CHAPTER 2
THE RIGHT PEACEABLY TO ASSEMBLE

The following pages trace the story of the freedom of assembly. This is the right of assembly “violently wrested” from slave and free African Americans in the South and denied to abolitionist William Lloyd Garrison in the North. It is the freedom recognized in tributes to the Bill of Rights across the nation as America entered the Second World War—at the very time it was denied to 120,000 Japanese Americans. It is the right placed at the core of democracy by many eminent twentieth-century Americans, including Dorothy Thompson, Zechariah Chafee, Louis Brandeis, John Dewey, Orson Welles, and Eleanor Roosevelt.

After examining the constitutional grounding of assembly in the Bill of Rights, I explore its use in legal and political discourse in six periods of American history: (1) the closing years of the eighteenth century that brought its first test through the Democratic-Republican Societies; (2) assembly in the antebellum era; (3) federal and state understandings of assembly following the Civil War; (4) the claims of assembly by suffragists, civil rights activists, and organized labor during the Progressive Era; (5) the rhetorical high point of assembly between the two world wars; and (6) the end of assembly in the midst of mid-twentieth-century liberalism and the Court’s initial recognition of the freedom of association. The
diverse contexts through which I trace appeals to and denials of the right of assembly inevitably present a textured understanding of what is meant by “assembly.” In some cases, the people claiming assembly focused solely on a particular gathering—something akin to a protest or demonstration. But in many other instances, the right of assembly extended beyond an expressive moment to protect the group that made that expression possible. Similarly, while some claims of assembly came from traditionally conceived political groups, others arose from more surprising sources.

As I recount the role of assembly in the political history of the United States, I pay particular attention to three characteristics. First, groups invoking the right of assembly have usually been those that dissent from the majoritarian standards endorsed by government. Second, claims of assembly have insisted on a political mode of existence that is separate from the politics of the state. Finally, practices of assembly have themselves been forms of expression—parades, strikes, and meetings, but also more creative means of engagement like pageants, religious worship, and the sharing of meals. The diverse groups that have gathered throughout our nation’s history embody these three themes of assembly: the dissenting, the political, and the expressive. Theirs is the story of the forgotten freedom of assembly.

The Constitutional Right of Assembly

I begin with the text of the First Amendment, and with a textual observation. While we should not make too much of slight variations in wording, grammar, and punctuation in constitutional clauses (there is little indication that the framers applied our level of exegetical scrutiny to the texts that they considered and created), our current arguments are constrained by the precise text handed down to us because modern constitutional law sometimes parses wording more carefully. And so it is for this reason a useful exercise to consider forensically the text that survived and the text that did not.

The most important aspect of the clause containing the constitutional right of assembly may be three words missing from its final formulation: the common good. Had antecedent versions of the assembly clause prevailed in the debates over the Bill of Rights and assembly been limited to
purposes serving the common good, the kinds of dissenting and disfavored groups that have sought refuge in its protections may have met with far less success. That understanding of assembly would have foreshadowed the consensus narrative advanced by mid-twentieth-century pluralism: we tolerate groups only to the extent that they serve the public interest and thereby strengthen the stability and vitality of the nation. The framers decided otherwise.

When the First Congress convened in 1789 to draft amendments to the Constitution, it took under consideration proposals submitted by the several states. Virginia and North Carolina offered identical amendments covering the rights of assembly and petition: “That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.” New York and Rhode Island offered slightly different wording, emphasizing that the people assembled for “their” common good rather than “the” common good: “That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person has a right to Petition or apply to the Legislature for redress of Grievances.” On June 8, 1789, James Madison’s proposal to the House favored the possessive pronoun over the definite article: “The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.” Whether intentional or not, the recognition of the common good of the people who assemble rather than the common good of the state signaled that the interests of the people assembled need not align with the interests of those in power.  

The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, “every thing that was not incompatible with the general good ought to be granted,” Elbridge Gerry of Massachusetts replied that if Hartley “supposed that the people had a right to consult for the common good” but “could not consult unless they met for that purpose,” he was in fact “contend[ing] for nothing.” In other words, if the right of assembly encompassed only the common good as defined by the state, then assembly as a means of protest or dissent would be eviscerated.
On August 24, 1789, the House approved a version of the amendment that retained the reference to “their common good” and also incorporated the rights of speech and the press: “The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.” Eleven days later, the Senate defeated a motion to strike the reference to the common good. But the following week, the text was inexplicably dropped when the Senate merged language pertaining to religion into the draft amendment.5

Striking the reference to the common good may have been intended to broaden the scope of the assembly clause, but it also introduced a textual ambiguity. Without the prepositional “for their common good” following the mention of assembly, the text now described “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” This left unclear whether the amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition. In one of the only recent considerations of assembly in the First Amendment, Jason Mazzone argues in favor of the former: “There are two clues that we should understand assembly and petition to belong together. The first clue is the use of ‘and to petition,’ which contrasts with the use of ‘or’ in the remainder of the First Amendment’s language. The second clue is the use of ‘right,’ in the singular (as in ‘the right of the people peaceably to assemble, and to petition’), rather than the plural ‘rights’ (as in ‘the rights of the people peaceably to assemble, and to petition’). The prohibitions on Congress’ power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.”6

Mazzone’s interpretation is problematic because 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.” Whether left in deliberately or inadvertently, the comma relates back to a distinction between a right to peaceable assembly and a right to petition. Moreover, at least some members of the First Congress conceived of a broader notion of assembly, as evidenced by an exchange
between Theodore Sedgwick of Massachusetts and John Page of Virginia during the House debates over the language of the Bill of Rights. Sedgwick criticized the proposed right of assembly as redundant in light of the freedom of speech: “If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minuiaet.” Page responded: “[Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.” Irving Brant notes that while Page’s allusion to a man without a hat is lost on a contemporary audience, “the mere reference to it was equivalent to half an hour of oratory” before the First Congress. Page was referring to the trial of William Penn.

On August 14, 1670, Penn and other Quakers had attempted to gather for worship at their meeting-house on Gracechurch Street in London, in violation of the 1664 Conventicle Act that forbade “any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England.” Prevented from entering by a company of soldiers, Penn began delivering a sermon to the Quakers assembled in the street. Penn and a fellow Quaker, William Mead, were arrested and brought to trial in a dramatic sequence of events that included a contempt of court charge because they wore hats in the courtroom. A jury acquitted the two men on the charge that their public worship constituted an unlawful assembly. The case gained renown throughout England and the American colonies. Brant reports that “every Quaker in America knew of the ordeal suffered by the founder of Pennsylvania and its bearing on freedom of religion, of
speech, and the right of assembly” and “every American lawyer with a practice in the appellate courts was familiar with it, either directly or through its connection with its still more famous aftermath.” According to Brant:

William Penn loomed large in American history, but even if he had never crossed the Atlantic, bringing the Quaker religion with him, Americans would have known about his “tumultuous assembly” and his hat. Few pamphlets of the seventeenth century had more avid readers than the one entitled “The People’s Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves.” Congressman Page had known the story from boyhood, reproduced in Emlyn’s State Trials to which his father subscribed in 1730. It was available, both in the State Trials and as a pamphlet, to the numerous congressmen who had used the facilities of the City Library of Philadelphia. Madison had an account of it written by Sir John Hawles, a libertarian lawyer who became Solicitor General after the overthrow of the Stuarts in 1688.9

Congressman Page’s allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for a redress of grievances: Penn’s gathering had nothing to do with petition; it was an act of religious worship. After Page spoke, the House defeated Sedgwick’s motion to strike assembly from the draft amendment by a “considerable majority.” On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted “the right of the people peaceably to assemble.”10

The text handed down to us thus conveys a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good, thereby implicitly allowing assembly for purposes that might be antithetical to that good (although constraining assembly to peaceable means). Second, it does not limit assembly to the purposes of petitioning the government. As we will see in this and later chapters, both of these interpretations have at times been neglected in legal and political discourse. But the dissenting, political, and expressive assembly is consistently displayed in the practices of the people who have gathered throughout American history. It is to these practices that I now turn.
The First Test of Assembly: The Democratic-Republican Societies

The freedom of assembly faced an early challenge when the first sustained political dissent in the new republic emerged out of the increasingly partisan divide between Federalists and Republicans. By the summer of 1792, Republican concern over the Federalist administration and its perceived support of the British in their conflict with the French had reached new levels of agitation. The Republican-leaning National Gazette began calling for the creation of voluntary “constitutional” and “political” societies to critique the Washington administration.11

The first of these societies was organized in Philadelphia in March of 1793. Over the next three years, dozens more emerged in most of the major cities in the United States. The Democratic-Republican Societies consisted largely of farmers and laborers wary of the aristocratic leanings of Hamilton and other Federalists, but they also included lawyers, doctors, publishers, and government employees. The largest society—the Democratic Society of Pennsylvania—boasted more than three hundred members.12

The societies “invariably claimed the right of citizens to assemble.” A 1794 resolution from a society in Washington, North Carolina, asserted: “It is the unalienable right of a free and independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern.” That same year, the Boston Independent Chronicle declared: “Under a Constitution which expressly provides ‘That the people have a right in an orderly and peaceable manner to assemble and consult upon the common good,’ there can be no necessity for an apology to the public for an Association of a number of citizens to promote and cherish the social virtues, the love of their country, and a respect for its Laws and Constitutions.” The Democratic Society of Pinckneyville similarly insisted: “One of our essential rights, we consider that of assembling, at all times, to discuss, with freedom, friendship and temper, all subjects of public concern.”13

The societies usually met monthly, and more frequently during elections or times of political crisis. Philip Foner reports that a large part of their activities consisted of “creating public discussions; composing, adopting, and issuing circulars, memorials, resolutions, and addresses to
the people; and remonstrances to the President and the Congress—all expressing the feelings of the assembled groups on current political issues.” In Robert Chesney’s characterization, the societies “embodied an understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life.” But the societies that represented some of the earliest lived expressions of dissenting groups also recognized that their assembly—their existence—extended far beyond simple meetings or political discussion. They joined in the “extraordinarily diverse array of feasts, festivals, and parades” that unfolded in the streets and public places of American cities. As Simon Newman’s study of popular celebrations observes more generally, gatherings of this era were self-consciously political expressions: “Festive culture required both participants and an audience, and by printing and reprinting accounts of July Fourth celebrations and the like newspapers contributed to a greatly enlarged sense of audience: by the end of the 1790s those who participated in these events knew that their actions were quite likely going to be read about and interpreted by citizens far beyond the confines of their own community.”

Celebrations of the French Revolution assumed an especially partisan character when members and supporters of the Federalist party refused to participate in them. Without the endorsement of the Federalist government, Republicans “were forced to foster alternative ways of validating celebrations that were often explicitly oppositional.” In doing so, they characterized their tributes as representing the unified views of the entire community rather than political elites. Newman writes: “The result of the Democratic Republican stratagem was that members of subordinate groups—including women, the poor, and black Americans, all of whom were excluded from or had strictly circumscribed roles in the white male contests over July Fourth and Washington’s birthday celebrations—found a larger role for themselves in French Revolutionary celebrations than in any of the other rites and festivals of the early American republic.” The relatively egalitarian gestures of these celebrations were not well received by Federalists, who berated the women who participated in them with sarcasm and derision and raised fears about black participation in public events.
Federalists became increasingly agitated with the growing popular appeal of the societies. The pages of the pro-Federalist *Gazette of the United States* repeatedly warned that they were fostering disruptive tendencies and instigating rebellion. The Federalist press also highlighted that several members of societies in western Pennsylvania had been actively involved in the Whiskey Rebellion. President Washington had been incensed by organized opposition to the whiskey tax, writing in a personal letter that while “no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature,” nothing could be “more absurd, more arrogant, or more pernicious to the peace of Society, than for . . . a self-created permanent body” that would pass judgment on such acts. He came to believe that the widespread public condemnation of the Whiskey Rebellion had created a political opportunity for the “annihilation” of the societies. Washington took aim at them in his annual address to Congress on November 19, 1794, asserting that “associations of men” and “certain self-created societies” had fostered the violent rebellion. Chesney suggests that “the speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent.” And Irving Brant observes that “the damning epithet ‘self-created’ indorsed the current notion that ordinary people had no right to come together for political purposes.”

Following Washington’s address, the Federalist-controlled Senate quickly censured the societies. The House, in contrast, entered an extended debate about the wording of its response, and assigned James Madison, Theodore Sedgwick, and Thomas Scott to draft a reply. The Federalist Sedgwick, who years earlier had suggested that the freedom of assembly was so “self-evident” and “unalienable” that its inclusion in the constitutional amendments was unnecessary, now argued in spite of the First Amendment that the societies’ efforts to organize were effectively illegal. But after four days of debate, Madison maintained that a House censure would be a “severe punishment” and have dire consequences for the future of free expression. The final language in the House response was substantially more muted than that issued by the Senate.

After Washington’s address and the congressional responses, “spirited debates concerning the legitimacy of the societies were conducted in
every community where a society existed.” Responding to Washington’s charge that the societies were “self-created,” the Democratic Society of New York asked: “Is it for assembling, that we are accused; what law forbids it?” The Patriotic Society of the County of New Castle noted more tersely: “The right of the people to assemble and consult for their common good, has been questioned by some; to such we disdain any reply.”

Due in part to Washington’s wide popularity, public opinion turned the corner against the societies. Many of them folded within a year of the president’s speech, and by the end of the decade, all had been driven out of existence. But despite their short tenure, the societies’ influence was not inconsequential. According to Foner, “as a center of Republican agitation and propaganda . . . the societies did much to forge the sword that defeated Federalism and put Jefferson in the presidency.” They also resisted majoritarian conceptions of the common good, practiced a different form of politics in their planned and spontaneous gatherings, and expressed their message through their composition as well as their words—who these societies included signaled much about what they represented as a group.

Assembly in the Antebellum Era

In spite of the fate of the Democratic-Republican Societies, the idea that the people could assemble apart from the state continued to take hold in early America. Benjamin Oliver’s 1832 treatise *The Rights of an American Citizen* called the right of assembly “one of the strongest safeguards, against any usurpation or tyrannical abuse of power, so long as the people collectively have sufficient discernment to perceive what is best for the public interest, and individually have independence enough, to express an opinion in opposition to a popular but designing leader.”

Writing in 1838, the state theorist Francis Lieber described “those many extra-constitutional, not unconstitutional, meetings, in which the citizens either unite their scattered means for the obtaining of some common end, social in general, or political in particular; or express their opinion in definite resolutions upon some important point before the people.” These “public meetings” were undertaken for a variety of purposes:
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They are of great importance in order to direct public attention to subjects of magnitude, to test the opinion of the community, to inform persons at a distance, for instance, representatives, or the administration, of the state of public opinion respecting certain measures, whether yet depending or adopted; to resolve upon and adopt petitions, to encourage individuals or bodies of men in arduous undertakings, requiring the moral support of well-expressed public approbation; to effect a contract and connexion with others, striving for the same ends; to disseminate knowledge by way of reports of committees; to form societies for charitable purposes or the melioration of laws or institutions; to sanction by the spontaneous expression of the opinion of the community measures not strictly agreeing with the letter of the law, but enforced by necessity; to call upon the services of individuals who otherwise would not feel warranted to appear before the public and invite its attention, or feel authorized to interfere with a subject not strictly lying within their proper sphere of action; to concert upon more or less extensive measures of public utility, and whatever else their object may be."

The antebellum era also produced several state court decisions upholding the right of religious groups to exclude unwanted members. Although not specifically invoking the right of assembly, these cases recognized that a group’s control of its membership mattered to its autonomy—a principle that remains crucial today. In the 1832 case of *Leavitt v. Truair*, the Supreme Judicial Court of Massachusetts noted that pursuant to the state’s religious freedom act: “To form an original society several persons must agree to unite; the society then exists to some purposes, and may be called together and organized under the statute. Under a warrant of a justice of the peace, calling a meeting of such society, all those persons who had thus agreed and associated, would have a right to assemble and act, and no others.”

Six years later, the court revisited the autonomy of religious societies in *First Parish in Sudbury v. Stearns* and stressed that while “no person can be made or become a member of any such corporation, without his consent,” it was equally true that “no person can thrust himself into any such body against its will.”

Citizens in southern states recognized the significance of assembly and routinely sought to prohibit its exercise among slaves and free blacks. Throughout the antebellum era, white citizens petitioned state
legislatures to intensify restrictions on assembly against African Americans. In 1818, citizens in North Carolina petitioned for restrictions against “the Numerous quantity of Negroes which generally assemble,” and forty years later sought “to relieve the people of the State from the evils arising from numbers of free negroes in our midst.” In South Carolina, citizens petitioned in 1820 to ban churches established “for the exclusive worship of negroes and coloured people.” And in Mississippi, citizens distraught over “crowds of negroes, drinking, fiddling, dancing, singing, cursing, swearing, whooping, and yelling, to the great annoyance and scandal of all respectable and order loving persons,” sought in 1852 to restrict “any noisy or clamorous assembly of negroes.” Similar petitions unfolded in Virginia and Delaware.

Southern legislatures embraced these restrictions. A 1792 Georgia law restricted slaves from assembling “on pretense of feasting.” In South Carolina, an 1800 law forbade “slaves, free negroes, mulattoes, and mestizos” from assembling for “mental instruction or religious worship.” An 1804 Virginia statute made any meeting of slaves at night an unlawful assembly. In 1831, the Virginia legislature declared “all meetings of free Negroes or mulattoes at any school house, church, meeting house or other place for teaching them reading or writing, either in the day or the night,” to be an unlawful assembly.

The restrictions on assembly intensified following Nat Turner’s 1831 rebellion in Southampton County, Virginia. Turner’s insurrection sent Virginia and other southern states into a panic. Virginia governor John Floyd made the rebellion the central theme of his December 5, 1831, address to the legislature. Floyd believed that black preachers were behind a broader conspiracy for insurrection and had acquired “great ascendancy over the minds of their fellows.” He argued that these preachers had to be silenced “because, full of ignorance, they were incapable of inculcating anything but notions of the wildest superstition, thus preparing fit instruments in the hands of crafty agitators, to destroy the public tranquility.” In response, the legislature strengthened Virginia’s black code by imposing additional restrictions on assembly for religious worship.

Concern over Turner’s rebellion also spawned additional restrictions on the assembly of slaves and free blacks in Maryland, Tennessee, Georgia,
North Carolina, and Alabama. By 1835, “most southern states had outlawed the right of assembly and organization by free blacks, prohibited them from holding church services without a white clergyman present, required their adherence to slave curfews, and minimized their contact with slaves.” The following year, Theodore Dwight Weld aptly referred to the oppressive restrictions on blacks as “‘the right of peaceably assembling’ violently wrested.”

The extent of restrictions on the assembly of African Americans is evident in an 1860 opinion of the Louisiana Supreme Court, *African Methodist Episcopal Church v. City of New Orleans*. In 1848, a group of ten free blacks had established the African Methodist Episcopal Church as “a private corporation having a religious object,” pursuant to the state’s statute governing the organization of corporations. Two years later, the Louisiana legislature amended the relevant statute to provide that “in no case shall the provisions of this Act be construed to apply to free persons of color in this State, incorporated for religious purposes or secret associations, and any corporations that may have been organized by such persons under this Act for religious purposes, or secret associations, are hereby annulled and revoked.” New Orleans then passed an ordinance that outlawed “assemblages of colored persons, free and slave” “for purposes of worship . . . unless such congregation be under the supervision and control of some recognized white congregation or church.” In rejecting the claims of church members against the city, the Louisiana Supreme Court opined that “the African race are strangers to our Constitution.”

The importance of assembly to religious worship and the felt impact of its loss is captured in the words of James Smith, a Methodist minister whose 1881 narrative detailed his experiences as a slave in Virginia: “The way in which we worshiped is almost indescribable. The singing was accompanied by a certain ecstasy of motion, clapping of hands, tossing of heads, which would continue without cessation about half an hour; one would lead off in a kind of recitative style, others joining in the chorus. The old house partook of the ecstasy; it rang with their jubilant shouts, and shook in all its joints. . . . When Nat Turner’s insurrection broke out, the colored people were forbidden to hold meetings among themselves.” The restrictions on assembly did not simply silence political
dissent in a narrow sense. They assaulted an entire way of life: suppressing worship, stifling education, and blocking community among slave and free African Americans. Conversely, the persistent pleas for a meaningful right of assembly by slave and free blacks claimed far more than a right to hold a meeting—they demanded a right to gather and exist in groups.  

While southern states increased their efforts to deny the freedom of assembly for African Americans, abolitionists in the North expanded their reliance on the right. And because many abolitionists were women, freedom of assembly was “indelibly linked with the woman’s rights movement from its genesis in the abolition movement.” Female abolitionists and suffragists organized their efforts around a particular form of assembly: the convention. The turn to the convention was not accidental. Between 1830 and 1860, official conventions accompanied revisions to constitutions in almost every state. The focus of these official conventions on rights and freedoms provided a natural springboard for “spontaneous conventions” to criticize the blatant racial and gender inequalities perpetuated by the state constitutions.  

Women held antislavery conventions in New York in 1837 and in Philadelphia in 1838 and 1839. Two years after the famous 1848 convention in Seneca Falls, New York, and less than a month before the official convention to revise the Ohio constitution, a group of women gathered in Salem, Ohio, to call for equal rights for all people “without distinction of sex or color.” These early suffragist assemblies were in one sense narrowly “political,” focusing on questions of rights and equality. But they also demonstrated the expressive significance of the group itself, quite apart from the spoken expression of its members. It mattered that these assemblies consisted of women. As Nancy Isenberg describes, “The Salem forum stood apart from the American political tradition. Activists used the meeting to critique politics as usual. Women occupied the floor and debated resolutions and gave speeches, while the men sat quietly in the gallery. Through a poignant reversal of gender roles, the women engaged in constitutional deliberation, and the men were relegated to the sidelines of political action.” The very form of the convention conveyed the suffragist message of equality and disruption of the existing order.
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Women’s conventions often met with harsh resistance. When Angelina and Sarah Grimké toured New England on a campaign for the American Anti Slavery Society in 1837, they were rebuked for lecturing before “promiscuous audiences.” The following year, Philadelphia newspapers helped inspire a riotous disruption of the Convention of American Women Against Slavery that ended in the burning of Pennsylvania Hall. The participants of the 1850 Salem convention were denied the use of the local school and church. An 1853 women’s rights convention at the Broadway Tabernacle in New York degenerated into a shouting match when hecklers interrupted the speakers. Rather than criticize the disruptive crowd, the New York Herald sardonically characterized the gathering as the “Women’s Wrong Convention” and quipped that “the assemblage of rampant women which convened at the Tabernacle yesterday was an interesting phase in the comic history of the nineteenth century.” The following year, the Sunday Times published an editorial describing the national women’s rights convention in Philadelphia with racial and sexual slurs. Isenberg intimates that proponents of these attacks believed that “women’s unchecked freedom of assembly mocked all the restraints of civilized society.”

A striking example of the importance of free assembly to politically unpopular causes in the antebellum era occurred in 1835, when the Boston Female Anti-Slavery Society invited William Lloyd Garrison and the British abolitionist George Thompson to speak at its annual meeting. After the society had announced that the meeting would take place at the offices of Garrison’s Liberator, antiabolitionists circulated a handbill, duly printed in the Boston Commercial Gazette: “That infamous foreign scoundrel THOMPSON, will hold forth this afternoon, at the Liberator Office, No. 46 Washington street. The present is a fair opportunity for the friends of the Union to snake Thompson out! It will be a contest between the abolitionists and the friends of the Union. A purse of $100 has been raised by a number of patriotic citizens to reward the individual who shall first lay violent hands on Thompson, so that he may be brought to the tar kettle before dark. Friends of the Union, be vigilant!” When the society proceeded with its meeting in spite of the threat, a large crowd gathered and soon turned riotous. Unable to locate Thompson, some of them called for Garrison’s lynching. Garrison fled through a back
entrance and barely escaped with his life. Reflecting on the harrowing experience in the November 7, 1835, edition of the Liberator, Garrison lambasted the instigators of the riot in an editorial entitled “Triumph of Mobocracy in Boston”: “Yes, to accommodate their selfishness, they declared that the liberty of speech, and the right to assemble in an associated capacity peaceably together, should be unlawfully and forcibly taken away from an estimable portion of the community, by the officers of our city—the humble servants of the people! Benedict Arnold’s treachery to the cause of liberty and his bleeding country was no worse than this.”

The Boston violence “became a cause célèbre among abolitionists who defended their right to free speech and assembly.” But fifteen years later, when Thompson returned to Boston to address the Massachusetts Anti-Slavery Society in Faneuil Hall, he was again driven away by a mob. Frederick Douglass referred to this later incident as the “mobocratic violence” that had “disgraced the city of Boston.” In an 1850 address delivered in Rochester, New York, Douglass decried “these violent demonstrations, these outrageous invasions of human rights” and argued that “it is a significant fact, that while meetings for almost any purpose under heaven may be held unmolested in the city of Boston, that in the same city, a meeting cannot be peaceably held for the purpose of preaching the doctrine of the American Declaration of Independence, ‘that all men are created equal.’”

Assembly at the Close of the Nineteenth Century

The right of assembly figured prominently in political rhetoric during the 1866 congressional campaign, which Michael Kent Curtis has called “a referendum on the plan of reconstruction embodied in the Fourteenth Amendment.” According to Curtis, “The insistence on protecting constitutional rights to free speech, press, religion, and assembly throughout the nation was a recurring theme in the 1866 campaign. It was clearly expressed in the convention of Southern loyalists who assembled in Philadelphia in 1866. The convention was attended by a number of influential Republicans from the North, and its activities were reported in detail by the Republican press.” When the call for the Philadelphia convention had been issued in July 1866, its organizers included an
“Appeal of the Loyal Men of the South to their Fellow Citizens,” which was “widely reprinted in the Republican press.” The appeal argued for the protection of First Amendment rights, contending that in the years since the founding, “statute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition for redress of grievances.”

At the very time the Southern loyalists organized their Philadelphia convention, a different convention met with tragic results. After Republicans in Louisiana called a constitutional convention in New Orleans for the purpose of giving blacks the right to vote, Democrats convened a grand jury that indicted every member of the convention. But the commanding general of the federal troops in New Orleans refused to allow the arrests, writing to the mayor of the city that “if these persons assemble, as you say is intended, it will be, I presume, in virtue of the universally-conceded right of all loyal citizens of the United States to meet peaceably, and discuss freely questions concerning their civil governments.” When the convention met on July 30, 1866, “the police and white Louisianans, in a paroxysm of hatred and fear, mobbed the delegates. Ignoring white handkerchiefs that [delegates] ran up the flag-pole and waved from the windows . . ., the mob fired into the building, shot loyalists as they emerged, and pursued them through the streets, clubbing, beating, and shooting all they caught. Forty of the delegates and their supporters were killed, another one hundred and thirty-six wounded.”

The Louisiana massacre confirmed that the right of peaceable assembly remained vulnerable to violent suppression. A similar violence soon emerged elsewhere in the South, where widespread lawlessness and instability stifled political assemblies and empowered anarchic ones. The Ku Klux Klan formed in late 1865 in Pulaski, Tennessee, and within five years “most white men in [the southeastern United States] either belonged to the organization or sympathized with it.” Charles Lane has chronicled the violence that immediately characterized Klan activities:

In 1868, the Klan assassinated a Negro Republican congressman in Arkansas and three black Republican members of the South Carolina
legislature—and in Camilla, Georgia, four hundred Klansmen, led by the sheriff, fired on a black election parade and hunted the countryside for those who fled, eventually killing or wounding more than twenty people. A Klan-led “nigger chase” in Laurens County, South Carolina, claimed thirteen lives in the fall of 1870. Thanks in part to Klan intimidation of Republican voters—white and black—Democrats had returned to power in Alabama, Virginia, Tennessee, North Carolina, and Georgia in the 1870 elections. This only seemed to encourage more Klan terror elsewhere. In January 1871, five hundred masked men attacked the Union County jail in South Carolina and lynched eight black prisoners. In March 1871, the Klan killed thirty Negroes in Meridian, Mississippi.

These criminal acts fell outside the exercise of peaceable assembly, but they encountered little resistance in southern states where the rule of law itself was in question.38

Responding in part to the Klan offensives, Congress passed the Enforcement Act of 1870 to federalize crimes that were going unpunished in southern jurisdictions. The act relied on the powers granted Congress under the recently enacted Fourteenth and Fifteenth Amendments. Among other things, it prohibited conspiracy “to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.” In October of 1870, the United States attorney in Alabama indicted a number of Klansmen who had killed four and wounded fifty-four in an assault on a Republican campaign meeting in Eutaw, Alabama. The indictment charged that the Klansmen had conspired to violate the Republicans’ First Amendment rights of speech and assembly. Defense attorneys argued that the Bill of Rights applied to the federal government, not the states, and that the Fourteenth Amendment had not altered its scope. In any case, they pointed out, the violence had been carried out by private citizens, not state actors.39

In United States v. Hall, Fifth Circuit judge William Woods rejected both arguments. He concluded that the Fourteenth Amendment had made the rights of speech and assembly applicable to the states and had authorized Congress to enforce those rights against the states. Moreover, the state need not have itself endorsed or carried out the violence, because
“denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.” As Lane suggests, this meant that the federal government “had the power to protect freedmen not only from discriminatory state legislation but also from ‘state inaction, or incompetency.’” Such a broad understanding of the right of assembly could have become one of the primary weapons to combat the Klan and other violent organizations set on suppressing the freedoms of blacks.\textsuperscript{40}

Woods’s interpretation would not last. Its unraveling began in Grant Parish, Louisiana, one of the crucibles of white supremacist violence. By the fall of 1871, whites in the area had formed a secret society “whose purpose was to kill or expel leading Republicans and prevent blacks from voting.” One report indicated the group had 360 members, more than half of the adult white males in the parish. The unrest proved so unsettling that local Republican officials repeatedly requested the assistance of federal troops stationed in New Orleans. Tensions escalated further after Republicans challenged the results of the 1872 elections around the state. The contested elections led to a particularly volatile situation in Grant Parish, where racist candidates claimed landslide victories despite the fact that registered black voters outnumbered whites and Republicans had won handily just two years before. In March of 1873, Republicans sneaked into the parish courthouse in Colfax and swore in their candidates to the elected positions. White supremacists from Grant and nearby parishes converged on the courthouse, and black citizens moved in to defend it. On April 13, Easter Sunday, the whites attacked the courthouse. After a brief skirmish, the black citizens surrendered. In what became known as the Colfax Massacre, the white attackers then massacred dozens of their prisoners, including a number whom they marched into the woods and shot execution-style.\textsuperscript{41}

The federal government tried nearly one hundred white perpetrators of the Colfax Massacre for violations of the Enforcement Act. Two counts of the indictments alleged that the defendants had prevented black citizens from enjoying their “lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.” William Cruikshank was one of only three defendants convicted. On appeal, Cruikshank and his
co-defendants contended that the First Amendment did not guarantee the right of assembly against infringement by private citizens. The Supreme Court agreed, concluding in *United States v. Cruikshank* that the First Amendment “assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.” The Court stopped short of declaring the Enforcement Act unconstitutional, but its ruling made further prosecutions practically impossible.40

*Cruikshank’s* holding meant that private citizens could not be prosecuted for denying the First Amendment’s freedom of assembly to other citizens. But the Court’s dictum also proved significant. Reiterating that the First Amendment established a narrow right enforceable only against the federal government, Chief Justice Waite wrote: “The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.” In context, it is likely that Waite was listing petition as an example of the kind of assembly that the First Amendment protected against infringement by the federal government; the Constitution also guaranteed assembly “for any thing else connected with the powers of the duties of the national government,” which was as broadly as the right of assembly could be applied prior to its incorporation through the Fourteenth Amendment. But Waite’s reference to “the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances” came close to the text of the First Amendment. Read in isolation from his qualifying language, the dictum could erroneously be construed as limiting assembly to the purpose of petitioning Congress for a redress of grievances.43

Eleven years after *Cruikshank*, Justice William Woods made precisely this interpretive mistake in *Presser v. Illinois*. Woods, the same judge who prior to his elevation to the Supreme Court had held the right of assembly
applicable to states and private actors in *Hall*, now reversed course and concluded that *Cruikshank* had announced that the First Amendment protected the right to assemble only if “the purpose of the assembly was to petition the government for a redress of grievances.” *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 Woods’s mistake has been followed in decades of scholarship.\(^{44}\)

Despite the interpretative missteps by the Court and its commentators, the immediate effects of *Cruikshank* and *Presser* on the right of assembly were relatively minor. While the enactment of the Fourteenth Amendment laid the foundation for the eventual application of parts of the federal Constitution to the states, at the end of the nineteenth century neither the assembly clause nor any other provision of the Bill of Rights had yet been incorporated against the states. The more significant civil liberties protections were found in state constitutions. Although woefully inadequate in the protections they afforded African Americans, state court decisions and state constitutional provisions otherwise conveyed a broad sense of the scope and meaning of the right of assembly in at least two ways. First, they reinforced antebellum decisions signaling the importance of assembly and related political concepts to group autonomy. Second, they applied the right of assembly to purely social gatherings.

State recognition of the importance of membership decisions to group autonomy came in several forms. At least one court expressly adopted the principles set forth in *Leavitt* and *First Parish*, the Massachusetts antebellum cases that had endorsed the autonomy of religious societies. In 1877, the Supreme Court of New Hampshire cited both cases in *Richardson v. Union Congregational Society of Franconia*, observing that the idea that a society could not “be compelled to admit any one against its will” was a principle “inherent in every voluntary association.”\(^{45}\)

Similar ideas arose in other decisions upholding the rights of private societies to expel dissident members. In 1875, the Supreme Court of Illinois denied a challenge to a Chicago board of trade’s decision to expel members of a certain firm. The board of trade had been chartered by the General Assembly, but the court explained:
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It is true, that the body is organized under a statutory charter, and so are churches, masonic bodies, and odd fellow and temperance lodges; but we presume no one would imagine that a court could take cognizance of a case arising in either of those organizations, to compel them to restore to membership a person suspended or expelled from the privileges of the organization. They being organized by voluntary association, and not for the transaction of business, but for the purpose of inculcating their precepts and trusts, not for pecuniary gain, but for the advancement of morals and for the improvement of their members, they are left to adopt their constitutions, by-laws and regulations for admitting, suspending or expelling their members.\(^6\)

Four years later, the St. Louis Court of Appeals rejected the appeal of four former members of the Grand Lodge of Missouri Independent Order of Odd Fellows. The court reasoned:

It is competent for the Baptist Church alone, through its proper officers (who do not derive their commissions from the State), and according to its established modes of procedure, to determine who is a Baptist; and it is, in like manner, competent for the Odd Fellows to determine who is an Odd Fellow; and these are questions into which the courts of this country have always refused to enter: holding that when men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject thus to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own. *To deny to it the power of discerning who constitute its members, is to deny the existence of such a society, or that there is any meaning in the name which the Legislature recognizes when it grants the charter.*\(^7\)

Legal treatises from this era echoed these general principles. The 1894 edition of Frederick Bacon’s *Treatise on the Law of Benefit Societies and Life Insurance* emphasized that when “the membership is recruited from a certain class, as Masons or Odd-fellows and the association is not for pecuniary gain, no person can compel the society to admit him.”\(^8\)

Legal commentators and state courts also applied the right of assembly to a broad array of gatherings. In 1867, John Alexander Jameson’s treatise referred to “wholly unofficial” gatherings and “spontaneous assemblies”
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that were protected by the right of peaceable assembly, a “common and most invaluable provision of our constitutions, State and Federal.” These assemblies were “at once the effects and the causes of social life and activity, doing for the state what the waves do for the sea: they prevent stagnation, the precursor of decay and death.” They were “public opinion in the making,—public opinion fit to be the basis of political action, because sound and wise, and not a mere echo of party cries and platforms.” Albert Wright’s 1884 *Exposition of the Constitution of the United States* observed that under the right of assembly, “any number of people may come together in any sort of societies, religious, social or political, or even in treasonous conspiracies, and, so long as they behave themselves and do not hurt anybody or make any great disturbance, they may express themselves in public meetings by speeches and resolutions as they choose.”

In 1885, an Illinois state appellate court reviewed a village ordinance that restricted as nuisances “all public picnics and open air dances within the limits of the village.” Rejecting the village’s assertion that it could restrict these activities in any form, the court reasoned:

> It would be a startling proposition that under this general grant of power authorizing cities and villages to declare what shall be nuisances, they could prevent the people from assembling in a peaceable and orderly manner, on suitable occasions, to indulge in healthful recreations and innocent amusements. It is difficult to perceive why dancing in the open air is per se any more reprehensible or more of a nuisance than playing at leap frog or lawn tennis. The groves and green woods are nature’s own temples, to which the people have the right to repair with the consent of the owner, for rational sports and social intercourse, provided they do not disturb the public peace nor encroach upon private rights. The framers of the constitution inserted in that instrument a clause making inviolate the right of the people to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of their grievances. And it may well be supposed they would have added the right to assemble for open air amusements had any one imagined that the power to deny the exercise of such right would ever be asserted by a municipal corporation.

Assembly, in other words, encompassed far more than overtly political gatherings. It protected forms of expression that extended to “open air amusements”—even to dancing.
Three years later, the Supreme Court of Kansas invalidated a Wellington city ordinance that prohibited parading without consent that involved “shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, or doing any other act or acts designed, intended, or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues, or alleys.” A group of men and women making up a local branch of the Salvation Army and led by a female “captain” had intentionally transgressed the ordinance. In overturning their convictions, the court chastised the city for the reach of its restriction:

This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together with their party banners, and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-School children cannot assemble at some central point in the city, and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in their march by the written consent of his honor, the mayor, or march without drums or fife, shouts or songs.

The court concluded:

We do not believe that the legislative grant of power to the city council, as enumerated in the sections above cited, can be so construed as to authorize the city council to take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land—to form their processions and parade the streets with banners, music, songs, and shouts. It is an abridgment of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention, and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious, and political. It practically destroys these great public demonstrations that are the most natural product of common aims and kindred purposes.

Other courts reached similar conclusions in challenges to restrictive ordinances by the Salvation Army.54
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In 1897, the Supreme Court of Wisconsin interpreted a statutory grant of free assembly by specifying that: “Any person who shall, at any time, willfully interrupt or molest any assembly or meeting of people, for religious worship or for other purposes, lawfully and peaceably assembled, shall be punished by fine.” Pointing to the right of assembly recognized under Wisconsin’s constitution, the Court emphasized a broad interpretation of the “other purposes” specified in the statute: “The history and reason and spirit of the enactment show that any assembly or meeting of the people, lawfully and peaceably assembled, is within its protection.” These broad interpretations of assembly also gestured toward the blurring of social and political lines that Aziz Rana describes in Populists of the time who “created lasting ties between party affiliation and ethnic, religious, or racial identity . . . through numerous social activities and popular spectacles, including parades and picnics.”

Assembly in the Progressive Era

As in many of the state court decisions at the turn of the century, the people claiming the right to assemble insisted on a far broader purpose and meaning than Cruikshank had signaled. During the Progressive Era, this thicker sense of assembly (as more than simply the right to gather to petition) is most evident in the practices of three political movements: a revitalized women’s movement, a surge in political activity among African Americans, and an increasingly agitated labor movement. The histories of these movements are storied and complex, and even the most elementary treatment of them is beyond the scope of this book. But we can glean insights into the importance of assembly through snapshots of each.

The women’s movement reemerged at the end of the nineteenth century, when “hundreds of thousands of women joined the thousands of clubs united under the auspices of the General Federation of Women’s Clubs and the National Association of Colored Women.” According to Linda Lumsden, these clubs “served as training grounds for the activist, articulate reformers who steered the suffrage movement in the 1910s.” In 1908, various women’s clubs began holding “open-air” campaigns to draw attention to their interests:
The success of the open-air campaigns helped prompt the organization of the first American suffrage parades, a more visible and assertive form of assembly. The spectacle of women marching shoulder to shoulder achieved many ends. One was that because of the press coverage parades attracted, suffrage became a nationwide issue. Women also acquired organizational and executive skills in the course of orchestrating extravaganzas featuring tens of thousands of marchers, floats, and bands. Better yet, parades showcased women’s skills in these areas and emphasized their numbers and determination. Finally, and most crucially, marching together imbued women with a sense of solidarity that lifted the movement to the status of a crusade for many participants.

As is often the case, the growth of local assemblies corresponded with the growth of the larger institutional structures that operated on a national level. The National American Woman Suffrage Association grew from forty-five thousand members in 1907, to one hundred thousand in 1915, to almost two million in 1917. But the core of assembly in the women’s movement came through local networking and personal connections. Women’s assemblies were not confined to traditional deliberative meetings but included banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes. Just as the Democratic-Republican Societies had earlier refused to limit their gatherings to formal meetings, the women’s movement capitalized on an expanded conception of public political life. Their gatherings appealed not only to reason but also to the emotions of those before whom they assembled. As Harriot Stanton Blatch affirmed in 1912, men and women “are moved by seeing marching groups of people and by hearing music far more than by listening to the most careful argument.”

Important gatherings also unfolded among civil rights activists. Stirred by the brutal race riots in Atlanta in 1906 and in Springfield, Illinois, in 1908, Mary White Ovington joined Jane Addams, William Lloyd Garrison, John Dewey, W. E. B. Du Bois and other prominent Americans in calling for a conference to discuss “present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.” The first National Negro Conference that ensued soon led to the formation of the NAACP. The new organization struggled, but in its early years, “the NAACP triumphed even in defeat.” As Adam Fairclough
writes: “Simply by creating public controversy, the Association forced whites to pay attention. Stung by the almighty row over *Birth of a Nation* [a racist film that the NAACP had campaigned against], Woodrow Wilson distanced himself from the film. Embarrassed by the dispute over segregation in the civil service, the federal government backed off from making racial segregation an official policy. Plans for a completely segregated postal service, for example, were quietly dropped.” The NAACP’s early efforts also aided membership drives, and a decade later, the group had more than 350 branches and one hundred thousand members.

In addition to the rapid growth of the NAACP, Marcus Garvey’s Universal Negro Improvement Association (UNIA) drew tens of thousands of members. Garvey capitalized on symbolic expression that upended social norms:

Parading through Harlem on August 2, 1920, the UNIA’s massed ranks took three hours to pass by. A chauffeured automobile, preceded by four mounted policemen, conveyed Marcus Garvey, the Provisional President of Africa, in the manner befitting a head of state. Resplendent in brocaded uniform and cocked hat, Garvey acknowledged the cheering onlookers with a regal wave of the hand. More cars trailed behind him, carrying regalia-attired lesser officials, including the Knight Commanders of the Distinguished Order of the Nile.

Then came thousands of walking rank-and-file. Uniformed contingents marched in proud lockstep: the Black Star Line Choir, the Philadelphia Legion, the Black Cross Nurses, the Black Eagle Flying Corps, the African Motor Corps. Swaying bands from Norfolk and New York City “whooped it up.” Then a forest of banners, each emblazoned with a slogan—variations on “Africa for the Africans!”—snaked its way down Lenox Avenue. They were borne aloft by UNIA members who came from Liberia, Canada, Panama, British Guiana, the Caribbean islands, and a dozen states of the Union. Hundreds of cars and more mounted policemen ended “the greatest parade ever staged anywhere in the world by Negroes.”

Fairclough cautions against dismissing “Garveyism” as mere showmanship; for one thing, it “reflected a popular fad of a type all too common
in the 1920s—when millions of Americans, whites and blacks, donned exotic hats and robes to become Masons, Elks, Oddfellows, and Shriners.” Garvey’s contemporaries took him seriously, and he became “the first black nationalist—the only one before or since—to create a mass movement.” The movement proved short-lived, due in part to Garvey’s contentious positions and unconventional alliances (among other views, Garvey espoused racial separatism and “racial purity” that earned him the support of white segregationists). But unlike the NAACP, Garvey’s UNIA “was entirely led, controlled, and financed by black people,” and it “fostered racial pride in ways the NAACP simply could not.”

As Garvey’s displays embodied one form of assembly, a less flamboyant kind of assembly emerged in Harlem: “Caught up in the controversies of which Garvey was the center, or brooding over the conditions in American life to which he pointed, many blacks began to write about them, as though reacting to Garvey’s harangues, even if they seldom agreed with him.” The writers that were part of the Harlem Renaissance drew upon “a body of common experiences that in turn helped to promote the idea of a distinct and authentic cultural community.” John Hope Franklin and Alfred Moss Jr. stress the interconnectedness between message and group that these writers experienced: “It was only natural that leaders of the Harlem Renaissance in New York would tend to move in the same social circles. There was a community of spirit and point of view that found its expression not only in the cooperative ventures of a professional nature but also in the intimate social relationships that developed. Perhaps these Harlemites felt that form and substance could be given to their efforts through the interchange of ideas in moments of informality.” These “moments of informality” spread across mixed race clubs, literary parties, and other events that created “a cohesive force in the efforts of the group.”

While both suffragists and African Americans built on ideas of assembly in the Progressive Era, the most frequent articulations of the right came from an increasingly vocal labor movement. Widespread labor unrest had emerged with the increase in industrialization and immigration at the end of the nineteenth century. The Great Strike of 1877 had involved more than one hundred thousand workers
throughout the country and brought to a halt most of the nation’s transportation system. By the early 1880s, the Knights of Labor had organized hundreds of thousands of workers. The Haymarket Riot of 1886 and the Pullman Strike of 1894 sandwiched “almost a decade of labor unrest punctuated by episodes of spectacular violence” that included “the strike of the Homestead Steel workers against the Carnegie Corporation, the miners’ strikes in the coal mining regions of the East and hardrock states in the West, a longshoremen’s strike in New Orleans that united black and white workers, and numerous railroad strikes.” But these labor efforts remained largely unorganized, and direct appeals to the freedom of assembly did not begin in earnest until the Industrial Workers of the World (IWW) formed in 1905.

The IWW (nicknamed the “Wobblies”) emerged out of a conglomeration of labor interests dissatisfied with the reform efforts of the American Federation of Labor. Led by William Haywood, Daniel De Leon, and Eugene Debs, the Wobblies employed provocative words and actions. The preamble to their constitution declared that “the working class and the employing class have nothing in common,” and the IWW advocated this message in gatherings and demonstrations throughout the country. The freedom of assembly figured prominently in their appeals to constitutional protections during organized strikes in major industries, including steel, textile, rubber, and automobile, from 1909 to 1913. In 1910, Wobblies highlighted the denial of the right to assemble at a demonstration in Spokane. When members of the IWW invoked the rights of speech and assembly during the Paterson Silk Strike of 1913, Paterson mayor H. G. McBride responded that these protections extended to the striking silk workers but not to the Wobblies: “I cannot stand for seeing Paterson flooded with persons who have no interest in Paterson, who can only give us a bad name, who can despoil in a few hours a good name we have been years in building up, and I propose to continue my policy of locking these outside agitators up on sight.” True to his word, McBride arrested a number of IWW leaders, including Elizabeth Gurley Flynn. Later that year, the IWW publication *Solidarity* protested that “America today has abandoned her heroic traditions of the Revolution and the War of 1812 and has turned to hoodlumism and a denial of free speech and assembly to a large and growing body of citizens.”
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The Interwar Years and the Rise of Assembly

Progressives’ reliance on the right of assembly confronted a roadblock in the emerging anticommunist hysteria. As Irwin Marcus has observed, “Unrest associated with the assertiveness of women, African Americans, and immigrant workers could be ascribed to the influence of the Communists and inoculating Americans with a vaccine of 100 percent Americanism was offered as a cure for national problems.” The rising Americanism verged on claiming the freedom of assembly as one of its casualties. On the eve of America’s entry into the First World War, President Wilson predicted to New York World editor Frank Cobb that “the Constitution would not survive” the war and “free speech and the right of assembly would go.” Seven months later, Wilson’s words seemed ominously prescient when the Bolshevik Revolution in Russia triggered the first Red Scare. Over the next few years, the federal government constrained the freedom of assembly through shortsighted legislation like the Espionage Act of 1917 (and its 1918 amendments) and the Immigration Act of 1918, and the Justice Department’s infamous Palmer Raids in 1920. Despite the Red Scare, and probably because of some of the flagrant abuses of civil liberties that occurred during it, libertarian interpretations of the First Amendment that had surfaced prior to the First World War took shape in the interwar period. Harvard law professor Zechariah Chafee led the doctrinal charge and “provided intellectual cover for Justices Holmes and Brandeis when they began to dissent in First Amendment cases in the fall of 1919.”

References to free speech and assembly also increased in political rhetoric. In 1920, Senator Warren Harding’s acceptance speech as the Republican presidential nominee warned that “we must not abridge the freedom of speech, the freedom of press, or the freedom of assembly.” In 1921, the Intercollegiate Liberal League organized at Harvard and asserted that it would “espouse no creed or principle other than the complete freedom of assembly and discussion in the college.” Meanwhile, Samuel Gompers repeatedly invoked the freedoms of speech and assembly in his battle against labor injunctions.

The importance of assembly—broadly construed not only as a right to attend a meeting but also as a right to form and participate in groups—is
strikingly evident in Brandeis’s famous concurrence in Whitney v. California. Anita Whitney’s appeal stemmed from her conviction under California’s Criminal Syndicalism Act for having served as a delegate to the 1919 organizing convention of the Communist Labor Party of California. The Court rejected her argument that the California law violated her rights under the First Amendment, expressing particular concern that her actions had been undertaken in concert with others, which “involve[d] even greater threat to the public peace and security than the isolated utterances and acts of individuals.”

Rejecting this rationale, Brandeis penned some of the most well-known words in American jurisprudence: “Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” The connection between “free speech and assembly” lies at the heart of Brandeis’s argument—the phrase appears eleven times in his brief concurrence. The Court had linked these two freedoms only once before; after Whitney, the nexus occurs in more than one hundred of its opinions.

Brandeis’s link between speech and assembly suggests two important connections. First, it recognizes that a group’s expression includes not only the spoken words of those assembled but also the expressive message inherent in their very act of gathering. Second, it emphasizes that the rights of speech and assembly extend across time, preceding the expressive moment to guard against prior restraints that would prevent that moment from ever occurring. Just as actual speech is not a necessary condition for the protections of speech, physical presence is not a necessary condition for the protections of assembly.

There was, however, one group that even Brandeis considered beyond the constitutional protections of free assembly: the Ku Klux Klan. The year after Whitney, Brandeis joined an 8–1 majority in Bryant v. Zimmerman that rejected the Klan’s challenge to New York’s Walker Law, which
mandated that associations requiring a membership oath and having
twenty or more members file documents including a membership roster
and a list of officers. Under the law, members of an association with
knowledge that the association had failed to register were guilty of a
misdemeanor. George Bryant, who had been imprisoned after the Klan
failed to register, argued that the New York statute deprived him of
“liberty” and prevented him “from exercising his right of membership in
the organization,” in violation of the Due Process Clause of the
Fourteenth Amendment. The Court concluded that liberty “must yield to
the rightful exertion of the police power” and there “can be no doubt
that under that power the State may prescribe and apply to associations
having an oath-bound membership any reasonable regulation calculated
to confine their purposes and activities within limits which are consistent
with the rights of others and the public welfare.”

Thirty years later, the State of Alabama leaned heavily on Bryant in
arguing for disclosure of the NAACP’s membership list in *NAACP v.
Alabama*. The Court rejected the comparison, noting that the Klan’s
violent nature was a far cry from the NAACP. The Klan’s prominence at
the time the Court decided *Bryant* also likely played a role. Following
World War I, the Klan had garnered millions of recruits with its appeals
to “traditional American values.” During the 1920s, Klan members rose
to political power in states across the union, and Klan rallies drew tens of
thousands of supporters. The frenzy proved short-lived—by the
Depression, the Klan had fewer than a hundred thousand members, and
its continued decline likely explains the Court’s willingness to tolerate the
Klan’s expressive antics in its landmark 1969 decision, *Brandenburg v. Ohio*.
But when the Court decided *Bryant* in 1928, the Klan’s prominence—and
its propensity for violence—was alive and well.

Around this time, appeals to assembly increased in the rhetoric of labor
activists. In the early 1920s, the conservative wing of the Supreme Court
issued a series of antilabor decisions aimed at stopping picketing and
union organizing. But by 1933, workers had successfully obtained legisla-
tive relief through the National Industrial Recovery Act, which provided
the first guarantee to workers of the right to organize in associations. Two
years later, the Wagner Act added additional protections for associational
rights of workers. These initial statutory protections set in motion a
byzantine legislative structure whose intricacies far exceed the scope of this book. It is nevertheless useful to highlight some of the invocations of assembly advanced in the context of these statutory developments. On April 10, 1936, Congress initiated hearings on legislation to authorize the Committee on Education and Labor to investigate “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.” National Labor Relations Board chairman J. Warren Madden testified that “the right of workmen to organize themselves into unions has become an important civil liberty” and that workers could not organize without exercising the rights of free speech and assembly. Following the hearings and subsequent approval of the Senate measure, the committee’s chairman Hugo Black named Senator Robert La Follette Jr. of Wisconsin to chair a subcommittee to investigate these concerns. The La Follette Committee embarked with “the zeal of missionaries” in an exhaustive investigation that spanned five years. When it concluded, La Follette reported to Congress that “the most spectacular violations of civil liberty . . . [have] their roots in economic conflicts of interest” and emphasized that “association and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly.”

Rhetoric across the political spectrum during the mid-1930s echoed the increased appeals to assembly in the labor context. In a 1935 speech on Constitution Day, former president Herbert Hoover listed assembly among the core freedoms that guarded liberty. That same year, President Roosevelt’s interior secretary Harold Ickes referred to the freedoms of speech, press, and assembly as “the three musketeers of our constitutional forces” during an address before an annual luncheon of the Associated Press. Ickes asserted that “we might give up all the rest of our Constitution, if occasion required it, and yet have sure anchorage for the mooring of our good ship America, if these rights remained to us unimpaired.”

In 1937, the Supreme Court incorporated the freedom of assembly against the states in De Jonge v. Oregon. Dirk De Jonge had spoken before a group of 150 people at a Portland meeting that occurred under the auspices of the Communist Party. During his speech, De Jonge protested the conditions at the county jail and the actions of the police in response
to an ongoing maritime strike. The orderly meeting was open to the public, and only a fraction of the attendees were communists. De Jonge was convicted under Oregon’s criminal syndicalism statute, which prohibited “the organization of a society or assemblage” that “advocate[d] crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.”

A unanimous Supreme Court reversed the conviction. Chief Justice Hughes emphasized that the broad statute meant: “However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party.” Hughes rejected this outcome: “The First Amendment of the Federal Constitution expressly guarantees that right [of assembly] against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.” Hughes underscored the significance of applying the right of assembly to state action by observing that “the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” In words strikingly similar to Brandeis’s Whitney concurrence, Hughes emphasized the need “to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”

Months later, the Court underscored in Herndon v. Lowery that “the power of a state to abridge freedom of speech and of assembly is the exception rather than the rule.” The case involved the appeal of Angelo Herndon, a young black man affiliated with the Communist Party in Georgia who had attempted to organize black industrial workers. In 1933, Georgia had convicted Herndon of attempting to incite an insurrection
under a Reconstruction era law and sentenced him to eighteen to twenty years’ imprisonment (the insurrection conviction was a capital offense, but the jury had recommended mercy). The state had argued that Herndon was “attempting to organize a Negro Republic in Georgia.” The trial court emphasized that Herndon “was an organizer and induced a number of persons to become members of the Communist Party,” an “attempt to induce others to combine in [violent] resistance to the lawful authority of the state.” The Communist Party’s International Labor Defense pursued his appeals, and within two years, “white liberals, labor leaders, and other citizens joined blacks and radicals in viewing the conviction as a serious threat to basic civil liberties, especially the rights of free speech and free assembly.” After Herndon had spent years languishing in a Georgia prison while his appeals went up and down the courts, the Supreme Court concluded that the statute under which he had been convicted was “merely a dragnet which may enmesh anyone who agitates for a change of government.” Herndon’s efforts to solicit members and hold meetings fell squarely within the boundaries of the right of peaceable assembly.74

In 1938, Dewey’s essay “Creative Democracy: The Task Before Us” asserted that “the free play of facts and ideas” is “secured by effective guarantees of free inquiry, free assembly and free communication” and cautioned that “merely legal guarantees of the civil liberties of free belief, free expression, free assembly are of little avail if in daily life freedom of communication, the give and take of ideas, facts, experiences, is choked by mutual suspicion, by abuse, by fear and hatred.” Later that year, the American Bar Association’s Committee on the Bill of Rights hailed the importance of the right of assembly in an amicus brief to the Third Circuit in *Hague v. Committee for Industrial Organization*. The appeal involved Mayor Frank Hague’s repeated denials of a permit to the Committee for Industrial Organization (CIO) to hold a public meeting in Jersey City. Hague’s permit denials had gained such notoriety that when a CIO delegation met with congressional representatives, Representative Knute Hill “inquired whether Mayor Hague would prevent a group of Congressmen from hiring a hall in Jersey City to speak on the Bill of Rights.” The committee’s lengthy amicus brief emphasized that “the integrity of the right ‘peaceably to assemble’ is an essential element of the American
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democratic system,” involving “the citizen’s right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social,” that “assemblies face to face perform a function of vital significance in the American system,” and that public officials had the “duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.”

The brief garnered an unusual amount of attention. The American Bar Association wrote: “The filing of the brief was widely hailed as a great step in the defense of liberty and the American traditions of free speech and free assembly as basic institutions of democratic government. The clear and earnest argument of the brief was attested as an admirable exposition of the fundamental American faith. Hardly any action in the name of the American Bar Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief.” The New York Times reviewed the brief with similarly effusive language: “This brief ought to stand as a landmark in American legal history. It ought to be multiplied and spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty. It ought to be on file in every police station. It ought to be in every public library, in every school library, and certainly in the home of every voter in Jersey City.” The Third Circuit ruled in favor of the CIO, but Hague appealed to the Supreme Court, setting the stage for an even broader judicial endorsement of the freedom of assembly.

In 1939, assembly joined religion, speech, and press as one of the “Four Freedoms” celebrated at the New York World’s Fair. Fair organizers commissioned Leo Friedlander to design a group of statues commemorating each of the four freedoms. Grover Whalen, the president of the fair corporation, credited New York Times president and publisher Arthur Sulzberger with the idea: “Mr. Sulzberger pointed out that if we portrayed four of the constitutional guarantees of liberty in the ‘freedom group’ we could teach the millions of visitors to the fair a lesson in history with a moral. The lesson is that freedom of press, freedom of religion, freedom of assembly and freedom of speech, firmly fixed in the cornerstone of our government since the days of Washington, have
enabled us to build the most successful democracy in the world. And the moral is that as long as these freedoms remain a part of our constitutional set-up we can face the problems of tomorrow, a nation of people calm, united and unafraid.\textsuperscript{77}

The buildup to the opening of the fair began with New Year’s Day speeches broadcast internationally from Radio City Music Hall. Dorothy Thompson, the “First Lady of American journalism,” delivered a speech on the freedom of assembly. Calling assembly “the most essential right of the four,” Thompson elaborated: “The right to meet together for one purpose or another is actually the guaranty of the three other rights. Because what good is free speech if it impossible to assemble people to listen to it? How are you going to have discussion at all unless you can hire a hall? How are you going to practice your religion, unless you can meet with a community of people who feel the same way? How can you even get out a newspaper, or any publication, without assembling some people to do it?\textsuperscript{78}

Three months later, Columbia University president Nicholas Butler penned a \textit{New York Times} editorial entitled “The Four Freedoms.” With the European conflict in mind, Butler warned of the “millions upon millions of human beings living under governments which not only do not accept the Four Freedoms, but frankly and openly deny them all.” The following month, the \textit{Times} ran an editorial by Henry Steele Commager, who decried the assaults on the “four fundamental freedoms” and concluded his essay by asserting: “The careful safeguards which our forefathers set up around freedom of religion, speech, press and assembly prove that these freedoms were thought to be basic to the effective functioning of democratic and republican government. The truth of that conviction was never more apparent than it is now.\textsuperscript{79}

On April 30, 1939, the opening day of the World’s Fair, New York mayor Fiorello La Guardia called the site of Friedlander’s four statues the “heart of the fair.” A month later, the Supreme Court issued its \textit{Hague} decision. Justice Roberts relied on the Privileges and Immunities Clause to hold the freedom of assembly applicable to Mayor Hague’s actions. The \textit{New York Times} coverage of the decision pronounced that “with the right of assembly reasserted, all ‘four freedoms’ of [the] Constitution are well established.” Hague’s words on the heels of the tribute to the four
freedoms at the World’s Fair appeared to have anchored the freedom of assembly in political discourse. Indeed, a poll by Elmo Roper’s organization at the end of 1940 reported that 89.9 percent of respondents thought their personal liberties would be decreased by restrictions on freedom of assembly (compared to 81.5 percent who expressed concern over restrictions on “freedom of speech by press and radio”). Americans appeared resolute in their belief in the indispensability of free assembly to democracy. 

Politics and history decided otherwise. On January 6, 1941, President Roosevelt proclaimed “four essential human freedoms” in his State of the Union Address. Rather than refer to the freedoms of speech, religion, assembly, and press that had formed the centerpiece of the World’s Fair, Roosevelt’s “Four Freedoms Speech” called for freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. The new formulation—absent assembly—quickly overtook the old. Seven months later, Roosevelt and Churchill incorporated the new four freedoms into the Atlantic Charter. In 1943, Norman Rockwell created four paintings inspired by Roosevelt’s four freedoms. The Saturday Evening Post printed the paintings in successive editions, accompanied by matching essays expounding upon each of the freedoms. And like the earlier four freedoms, the new ones were also set to stone. Roosevelt commissioned Walter Russell to create the Four Freedoms Monument, which was dedicated at Madison Square Garden. Today, the Franklin and Eleanor Roosevelt Institute honors well-known individuals with the Four Freedoms Award.

Although Roosevelt’s four freedoms omitted assembly, the right did not immediately disappear from political and legal discourse. In 1941, an illustrious group called the Free Company penned a series of radio dramas about the First Amendment. Attorney General Robert Jackson and Solicitor General Francis Biddle helped shape the group, which included Robert Sherwood (then Roosevelt’s speechwriter), William Saroyan, Maxwell Anderson, Ernest Hemingway, and James Boyd. The group operated under what was “virtually a Government charter” to spread a message of democracy.

Orson Welles wrote the Free Company’s play on the freedom of assembly. “His Honor, the Mayor” portrayed the dilemma of Bill
Knaggs, a fictional mayor confronted with an impending rally of a group called the “White Crusaders.” After deciding to allow the rally, the mayor addressed the crowd that had gathered in protest: “Don’t start forbiddin’ anybody the right to assemble. Democracy’s a rare and precious thing and once you start that—you’ve finished democracy! Democracy guarantees freedom of assembly unconditionally to the worst lice that want it. . . . All of you’ve read the history books. You know what the right to assemble and worship God meant to most of those folks that first came here, the ones that couldn’t pray the way they wanted to in the old country?” The play concluded with music followed by the solemn voice of the narrator: “Like his honor, the Mayor, then, let us stand fast by the right of lawful assembly. Let us say with that great fighter for freedom, Voltaire, ‘I disapprove of what you say but I will defend to the death your right to say it.’ Thus one of our ancient, hard-won liberties will be made secure and we, differing though we may at times among ourselves, will stand together on a principle to make sure that government of the people, by the people, for the people shall not perish from the earth.” Not everyone shared these sentiments. Following the broadcast of “His Honor, the Mayor,” the Hearst newspaper chain and the American Legion attacked it as “un-American and tending to encourage communism and other subversive groups” and “cleverly designed to poison the minds of young Americans.” The next week, J. Edgar Hoover drafted a Justice Department memorandum “concerning the alleged Communist activities and connections of Orson Welles.”

Later in 1941, festivities around the country marked the sesquicentennial anniversary of the Bill of Rights. In Washington D.C.’s Post Square, organizers of a celebration displayed an oversized copy of the Bill of Rights next to the four phrases: “Freedom of Speech, Freedom of Assembly, Freedom of Religion, Freedom of the Press.” The Sesquicentennial Committee, with President Roosevelt as its chair, issued a proclamation describing the original four freedoms as “the pillars which sustain the temple of liberty under law.” Days before the attack on Pearl Harbor, Roosevelt declared that December 15, 1941, would be Bill of Rights Day. Roosevelt heralded the “immeasurable privileges” of the First Amendment and signed the proclamation for Bill of Rights Day against the backdrop of a mural listing the original four freedoms.
The photo op was not without irony; less than three months later, Roosevelt signed Executive Order 9066 authorizing the internment of Japanese Americans. The federal government’s pervasive denial of civil liberties to Japanese Americans included the denial of the right of assembly and began almost immediately after Pearl Harbor. Emily Roxworthy reports that “the FBI endorsed the logic that the very gathering of Japanese Americans into a group guaranteed that suspicious activities would take place” and “the supposed political disinterest of religious organizations especially attracted FBI suspicion, as did ‘Americanization’ campaigns originating within Japanese communities.” Greg Robinson notes that Japanese Americans corralled into the (ironically named) “assembly centers” encountered harsh restrictions: “In Santa Anita [one of the preinternment assembly centers], . . . use of the Japanese language—the first language of many inmates, and in some cases their only language—was strictly banned in public meetings without the express consent of the administration. . . . When a group at Santa Anita, led by Shuji Fujii (Kibei editor of the prewar left-wing newspaper Doho), circulated petitions demanding that bans on Japanese language and on public assembly be lifted, they were arrested by center police.”

Although the Supreme Court infamously endorsed the president’s restrictions on the civil liberties of Japanese Americans in Hirabayashi v. United States and Korematsu v. United States, it elsewhere affirmed a core commitment to the Bill of Rights generally and the freedom of assembly in particular. In 1943, Justice Jackson wrote in West Virginia v. Barnette: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

Two years later, the Court emphasized in Thomas v. Collins that restrictions of assembly could only be justified under the “clear and present danger” standard that the Court had adopted in its free speech cases. R. J. Thomas, the president of the United Auto Workers, had traveled
to Texas with the express purpose of testing the constitutionality of the Manford Act, which required that all union organizers register with the secretary of state and imposed other substantive restrictions. The act represented Texas’s first attempt to regulate labor unions, and its provisions infuriated J. Frank Dobie, who argued: “A man can stand up anywhere in Texas, or sit down either, and without interference invite people, either publicly or privately, to join the Republican party, the Holy Rollers, the Liars Club, the Association for Anointing Herbert Hoover as a Prophet, the Texas Folklore Society—almost any organization on earth but one—but it is against the law in Texas for a man unless he pays a license and signs papers to invite any person to join a labor union.” The New York Times was more circumspect, editorializing that “the layman probably does not see the law as having any far-reaching effects on the rights of the laboring man or the rights of workers to join or to refrain from joining labor unions.”

Thomas found himself in contempt after defying a Texas court’s temporary restraining order forbidding him to solicit members without the proper license and registration under the Manford Act. The Supreme Court overturned the contempt conviction in a 5–4 decision. Because of the “preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment,” the Court concluded that only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” Justice Rutledge’s opinion noted that the right of assembly guarded “not solely religious or political” causes but also “secular causes,” great and small. And Rutledge gestured toward the expressive nature of assembly by noting that the rights of the speaker and the audience were “necessarily correlative.”

A further endorsement of assembly came by way of the executive branch in the 1947 Report of the President’s Committee on Civil Rights. The report indicated that the “great freedoms” of religion, speech, press, and assembly were “relatively secure” and that citizens were “normally free . . . to assemble for unlimited public discussions.” Noting growing concerns about “Communists and Fascists,” the committee asserted that it “unqualifiedly opposes any attempt to impose special limitations on the rights of these people to speak and assemble.”
The Demise of Assembly

The rhetorical tributes to assembly in Supreme Court opinions and popular discourse overshadowed what was lacking: a clear doctrinal framework for resolving constitutional cases asserting that right. Frequent invocations of Brandeis’s “free speech and assembly” usually meant that the Court resolved challenges to the latter within the growing doctrinal framework of the former. 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. In political discourse, Martin Luther King Jr. appealed to assembly in his Letter from a Birmingham Jail and in his speech I’ve Been to the Mountaintop, which he delivered just prior to his assassination. But by the end of the 1960s, the right of assembly in law and politics was largely confined to protests and demonstrations. Earlier intimations of a broadly construed right—one that encompassed social and other “nonpolitical” gatherings and extended to a group’s composition and membership as well as its moment of expression—were largely forgotten.

In 1983, the Court swept the remnants of assembly within the ambit of free speech law in Perry Education Association v. Perry Local Educators’ Association. Justice White reasoned:

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

The doctrinal language came straight out of the Court’s free speech cases and made slight mention of the right of assembly (a perilous
foreshadowing of the Court’s “merging” of the speech and association claims in *Christian Legal Society v. Martinez*. With *Perry*, even cases involving protests or demonstrations could now be resolved without reference to assembly. The Court’s 1988 opinion in *Boos v. Barry* exemplifies this change. *Boos* involved a challenge to a District of Columbia law that prohibited, among other things, congregating “within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes.” The petitioner challenged the “deprivation of First Amendment speech and assembly rights” and argued that “the right to congregate is a component part of the ‘right of the people peaceably to assemble’ guaranteed by the First Amendment.” Justice O’Connor’s opinion for the Court cited *Perry* three times and resolved the case under a free speech analysis without mentioning the freedom of assembly. The Court, in fact, has not addressed a freedom of assembly claim in thirty years.\textsuperscript{30}