CHAPTER 1
OVERVIEW OF THE ARGUMENT

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.

—United States Constitution, Amendment I

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women’s suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and the New Deal, and the Civil Rights Movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the Second Red Scare of 1950s’ McCarthyism. Abraham Lincoln once called “the right of the people peaceably to assemble” part of “the Constitutional substitute for revolution.” In 1939, the popular press heralded assembly as one of the “four freedoms” central to the Bill of Rights. Even as late as 1973, John Rawls characterized it as one of the “basic liberties.” But in the past thirty years, the freedom of assembly has become little more than a historical footnote in
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American law and political theory. Why has assembly so utterly disappeared from our democratic fabric? And, as important, what has been lost with the loss of assembly?" One might, with good reason, think that the right of assembly has been subsumed into the rights of speech and association and that these two rights adequately protect the boundaries of group autonomy. On this account, contemporary free speech doctrine guards the best-known form of assembly—the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration. Meanwhile, the right of association, or, more precisely, the right of expressive association, shelters assemblies that extend across time and place—groups like clubs, churches, and civic organizations. In other words, the free speech framework focuses on the message that a group conveys at the moment of its gathering (the words on a placard, the shouts of a protester, the physical presence of a sit-in), while the expressive association framework focuses on the group that enables a message by ensuring that people can “associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”

The idea that the rights of speech and association adequately guard the groups that the right of assembly might otherwise have protected is not implausible, and a number of scholars appear to have adopted it. Indeed, most modern constitutional arguments involving questions of group autonomy invoke the right of expressive association. Andrew Koppelman, a well-respected constitutional scholar, has argued that expressive association has come to represent “a well-settled law of freedom of association,” an “ancien regime.”

I believe that this turn to speech and association to protect the boundaries of group autonomy—and therefore pluralism and dissent—is misguided. The central argument of this book is that something important is lost when we fail to grasp the connection between a group’s formation, composition, and existence and its expression. Many group expressions are only intelligible against the lived practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe to them. The political significance of a women’s pageant in the 1920s would be lost without knowing why these women gathered. And the creeds and songs
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recited by members of groups ranging from Alcoholics Anonymous to the Boy Scouts reflect a way of living that cannot be captured by a text or its utterance at any one event. The right of expressive association elides this connection between a group’s practices and its message. Consider the following examples: a gay social club, a prayer or meditation group, and a college fraternity. Each of these groups conveys a message by its very existence. Each of these groups bears witness to a social practice that, to varying degrees and at various times, disrupts social norms and consensus thinking. Those sound like important First Amendment interests. But none of these groups qualifies as an expressive association—none of these groups is “expressive enough” under current constitutional doctrine.

What is more, even when the right of expressive association does show up, it doesn’t offer very rigorous protections, at least when confronted with antidiscrimination norms. Civic organizations, social clubs, and religious student groups have all been found to be expressive associations—and all have been left utterly unprotected by the right of expressive association. The Ninth Circuit recently illustrated this trend—and the logical end of antidiscrimination norms unchecked by principles of group autonomy—in the reasoning underlying its denial of constitutional protections to a high school Bible club that sought to limit its membership to Christians: “States have the constitutional authority to enact legislation prohibiting invidious discrimination. . . . We hold that the requirement that members [of a high school Bible club] possess a ‘true desire to . . . grow in a relationship with Jesus Christ’ inherently excludes non-Christians . . ., [thus violating] the District’s non-discrimination policies.” In other words, a Christian group that excludes non-Christians is for that reason invidiously discriminating.

There is another problem with the right of association—it is not actually in the text of the Constitution. This will come as a surprise to some, including dozens of federal judges and their law clerks who have referred to a nonexistent “freedom of association clause” in the First Amendment. Look again at the epigraph to this introductory chapter—there is no such clause. In fact, the right of association was absent from our constitution-
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Of course, any written document requires some level of interpretation, and the Supreme Court has long recognized other rights not in the text of the Constitution, most notably a right to privacy. But unlike privacy, association has an obvious antecedent in the text of the Constitution: the right of assembly. We should not supplant assembly with the invented right of association—or at least the version of that right that the Court has embraced over the past fifty years—without understanding why we have done so and what we have given up in the process.

This book offers assembly as an alternative to the enfeebled right of expressive association. The history of assembly reveals four principles that help us see its contours and its contemporary applications. First, assembly extends not only to groups that further the common good but also to dissident groups that act against the common good. Second, this right extends to a vast array of religious and social groups. Third, just as the freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group’s autonomy, composition, and existence. Fourth, assembly is a form of expression—the existence of a group and its selection of members and leaders convey a message. Collectively, these four principles counsel for strong protections for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards.

The judicially recognized right of association advances neither these principles nor the values that underlie them. The shift in the constitutional framework from assembly to association (1) diminished protections for dissenting and destabilizing groups; (2) marginalized political practices of these groups by narrowing the scope of what counts as “political”; and (3) obscured the relationship between the practices and expression of these groups. The forgetting of assembly and the embrace of association thus marked the loss of meaningful protections for the dissenting, political, and expressive group.

While today’s cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have been silenced and stilled by the state cuts across political and ideological boundaries. The freedom of assembly once opposed these incursions. As C. Edwin Baker has argued: “The
function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms.99

But the social vision of assembly does more than enable meaningful dissent. It provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity. And it facilitates a kind of flourishing that recognizes the good and the beautiful sometimes grow out of the unfamiliar and the mundane. Indeed, almost every important social movement in our nation’s history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity. We lose more than the shared experience of cheese fries and cheap beer when we bowl alone.10

Recovering the vision of assembly remains an urgent task. In June 2010, the Court dealt a twofold blow to the principles of group autonomy by relying on attenuated conceptions of the rights of speech and association. In Holder v. Humanitarian Law Project, the Court curtailed in the name of national security interests the right of individuals to associate with and advocate on behalf of certain foreign political groups. And in Christian Legal Society v. Martinez, the Court relied on a muddied area of free speech doctrine to deny the right of a religious student group to limit its membership to those of its choosing, the right to retain control over its own message—the right to exist.11

Holder and Martinez hinder the group autonomy upon which democracy depends. As Stephen Carter has argued, “Democracy advances through dissent, difference, and dialogue. The idea that the state should not only create a set of meanings, but try to alter the structure of institutions that do not match it, is ultimately destructive of democracy because it destroys the differences that create the dialectic.”12 Beginning from a very different perspective, William Eskridge arrives at a similar conclusion: “The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.”13 The Court’s doctrinal reliance on the right of association in Holder and the right
of speech in *Martinez* ignores the important views that Carter and Eskridge raise.

*Holder* and *Martinez* are lamentable, but they are unsurprising. They reflect the unprincipled development of the Court’s approach to questions of group autonomy over the past fifty years. This book proposes an alternative. It tells a different story about the constitutional protections for groups and argues that we need to reinvigorate these protections. The following pages provide an overview of the next four chapters: (1) the history of the right of assembly; (2) the invention of the right of association in the 1950s and 1960s; (3) the transformation of the right of association in the 1970s and 1980s; and (4) a theory of assembly.

The Right Peaceably to Assemble

There has been some debate as to whether “the right of the people peaceably to assemble, and to petition the government for a redress of grievances” in the First Amendment recognizes a single right to assemble for the purpose of petitioning the government or establishes both an unencumbered right of assembly and a separate right of petition. Contrary to interpretations advanced in some scholarship, the text of the First Amendment and the corresponding debates over the Bill of Rights suggest that the framers understood assembly to encompass more than petition. The first groups to invoke the freedom of assembly also construed it broadly. At the end of the eighteenth century, the Democratic-Republican Societies emerging out of the increasingly partisan divide between Federalists and Republicans repeatedly invoked the right of assembly. During the antebellum era, policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks. Meanwhile, female abolitionists and suffragists in the North organized their efforts around a particular form of assembly, the convention. As Akhil Amar has observed, the nineteenth-century movements of the disenfranchised brought “a different lived experience” to the words of the First Amendment’s assembly clause. They were political movements, to be sure, but they embodied and symbolized even larger societal and cultural challenges.14
At the end of the nineteenth century, the Supreme Court misconstrued the text of the First Amendment in suggesting that the right of assembly was limited to the purposes of petitioning for a redress of grievances. But while some commentators accepted this narrow interpretation, state courts interpreting parallel state constitutional provisions of assembly articulated far broader protections. This more expansive sense of assembly was also represented in three social movements during the Progressive Era: a revitalized women’s movement, a surge in political activity among African Americans, and an increasingly agitated labor movement.

The Supreme Court made the federal right of assembly applicable to the states in its 1937 opinion *De Jonge v. Oregon*. The newly expanded right gained traction in subsequent cases. But these advances proved evanescent, and later cases involving the rights of “speech and assembly” routinely resolved the latter within the framework of the former. Although the right of assembly remained important in several decisions overturning convictions of African Americans who participated in peaceful civil rights demonstrations in the 1960s, courts resolved most cases involving group autonomy without considering assembly. The Supreme Court, in fact, has not addressed an assembly claim in thirty years.15

The Right of Association in the National Security Era

Around the time that assembly began falling out of political and legal discourse, the Supreme Court shifted its constitutional focus to a new concept: association. The development of the constitutional right of association—and with it, the disappearance of assembly—in many ways depended upon surrounding contexts. I divide these contexts into two eras. The first, which I call the national security era, began in the late 1940s and lasted until the early 1960s. It formed the background for the Court’s initial recognition of the right of association in *NAACP v. Alabama*. The second, which I call the equality era, began in the 1960s and included an important reinterpretation of the right of association in *Roberts v. United States Jaycees*.16

Political, jurisprudential, and theoretical factors shaped the right of association in each of these eras. In the national security era, the primary
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political factor was the historical coincidence of the Second Red Scare and the Civil Rights Movement. From the late 1940s to the early 1960s, the government’s response to the communist threat pitted national security interests against group autonomy. Segregationists in the South capitalized on these tensions by analogizing the unrest stirred by the NAACP to the threats posed by communist organizations; segregationists even charged that communist influences had infiltrated the NAACP. The Supreme Court responded unevenly, suppressing communist groups in the name of order and stability but extending broad protections to civil rights groups.

The jurisprudential factor shaping the right of association involved disagreement on the Court over the constitutional source of that right. This disagreement was most evident when the Court applied the right to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that association constrained state action because like other rights, it could be derived from the “liberty” of the Due Process Clause of the Fourteenth Amendment. Justices Black, Douglas, Brennan, and Warren insisted that association was located in some aspect of the First Amendment and argued that it be given the same “preferred position” as other First Amendment rights. On their view, association applied to the states because the Fourteenth Amendment had incorporated the provisions of the First Amendment. These differences encompassed not only the source of the constitutional limits on state action but also the extent of those limits. For Black, the rights in the First Amendment were “absolute” and could not be restricted by state action. Frankfurter argued instead for a “balancing” that weighed the interests of the government against the liberty of the Fourteenth Amendment. The result of these two perspectives was that the Court was more likely to uphold a state law restricting expressive freedom if it followed the liberty argument and more likely to strike down the law if it followed the incorporation argument.

The theoretical factor influencing the shaping of association was the pluralism popularized by David Truman and Robert Dahl in the 1950s and 1960s. Earlier pluralists had advanced “the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own
free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.” But mid-twentieth-century pluralism merged these insights with currents from Arthur Bentley’s “science of politics” and Louis Hartz’s “Lockean consensus.” The resulting political theory emphasized the balance and consensus among groups rather than the juxtaposition of groups against the state. These assumptions laid the foundation for the freedom of association in two ways. First, they established a normative presumption that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises and, conversely, that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because this normative presumption excluded groups beyond the margins of consensus, pluralists saw the possibility of harmony and balance among those groups that remained.  

The Transformation of Association in the Equality Era

The second constitutional period of the right of association is the equality era, which began in the mid-1960s. The equality era introduced its own political, jurisprudential, and theoretical factors to the right of association. The primary political factor involved ongoing efforts to attain meaningful civil rights for African Americans. As the Civil Rights Movement gained traction, the focus of activists shifted from protecting their own associational freedom (as represented in cases like NAACP v. Alabama) to challenging segregationists’ right to exclude African Americans from group membership. Questions over the limits of this right to exclude became increasingly complex when civil rights litigation moved from public accommodations to private groups.

The jurisprudential factor in the equality era involved the right to privacy. Although privacy and association had been linked in some of the Court’s earliest cases on the freedom of association, new connections emerged when the Court first recognized a constitutional right to privacy in its 1965 decision Griswold v. Connecticut. Because privacy, like association, appeared nowhere in the text of the Constitution, the Court’s earlier recognition of the right of association in NAACP v. Alabama became an important example of the kind of “penumbral” reasoning underlying
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Griswold. But there was a definitional problem with the Court’s understanding of associational privacy. In contrast to the view of privacy as the guarantor of individual autonomy that Griswold came to represent, privacy in the early right of association cases had more to do with protecting the boundaries of group autonomy.10

The theoretical factor in the equality era was the rise of Rawlsian liberalism. Rawlsian questions about the relationship between liberty and equality and the meaning of justice dominated scholarly discussions about associational freedom. Rawlsian premises also permeated the work of legal scholars like Kenneth Karst and Ronald Dworkin. Dworkin’s recognition of “rights as trumps” revealed that Rawlsian-inspired thought shared concerns about majoritarianism voiced by earlier theorists like Madison and Tocqueville. But unlike Madison’s factions and Tocqueville’s associations, the ostensibly neutral procedural devices of Rawls’s “public reason” and Dworkin’s “law as integrity” didn’t merely counter majoritarian influence—they constrained the autonomy of groups that failed to comport with liberal values.11

The influence of Rawlsian liberalism and the two lines of cases that emerged over the right to exclude and the right to privacy coalesced in Roberts v. United States Jaycees. Justice Brennan’s opinion for the Court identified two separate constitutional sources for the right of association in earlier cases. One line of decisions protected “intimate association” as “a fundamental element of personal liberty.” Another set of decisions guarded “expressive association,” which was “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” Sixteen years later, the Court reaffirmed this fundamental distinction in Boy Scouts of America v. Dale.12

A Theory of Assembly

This book suggests that the loss of assembly and the uncritical embrace of the constitutional right of association have weakened group autonomy by suppressing dissent, depoliticizing action, and constraining expression. These changes are related to each other: they are all methods of control. They deny that “the activity of rendering the world a meaningful place
by generating narratives and norms requires space for groups of people gathered apart from the state and bound to come into conflict with it.” In other words, they open the door for the state to impose meaning, purpose, and value on groups and their activities.21

The thin protections of the right of association are underwritten by a political theory of *consensus liberalism*, which purports to be “procedural” or “neutral” but whose espoused tolerance extends only to groups that endorse the fundamental assumptions of liberal democratic theory. Consensus liberalism paves the way for the state to demand what Nancy Rosenblum has called a “logic of congruence” requiring “that the internal life and organization of associations mirror liberal democratic principles and practices.” It leaves us without all-male fraternities, all-male Jaycees, and all-Christian student groups. Taken seriously, it also leaves us without all-female sororities, all-female health clubs, and all-gay social clubs. In other words, it leaves us without a meaningful pluralism.22

Consensus liberalism is objectionable from at least four distinct strands of political theory: contemporary liberalism, communitarianism, classical liberalism (and its contemporary libertarian successors), and radical democracy. *Contemporary liberalism* (or at least some versions) objects to consensus liberalism’s privileging of certain liberal values over others. Since the work of Isaiah Berlin, contemporary liberalism has recognized the necessity of balancing a plurality of values—one value cannot uniformly trump others. More recently, William Galston has argued that “value pluralism” means that “liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”23

*Communitarianism*, which emerged during the 1980s and 1990s in response to some of the claims of Rawlsian liberalism, objects to the idea that the equality upon which consensus liberalism depends can be given a coherent meaning apart from the practices of a particular community. “Liberal equality” begs the question of “whose equality, which liberalism.”24

*Classical liberalism* objects to consensus liberalism’s push to eliminate the private sphere. Much of the theoretical work traces back to John Locke’s divide between public and private. Locke has become the patron saint of
one of the modern heirs to classical liberalism, libertarianism. For example, Robert Nozick’s *Anarchy, State, and Utopia* employs Lockeian arguments against Rawls’s theory of justice. Similar libertarian arguments have also been raised in the specific context of the boundaries of group autonomy.\(^5\)

An absolute libertarianism is implausible today. Employment discrimination, public accommodation, and other laws that emerged out of the civil rights era routinely curtail the autonomy of commercial enterprises, and few people object to these restrictions. For this reason, most recent libertarian arguments defend the autonomy of “noncommercial” groups rather than private groups more generally. Andrew Koppelman has called these arguments *neolibertarian*. According to Koppelman, neolibertarian arguments are “only slightly modified versions of old, discredited libertarian objections.”\(^6\)

Koppelman links neolibertarian arguments not only to segregationist objections to the Civil Rights Act of 1964 but also to rampant racism following the Civil War that led private businesses to refuse to serve African Americans. His objection to the neolibertarian position is politically salient and intellectually rigorous. It ties some arguments for greater group autonomy to a virulent racism that most people—including most of those who fall under Koppelman’s neolibertarian label—condemn as reprehensible. But Koppelman’s historical and normative argument falls short in one important respect: it leaves unaddressed the competing narrative of the protections our country has long granted to groups that dissent from majoritarian control. Like “the idea of a legal prohibition against discrimination,” the legal recognition of the importance of group autonomy “is as old as the United States.”\(^7\)

The latter, in fact, long precedes the founding, having taken root in the political practices of William Penn and Roger Williams, who between them founded four of the original thirteen colonies. As Richard Hofstadter has noted:

> Madisonian pluralism owes a great deal to the example of religious toleration and religious liberty that had already been established in eighteenth-century America. The traditions of dissenting Protestantism had made an essential contribution to political pluralism. That fear of arbitrary power
which is so marked in American political expression had been shaped to a large degree by the experience men of dissenting sections had had with persecution. Freedom of religion became for them a central example of freedom in general, and it was hardly accidental that the libertarian writers who meant so much to the colonials so often stemmed from the tradition of religious dissent.

This other history that Koppelman omits points toward yet another political theory that objects to consensus liberalism: radical democracy. My book locates the right of assembly in the political theory of Sheldon Wolin, who both fears the expansion of power in unforeseen and uncontrolled channels and offers a counternarrative to the stories perpetuated by consensus liberals like Dahl and Rawls. Wolin’s work illuminates neglected constitutional values and highlights the importance of challenging the ways in which consensus liberalism characterizes groups and their forms of expression.

After laying out a political theory of assembly, I revisit the historical and jurisprudential developments that locate theory in the actual politics of the United States. The call for greater group autonomy through the right of assembly is not without limiting principles. The text of the First Amendment offers one: assemblies must be peaceable. Our constitutional, social, and economic history suggests another: antidiscrimination norms should typically prevail when applied to commercial entities.

Other questions are more difficult to answer. Among the most difficult is whether the right of assembly tolerates racial discrimination by peaceable, noncommercial groups. Our constitutional history supports a plausible argument that “race is just different,” that the state’s interest in eliminating racial discrimination justifies a nearly total ban on racially segregated private groups. As Justice Stewart wrote in *Jones v. Alfred H. Mayer Co.*, “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. . . . When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.” We might plausibly treat race differently when considering the boundaries of group autonomy. I would be quick to do so as a
matters of personal preference—I can think of no racially discriminatory
group to which I attach personal value or worth. But treating race differ-
ently in all areas ultimately undercuts a vision of assembly that protects
pluralism and dissent against state-enforced orthodoxy. We cannot move
from the premise that genuine pluralism matters to an effort to rid
ourselves of the groups that we don't like.

The question of racial discrimination, specifically discrimination by
whites against African Americans, is one of the most difficult issues
contending any argument for greater group autonomy. As I explain in
Chapter 5, my proposal permits some racially discriminatory groups. It is
an argument rooted in social change—the belief that today we are a
society different from the one we were in 1960 and that we will continue
to hold the ground that has been won. I do not mean to suggest that we
have solved the problem of race. I do argue that in this, as in many other
areas of the law, we recognize that the structural politics today are
different from what they were fifty years ago.31

On the other hand, the right of assembly will not always trump
competing interests. Courts will have to draw lines and balance interests,
just as they do with the freedom of speech. As I suggest in Chapter 5, the
protections for assembly ought to be constrained when a private group
wields so much power in a given situation that it prevents other groups
from meaningfully pursuing their own visions of pluralism and dissent—
as private groups did in the American South from the decades following
the Civil War to the end of the civil rights era.32

Toward a Contextual Analysis

In light of the constraints described above and the social and constitu-
tional history of the right of assembly, I propose the following definition:

_The right of assembly is a presumptive right of individuals to form and participate in
peaceable, noncommercial groups. This right is rebuttable when there is a compelling
reason for thinking that the justifications for protecting assembly do not apply (as when
the group prospers under monopolistic or near-monopolistic conditions)._ 

This proposal differs from two competing alternatives. The first is the
neoliberatarian proposal. I reject this approach because it fails to account
for the way in which the dynamics of power operate in some noncommercial groups. The second is what Koppelman calls the message-based approach, the Court’s current framework for analyzing claims of the right of association. I critique the theory, doctrine, and history of the message-based approach throughout this book, but in Chapter 5, I pay particular attention to Koppelman’s arguments. Koppelman believes that a requirement that a group self-identify as “stridently prejudiced” is “desirable,” because “discrimination is not so cheap as it was before, and a group will have to decide whether discrimination is worth the added cost.” I explain why this approach is misguided as a matter of First Amendment doctrine, workability, and efficiency.

In my view, we are better off with a contextual analysis that allows courts to examine how power operates on the ground. This approach would ask courts to evaluate challenges to the exercise of the right of assembly in the specific contexts in which those assemblies exist. Sometimes—albeit rarely—the power exerted by peaceable, noncommercial assemblies will overreach to such an extent that the right will give way to the interests of the state. Let me offer a few other examples of the kind of contextual analysis that I have in mind. In the 1950s, African American voters in Fort Bend County, Texas, challenged their exclusion from the Jaybird Democratic Association—a private group not governed by state election laws. The Jaybird Association held an election among its members every year prior to the Democratic primary. For more than sixty years, the candidate selected by the Jaybirds went on to win the Democratic primary and the general election. Most people would recognize that the Jaybirds would qualify under my definition as a peaceable, noncommercial assembly. Most people would also recognize that the Jaybirds had so skewed the balance of power in Fort Bend County that they deserved to be denied the protections of assembly.

Or take a more contemporary example. Suppose that membership in the Christian Legal Society at Hastings College of the Law was a prerequisite to the most desirable legal jobs—a feather in the cap surpassing even membership on the Hastings Law Journal. If that were the case, the Christian Legal Society may well lose the protections of assembly. Of course, membership in the Christian Legal Society at Hastings College of the Law did not provide these kinds of advantages. A closer case may
have existed with the Minneapolis and St. Paul Jaycees when the Court decided *Roberts v. United States Jaycees* in 1984. The problem is that we simply don’t know. The opinions in *Roberts* lack any contextual analysis. Nothing in Justice Brennan’s majority opinion or Justice O’Connor’s concurrence tells us anything about how the Jaycees in Minneapolis and St. Paul had overreached their private power to the detriment of women or why compelling the Jaycees to accept women as full members rather than as associate members would have remedied that power disparity. The justices simply assumed that the state’s interest in eradicating gender discrimination warranted trumping the autonomy of the Jaycees. Nobody offered any explanation of why *this* remedy helped to eradicate gender discrimination in *these* circumstances sufficient to trump the autonomy of *this* group.

Having mentioned these examples, let me be quick to note that I find aspects of my own proposed drawing of lines incomplete and imprecise. For example, I am unsure how a theory of assembly would address highly regulated groups like political parties, labor unions, and professional associations. As Steven Calabresi notes, these kinds of groups present a particular challenge to questions of group autonomy: “Some so-called mediating institutions may truly mediate between the private individual and the state. Synagogues, churches, temples, families, and voluntary community and civic associations and groups often fall readily into this category. Other groups, however, such as political parties, labor unions, bar associations, and other modern-day corporate ‘guilds’ may not. It may often be the case that these kinds of groups do not so much ‘mediate’ between the individual and the state, as that they try actually to enlist the state on their side of some otherwise-private competitive struggle.” On the other hand, some highly regulated groups embody the very values and purposes that I defend throughout this book. In fact, in recent decades, the Court appears to have developed a distinct right of “political association” applicable to political parties.35

It may be that the principles of assembly that I have sketched here are capacious enough to encompass some highly regulated groups. It may be that the “highly regulated” distinction is itself problematic—after all, the state could simply start to regulate more groups more extensively. More pointedly, this kind of ambiguity is inherent in all line-drawing and to
some extent plagues the distinction that I have proposed between commercial and noncommercial groups. As James Boyle has argued with respect to the related divide between public and private, the process of marking these boundaries “is one of contentious moral and political decision making about the distribution of wealth, power, and information” and “the supposedly settled landscape is in fact an ever-changing scene.”

I believe that the contextual analysis that I recommend—which accounts for some of the realities of the changing dynamics of power—addresses some of these concerns. But I hope that critics who disagree with my reasoning on this point will nonetheless take seriously the critiques in the rest of the book and either sharpen my proposed alternative or strengthen the explanations for the neolibertarian and message-based proposals. We need to find a better way forward in this area of the law. The aspiration of this book is to get us thinking in that direction, not to insist that I have arrived at the best possible solution.

My inquiry into a theory of assembly ends with an illustration: the “missing dissent” in Roberts v. United States Jaycees. One reason for engaging in this exercise is to demonstrate the plausible fit of assembly in American constitutionalism. Our constitutional rights unfold within a discourse shaped by judicial decisions, most especially those decisions of the United States Supreme Court. This doesn’t mean that the Court’s opinions do or should assume an infallible place in our constitutionalism. But they do have a place, and arguments from history and political theory must at some point intersect and engage with law to make “connections to possible and plausible states of affairs” and to “integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’”

On Method (and Substance)

This book confronts contentious issues of political theory and constitutional interpretation. The latter in particular exposes me to a number of methodological critiques. Do I reject or embrace an originalist argument? Am I consistent with a textualist approach? Am I more or less faithful to the kind of interpretive “dynamism” that supports contemporary social values? Even after this brief introduction, it should be apparent that my method of constitutional interpretation does not fit neatly within any one
of these perspectives. It aligns most closely with the eclectic vision set forth in Philip Bobbitt’s *Constitutional Fate* but draws as well from the kind of tradition-based arguments employed by Alasdair MacIntyre. Although I will return briefly to Bobbitt’s modalities in Chapter 5, I will have little else to say explicitly about methods of constitutional interpretation. The lack of direct theoretical engagement should not be mistaken for a lack of awareness or concern. This book argues that the current approach to constitutional protections for group autonomy fails historically, theoretically, and doctrinally. The skeptical reader will need to answer each of these arguments, even if he or she remains wedded to a particular interpretive methodology.

Some people will be unpersuaded by a constitutional vision that gives greater protections to dissenting groups, particularly one that limits the reach of antidiscrimination laws. They will push instead for greater congruence and less difference. That is the logic underlying the Court’s decision in *Martinez*. It is the fundamental tenet of the Ninth Circuit’s decision in *Truth v. Kent* that equates a Christian club’s desire to limit its members to Christians to invidious discrimination. Those who endorse decisions like *Martinez* and *Kent* and reject the constitutional vision set forth in this book need to provide a better justification for their normative preferences. They should articulate a convincing constitutional doctrine and ethos that legitimates the jurisprudential silencing of “those who would make a *nomos* other than that of the state.” This area of the law deserves greater respect—and a more coherent jurisprudential approach—than we have given it thus far.

Our efforts to address these challenges should be guided by an interdisciplinary awareness. The important issues surrounding the boundaries of group autonomy cannot be addressed through a theoretical lens that forgets legal history or a doctrinal legal lens that ignores political context. Resources within history and political theory can help sharpen the ways in which we explore the meaning of constitutionalism. Yet this openness to other resources introduces problems of its own. The greatest challenge to an interdisciplinary conversation is the same one that complicates our ability to render sympathetic readings of groups not our own: the ease and frequency with which we gloss over and caricature unfamiliar ways of knowing and doing. Part of the value of engaging in this kind of
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interdisciplinary work is the reminder that the meaning and significance of texts and events is not exhausted by a parochial or canonical reading from a specific discipline; so too, the meaning and significance of a group’s practices to its expression cannot adequately be captured by the uncharitable or monolithic description of a court, government official, or scholar. *Liberty’s Refuge* argues that the best protection against this danger is the forgotten freedom of assembly.