuge. 56.
guaranty of the three other rights.” Discussions, speeches, community gatherings, religious worship, and publication all rely on the ability of people to gather.

The *Hague* decision was released a month after the opening of the fair. The New York Times declared that "with the right of assembly reasserted, all 'four freedoms' of [the] Constitution are well established." By the end of 1940, a poll found that 89.9% of Americans thought restrictions on freedom of assembly would diminish their personal liberties. Only 81.5% of respondents said the same for freedom of speech by press and radio.

**Assembly on the Decline**

Assembly’s cultural popularity was not to last. President Roosevelt's State of the Union address on January 6, 1941, also included "four essential freedoms": freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. Assembly had not made the cut. Instead, President Roosevelt presented his four freedoms as promising a world free of tyranny.

He used the United States as an example of these freedoms, arguing, “[s]ince the beginning of our American history, we have been engaged in change—in a perpetual peaceful revolution—a revolution which goes on steadily, quietly adjusting itself to changing conditions—without the concentration camp or the quick-lime in the ditch.”

---

149 Inazu. 56.
150 Inazu. 56.
151 Inazu. 57.
152 Roosevelt, “State of the Union.”
153 Roosevelt.
His reasoning fails to acknowledge the role that assembly has played in the “perpetual peaceful revolution.” Assembly, for protest, discussion, and celebration, was essential to the formation of the US government and its subsequent evolution. They are how men and women can meet peacefully to reform their government through legislation and amendment.

President Roosevelt’s four freedoms quickly overtook those of the World Fair. They were added into the Atlantic Charter by Roosevelt and Churchill. Norman Rockwell created four paintings in response and Walter Russell was commissioned to create a statue. The Saturday Evening Post printed essays on each freedom. Assembly was not eradicated from the public mind but it had suffered a serious blow. Its exclusion from the four freedoms implied that “freedom of speech and expression” could sufficiently protect gatherings of citizens for exchanging ideas. This assumption is erroneous. There are crucial ways that assemblies operate independently of their expression to develop norms of self-governance.\textsuperscript{154}

The Court decided \textit{Cox v. New Hampshire} in 1941. A large group of Jehovah Witnesses had paraded through Manchester, New Hampshire without first obtaining a permit. The Court found that this violated the Manchester ordinance, ruling that “the authority of a municipality to impose regulations to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties, but, rather, as one of the means of safeguarding the good order upon which

\textsuperscript{154} Inazu, \textit{Liberty’s Refuge}. 
they ultimately depend.” As a result, the Court justified placing “time, place, and manner” restrictions on public streets “in relation to the other proper uses of streets.”

Treating permit requirements as “a means of safeguarding the good” was a shift from earlier decisions like *Hague* which emphasized preserving assembly over regulation as much as possible. It suggests that public convenience was more important than public assembly.

The assertion that such restrictions had “never been regarded as inconsistent with civil liberties” also ignored the long history of spontaneous assembly in the United States, especially in the Founding era. When gatherings are limited by permit requirements, there are two consequences: they cannot respond immediately to current events and they cannot always access the forums that would make their assembly impactful.

For example, the celebrations after the Battle of Valmy in Boston were spontaneous affairs. Because none of the marches celebrating the victory had to obtain permission to use public streets, they could immediately react to news. This groundswell celebration strengthens the political awareness of its participants. The fact that the marches could freely use the streets also allowed them to spread the celebration across Boston. Indeed, many of the parades picked up marchers as they went along. Permit requirements that limit access to certain spaces prevent assemblies from having as expansive of an impact.

As the United States descended into World War II, new restrictions were placed on assembly. Concern over communism grew. After Pearl Harbor, the civil liberties of

---

Japanese Americans were egregiously restricted. The FBI reportedly feared that "the very gathering of Japanese Americans into a group guaranteed that suspicious activities would take place," which in turn justified the creation of repressive internment camps.\textsuperscript{157}

Assembly experienced a slight resurgence during the Civil Rights Movement for the protection it afforded to protests and demonstrations. The Movement used various forms of assembly as political protest. The Greensboro Sit-Ins involved black protesters sitting at segregated lunch and led to the desegregation of eating places across the United States.\textsuperscript{158} The March on Washington in 1963 brought 200,000 peaceful protesters to the Lincoln Memorial in support of racial equality.\textsuperscript{159} Two years later, thousands marched from Selma to Montgomery, Alabama in support of voting rights.\textsuperscript{160}

The March on Washington in 1963 brought 200,000 peaceful protesters to the Lincoln Memorial in support of racial equality.\textsuperscript{159} Two years later, thousands marched from Selma to Montgomery, Alabama in support of voting rights.\textsuperscript{160}

The March on Washington in 1963 brought 200,000 peaceful protesters to the Lincoln Memorial in support of racial equality.\textsuperscript{159} Two years later, thousands marched from Selma to Montgomery, Alabama in support of voting rights.\textsuperscript{160}

In return, civil rights leaders organized a four-day march from Selma to Montgomery, Alabama down U.S. Highway 80. They sought a federal permit protecting their march in the case \textit{Williams v. Wallace}. In deciding to grant the permit, Judge Johnson deviated from First Amendment doctrine. Highways are a non-public forum,

\begin{flushright}
\textsuperscript{157} Inazu, \textit{Liberty's Refuge}. 60.
\textsuperscript{158} United Press International, "Sit-Ins Victorious Where They Began."
\textsuperscript{159} Kenworthy, "200,000 MARCH FOR CIVIL RIGHTS IN ORDERLY WASHINGTON RALLY; PRESIDENT SEES GAIN FOR NEGRO; ACTION ASKED NOW."
\textsuperscript{160} Krotoszynski, "Celebrating Selma." 1416.
\textsuperscript{161} Krotoszynski. 1417.
\end{flushright}
leaving the government free to regulate them to prioritize public convenience.\textsuperscript{162}

However, Judge Johnson argued that:

“the extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and ‘living’ document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against.”\textsuperscript{163}

This reasoning both celebrates and stifles assembly. On one hand, it recognizes the importance of assembly in self-governance. It is essential to the expression of grievance against the governance. On the other hand, it implies that assembly must have a purpose to be justified in its protection.

This approach is different from how the Founders envisioned it when they choose to leave assembly free of limitations, even the common good. An assembly would only be dispersed once it became a nuisance or riotous; the content was not figured into the protections it was granted, only its conduct.\textsuperscript{164} The approach by Judge Johnson inverts this. This precedence is dangerous for dissident groups whose intentions might be widely regarded as unimportant. Indeed, depending on the judge they encountered, the NAACP might be denied protections under the very same test.

Assembly was also referenced by Martin Luther King Jr. in his writings and speeches, including the prophetic “I Have Been to the Mountaintop” speech.\textsuperscript{165} After being arrested in Alabama while protesting for voting rights, he wrote “Letter from a

\textsuperscript{162} Krotoszynski.
\textsuperscript{163} Krotoszynski. 1422.
\textsuperscript{165} Inazu, Liberty's Refuge.
Birmingham Jail” from his cell. In the letter, he specifically references the permitting of parades, arguing, “such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.” His complaint echoes that of labor unions in *Hague*.

By the 1960s, assembly was only used by the Court to overturn convictions of peaceful protesters in the Civil Rights Movement. Judicially, freedom of speech had expanded to protect much of what might have been decided under assembly. This shift can be traced back to Justice Brandeis’s connection between “free speech and assembly” in *Whitney*, although he had treated the two as coequals.

The Court ruled on almost 30 cases that centered on convictions of peaceful protesters, usually attendees to sit-ins, in the early 1960s. They limited their rulings to narrow grounds like that protesters maintained peaceful conduct or city ordinances compelling segregation were to blame. By doing so, the Court dodged broader rulings about the nature of assembly and protest in semi-public spaces, while still supporting the Civil Rights Movement. In contrast, the Court chose to extend their argument in *Hague* to broader principles, rather than focus on the discrimination suffered by the CIO.

Overall, the Civil Rights Movement demonstrated the tension that has existed between black liberation movements and the freedom to assemble since the founding. Assembly remains one of the best tools to express grievances and promote peaceful, democratic change. It also can be suppressed through legislation, petitions, and Court rulings. Both these realities existed in the 1960s.

---

In *Perry Education Association v. Perry Local Educators’ Association* (1983), the Court decided that school mail faculties could not be considered “public forum” and struck down Perry Logical Educator’s Associations complaint. The opinion included that, “in quintessential public forums, the government may not prohibit all communicative activity" and that time, place, and manner restrictions must "leave open ample alternative channels of communication." In doing so, the use of public forums was restricted solely to communicative activities. Assembly may occur only as an expressive act and even then, so long as the government leaves open channels for speech, assemblies may be prevented entirely. This shift meant that the Court could discuss cases involving assembly in public forums without mentioning assembly itself. Instead, cases could be decided on the grounds of free speech.

The impact of this change is evident. The Supreme Court has not ruled on a case on the grounds of assembly for the last thirty years.

**Conclusion**

Assembly has changed significantly throughout the history of the United States. However, there are fundamental conflicts that continually arise around it. Whether or not assembly needs to be driven by a purpose was at issue when the First Congress was debating the phrasing of the First Amendment. It emerged in a different light in the Selma case, where assembly was extended precisely for its intended purpose. But in *Perry*, assembly was limited to “communicative activity.” This choice not only led to

---

assembly’s elimination from Supreme Court decisions, but also leads to strong limits on the right to association which I will explore in the next chapter.

There is also the inescapable tension between the value and cost of assembly. Assembly is an essential freedom in a democratic society. It allows for groups to gather, exchange thoughts, protest, petition their government, and generate change. The importance of the act of assembly cannot be overstated: it is why there is a US Constitution in the first place. The use of public protest and the exchange of ideas in places like taverns were instrumental in developing public opposition to Britain. The meetings that drafted the Declaration of Independence and the US Constitution were also assemblies. Had those men not been able to meet and exchange ideas, the system of democratic governance which we have today would never have been formed.

This principle is at odds with the practicality of implementation. Throughout the first century, assembly was left largely unimpeded by regulations. *Davis v. Massachusetts* changed this, handing public spaces over to the control of local government. Though *Hague* would later reverse the decision, assembly would never again to unlimited by retractions in Supreme Court doctrine, as solidified in *Cox*. This decision is understandable: public spaces are for all public uses, not just assembly.

However, drawing lines on when assembly becomes too disruptive is difficult. This problem is illustrated by various social movements. Labor unions and communist organizations both found themselves denied permits and meeting spaces—and thus assembly—because of their causes. The syndicalism laws in *DeJonge* and permit denial in *Hague* are examples of this. Suffragettes avoided the same degree of persecution because they were perceived as less threatening because of their class and lack of
political status. Still, they encountered their own troubles with violent law enforcement and arrest while petitioning.

No group of Americans has experienced more contradiction with the freedom to assemble than Black citizens. Parades were used to celebrate Black liberation before the civil war, the NAACP and Harlem Renaissance both began under the protection of assembly, and demonstrations were key to the 1960s Civil Rights Movement—which had the support of the Supreme Court. At the same time, the Antebellum South placed extreme restrictions on all forms of assembly by Black citizens, suffocating their political, social, and religious lives. After the Civil War, the Supreme Court ruled on *Cruikshank* and limited the scope of the Fourteenth Amendment, taking away the protections offered by the Enforcement Act and First Amendment. And during the Civil Rights Movements, permits were repeatedly denied, and peaceful protests were broken up by violence from law enforcement. As association became its own freedom separate from assembly, these same contradictions were carried over.

In sum, this chapter followed the evolution of assembly in the United States. It began with the formation of the First Amendment right, unconstrained by the common good or by petition. I explored assembly in the Founding Era, from boisterous celebrations in Boston and quiet dissident marches in Philadelphia, to partisan debate clubs under Federalist administrations. Then, I tracked assembly through the 19th century, as it was repeatedly denied to Black citizens in the South but protected from permit or public space requirements by state courts. In the 20th century, I showed how the First Amendment was applied to the states, how the public forum doctrine was established, and how permit requirements became acceptable. Assembly was used by women’s
suffrage movements, labor organizations, and civil rights movements to advocate for change. Finally, assembly reached a cultural high in 1940, only to become irrelevant by the 1980s.

I will explore the history of association in the next chapter. Association emerged as a new means to protect the NAACP during the Civil Rights Movement. Through litigation, it was repeatedly denied to communist organizations. The advent of the right to privacy complicated association, by making it stronger as an independent entity but more limited as it applied to intimate and expressive associations. By the close of the 20th century, it too was largely eclipsed by freedom of speech.
III. History of Association

Association became an independent, nontextual right in 1958. But it has existed as a part of US political philosophy and legal doctrine since the Founding.

Assembly and association carry distinct meanings. Definitions in the Oxford English Dictionary from the 18th century reveal these differences. Assembly was understood to refer to ad hoc gatherings of people, whereas associations were more or less permanent groups—collections who “have combined to execute a common purpose.”169 Both were considered forums at which citizens may engage in self-government. In this sense, the two can be used interchangeably.

Whether or not the Founders intended to make this distinction is debatable. The word “assemble” is used twice in the Constitution, both referencing Congress. Article I, Section 3 declares that the First Senate will be "assembled" and then divided into staggered reelection years.170 Article I, Section 4 mandates that “Congress shall assemble at least once in every Year.”171 Both uses specify the gathering of a permanent group—Congress—who works for the end purpose of governance. Thus, the references to

169 “Association, n.”
assembly in the Constitution imply the existence of associations. The protection of assembly in the Bill of Rights necessitates subsequent protections for such associations.

In the last chapter, I explored the history of the right to assemble in the US, beginning with the Founding era. How assembly was treated and used in this time varies dramatically from how it is treated today. There has been a shift in perspective. Whereas assemblies were widely seen as a crucial part of democratic governance, they have since come to be treated merely as means to free speech.

In the Founding era, assemblies were essential to festive politics. Most of these assemblies were not expressive by the Court's standard; they did not have a clear end goal or list of demands. But gatherings like parades to celebrate holidays, feasts on voting days, and meetings at taverns to discuss current events made up a civic life that kept the citizenry informed and engaged with governance.172

This understanding of assembly as fundamental to democratic government has eroded through time. Permit requirements were placed on gatherings to restrict them, the public forum doctrine was created, and eventually, the right became secondary to speech. Still, assemblies remained an important part of American life. The suffragettes, labor movement, and NAACP all used assembly as a means to pursue real democratic governance.173 The suffragette's fight for the vote is especially emblematic of how assemblies are an important part of political representation.174

173 Inazu, Liberty’s Refuge.
174 Lumsden, Rampant Women.
This pattern is useful for contextualizing the treatment of free association. After being separated from assembly, association remained a crucial part of self-governance in the United States. Specifically, it was used to great success during the Civil Rights Movement to protect the NAACP. As I show, association too became consumed by expressive requirements which confuse the ultimate purpose of the freedom by being too restrictive.

This chapter will build on the history of assembly in Chapter II in two ways. First, it will expand on the dangers of group rights being treated as a means to free speech. The devolution of association into expression is more gradual, and thus more reveals more about the repercussions. Second, it will highlight the way modern associations have used, or attempted to use, freedom of association to influence democratic change.

To begin this chapter, I will consider Alexis de Tocqueville’s description of associations in American life. His argument highlights how association can be distinguished from assembly and the unique role it plays in a democratic society. I then consider three cases decided before 1958 which center on association: *Whitney v. California* (1927), *Bryant v. Zimmerman* (1928), and *Bridges v. Wixon* (1945). These cases offer insight into how association was treated before it became a formalized right. The Court continually emphasizes the balance between state interest and individual liberties, while also recognizing the importance associations have to democratic governance. *Bryant* offers a new perspective on Tocqueville’s theories. *Bridges* and

---

175 Tocqueville and Reeve, *Democracy in America. Volumes I & II.*
Whitney both deal with the threat of communism, a pattern that arises again after freedom of association is officially established.\textsuperscript{176}

In 1958, the Court decided the landmark case *NAACP v. Alabama* and establishes the right to association. There are two valuable takeaways from this decision: first, in the decision, the Court sets up associational freedom by partially tying it to its expressive purpose. This begins a trend that will eventually lead to the elimination of association in favor of speech. Second, *NAACP* has remarkable similarities to *Bryant*. Its differences offer a valuable perspective on the purpose of association in the United States.\textsuperscript{177}

After *NAACP*, freedom of association was used to protect the racial equality movement. I point to *Bates v. City of Little Rock*, *Shelton v. Tucker*, and *Louisiana v. NAACP* as cases that all protected the NAACP’s activities in the South. In each of these cases, association is connected less and less to assembly and more to expression.\textsuperscript{178}

In contrast, the cases from the same time relating to communist organizations prioritized state interest over free association. *Uphaus v. Wyman* and *Barenblatt v. United States*, both decided immediately after *NAACP*, exemplify this dichotomy.\textsuperscript{179} The pattern continued in *Communist Party v. Subversive Activities Control Board (SACB)* and *Scales v. United States*. In each, the Court uses a balancing on compelling state interest to deny individual freedoms because of the ideology of communism.\textsuperscript{180}

\begin{footnotesize}
\begin{enumerate}
\item[177] NAACP v. Alabama ex rel. Patterson, 357 U.S.
\item[179] Uphaus v. Wyman, 360 U.S.; Barenblatt v. United States, 360 U.S.
\item[180] Inazu, *Liberty’s Refuge*. 85.
\end{enumerate}
\end{footnotesize}
The Court’s interest in protecting the NAACP and opposition to Communism was brought to a head in *Gibson v. Florida Legislative Investigation Committee*. After the turnover of two Justices, the Court maintained its commitment to the NAACP in a 5-4 decision. The opinion turns on associational freedom—assembly is only mentioned in the concurrence and is constrained to its expressive value.\(^{181}\)

The next landmark case I discuss was almost one based on freedom of association—*Griswold v. Connecticut*. Decided in 1972, *Griswold* established the right to privacy—the second formal nontextual right created by the Supreme Court. While the original draft of the decision focused on association, the expressive limitations the Court had placed on it in earlier decisions made it a weak legal argument. Instead, the right to privacy was created by drawing on the First, Third, Fourth, Fifth, and Ninth Amendments. Privacy strengthened the legitimacy of association as another non-textual right. But it would come to limit association in the *Roberts* decision a decade later.\(^{182}\)

In *Roberts v. United States Jaycees*, the Court created a new test for association that protected two different sorts of organizations: expressive associations and intimate associations. By formalizing these distinctions, association was made secondary to speech and privacy because it protected associations only engaged in those two activities.\(^{183}\) The fallibility of defining associations by their expressive content was made clear in the 5-4 decision *Boy Scouts of America v. Dale*, which centered on whether or not the Boy Scouts were expressively anti-gay.\(^{184}\)

\(^{181}\) *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S.
\(^{183}\) *Roberts v. United States Jaycees*, 468 U.S.
\(^{184}\) *Roberts v. United States Jaycees*, 468 U.S.; *Boy Scouts of America v. Dale*, 530 U.S.
As a result of *Roberts*, association became eclipsed by speech in the later decisions *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, and *Christian Legal Society v. Martinez*. Like assembly in *Perry Education Association* thirty earlier, the Court found it was able to sufficiently decide association cases on speech grounds because association had been constrained so completely to expression.\(^{185}\)

**Tocqueville on Association**

Alexis de Tocqueville expounds on the benefits of associations in US political life in *Democracy in America*. His observations are valuable both for those that are accurate and those that have proven to be false.

Tocqueville argues that free associations are uniquely suited to and especially important for the United States. In the United States, associations are a “dangerous expedient […] used to obviate a still more formidable danger”—tyranny of the majority.\(^{186}\) It is precisely because the United States is a democracy that association is so essential. The freedom allows minority groups to organize against whoever is in power, an important restriction in a system designed to empower the majority. In other systems of government, like aristocracies, protecting the minority is less important. The liberty of association is also “unbounded” in the United States. This quality makes it less dangerous by preventing conspiracies. Where there is total freedom of association, “secret societies are unknown.”\(^{187}\)


\(^{186}\) Tocqueville and Reeve, *Democracy in America. Volumes I & II*. 121.

\(^{187}\) Tocqueville and Reeve. 122.
He contrasts the US system with European systems to emphasize the well-suitedness of free association to the United States. Associations in America are used peaceably and legally, as citizens in the minority organize “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.”¹⁸⁸ In contrast, he suggests Europeans are inclined to use association “as a weapon” to create immediate conflict against their opponent.¹⁸⁹ This is why associations are a “dangerous expedient”: they can quickly turn from a group that advocates for different opinions to a group that enforces those opinions, often through violence.

Tocqueville identifies two key causes of this difference. First, opinions in US society are divided by “mere differences of hue,” whereas in Europe, there are multiple parties that find themselves diametrically opposed. This extreme disparity inclines an association to take more drastic action, like attacking the government. Second, the United States has universal suffrage, which means the majority in power is always reflective of the majority of citizens. Tracking the opinion of the majority is more challenging when there is no universal suffrage.

These last two arguments are important to take note of while tracing the history of assembly and association. First, Tocqueville’s warning about diametrically opposed associations applies to several different groups in US history, like the KKK and the Communist Party. His theory offers insights into these cases. Second, universal suffrage

¹⁸⁸ Tocqueville and Reeve. 122.
¹⁸⁹ Tocqueville and Reeve. 122.
did not actually exist in the United States when *Democracy in America* was written in 1830—only white men could vote.\(^{190}\) Freedom of association and assembly was important in fighting for voting rights, for both women and black citizens, as illustrated in the last chapter.

**Pre-1958 Association**

The close connection between assembly and association is undeniable in US jurisprudence: the Supreme Court used the two terms interchangeably for 150 years.\(^{191}\) That being said, the meanings of the two words are distinct enough that there are cases where the Court chose to focus mainly on association. The three decisions which did so prior to 1958 are *Whitney v. California* (1927), *Bryant v. Zimmerman* (1928), and *Bridges v. Wixon* (1945).\(^{192}\) Fittingly, these three cases all relate to social movements which would become extremely relevant to the freedom of association after its coining: Black civil rights and communist organizing.

In *Whitney*, which I explored last chapter, the Court found that the California Criminal Syndicalism Act, which made anyone who, “is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism” a felon, was detailed enough to not violate due process. Justice Sanford, who wrote the majority opinion, explicitly recognized the right to association, stating that the act did not violate the Due

\(^{190}\) “The Bill of Rights.”

\(^{191}\) Bhagwat, “Associational Speech,” 990.

\(^{192}\) Wyzanski, “The Open Window and the Open Door.”
Process Clause of the Fourteenth Amendment because it was not a significant restraint on “the rights of free speech, assembly, and association.”\textsuperscript{193} As such, Ms. Whitney’s participation in the Resolution Committee of the Communist Labor Party was sufficient to indict her under the Act.\textsuperscript{194}

While Justice Brandeis’s concurrence is mainly focused on speech and assembly, Justice Sanford concludes with a discussion of association. He recognizes that the “essence of the offense” under the California act is “combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful means.”\textsuperscript{195} This terminology invokes the distinction between assembly and association discussed above; the former tends to be ad hoc, while the latter is semi-permanent. It is also notable because the act itself refers to “assemblages” and groups who “assemble.” The choice by the Court to discuss assembly reflects an understanding of how closely tied the two rights are.

It also allows the Court to argue that associations are uniquely dangerous and hold that the restrictions placed on association were acceptable under the California act.\textsuperscript{196} Assemblies and associations both involve group gatherings. The cohesive action of many is naturally more dangerous than the actions of one because of their size. So, an independent right like speech does not pose the same threat as a group right. Associations then transcend assemblies in risk because they imply a longer planning period. A more

\textsuperscript{193} Whitney v. California, 274 U.S. 371.
\textsuperscript{194} Whitney v. California, 274 U.S. 357.
\textsuperscript{195} Whitney v. California, 274 U.S. 371-372. (emphasis added)
\textsuperscript{196} Whitney v. California, 274 U.S. 372.
permanent organization is capable of creating more dramatic action because of planning.\textsuperscript{197}

For example, the Constitutional Convention was a long-term assembly of men. Over four months, the gathering created a draft of the US Constitution. This gathering was not spontaneous or brief. Instead, it was the drawn-out nature of the association that resulted in its larger impact. Associations thus can be more threatening and more crucial than traditional assemblies.\textsuperscript{198}

The danger that associations can uniquely pose was at issue once more in \textit{Bryant v. Zimmerman} (1928). The case centered on the membership lists of the Ku Klux Klan in New York, an issue that would arise again thirty years later for a very different organization, the NAACP. In \textit{Bryant}, a New York regulation required associations with oath-bound memberships to file their constitutions and lists of their members, or risk being arrested. Mr. Bryant objected to this regulation after his arrest, arguing that it violated the privileges and immunities clause of the Fourteenth Amendment and unfairly targeted members of the KKK. The Court ruled against Mr. Bryant on both counts.\textsuperscript{199}

The Court does not mention assembly once in the opinion. Instead, they focus on association. First, the Court argues that requiring membership lists is not a violation of the Privileges and Immunities Clause of the Fourteenth Amendment because any protections afforded to “a member of a secret, oath-bound association within a state” must be a result of state protections, not US citizenship.\textsuperscript{200} Next, they argue that the

\textsuperscript{197} Whitney v. California, 274 U.S. 357.
\textsuperscript{198} Bowen, \textit{Miracle at Philadelphia}.
“rightful exertion of the police power” takes priority over Mr. Bryant's freedom of association under the Due Process Clause.\(^{201}\) Beyond a doubt, the state of New York may reasonably regulate associations to protect the rights of others. Finally, the Court found that assigning different levels of regulation to different associations did not violate the Equal Protection Clause. Specifically, labor unions and the KKK are different enough associations—in terms of when they meet, their activities, and their level of secrecy—that New York may regulate the KKK more tightly than unions.\(^{202}\)

*Bryant* is a case that offers a new perspective on Alexis de Tocqueville’s theories from a century earlier. The KKK is an association that encapsulates much of what Tocqueville said associations in the US were not. The KKK in New York operated largely in secret: meeting at night, wearing hoods and gowns, and so on.\(^{203}\) Whereas Tocqueville argued that the unhindered freedom of association in the United States would prevent the formation of secret societies, the regulations placed on the KKK existed precisely because they were a secret society.

The reason for the secrecy of the KKK can be surmised out of its purpose. The Court in *Bryant* described the KKK as an organization that "exercises activities tending to the prejudice and intimidation of sundry classes of [New York] citizens" and does "things calculated to strike terror into the minds of the people."\(^{204}\) These activities are the weaponization of association which Tocqueville feared. The calculated, attacking actions taken because of sharp prejudice to another group are those he warned would be born

from associations in Europe. The violence of the KKK is what requires the group to be more heavily regulated, which in turn is why the group turns to secrecy. The cycle is self-fulfilling and presents a necessary check on the freedom of association.

The third case to invoke the right to association in the early 20th century was *Bridges v. Wixon* (1945), which had several similarities to *Whitney*. Harry Bridges was an immigrant from Australia who had joined the Communist party. Multiple attempts were made to deport him under laws that criminalized affiliations with the party. The majority opinion rejected the efforts to deport Mr. Bridges, arguing that freedom of speech and press protected all the activities associated with the Communist party in which Mr. Bridges partook. 205

The concurrence by Justice Murphy includes an explicit endorsement of the right to assemble. He agrees with the Court’s arguments that the deportation proceedings defined affiliation too broadly and misused hearsay statements. He then points to a broader constitutional issue; unlike what the defendants argued, the power of Congress to deport resident aliens is checked by constitutionally guaranteed rights like “free speech and association.” 206 Furthermore, such legislation violates the principle of personal guilt by making Mr. Bridges guilty by association. None of his personal actions advocated for the violent overthrow of the US government, though parts of the Communist Party ideology may do so. 207

---

In *Bridges*, the Court protected Mr. Bridge’s affiliation with the Communist party. As fear of communism spread across the United States in the wake of World War II, the Court would turn away from such protections. Instead, the overthrow of capitalism advocated by the party would become the grounds on which the Court denied associational rights to US citizens. This shift highlights how important association protections of dissident groups can be: what was included in the ideology of the Communist party did not change between *Bridges* and future cases, but the political climate of the United States did.  

**Establishing Association**

Though association was used in specific cases prior to 1958, it had never been established as a formal right. Crucially, only assembly is guaranteed in the text of the First Amendment. In 1958, the case which is largely seen as establishing the freedom to associate as an independent right was decided. This case was *NAACP v. Alabama.*

In 1956, the Alabama chapter of the NAACP was sued by the state attorney general John Patterson for failing to register as a foreign corporation because the NAACP headquarters was in New York. The state trial court ruled in favor of Patterson, forcing the NAACP to stop further activities. In response, the NAACP provided all the necessary data for registration at the court’s order, except for their membership lists. The state court held the NAACP in contempt and fined them $100,000 for failing to produce the lists.

---

208 Iñazu, *Liberty’s Refuge.*
209 Iñazu. 79.
The US Supreme Court granted the NAACP certiorari after the Alabama Supreme Court refused to do so.\footnote{210 NAACP v. Alabama ex rel. Patterson, 357 U.S. 449.}

The Court’s opinion, penned by Justice Harlan, was unanimous. After denying Alabama’s claim that the Court lacks jurisdiction and asserting that the NAACP has sufficient standing, the Court turns to the meat of the issue. They hold that “whatever interest the State may have in obtaining the names of petitioner’s ordinary members, it has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.”\footnote{211 NAACP v. Alabama ex rel. Patterson, 357 U.S. 450.} To prove this, Justice Harlan elaborates on the NAACP’s constitutional objections. Invoking \textit{de Jonge}, he writes:

“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 [...] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”

This is the first invocation of association by the Court in the opinion. It initially styles association as a secondary right to speech and assembly by suggesting that association “enhances” the other two rights.

Throughout the rest of the opinion, however, association is elevated to status as an independent right. Justice Harlan refers to the “freedom” or “right” of association seven
different times. He also describes “indispensable liberties” as “speech, press, or association,” signaling that it should be held as equal to textual freedoms.\textsuperscript{212}

Having established the freedom of association, Justice Harlan then argues that Alabama has violated the NAACP’s right to association through legislation that discourages it—even if they did not outright prevent associating. Specifically, forcing the release of membership lists can substantially diminish participation in the NAACP.

Justice Harlan argues that "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."\textsuperscript{213} The NAACP, which fights for the advancement of Black American’s welfare, would be especially unpopular in Alabama during the Civil Rights Movement. Their promotion of racial equality meant that previous revelations of rank-and-file members had “exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”\textsuperscript{214}

With this impact in mind, the opinion finally turns to whether Alabama can justify the burden they place on the NAACP’s right to associate by requiring the release of membership lists. Weighing both sides, the Court concludes that the regulations from the Alabama law are too oppressive on the rights of the NAACP.\textsuperscript{215}

Before moving on, it is valuable to note how Justice Harlan presents association. It is a coequal right, but its function is to advance speech. Whereas assembly is not

\begin{footnotesize}
\begin{enumerate}
\item[212] NAACP v. Alabama ex rel. Patterson, 357 U.S. 461. (emphasis added)
\item[213] NAACP v. Alabama ex rel. Patterson, 357 U.S. 462.
\item[214] NAACP v. Alabama ex rel. Patterson, 357 U.S. 462.
\item[215] NAACP v. Alabama ex rel. Patterson, 357 U.S. 464.
\end{enumerate}
\end{footnotesize}
limited to one purpose, association is “for the advancement of beliefs and ideas.”\textsuperscript{216} The subject is not limited, as it may “pertain to political, economic, religious or cultural matters.”\textsuperscript{217} But the expectation is that an association is meant to pursue something expressive. This minor difference is important because of how the right to associate has modernized and largely been eclipsed by freedom of speech.

\textit{NAACP} also bears significant similarities to \textit{Bryant}. Both center on the membership lists of controversial associations. Both invoke freedom of association. However, the two cases ended very differently. The Court emphasizes the importance of police power in \textit{Bryant} but protects the privacy of the NAACP in \textit{NAACP}.

Justice Harlan addresses this divergence in the \textit{NAACP} opinion. He argues that the cases are different because of the nature of the organizations themselves, a factor that the Court in \textit{Bryant} relied on. The unlawful activities associated with the KKK justify the prioritization of police power. The NAACP does not meet the same standard because its activities are all non-violent and lawful.\textsuperscript{218}

Again, Tocqueville’s theory of association can be instructive here. An association’s privacy is distinct from the association being secretive. The organizing of the NAACP in the South represents the organizing of a minority in the face of a majority to advocate for different ideas—a purpose emblematic of the democratic value of association. The NAACP’s work to promote voting rights furthers the effectiveness of

\textsuperscript{216} NAACP v. Alabama ex rel. Patterson, 357 U.S. 460.
\textsuperscript{217} NAACP v. Alabama ex rel. Patterson, 357 U.S. 460.
\textsuperscript{218} NAACP v. Patterson, 357 U.S. 465-466.
associations in US society by promoting universal suffrage. On the whole, the group represents the sort of association that Tocqueville’s theory would want to protect.

Two years later, the Court decided on another case involving membership lists and the NAACP. In *Bates v. City of Little Rock* (1960), two petitioners from the NAACP were convicted and fined under an Alabama tax ordinance for failing to provide membership lists of local branches. The Court held in favor of the NAACP once more.

There are two striking features of the decision. First, assembly and association are tied together. Whereas NAACP located association at the “nexus” between speech and assembly, the *Bates* decision emphasizes the latter. In defending the existence of association, the Court argues:

“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.”

While the Court mentions speech, it chooses to begin its description of association with the right to assemble. Assembly is not mentioned because of its relevance to the case itself: the precedence of the holding in *NAACP* two years earlier places this conflict under

---

the scope of association. Instead, it is mentioned as a means of introducing association, demonstrating the close connection between the two.

The short concurrence by Justice Black and Justice Douglas goes so far as to explicitly connect the two. Stressing that First Amendment rights cannot be impaired by the government through any form, the concurrence states that, “freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right.”²²² In their description, association is wholly derived from and dependent on assembly.

The decision argues that assembly plays a key role in self-governance by creating an informed citizenry. Associations of citizens are an important part of achieving this end, insofar as free association exists as an extension of assembly because associations allow for a more prolonged and intimate exchange of ideas. This connection is important to understand why the right of assembly became so neglected by the Supreme Court: association was able to cover much of what assembly might have.

The second feature is that the Court limits association to its capacity as a forum. It is introduced in the decision as the “freedom of association for the purpose of advancing ideas and airing grievances.”²²³ This purpose leaves all forms of association not involving speech unprotected. Assembly, as written into the Bill of Rights, is not constrained by any purpose. As association comes to replace assembly in US jurisprudence, the right to gather is more constrained by the nontextual associational freedom than by First Amendment assembly.

Freedom of association became a key tool of the Court to protect the NAACP during the Civil Rights Movement. For example, in *Shelton v. Tucker* (1960), the Court struck down an Arkansas statute requiring teachers to reveal all the organizations they affiliated with—a law clearly targeted at the NAACP.224 The decision used freedom of association to protect the NAACP. But it described it as “a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society,” demonstrating the Court’s shift away from assembly.225

The next year, in *Louisiana v. NAACP* (1961), the Court struck down two Louisiana statutes. The first prohibited interstate business with communist or subversive organizations, while the other required membership lists from registered associations. The Court ruled that the former was too vague and that the latter too broad, thus violating the freedom to associate.226

These rulings were crucial to the survival of the NAACP. From 1955 to 1957, membership of the NAACP in the South had dropped decreased by 50,000 people to 80,000 total. In Louisiana, it had dropped from 13,000 to just 1,700. The protection and privacy afforded by the Court allowed the NAACP to expand without fear of retribution.227

Association ushered in a new chapter to the conflict between assembly and racial equality. Physical assemblies were crucial in the Civil Rights Movement, as were the associations that organized them. Protected associations can plan and execute coordinated

227 Inazu. 219.
efforts with much higher effectiveness which was key in fostering social change across the United States. At the same time that the Court was striking down the convictions of demonstrators without expanding the principle of assembly, they were meaningfully developing association to protect the groups organizing the demonstrations.228

During this period, a different social movement was having a very disparate experience with their associational freedom. As the Cold War intensified, Communist organizations and the citizens affiliated with them were denied protection by the Supreme Court. In the year after NAACP was decided, the opportunity to apply freedom of association to two different cases appeared before the Court. In both cases, the Court held in favor of the government, reducing the decision to balancing the interests of each party rather than defending the civil liberties of citizens affiliated with Communist organizations.229

In Uphaus v. Wyman (1959), a summer camp Executive Director was called to testify before a New Hampshire legislative investigating committee for violating the State Subversive Activities Act. After refusing to release the names of camp attendees, the director was jailed by a state court.

In the decision, the Court acknowledges that the camp guests have an “interest” in their “associational privacy.”230 They maintain that this interest must be balanced against public ones. In doing so, the Court skirts any serious examination of the right to association, instead prioritizing state interest of “self-preservation” against

228 Inazu. 89.
229 Inazu. 85.
230 Uphaus v. Wyman, 360 U.S. 78.
communism.\textsuperscript{231} \textit{NAACP} is explicitly invoked when the Court concludes that the “governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, \textit{cf. National Association for Advancement of Colored People v. Alabama, supra,} were here tenuous, at best.”\textsuperscript{232}

\textit{Barenblatt v. United States} was decided the same year. Instead of the interests of a state government, it centered on the conflict between the federal government and communism. It also dodged any serious discussion of freedom of association.\textsuperscript{233}

The Court held that the conviction of a professor who refused to testify about his membership history with the Communist party in front of the House Committee on Un-American Activities was constitutional. Justice Harlan wrote the majority opinion. Despite its length, the decision lacks any serious analysis of how the inquiries of the House Committee hinged on the testimony of a professor’s experiences in graduate school. Instead, he holds that it would be too constricting to investigatory processes to dismiss the Committee’s inquiry into the professor and concludes, “that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter.”\textsuperscript{234}

Justice Black, joined by the Chief Justice and Justice Douglas, wrote a scathing dissent in response to the \textit{Barenblatt} decision. In it, he condemns the Court for the vagueness of the balancing test used, arguing that the current system rewrites the First Amendment to read:

\begin{itemize}
\item \textsuperscript{231} Uphaus v. Wyman, 360 U.S. 80.
\item \textsuperscript{232} Uphaus v. Wyman, 360 U.S. 80.
\item \textsuperscript{233} Barenblatt v. United States, 360 U.S. 109.
\item \textsuperscript{234} Barenblatt v. United States, 360 U.S. 134.
\end{itemize}
“Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that, on balance, the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.”

The Court continued to hold in favor of the government when it came to the Communist party in *Communist Party v. Subversive Activities Control Board (SACB)* (1961) and *Scales v. United States* (1961). While the decisions that backed the NAACP were all unanimous, the communist cases split the Court: Justices Stewart, Frankfurter, Harlan, Whittaker, and Clark consistently sided with government interests when communism was involved. These rulings demonstrate the extent to which anti-communist sentiment colored the Court’s willingness to prioritize individual liberties. As the ACLU legal director Mel Wulf put it, there were “red cases and black cases.”

This tension came to a head in *Gibson v. Florida Legislative Investigation Committee* (1963). The president of the Miami branch of the NAACP was imprisoned after refusing to turn over membership lists to a Florida committee investigating communist activity. For segregationists, the case was an ideal opportunity to weaken the NAACP by forcing the Court to choose between competing interests.

After the retirement of Justice Whittaker, the Court was left deadlocked 4-4 over the decision. Then, Justice Frankfurter suffered a stroke. The case was reargued for two

---

237 Inazu. 90.
new Justices, White and Goldberg, the next term. Justice Goldberg provided the vote the NAACP needed, solidifying the Court’s commitment to the Civil Rights Movement.²⁴⁰

The “constitutionally protected rights of speech, press, association and petition” are referred to in the decision.²⁴¹ The exclusion of assembly is a sign of how association by 1961 was beginning to entirely obscure the right of assembly. Whereas early cases had invoked both assembly and association, later cases began to center solely on association.

Only Justice Douglas’s concurrence looks to assembly in deciding the case. He elaborates on the importance of association activity under the First Amendment, quoting *De Jonge* to emphasize the right of peaceable assembly as “essential.”²⁴² He argues that the ability to freely gather to discuss with fellow citizens is too important for the government to impede, no matter their interest. Still, Justice Douglas frames group rights as important to free speech, stating that, “Joining a group is often as vital to freedom of expression as utterance itself.”²⁴³

In sum, the Supreme Court formalized freedom of association in 1958 as a means to protect the growing Civil Rights Movement in the United States. Before *NAACP v. Alabama*, assembly and association had been largely interchangeable. Associational freedom offered a more obvious means by which to protect the NAACP membership lists because of the more permanent gatherings that it implied. While decisions after *NAACP* treated association as a right stemming from the assembly right, the Court relied more and more on speech to ground association.

---

²⁴⁰ Inazu, 92.
In these decisions, the Court continually tied the freedom of association to the purpose of expression. In the next section, I will discuss the Court’s ruling in *Griswold v. Connecticut*, which introduced the non-textual right of privacy. These two trends set up the Court’s ruling in the 1980s cases *Roberts v. United States Jaycees*, which officially constrain associations to private and expressive ones. As assembly was made irrelevant in part by association, the limiting of association to expression would effectively eliminate both rights from Supreme Court jurisprudence.

**Right to Privacy**

In 1972, the Court ruled that a married couple’s access to contraception could not be limited by governmental legislation because of the right to privacy. The case, *Griswold v. Connecticut*, established privacy as an independent, nontextual right. To do so, *Griswold* relied on the precedence set by the freedom of association.

The opinion, written by Justice Douglas, argues that the “association of people is not mentioned in the Constitution nor in the Bill of Rights,” but “its existence is necessary in making the express guarantees [of the First Amendment] fully meaningful.”

In doing so, Justice Douglas diminishes the importance of assembly, limiting it only to “the right to attend a meeting.” He suggests that the freedom of association is what allows people to gather, exchange ideas, and promote change instead. This assertion is in contradiction to the treatment of assembly throughout the 19th and 20th centuries, which elevated assembly as a critical tool in self-governance. Much more than

---

simply protecting meetings, assembly was taken to protect groups that generated
democratic change.

Justice Douglas goes on to argue that the guarantees in the Bill of Rights have
“penumbras, formed by emanations from those guarantees that help give them life and
substance.” He asserts that the First, Third, Fourth, Fifth, and Ninth Amendments all have
protections that create spaces of privacy in practice. These zones in combination imply
the existence of a right to privacy.246

When Griswold was decided, it served to strengthen the legitimacy of the freedom
of association. No longer was association the sole nontextual right relied on by the
Supreme Court. Over time, however, Griswold changed how privacy was treated by the
Court in a way that would erode association and assembly. 247

When the decision was first drafted by Justice Douglas, it argued that a married
couple’s right of association was violated by the Connecticut law criminalizing
contraception, much like how the right to send a child to a religious school was
peripherally protected by association. Privacy was not mentioned until the last
sentence.248 The problem with this reasoning was that association had been limited to the
purpose of advocacy in previous opinions. The decisions made between a married couple
did not serve to advance beliefs or express grievances, leaving it outside the scope of
what the Court had treated association as covering.249

247 Inazu, Liberty’s Refuge. 124.
249 Schwartz. 237.
After criticism from Justice Brennan that his construction of association might open group protections to the Communist party, Justice Douglas rewrote the opinion. His second draft became the *Griswold* decision, sans two sentences.250

Prior to *Griswold*, privacy was primarily invoked by the Supreme Court to protect groups with outward-facing actions. For example, in *NAACP v. Alabama*, the Court is concerned with protecting “effective advocacy of both public and private points of view, particularly controversial ones.”251 The NAACP’s privacy was repeatedly protected by the Supreme Court because it is an association that expresses dissident views.

*Griswold* introduced a right to privacy that protected intimate, inward-facing associations. In *Eisenstadt v. Baird* (1972), the Court extended the protections of *Griswold* to single people in search of contraception. Freedom of association was set aside entirely, as the Court protected the privacy of individual, autonomous decision-making.252 This reworked approach to privacy would affect assembly in the landmark case *Roberts v. United States Jaycees* (1984).

**Roberts v. United States Jaycees and its Impact**

The United States Jaycees was an all-men's nonprofit organization dedicated to promoting and fostering "the growth and development of young men's civic organizations."253 When two Minnesota chapters began accepting women into their ranks, they were faced with sanctions and other punishments from the national organization.

250 Schwartz, 238.
The chapters then sued the Jaycees under the Minnesota Human Rights Act, which makes discriminatory practices in the enjoyment of public accommodations illegal.\textsuperscript{254}

The question of whether forcing the inclusion of women violated the Jaycee’s freedom of speech and association came before the Supreme Court. In their landmark decision, the Court split association into two different forms: intimate association and expressive association. Considering each kind in turn, the Court held that neither were violated by the Minnesota Human Rights Act.\textsuperscript{255}

The decision, written by Justice Brennan, begins with intimate associations. First, he asserts that “certain kinds of highly personal relationships” have been protected under the Bill of Rights because of the individual liberties it protects.\textsuperscript{256} While the state may be able to regulate who is hired as your coworker, they cannot regulate who you marry. These close ties have several benefits: they help people share ideas, they provide emotional enrichment, and they ultimately contribute to defining one’s identity, a task “central to any concept of liberty.”\textsuperscript{257}

There is a broad range of relationships between the intimacy of marriage and the association of employees. For the sake of \textit{Roberts}, it is sufficient to show that the Jaycees are not an intimate association. Justice Brennan describes the chapters of the Jaycees as “large and basically unselective groups,” pointing to their membership numbers and acceptance criteria. Thus, they are not an intimate association.\textsuperscript{258}

\textsuperscript{254} Roberts v. United States Jaycees, 468 U.S. 609.
\textsuperscript{255} Roberts v. United States Jaycees, 468 U.S. 609.
\textsuperscript{256} Roberts v. United States Jaycees, 468 U.S. 618.
\textsuperscript{257} Roberts v. United States Jaycees, 468 U.S. 618.
\textsuperscript{258} Roberts v. United States Jaycees, 468 U.S. 621.
Next, Justice Brennan considers whether the Jaycees could be considered an expressive association. He asserts that First Amendment activities that involve associating have long been protected for a variety of ends—“political, social, economic, educational, religious, and cultural.” The right to associate does, however, have a significant limit: it must on balance be more important than compelling state interests.

In *Jaycee*, Justice Brennan weighs the Jaycee male members’ associational freedom with Minnesota’s interest in preventing discrimination against women. He finds that the scales tip in favor of anti-discrimination; the Jaycee’s claim fails under both intimate and expressive associational protections.260

*Roberts* marks a significant narrowing in the scope of associational rights. Associational rights were established for the purpose of “advancing ideas and airing grievances.” While the advent of intimate associations theoretically expands on this definition, it leaves the vast majority of associations unprotected—while most intimate associations could be adequately protected by the right to privacy. The formal establishment of “expressive associations” solidifies the restrictions the Court was applying to association as early as *NAACP v. Alabama*. It formalizes the limitation, meaning associations must have a clear expressive purpose beyond just “advancing ideas” between each other. *Roberts* set association on the path to extinction by placing it as subordinate to speech and privacy rights.

In her concurrence, Justice O’Connor advocated for a different test for association. She argues that it is an error to base the constitutional protections for an

---

association on the statements of it or its members. For example, even if the Jaycees had a clear anti-women expressive stance, their discriminatory policy still seems unacceptable. Instead, she suggests that the Court should distinguish between commercial associations and “protected expression” associations. She defines the latter broadly to include “quiet persuasion, inculcation of traditional values, instruction of the young, and community service.”\textsuperscript{261} The Jaycees are engaged in sufficiently commercial activities to justify the Minnesota government's legitimate interest in regulating their membership.\textsuperscript{262}

This alternative presents its own problems. Some associations may be commercial and expressive. For example, dissident groups may need to expend large amounts of their time fundraising to remain viable because of the unpopularity of their expression.\textsuperscript{263}

The Court ruled on two more gender discrimination cases in the wake of \textit{Roberts}. In \textit{Board of Directors of Rotary International v. Rotary Club of Duarte} and \textit{New York State Club Ass’n v. City of New York}, the Court held that legislation forcing large local clubs to accept women was constitutional. In these cases, freedom of association’s connection with speech was used to restrict the right. Associations that failed to be expressive enough were denied protection. Before \textit{Roberts}, the connection between association and speech had been used to bolster the right by grounding it beyond assembly in the First Amendment.\textsuperscript{264}

In \textit{Boy Scouts of America v. Dale} (2000), the Court found a sufficiently expressive association. After an assistant scoutmaster was fired for being gay and

\begin{footnotes}
\item[261] Roberts v. United States Jaycees, 468 U.S. 636.
\item[262] Roberts v. United States Jaycees, 468 U.S. 636.
\item[263] Inazu, \textit{Liberty’s Refuge}, 135.
\item[264] Bhagwat, “Associational Speech.” 988.
\end{footnotes}
participating in gay activism, he sued the Boy Scouts of America for discrimination on the grounds of sexual orientation.\textsuperscript{265}

In the opinion, Justice Rehnquist assesses the materials of the Boy Scouts to conclude that their general mission is “to instill values in young people.”\textsuperscript{266} The assistant scoutmasters play a key role in the pursuit of this mission because of their time spent with the young scouts. Concluding that it is “indisputable that an association that seeks to transmit such a system of values engages in expressive activity,” the Court finds the Boy Scouts of America to be an expressive association.\textsuperscript{267}

Justice Rehnquist then considers if anti-gay rhetoric is part of the Boy Scout’s expressive activity. Pointing to the use of “morally straight” and “clean” in the Scout Oath and Law, along with other statements by the organization, Justice Rehnquist acquiesces that a gay assistant scoutmaster is sufficiently contrary to the Boy Scout’s expressive intent. As such, the forced inclusion of Mr. Dale damages the expressive ability of the association, a burden that outweighs the interest of public accommodation laws.\textsuperscript{268}

The dissent written by Justice Stevens highlights the fallibility of the Court’s approach to association. To begin, Justice Stevens points out that nowhere in the Scout Oath, Scout Law, or Scout Handbook is homosexuality mentioned or condemned. The definitions of the terms “clean” and “morally straight” provided by the Boy Scouts bear no relation to sexuality, and the handbook advises that “Your parents or guardian or a sex

\textsuperscript{265} Boy Scouts of America v. Dale, 530 U.S. 640.
\textsuperscript{266} Boy Scouts of America v. Dale, 530 U.S. 649.
\textsuperscript{267} Boy Scouts of America v. Dale, 530 U.S. 650.
\textsuperscript{268} Boy Scouts of America v. Dale, 530 U.S. 648-658.
education teacher should give you the fact about sex that you must know." In sum, there is no clear expressive goal for or against gay rights in any of the Boy Scout’s material, except for one exclusionary policy statement. Though they may be an expressive association, they are not an expressive association against homosexuality.

Similar to the 1960s communism cases, the cultural attitudes impact the Court’s interpretation of expressive activity in *Boy Scouts*. This bias highlights the problem of treated associational and assembly right as purely expressive. When content is the primary concern, the basic liberty of gathering falls to the wayside. It can cut both ways: content was used to deny communist groups associational rights but maintain the Boy Scouts’ right to discriminate. A cohesive approach to association would prevent the same manipulation of expression.

**The Disappearance of Association**

After association was explicitly tied to expression in *Roberts*, the freedom began to erode in free speech, much like assembly.

The controversy in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, centered on the inclusion of different groups during a parade. Parades, a celebratory, impermanent gathering of citizens, are a textbook exercise of the right to free assembly. The fact that the *Hurley* decision does not once mention assembly or association is emblematic of the degradation of both rights in favor of speech.

---

269 Boy Scouts of America v. Dale, 530 U.S. 669.
In *Hurley*, the South Boston Allied War Veterans Council did not want to include the Irish-American Gay, Lesbian, and Bisexual Group (GLIB) in their Boston St. Patrick’s Day parade. When GLIB was denied participation in the parade, they sued the veteran’s organization for discrimination. The Court held that forcing the Veterans Council to include GLIB would force a private speaker to express content to which it was opposed, a violation of their speech rights.\(^\text{272}\) Rather than focus on the constitutional significance of in-person gatherings, the Court reduced the parade to only have expressive value. Such a decision neglects the rich and important history that assembly has in the United States regardless of its instrumental value to expression.

In the 2010 decision *Christian Legal Society v. Martinez*, association was collapsed in speech. The Christian Legal Society (CLS) at Hastings Law School required all members to adhere to their Statement of Faith and membership requirements—which included forbidding homosexuality. The school forced the CLS to have a policy that welcomed all new members, no matter their sexual orientation, to receive funding and other benefits from the school. The CLS held that this violated their First Amendment and Fourteenth Amendment rights.\(^\text{273}\)

Though the CLS presented two different arguments based on their speech and associational freedoms, the Court found that the two merged because “*Who* speaks on [the CLS’s] behalf […] colors *what* concept is conveyed.”\(^\text{274}\) This assertion demonstrates the extent to which association had become defined solely by its expressive content, or

\(^{272}\) *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S.
\(^{274}\) *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S.
“what concept” it conveys. As such, the Court decided to apply their limit-public-forum test rather than the strict scrutiny test that would be applied to violations of association. Because freedom of association had been morphed into an expressive right, the Court could justify collapsing it entirely into freedom of speech. As such, they were able to apply a more lenient test.275

Luke Sheahan argues that there are two ways in which this move by the Court erased freedom of association. First, it limited First Amendment rights at a public university. Before, universities had historically been treated as protected spaces for speech and association. Second, the Court did not apply freedom of association to their public forum deliberation. Instead, they consider it in terms of speech rights. This cuts association out of an important protection.276

**Conclusion**

In the conclusion of Chapter II, I pointed to several key themes in the history of assembly. Because freedom of association largely carried on assembly’s mantle after 1958, it is worth touching on these themes again.

First, there is the question of where group gatherings need to have a purpose to be protected. From the case that first formalized it, association was given an explicit purpose that assembly was not: the exchange of ideas. This expressive purpose limited the right, as was seen in the communism cases and the initial draft of *Griswold*. When the right was

---

275 Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S.
formally limited in *Roberts* to expression and privacy, it led to the eventual disappearance of association entirely.

When the value of association is set at its expression, something is lost. Groups are important beyond the cohesive message they impart because of the role they play in a democratic society, as expounded upon by Tocqueville. While expression is part of that, it cannot capture all the importance of association.

Expression is also liable to limitations that association is not. Limiting or protecting an association because of the content they express ignores the fundamental right that people have to assemble in the first place. Expressive aims between groups may conflict, but the basic assembly rights of those groups should remain the same. Assembly and association should be independent of expression to protect dissident groups with unpopular expression.

In Chapter II, I also discussed the role of assembly in the fight for racial equality. Association carried on this fight in the Civil Rights Movement by protecting the NAACP. The juxtaposition between *Bryant* and the Civil Rights cases demonstrates how associational freedom can protect dissident groups pursuing racial equality without having to extend the same protections to organizations fostering violent activity.

In sum, this chapter began with the work of Alexis de Tocqueville on American associations. I then considered the cases that came before *NAACP v. Alabama*. In *NAACP*, the Court formally established the freedom of association but limited it to the purpose of exchanging ideas. In the wake of *NAACP*, civil rights organizations were extended associational protections while communist groups were denied. The freedom continued to be constrained by an expressive purpose. After *Griswold v. Connecticut*
established the right to privacy, *Roberts v. United States Jaycees* formally limited association freedom to expressive and private organizations. This limitation would come to restrict the right of association entirely to speech and privacy, collapsing association into the other rights entirely.

In the next chapter, I will consider four different scholarly theories on how we may reinvigorate the right to assemble and the right to association. I’ll begin with Nicholas Brod and Tabatha Abu El-Haj, who focus on protecting in-person gatherings. Then, I will consider the work of John Inazu, who argues that assembly can be used to protect group autonomy where association has failed. Finally, I summarize Ashutosh Bhadwhag’s theory of association speech, which emphasizes the role assembly and association have in self-governance.
IV. Modern Theories of Assembly

Throughout the last two chapters, I have traced the evolution of the right of assembly throughout the history of the United States. Assembly began as a robust American tradition at the founding, but through time, became restricted by permit requirements, public space regulations, and freedom of speech. Freedom of association rose to prominence as assembly declined, though the two had historically always been connected. As association was collapsed into free speech, the right to assembly was left largely unprotected by the Supreme Court of the United States.

A variety of modern scholars have identified the disappearance of assembly from US Supreme Court decisions as concerning. In this chapter, I will consider the theories of four of these scholars. These theories share three underlying themes: that the history of assembly reveals meaningful principles that have been lost over time, that the current Supreme Court expressive requirements are too limiting on group autonomy, and that assembly and association are important because of their fundamental contributions to self-governance.

The first two theories I will consider are concerned with physical gatherings. Tabatha Abu El-Haj argues that permit requirements and other regulations on assembly are too restrictive given the original understanding of assembly and must be reconsidered.
She uses the protests at the 2008 RNC and DNC as examples of assembly restrictions being too suffocating.  

Nicholas Brod argues that assembly needs to be reinvigorated separate from association to protect in-person gatherings and suggests that the Court might apply means-end scrutiny on assembly instead. He argues that the Occupy movement that spread across the country after the financial crisis was precisely the sort of assembly that would have been protected in the Founding era but was left in the cold by current court doctrine.  

The next two focus on group autonomy. John Inazu inverts Brod’s argument, suggesting that assembly should be used to reinvigorate associational rights. Inazu asserts that association has become too constrained in modern jurisprudence. He points to pluralism in the 1960s and Rawlsian liberalism in the 1980s as theoretical factors that resulted in freedom of association excluding dissident or unpopular groups. Because association was limited by expression, it fails to recognize that groups have expressive value simply for existing. Instead, Inazu argues that the history of assembly rights is sufficient to ground the right as protecting noncommercial, peaceable groups, so long as the group does not partake in monopolization.  

Ashutosh Bhagwat is also concerned with reinvigorating group rights but believes that freedom of association is capable of doing so rather than assembly. He argues that assembly and association should be treated as equal to freedom of speech,

---

277 Abu El-Haj, “The Neglected Right of Assembly.”
278 Brod, “Rethinking a Reinvigorated Right to Assembly.”
279 Inazu, Liberty’s Refuge.
rather than subordinate. He points out that First Amendment freedoms like petition and assembly appeared in British governance earlier than free speech and contribute to the democratic process in vital ways. Expanding the conception of self-governance to include all First Amendment freedoms offers a means by which to ground association by protecting democratic associations rather than expressive ones.\textsuperscript{280}

**El-Haj’s Criticism of Permit Requirements and Other Regulations**

In “The Neglected Right of Assembly,” Tabatha Abu El-Haj is critical of the normalization of permit requirements and other regulations in order to assemble. She contrasts the festive street politics of the late 1700s and early 1800s with the state of assembly now.

El-Haj uses the festive politics in the first hundred years of the United States to illustrate how an uninfringed assembly right enriched the civic culture. While I covered much of this in Chapter II, it is worth restating here. Elections and national holidays were times to march together, eat together, toast together, and celebrate together. Even momentous events in foreign affairs like the French Revolution sparked spontaneous marches that spread across cities in celebration.\textsuperscript{281}

El-Haj argues that these events were “infused with political meaning.”\textsuperscript{282} For example, the processions through Boston in 1793 after the Battle of Valmy was inherently political given the conflicts over aid to France at the time. That day in Boston

\textsuperscript{280} Bhagwat, “Associational Speech.”
\textsuperscript{281} Abu El-Haj, “The Neglected Right of Assembly.” 554-555.
\textsuperscript{282} Abu El-Haj. 556.
saw a series of marches trace their way through the streets, including one led by carts loaded with food for a feast at the end. The marches did not have a set of demands or petition they submitted to the government. But it served to inform the citizenry, express positive attitudes towards France, and build community.\textsuperscript{283}

Assemblies were also used to push back against political majorities as Tocqueville observed. After the passage of the Alien and Sedition acts, Republicans met in Maryland "for an open-air celebration, military … maneuvers, and open-air feast."\textsuperscript{284} As a rebuke to the Federalist administration, the group toasted Thomas Jefferson and the Declaration of Independence.\textsuperscript{285} This group was allowed to meet, sans permits and restrictions, to exchange ideas amongst themselves. They acted as a check on the will of the majority.\textsuperscript{286}

The culture of unrestricted assembly carried into the 19th century. The 1830 celebration of the French Revolution in Philadelphia had great similarities to the marches in Boston 37 years prior. Excepting the Antebellum South, assembly was something that could be accessed no matter race, class, or gender. For example, Black communities organized annual celebrations of the slave trade abolition that included parades in New York and Philadelphia.\textsuperscript{287}

When it came to regulating assembly, the traditional framework dictated that "[i]t is only when political, religious, social, or other demonstrations create public

\textsuperscript{283} Abu El-Haj. 557.
\textsuperscript{286} Abu El-Haj.
\textsuperscript{287} Abu El-Haj. 559.
disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes.”

This approach is in sharp contrast to the limitations on assemblies in the modern-day. Not only is it incredibly arduous to organize a march or demonstration, as I will describe below, but the expressive value of assemblies is now scrutinized in deciding how they are afforded protections. The traditional approach allows dissident groups to assemble freely, regardless of how the government feels about their ideology—like communist organizations. Gatherings cannot be problematic for contradictory viewpoints until they start causing violence. Content-based restrictions on assembly are trickier.

Having described the salience of assembly in Founding-Era life, I will now summarize El-Haj’s assessment of contemporary street regulations. In 2009, twenty American cities had “extensive permit requirements for gatherings on public streets.”

Most public parks had similar requirements. In these cities, applying for a permit involved providing a range of information, from the personal details of the organizer to the timing, purpose, and attendee numbers of the event. Some permits were time-sensitive—a permit for a parade in Chicago had to be submitted at least fifteen business days before the event.

Many permits still have conditions attached once they are issued. Officials may reroute parades if they are taking an inconvenient route. Sometimes, the action may be more drastic. El-Haj points to the New York City protests against the Iraq War in 2003,

---

288 Abu El-Haj. 562.
289 Abu El-Haj. 548.
where a march was moved a distance away from the United Nations and forced to be stationary. The provided reasoning for this decision was that the proposed demonstration “[did] not have the discipline of an organized line or march where there is an established, carefully planned and paced sequence throughout the parade route.”

Sometimes, regulations are temporarily issued in anticipation of controversial events. At the 2008 Republican National Convention, St. Paul created a security zone that banned assemblies near the convention center. Protests were only allowed in the free speech zone 80 feet away from the RNC. That same year, Denver created a demonstration zone two football fields away from the Democratic National Convention Center. Permits to hold demonstrations in these zones had to be requested months in advance.

In the modern-day, these restrictions are widely accepted in constitutional law as time, place, and manner regulations on public forum use. The public forum doctrine established in Hague v. CIO has evolved to include such restrictions on expressions, so long as they serve a significant government interest. These interests can be ”[m]aintaining order, preventing traffic jams, and ensuring security.”

Hague was widely seen as expanding freedom of assembly because struck the standard set in Davis v. Massachusetts that public spaces were under the total control of the legislatures. However, it still held that assembly in public spaces “must be exercised in subordination to the general comfort and convenience.” This is already a narrower

---

292 Abu El-Haj. 551-552.
293 Abu El-Haj. 553.
standard than the traditional one because it places assembly at a lower priority than “convenience.” In contrast, assemblies in the Founding era could be inconvenient, so long as they were not violent or disruptive.

*Cox v. New Hampshire*, which came just two years, illustrates the ramifications of this change. In *Cox*, the Court held that regulations of parades on public streets to “assure the safety and convenience of the people in the use of public highways” can take preference to free assembly.295 The use of "convenience" in both decisions demonstrates that how assemblies had become inferior to the comfort of the population at large. Changes like this disadvantage minority group's ability to influence the government.296

This treatment of assembly is a sharp divergence from how gatherings were treated at the turn of the 19th century. In that period, assemblies were permitted to gather freely in the streets *until* they became violent. Now, assemblies must obtain permits, provide all relevant information, remain non-disruptive, and still may be faced with regulations—something like disrupting traffic may now be considered a violation of the peace.297

El-Haj argues that we should be concerned about the intense government regulation currently surrounding assembly. As the evolution of the right reveals, it:

“is meant foremost to protect an avenue of democratic politics. It protects both the people’s ability to influence and check government and a space for the formation,

---

296 Cox v. New Hampshire, 312 U.S.
reconsideration, and consolidation of political preferences and, by implication, for the formation of an autonomous people.”

Assembly is valuable in and of itself because of its role in self-governance—a value that extends beyond what assembly contributes to speech. Regulations like those at the 2008 RNC and DNC separate protesters from those they are protesting. Such restrictions prevent assemblies from performing their full duty in a democratic society.

El-Haj concludes her argument by warning that the right to assembly “should not be collapsed into the right of free expression.” The power of collective action is unique to assembly and thus, regulations on group activity should be subject to higher scrutiny.

While El-Haj makes a convincing point in juxtaposing assemblies in the past and present-day, her theory does have limitations. She does not present a substantive test by which to determine constitutionally suffocating regulations. Her main focus is identifying the problem—though this is certainly a valuable contribution in and of itself.

Returning the standard for assembly to the traditional one of the Founding era poses problems. Technology has advanced in ways that make a rowdy assembly even more dangerous than it once was—the January 6th insurrection that I discuss in the next chapter is a painful illustration of this. Cars and motorcycles also make public forums like streets more dangerous than they once were. Finding a way to reinvigorate assembly while still protecting public safety is not impossible, but it will take further analysis to

---

298 Abu El-Haj. 588.
299 Abu El-Haj. 589.
300 Abu El-Haj. 589.
determine which regulations should go. Some might be obvious, like her condemnation of the free speech zones at the convention, but others require more consideration.

**Brod’s Assembly as Physical Gatherings**

In “Rethinking a Reinvigorated Right to Assemble,” Nicholas S. Brod is similarly concerned about protections for in-person gatherings. He argues that the Court needs to revive the right to assemble, independent of association, to protect non-expressive, physical gatherings. He uses the Occupy movement, which stemmed from 2011 and 2012, as an example of demonstrations that would have been protected as lawful assembly two centuries earlier.  

Brod contends that the Occupy movement shares key similarities with Founding era gatherings. However, associational rights as they exist today are incapable of protecting such demonstrations. Associational rights after *Roberts* came to depend on the expressiveness and intimacy of an organization. The Occupy movement was neither—Brod describes it as “a heterogeneous group that lacked a formalized set of goals, criteria for membership, or a leadership class.” While they advocated for social change and economic reform, they did not have a cohesive expression or a formalized list of demands. They also were not intimate: the movement was large and open to anyone.  

Brod looks to the colonial era to defend his claims and examine how the Founder’s would have understood assembly. First, he points out that assembly in the

---

301 Brod, “Rethinking a Reinvigorated Right to Assembly.”
303 Brod, “Rethinking a Reinvigorated Right to Assembly,” 182.
304 Brod. 182.
Founding Era was defined as, “[t]o meet together,” “to flock together,” and “to convene, as a number of individuals.” In other words, “assembly” implied flesh-and-blood gatherings. Second, debates from the First Congress suggest that assembly was understood to protect dissenting groups congregating in person. This intent is illustrated by Representative John Page’s invocation of the trial of Willian Penn during the debates. Third, over a third of state constitutions at the time included protections for assembly. Fourth, assemblies played a key role in the daily lives of colonists, from parades to taverns. Though I have already covered some of this history in Chapter II and above, it’s worth reiterating the historical examples Brod chose to highlight.

Public streets were a gathering place of special importance. Demonstrations against England often occurred there, in which marchers, “chanted, sang, and burned objects in effigy.” These were often spontaneous, though rarely violent, and allowed disadvantaged groups like women and free Black people to participate politically. Assembly was crucial to one of the most famous events of the revolution—the Boston Tea Party.

Taverns were also a very important part of assembly. Brod describes them as “quasi-public” spaces, in which colonists could plan, exchange ideas, and discuss politics. They were also largely inclusive spaces, as class did not determine who could frequent a tavern.

---

305 Brod. 163.
306 Brod. 174.
307 Brod. 176.
309 Brod, “Rethinking a Reinvigorated Right to Assembly,” 179.
310 Brod, 179.
There are three key traits that the Occupy movement shared with colonial demonstrations. First, they utilized public spaces. Occupy set up encampments across the United States, while colonialists were free to use the streets to demonstrate. Second, they employed similar, attention-grabbing tactics. Like colonists dumping tea into the Boston Harbor, Occupy used expression conduct in their protests. Third, both called for “a thorough rethinking of the political order.” The fundamental purpose of assembly is to promote self-governance. The colonists used it to fight for a new system of government. The Occupy movement did the same in the wake of the 2008 financial crisis, reflecting the sentiment that “ordinary politics had failed.”

Brod ends by sketching out the contours of a potential theory of assembly. First, he asserts that the Court should eliminate expression requirements on assemblies. Assembly is a form of conduct, and the Court currently only recognizes some forms of conduct as expressive. The conduct itself must intend, “to convey a particularized message” that would have a high likelihood of being “understood by those who view it.” Assembly that meets this standard is protected under strict scrutiny, meaning that laws that impede it must be “necessary to serve a compelling state interest [and] narrowly drawn to achieve that end.” Conduct that is not expressive is only protected by intermediate scrutiny. This test requires that content-neutral regulations be, "narrowly drawn to further a substantial government interest' and to 'preserve […] ample alternative channels of communication.

311 Brod, 183.  
312 Brod, “Rethinking a Reinvigorated Right to Assembly.” 182-183.  
313 Brod. 185.  
314 Brod. 185.  
315 Brod, 185–86.
Brod argues that the intermediate standard is too feeble in practice. It does not require that a law uses the least restrictive means, which means nonexpressive assemblies may be impeded by the government even when there are other options available. Even more problematic, “amble alternative channels of communication” allows for speech to be substituted for action. An inconvenient assembly could make the same point in an op-ed, but that misses the value of the gathering itself.316

Second, Brod contends that judges should use a means-end scrutiny in relevant cases. This test could look like a significantly modified version of the Court’s free speech jurisprudence but would require “special vigilance” in distinguishing “facially content-neutral laws that are nonetheless applied in content-based ways.”317 For example, the neutral time, place, and manner restrictions usually applied to free expression in public forums could not account for the nature of the Occupy movement. Its disruptive timing, placement, and manner were part of its message because it is conduct, not speech. But courts continually ruled in favor of local regulations that shut down these camps, ending the assembly.318

Third, when intermediate-scrutiny is applied, it should be done so in a way mindful of accessibility in the treatment of assembly rights. Assembly in inconvenient spaces may be the best option for those who lack access to the forums utilized by wealthier and better-connected people like the internet.319 This dichotomy was recognized in Justice Marshall’s dissent in Clark v. Commun. For Nonviolence, in which

316 Brod, “Rethinking a Reinvigorated Right to Assembly.” 185.
317 Brod. 191.
318 Brod. 189.
319 Brod. 191-192.
he remarked: “[J]udicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas.”\(^{320}\)

To conclude, Brod argues that freedom of assembly offers a unique way to protect property rights under the First Amendment. Taken as a positive right, peaceable assembly could oblige the government to created areas free of traditional public-forum constraints.\(^{321}\)

While the main concerns of Brod and El-Haj’s theories differ, what they share thematically is mutualistic. El-Haj offers a detailed examination of how assemblies once freely contributed to the democratic process, emphasizing its importance, and Brod introduces a new framework to approach assembly jurisprudence. While his theory is promising, it leaves freedom of association untouched, despite its degradation over the last 40 years. Assembly was considered the same as association for a significant enough time in the US, including the colonial period that Brod grounds his argument in, that to fully reinvigorate the right of assembly demands attention to association as well. The next two theories offer perspectives on this.

**John Inazu’s Assembly as Protecting Group Autonomy**

John Inazu takes the opposite approach to Brod, arguing that assembly can and should be expanded to protected group autonomy. As I discussed in Chapter III, requiring

\(^{320}\) Clark v. Commun. for Nonviolence, 468 U.S. 313, n.14
\(^{321}\) Brod, “Rethinking a Reinvigorated Right to Assembly.” 194-195.
that associations are expressive to receive legal protection fails to acknowledge the importance of group dynamics. Inazu argues that this is because “something important is lost when we fail to grasp the connection between a group’s formation, composition, and existence and its expression.”\textsuperscript{322} He uses “a gay social club, a prayer or meditation group, and a college fraternity” as examples of associations that are not protected under current constitutional doctrine but still convey a message simply by existing.\textsuperscript{323} The rituals and gatherings of these groups all express something—even if the groups do not have a clear doctrine—each which conflicts to some degree with social norms.\textsuperscript{324} Like Brod and El-Haj, Inazu grounds the importance of reviving assembly in the work that it does to further the democratic process.

Even when groups are afforded an expressive status, they are still given few protections when it comes to anti-discrimination. Inazu points to a recent Ninth Circuit ruling that held that a high school Bible club could not limit their membership to Christians as evidence for this degradation. Deciding on who can be part of a group is essential to group autonomy, and current Court doctrine fails to account for this.\textsuperscript{325}

Inazu argues that the right to assemble should be used by the Court to reinvigorate protections for group associations, using the history of assembly to back this claim. There are four principles at play in its past that make it applicable.

First, Inazu argues that historically “assembly extends not only to groups that further the common good but also to dissident groups that act against the common

\textsuperscript{322} Inazu, \textit{Liberty’s Refuge}.
\textsuperscript{323} Inazu. 3.
\textsuperscript{324} Inazu. 3.
\textsuperscript{325} Inazu. 3.
good.”

This can be seen in comparing the text of state constitutions with the First Amendment at the time of its passage. While “common good” clauses were used in state constitutions, there is no qualifier on assembly in the US Constitution. In practice, this meant that assemblies could not be persecuted for their content so long as their conduct was peaceful. For example, Henry Bridges was not deported despite his participation in activities of the Communist Party because he never advocated for violence.

Next, he asserts that “this right extends to a vast array of religious and social groups.” The labor movement, Suffragettes, and those fighting for racial equality all used assembly to protect their associations, demonstrations, and marches in pursuit of democratic change. Religious groups also historically enjoyed assembly protections. The paradigmatic British assembly case—the trial of William Penn—centered on protecting assemblies engaging in religious activity. There were also several cases decided before the Civil War that protected the right of religious groups to exclude, like Leavitt v. Truair and First Parish in Sudbury v. Stearns.

His third point is that “just as the freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group’s autonomy, composition, and existence.”

This can be seen in the minimal regulation on assembly in the Founding era. Permission

---

326 Inazu, 4.
327 Thorpe and United States., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now or Heretofore Forming the United States of America; Inazu, Liberty’s Refuge.
328 Bridges v. Wixon, 326 U.S.
329 Inazu, Liberty’s Refuge, 4.
330 Inazu, 30.
331 Inazu, 4.
did not need to be given to gather, so long as a group did so peaceably. Modern requirements subvert this history standard.

Finally, he asserts that “assembly is a form of expression—the existence of a group and its selection of members and leaders convey a message.” A great example of this was the Democratic-Republican societies that formed to criticize Federalist administrations. Whether or not the group was publishing a formalized set of demands, their existence still acted as a rebuttal to the political majority. The meetings of the societies conveyed a message that the power of the Federalists was not total. There were alternatives, as embodied by the people in the organization. The societies made an effort to involve women and Black citizens to illustrate their egalitarian values. In this fashion, the identities of the members and leaders mattered toward the message ultimately conveyed by the group.

A central tenet to Inazu’s argument is that association cannot do the legwork that is needed to revive assembly. Instead, the Court can revive assembly without having to rework their current doctrine around expressive association. He blames this current doctrine in part on the prevalence of pluralist assumptions in the 1950s and of Rawlsian liberalism at the time of Roberts v. United States Jaycees.

Pluralism was championed by David Truman and Robert Dahl after World War II, though it was a tradition that had existed since the early 20th century. It grounded the success of democratic government in the consensus of groups in society, rather than in

---

332 Inazu, Liberty’s Refuge. 4.
333 Inazu, 27.
334 Inazu, Liberty’s Refuge.
the state like German idealism. In Dahl’s theory, society is comprised of “[m]ultiple centers of power, none of which is or can be wholly sovereign.”

Majorities are achieved through compromises between these groups, which moderates the outcome. Combined with an assumption of shared democratic ideals, very little room is left for dissenting groups or organizations opposed to the common good.

The rise of pluralism had two impacts on freedom of association. First, it placed the value of groups in the United States on “the extent that they reinforced and guaranteed democratic premises.” This perspective explains in part why communist organizations were left so unprotected by the Court. Because communist ideology operated against the US capitalist system, their rights as a group were rejected. The second effect was that groups who did fit the theory were given an incredibly positive gloss.

In 1971, John Rawl’s *Theory of Justice* reinvigorated the field of political theory. His theory echoed parts of the pluralism of a decade earlier, despite differences in approach. Consensus and stability were key premises: he believed that an overlapping consensus about justice could be discovered from a diversity of reasonable doctrines constrained by public reason and result in a stable, prosperous society. He included freedom of association as a basic liberty, but it was constrained by public reason. Unlike de Tocqueville, Rawls “never really recognized the value of protecting antimajoritarian groups on nonideological grounds.”

---

335 Inazu. 101.
336 Inazu. 105.
337 Inazu. 105.
338 Inazu. 129-130.
339 Inazu. 132.
Rawlsian liberalism was widely adopted by scholars at the time. Though it was never cited by the Court in their landmark association cases, it was used by academics “to provide intellectual cover to the Warren Court’s decisions,” especially in creating nontextual rights.\footnote{Inazu. 131.}

These theories illustrate the weaknesses Inazu identifies in current Supreme Court doctrine. He believes that dissident and unpopular groups are just as deserving of group freedoms as any other organization. The democratic value is not added by what the group says, but by their existence. The presence of a group can often hold great expressive value, regardless of its stated goals, even if the Court does not recognize it as such. With this in mind, Inazu’s suggested meaning of assembly is as follows:

“The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups. This right is rebuttable when there is a compelling reason for thinking that the justifications for protecting assembly do not apply (as when the group prospers under monopolistic or near-monopolistic conditions).”\footnote{Inazu. 166.}

The use of "peaceable" in the definition allows for legislation that furthers a state's compelling interest in peace—like preventing riots or anarchy by a group.

"Noncommercial" prevents discriminatory hiring practices and other forms of discrimination in the economic sector. Under Inazo’s understanding, neither the Boy Scouts nor the United States Jaycees would qualify as commercial groups. The caveat in the second sentence is intended as a protection against discrimination. If the Boy Scouts
could be proven to be a monopolistic organization in their field, then they could not hold the same discriminatory policies.\textsuperscript{342}

Inazu’s approach is not without its weaknesses. Richard A. Epstein points out two in his review of Inazu’s work. First, Epstein argues that the “peaceably” qualifier on assembly is too indicative of a physical gathering to truly expand the right to association. I do not think this is an unavoidable problem for Inazu. The history of assembly as association is rich that the qualifier could be feasibly understood to require non-violent actions from an association.\textsuperscript{343}

Epstein’s second criticism is more salient. He is concerned with Inazu’s approach to anti-discrimination concerns. Inazu is very clear to reject an approach centered on "logic of congruence" between state and private discrimination standards because they would subsequently prevent the formation of exclusive groups for people of color, women, and so on. However, his theory as it stands does not provide a good test for when anti-discrimination should trump association in non-monopolistic, noncommercial groups. Though he wants to argue that race should be treated differently, his failure to elaborate a clear standard leaves his theory overcorrecting anti-discrimination norms.\textsuperscript{344}

\textsuperscript{342} Inazu.
Ashutosh Bhagwat’s Associational Speech

The final theory I will consider in this chapter is not an assembly theory. Rather, Ashutosh Bhagwat argues for a reinvigorated conception of association in his paper “Associational Speech.” To do so, Bhagwat illustrates the close connection between assembly and association. Though the Court has often tied association to speech, Bhagwat argues that assembly and association were historically treated as coequal, independent rights. By treating association as subordinate to speech, the Court fails to uphold the fundamental purpose of the First Amendment: self-governance.345

Bhagwat defends his theory by pointing to the different meanings of assembly and association. He traces the two rights as they were employed by the Supreme Court from Whitney v. California and De Jonge v. Oregon to the advent of association in NAACP.

He identifies Whitney as the beginning of the explicit connection between assembly and associational rights. Even though the Court focused on Whitney's freedom of speech, the case was fundamentally about her association with the Communist party. Bhagwat identifies two key takeaways from the decision: first, assembly, association, and speech were treated as coequal and separate by the 1927 Court. Second, assembly and association were still being treated as largely interchangeable. Though Justice Brandeis only refers to assembly in his concurrence, his usage implicates association as well.346

In De Jonge, the Court continued to treat assembly and association as the same thing. The conflict centered on Mr. De Jonge’s participation in a meeting of the

346 Bhagwat. 984.
Communist Party, something that is more similar definitionally to association, but the Court struck down De Jonge’s conviction because of his right to free assembly.\textsuperscript{347}

Bhagwat argues that after the NAACP decision, “membership in organizations was protected no longer as an independent political freedom but as an aspect of free speech.”\textsuperscript{348} He is critical of the decision because it treats the freedoms of association and assembly as valuable because of what they contribute to freedom of speech. They are referred to as secondary rights, both employed for the purpose of expressive activity. After this case, the Court continued to use freedom of association to protect the NAACP.\textsuperscript{349}

Bhagwat suggests that the Court grounded association in speech out of concern that its long history with assembly which be insufficient to justify the formation of the nontextual right. But the history between assembly and association operating in the interest of democratic governance is substantial enough that such a move was unnecessary.\textsuperscript{350}

\textit{Roberts v. United States Jaycees} established the modern standard for freedom of association. The opinion argued that there are two protected forms of associations: expressive ones and intimate ones. The Court held that the Jaycees were neither intimate nor expressive enough to justify their discriminatory membership standard, which excluded women. In the subsequent decisions \textit{Board of Directors of Rotary International}
v. Rotary Club of Duarte and New York State Club Ass’n v. City of New York, the Court used the same standard to force two more organizations to accept women.\textsuperscript{351}

Bhagwat points out that Roberts marks a shift in how the expression standards were used by the Court. After NAACP, the expression produced by an association was used as a reason to protect its rights. In contrast, after Roberts, expression was a means by which to limit associational freedoms in the interest of anti-discrimination.\textsuperscript{352} This transition illustrates the dangers of making group rights subsidiaries of free speech: new limitations appear that would be irrelevant if the rights were treated as independent.

Bhagwat asserts that the importance of assembly and association in democratic government has been made clear throughout history. He argues that the colonists, “[t]he generation that drafted the First Amendment had lived through the Revolutionary era and surely understood the importance of association and assembly in creating a popular revolution.”\textsuperscript{353} Those who drafted the Fourteenth Amendment after the Civil War were also intimately aware of the importance of First Amendment freedoms towards the political and economic empowerment of US citizens. Finally, he points to Tocqueville’s theory of association, which prizes the freedom of association both for its role in resisting majoritarian rule and its contribution to developing the skills and values necessary for collective rule.\textsuperscript{354}

With this history established, Bhagwat turns to locating association in First Amendment theories. He focuses on the theory that the value of free speech comes from

\textsuperscript{351} Bhagwat. 988.
\textsuperscript{352} Bhagwat. 988.
\textsuperscript{353} Bhagwat. 992.
\textsuperscript{354} Bhagwat. 992.
its role in self-governance. This approach originated in Justice Brandeis’s *Whitney* concurrence but has been repeated by scholars like Alexander Meiklejohn, Robert Bork, and Cass Sunstein.\footnote{Bhagwat. 994.}

Bhagwat argues that the theory of self-governance should be expanded to apply to all First Amendment freedoms. Speech alone is insufficient to capture all forms of participation. Indeed, the right to petition the government originated in British governance long before free speech. Instead, speech, press, assembly, and petition should all be treated as “independent provisions, protecting distinct human activities but serving the common political and structural goal of enabling meaningful self-governance by the sovereign People.”\footnote{Bhagwat. 995.} No right is subordinate to another, but all rights must be used together to be effective.

Current Court doctrine largely views self-governance as being limited to voting rights. Speech generates thoughtful voting and association allows that speech to be heard. The reality of self-governance is much messier; Bhagwat points to modern cable news, the attacks on the Adams Administration that resulted in the Sedition Act, and opposition to President Lincoln as examples. Aside from the contentious debates, group organization is also essential to petitioning the government. Privately, associations are important in the pursuit of self-governance because they allow for personal development and education.\footnote{Bhagwat. 998.}

The theory of self-governance does not leave freedom of association without checks. Instead of protecting expressive associations, Bhagwat concludes that the Court
should protect associations “whose primary goals are relevant to the democratic process,” though he defined the relevancy broadly.\textsuperscript{358} Bhagwat uses the Sierra Club as an example of an association that is not purely democratic but would still be protected. The Sierra Club dedicates tremendous time to lobbying and publicity campaigns. It also organizes hikes, clean-up days, and other activities which are not explicitly political but still contribute to their end goal. Such peripheral activities would still be protected.\textsuperscript{359}

Bhagwat’s theory leaves less room for dissident groups than those espoused by Brod and Inazu. A group like the Communist party, which is anti-democratic, may be left unprotected by Bhagwat’s approach to associational rights. Inazu argues that the expressive value of a group comes from its existence, where Bhagwat suggests that it comes from the group’s purpose. Thus, Bhagwat would not have a problem with the pluralism or liberalism that Inazu criticizes.

Bhagwat’s theory does function well in combination with El-Haj or Brod. His conclusion emphasizes the importance of treating every First Amendment right as independent and necessary. While his main focus is reworking association so that it may better serve the purpose of self-governance, presumably doing the same for assembly is a crucial next step in his theory. Both El-Haj and Brod center their concerns on assembly and how it contributes to a democratic government. El-Haj’s analysis of politically infused assemblies from the Founding fits in especially well alongside Bhagwat’s interest in democratic association.

\textsuperscript{358} Bhagwat. 1000. 
\textsuperscript{359} Bhagwat. 1000.
Conclusion

There are four theories I reviewed in this chapter. First, I began with Tabatha Abu El-Haj’s argument that modern permit requirements are antithetical to the treatment of assembly in the Founding era and must be rolled back.\footnote{Abu El-Haj, “The Neglected Right of Assembly.”}

Next, I focused on Nicholas S. Brod, who condemns efforts to combine freedom of association and assembly. Instead, he advocates for a reinvigoration of the right to assemble as it protects in-person gatherings, an approach the respects the importance of time and place in exercising assembly.\footnote{Brod, “Rethinking a Reinvigorated Right to Assembly.”}

Third, I summarized John Inazu’s argument for expanding assembly rights to include group autonomy. Inazu highlights how freedom of association has failed dissident groups and suggests that assembly should protect noncommercial, peaceably groups because their democratic expression stems from their existence.\footnote{Inazu, \textit{Liberty’s Refuge}.}

Finally, I presented Ashutosh Bhagwat’s defense of association. Bhagwat seeks to revitalize all First Amendment rights under the self-governance theory, rather than depend mainly on freedom of speech, as the Court does now. With this approach, he argues that freedom of association should protect democratic groups, rather than expressive ones.\footnote{Bhagwat, “Associational Speech.”}

Each of these theories has strengths and weaknesses, depending on what someone aims to achieve in reinvigorating assembly. The important thing is that each seeks to

\footnote{Abu El-Haj, “The Neglected Right of Assembly.”} \footnote{Brod, “Rethinking a Reinvigorated Right to Assembly.”} \footnote{Inazu, \textit{Liberty’s Refuge}.} \footnote{Bhagwat, “Associational Speech.”}
separate speech from group freedoms, and each emphasizes the role that groups play in the democratic process, by organizing and expressing different opinions.

In the next chapter, I will catalog the events of 2020 that highlighted the importance of a strong right to assemble in the US. I argue that these events should serve as inciting incidents for the Court to reexamine their current treatment of assembly and association. These four theories each provide convincing arguments about the neglect of these freedoms and can be used to shape solutions to the dilemma the Supreme Court currently faces.
V. Assembly in 2020

In Chapter II, I reviewed the history of the right to assemble. What began as a robust right, one used by Americans from all walks of life, in celebrations, political debates, and beyond, transformed into a right entirely limited to its expressive value. In Chapter III, I picked up where assembly was largely left off: with the right of association. Associational freedom offered important protections during the Civil Rights Movement but eventually, the right was subsumed into its expressive purpose as well. In Chapter IV, I grounded the importance of this history in four modern theories dealing with group rights: three focused on assembly, while one focused on association.

Two key observations tied these chapters together. First, the importance of assembly has repeatedly been connected back to its role in self-governance. The history of the right illustrates how it has fulfilled this role in the United States. Second, there is an inescapable tension between the importance of group action in democracy and the danger that an organized group can pose. Drawing lines to limit groups that engage in violent action or discrimination may be easier said than done because it runs the risk of leaving other non-objectionable groups without constitutional protection.

Both of these themes connect to the recent events in the United States that brought freedom of assembly to the forefront of public consciousness. I will focus on four different categories to discuss these developments. I will begin with the protests in
response to police brutality that broke out internationally beginning in May 2020, largely driven by the Black Lives Matter movement. These protests formed a new chapter in the complicated history between racial equality and assembly since the founding of the United States. The violence that the protesters faced in response to their work is an alarming look into the state of assembly rights in the United States today.

In contrast, some of the protests became violent themselves, posing questions about how far assembly rights should extend. Past Supreme Court cases involving the KKK and NAACP offer a lens through which to consider what protections should be given to violent assemblies.

In the second section, I explore the one case involving violent assembly, permit requirements, and Black Lives Matter that has already made it to the Supreme Court. In *DeRay McKesson v. John Doe*, the Supreme Court vacated and remanded a Fifth Circuit court decision that made a protest organizer liable for injuries sustained by a police officer—even though the injuries were caused by a different protester. Rather than using the case for a meaningful exploration of First Amendment rights, the Court directed the Fifth Circuit back to the Louisiana Supreme Court to clarify the meaning of state law.

The Fifth Circuit decision sets the precedent for a guilt-by-association standard being applied to protest organizers. I compare this with the decision made in *Whitney v. California* to warn about the dangers of such a doctrine.

---

365 Buford et al., “We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found.”
Then, I consider the Supreme Court’s decision. The choice to not include a principled exploration of assembly is somewhat reminiscent of the decisions handed down by the Court during the Civil Rights Movement. It shows that the Court is continuing its pattern of not seriously addressing assembly rights no matter how salient the case.

My next section will explore the implications the January 6th insurrection at the Capitol has for freedom of association.\(^{367}\) The riot at the Capitol demonstrates the tension already brewing during the Black Lives Matter movement over summer: how can the right to assemble be meaningfully protected but subsequent violence avoided? Which interest should be given higher priority? It also highlights how white privilege protects white citizen's ability to engage in constitutionally protected assembly to a much greater degree than Black citizens.

Tocqueville's theory of association in the United States is disrupted by the existence of alt-right groups. Their extreme tactics and antipodal beliefs make them the sorts of associations Tocqueville argued were dangerous in European states. The theories of Ashutosh Bhagwat and John Inazu offer two different approaches to protecting such dissident groups. The former would object to their anti-democratic nature, while the latter would want to protect them precisely for their alternate views.

While the Court has refrained from seriously considering these questions about assembly in the modern-day, state legislatures have given their answers. These laws are what I focus on in my fourth and final section. Tracking by the International Center for

\(^{367}\) Mazzetti et al., “Inside a Deadly Siege.”
Not-for-Profit Law found that in the United States, more than double the average number of anti-protest bills have been introduced during the 2021 legislative session. These bills have serious consequences—in Oklahoma, one was introduced that would absolve drivers who run over protesters of guilt.\textsuperscript{368}

In this section, I argue that these anti-protest bills are largely unjustifiable. The extent to which the bills aim to stifle assembly is unacceptable given the important role assembly plays in self-government. They are a different kind of time, place, and manner restriction. Some also implicate guilt-by-association. I use the history of assembly and Nicholas S. Brod’s theory of assembly to emphasize that legislation endangering protesters on public streets is antithetical to the self-governing purpose of assembly.

To conclude, I argue that these events highlight the necessity of a clear Supreme Court assembly doctrine. The events of 2020 and 2021 demonstrate not just the importance of the right to assembly and the rising imperative on the Court to protect the rights of protesters and association, but also the danger that groups can pose. Coming up with a clear standard can temper both the abuse on and of assembly.

\textbf{The Rise of the Black Lives Matter Movement}

On May 25\textsuperscript{th}, 2020, a forty-six-year-old Black man named George Floyd was murdered in Minneapolis. A police officer was recorded kneeling on his neck for eight minutes while Floyd pleaded for him to stop. The video of his murder incited outrage across the nation. Within two days, protests against police brutality and racial inequality

\textsuperscript{368} Epstein and Mazzei, "G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)."
began in cities and towns everywhere.\textsuperscript{369} The protests peaked on June 6\textsuperscript{th}, as half a million people gathered in 550 different places in support of the movement. For comparison, attendance at the Civil Rights marches in the 1960s only numbered in the hundreds of thousands.\textsuperscript{370}

I will focus on two protests emblematic of the assembly issues presented by the movement: the June 1\textsuperscript{st} protest in Lafayette Square in Washington DC and the 100 nights of protest in Portland, Oregon, several of which were declared riots.

On June 1\textsuperscript{st}, a group assembled in Lafayette Square across from the White House to protest police brutality. The gathering was peaceful. Despite this, about thirty minutes before DC's curfew was set to begin at 7:00pm, the National Guard surrounded the crowd. Then, the federal troops moved in. Flashbangs, rubber bullets, and tear gas were used from the middle of the crowd to clear the assembly.\textsuperscript{371} Journalists were among those assaulted, indiscriminately subjected to the brutal means of disbursement.\textsuperscript{372}

While the troops were moving in on the peaceful protesters, President Trump was giving an address in the Rose Garden. In the address, he announced, “Our 7 o’clock curfew will be strictly enforced. Those who threaten innocent life and property will be arrested, detained, and prosecuted to the fullest extent of the law.”\textsuperscript{373} Minutes after it was

\par

\textsuperscript{369} Motala, “‘Foreseeable Violence’ & Black Lives Matter.”
\textsuperscript{370} Buchanan, Bui, and Patel, “Black Lives Matter May Be the Largest Movement in U.S. History.”
\textsuperscript{371} Parker, Dawsey, and Tan, “Inside the Push to Tear-Gas Protesters Ahead of a Trump Photo Op."
\textsuperscript{372} Allen, “Trump and Tear Gas in Lafayette Square: A Memo from the Protest Front Lines.”
\textsuperscript{373} Parker, Dawsey, and Tan, “Inside the Push to Tear-Gas Protesters Ahead of a Trump Photo Op.”
forcefully cleared, President Trump and a collection of his top advisors walked through Lafayette Square to reach St. John’s church for a photo-op.\textsuperscript{374}

The treatment of protestors in Lafayette Square is emblematic of the constraints placed on assembly during the Black Lives Matter movement at large. First, and most obviously, law enforcement used disproportionately violent means to respond to protesters. Data from Bellingcat and Forensic Architecture and analyzed by The Guardian identified over 950 instances of police brutality against civilians and journalists between May and October 2020.\textsuperscript{375} Between just May 26\textsuperscript{th} and June 2\textsuperscript{nd}, 148 attacks or arrests on journalists were recorded.\textsuperscript{376}

Similarly, ProPublica surveyed 400 videos of police interactions with protesters from across the country and found that 184 of them contained “troubling conduct” on the part of law enforcement.\textsuperscript{377} Eighty-seven videos showed officers hitting and kicking retreating protesters, 59 involved improper use of pepper spray and tear gas, and 12 showed officers using batons against noncombative protestors.\textsuperscript{378}

Conduct like this serves to discourage assemblies, as it makes people fear for their health and wellbeing should they be caught in the wrong place at the wrong time. Even nonlethal means like pepper spray or rubber bullets can cause lifelong injuries.\textsuperscript{379} This damages freedom of assembly even if it does not place explicit legal constraints on it.

\textsuperscript{374} Parker, Dawsey, and Tan.
\textsuperscript{375} Gabbatt, Thomas, and Barr, “Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests.”
\textsuperscript{376} Safi et al., “I’m Getting Shot.”
\textsuperscript{377} Buford et al., “We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found.”
\textsuperscript{378} Buford et al.
\textsuperscript{379} Buford et al.
The treatment of journalists also connects back to Ashutosh Bhagwat’s theory of self-governance and First Amendment rights. Freedom of the press, freedom of assembly, freedom of speech, and freedom of petition are all necessary in combination with each other for true self-governance. By indiscriminately assaulting the press and normal citizens, law enforcement is assaulting both the free press and assembly. It is a two-tiered attack on democratic government.

The second kind of limit confronted by protesters was regulatory. Curfews, permit requirements, and other kinds of regulations seek to limit where, when, and how assemblies take place. They were implemented across the country during the Black Lives Matter movement. For example, New York City instituted an 8:00pm curfew in early June. In one instance, officers boxed in protesters before the curfew officially began, and then drove bikes into the crowd once 8:00pm arrived to arrest protesters for curfew violations.

Tabatha Abu El-Haj was worried that restrictions on assemblies might be too suffocating in the modern day to allow for real democratic impact. The curfew requirements from the summer of 2020 demonstrate the salience of this concern. The temporary restrictions were used to place extraordinary limits on assembly that were easily exploited by law enforcement.

The restrictions on assembly not only prevented protesters from staying for as long as they wanted but also prevented them from being where they wanted to be. El-Haj

---

380 Bhagwat, “Associational Speech.”
381 Offenhartz, Pinto, and Hogan, “NYPD’s Ambush Of Peaceful Bronx Protesters Was ‘Executed Nearly Flawlessly,’ City Leaders Agree.”
382 Abu El-Haj, “The Neglected Right of Assembly.”
criticizes the free speech zones implemented for the 2008 DNC and RNC because they placed assemblies too far from the convention centers.\textsuperscript{383} The protesters in Lafayette Square were there to send a clear message to President Trump. When the National Guard forcibly ended the assembly, they did it so that the President of the United State could walk through the Square unimpeded.\textsuperscript{384} For assembly to act as a meaningful check on the government, those who participate in assemblies must have their concerns heard by those in power. The time and place restrictions placed on assemblies across the country prevented this from happening.

The Black Lives Matter protests in Portland showcase two extremes. On one hand, some protesters engaged in violent activities that constituted unlawful assembly. On the other hand, law enforcement used tactics to discourage protesting that were a blatant violation of freedom of assembly.

The protests in Portland were largely peaceful.\textsuperscript{385} Beginning in late May, protesters came out for over 100 nights in a row in support of Black Lives Matter. During this time, there were outbreaks of violence at certain protests that resulted in injured law enforcement officers and serious property damage.\textsuperscript{386} However, the most destructive clashes between law enforcement and protesters began after President Trump sent federal troops to Portland to protect federal property.\textsuperscript{387}

\textsuperscript{383} Abu El-Haj.
\textsuperscript{384} Gjelten, “Peaceful Protesters Tear-Gassed To Clear Way For Trump Church Photo-Op.”
\textsuperscript{385} Conger and Bogel-Burroughs, “Fact Check.”
\textsuperscript{386} Thompson, “Portland Police Create Timeline, Map of Civil Disturbances and Riots.”
\textsuperscript{387} Levinson, Wilson, and Haas, “50 Days of Protest in Portland. A Violent Police Response. This Is How We Got Here.”
On July 22\textsuperscript{nd}, the U.S. attorney in Oregon reported that 28 federal law enforcement officers had been injured during protests. The most serious injury involved “a protester wielding a two-pound sledgehammer” who “struck an officer in the head and shoulder when the officer tried to prevent the protester from breaking down a door to the Hatfield Courthouse.”\textsuperscript{388}

Property damage is more difficult to calculate. After the Portland police announced that $23 million in damages was sustained by Portland businesses during six weeks of protests, independent fact-checkers cast doubt on that statistic. Further analysis showed that one respondent had reported 90\% of the total damages. The only business downtown that could feasibly earn that level of daily revenue was Pioneer Place mall, which was still closed for the majority of the protests because of Covid-19 restrictions. Nonetheless, it remains true the downtown businesses sustained losses from graffiti, broken windows, and other damage during the protests.\textsuperscript{389}

Law enforcement responded to the Portland protests in turn. While the police violence that manifested in protests across the country also manifested in Portland, there were also new means of preventing protest. The most egregious may have been the conditional releases some arrested protestors were forced to sign.\textsuperscript{390}

Federal authorities used minor reasons to arrest protesters, like failure to immediately comply with orders to step off a sidewalk. Then, they included conditions in the arrest releases that barred the defendants from attending all other “protests, rallies,

\textsuperscript{388} Conger and Bogel-Burroughs, “Fact Check.”
\textsuperscript{389} Bailey Jr., “$23 Million Cited as Portland Protest Damages Was Mostly Tied to Coronavirus Closures.”
\textsuperscript{390} Lind, “Defendant Shall Not Attend Protests.”
assemblies, or public gatherings” in Portland or Oregon.\textsuperscript{391} Protesters were faced with the choice between remaining in a holding cell indefinitely or giving up their freedom of assembly. On one release, Magistrate Judge Acosta wrote in a restriction on attending protests by hand, which one constitutional scholar described as “sort of hilariously unconstitutional.”\textsuperscript{392}

The Lafayette Square and Portland protests offer a modern perspective on the themes that I have traced through the history of assembly and association. The violence faced by protesters in the Black Lives Matter movement this summer was reminiscent in some ways of the harsh limitations on assembly in the Antebellum and Reconstruction South, and especially of the police brutality faced by protesters in the Civil Rights Movement of the 1960s. Assembly has been a valuable tool in the fight for racial equality—it has protected the NAACP from its creation in the early 20\textsuperscript{th} century and was used to convict white supremacists under the Enforcement Act in the Reconstruction South. Unfortunately, it has been repeatedly denied to people of color because of the importance assembly has in social and political life. After all, the Court gutted the first Enforcement Act in \textit{US v. Cruikshank}.

In Chapter III, I suggested that the Court’s ruling in \textit{Bryant v. Zimmerman} was sufficiently distinct from \textit{NAACP} because one involved the KKK, which partook in violent activities, and one involved the NAACP, which did not.\textsuperscript{393} \textsuperscript{394} The violence of some of the protests in Portland challenges this notion by blurring the line between the

\textsuperscript{391} Lind.
\textsuperscript{392} Lind.
\textsuperscript{393} New York ex Rel. Bryant v. Zimmerman, 278 U.S.
\textsuperscript{394} NAACP v. Alabama ex rel. Patterson, 357 U.S.
two. The protestors in Portland were both violent and nonviolent, often in the same crowd. Distinguishing between the two can be very challenging for officers in the moment.

There are differences between the past cases and the Portland protests. Bryant and NAACP both focus on associations, while the protests in Portland were much more similar to assemblies by definition—the protests were made up of a variety of changing groups and individuals. As a result, demanding membership lists is not a feasible option. In executing arrests for unlawful assembly, it seems that officers will either have to choose to over or under correct. Asking officers to air on the side of caution ensures the broadest protection constitutionally. However, when officers begin to sustain serious injuries, there needs to be some mechanism in place to limit the violence.

The Portland riots emphasize how group rights can be dangerous in a way that individual rights, like speech, are not. One speaker cannot begin to cause the physical damage that one assembly can in the same timeframe. Groups can also spin out of control and become significantly harder to contain than one speaker ever would be. Assembly rights must be broad and unregulated to be meaningful, but some limitations might be necessary to prevent serious violence. This tension will be made starkly clear when I discuss the Capitol insurrection later in this chapter. While that example involves associational freedoms, the Portland protests are predominantly assembly-based.

Finally, it is worth considering how the Black Lives Matter movement bears some similarities to the communist organizations of the 1960s. This summer, the Black Lives

\[395\] Garcia, “Inside Portland’s Autonomous Protest Movement.”
Matter called for a radical restructuring of the United States. Specifically, they sought to deconstruct the systemic racism that has permeated almost every avenue of American life. In the 1960s, affiliates with communist organizations were repeatedly denied their freedom of assembly because communist ideology was considered too radical in its opposition to the US government. Communists were opposed to the US economic system. The Black Lives Matter protesters were particularly focused on reforming policing and the justice system.

The Court used the fact that “the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence” to justify limiting freedom of expression. In retrospect, these judgments seem overly cautious. In 1969, the Court overturned the ruling in Whitney with the case Brandenburg v. Ohio. The Court held that “[f]reedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” and struck down the conviction of a KKK member under a syndicalism law. This standard is significantly more lenient because it requires there to be a strong likelihood of incitement of lawless action. In contrast, Whitney was indicted for being associated with a group that partially advocated for violence.

This shift in jurisprudence is important to protecting the Black Lives Matter movement. It means that different associations in the movement cannot be criminalized for advocating for revolution, so long as they do not incite imminent violence. The

---

397 Barenblatt v. United States, 360 U.S.
violence that has existed in the Black Lives Matter movement also takes a different form. Rather than being part of the ideology, it is a rare occurrence that has happened at a small number of riotous gatherings. 398

**DeRay McKesson v. John Doe**

On November 2nd, 2020 the Supreme Court handed down a decision directly related to freedom of assembly, permit requirements, and Black Lives Matter. During protests against the shooting of a black man named Alton Sterling in July 2016, a Baton Rouge officer sustained injuries after being hit with a “rock like” object. The officer, referred to as Officer Doe in the case, sued the organizer, DeRay McKesson. McKesson was not accused of throwing the object or of encouraging the throwing of the object. Rather, the lawsuit alleged that McKesson “negligently staged the protest in a manner that caused the assault.” 399

The district court held in favor of McKesson on First Amendment grounds. The Fifth Circuit court reversed, arguing that it was “patently foreseeable” that by leading the protest onto public streets, the Baton Rouge police would begin arrests which would create a “foreseeable risk of violence.” Thus, McKesson had violated his “duty not to negligently precipitate the crime of a third party.” 400

---

The Court used a technicality to avoid making any meaningful ruling on the grounds of First Amendment freedoms. In the decision, they hold that “the Fifth Circuit’s interpretation of state law is too uncertain a premise on which to address the question presented.” The Court directs the Fifth Circuit back to the Louisiana Supreme Court to clarify the state law at hand because there is no current precedent on the meaning of the liability standard. They acknowledge that this is an unusual directive but suggest that it is appropriate given the peculiarity of state laws on this subject and the interest in avoiding premature adjudication.

This case illustrates how permit requirements can discourage the exercise of assembly rights. By making organizers responsible for the behavior of those who attend their marches, the Fifth Circuit places an incredible burden on those seeking to assemble. Because spontaneous marches are largely impossible in the modern regulatory system, a protest organizer would have to decide whether they are willing to take on the liability for the actions of anyone who might attend.

The Fifth Circuit ruling also displays a different kind of guilt-by-association than that was present in communist cases like Whitney. In that case, Whitney was convicted for her participation in the convention that established the Communist Labor Party in California. Even though she showed no “specific intent on her part to join in the forbidden purpose of the association,” her continued presence at the convention,

\[402\] DeRay McKesson v. John Doe, 592 U.S.
membership to the Communist party, and failure to object to discussions of violence and terrorism all were sufficient to convict her.\footnote{Whitney v. California, 274 U.S.}

In both cases, Whitney and McKesson are punished for the actions of those they affiliate with, but not for anything they did themselves. Whitney faced a criminal charge, while McKesson’s was civil. Whitney was participating in the meeting of an association, while McKesson was leading an assembly. But both suffered because according to courts, they should have foreseen the actions of others.\footnote{Whitney v. California, 274 U.S.; DeRay McKesson v. John Doe, 592 U.S.}

This approach seems flawed. If assembly rights protect the right individuals to meet, it seems erroneous to then punish someone for who they have chosen to meet with. Instead, punishment for illegal actions in assemblies should be dealt with on an individual basis as much as possible. The foreseeable actions in both cases are not convincing enough to justify this erosion of assembly rights.

The choice of the Supreme Court to dodge a decision that would involve a serious exploration of First Amendment rights is similar to the protest cases from the Civil Rights movement. In those cases, the Court chose to strike down the convictions of protesters on mostly technical grounds.\footnote{Inazu, \textit{Liberty’s Refuge}.} Similarly, the Court prevented the conviction of McKesson by the Fifth Circuit by using a rare move and deferring to the Louisiana Supreme Court. However, they did not absolve McKesson of the charges.

The Court did not take the opportunity in the 1960s to reinvigorate the right to peaceably assembly. In the absence of such a decision, assembly continued to decline in
importance until it disappeared entirely in 1983. Now, the Court is presented with a unique opportunity to introduce freedom of assembly back into their doctrine as they confront the cases generated out of the new Civil Rights Movement.

**January 6\(^{th}\) Insurrection**

Part of what drove the uproar around the police brutality encountered by Black Lives Matter protesters was how sharply it was juxtaposed with the assemblies, made predominantly up of white people, that had protested Covid-19 restrictions earlier in the year. Those groups carried guns, violated stay-at-home orders, and called for armed insurrection against state governments. Still, nonviolent protesters for racial equality experienced more mass arrests and brutality from law enforcement than the white insurrectionists.\(^\text{406}\)

This dynamic is the result of systemic racism that has always existed in the United States. While white Americans were able to gather in spontaneous and rowdy groups across the United States in the 19\(^{th}\) century, Black citizens in the South were being denied the right to attend church, school, and more.\(^\text{407}\)

The events of January 6\(^{th}\), 2021 underline this contradiction. On the day that Congress was set to verify the results of the 2020 presidential election, President Trump held a rally near the White House. He called for members of Congress to reject the results

\(^{406}\) Motala, "'Foreseeable Violence’ & Black Lives Matter."

\(^{407}\) Inazu, *Liberty’s Refuge*. 
of the election as fraudulent and encouraged his supporters to “walk down to the Capitol.” And walk to the Capitol they did.

   Angry, armed, and violent, protesters swarmed the building and began engaging the small force of Capitol Police officers protecting it. They broke windows and doors to get inside—the first time an insurrectionist force had entered the Capitol since the British in 1812. Many carrying guns and other weapons came within moments of Congresspeople who they had threatened violence against earlier. The fact that no member of Congress died that day had much more to do with luck and quick thinking than anything else.

   The attack was not without warning. Conversations about targeting the Capitol and planning logistics were all over far-media social media in the days leading up to it. These posts included photos and descriptions of guns that attendees planned on bring. While some action was taken by the F.B.I. and Homeland security officials to prepare, the majority of law enforcement received no warning.

   First and foremost, the siege on the Capitol is a disquieting example of how dangerous assemblies can become. As the rally spun out of control, hundreds flooded into the Capitol—the symbolic and literal center of government of the United States—with the intent of stopping the process of governance. Once it started, it became very hard to stop. The building was only secured after National Guard arrived four hours after the Capitol Police called for backup.

---

408 Haberman, “Trump Told Crowd ‘You Will Never Take Back Our Country With Weakness.’”
409 Mazzetti et al., “Inside a Deadly Siege.”
410 Mazzetti et al.
411 Mazzetti et al.
The premeditation on social media tells a similar story about the dangers of association. Tocqueville warned that associations in countries with diametrically opposed parties are especially dangerous because such assemblies will be more inclined to resort to violence and attack the opposition. The far-right organizations that believed the 2020 election was stolen fit this description to a tee. As associations move online, it will become more pressing for the Court to establish a clear doctrine on how and when to protect such groups—and when threats of imminent danger take preference.

January 6th, 2021 was also the first time the Confederate Flag was ever flown in the US Capitol building. The Confederate troops came within six miles of the building during the Civil War but never made it inside. This symbol communicates a great deal about how race affects the treatment of protesters. In lack of preparation for the rally, a former American counterterrorism official reflected, "There was a failure among law enforcement to imagine that people who ‘look like me’ would do this."

The dichotomy in treatment between races when it comes to assembly is extremely concerning. The freedom peaceably to assembly in the United States does not truly exist if it is only applied to a portion of the population. In the interest of self-government, all communities should be able to organize and participate safely in assemblies. When white rioters are allowed to gather and threaten violence against the government, but peaceful Black protesters are teargassed and regulated out of public

---

412 Tocqueville and Reeve, *Democracy in America. Volumes I & II.*
413 Haberman, “Trump Told Crowd ‘You Will Never Take Back Our Country With Weakness.’”
414 Mazzetti et al., “Inside a Deadly Siege.”
spaces, there is a serious imbalance in who can fully participate in governance. At the extreme, this becomes anti-democratic.

The aims of far-right groups who perpetuated theories about the 2020 stolen election also offer an interesting study on Ashutosh Bhagwat’s theory. Bhagwat suggests that only associations with broadly democratic primary goals should be protected. In other words, groups are valuable insofar as they contribute to democracy, whether that be by petitioning the government, informing the citizenry, or serving a value-forming function. For example, the Boy Scouts serve a value-forming function, even if they are not clearly political. This approach contrasts the Supreme Court by not placing expressive requirements on associations.415

The question is whether the organizations that perpetuate falsehoods about the 2020 election would receive associational protection. The insurrection at the Capitol was a violent and criminal attack. But if the group had instead just assembled peacefully, would the organizations still be afforded constitutional protections? The goal of the organizers was antidemocratic, as they sought to overturn the results of free and fair elections. However, most of the people who participated genuinely believed that the election was being stolen—that they were fighting back fascism rather than instigating it.416 As they saw it, they were petitioning the government and informing the citizenry.

Bhagwat warns against the perils of granting “government officials (including judges) the power to determine the ‘true’ values of democratic association.”417 He also

---

415 Bhagwat, “Associational Speech.”
acknowledges that prioritizing group autonomy may result in “exclusion and vision” in society but that it’s a worthwhile cost. These statements suggest that he would be willing to accept more extreme and dissident groups to air on the side of caution. However, because his approach is content-based, it can be fallible.

There are three ways Bhagwat’s theory could apply to this scenario. If “broadly democratic” includes political groups that are anti-democratic but exercising their voice, then the far-right groups in question would still receive protection under Bhagwat’s theory. If instead “broadly democratic” include groups who believe their primary goal is democratic, even when there is a good deal of evidence that it is not, then the group may or may not receive protections, depending on where an official chooses to draw the line. A court may deny that a clearly anti-democratic primary goal, like overturning a free and fair election, cannot be protected no matter how much a group believes in it. The goal is too opposed to free self-governance by all American people.

John Inazu might have a different perspective under his theory of group autonomy. While he would not want to endorse the siege on the Capitol, his theory continually emphasizes the importance of dissident groups in democracies. He criticizes pluralism and Rawlsian liberalism for how they limit assemblies to create general consensus. The alt-right organizations represented at the Capitol insurrection certainly fall outside the bounds of popular consensus in the US. In this way, they would be protected as assemblies that embody a dissident perspective that is worthy of constitutional protection, no matter its purpose.

---

418 Bhagwat, 1002.
419 Inazu, Liberty’s Refuge.
For Inazu, the issue is much simpler because he does not involve the content of an assembly in his theoretical standard. Instead, he is mainly concerned with conduct. While the violent conduct of the mob at the Capitol would not be protected under his approach, associations that perpetuated myths about a stolen election would be. In this way, Inazu's approach is beneficial because of the clarity it offers; by focusing primarily on conduct, it is easier to avoid the loss of group autonomy through unfair rulings.

**Anti-Protest Laws**

In response to the Black Lives Matter movement, Republican lawmakers across the country have begun introducing anti-protest legislation. The International Center for Not-for-Profit Law reported that twice as many bills limiting assembly rights have been introduced across the country in 2021 as compared to any other year. In total, 81 proposals have been made in 34 states.\(^{420}\)

The proposals take different forms. In Indiana, people convicted of unlawful assembly would be banned from working for the state government, including in elected positions. In Minnesota, those same people would be denied access to “student loans, unemployment benefits, or housing assistance.”\(^{421}\) In the most extreme proposals, drivers in Oklahoma and Iowa who hit protesters with their vehicles in public streets would be granted immunity.\(^{422}\)

---

\(^{420}\) Epstein and Mazzei, “G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them).”

\(^{421}\) Epstein and Mazzei.

\(^{422}\) Epstein and Mazzei.
In Florida, Governor Ron DeSantis signed what he called “the strongest anti-looting, anti-rioting, pro-law-enforcement piece of legislation in the country” into law.\(^{423}\) The legislation expands the definition of a riot to include gatherings of just three people. It then places extreme consequences on anyone arrested for rioting. Furthermore, it absolves liability for “personal injury, wrongful death, or property damage,” if someone injures or kills a person guilty of so-called “rioting.”\(^{424}\)

These bills represent an extreme form of assembly regulation that Tabatha Abu El-Haj and Nicholas S. Brod are concerned about.\(^{425}\) Rather than placing limits on the assembly itself, these proposals dissuade citizens from wanting to engage in assembly at all. In the same way that McKesson has been sued for the violent actions of another person at a protest, laws like the one passed in Florida could convict whole groups of people for the actions of a riotous few.

Laws that leaving gatherings unprotected in public streets from drivers are another serious limitation. Public streets are a salient place to gather. This can be seen throughout the history of assembly. William Penn sermonized in the streets of England after being denied a place of worship, an event later referenced by the First Congress. In the Founding era, spontaneous marches traced their way through streets, gathering supporters as they went. After Bloody Sunday during the Civil Rights Movement, protesters made the long walk on the highway from Selma to Montgomery, Alabama. Public streets have been a special way of gaining the attention of the nation at large.

\(^{423}\) Epstein and Mazzei.
\(^{424}\) Goodman and Moynihan, “Anti Protest Laws Grant Drivers License to Kill.”
\(^{425}\) Abu El-Haj, “The Neglected Right of Assembly.”; Brod, “Rethinking a Reinvigorated Right to Assembly.”
Brod emphasizes the importance of time and place in the message of assemblies. Legislation that leaves protesters unprotected against motorists is a clear restraint on assembly, even if it does not come in the form of a time, place, or manner restriction. Instead, it fosters violence against citizens who are trying to exercise their fundamental right to self-governance. Laws like that in Florida would be unlikely to hold up under the means-end scrutiny that Brod advocates for, as using public streets is often a crucial means to the end goal of an assembly.426

Conclusion

In this chapter, I reviewed four events from the last year that offer key perspectives on assembly in 2021. First, the Black Lives Matter movement in the summer of 2020 demonstrated how important assemblies still are in the political lives of Americans. When it came to expressing deep dissatisfaction over systemic racism in the US, protest was the main tool utilized. Unfortunately, many of these protests were met with disproportionate violence from law enforcement. I describe the Lafayette Square protests as emblematic of this and apply Tabatha Abu El-Haj’s argument against permit requirements to the police violence and curfew requirements.

I used the protests in Portland to investigate assemblies which resulted in property damage and rioting. I compare this violence to that in Bryant v. Zimmerman and consider whether the line drawn between Bryant and NAACP v. Alabama holds up. I also point out that the violence against journalists throughout the protests shows the usefulness of

426 Brod, “Rethinking a Reinvigorated Right to Assembly.”
Ashutosh Bhagwat’s theory of self-governance. Each First Amendment freedom is crucial towards real democratic government.

In my next section, I discussed the November 2020 decision by the Supreme Court, *DeRay McKesson v. John Doe*. The case offered the Court an opportunity to reinvigorate the right to assembly. Instead, it used a technicality to pass the decision back to the Fifth Circuit court. I point out that the Court similarly dodged opportunities to expand assembly when deciding Civil Rights cases in the 1960s. I also argue that the Fifth Circuit ruling has troubling similarities to *Whitney v. California* in its approach to guilt by association.

In the section, I changed focus from the Black Lives Matter movement to the January 6th insurrection on the Capitol. I point out that this attack epitomizes the danger that white privilege poses to the democratic exercise of freedom to assemble. I also use the theories of Tocqueville, Bhagwat, and John Inazu to consider what freedoms should be afforded to extremist dissident groups, if any.

Finally, I explored the wave of anti-protest legislation introduced by G.O.P. politicians across the country. I argue that these bills are extremely damaging to freedom of assembly. Rather than being typical regulations like curfews, they limit assembly expanding the definition of unlawful assembly, raising the stakes of potential arrest, and putting the lives of protesters in danger. I use Brod’s theory to point out how endangering protesters using public streets is antithetical to the nature of assembly and contradictory to how it was conceived of and used throughout our nation's history.

The siege of the Capitol and the violence in Portland offer two competing perspectives on violent assemblies. I believe they also give insight into what an effective
standard for violent assembly might. The Portland protests illustrate the danger of over-policing assemblies. When federal troops arrived, the violence escalated. This is why placing minimal regulations on assembly is important.

On the other hand, the siege on the Capitol should have been met with greater law enforcement. This is not a failure of free assembly, but rather part of an endemic problem in law enforcement—white supremacy. When there is the intelligence to indicate an attempt to attack the Capitol, increased security is extremely justified. Groups advocating for this type of unlawful activities are not entitled to the same association rights as groups that are largely peaceful like those in the Black Lives Matter.

In sum: assemblies should be allowed to gather free of police brutality, even given the risk of violence, unless there is substantial evidence demonstrating a risk of an imminent attack. The potential for property damage as a result of less regulated assemblies is a cost that must be taken on to preserve the fundamental contributions that assemblies make towards self-governance. The emphasis on eliminating preemptive limits on assembly in Inazu's theory and on the importance of democratic associations in Bhagwat's theory both contribute to this approach.

Taken in combination, these four events drive home the importance of unencumbered freedom of assembly in the United States. Even after being ignored by the Supreme Court for over thirty years, assembly remains a rich part of American life. Protest is a key way in which citizens gathering to express dissatisfaction, spread ideas, and influence their leaders.

But assembly is also under attack. Between excessive police brutality, an evasive Supreme Court decision, and anti-protest legislation, assembly is less protected than ever
in the United States. To ensure that the right remains focal in American life—and that protesters are not risking their lives by walking on the street—the Court must separate assembly from speech. In doing so, they will have the leeway to expand protections beyond clearly expressive organizations. This will ensure that citizens can still exercise a right fundamental to the process of self-governance.
Conclusion

What this thesis has attempted to do is illustrate the importance freedom of assembly has had in the history of the United States as it contributes to democratic governance. Assemblies and associations help people build personal identities, communities, and values. It allows them to exchange ideas, air grievances, and organize protests. It is a tool for grabbing the attention of the public, exerting power on politicians, and checking the majority. These are vital tasks to self-government. As it has been eroded through time because of municipal regulations and expressive requirements, something important has been a loss. Given the events of the last year, I argue that it is overdue for the Supreme Court to reinvigorate the right once more.

In Chapter II, I trace the history of assembly in the United States. In the Founding era, assembly was freely used to participate in civic culture. First, permit requirements were unheard of. Instead, spontaneous gatherings to celebrate holidays and participate in festive politics were common. Second, the qualifier "peaceably" did very little to constrain the right—disruptive and loud assemblies were acceptable so long as they did not become too rowdy. Third, assembly was seen as protecting associations as well. Groups like the Democratic-Republican societies invoked freedom of assembly to justify protect themselves.
This remained true about assembly through the majority of the 19th century. Then, at the close of the 1800s, *US v. Cruikshank* and *Davis v. Massachusetts* significantly restricted the right of assembly in ways it would never quite recover from. Limits on public forum use, permit requirements, and enforcement of assembly protections all remain part of Court jurisprudence today as a result.

Despite these limitations, assembly has remained crucial to social movements in the United States. Especially to disenfranchised citizens, assembly offers a powerful tool for organizing and exercising political power. This was illustrated most clearly through the Suffragettes and the 1960s Civil Rights Movement. The opposite is also true: reducing the ability of groups to meet has deep consequences for their social, cultural, and political lives. This was illustrated by the treatment of Black Americans in the Antebellum South.

Assembly began to fade from court jurisprudence after the introduction of association as an independent right in 1958. But it was not eliminated entirely until the Court defined it as “communicative activity,” making it secondary to speech, in *Perry Education Association v. Perry Local Educators’ Association*.

Freedom of association became an official nontextual right in 1958, in the landmark case *NAACP v. Alabama*. In Chapter III, I trace associations trajectory from being interchangeable with assembly for the first 150 years to it eventually being subsumed into free speech. I also consider Tocqueville’s argument in favor of US associations because of our democratic system.

Freedom of association protected the NAACP during the Civil Rights Movement, ensuring that the association had the privacy it needed to continue operating effectively.
In contrast, communist organizations were frequently denied those same protections, often for tenuous reasons.

At this time, freedom of association was being equated with an expressive purpose. The Court would protect the NAACP because they were a place to exchange ideas and they sent a political message. At the start of the 1980s, *Roberts v. United States Jaycees* set out a new standard that would connect association almost entirely to its expressive content and begin a new doctrine surrounding anti-discrimination cases.

The *Roberts* test has its weaknesses, as highlighted in the case *Dale v. Boy Scouts of the United States*. More importantly, it limited association to its expressive content or intimacy. Any non-intimate association must have a clear doctrine or expressive purpose to receive constitutional protections, a dramatic change from how association was treated in the past.

In Chapter IV, I review four different theories, three of which focus on assembly and one of which focuses on association. While each of these theories makes valuable, original contributions, they are also useful for what they share in common. Each argues that expressive constraints on assembly and/or association are too limiting, that the history of assembly can be used to ground how we approach these rights in the modern-day, and—most importantly—assembly and associations are fundamentally important towards the purpose of self-governance. These group rights contribute to a democratic government in ways that cannot be captured by individual rights like speech. To attempt to do so is to misunderstand their purpose.

The reason this all matters now is grounded in Chapter V. I review the events of the past year, focusing on four in particular: the Black Lives Matter movement, the
Court’s decision in *DeRay McKesson v. John Doe*, the January 6th siege on the Capitol, and the wave of anti-protest bills sweeping the country. Each of these events, in combination with the theories from Chapter IV, offers insight into the problems with how assembly operates in the modern-day. The asymmetrical treatment of race, the intense regulations, and the development of guilt-by-association penalties are all seriously concerning. The potential for violence by assemblies also must be reckoned. I argue that the appropriate way to handle this conflict is to allow assemblies to gather freely as much as possible until there is substantial evidence for unlawful intent.

The Court must reincorporate freedom of assembly and association back into their jurisprudence, independent of expressive requirements. These rights are part of an essential collection of freedoms that promote democratic governance in the United States. Assemblies allow citizens to gather, celebrate, and learn, in both spontaneous and permanent ways. This dynamic is a fundamental part of understanding political organizing throughout the history of the United States. Ultimately, the ability of people to assembly without restrictions is why the Founders were able to write the US Constitution. And it is part of how American citizens can amend that Constitution--by calling together conventions. The power of those gatherings transcends any expressive purpose that might be applied to them.

The current restrictions suffocate this culture of assembly and threaten American self-governance. To ensure that the United States remains a government by the people, for the people, the Court must reinvigorate assembly and association.

---

Bibliography


Barenblatt v. United States, 360 U.S. 109 (Supreme Court 1959).

Bates v. Little Rock, 361 U.S. 516 (Supreme Court 1960).


Boy Scouts of America v. Dale, 530 U.S. 640 (Supreme Court 2000).

Bridges v. Wixon, 326 U.S 135 (Supreme Court 1945).


Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 661 (Supreme Court 2010).


Cox v. New Hampshire, 312 U.S. 569 (Supreme Court 1941).

Davis v. Massachusetts, 167 U.S. 43 (Supreme Court 1897).

De Jonge v. Oregon, 299 U.S. 353 (Supreme Court 1937).


Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (Supreme Court 1963).


Griswold v. Connecticut, U.S. 381 479 (Supreme Court 1965).


Hague v. CIO, 307 U.S. 496 (Supreme Court 1939).


NAACP v. Alabama ex rel. Patterson, 357 U.S 449 (Supreme Court 1958).


Perry Education Association v. Perry Local Educators’ Association, 460 U.S (Supreme Court 1983).


Roberts v. United States Jaycees, 468 U.S. 609 (Supreme Court 1984).


United States v. Cruikshank, 92 U.S. 542 (Supreme Court 1875).


Uphaus v. Wyman, 360 U.S. 72 (Supreme Court 1959).


Whitney v. California, 274 U.S. 357 (Supreme Court 1927).
