Notes

RETHINKING A REINVIGORATED RIGHT TO ASSEMBLE

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ABSTRACT

Revived after a decades-long slumber, the First Amendment's Assembly Clause has garnered robust attention of late. Endeavoring to reinvigorate this forgotten clause, legal scholars have outlined a normative vision of the assembly right that would better safeguard the freedom of association. This Note argues that such an approach—no matter its merits or its deficiencies—overlooks the Clause's central aim. The assembly right is in fact best understood as an assembly right, *not as a right about associations. This Note advances that proposition by closely analyzing the text and the history of the Assembly Clause, a project that has not yet been systematically undertaken. The evidence unearthed from this inquiry demonstrates that the Assembly Clause seeks, as its first-order concern, to protect in-person, flesh-and-blood gatherings. Such protection is thus ultimately of great import in rethinking both the freedoms afforded and the constraints imposed on dissent within our constitutional framework.*

INTRODUCTION

The words marched across the crowd assembled in Oakland, California, that night, May 1, 2012:

> I hereby declare this to be an unlawful assembly and . . . command all those assembled to immediately leave. If you do not do so, you may be arrested or subject to other police action . . . which may

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> result in serious injury. . . . If you refuse to move, chemical agents will be used.[1]

Familiar by now, the echoing threat stubbornly reminded those gathered of the limits to their enterprise. Most, having played their role in this protest ritual, retreated.[2] A few hundred holdouts endured, clinging to glass bottles and metal shields as the police chased them down the street, dissenters running in the shadows of their city's angry and retreating past.[3] This scene was what little remained of Occupy Oakland, the final outpost of a dying movement in the city of radical America's last refuge.[4]

Protesters had once occupied Oakland, quite literally, constructing a veritable microcity of tents in a public park across the street from city hall.[5] In fact, protesters occupied cities across America: 150 cities hosted an estimated 100,000 demonstrators on one Saturday in October 2011 alone.[6] Tracing their roots to a September 17, 2011, protest in New York City dubbed Occupy Wall Street (Occupy),[7] these widespread demonstrations captivated the national imagination with their vague but persistent calls for fairness, equality, and empowerment.[8] So it was that *Time* pronounced "The Protester" its 2011 Person of the Year, declaring that "suddenly, shockingly . . . the protester once again became a maker of history."[9]

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1. Jonathan Mahler, *The World Capital of Anti-Capitalism*, N.Y. TIMES MAG., Aug. 5, 2012, at 37, 51.

2. *Id.*

3. *Id.* Oakland has long been a hotbed of revolutionary activity. *See id.* at 38. ("In Oakland, the revolutionary pilot light is always on. . . . [The] dream that still exists in Oakland [is] that the world can be taken from the haves and delivered to the have-nots. Like all dreams that are on the brink of being extinguished, its keepers cling to it with a fierceness that is both moving and an extreme exercise in the denial of the reality that is at their door.").

4. *See generally id.*

5. *See* Malia Wollan, *Oakland Police Clash with Fringe Protesters*, N.Y. TIMES, Nov. 4, 2011, at A15 (describing "several hundred protesters" encamped downtown and one night of Occupy Oakland protests "that city officials estimated as at least 7,000 strong").

6. Nate Silver, *The Geography of Occupying Wall Street (and Everywhere Else)*, FIVETHIRTYEIGHT (Oct. 17, 2011, 10:57 AM), http://fivethirtyeight.blogs.nytimes.com/2011/10/17/the-geography-of-occupying-wall-street-and-everywhere-else.

7. *See* WRITERS FOR THE 99%, OCCUPYING WALL STREET: THE INSIDE STORY OF AN ACTION THAT CHANGED AMERICA 10 (2011) (attributing the movement's origins to *Adbusters*, a "Vancouver-based ecological, anti-consumerist magazine" that called for protesters to flood lower Manhattan on September 17, 2011, under the moniker "#OCCUPY WALL STREET").

8. For example, Nate Silver, who famously predicted the results of the 2012 presidential election, wrote about the Occupy protests on his blog, FiveThirtyEight. *See* Silver, *supra* note 6.

9. Kurt Andersen, *The Protester*, TIME (Dec. 14, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132_2102373-1,00.html.

And yet, on November 15, 2011, two months after the original Occupy protesters pulled out their sleeping bags and set up camp in New York City's Zuccotti Park, the occupation met its end.[10] An early morning police raid cleared the park of its tents, its protesters, and even its makeshift library.[11] Later that afternoon, the New York Supreme Court denied an application for a temporary restraining order to stop the eviction, holding that the Occupy protesters did not demonstrate "a First Amendment right to remain in Zuccotti Park . . . to the exclusion of the owner's reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might wish to use the space safely."[12] Courts across the country largely followed suit, upholding efforts to dismantle Occupy camps in the days and months that followed.[13]

Leaving the protesters bereft of a physical space to situate their movement, these judicial opinions tested the staying power of Occupy's ideas. The movement's location in Zuccotti Park had enabled Occupy to engage the country in a conversation about the status quo: during the week of October 30, 2011, for example, news reports mentioning "income inequality"—one of Occupy's central themes—occurred more frequently than they had during the entire month of August earlier that year.[14] But with nowhere to go, the

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10. James Barron & Colin Moynihan, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html; *see also* WRITERS FOR THE 99%, *supra* note 7, at 177–84 (describing the eviction from Zuccotti Park).

11. WRITERS FOR THE 99%, *supra* note 7, at 183–84.

12. Waller v. City of New York, 933 N.Y.S.2d 541, 545 (N.Y. Sup. Ct. 2011).

13. *E.g.*, Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d. 1110, 1123–24 (E.D. Cal. 2012); Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 241 (D. Conn. 2012); Davidovich v. City of San Diego, No. 11cv2657 WQH-NLS, 2012 WL 439642, at *7 (S.D. Cal. Feb. 10, 2012); Occupy Tucson v. City of Tucson, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at *8 (D. Ariz. Dec. 22, 2011); Freeman v. Morris, No. 11-cv-00452-NT, 2011 WL 6139216, at *1 (D. Me. Dec. 9, 2011). *But see* Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 563 (D.S.C. 2011) (granting the Occupy movement a preliminary injunction to prevent eviction from the grounds of the state house); *cf.* Watters v. Otter, 854 F. Supp. 2d 823, 831 (D. Idaho 2012) (granting Occupy's motion to enjoin the state from removing its tents but denying a motion to enjoin the state from banning overnight sleep and the storage of personal items); Occupy Minneapolis v. Cnty. of Hennepin, 866 F. Supp. 2d 1062, 1066 (D. Minn. 2011) (granting in part a motion for a preliminary injunction brought by the Occupy movement); Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320, 1340 (M.D. Fla. 2011) (same).

14. *See* Dylan Byers, *Occupy Wall Street Is Over*, POLITICO (Sept. 17, 2012, 4:15 PM), http://www.politico.com/blogs/media/2012/09/occupy-wall-street-is-over-135781.html ("For the week starting October 30, 2011, 'income inequality' was mentioned nearly 500 times in the news, more than it had been mentioned during the entire month of August . . . .").

movement struggled to remain relevant.[15] Nine months after Occupy's eviction from Zuccotti Park, media references to income inequality had fallen back to their pre-Occupy levels.[16] Disenchanted, the *New York Times* marked Occupy's one-year anniversary by bleakly proclaiming that history would dismiss the movement as nothing more than "an asterisk . . . if it gets a mention at all."[17]

Why did one of America's most prolific social movements since the 1960s[18] evaporate so quickly? If the text of the Constitution matters, the First Amendment may house the answer in an enumerated right roundly ignored and undertheorized by courts and legal scholars alike. That such a right—the "right of the people peaceably to assemble"[19]—rests dust covered and dormant in an amendment the Roberts Court has otherwise defended with particular vigor[20] makes its disappearance from the constitutional conversation all the more intriguing.

Not so long ago, assembly featured prominently in the Court's First Amendment jurisprudence.[21] In one of the Court's most celebrated opinions, *Whitney v. California*,[22] Justice Brandeis centered

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15. Social movements are, no doubt, complex organisms, and their rises and falls can never be precisely pinned to a specific cause. The contention here, then, is that legal battles resulting in the eviction of Occupy installations across the country played an important role—but certainly not the only role—in the movement's loss of momentum.

16. Byers, *supra* note 14.

17. Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, N.Y. TIMES DEALBOOK (Sept. 17, 2012, 8:51 PM), http://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled.

18. *See* TODD GITLIN, OCCUPY NATION: THE ROOTS, THE SPIRIT, AND THE PROMISE OF OCCUPY WALL STREET 5 (2012) ("The sort of sea changes in public conversation that took three years to develop during the long-gone sixties . . . took three weeks in 2011. At warp speed, all kinds of people felt that they needed to have opinions about the movement, what it was doing and saying, and what it ought to do and say.").

19. U.S. CONST. amend. I.

20. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (holding unconstitutional a federal statute criminalizing lies about having received, among other military awards, the Congressional Medal of Honor); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011) (holding California's ban on the sale or rental of violent video games to minors violative of the First Amendment); Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (shielding from tort liability peaceful protesters at a military funeral on free speech grounds); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (striking down a federal statute criminalizing depictions of animal cruelty as substantially overbroad and invalid under the First Amendment); Citizens United v. FEC, 130 S. Ct. 876, 917 (2010) (striking down a federal ban on corporate independent expenditures on free speech grounds).

21. *See generally* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) (documenting the rise and fall of the Court's Assembly Clause jurisprudence).

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

his famous concurrence on free speech *and* assembly, rights he treated as coequal for the purposes of First Amendment analysis.[23] Soon thereafter, the Assembly Clause was incorporated against the states via the Due Process Clause of the Fourteenth Amendment.[24] And in more than one hundred subsequent opinions, the Court continued to recognize the Assembly Clause as a right related to, but nonetheless independent from, free speech.[25]

This speech-assembly nexus dissolved in the 1950s, when the Court began to muddle First Amendment rights that had once been considered distinct. It did so primarily by introducing a new, atextual right to the First Amendment landscape: the "freedom of association."[26] At first, this newfound freedom sporadically replaced the right to assemble.[27] But by 1958, the associational right had displaced assembly almost altogether.[28] And, in any event, both came to be characterized by the Court as secondary rights enabling speech rather than coequal rights independent of speech.[29] In the decades that followed, assembly withered into a mere afterthought, nothing more than a historical artifact.[30]

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23. *See id.* at 375 (Brandeis, J., concurring) ("Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . .").

24. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

25. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 50 (2012) ("The Court had linked these two freedoms [speech and assembly] only once before; after *Whitney*, the nexus occurs in more than one hundred of its opinions."); *see, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance." (citation omitted)).

26. *See e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 409 (1950).

27. *Compare id.* at 400 ("In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly . . . ."), *with id.* at 409 ("[T]he effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts . . . .").

28. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958) (identifying as "indispensable liberties" the rights of "speech, press, [and] association").

29. *See id.* at 460 ("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.").

30. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 986 (2011) ("In later cases [following *NAACP*], the Court largely followed its new approach, emphasizing association, not assembly, as the relevant right and treating association as subsidiary to free

So while individual free speech rights have expanded—the Court has, for example, recently struck down statutes criminalizing the creation of virtual child pornography[31] and the production of videos depicting animal cruelty[32]—assembly rights have approached a vanishing point. Tellingly, in a recent Supreme Court case involving protests at military funerals, a paradigmatic assembly case if there ever was one, the word "assembly" appears not once in the text of the opinion.[33] The cases surrounding the Occupy movement similarly turned a blind eye toward the assembly right: every Occupy case, without exception, was resolved on free speech grounds.[34] The First Amendment's center of gravity has shifted so far toward the protection of speech rights that it has been thirty years since the Court authored an opinion that rested, in whole or in part, on the Assembly Clause.[35]

This approach overlooks the Constitution's text and history. The Framers enshrined the right to assemble in the First Amendment for a reason, and that right played a critical role in shaping the nation's founding.[36] And yet, although the Court has gone to great lengths to protect unreasonable (and sometimes abhorrent) speech, it has adopted the polar-opposite approach in the assembly context, where protections for such behavior have tended to give way to the government's interest in maintaining security and order.[37] By casting the Assembly Clause aside, courts often allow the government to run roughshod over the ability of citizens to gather,[38] a right that has long

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speech."); *see also* INAZU, *supra* note 25, at 61 ("By the mid-1960s, the only cases invoking the freedom of assembly were those overturning convictions of African Americans who had participated in peaceful civil rights demonstrations."); *id.* ("In 1983, the Court swept the remnants of assembly within the ambit of free speech law . . . .").

31. Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

32. United States v. Stevens, 130 S. Ct. 1577, 1592 (2010).

33. *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

34. *See infra* Part III.B.2.

35. *See* INAZU, *supra* note 25, at 7 n.15 ("The last time the Court applied the constitutional right of assembly appears to have been in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 88 (1982)—thirty years ago. A majority opinion of the Supreme Court has only *mentioned* the right of assembly six times in the past twenty years.").

36. *See infra* Part II.

37. *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009) (describing the increasing regulation of expression in public places).

38. For a catalogue of judicial opinions ordering the eviction of various Occupy movements, see *infra* Part III.B.2; *see also* Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1241–42 (2008) (discussing court-

given voice to marginalized groups, sparked dissent, and facilitated political and legal change.[39] The way in which citizens have publicly practiced their politics of late should cast a renewed sense of urgency over the need to bring the Assembly Clause in from the cold. This Note submits that a reinvigorated right peaceably to assemble could enable movements like Occupy to make more meaningful, sustained contributions to our national dialogue. The First Amendment's legal framework is surprisingly ill-equipped to recognize the enduring value of public dissent that assembly rights can contribute to our democracy. That should not be so.

In an attempt to restore the right to assemble, an emerging line of scholarship has argued that the Assembly Clause should play host to a renovation of the Court's free association jurisprudence.[40] Such an approach suggests that assembly offers "an alternative to the enfeebled right of expressive association"[41] and that it "guards against restrictions imposed prior to an act of assembling [by protecting] a group's autonomy, composition, and existence."[42] Under this rubric, the Assembly Clause would provide a textual hook for associational freedom, a freedom that often manifests itself as the "freedom *not* to associate."[43] In this way, the right to assemble would blunt the force of antidiscrimination norms,[44] which can trample group autonomy and force organizations to accept members whose inclusion in the group would "impair the ability of the original members to express only

approved restrictions on assemblies near political conventions); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 412–13 (2005) (detailing restrictions on post-9/11 antiwar demonstrations).

39. *See infra* Part II.

40. INAZU, *supra* note 25, at 4; Bhagwat, *supra* note 30, at 981; *cf.* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 545–47 (2009) (documenting the historical erosion of protections under the Assembly Clause). *But see* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 713 (2002) (arguing that the assembly right can be exercised only insofar as it is used to petition the government).

41. INAZU, *supra* note 25, at 4.

42. *Id.*

43. *E.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (emphasis added).

44. *See* INAZU, *supra* note 25, at 184 ("The minimal constraints of peaceable assembly leave us with racists, bigots, and ideologues. They also leave us with difference. Peaceable assembly forces us to confront more honestly questions of what it means to live among dissenting, political, and expressive groups.").

those views that brought them together"[45]—the group's "voice,"[46] as it were.

This Note advances a distinctly different normative position. It contends that an association-based view of the Assembly Clause—no matter its merits or its deficiencies—overlooks the Clause's central aim; that is, the right to peaceably assemble is best understood *as an assembly right*, one that protects in-person, flesh-and-blood gatherings like protests and demonstrations, regardless of their relationship to associational freedom. By looking to American history, legal experience, and public culture, this Note attempts to recapture the importance of such a distinct take on assembly and to sketch out the doctrinal implications of recognizing the assembly right for what it is.

Part I makes the textual argument for this view of the Assembly Clause by presenting a new framework for analyzing the Clause's language. Part II adds a historical gloss, emphasizing founding-era sources that have been ignored by modern Assembly Clause commentators. Part III analyzes the implications of such an approach by discussing how the Assembly Clause might be operationalized and how examining the Occupy movement might inform that task.

I. THE TEXTUAL CASE FOR ASSEMBLY

Constitutional interpretation must begin with the text, looking to what the words of the Constitution meant to ordinary citizens at the time of the founding.[47] When examining the Constitution in this way, no part of the text is treated as superfluous, and every word is

45. *Roberts*, 468 U.S. at 623; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (upholding the First Amendment right of the Boy Scouts to exclude a gay scoutmaster over a challenge brought under state public-accommodation laws).

46. *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

47. This interpretive method, often called textualism, is the best place to start when thinking about one of the Constitution's provisions, especially one that is undertheorized. *See, e.g.*, United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning . . . ."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824) ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 16 (1980) ("[T]he most important datum bearing on what was intended is the constitutional language itself."); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985) ("The Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.").

assumed to carry independent weight where possible.[48] An analysis of the Assembly Clause should first be conducted with these guiding principles in mind.

The few scholars who have attempted this inquiry have started with the syntax of the First Amendment.[49] But this approach skips a crucial step: understanding what the individual *words* of the Assembly Clause meant to the founding generation.[50] The Assembly Clause contains an infinitive, a phrase, and an adverb that merit close scrutiny: the substantive right itself, "to assemble"; those to whom the right is afforded, "the right of the people"; and a qualification, "peaceably."[51]

A. The Language of the Assembly Clause

1. *"To assemble."* The founding-era meaning of the verb "assemble" largely resembles our common understanding of the word today. Dictionaries at the time defined it as "[t]o meet together,"[52] "to flock together,"[53] and "to convene, as a number of individuals."[54]

These definitions provide a helpful starting point for assessing the scope of the assembly right. The plain meaning of the word indicates that the act of assembling, as originally understood, involved face-to-face meetings of individuals, a kind of calling or getting together that existed regardless of long-term associational ties. Indeed, the verb "assemble" does not encompass acts of forming, establishing, or maintaining a group; instead, its emphasis in

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48. *See* Marbury v. Madison, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

49. INAZU, *supra* note 25, at 21–23; Mazzone, *supra* note 40, at 712–13.

50. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 553 (1994) (noting that this methodology requires both "*a dictionary* and a grammar book" (emphasis added)); *see also id.* at 552 n.35 ("Language is a social invention, and thus meaningless without access to those external sources, such as dictionaries, that explain the rules as to how a particular language is used.").

51. U.S. CONST. amend. I.

52. 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785).

53. 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London, J.F. & C. Rivington et al. 3d ed. 1783).

54. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New Haven, S. Converse 1828); *see also* NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh, Neill & Co. 25th ed. 1783) (defining "to assemble" as "to call, gather, meet, or get together").

founding-era dictionaries lies in notions about flesh-and-blood, heat-of-the-moment gatherings of individuals irrespective of an overriding group identity. In this sense, the assembly right may be best conceptualized as protecting "the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration"[55]—whether that physical gathering has anything to do with an association or not.[56]

This conclusion finds additional support from an intratextual approach to the verb "assemble."[57] The word also appears in Article I, Section 3; Article I, Section 4; the Twentieth Amendment; and twice in the Twenty-Fifth Amendment.[58] In each instance, assembly refers to an in-person gathering of a legislative body.[59] Article I, Section 3, for example, mandates that once two senators have been chosen from each state,[60] they must be "immediately" assembled after the first election.[61] Article I, Section 4 requires that Congress assemble at least once per year, and it provides a specific date for when that gathering must take place.[62] The Twentieth Amendment, which modified the date provided by Article I, Section 4, even went so far as to specify

55. INAZU, *supra* note 25, at 2.

56. An association can assemble, of course. But the Assembly Clause protects the physical, in-person right to gather, which means that its protections can also extend to heat-of-the-moment, spontaneously formed groups devoid of a long-term identity, that is, groups that are not in any real sense associations.

57. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) ("In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.").

58. Intratextualism remains a valid interpretive mechanism despite time lapses in codification. *Cf. id.* at 791 ("[T]he Constitution itself provides a common reference point for all concerned: drafters composing constitutional language, ratifiers deciding whether to make such language supreme law, . . . and subsequent generations of would-be amenders seeking to add postscripts to the prior text." (footnote omitted)).

59. True, the Constitution's other references to the verb "assemble" all relate to meetings of legislative bodies. But that fact need not cabin the reach of the intratextual argument. After all, the First Amendment specifies that the right to assemble is a right "of the *people*," not one afforded to only elected representatives. U.S. CONST. amend. I (emphasis added). For a discussion of this language, see *infra* Part I.A.2.

60. U.S. CONST. art. I, § 3, cl. 1.

61. U.S. CONST. art. I, § 3, cl. 2 ("Immediately after they [two senators from each state] shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes.").

62. U.S. CONST. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the First Monday in December . . . .").

the *time* when the congressional assembly must meet.[63] And the Twenty-Fifth Amendment's two references to assembly are similarly temporal in nature: Congress must, for instance, assemble within forty-eight hours to determine whether the President is incapacitated upon such a declaration by the Vice President and the Cabinet.[64] When coupled with the definition of "assemble" contained in founding-era dictionaries, these intratextual references indicate that the Constitution embodies an understanding of the assembly right whose first-order concern is with physical, in-person gatherings.

2. *"The right of the people."* That the assembly right is "the right of the people" lends further credence to this interpretation. The meaning of "the right of the people" as it appears in the Bill of Rights has been considerably contested.[65] This exact phrase appears two other times in the Constitution's text: in the operative clause of the Second Amendment[66] and in the Search and Seizure Clause of the Fourth Amendment.[67] Moreover, the words "the people" are also featured in the Preamble;[68] Article I, Section 2;[69] the Ninth Amendment;[70] and the Tenth Amendment.[71] An intratextual approach, once again, is thus helpful to better understand the phrase's meaning.

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63. *See* U.S. CONST. amend. XX (changing this date to "noon on the 3d day of January" but preserving the use of "assemble" in Article I, Section 4, clause 2).

64. U.S. CONST. amend. XXV ("Thereupon Congress shall decide the issue [whether the President is incapacitated], assembling within forty-eight hours for that purpose if not in session."); *see also id.* (noting that "Congress is required to assemble" to make such a determination).

65. *Compare* District of Columbia v. Heller, 554 U.S. 570, 580 (2008) ("Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."), *with id.* at 645 (Stevens, J., dissenting) (arguing that the phrase "contemplate[s] collective action").

66. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, *the right of the people* to keep and bear Arms, shall not be infringed." (emphasis added)).

67. U.S. CONST. amend. IV ("*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)).

68. U.S. CONST. pmbl. ("We the People . . .").

69. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

70. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

71. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The Court has read references to "the people" in all six of these provisions as "unambiguously refer[ring] to all members of the political community, not an unspecified subset."[72] Thus, the right to assemble should be afforded to all members of the constitutional community, not to just a select few. The Court has also held that such references, when used to refer to the exercise of *rights* (as they do in the Second, Fourth, and Ninth Amendments), guarantee an individual, as opposed to a collective, right.[73] Intratextual references to "the right of the people" and "the people" in the context of constitutional rights thus demonstrate that the Assembly Clause is an individual, not a collective, right. Indeed, as Justice Scalia has written, although "the right to assemble cannot be exercised alone . . . it is still an individual right, and not one conditioned upon membership in some defined 'assembly.'"[74]

This observation is overlooked by those scholars who advance a theory of the assembly right premised on group membership and autonomy.[75] In fact, an intratextual analysis demonstrates that the assembly right is not necessarily aimed at protecting associational identity, but rather at facilitating *individual* participation in a physical collective with others, regardless of whether that activity is connected with a formally constituted group. In this way, the Assembly Clause can protect gatherings unmoored from deeper associational aims.

References to "the people" in the context of constitutional *powers* are not entirely unavailing as a source of intratextualism, however. As Professor Alexander Meiklejohn has famously observed, the Preamble; Article I, Section 2; and the Tenth Amendment all speak to the value of popular sovereignty and self-government, holding important clues to the animating rationale behind the Assembly Clause and the First Amendment.[76] The Preamble's reference to "the people," for example, identifies the authority to govern the people as "belong[ing] to the people themselves, acting as

72. District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

73. *See id.* at 579–80 (noting that "the people" in the Preamble, Article I, Section 2, and the Tenth Amendment "arguably refer to 'the people' acting collectively—but they deal with the exercise or reservation of powers, not rights").

74. *Id.* at 579 n.5.

75. *See, e.g.*, INAZU, *supra* note 25, at 21 (arguing that the right to assemble often "extend[s] beyond an expressive moment to protect the group that made that expression possible").

76. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253–54.

members of a corporate body politic."[77] The Tenth Amendment places a similar emphasis on self-government, reminding us that "the people" reserve for themselves the powers they do not delegate.[78] And Article I, Section 2 speaks to yet another "reserved power," the power to vote, "[in] which the people, as an electorate, actively participate in governing both themselves . . . and their agencies."[79] Surveying these internal references suggests that the Assembly Clause—and perhaps the First Amendment itself—has as one of its central themes the idea that "[p]olitical freedom is not the absence of government. It is self-government."[80]

3. *"Peaceably."* Founding-era dictionaries defined the adverb "peaceably" as "without tumult,"[81] "without disturbance,"[82] "opposite to war or strife,"[83] and "quietly."[84] These definitions also support a reading of the Assembly Clause that focuses more on physical gatherings than on metaphysical associations. This proposition is supported by the fact that, given its plain meaning, the term "peaceably" does not align well with the type of activities that would be protected by associational freedoms. An association-based view of the assembly right, for example, might encompass "the ability to decide on the membership of permanent organizations," including "activities like filing papers and setting up by-laws to which the adverb 'peaceably' does not seem to apply at all."[85]

At bottom, "peaceably" appears to act as a limitation on the right to assemble, one informed by the potential for assemblies to devolve into mobs or to serve as a vehicle for organizing criminal conduct.[86] Scholars have offered several suggestions for giving substance to this built-in restriction. Some have drawn from the

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77. *See id.* at 253 (discussing passages of the Constitution regarding "the people").

78. U.S. CONST. amend. X.

79. Meiklejohn, *supra* note 76, at 254.

80. *Id.*

81. 2 JOHNSON, *supra* note 52.

82. 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly 4th ed. 1797).

83. 2 CUNNINGHAM, *supra* note 53 (defining the noun "peace").

84. BAILEY, *supra* note 54; *see also* 2 WEBSTER, *supra* note 54 (defining "peaceably" as "without agitation; without interruption").

85. Richard A. Epstein, *Forgotten No More*, ENGAGE, Mar. 2012, at 138, 139 (reviewing INAZU, *supra* note 25).

86. For a historical discussion, see *infra* Part II.C.2.

Court's free speech jurisprudence to operationalize the term,[87] which would prohibit the state from restricting the assembly right unless such activity "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[88] Others, however, have cautioned against using the test for incitement in the assembly context, recognizing that "groups are more dangerous than individuals when it comes to advocacy of violence."[89]

That said, this discussion assumes that the word "peaceably" functions as a restriction on the Assembly Clause in the first place. But an alternative reading exists that modern scholarship has ignored: that "peaceably" acts as a *guarantee*, not as a limit. Suppose that an instructor promises her students that they have a right "peaceably to complete the exam." She may very well mean that her students have a right to finish their exams *so long as* they do so quietly, without disturbance. She may also mean, however, that her students have a right to finish their exams *free from* any noise or disturbance, a condition she is obligated to ensure. Looked at this way, the Assembly Clause promises those gathered that they may do so without interference from external pressures, that they have a right to assemble *in peace*, a condition that the government—much like the teacher in the hypothetical above—bears the burden of safeguarding.

This reading could mean that the Assembly Clause embodies both a positive and a negative right.[90] As a negative right, the Assembly Clause would function like any other First Amendment freedom: it would shield the assembly right from government abridgement. As a positive right, the Assembly Clause could impose an affirmative obligation on the government to protect assemblies from external and internal violence; it could also obligate the government to hold open certain public spaces for protests and other in-person gatherings.[91] Regardless of the specific approach, this interpretation would create an Assembly Clause both "'regulated'

87. INAZU, *supra* note 25, at 166–67.

88. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

89. Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1394 (2012).

90. The First Amendment is traditionally thought to encompass only a negative right. After all, it speaks exclusively in negative terms: "Congress shall make *no* law . . . ." U.S. CONST. amend. I (emphasis added). The contention here is that the term "peaceably" makes a strictly negative interpretation—of the Assembly Clause, at least—inconsistent with the text. *Cf.* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872–80 (1986) (cataloging potential positive constitutional rights and their limits).

91. *See infra* Part III.B.4.

and 'free,'"[92] jibing with the founding-era understanding of the adverb "peaceably" by ensuring that assemblies occur without "tumult" or "disturbance,"[93] broadly understood.

Indeed, this interpretation suggests a physicality to the way in which the act of assembling is practiced; that an assembly must be both regulated and free are two conditions to be secured on the spot, with access to land[94] or with police protection to guard the assembly from violence.[95] The concern here is not so much with associational identity as it is with securing the conditions necessary for an in-person gathering to take place in the first instance, yet another clue that the nature of the assembly right has more to do with facilitating flesh-and-blood gatherings than with protecting the freedom of associations to choose their members.

B. The Syntax of the First Amendment

Having analyzed the words of the Assembly Clause, it is now appropriate to turn to the larger context in which that Clause operates: the text of the First Amendment. In its entirety, the 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."[96]

The rights outlined in the First Amendment are no doubt interrelated,[97] but a reading of the Assembly Clause that casts it as merely enabling speech would render the Clause superfluous. The text alone should be enough to support this argument: because no "clause in the [C]onstitution is intended to be without effect,"[98] speech and assembly must be separate, independent rights.

Assuming the right to assemble is independent from the right to free speech, the text then raises the question of whether the First Amendment protects a freestanding right to assemble, or whether

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92. Meiklejohn, *supra* note 76, at 259.

93. *See supra* notes 81–84 and accompanying text.

94. *See infra* Part III.B.4.

95. Meiklejohn, *supra* note 76, at 260.

96. U.S. CONST. amend. I.

97. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (noting that although the rights secured by the First Amendment are not "identical," they are nonetheless "inseparable," "cognate rights").

98. Marbury v. Madison, 5 U.S. 137, 174 (1803).

that right exists only insofar as it is exercised to petition the government. Professor Jason Mazzone has argued that the right to assemble is guaranteed only to petition the government.[99] He cites two pieces of evidence in the grammatical structure of the First Amendment to support this proposition. First, he observes a distinction between "the use of [the words] 'and to petition,' which contrasts with the use of 'or' in the remainder of the First Amendment's language."[100] Professor John Inazu, however, persuasively argues that "the comma preceding the phrase 'and to petition' is residual from the earlier text that had described the 'right of the people peaceably to assemble *and consult for their common good*, and to petition the government for a redress of grievances.'"[101] Inazu goes on to argue that this comma, left intact despite the deletion of the qualification "for their common good," demonstrates that the Framers sought to distinguish the right to assemble from the right to petition.[102]

Mazzone's second argument proves similarly unavailing. He notes that the right to assemble is conditioned on the right to petition because the Assembly Clause refers to a "right" (singular), as opposed to "rights" (plural), indicating a single right to assemble in order to petition the government.[103] This reading tracks the pre-incorporation interpretation of the Assembly Clause, in which the Court held that "the right peaceably to assemble [is] not protected . . . unless the purpose of the assembly [is] to petition the government for a redress of grievances."[104] It is an approach that has long since been discredited by the Court. In fact, "[s]tate constitutions of the founding period routinely grouped multiple (related) guarantees under a singular 'right,'"[105] and the First Amendment is

99. Mazzone, *supra* note 40, at 713.

100. *Id.* at 712.

101. INAZU, *supra* note 25, at 23 (emphasis added).

102. *See id.* at 23 n.7 ("Mazzone addresses the comma in a footnote and argues that because it 'mirrors the comma' preceding the words 'or prohibit the free exercise thereof' in the first half of the First Amendment, 'it does not therefore signal a right of petition separate from the right of assembly.' The argument for textual parallelism doesn't hold because the free exercise clause explicitly refers back to 'religion' (before the comma) with the word 'thereof.' A close parallel—which illustrates the problem with Mazzone's interpretation—is the suggestion that the comma separating speech and press connotes that they embody only a singular freedom." (citation omitted) (quoting Mazzone, *supra* note 40, at 713 n.392)).

103. Mazzone, *supra* note 40, at 712–13.

104. Presser v. Illinois, 116 U.S. 252, 267 (1886).

105. District of Columbia v. Heller, 554 U.S. 570, 591 (2008).

now thought to "protect[] the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'"[106]

C. The Textual Synthesis

The textual evidence, viewed as a whole, thus demonstrates that the Assembly Clause is both *independent* and *in person.* It is independent in the sense that the assembly right, based on the grammar of the First Amendment, stands on its own, distinct from other rights to free speech, press, and petition. It is in person in the sense that the words of the Assembly Clause, as originally understood, were crafted to protect physical gatherings. In this way, the First Amendment does not house a generalized *freedom* of assembly, but rather a *right* to peaceably assemble, one that is both regulated and free.

II. THE HISTORICAL CASE FOR ASSEMBLY

Lessons from the Assembly Clause's text in hand, this Note now turns to how the right to peaceably assemble has been historically understood.[107] This inquiry aims to illuminate the "original public meaning [of] the text,"[108] recognizing that it represents "the expression of a collective decision: a decision made by the established political authority and expressed in a form recognized as conferring

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106. *Id.* (alteration in original) (quoting U.S. CONST. amend. I); *see also* INAZU, *supra* note 25, at 40 ("*Presser* is the only time that the Supreme Court has expressly limited the right of assembly to the purpose of petition, and the Court has since indirectly contradicted the view that assembly and petition compose one right. But [this] mistake has been followed in decades of scholarship."); *cf.* Chisom v. Roemer, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) ("[The First Amendment] has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances."); JAMES E. LEAHY, THE FIRST AMENDMENT, 1791–1991: TWO HUNDRED YEARS OF FREEDOM 202 (1991) ("The final wording of the First Amendment indicates that the first Congress intended to protect the right of the people to assemble for *whatever* purposes and at the same time to be assured of a separate right to petition the government if they chose to do so." (emphasis added)). Where, then, does this analysis leave the Petition Clause? At least one piece of scholarship has argued that the right to petition is, like the right to assemble, a freestanding First Amendment right whose contours have long been ignored by courts. Krotoszynski & Carpenter, *supra* note 38, at 1246. A discussion of the precise meaning of that clause, however, is beyond the scope of this Note.

107. This Note does not purport to adopt a strict "hierarchy of originalist source materials." *See* Calabresi & Prakash, *supra* note 50, at 552. Suffice it to say that, given the undertheorized nature of the Assembly Clause, history provides a useful tool in thinking about the right.

108. *Id.* at 553.

legal force and validity upon the decision."[109] Modern investigations of the Assembly Clause have focused most of their attention on postenactment history.[110] Arguably, this evidence is "the least reliable source for recovering the original meaning of the [text]"[111] because "there can be no guarantee that a later lawmaker's understanding in fact bears on the intent animating an earlier enactment."[112] As a result, this Note seeks to chart a different course in documenting the history of the Assembly Clause by looking more closely at pre-founding and founding-era conceptualizations of the assembly right.

A. Assembly in English Common and Statutory Law

The right to assemble has deep historical roots that predate the founding. Both English common and statutory law recognized the right to assemble.[113] Under Queens Mary I and Elizabeth I, a comprehensive set of statutes were passed regulating assemblies that afforded justices of the peace the authority to "disperse a group assembly if in *their opinion* it was, or could well lead to an unlawful gathering."[114] In so doing, the justices were to approach the assembly as closely as possible and read a proclamation ordering the assembly to disband.[115]

References to assembly were not entirely limited to legal regulations surrounding the gathering of individuals. The word

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109. Steven D. Smith, Correspondence, *Law Without Mind*, 88 MICH. L. REV. 104, 111 (1989).

110. *See, e.g.*, INAZU, *supra* note 25, at 26–62 (documenting assemblies and associations throughout American history); *cf.* El-Haj, *supra* note 40, at 554–61 (detailing the nineteenth-century understanding of the right to assemble in public streets). *But see* INAZU, *supra* note 25, at 21–25 (describing House debates surrounding the meaning of the Assembly Clause).

111. Calabresi & Prakash, *supra* note 50, at 553.

112. *Id.* at 554.

113. At common law, the assembly right was distinguished from an unlawful assembly, which was defined as the "company of three persons (or more) gathered tog[e]ther to do[] such an unlawful[] act[], although[] they do it not in deed[]." WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE 175 (P.R. Glazebrook ed., Prof'l Books Ltd. 1972) (1582); *see also* CUNNINGHAM, *supra* note 53 (defining an unlawful assembly as "the meeting of three or more persons to do an unlawful act, although they do it not"); George P. Smith, II, *The Development of the Right of Assembly—A Current Socio-Legal Investigation*, 9 WM. & MARY L. REV. 359, 362 (1967) ("In passing on a question of assembly, the jurists [at English common law] usually found it necessary to consider both the intent and purpose of those assembled and whether their behavior was such that it terrorized the other people in the area who were not participating in the assembly.").

114. Smith, *supra* note 113, at 363 n.19.

115. James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 5, 8 (1931).

"assembly" also carried political connotations, and the English frequently used it in reference to meetings of legislative bodies or popular conventions. Blackstone, for example, described the British Parliament during the English Revolution of 1688 as "assembl[ed]" in "a convention."[116] Historian Gordon Wood has noted that political conventions "were closely allied in English thought with the people's right to assemble."[117] It should come as little surprise, then, that many of the Constitution's references to the act of assembling involve meetings of Congress.[118]

The origin of the assembly right in English common and statutory law demonstrates an understanding of assembly focused on in-person, often politically oriented gatherings. Laws regulating these assemblies outlined the conditions under which authorities could end an assembly considered dangerous to public order, including its size and its alleged purpose. But assembly carried a deeper meaning as well—one that touched on politics and popular sovereignty. Regardless, the right to assemble in all of its manifestations concerned in-person, physical gatherings, whether connected to an association or not.

B. Assembly and the Debates of the First Congress

The debates in the First Congress over the Bill of Rights[119] demonstrate that the English legal tradition was very much on the minds of the founding generation while drafting the Assembly Clause. When Representative Theodore Sedgwick of Massachusetts contended that the Assembly Clause was "self-evident,"[120] a right

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116. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *151–52 (noting both that "the peers might assemble" and that "the lords and commons . . . met in a convention").

117. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 312 (1969). For an example of this link in founding-era documents, consider the founding-era constitution of the Commonwealth of Virginia, which sets "[a] declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention . . . as the basis and foundation of government." *See* VA. CONST. OF 1776 (Declaration of Rights), pmbl., *reprinted in* 7 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3812 (1909).

118. *See supra* Part I.A.1.

119. The debates of the First Congress are widely regarded as a legitimate historical source for interpreting the various provisions of the Bill of Rights. *See, e.g.*, Calabresi & Prakash, *supra* note 50, at 555 ("Th[e] use of the First Congress' actions to shed light on the meaning of the Constitution [is helpful as a matter of constitutional interpretation] because the First Congress played a role in creating the Bill of Rights when it proposed the first ten amendments to the states . . . .").

120. 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834).

"that would never be called into question,"[121] Representative John Page of Virginia responded with an allusion to the type of government suppression from which the Framers had fled: "A man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions."[122]

Most citizens would have recognized this statement as a reference to the trial of William Penn, a Quaker widely known throughout England and the American colonies as having been charged with engaging in an unlawful assembly when he delivered a sermon to Quakers on a London street.[123] Of course, one isolated exchange about the Assembly Clause can hardly serve as the lynchpin for how that right ought to be understood. But to the extent that Penn's trial was an influential story for the First Congress when drafting the Assembly Clause, it indicates that the Framers did not intend to restrict the assembly right to a certain subject. Penn's conduct had nothing to do with petitioning the government, or even with politics; a religious purpose animated his gathering, a gathering that Representative Page nonetheless characterized as an assembly.[124]

Whether Penn's ordeal has anything to say about the validity of a broader associational view of assembly is less clear. Authorities charged Penn with violating the common law prohibition against unlawful assembly,[125] and Penn's jury trial focused largely on the meaning of the assembly charge, an offense that at the time had little to do with associational rights.

Over Penn's protestations, the recorder at his trial specifically instructed the jury that Penn's indictment was for "drawing a tumultuous company."[126] After deliberating, the jury delivered a

121. *Id.* Representative Sedgwick proposed striking the Assembly Clause from the First Amendment altogether, finding the proposal of such a right "derogatory to the dignity of the House." *Id.* When put to a vote, the House rejected the proposal by a large majority. Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q., 593, 611–12 (2012).

122. 1 ANNALS OF CONG. 732; *see also* INAZU, *supra* note 25, at 23–24 (describing the exchange between Representatives Sedgwick and Page).

123. INAZU, *supra* note 25, at 24.

124. 1 ANNALS OF CONG. 732.

125. Trial of William Penn & William Mead (Old Bailey 1670), *in* 2 STATE TRIALS 610 (London, 3d ed. 1742).

126. *Id.* at 613.

verdict of "[g]uilty of *speaking* in Gracechurch Street,"[127] to which one of the presiding judicial officers incredulously asked, "Was it not an unlawful [a]ssembly? [Y]ou mean he was speaking to a [t]umult of [p]eople there?"[128] When the foreman responded in the negative, the judge, frustrated and displeased, forced the jury to reconsider its verdict, but for a second time, it found Penn guilty of speaking, not assembling.[129] Upon threatening to lock up the jury for its ostensibly incorrect verdict, the judge found himself interrupted by Penn, who marshaled his best defense against the assembly charge, arguing that "[t]he [j]ury cannot be so ignorant as to think, that we met there, with a [d]esign to disturb the [c]ivil [p]eace . . . we are a peaceable [p]eople, and cannot offer [v]iolence to any [m]an."[130]

Both the indictment and Penn's defense focused on assembly as an in-person act: a gathering in the street, the legal significance of which turns not on who is there or why they have met but on *how they have gathered* and whether their union threatens public order or harbingers tumult. Understood this way, the story behind Penn's trial does not reveal much about the validity of an association-based view of assembly rights; instead, it demonstrates that assembly was, first and foremost, a right protective of face-to-face meetings, protests, and demonstrations.[131] That said, it would be a mistake to forget the larger theme lurking behind this narrative: that the Framers had *dissent* in mind when drafting the Assembly Clause. To the extent that Penn's trial was instructive in developing a rationale for the Assembly Clause, it reveals that the assembly right was designed, at least in part, to protect gatherings that ran against the status quo, even if their message was not inherently political.

In addition to debating the need for an Assembly Clause, the First Congress also debated the language of that clause as it appeared in initial proposals for the Bill of Rights that were submitted by state ratifying conventions.[132] North Carolina[133] and Virginia,[134] for example,

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127. *Id.* at 614 (emphasis altered). This distinction adds additional support to the contention, made earlier, that assembly and speech should be thought of as separate, independent rights. *See supra* Part I.B.

128. 1 ANNALS OF CONG. 614.

129. *Id.*

130. *Id.*

131. *See supra* Part I.A.1.

132. James Madison described the Constitution as "nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions." 5 ANNALS OF CONG. 776 (1796).

limited the right of the people to assemble only for "the common good." James Madison's 1789 proposal to the House employed a slightly different restriction, limiting the right to assemble to those pursuing "their common good."[135] The House approved this latter version of the Assembly Clause on August 24, 1789, but Madison's restriction was mysteriously dropped after the Senate added the religion clauses into the First Amendment.[136]

Professor Inazu has argued that this drafting history reveals that the text "does not limit the purposes of assembly to the common good, thereby implicitly allowing assembly for purposes that might be antithetical to that good."[137] This theory may be an accurate historical interpretation, but it is impossible to discern the exact meaning behind the nonadoption of a proposed constitutional provision. The decision to exclude the words "for their common good" could indicate that the Framers, by their silence, decided to explicitly reject that provision; it could also mean, though, that the Framers assumed that the words of the Assembly Clause compelled such a reading in the first place. Professor Inazu's take, however, tends to corroborate the primary lesson illuminated by Penn's trial: that protecting dissent colored the motivation behind the Assembly Clause, even if the Clause was thought to extend primarily to in-person gatherings.

C. Assembly's Historical Backdrops

Given the relative paucity of evidence that can be gleaned about the Assembly Clause from the debates of the First Congress, it is useful to analyze the broader historical environment in which the Clause was written.

1. *State Constitutions.* The state constitutions that began to emerge in 1776 played a central role in shaping the Federal Constitution, especially the Bill of Rights.[138] Every right eventually protected by the Bill had previously found sanctuary in the text of at

133. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 244 (Jonathan Elliot ed., 2d ed. 1901).

134. 3 *id.* at 658–59.

135. 1 ANNALS OF CONG. 434.

136. INAZU, *supra* note 25, at 23.

137. *Id.* at 25.

138. *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 262 (1992) ("[T]he very idea of a written bill of rights attached to a constitution, as well as the content of the U.S. Bill of Rights, developed first at the state level.").

least one state constitution.[139] The centrality of the state constitutional experience, then, may shed light onto the meaning of the Assembly Clause in a way that an isolated debate of the First Congress never could.[140]

Five state constitutions explicitly protected the assembly right prior to the ratification of the Bill of Rights.[141] The constitutions of Massachusetts and New Hampshire ensured that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; 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."[142] North Carolina, Pennsylvania, and Vermont's constitutions contained similar guarantees, providing that "the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."[143]

The provisions in these five state constitutions bear striking resemblances to the version of the Assembly Clause adopted in the First Amendment. All recognized that the right to assemble is one of "the people." The "orderly and peaceable" limitation in the constitutions of Massachusetts and New Hampshire parallels the inclusion of "peaceably" in the First Amendment. Moreover, these early versions of the Assembly Clause have nothing to say about speech rights, which often found protection elsewhere.[144] And

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139. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

140. *See, e.g.*, Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 989 (1996) ("State charters are the foundation of American constitutional law.").

141. It should be noted that a sixth state, South Carolina, also protected the assembly right, but only to the extent that the assembly was religious in nature: "No person shall disturb or molest any religious assembly . . . ." S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 6 THORPE, *supra* note 117, at 3257.

142. MASS. CONST. of 1780, pt. I, art. XIX, *reprinted in* 3 THORPE, *supra* note 117, at 1892; *see also* N.H. CONST. of 1784, pt. I, art. 1, § XXXII, *reprinted in* 4 THORPE, *supra* note 117, at 2457 (using nearly identical language).

143. N.C. CONST. of 1776, Declaration of Rights, art. XVIII, *reprinted in* 5 THORPE, *supra* note 117, at 2788; *see also* PA. CONST. of 1776, Declaration of Rights, art. XVI, *reprinted in* 5 THORPE, *supra* note 117, at 3084 (using nearly identical language, and providing that application for the redress of grievances might take place "by address, petition, or remonstrance"); VT. CONST. of 1777, ch.1, art. XVIII, *reprinted in* 6 THORPE, *supra* note 117, at 3741 (same).

144. These speech rights were protected but often heavily qualified. *See, e.g.*, MASS. CONST. of 1780, pt. I, art. XXI, *reprinted in* 3 THORPE, *supra* note 117, at 1892 ("The freedom of deliberation, speech, and debate, *in either house of the legislature*, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or

although all five link the right to assemble with the right to petition, these two rights were also kept separate: no reasonable interpretation of these provisions could find the right to assemble dependent on the act of petitioning the government, especially because the two rights are crisply demarcated by a comma or a semicolon.

This evidence counsels that the Framers conceptualized the assembly right broadly, insofar as they chose not to dictate what an assembly ought to be *about.* Notably, however, these provisions do not extend protection to associations by their own terms. Moreover, two state constitutions included the kind of qualifying language—assemblies must be "orderly and peaceable"[145]—that, as discussed above, does not have much of an application in the associational context.[146] So though evidence from state constitutions demonstrates that the assembly right was thought to apply to any particular topic and to safeguard dissent, there is no reason to think that states understood the assembly right to protect notions of group autonomy.

2. *Founding-Era Assemblies*. Assemblies provided colonial Americans with a central tool as they went about their day-to-day lives and as they organized and framed their revolution against the English Crown.[147] The sum of these experiences no doubt informed those who drafted the Assembly Clause. Colonial Americans lived their lives publicly, and, as a result, they relied on common areas to express themselves and to interact with others. Unsurprisingly, then, the Court has long recognized the important role public spaces have played in American life, noting that streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[148]

Founding-era streets housed countless assemblies where people gathered as "'mobs,' rioters, soapbox orators, pamphleteers,

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complaint, in any other court or place whatsoever." (emphasis added)); VT. CONST. of 1777, ch. 1, art. XIV, *reprinted in* 6 THORPE, *supra* note 117, at 3741 ("That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained.").

145. *See supra* note 142 and accompanying text.

146. *See supra* Part I.A.3.

147. *E.g.*, ZICK, *supra* note 37, at 26–27.

148. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

proselytizers, provocateurs, and press agents."[149] The colonists used the streets to stage demonstrations against England in which protesters "marched, chanted, sang, and burned objects in effigy,"[150] engaging in public outcries that were "not only tolerated but generally supported."[151] These demonstrations were frequently spontaneous and contentious,[152] but they rarely turned violent[153] and often allowed marginalized groups such as women, free blacks, and servants to temporarily make their voices heard.[154] Public riots thus served both as a "safety valve[] for defusing class tensions"[155] and as an engine for rebellion against the British.[156] Protests against the Stamp Act[157] and the Tea Act[158] numbered among the Revolution's most memorable events—events that would have disappeared without the ability of citizens to gather in the streets.[159]

Assemblies took place indoors, as well. Taverns were an especially central location for colonial political and social life.[160] Colonists often gathered in taverns to plot boycotts of British goods, read newspapers and political pamphlets, and discuss political affairs with out-of-town visitors.[161] And although taverns were privately

149. ZICK, *supra* note 37, at 26.

150. *Id.* at 27.

151. *Id.*

152. *Id.* at 30.

153. *Id.* Riots did grow violent, however, when aimed at tax collectors or other officials representing the British, who suffered "[a]ssault, tarring and feathering, and binding." *Id.* at 29.

154. *Id.* at 30.

155. *Id.* at 31.

156. *See id.* at 28 ("By facilitating the making of identity or representational claims and the participation of the common man in politics and self-governance, these common spaces helped propel Americans into the Revolution.").

157. Stamp Act, 5 Geo. 3, c. 12 (1765), *repealed by* 6 Geo. 3, c. 11 (1766); *see also* ZICK, *supra* note 37, at 28 (recounting a typical Stamp Act demonstration, which involved well-organized, peaceful parades through town).

158. Tea Act, 13 Geo. 3, c. 44 (1773), *repealed by* Statute Law Revision Act, 1861, 24 & 25 Vict., c. 101; *see also* GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 37 (2002) (reporting that John Adams extolled the Boston Tea Party as "so bold, so daring, so firm, intrepid, and inflexible, and it must have so important consequences, and so lasting, that I can't but consider it an epocha in history").

159. *See* ZICK, *supra* note 37, at 30 ("[R]udimentary streets and town squares [were] critical to the revolutionary spirit and cause.").

160. *See* Linnekin, *supra* note 121, at 599 ("The singular role that taverns played in facilitating public speech, discourse, and assembly prior to, during, and after the Revolutionary War simply cannot be overstated.").

161. *Id.* at 601–05.

owned, they functioned as "quasi-public" spaces[162] where "people assembled on a . . . regular basis to discuss political and other matters on the most egalitarian level."[163]

Both indoors and outdoors, then, colonists practiced their assembly rights in surprisingly spontaneous and inclusive ways.[164] Membership was fluid, debate vibrant, and dissent the order of the day. Whether in the streets or in the taverns, assembly facilitated a robust conversation among citizens of the founding generation, a force so powerful that it often cut across gender, race, and class.[165] Assembly was a shared public act during a moment of intense political upheaval, a "right of the people to bring wayward government to heel."[166] In this sense, assembly maintained a narrow and distinct meaning for the Framers,[167] but it was also a right imbued with deep significance. It was assembly that gave voice to the Revolution, and it was assemblies "in convention"[168] that brought that revolution to fruition when "We the People" ratified the Constitution.[169] This right—a throwback to the classical republicanism of a bygone age where politics rested on virtue and civic responsibility[170]—was to be exercised during those "certain moments

162. *Id.* at 620.

163. *Id.* at 621.

164. To be sure, not all colonial assemblies had quite so heroic a pedigree, and not all were endorsed by the Framers. The Framers understood the need to prevent peaceful assemblies from descending into mobs based on firsthand experience, for example, with Shays's Rebellion. WOOD, *supra* note 117, at 412–13.

165. ZICK, *supra* note 37, at 30; *see also* Linnekin, *supra* note 121, at 604 ("Long communal tables in taverns promoted interaction and discussion between disparate groups. Some taverns even catered to a racially integrated clientele." (footnote omitted)).

166. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 26 (1998).

167. For a description of the assembly right as both independent and in person, see *supra* Part I.C.

168. *See supra* notes 116–18 and accompanying text; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("[B]y the convention, by congress, and by the state legislatures, the [Constitution] was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively, and wisely on a subject, by assembling in convention." (emphasis added)).

169. AMAR, *supra* note 166, at 26.

170. *See* MICHAEL LIENESCH, NEW ORDER OF THE AGES: TIME, THE CONSTITUTION, AND THE MAKING OF MODERN AMERICAN POLITICAL THOUGHT 155 (1988) ("Ultimately, [the Framers] saw the first ten amendments as a symbol, a source of political education, or a reminder to future citizens, not only of their rights, but also of their responsibilities. Antifederalists did not rely on progress to advance the cause of freedom. Instead they put their faith, what little of it they had, in the decency, and honesty, and public-mindedness of future citizens.").

in history in which political action had special significance,"[171] moments where, as Alexander Hamilton sensationally put it, "the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins."[172] So although members of the founding generation exercised their assembly rights every day—in streets, in taverns—they also understood those rights' enduring revolutionary significance in enabling the people to erect a new constitutional and political order.

III. ASSEMBLY IN THE AGE OF OCCUPY

What, then, should the Assembly Clause actually protect in practice? To answer this question, this Note turns to the Occupy movement. Social movements like Occupy play an important role in constitutional change by giving "nongovernmental actors an opportunity to talk back to institutions of power and to have a voice in the development of constitutional norms."[173] In the face of legal losses, such movements "give people a sense of . . . why they should be aggrieved by existing practices,"[174] thereby "reorienting law to shifting social understandings."[175] Although Occupy did not often center its ambiguous calls for change on explicitly constitutional arguments, it nonetheless offered an invitation to think differently about the state of First Amendment law, both by the way in which its occupations were practiced and the way in which our legal regime caused them to end.[176]

This Part begins with an examination of the many features shared by the Occupy movement and founding-era assemblies. Drawing on these parallels, it then considers how experiences with Occupy might inform judicial interpretation of the Assembly Clause.

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171. *Id.* at 140.

172. THE FEDERALIST NO. 15 at 113 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

173. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements,* 154 U. PA. L. REV. 927, 946 (2006).

174. *Id.* at 948.

175. *Id.*

176. *See* Bruce Ackerman & Yochai Benkler, *Occupying the First Amendment*, HUFFINGTON POST (Oct. 21, 2011, 9:51 AM), http://www.huffingtonpost.com/bruce-ackerman/occupy-wall-street-first-amendment-_b_1023709.html ("Whatever else it accomplishes, Occupy Wall Street is revealing distortions in our current understanding of the First Amendment."); *cf.* Ilya Somin, *Occupy Wall Street and Popular Constitutionalism*, VOLOKH CONSPIRACY (Jan. 20, 2012, 3:44 PM), http://www.volokh.com/2012/01/20/occupy-wall-street-and-popular-constitutionalism (documenting emerging constitutional arguments made by Occupy protesters).

In so doing, it sketches out the existing jurisprudential framework for evaluating assembly rights, describes how courts have applied that framework to the Occupy movement, and articulates First Amendment and property-based doctrinal changes to more coherently operationalize the Assembly Clause as a freestanding, independent constitutional right.

A. How To Occupy: Occupy Movements as Founding-Era Assemblies

Occupy, like many founding-era assemblies, had an at best tenuous link to associational freedoms. To the contrary, Occupy protesters formed a heterogeneous group that lacked a formalized set of goals,[177] criteria for membership,[178] or a leadership class.[179] And this was very much by design. Like those who gathered to protest the English Crown,[180] the accept-all-comers Occupy movement did not seek a right to exclude or a right to rigidly police its own membership, the kind of rights that would feature prominently in a broader view of the Assembly Clause protective of expressive associations.[181] In this sense, movements like Occupy risk slipping through the cracks of an Assembly Clause devoted to protecting associations, despite the fact that it is precisely this kind of movement the Framers crafted the Assembly Clause to safeguard.

For example, Occupy's reliance on parks and other common spaces would have been familiar to the Framers, who depended on such public and quasi-public areas to communicate political messages.[182] And both Occupiers and members of the founding generation used similar tactics to relay their messages: colonial demonstrations often involved the kind of expressive conduct—burning effigies or dumping tea into a harbor, for example[183]—that

177. *See* GITLIN, *supra* note 18, at 109 ("[W]hat was truly impossible to find in the vast reaches of the Occupy movement—for more than three months—was a *single* demand, or distinct package of them . . . .").

178. Hence the slogan, "We are the 99 percent."

179. To demonstrate just how leaderless its movement was, Occupy Denver elected Shelby, a three-year-old border collie, as its leader, observing that she was "more of a 'person' than a corporation." GITLIN, *supra* note 18, at 100.

180. *See supra* Part II.C.2.

181. *See* INAZU, *supra* note 25, at 183 ("[T]he proper standard for determining the limits of group autonomy is through the right of assembly.").

182. *See* ZICK, *supra* note 37, at 25–31 (detailing founding-era protests and demonstrations).

183. *See id.* (describing the methods of dissent employed by colonists); *see also* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J.

Occupy put to use when staging its protests and constructing its encampments.[184]

More fundamentally, though, Occupy evoked the specter of founding-era assemblies by calling for a thorough rethinking of the political order. Like the Antifederalists before them, Occupy protesters understood assembly as an element of civic responsibility,[185] a duty incumbent upon citizens to challenge what is orthodox. This was precisely the Framers' aim when they spoke of assembly: to gather together during those moments when ordinary politics had failed and the pursuit of freedom required the people to chart a new course.[186]

Occupy gave voice to those gathered at a time when many felt increasingly voiceless. It was, after all, the Great Recession's social movement. Its tents and makeshift shelters, eerily reminiscent of the Hoovervilles of the 1930s,[187] stood in solidarity with those victims of spiking home foreclosures.[188] Its emphasis on shared sacrifice and the dignity of work[189] contrasted sharply with the financial gymnastics that had left the American economy riddled with rising levels of income inequality[190] and unemployment.[191] And its internal politics, carefully

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1057, 1060 (2009) ("Framing-era English and American political culture was rich with symbolic expression, used interchangeably with words.").

184. *See* Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 247 (D. Conn. 2012) ("The Occupy movement . . . aims to exemplify its message: to express the desire that the economically disenfranchised become more central to American public life by literally placing the economically disenfranchised in the center of America's public spaces.").

185. *Cf. supra* note 170 and accompanying text.

186. *See supra* Part II.C.2.

187. Michael Muskal, *Occupy Wall Street Camps Are Today's Hoovervilles*, L.A. TIMES: NATION NOW (Nov. 15, 2011, 10:46 AM), http://latimesblogs.latimes.com/nationnow/2011/11/occupy-wall-street-hoovervilles.html.

188. *See* Robbie Whelan, *Faces of the Home Foreclosure Crisis*, WALL ST. J. (Dec. 28, 2010, 8:21 PM), http://online.wsj.com/article/SB10001424052748704610904576031632838153532.html ("At the start of 2008, with the U.S. economy weakening and job losses multiplying, the defaults [on mortgages] began to spread as millions of Americans . . . ran into trouble making their payments.").

189. *See* Jed Purdy, *Observations from Occupy Wall Street*, FIELDWORK (Oct. 23, 2011, 8:44 AM), http://jedfieldwork.blogspot.com/2011/10/observations-from-occupy-wall-street.html ("Do it yourself . . . is an aesthetic and also an ethic, which the Occupiers are trying to take from the personal to the social scale.").

190. *See* CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 ix (2011), *available at* http://cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf (noting that for the top 1 percent of all income earners, household income grew by 275 percent from 1979 to 2007, while the bottom 20 percent of all income earners saw household incomes rise by only 18 percent over the same time period).

guided by "facilitators" who made sure everyone had the opportunity to be heard,[192] defied the partisan rancor that had become Washington's way.[193] It disseminated its message virtually,[194] but it *lived* its message in person. As one protester put it, "[Occupy] calls us with a single unspoken but implicit demand: participate!"[195]

B. Occupy and the Right To Peaceably Assemble

The courts that evaluated the legal challenges brought by Occupy protesters consolidated widespread losses for the movement.[196] If the Occupy cases demonstrate that First Amendment law is increasingly out of step with what is going on in the world, advocates and other participants in our legal system must begin to creatively rethink the principles that allowed a movement with so much to say to end so quickly. To disrupt the doctrine, we must understand how it operates, why it fails to work, and how it might be changed. As a matter of legal strategy, the best course of action may be to look outside the complicated maze of free speech law and instead craft arguments in an area better suited—textually and historically—to both regulate and safeguard dissent. In short, we must rethink assembly.

1. *The Current Paradigm: Assembly as Speech*. By ignoring the right to assemble, courts must squeeze their arguments regarding assemblies like Occupy into the confines of free speech jurisprudence. Because the First Amendment protects the freedom of *speech*, to find protection under the free speech framework, the expression must necessarily constitute speech. If a given case does not involve

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191. In September 2011, when the Occupy movement began, an estimated fourteen million Americans were out of work, and the unemployment rate stood at 9.1 percent. News Release, Bureau of Labor Statistics, U.S. Dept. of Labor, The Employment Situation — September 2011 (Oct. 7, 2011), *available at* http://www.bls.gov/news.release/archives/empsit_10072011.pdf.

192. GITLIN, *supra* note 18, at 104 ("Facilitators kept up conversation, inhibited big talkers and big interruptions, [and] kept conflicts manageable.").

193. *See, e.g.*, *Vote Studies 2011, in Graphics*, CONG. Q. (Jan. 17, 2012), http://media.cq.com/media/2011/votestudy_2011/graphics/ ("In the House, a record percentage of votes divided the two parties [in 2011], and Republicans voted with their caucus at a record rate. Senate Democrats also set a record for voting together.").

194. *See* GITLIN, *supra* note 18, at 5 (describing Occupy's use of social media).

195. *Id.* at 74.

196. *See* Sarah Kunstler, *The Right To Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 1019 (2012) (documenting the "string of recent defeats faced by the Occupy movement in the courts").

"speech," the moving party has no basis upon which to launch a First Amendment challenge.[197]

Conduct, of course, is not speech.[198] But the Court has recognized that *some* conduct may be so expressive as to constitute a form of speech within the meaning of the First Amendment.[199] Such expression must demonstrate an "intent to convey a particularized message"[200] and, given the context in which it occurs, "the likelihood [must be] great that the message would be understood by those who viewed it."[201] The message must also be "created by the conduct itself,"[202] not "by [explanatory] speech that accompanies it."[203]

Laws regulating conduct that satisfies this standard and that are applied because of the "likely communicative impact"[204] of the expression are evaluated under strict scrutiny;[205] that is, to survive a First Amendment challenge, such laws must be "necessary to serve a compelling state interest [and] narrowly drawn to achieve that end."[206] In contrast, generally applicable laws justified *without* reference to the communicative impact of the expression are evaluated using a distinct form of intermediate scrutiny that requires such content-neutral time, place, and manner regulations to be "narrowly drawn to

197. The Court has outlined a number of categorical exceptions that do not constitute a part of the freedom of speech. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (threats); New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography); Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (incitement); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (defamation); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (speech that constitutes an integral part of criminal conduct); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words).

198. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

199. *See, e.g.*, *Black*, 538 U.S. at 347–48 (cross burning); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995) (parades); Texas v. Johnson, 491 U.S. 397, 399 (1989) (flag burning); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65–66 (1981) (nude dancing); Schacht v. United States, 398 U.S. 58, 61–63 (1970) (theatrical performances); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (wearing black wristbands); Stromberg v. California, 283 U.S. 359, 369–70 (1931) (flag waving).

200. Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

201. *Id.* at 411.

202. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2006).

203. *Id.*

204. *Johnson*, 491 U.S. at 411.

205. *See, e.g.*, *id.* at 412 (applying strict scrutiny to a Texas statute criminalizing the desecration of the American flag that was invoked "because of the content of the message [flag burning] conveyed").

206. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

further a substantial governmental interest"[207] and to "preserve[] ample alternative channels of communication."[208]

This seemingly rigorous intermediate-scrutiny standard is, in practice, quite feeble, and the Court has largely eviscerated any of its potential force. First, the narrow-tailoring analysis in this context is decidedly dissimilar from how it is conducted under strict scrutiny. The test does not require the regulation to be the least restrictive means of accomplishing the government interest,[209] and it does not evaluate the underinclusiveness of the regulation,[210] both of which strict scrutiny demands. Second, the "ample alternative channels" prong is a flimsy guarantee, requiring the government to show only that it has left open "other ways" of communicating the message, even if those ways are significantly less effective.[211] This standard is particularly problematic when evaluating expressive conduct because there is *always* another way to communicate the message: by speaking rather than acting.[212]

Indeed, the free speech framework often mistakes expressive conduct—a term with no hook in the Constitution's text—for assembly. Political demonstrations,[213] overnight campouts designed to raise awareness for the problem of homelessness,[214] and parades,[215] for example, have all been reviewed under the guise of expressive conduct without so much as a nod to what they really are—assemblies. This mischaracterization matters because although content-neutral regulations of expressive conduct were once thought to merit exacting scrutiny,[216] they are now evaluated using the same

207. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

208. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

209. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (noting that content-neutral regulations "need not be the least restrictive or least intrusive means" of achieving the government's interests).

210. City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 n.28 (1984) (citing approval of a content-neutral statute despite its admittedly underinclusive nature).

211. *Clark*, 468 U.S. at 295; *see also Frisby*, 487 U.S. at 483 (upholding a content-neutral statute so long as it permits "the more general dissemination of a message").

212. *See Clark*, 468 U.S. at 295 (stressing the existence of ample alternative means of conveying the message—including signs and demonstrations—as grounds for upholding a ban on overnight sleeping in a park to draw attention to the plight of the homeless).

213. United States v. O'Brien, 391 U.S. 367, 376 (1968).

214. *Clark*, 468 U.S. at 289, 293.

215. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 566 (1995).

216. *See, e.g.*, *O'Brien*, 391 U.S. at 376–77 (requiring the government interest offered to justify regulations on expressive speech to be "compelling; substantial; . . . [or] paramount"

test applied to content-neutral regulations of speech.[217] For regulations of expressive conduct, then, the government has a relatively low bar to clear.[218]

In sum, courts are using the wrong classification and the wrong test; instead of relying on expressive conduct and intermediate scrutiny, courts would do well to think more carefully about the assembly right and how it should be put into practice.

2. *The Occupy Cases*. The Occupy movement faced a variety of hurdles under this legal regime, so an analysis of the judicial opinions evaluating Occupy's First Amendment claims is thus beneficial to further understand why free speech jurisprudence fails to capture the essence of assembly.

To begin, the threshold determination—whether Occupy movements, with their tent cities and around-the-clock occupations of public spaces, engaged in expressive conduct—remains very much an open question. The Supreme Court evaluated a similar movement that relied on camping and sleeping in public parks to raise awareness for the plight of the homeless roughly two decades before the Occupy movement.[219] In that case, the Court found the erection of tents in public parks to communicate a message, but it assumed without deciding that individuals sleeping in those tents engaged in symbolic speech sufficiently expressive to give rise to a First Amendment claim.[220]

The Occupiers largely succeeded on this count. Some courts, following the Supreme Court's lead, assumed but did not decide that

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(footnotes omitted)); *cf.* Schneider v. New Jersey, 308 U.S. 147, 160–62 (1939) (striking down a ban on leafleting and requiring courts to "be astute to examine the effect" of legislation burdening First Amendment rights and uphold such regulations only when the state can demonstrate "substantial[]" reasons for doing so).

217. *Clark*, 468 U.S. at 298 (noting that constitutional standards "for validating a regulation of expressive conduct [are] little, if any, different from the standard applied to time, place, or manner restrictions").

218. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring) ("We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.").

219. *See Clark*, 468 U.S. at 291–92.

220. *Id.* at 293; *cf. O'Brien*, 391 U.S. at 376 (taking a similar approach by assuming without deciding that burning a draft card has a "communicative element . . . sufficient to bring into play the First Amendment").

overnight sleeping in Occupy camps constituted expressive conduct.[221] Others, however, went further to explicitly hold that sleeping—in the context of the Occupy movement—demonstrated an intent to communicate a message likely to be understood by viewers that would merit First Amendment protection.[222]

Despite having survived the initial inquiry, Occupy movements across the country lost their legal challenges under the weight of content-neutral time, place, and manner regulations.[223] These regulations—which often banned the erection of buildings or structures (like tents) or the use of parks after a certain time of night[224]—were almost always found to have been applied without reference to the message communicated by the Occupy movement,[225]

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221. *E.g.*, Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d. 1110, 1120 (E.D. Cal. 2012).

222. *See, e.g.*, Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 246–47 (D. Conn. 2012) ("[T]he tents which Occupy members have erected and inhabited, and even the act of sleeping in those tents, are themselves forms of expression . . . . One would have to have lived in a bubble for the past year to accept Defendants' claim that Occupy's tents [do not relay a message]."); Watters v. Otter, 854 F. Supp. 2d 823, 830 (D. Idaho 2012) ("The act of sleeping in the tents conveys a message of personal commitment and sacrifice to the political cause that is not conveyed by the tent city alone. Political messages gain power by virtue of personal commitment and sacrifice. And while sleeping isolated from context is perhaps the least expressive activity imaginable, it becomes imbued with great meaning as used by Occupy Boise.").

223. *See, e.g.*, *supra* note 13 and accompanying text. It should also be noted that government regulations undergo different levels of scrutiny depending on *where* the First Amendment activity in question takes place. Public parks, which housed many Occupy camps, exemplify the traditional public forum, that is, "government property that has traditionally been available for public expression." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). First Amendment activity taking place in a traditional public forum is evaluated using the same test as when the government acts as sovereign: the corresponding level of scrutiny is applied depending on whether the law is content neutral or content based. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011) (discussing the content-based versus content-neutral distinction in the context of the traditional public forum). Some Occupy camps—Zuccotti Park, for example—took place in privately owned parks opened for public use. Courts have avoided the messy public-forum questions raised by such public-private arrangements by assuming without deciding that even privately owned parks are traditional public forums when opened to the public. *See, e.g.*, Waller v. City of New York, 933 N.Y.S.2d 541, 544 (N.Y. Sup. Ct. 2011). The Occupy cases have thus been uniformly evaluated in the context of a traditional public forum, where the classic content-based/content-neutral categorization remains in full force. For a discussion of the various approaches to the intersection of First Amendment and property law under the Assembly Clause, see *infra* Part III.B.4.

224. *E.g.*, *Mitchell*, 854 F. Supp. 2d at 244.

225. Some courts, upon examining more closely park regulations and city ordinances, have concluded that, although content neutral on their face, such regulations were content based as applied to Occupy protesters. In this relatively rare scenario, Occupiers were able to overcome threats of eviction from public spaces. *See Watters*, 854 F. Supp. 2d at 829 (noting that "content-

allowing courts to apply the deferential intermediate-scrutiny standard.[226] The various park regulations that stymied the movement's around-the-clock occupation of public spaces easily satisfied intermediate scrutiny. As one court candidly remarked, intermediate scrutiny "is not a particularly burdensome hurdle [for the government] to clear."[227]

This analysis took place in three steps. First, courts reasoned that the government had a substantial interest in preserving the appearance[228] and the safety[229] of its public parks. Second, regulations prohibiting structures, overnight sleeping, or camping were found to be narrowly tailored to achieve that interest.[230] Third, and perhaps most problematic for the Occupiers, courts held that the content-neutral time, place, and manner regulations of public parks left open ample alternative channels of communication because they allowed protesters to use the parks during the day and to avail themselves of other methods of communication, namely, speaking.[231]

3. *Rethinking Assembly*. The central irony of applying content-neutral time, place, and manner regulations in the assembly context is that the power of assemblies to relay a message comes from precisely those aspects of dissent the government seeks to regulate: decisions about *how* and *where* assemblies assert their First Amendment rights carry enormous communicative power. The importance of these tactical choices is all the more central in the assembly context because those assembling are often dissenting.[232] To land the most powerful

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based enforcement is just as pernicious as content-based wording"); Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 561 (D.S.C. 2011) (holding that an unwritten, no-camping policy that had never been applied to any person or group before the Occupy movement was content based); *cf.* Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320, 1335 (M.D. Fla. 2011) (striking down as facially content-based park regulations that permitted an extension of park hours only for "sporting events, cultural activities or civic activities").

226. *See Watters*, 854 F. Supp. 2d at 830 ("[T]he closer the facts in this case get to the facts in *Clark*, the weaker Occupy['s] case becomes.").

227. *Mitchell*, 854 F. Supp. 2d at 252.

228. *E.g.*, Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d. 1110, 1120 (E.D. Cal. 2012) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984)).

229. *E.g.*, *Mitchell*, 854 F. Supp. 2d at 252.

230. *E.g.*, *Occupy Sacramento*, 878 F. Supp. 2d. at 1118–20.

231. *E.g.*, Occupy Minneapolis v. Cnty. of Hennepin, 866 F. Supp. 2d 1062, 1071 (D. Minn. 2011).

232. *See* INAZU, *supra* note 25, at 21 (identifying three kinds of assembly: "the dissenting, the political, and the expressive"); *id.* at 156 ("Assembly—like speech, or the press, or religion—is most relevant when its exercise is challenged by the state."); *see also* Martin v.

punch, these marginalized groups rely on healthy doses of imagery and symbolism to color their cause and lend salience to their arguments. To conclude, then, this Note will offer an initial framework for better protecting such activity under the Assembly Clause. The aim here is not to detail a comprehensive theory or set of doctrines that can conclusively give meaning to the assembly right; rather, it has the more modest goal of beginning a conversation about the contours of Assembly Clause jurisprudence and identifying avenues for future research and scholarship.

First, evaluating claims under the Assembly Clause would no longer require courts to determine whether the conduct of a given assembly is expressive enough to merit First Amendment protection. If the Assembly Clause is understood to protect in-person gatherings, identifying an assembly will be a relatively straightforward task for courts. Physicality would be the touchstone—the assembly would need only to be a gathering of multiple individuals to trigger the potential for the Clause's protection.[233] As in the free speech context,[234] assemblies gathered to discuss matters of public concern would exemplify the core of what the Clause protects,[235] but this recognition would not preclude nonpolitical assemblies from bringing a cognizable claim.[236] This question could be difficult at the margins, for example, when thinking about the assembly rights of online groups[237] and the potential for assemblies to engage in constitutionally unprotected incitement[238] or criminal conduct.[239] On the whole,

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Struthers, 319 U.S. 141, 146 (1943) (characterizing methods of public dissent and expression as "essential to the poorly financed causes of little people").

233. *See supra* Part I.

234. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion [is] an opportunity essential to the security of the Republic, [and] is a fundamental principle of our constitutional system.").

235. This approach would comport with the historical understanding of the Assembly Clause. *See supra* Part II.C.2.

236. For example, a city ordinance limiting the use of dance halls to teenagers between the ages of fourteen and eighteen would infringe on the assembly right despite the entirely apolitical nature of dance halls. The Court has upheld such an ordinance, reasoning that it did not burden the right of association. City of Dallas v. Stanglin, 490 U.S. 19, 28 (1989). Under the approach advocated here, such activity—neither speech nor association—would easily satisfy the Assembly Clause's threshold condition (that the activity constitute an assembly), and a court would go on to apply some form of means-end scrutiny to evaluate the ordinance.

237. *See generally* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013) (exploring the extent to which online groups might find protection under the Assembly Clause).

238. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (defining the test for incitement in the free speech context).

however, this approach would hew closer to the Constitution's text and history by recognizing assemblies *as assemblies*, not as speech or associations.

Second, courts would then evaluate burdens on the assembly right using some form of means-end scrutiny. Such a framework could resemble the one at play in the Court's free speech jurisprudence, but it would require some significant modifications. The distinction between content-based and content-neutral regulations that features so prominently in the free speech context could plausibly be maintained for assembly cases. Courts would have to police that line with special vigilance, however. As several Occupy cases demonstrate, assemblies are particularly vulnerable to facially content-neutral laws that are nonetheless applied in content-based ways.[240] The consequence of ignoring this possibility is likely outcome determinative. Assemblies are afforded significantly reduced protection under intermediate scrutiny than under strict scrutiny,[241] a standard the government has satisfied only once in the free speech context.[242] Without courts to conduct a probing examination of the facts and procedural history of a given case, dissenting assemblies like Occupy risk suppression because of the content of their message, especially if courts continue to adhere to the content-based/content-neutral categorization in the context of the Assembly Clause.

Third, the intermediate-scrutiny inquiry could also be altered to better account for the reliance of assemblies on the time, place, and manner of their gatherings to relay a message. Those who physically assemble to voice their political beliefs disproportionately bear the burden of the intermediate-scrutiny standard because it threatens to overly restrict the one form of communication accessible to all, regardless of wealth: the use of our voices and our bodies to relay a

239. The Clause's "peaceably" limitation would preclude, for example, conspiracies or street gangs from gaining constitutional protection under the Assembly Clause. *See supra* Part I.A.3.

240. Indeed, some courts evaluating the First Amendment challenges brought by Occupy protesters recognized well the importance of ensuring that content-neutral regulations—such as no-camping policies—were not used to single out Occupy's conduct *because of* its expressive nature. *See supra* note 225 and accompanying text; *see also* Texas v. Johnson, 491 U.S. 397, 406 (1989); United States v. O'Brien, 391 U.S. 367, 377 (1968); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (recognizing that, in the Equal Protection Clause context, even a race-neutral law can be race conscious as applied).

241. *See supra* Part III.B.1.

242. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010) (upholding a federal ban on legal services and advice to terrorist organizations against a First Amendment challenge).

message.[243] The existence of ample alternative channels, for example, may be out of reach for the poor who cannot afford access to radio waves, television screens, or the Internet to broadcast their views. In the long run, then, seemingly innocuous content-neutral regulations can effectuate a type of viewpoint discrimination[244] by systematically excluding dissenting opinions from the marketplace of ideas in favor of those messages put forward by well-funded political candidates, corporations, and media conglomerates, all of whom often have an interest in preserving the status quo.[245]

And even assuming protesters could afford access to such resources, those methods of communication would hardly provide them with *meaningful* ample alternative channels to be heard. Speech via social media, for example, simply does not carry the same emotional power as the kind of *physical* assembly—and the sustained personal sacrifice it entails—that protesters so often lend to their cause. This sacrifice is one that, in the context of the Occupy movement, at least, provided the driving force behind the movement's ability to garner national media attention.[246]

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243. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313 n.14 (1984) (Marshall, J., dissenting) ("[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.").

244. Viewpoint discrimination occurs when "government allows one message while prohibiting the messages of those who can reasonably be expected to respond." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (describing viewpoint discrimination as occurring when the government uses its "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). It might be argued that viewpoint discrimination cannot exist under these circumstances because the government has simply remained neutral with respect to income disparities that affect an individual's ability to communicate his ideas and has thus in no way skewed public debate one way or another. That said, such disparities arguably implicate state action because a "state's contract and property laws always help determine one's freedom of speech [by] determin[ing] access to the means of communication, [which is a function of] economic power." J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412.

245. *See, e.g.*, Balkin, *supra* note 244, at 379 ("[T]he paradigmatic example of free speech in this country is the parroting of values created for us by those groups and persons who have sufficient money and clout to monopolize our attentions and ultimately our very imaginations.").

246. *See* Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 252–53 (D. Conn. 2012) ("The City argues that the Occupy protesters are able to get their message out through Facebook, Twitter, and the Occupy New Haven website. . . . There is something unsatisfying about telling a movement that aims to make visible an often unseen, ignored population that it should content itself with forms of communication that are only seen when someone seeks them out.").

How to better account for these disparities in the assembly context? Courts would do well to adopt a more probing posture when evaluating content-neutral laws, recognizing that the government always has "strong incentives to overregulate even in the absence of an intent to censor particular views."[247] In fashioning a revised means-end scrutiny analysis for the Assembly Clause, courts could alter the ample alternative channels prong to require a more persuasive government showing that the individuals whose assembly rights are burdened by a given law have a realistic opportunity to effectively express their messages elsewhere or through other means. Moreover, a more skeptical approach to the narrow tailoring analysis could do some work by requiring the government to empirically demonstrate that its asserted interests will actually be advanced by the given regulation,[248] or by preventing the government from stifling an assembly with an underinclusive law.[249]

4. *Assembly as Access*. Courts could also look to the intersection of First Amendment and property law to give meaning to the Assembly Clause. First, a caveat: *speech* and property enjoy a notoriously complex relationship.[250] That relationship cannot be fully illuminated here. It can, however, be reframed. In light of its text and its history, the Assembly Clause more directly implicates the First Amendment's property foundations than the Free Speech Clause. A right to assemble, after all, presupposes the ability to access a *place* where that assembly can occur.[251] Moreover, the Clause's use of the adverb "peaceably" suggests that though there are identifiable limits on the right to assemble, the assembly right also imposes an affirmative obligation on the government to ensure that assemblies can form in the first place.[252]

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247. *Clark*, 468 U.S. at 315 (Marshall, J., dissenting).

248. *See, e.g.*, *id.* at 311–12 ("The majority cites no evidence indicating that sleeping engaged in as symbolic speech will cause *substantial* wear and tear on park property.").

249. As noted above, the intermediate-scrutiny standard permits the use of underinclusive legislation in the free speech context. *See supra* note 210 and accompanying text.

250. *E.g.*, Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1420 (2011) ("The relationship between property and expression is even more important, and more complicated, than it first appears.").

251. *See* Michael W. McConnell, *Freedom by Association*, FIRST THINGS, Aug./Sept. 2012, at 39, 41 ("A right of assembly without a right of access to *public* spaces would be an empty right. . . . The creation of the freedom of assembly embodied [a] legal change in the right of access." (emphasis added)).

252. *See supra* Part I.A.3.

This approach could guarantee access to public property for the purpose of exercising the assembly right, creating what has been described as a "First-Amendment easement"[253] against the government. Such a right of access is already embodied in the Court's public-forum doctrine, which has long recognized the right of the people to use streets, parks, and other common spaces for expressive activity.[254] That said, the Court has been unwilling to expand the scope of the traditional public forum in recent cases, making it an improbable vehicle for legal change.[255] Unsaddled with the Free Speech Clause's cumbersome legal framework, the Assembly Clause could provide an important textual hook for advancing access to certain government-owned property opened to the public, property that currently falls outside the ambit of traditional public-forum analysis.[256] The Court has, for example, sharply curtailed the scope of permissible expressive activity in airport terminals,[257] on roads and footpaths designated for public use within military bases,[258] and on

253. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13 ("When the citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement."); *cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. . . . [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet . . . ."); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (observing that "access to public property for speech purposes is essential to effective exercise of First Amendment rights").

254. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (classifying residential streets as public fora); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) (holding that individuals have the right to use "streets and parks for communication of views").

255. *Compare* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding that an airport is not a traditional public forum because "the rather short history of air transport . . . does not demonstrate that airports have historically been made available for speech activity"), *with id.* at 695 (Kennedy, J., concurring) ("[The majority's] analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government.").

256. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (holding that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse").

257. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 680.

258. Greer v. Spock, 424 U.S. 828, 837–38 (1976) (denying individuals a "generalized constitutional right to make political speeches or distribute leaflets" at military installations as a result of "the special constitutional function of the military in our national life").

property outside of public high schools[259] and jails,[260] denying dissenters access to fora where, in today's increasingly urbanized landscape,[261] they may have the best opportunity to meaningfully relay their message to others.

This march toward the minimization of assembly rights has not gone unnoticed, and a series of vigorous dissents have criticized the Court's propensity to overvalue the extent of the government interest in preventing expressive access to such property[262] and to undervalue the important First Amendment interests such access would preserve.[263] But the Justices have largely waged these wars on the free speech battlefield, despite the fact that many of the First Amendment's most contested cases involve the paradigmatic exercise of the assembly right: the physical, in-person gathering of multiple individuals seeking to voice their political views.[264] It is the Assembly Clause that can provide these dissenting groups with what the Free Speech Clause cannot: a textual and historical basis for a First Amendment easement on public property.

That is not to say, of course, that such access is without bound. To begin, the source of the access right—the peaceably term—is also its limit,[265] meaning that violent assemblies of the kind so often found during the Occupy Oakland movement[266] could be constitutionally restricted. And content-neutral regulations on such access—regulations used to protect public health and safety, for example—

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259. Morse v. Frederick, 551 U.S. 393, 397, 400 (2007) (permitting over a First Amendment challenge the confiscation of a banner reading "BONG HiTS 4 JESUS" from a student attending a rally on the street outside of a public high school).

260. Adderley v. Florida, 385 U.S. 39, 40–41, 47 (1966) (allowing the prosecution of college students gathered in front of a jail to protest against its policy of racial segregation despite a First Amendment challenge).

261. *See generally* ZICK, *supra* note 37 (describing the loss of shared outdoor spaces in the United States over the course of the twentieth century).

262. *See, e.g.*, *Greer*, 424 U.S. at 851–52 (Brennan, J., dissenting) ("The Court's opinion speaks in absolutes, exalting the need for military preparedness and admitting of no careful and solicitous accommodation of First Amendment interests to the competing concerns that all concede are substantial. . . . [T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security.").

263. *See, e.g.*, *Morse*, 551 U.S. at 445 (Stevens, J., dissenting) ("Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use.").

264. *See supra* notes 257–60.

265. *See supra* Part I.A.3.

266. *See* Mahler, *supra* note 1, at 41–42 (documenting violent Occupy Oakland protests).

would remain valid absent evidence they were content based as applied. The government, after all, need not tolerate anarchy to further the aims of the Assembly Clause.[267] That said, threadbare assertions of a state interest in preventing individuals from gathering in public spaces, especially with respect to those seeking to use such spaces to express political views, should not satisfy the First Amendment's demands. If the Assembly Clause were to ensure some minimum level of access to such government-owned property for expressive purposes, the right of citizens to gather publicly in dissent—the Clause's central aim—would be substantially more robust indeed.

Others have argued that the Assembly Clause could empower the government to subsidize expressive activity or to permit a First Amendment easement against private landowners who hold their property open to the public.[268] For a brief time, the Court authorized a First Amendment right of access onto privately owned property that was sufficiently public in nature.[269] These cases—which threatened to stretch the state-action doctrine to a breaking point[270]—have since been overruled, although states can and do, under their state constitutions, allow an expressive right of access to privately owned, publicly open spaces such as shopping malls or university campuses.[271]

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267. *See* Adderley v. Florida, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting) ("There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. . . . No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. . . . But this is quite different from saying that all public places are off limits to people with grievances. And it is farther yet from saying that the 'custodian' of the public property in his discretion can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble . . . ." (citations omitted)).

268. *See* Balkin, *supra* note 244, at 402 ("Once we understand that the problem of access is a problem of both private and public power, several alternative solutions present themselves.").

269. *See, e.g.*, Amalgamated Food Emps. Union Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968) (protecting under the First Amendment the right of groups to peacefully picket on a privately owned shopping center), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

270. *But see* Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.").

271. As noted above, some state courts have, under their state constitutions, permitted a right of access for expressive activity onto certain private property that is open to the public in defining the contours of the public-forum doctrine and the common law of trespass. *See, e.g.*, Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) (holding that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned"), *aff'd on other grounds*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (upholding a state constitutional

Adopting this approach under the Assembly Clause could be a particularly effective way of safeguarding the assembly right, especially in the face of the increasing privatization of public spaces throughout the country. Some Occupy movements, for example, took place in privately owned parks open for public use.[272] Courts evaluating First Amendment challenges under such circumstances assumed without deciding that such property is sufficiently public to fall within the ambit of the First Amendment.[273] An explicit access right to private property that is held open to the public would remove the need for such an assumption and treat such quasi-public property as fully implicating First Amendment rights.

CONCLUSION

If the First Amendment is to continue to provide space for dissent—for those who would call upon society to rethink our constitutional and political order—courts, legal scholars, and advocates alike must be willing to meaningfully extend First Amendment principles beyond the realm of speech and association. Assemblies like Occupy Wall Street have grabbed the attention of our ongoing national conversation only to sink away under the weight of legal challenges, despite the text and history of the Assembly Clause, which was specifically designed to safeguard the integrity of such movements. This incongruity demands a renewed effort to analyze the assembly right *as an assembly right*, one that both empowers and regulates those who physically gather to make their voices heard, as all those seeking meaningful change must.

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right of access to shopping malls against a free speech and a Takings Clause challenge under the federal constitution); Wood v. State, No. 00-0644-MMM-A, 2003 WL 1955433, at *3 (Fla. Cir. Ct. Feb. 26, 2003) (permitting public right of access to privately owned shopping malls to seek signatures to place a political candidate's name on the ballot); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 590–91 (Mass. 1983) (same); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994) (permitting public access to privately owned shopping malls to voice political views); Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 110 (Wash. 1981) (en banc) (same). *See generally* Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991) (detailing tensions between First Amendment and private property rights). Federal constitutional law, however, does not recognize First Amendment access to private property. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (holding that the First Amendment does not require a "dedication of private property to public use"). Occupy movements, which sometimes set up camp on private property, have challenged the limits of this principle. *See supra* note 223.

272. *See supra* note 223.

273. *See supra* note 223.