Perry and Boos demonstrate how some aspects of assembly have been swept within the Court’s free speech doctrine. But at least part of the reason for the forgetting of assembly has been the emergence and entrenchment of a different right: the judicially recognized right of association. The rise of this right of association in many ways depended upon surrounding political and cultural contexts, which I have divided into two eras. The national security era began in the late 1940s and lasted until the early 1960s. It formed the background for the initial recognition of the right of association in NAACP v. Alabama. The equality era began in the early 1960s and included an important reinterpretation of the right of association in Roberts v. United States Jaycees. I discuss the national security era in this chapter and the equality era in the next chapter.

Three factors shaped the right of association in the national security era: (1) the conflation of rampant anticommunist sentiment with the rise of the Civil Rights Movement (a political factor); (2) infighting on the Court over the proper way to ground the right of association in the Constitution (a jurisprudential factor); and (3) the pluralist political theory
of mid-twentieth-century liberalism that emphasized the importance of consensus, balance, and stability (a theoretical factor).

The primary political factor was the historical coincidence of the Second Red Scare and the Civil Rights Movement. From the late 1940s to the early 1960s, the government's response to the communist threat pitted national security interests against expressive freedoms. Segregationists capitalized on these tensions by analogizing the unrest stirred by the NAACP to the threats posed by communist organizations, and even charged that communist influences had infiltrated the NAACP. The Supreme Court responded unevenly, denying constitutional protections to communist organizations in the name of order and stability but protecting the NAACP.

The jurisprudential factor shaping the right of association involved disagreement on the Court over the constitutional source of association. The issue was most evident when the Court sought to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that association constrained state action because it, like other rights, could be derived from the “liberty” of the Due Process Clause of the Fourteenth Amendment (the liberty argument). Justices Black, Douglas, Brennan, and Warren insisted that association could be located in some aspect of the First Amendment and argued that it be given the same “preferred position” as other First Amendment rights. On their view, the right of association applied to the states because the Fourteenth Amendment had incorporated the provisions of the First Amendment (the incorporation argument). Disagreement between the justices over the liberty argument and the incorporation argument framed the legal discussion that shaped the right of association.

The theoretical factor influencing the shaping of association was the pluralism popularized by David Truman and Robert Dahl in the 1950s and 1960s, which emphasized the balance, stability, and consensus among groups rather than the juxtaposition of groups against the state. Truman and Dahl supported their views by appealing to the two great theorists of association in the American context: James Madison and Alexis de Tocqueville. The pluralist claims and their attendant interpretations of Madison and Tocqueville helped establish a theoretical background that qualified group autonomy with the interests of the democratic state.
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These factors contributed to three changes affecting group autonomy in the shift from assembly to association: (1) dissenting and destabilizing groups protected by the right of assembly were weakened by a right of association predicated upon a bounded consensus; (2) social practices that constituted forms of political life in the context of the right of assembly were depoliticized by a right of association that narrowed the scope of what constituted the “political”; and (3) assemblies as forms of expression were supplanted by associations as means of expression. This chapter and the one that follows illustrate the plausibility of these changes and their connection to the shift from assembly to association. Chapter 5 considers the implications of these changes through a theory of assembly.

The Postwar Political Context and the Communist Threat

The political context that shaped the constitutional right of association centered around a growing paranoia over the threat of domestic communism in the late 1940s and early 1950s. The ubiquity of the communist scare across the branches of state and federal government upset the checks and balances that should have guarded against pervasive incursions into civil liberties. It was not the first time that the American experiment faltered under such pressures, and as recent reactions to the threat of domestic terrorism attest, it would not be the last. But peculiar to the emergence of the right of association in the context of what became the Second Red Scare—perhaps in a way paralleled only by the right of assembly asserted by the Democratic-Republican Societies in the 1790s—was the claim by those outside of the political mainstream to an untested constitutional right of group autonomy during a politically tumultuous time.

The federal government had actively pursued the threat of domestic communism since the formation of the House Committee on Un-American Activities (HUAC) in 1938. Concern over “subversive” government employees had prompted the Hatch Act in 1939, the Civil Service Commission’s War Service Regulations in 1942, and the formation of the Attorney General’s Interdepartmental Committee on Investigations that same year. In 1947, the President’s Committee on Civil
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Rights reported that while “the government has the obligation to have in its employ only citizens of unquestioned loyalty,” our “whole civil liberties history provides us with a clear warning against the possible misuse of loyalty checks to inhibit freedom of opinion and expression.” The committee specifically cautioned of the dangers posed by “any standard which permits condemnation of persons or groups because of ‘association.’”

With an irony that rivaled President Roosevelt’s Bill of Rights Day proclamation, President Truman established the Federal Employee Loyalty Program the same year his civil rights committee issued its report. The program empowered the federal government to deny employment to “disloyal” individuals. Within a year, the FBI had examined more than two million federal employees and conducted more than 6,300 full investigations. The government’s loyalty determination considered “activities and associations” that included “membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive.” Attorney General Tom Clark quickly generated a list of 123 subversive organizations. Clark testified before a HUAC subcommittee that the government intended to “isolate subversive movements in this country from effective interference in the body politic.” In a speech delivered shortly before his testimony, he declared that “those who do not believe in the ideology of the United States should not be allowed to stay in the United States.”

Thomas Emerson and David Helfeld attacked the loyalty program in a 1947 article in the Yale Law Journal, contending that the investigations encompassed “not only membership and activity in organizations, including labor unions, but private beliefs, reading habits, receipts of mail, associations, and personal affairs.” They charged that the program relied upon “the legal premise that Federal employees are entitled to no constitutional protection” and ignored “the right to freedom of political expression embodied in the First Amendment.” To Emerson and Helfeld, the “concept of the right to freedom of political expression” emerged from “the specific guarantees of freedom of speech, freedom of the press, the right of assembly and the right to petition the government.” This
right of political expression was “basic, in the deepest sense, for it underlies the whole theory of democracy.”

Emerson and Helfeld did not explicitly reference a “freedom of association,” but they cited a speech delivered earlier in the year to the State Bar of California by the powerful federal judge, Charles Wyzanski Jr. In that speech, Wyzanski had offered “an inquiry into freedom of association,” suggesting that despite the “verbal kinship of the phrases freedom of speech, freedom of assembly and freedom of association[,] . . . the triad represented an ascending order of complexity.” The term “association” implied “a body of persons who have assembled not on an ad hoc, but on a more or less permanent, basis and who are likely to seek to advance their common purposes not merely by debate but often in the long run by overt action.” The “peculiarly complicated” freedom of association “cuts underneath the visible law to the core of our political science and our philosophy.” Wyzanski contended that by the time of Gunnar Myrdal’s 1944 book, _An American Dilemma_, “freedom of association was considered a deeply rooted characteristic of American society.”

But the “deeply rooted characteristic” was not evident in 1947. As the executive branch embarked on its loyalty investigations of government employees, the HUAC subpoenaed movie producers, screenwriters, and directors to examine alleged communist affiliations. Hollywood personalities, including Humphrey Bogart, Lauren Bacall, Groucho Marx, and Frank Sinatra, formed the Committee for the First Amendment and flew to Washington to support those called to testify. In October of 1947, ten Hollywood witnesses refused on First Amendment grounds to answer questions from the HUAC. But the “Hollywood Ten” were largely abandoned after Congress cited them for contempt. Within a month, top Hollywood executives agreed to blacklist them, and the Committee for the First Amendment “folded almost as fast as it had formed.”

In their investigative hearings, the HUAC and the Senate Internal Security Subcommittee (SISS) routinely asked witnesses whether they were currently or had ever been a member of the Communist Party. The question posed a catch-22. On the one hand, witnesses who denied any affiliation could be charged with perjury based on circumstantial evidence that suggested otherwise. On the other hand, those who admitted to a communist affiliation usually suffered adverse economic
and social consequences. As a result, a growing number of witnesses refused to answer questions. Initially, most of these witnesses invoked the Fifth Amendment right against self-incrimination. But observers increasingly saw this as an admission of guilt by those they labeled “Fifth Amendment Communists.” Accordingly, witnesses began turning to the First Amendment. As with the Hollywood Ten, reliance on the First Amendment usually resulted in contempt of Congress citations.\(^7\)

The executive and legislative actions to curtail communist activity took on added urgency in light of global events, including the Berlin blockade, the first Soviet test of an atomic bomb, and Mao Tse-tung’s overthrow of Chiang Kai-shek’s government in China. Alger Hiss’s 1950 perjury conviction and the espionage convictions of Julius and Ethel Rosenberg the following year reinforced fears of an ongoing domestic communist threat. As Lucas Powe has written, “Americans, very much including Supreme Court justices, viewed these trials against the backdrop of communist expansion in Europe and Asia, and an aggressive anticommunism became a staple of American politics and society.” In light of the unsettling domestic and global developments, citizens and politicians across the political spectrum welcomed the government’s intervention as a necessary defense against the spread of communism. The 1950 McCarran Internal Security Act added to the fervor by authorizing detention camps for subversives and requiring communists to register with the Subversive Activities Control Board. When Truman vetoed the act out of concern that it would lead to “Gestapo witch hunts,” Congress overrode his veto.\(^8\)

The first indication of the Supreme Court’s complicity in the communist scare came in its 1950 decision *American Communications Association v. Douds*. *Douds* involved a challenge to the Taft-Hartley amendments to the National Labor Relations Act (NLRA), which required that union officers submit affidavits disavowing membership in or support of the Communist Party before a union could receive the NLRA’s protections. The Court upheld the affidavit requirement. Chief Justice Vinson reasoned that the act protected the country from “the so-called ‘political strike.’” He referred to “substantial amounts of evidence” presented to Congress “that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union
objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government.”

The Court’s communist concerns continued in Dennis v. United States, a decision that ACLU national chairman Roger Baldwin later called “the worst single blow to civil liberties in all our history.” Dennis came to the Court after FBI director J. Edgar Hoover initiated Smith Act prosecutions of twelve senior leaders of the Communist Party of the United States of America (CPUSA). The government charged the defendants with violating the act’s membership clause, which made it unlawful “to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence, or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.” The government construed the act so broadly that it “made no effort to prove that this attempted overthrow was in any sense imminent, or even in the concrete planning stages.” Following a nine-month trial, the jury convicted all twelve defendants after less than a day of deliberation.

Vinson’s plurality opinion in Dennis recounted the speech-protective views of Holmes and Brandeis and conceded that “there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.” But Vinson refashioned Holmes’s clear and present danger standard, concluding that with respect to the CPUSA, “it is the existence of the conspiracy which creates the danger.” Milton Konvitz quipped that Vinson’s interpretation of Holmes and Brandeis was “doctrine reduced to a phrase.” Justice Black’s dissent lamented, “Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.” As Black anticipated, Dennis generated little public outcry, and even liberals like Norman Thomas and Arthur Schlesinger supported the decision. One of the lone openly critical voices was Eleanor Roosevelt, who wrote the day after the decision: “I am not sure our forefathers—so careful to guard our rights of freedom of speech, freedom of thought and freedom of assembly—would not feel that the Supreme Court had perhaps a higher obligation.” Roosevelt spent the
following two summers criticizing Dennis in public forums with Justice Douglas, an endeavor that at times met with hostility.¹¹

Dennis opened the floodgates for additional FBI investigations and prosecutions. The Justice Department began pursuing “second-string” CPUSA leadership and over the next few years charged 126 communists with conspiracy under the Smith Act. Paul Robeson, W. E. B. Du Bois, Lewis Mumford, Eleanor Roosevelt, and Henry Steele Commager launched sporadic efforts to halt the prosecutions or obtain amnesty for defendants. Albert Einstein also figured prominently in these efforts. When the SISS subpoenaed a high school English teacher named William Frauenglass to question him about possible communist affiliations in May of 1953, Frauenglass wrote Einstein requesting a letter of support. Einstein’s response, which appeared as part of a front-page story in the New York Times, counseled that “every intellectual who is called before the committees ought to refuse to testify” despite the inevitable consequences. Six months later, Albert Shadowitz, an electrical engineer, drove to Princeton to see Einstein after receiving a subpoena from the SISS. Einstein supported Shadowitz’s intention to rely on the First Amendment rights of speech and association rather than the Fifth Amendment in his refusal to answer the committee’s questions. At his public hearing, Shadowitz cited the First Amendment and noted that “Professor Einstein advised me not to answer.”¹²

Despite these efforts by Einstein and others, widespread public concern for the accused never materialized, and the government routinely won even its weakest cases. Anticommunist concerns also pervaded state legislation. In 1952, the Court reviewed a speech and assembly challenge to a New York law that denied employment in its public schools to any person who advocated the violent overthrow of the government or who joined a society or group of persons knowing that it advanced such advocacy. The law took aim at “members of subversive groups, particularly of the Communist Party and its affiliated organizations,” who had been “infiltrating into public employment in the public schools of the State.” In passing the restrictive statute, the New York legislature had found that “the members of such groups use their positions to advocate and teach their doctrines . . . without regard to truth or free inquiry” in ways “sufficiently subtle to escape detection in the classroom.” In Adler v. Board of
Education, a 6–3 majority concluded that New York had acted “in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.”

Nine months after Adler, the Court finally set limits on anticommunist legislation. Justice Clark’s majority opinion in Wieman v. Updegraff struck down an Oklahoma statute that required state employees to affirm, among other things, that they had not within the preceding five years “been a member of . . . any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization.” Clark distinguished Adler by emphasizing that the New York law had required a person to have known the purposes of the society or group that he or she had joined. In contrast, Oklahoma’s law mandated that “the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly.”

Frankfurter’s concurrence in Wieman referred to “a right of association peculiarly characteristic of our people.” That same year, Thomas Emerson and David Haber’s treatise Political and Civil Rights in the United States contended that the “right of association is basic to a democratic society.” Emerson and Haber asserted that association “embraces not only the right to form political associations but also the right to organize business, labor, agricultural, cultural, recreational and numerous other groups that represent the manifold activities and interests of a democratic people.”

In the midst of the Second Red Scare and early hints of a right of association, two men who would deeply influence the development of that right joined the Supreme Court: John Harlan and William Brennan. Brennan, who succeeded Sherman Minton in 1956, became the chief intellectual architect of the Warren Court and arguably “the most important jurist of the second half of the century.” His tenure on the Court included the first official recognition of the right of association in NAACP v. Alabama and its transformation in the opinion he wrote twenty-six years later in Roberts v. United States Jaycees. Harlan, who replaced Robert Jackson in 1955, wrote the Court’s opinion in NAACP v. Alabama. His role on the Court is often cast as “conservative” based on his close relationship with Felix Frankfurter, his deference to national security decisions by
government officials, and his constant sparring with the Warren Court liberals. But this label obscures the complexity of his thought. Within his first few months on the Court, Harlan expressed discomfort over Smith Act prosecutions and associational restrictions on communists and let slip that he had little patience for “McCarthyite garbage.”

Harlan’s constitutional hermeneutic also proved important in shaping the right of association. He believed that the “full scope” of the liberty of the Due Process Clause of the Fourteenth Amendment could not be “found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” For Harlan, the meaning of constitutional law was “one not of words, but of history and purposes.” This required an appropriate balancing of past tradition with present reform: “The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.” These views about liberty and tradition opened Harlan to the kind of arguments that would later be advanced to ground the right of association in the Constitution.

On Monday, June 17, 1957, with Brennan and Harlan now in place, the Court released a quartet of decisions curtailing the government’s anticommunist efforts in what became known as “Red Monday.” Three of the decisions checked actions by the federal government. Service v. Dulles ordered the reinstatement of a federal government employee who had been dismissed based on loyalty concerns. Watkins v. United States reversed John Watkins’s contempt conviction following his refusal on First Amendment grounds to respond to questions from the HUAC about his alleged communist affiliations. Yates v. United States, the most important of the three decisions against the federal government, involved the appeal of fourteen leaders of the Communist Party in California convicted under the Smith Act. Harlan’s majority opinion distinguished between advocacy of forcible overthrow of the government as an “abstract principle” on the one hand and “advocacy or teaching of action” on the other. Based on this standard, the Court directed that five of the convictions be overturned outright and the other nine remanded for retrial. More important,
Harlan’s statutory interpretation effectively constrained future Smith Act prosecutions.\textsuperscript{18}

The fourth Red Monday decision, \textit{Sweezy v. New Hampshire}, involved state rather than federal action. The New Hampshire attorney general had subpoenaed Paul Sweezy, the well-known Marxist economist and founder of the \textit{Monthly Review}, to testify about alleged communist affiliations. Like Watkins, Sweezy refused to answer certain questions on First Amendment grounds. The Superior Court of Merrimack County, New Hampshire, found him in contempt and ordered his imprisonment. The New Hampshire Supreme Court upheld his conviction despite its assertion that “the right to associate with others for a common purpose, be it political or otherwise,” was one of the “individual liberties guaranteed to every citizen by the State and Federal Constitutions.” Chief Justice Warren’s plurality opinion reversed the conviction, concluding that New Hampshire’s statute impermissibly extended to “conduct which is only remotely related to actual subversion.”\textsuperscript{19}

\textit{Sweezy} brought to the foreground an important legal question about the right of association: its constitutional source. Thomas Emerson, who represented Sweezy before the Court, noted that the New Hampshire Supreme Court had referred to “speech and association” rights in its review of Sweezy’s conviction. But Emerson also recognized that the New Hampshire court had cited only “the Federal Constitution” as its basis for these rights. Emerson offered two more specific possibilities. First, he argued that New Hampshire’s law deprived Sweezy “of liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.” Second, he wrote that “it can hardly be doubted that the requirements of the First Amendment, made applicable to the states through the Fourteenth Amendment, impose comparable or identical limits on state power.”\textsuperscript{20}

The differences between these arguments may seem like hairsplitting to nonlawyers, but they reflect a doctrinal divide that complicated the Court’s efforts to settle on a jurisprudential framework for the right of association. The disagreement centered on how rights located in the federal Constitution could limit state action. The Supreme Court had initially concluded that the substantive provisions of the Bill of Rights limited only the federal government and did not apply to the states. But the Fourteenth
Amendment’s Due Process Clause had subsequently established—in language similar to the Fifth Amendment—that states could not “deprive any person of life, liberty, or property, without due process of law.”

Whether the liberty of the Fourteenth Amendment encompassed specific provisions in the Bill of Rights remained unclear at the time of *Sweezy*. In 1922, Justice Pitney had written for a majority of the Court that “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about the freedom of speech.” But three years later, Justice Sanford concluded in *Gitlow v. New York* that “we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” Chief Justice Hughes reached a similar conclusion about assembly in *De Jonge v. Oregon*: because “the right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental,” it fell within “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.”

*Gitlow* and *De Jonge* made clear that states, like the federal government, could not “impair” the freedoms of speech, press and assembly, but the decisions didn’t identify the source of those restrictions. Justice Cardozo suggested two possibilities in *Palko v. Connecticut*: (1) that certain provisions from the Bill of Rights had been “brought within the Fourteenth Amendment by a process of absorption”; and (2) that restrictions against the federal government from “the specific pledges of particular amendments” were “implicit in the concept of ordered liberty” and thereby valid against the states through the Fourteenth Amendment. Restating Cardozo’s alternatives suggests the following two possibilities:

(1) The *incorporation argument*, which holds that the due process clause of the Fourteenth Amendment incorporated the specific rights enumerated in the First Amendment, thereby making those rights applicable to the states; and
(2) The liberty argument, which holds that rights similar to those in the First Amendment were implicit in the liberty protected by the due process clause of the Fourteenth Amendment.23

Douglas, Black, and Frankfurter had previously sparred over the differences between the incorporation and liberty arguments. In 1943, Douglas's majority opinion in *Murdock v. Pennsylvania* referred without elaboration to “the First Amendment, which the Fourteenth makes applicable to the states.” Four years later, Black's majority opinion in *Everson v. Board of Education* echoed the same language. Frankfurter dissented in both cases. He didn’t see anything in the text of the Fourteenth Amendment that applied the Bill of Rights to the states. Two years later, he rebuffed Douglas and Black in his majority opinion in *Wolf v. Colorado*:

“The notion that the ‘due process of law’ guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution, and thereby incorporates them, has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed.”24

Black and Douglas disagreed with Frankfurter not only about the source of the constitutional limits on state action but also about the extent of those limits. For Black, the rights in the First Amendment were “absolute” and could not be restricted by state action. Douglas did not always go that far, but he argued in *Murdock* that the freedoms of the First Amendment held a “preferred position.” Frankfurter considered the preferred position language a “mischievous phrase” which “express[e]d a complicated process of constitutional adjudication by a deceptive formula” and which implied “that any law touching communication is infected with presumptive invalidity.” He argued instead for a “balancing” that weighed the interests of the government against the liberty of the Fourteenth Amendment. On this view, Frankfurter would defer to a legislative judgment if a restriction of speech or assembly had a “rational basis.” Justice Jackson described the tension between the two positions in *West Virginia v. Barnette*:

In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and
those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a “rational basis” for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

The upshot of these two perspectives was that the Court would be more likely to uphold a state law restricting expressive freedom if it followed the liberty argument and more likely to strike down the law if it followed the incorporation argument.\textsuperscript{5}

\textit{Sweezy} added a new wrinkle: unlike the rights of speech, press, assembly, and religion at issue in earlier cases, the right of association appeared nowhere in the text of the Constitution. Under the liberty argument, association (like any other right enforced against the states) was implicit in the liberty of the Fourteenth Amendment. The incorporation argument faced a greater hurdle because it claimed that the Fourteenth Amendment relied upon provisions found in the First Amendment. The only possible explanation to support the incorporation argument was that a right implicit in the First Amendment implicitly applied to states through the Fourteenth Amendment. That was one more degree of inference than the liberty argument. Penumbras formed by emanations, as Douglas would later characterize it.\textsuperscript{6}

Chief Justice Warren’s plurality opinion, joined by Douglas, Black, and Brennan, relied on the incorporation argument: “The right to engage in political expression and association . . . was enshrined in the First Amendment.” Frankfurter, joined by Harlan, concurred only in the result. In Frankfurter’s view, the justices were confined to “the limited power to review the action of the States conferred upon the Court by the Fourteenth Amendment.” The Court had to undertake “the narrowly circumscribed but exceedingly difficult task of making the final judicial
accommodation between the competing weighty claims that underlie all such questions of due process.” Frankfurter made no reference to the First Amendment but relied instead upon “the concept of ordered liberty’ implicit in the Due Process Clause of the Fourteenth Amendment.” His concurrence rested upon “a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection.”

Civil Rights and the Right of Association

The divide between the liberty argument and the incorporation argument persisted when the Court formally recognized a constitutional right of association the following year in *NAACP v. Alabama*. The proximity between a waning but still active concern over domestic communism and the expanding Civil Rights Movement led to widely divergent claims about the relationship between the two. On the one hand, the federal government increasingly viewed segregation as undercutting its stance against communist ideology. Its amicus brief in *Brown v. Board of Education* argued that “the United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man,” and that segregation jeopardized “the effective maintenance of our moral leadership of the free and democratic nations of the world.” This view prevailed in the northern media as well. The *New York Times* described *Brown* as a “blow to communism.” The *Washington Post* added that with *Brown*, “America is rid of an incubus which impeded and embarrassed it in all of its relations with the world.”

In contrast to these attempts to link integration with democracy, southern conservatives argued that integration advocates were controlled by communists. The charges were not entirely surprising: segregationists had associated communism and black activism since the turn of the century and the early days of the NAACP. In the 1930s, this link between “red” and “black” solidified in the minds of many southerners when the Communist Party’s legal arm, the International Labor Defense, undertook the celebrated defenses of Angelo Herndon and the “Scottsboro Boys.” But the “southern
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red scare” of the 1950s pressed the connections between these two “radical” movements beyond the realm of plausibility. And while segregationists “never found any good evidence that Communists had a perceptible influence in the NAACP” they nevertheless perpetuated a link “to discredit the civil rights movement by associating it with the nation’s greatest enemy.”

Chief Justice Warren’s Brown opinion fueled efforts to steer anticommunist sentiment toward civil rights activists. His famous footnote 11 cited four nonlegal sources—including Gunnar Myrdal and two other authors who had “what passed for communist leanings during that era.” In response to the decision, Georgia’s lieutenant governor denounced the “meddlers, demagogues, race baiters, and communists [who] are determined to destroy every vestige of states’ rights.” Mississippi senator James Eastland, who at the time chaired both the Senate Judiciary Committee and the SISS, argued that the Court in Brown had “responded to a radical, pro-Communist political movement in this country.” Eastland, Arkansas senator John McClellan, and Louisiana representative Edwin Willis used their positions on the SISS, HUAC, and other investigative subcommittees to hold public hearings on “Communist influence in civil rights protests.” One of the most forceful advocates of the link between communism and civil rights in the South was Mississippi Circuit Court judge Tom P. Brady. Lucas Powe writes that “Brady saw Brown as a virtual communist plot to mandate the amalgamation of the races.” The summer after the Court’s decision, Brady spearheaded the creation of the Citizens’ Councils, which purported to be a “nonviolent alternative to the Ku Klux Klan” that would ensure economic ruin to anyone supporting integration. According to Neil McMillen, “the nexus between the NAACP and the international Communist apparatus was the central motif of literally hundreds of Council speeches and publications.”

In late 1954 and early 1955, Citizens’ Councils sprang up across Alabama. From October to December 1955 alone, membership in the Alabama Councils grew from “a few hundred to twenty thousand.” The councils made clear their intentions to bury civil rights advocates in Alabama under economic and social pressures: “The white population in this country controls the money, and this is an advantage that the council will use in a fight to legally maintain complete segregation of the
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races. We intend to make it difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage.” This background highlights the importance of the membership lists at issue in NAACP v. Alabama: once the names of NAACP members became public, the Citizens’ Councils would ensure dire consequences.31

The controversy leading to NAACP v. Alabama began in June of 1956, when Alabama attorney general John Patterson initiated an action to enjoin the NAACP from operating within the state, arguing that the group was a “business” that had failed to register under applicable state law. The state court trial judge issued the injunction ex parte, explaining that he intended “to deal the NAACP a mortal blow from which they shall never recover.” The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review. When the NAACP refused to comply, the judge responded with a $10,000 contempt fine, which he increased to $100,000 five days later. After the Alabama Supreme Court rejected the NAACP’s appeal of the judge’s order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court.32

In its petition for certiorari, the NAACP contended that the actions of Patterson and the Alabama courts amounted to “a serious interference with essential freedom of speech, freedom of assembly, freedom of association, and the right to petition” and “an unlawful restraint by the State of Alabama of First Amendment rights.” Despite the mention of association, the NAACP’s substantive legal arguments relied on the rights of speech and assembly. In contrast to its cert petition, which implicitly made the incorporation argument, the NAACP’s brief endorsed the liberty argument: the organization and its members were “merely invoking their constitutionally protected rights of free speech and free association guaranteed under the due process clause of the Fourteenth Amendment.” The brief elaborated that “the unimpaired maintenance of freedom of association and free speech is considered essential to our political integrity” and quoted from Frankfurter’s Wieman concurrence that the right of association was “peculiarly characteristic of our people.” In its reply brief, the state of Alabama conceded the existence of a right of association. Using “association” and “assembly” interchangeably, the state contended that
“like the other basic First Amendment freedoms, freedom of assembly is protected by the Fourteenth Amendment against unreasonable impairment by the states.” The Court, according to the state, had “recently reaffirmed” the “constitutional status of association” in Sweezy.33

First Amendment scholar Leo Pfeffer submitted an amicus brief on behalf of a number of organizations, including the American Jewish Congress, the American Baptist Convention, the Commission on Christian Social Progress, the American Civil Liberties Union (ACLU), and the American Veterans Committee. The Court refused to consider the brief, but Pfeffer’s arguments are preserved in the record and illuminate the conflation of the constitutional and doctrinal concepts in the case. Pfeffer was best known for his work on the First Amendment’s religion clauses, but his 1956 book The Liberties of an American had included a section on assembly and association in which he had asserted that despite the absence of any mention of association in the Bill of Rights, “there can be little doubt that [the founding fathers] recognized the right to associate as a liberty of Americans.” He elaborated by drawing a distinction between association and assembly: “When men band together for a single public demonstration of feeling or expression of a grievance they exercise their right of assembly; when they continue banding and acting together until the grievance is redressed they exercise their right of association. Freedom of indefinite or permanent association is as fundamental to democracy and as much a liberty of Americans as freedom of temporary assembly, and no less entitled to constitutional protection.” But a few sentences later, Pfeffer collapsed the distinction, referring to “the right of assembly (i.e., association).”34

In his amicus brief, Pfeffer opened by appealing both to the liberty argument and to the incorporation argument: “Freedom of association is a liberty guaranteed against Federal infringement by the Fifth Amendment to the United States Constitution and against state infringement by the Fourteenth. In addition it is one of the co-equal guarantees of the First Amendment applied to the states by the Fourteenth.” In support of the liberty argument, Pfeffer contended that “a constitutional provision protecting liberty against arbitrary governmental deprivation would have little meaning if it did not encompass the freedom of men to associate with each other.” Turning to the incorporation argument, he
revealed the same confusion between association and assembly that he had exhibited in *The Liberties of an American*. He argued on the one hand that association was broader than assembly: “‘Freedom of association’ may be viewed as a right to conduct indefinitely continuing assemblies.” But he also asserted that assembly, not association, offered the key framework: “Freedom of assembly is not limited to occasional meetings but includes the organization of associations on a permanent basis.” This kind of confusion over the relationship of association to assembly would extend well beyond Pfeffer.\(^{35}\)

Oral argument in *NAACP v. Alabama* focused almost entirely on procedural and jurisdictional questions related to Alabama state law. The justices showed little interest in the freedom of association and asked no questions about its constitutional basis. NAACP attorney Robert L. Carter, who had advanced the incorporation argument in his cert petition and the liberty argument in his brief, now reverted back to the incorporation argument: the denial of “free speech and freedom of association” infringed upon a right “protected by the First Amendment.” Alabama assistant attorney general Edmon Rinehart made no argument regarding the constitutional source of association but conceded its status as an individual right.\(^{36}\)

The justices agreed that Alabama had infringed upon the associational rights of the members of the NAACP. After they had met in conference, Warren assigned the opinion to Harlan with the understanding that it would be unsigned or per curiam, in keeping with the Court’s practice in post-*Brown* race cases. But Harlan soon realized that “it would reflect adversely on the Court were we to dispose of the case without a fully reasoned opinion” and convinced his colleagues that he should write a full opinion.\(^{37}\)

Harlan’s opinion for a unanimous Court framed the constitutional question in terms of the “fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment.” He began his constitutional analysis by citing *De Jonge v. Oregon* and *Thomas v. Collins* for the principle that: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.” *De Jonge* and *Thomas* had
established that the freedom of assembly applied to the states through the Fourteenth Amendment, that it covered political, economic, religious, and secular matters, and that it could only be restricted “to prevent grave and immediate danger to interests which the State may lawfully protect.” Moreover, after observing that the Court in *American Communications Association v. Douds* had referred to “the varied forms of governmental action which might interfere with freedom of assembly,” Harlan concluded that “compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.”

Based on these precedents, Harlan could have resolved the case under the freedom of assembly. But he instead shifted away from assembly, finding it “beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” The Alabama courts had constrained the “right to freedom of association” of members of the NAACP. These members had a “constitutionally protected right of association” that meant they could “pursue their lawful private interests privately” and “associate freely with others in doing so.” Writing a few years after *NAACP v. Alabama*, Thomas Emerson suggested that Harlan “initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them,” and then “elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment.” But Harlan’s opinion is more ambiguous than Emerson suggests: it is not clear that Harlan relied at all on the First Amendment to ground association—the opinion, in fact, never mentions the First Amendment. A related question was whether Harlan’s opinion tied the new right of association more closely to the right of speech or to the right of assembly. Harlan’s reference to “the close nexus between speech and assembly” highlighted both rights, but the two decisions that he cited for this view were assembly cases, not speech cases. It is more likely that, as George Smith has argued, “the broad concept of a right of association . . . developed largely out of the right of assembly and in part out of due process concepts.”

Harlan’s vagueness about the source of the right of association may explain how he marshaled a unanimous opinion. In an earlier draft that
he circulated to his colleagues, Harlan had written: “It is of course firmly established that the protection given by the First Amendment against federal invasion of such rights is afforded by the Due Process Clause of the Fourteenth Amendment against state action.” Douglas and Frankfurter were both troubled by the draft language, but for opposite reasons. Frankfurter pushed Harlan to rely expressly on the liberty argument and avoid any mention of the First Amendment: “Why in heaven’s name must we, whenever some discussion under the Due Process Clause is involved, get off speeches about the First Amendment? Why can’t you . . . state in two or three sentences that to ask disclosure of membership . . . is, in the light of prior decisions, merely citing them, an invasion of the free area of activity under the Fourteenth Amendment not overcome by any solid, as against a very tenuous, interest of the state in prying into such freedom of action by individuals[?]”\(^4\)

Douglas, on the other hand, feared that Harlan’s due process analysis diluted the First Amendment as it applied to the states: “If the right of free speech is watered down by the Due Process clause of the Fourteenth Amendment and made subject to state regulation, then the police power of the state has a pretty broad area for application. If we are dealing here with something that can be regulated then I think we are in very deep water in this case, as for the life of me I do not see why a state could not have a rational judgment for believing that an organization like the NAACP was a source of a lot of trouble, friction, and unrest.” Douglas expressed particular concern over Frankfurter’s proposed balancing approach, which Harlan had endorsed in earlier opinions: “I thought that when we dealt with these racial problems and with free speech and free assembly and religious problems we were dealing with something that is right close to the absolute.”\(^4\)

Harlan had no affinity for Douglas’s argument, but he also expressed “the most serious misgivings” about Frankfurter’s advice. Nonetheless, his revised draft eliminated any reference to the First Amendment. This concerned Black, who thought that the opinion now read “as though the First Amendment did not exist.” Black notified Harlan that he planned on submitting a brief concurrence to specify “that the state has here violated the basic freedoms of press, speech and assembly, immunized from federal abridgement by the First Amendment, and made
applicable as a prohibition against the states by the Fourteenth Amendment.” But he relented six days later, writing to Harlan that while he “would prefer our holding be supported by different reasoning,” he realized that doing so would prevent the unanimous decision so important to the Court in cases involving questions of race.49

In the midst of satisfying Frankfurter, Douglas, and Black, Harlan had one other hurdle to clear with his opinion. The state of Alabama had argued that the Court was bound by Bryant v. Zimmerman, the 1928 case in which an 8–1 majority had upheld New York’s Manford Act against Ku Klux Klan member George Bryant’s challenge. The Court had dismissed Bryant’s assertion of a Fourteenth Amendment due process liberty right “of membership in the association,” concluding that this right “must yield to the rightful exertion of the police power.” Justice Van Devanter’s opinion had noted: “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. . . . Requiring [membership lists] to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required.” This broad deference to police power, with explicit approval of the public disclosure of the Klan’s membership list, may have prompted Douglas’s concern that resolving NAACP v. Alabama under the liberty argument would make it difficult to distinguish Bryant. Harlan concluded that Bryant “was based on the particular character of the Klan’s activities, involving acts of unlawful intimidation and violence,” and emphasized the “markedly different considerations in terms of the interest of the State in obtaining disclosure.” That was a plausible distinction, but Harlan’s efforts to appease the concerns raised by Frankfurter, Douglas, and Black left uncertain both the constitutional source of the right of association and its applicability in other contexts.45

Association after NAACP v. Alabama

It was clear that NAACP v. Alabama had broken new constitutional ground, but specifying exactly what had taken place proved elusive. The
Washington Post editorialized that the Court had “cut through the flummery of Alabama’s treatment of the NAACP and dealt with it as an outright violation of the freedom of assembly.” The New York Times suggested that the Court had relied on the liberty argument, writing that the decision rested upon “one of the ‘fundamental freedoms’ guaranteed by the due process clauses [sic] of the Fourteenth Amendment.” Meanwhile, the first round of commentary in the law reviews endorsed the incorporation argument, contending that Harlan’s opinion had located the freedom of association in the First Amendment. The only thing clear from these initial reactions was that nobody was clear about the source or scope of the new right of association.44

The Court’s first opportunities to apply NAACP v. Alabama came the following term in Uphaus v. Wyman and Barenblatt v. United States, two cases involving inquiries into alleged communist affiliations. The new freedom of association could have muted the overzealous investigations of the waning days of the McCarthy era. But while Anthony Lewis had characterized NAACP v. Alabama as “an illustration of the court’s concern for the Constitutional right to express beliefs and ideas, however unpopular, through effective means,” when the Court turned from the NAACP to the Communist Party, it became clear that not all associations were created equal.45

Uphaus involved another inquiry by New Hampshire’s attorney general, Louis Wyman, who had been on the losing end of the Court’s Sweezy decision two years earlier. Without mentioning the freedom of association, Justice Clark suggested that the case turned on “the single question of whether New Hampshire, under the facts here, is precluded from compelling the production of the documents by the Due Process Clause of the Fourteenth Amendment.” Clark concluded that the “governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy.” Brennan filed a lengthy dissent premised on “the constitutionally protected rights of speech and assembly.” Because he saw “no valid legislative interest” behind Wyman’s inquiry, Brennan didn’t see the need for any balancing of interests. He thought that the “Court’s approach to a very similar problem in NAACP v. Alabama should furnish a guide to the proper course of decision here.”46
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_Barenblatt_, which unlike _NAACP v. Alabama_ and _Uphaus_ involved a congressional action, gave the Court its first opportunity to explain how the new right of association applied to the federal government. There were two possibilities. If association were a First Amendment right, then it would apply directly to actions of Congress. If, on the other hand, association were rooted in liberty, it presumably would apply to the federal government through the Due Process Clause of the Fifth Amendment. Harlan’s opinion for the Court endorsed the former view: “The precise constitutional issue confronting us is whether the Subcommittee’s inquiry into [Barenblatt’s] past or present membership in the Communist Party transgressed the provisions of the First Amendment.”

_Barenblatt_ presented facts similar to those in _Watkins_, one of the Court’s 1957 Red Monday decisions. The HUAC had summoned Lloyd Barenblatt, who had taught psychology at Vassar, to ask him questions about an alleged affiliation with the Communist Party while he had been a graduate student at the University of Michigan. Like Watkins, Barenblatt had refused on First Amendment grounds to answer questions. In the earlier case, Chief Justice Warren had skirted the First Amendment challenge and instead concluded in general due process terms that Watkins could not reasonably have been expected to know which questions from the HUAC were pertinent to its legitimate inquiry. (Frankfurter later referred to Warren’s efforts as that “god-awful _Watkins_ opinion.”) Harlan, writing for the Court in _Barenblatt_, distinguished _Watkins_ on the basis that the HUAC questions to Barenblatt were relevant to the inquiry.

Like Clark in _Uphaus_, Harlan largely eschewed the right of association and instead used a “balancing of interests” analysis. Frankfurter had been pushing for this approach for some time, first in his _Dennis_ concurrence and more recently in his _Sweezy_ concurrence. When Harlan circulated a draft of his _Barenblatt_ opinion, Frankfurter responded with the suggestion that Harlan include “a few pungent paragraphs putting the case in its setting.” This should happen “before the reader gets involved in the details of balancing.” Harlan’s revised opinion incorporated Frankfurter’s suggestions and emphasized “the close nexus between the Communist Party and violent overthrow of government.”

As Lucas Powe notes, Harlan never explained how the government’s “right of self preservation” related to “asking a former psychology
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instructor at Vassar about meetings when he was a graduate student.” Moreover, Harlan failed to articulate a single interest of Barenblatt’s against which the government’s interests could be balanced, noting only that “the record is barren of other factors which, in themselves, might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state.” Black’s dissent quipped that Harlan had rewritten the First Amendment to read, “Congress shall pass no law abridging the freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.” In a poignant passage, Black wrote:

The fact is that, once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men’s minds because some of its members are bad and some of its tenets are illegal, no group is safe. . . . History should teach us [that] in times of high emotional excitement, minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs, and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time.50

Neither Clark in Uphaus nor Harlan in Barenblatt had elaborated upon the constitutional right of association that the Court had recognized in its previous term. Harlan referred only once to “rights of association assured by the Due Process Clause of the Fourteenth Amendment.” Clark mentioned “associational privacy” made applicable through “the Due Process Clause of the Fourteenth Amendment.” But both decisions avoided a direct application of the new right, which would come not in a communist case but in one with facts remarkably similar to those in NAACP v. Alabama.51

In Bates v. City of Little Rock, the Court reviewed the convictions of two NAACP records custodians who had refused to produce local
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member lists as required by ordinances in two Arkansas cities. Like the disclosure order that had led to the Alabama litigation, the Arkansas ordinances were designed to cripple the NAACP. Relying on the freedom of association, Justice Stewart’s majority opinion cited *De Jonge* and *NAACP v. Alabama* to link association with assembly: “Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty [citing the First Amendment]. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.” As with Harlan’s wording in *NAACP v. Alabama*, Stewart’s language could be read to support either the incorporation argument or the liberty argument. To confuse matters further, Black and Douglas argued in a joint concurrence: “The ordinances as here applied violate freedom of speech and assembly guaranteed by the First Amendment which this Court has many times held was made applicable to the States by the Fourteenth Amendment. . . . One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right.”

Ten months after *Bates*, Stewart again wrote for the majority, in *Shelton v. Tucker*. The case involved a challenge to an Arkansas statute requiring every teacher at a state-supported school or college to file an annual affidavit disclosing all organizations to which he or she had belonged or regularly contributed in the previous five years. Although the affidavit requirement wasn’t overtly aimed at the NAACP, the Arkansas statute clearly targeted the organization. In *Bates*, Stewart had cited *De Jonge* to link association and assembly. In *Shelton*, he again cited *De Jonge* but now omitted any reference to assembly, referring instead to a “right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.” Unlike the unanimous decisions in *NAACP v. Alabama* and *Bates*, the Court split 5–4 in *Shelton*, with Frankfurter and Harlan joined by Clark and Whittaker in dissent. Harlan’s dissent asserted that “the rights of free speech and association embodied in the ‘liberty’ assured against state action by the
Fourteenth Amendment are not absolute,” reiterating both his liberty argument and his endorsement of a kind of balancing.\textsuperscript{53}

In 1961, a year after Shelton, Douglas wrote the majority opinion in \textit{Louisiana v. NAACP}. The case had arisen in 1956, after Louisiana sought to enjoin the NAACP from doing business in the state. The state asserted that the NAACP had violated two statutes, the first of which prohibited associations from doing business with out-of-state communist or subversive organizations, and the second of which required “benevolent” associations to disclose the names and addresses of all officers and members regulating associations. The Court struck down both statutes. Douglas dispensed with the first provision on vagueness grounds without referring to the right of association. Turning to the second provision, Douglas wrote that “freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.” He interpreted Shelton to have emphasized that “any regulation must be highly selective in order to survive challenge under the First Amendment” and peppered his opinion with other references to the First Amendment. The four dissenting justices in Shelton concurred in the judgment but not in Douglas’s opinion.\textsuperscript{54}

The first four cases in which a majority of the Court had explicitly relied on the constitutional right of association (\textit{NAACP v. Alabama}, Bates, Shelton, and \textit{Louisiana v. NAACP}) had all invalidated regulations aimed at the NAACP. These decisions were vital to the Civil Rights Movement. As Samuel Walker has argued, “the NAACP could not have survived in the South, and the civil rights movement would have been set back for years, without the new freedom of association protections.” But if upholding a right of association for members of the NAACP sustained that organization’s existence, the failure to enforce that same right on behalf of members of the CPUSA almost certainly contributed to its demise.\textsuperscript{55}

While a majority of the Court had already shown a reluctance to apply or even acknowledge a right of association for communists in \textit{Uphaus} and Barenblatt, the trend intensified in 1961. In \textit{Communist Party v. Subversive Activities Control Board (SACB)}, the Court reviewed the Subversive Activities Control Act, which imposed registration and disclosure requirements on
“subversive” organizations. Harry Kalven has suggested that SACB “should have been the architectonic case for freedom of association” because the statute at issue “aimed at sanctioning association and thus openly posed the issue that had been disguised as a speech problem in Dennis.” Instead, the Court upheld the entire act in the same 5–4 split as Uphaus and Barenblatt. Frankfurter wrote the lengthy majority opinion, distinguishing the case from NAACP v. Alabama, Bates, and Shelton based on “the magnitude of the public interests which the registration and disclosure provisions are designed to protect” and “the pertinence which registration and disclosure bear to the protection of those interests.” Although the justices disagreed on the outcome, they all agreed that the right of association applied to the federal government through the First Amendment.56

On the same day that it decided SACB, the Court issued its 5–4 decision in Scales v. United States. Harlan wrote the opinion upholding a conviction under the Smith Act’s membership clause, which he construed as requiring proof of “active” rather than merely “passive” membership in the Communist Party. Harlan insisted that a conviction under the act required the government to establish more than mere membership, but “active and purposive membership, purposive that is as to the organization’s criminal ends.”57

All nine justices had backed the right of association for the NAACP in NAACP v. Alabama, Bates, and Louisiana v. NAACP. Stewart’s vote had ensured a similar outcome in Shelton. But in Uphaus, Barenblatt, SACB, and Scales, Stewart joined Frankfurter, Harlan, Whittaker, and Clark to deny these same associational protections to the CPUSA. In the words of ACLU legal director Mel Wulf, there were “red cases and black cases.” Kalven phrased it more bluntly: “The Communists cannot win, the NAACP cannot lose.”58

There was certainly a kind of double standard at work, but it was more complicated than Wulf and Kalven suggested. For one thing, the conservative justices were largely convinced by the severity of the communist threat they perceived. We can now see clear instances of overreaching on and off the Court, but it remains the case that communist organizers generally raised national security concerns different from those that civil rights activists raised.
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Harlan’s judicial restraint and deference to government officials on national security matters made him less than eager to join the Warren Court’s curtailment of government inquiries in the name of civil liberties. *NAACP v. Alabama* had been an easy case for him because he believed that Alabama hadn’t shown any legitimate interest in the NAACP’s membership list. *Bates* differed from *NAACP v. Alabama* and required a balancing of interests. Although the decision ended up unanimous, Harlan had originally drafted a dissent. According to Brennan’s conference notes, Harlan believed that while “there can be little doubt that much of the association information called for by the statute will be of little or no use whatever to the school authorities,” he could “not understand how those authorities can be expected to fix in advance the terms of their inquiry so that it will yield only relevant information.” *Shelton* had been even closer than *Bates* and hinged on Stewart’s vote. The four dissenters (Frankfurter, Harlan, Whittaker, and Clark) believed that the government had shown a rational relationship between its articulated interest and the nature of the regulation. And while Stewart disagreed in *Shelton*, his position in the communist cases left open the possibility that a better articulated government interest would prevail over an NAACP claim to the right of association.\(^9\)

The fracture over communism and civil rights meant that a Supreme Court case connecting communism and the NAACP “was every segregationist’s dream” and offered “the South the chance to take out the NAACP by painting the organization red.” That case began in 1956, when the Florida legislature started to investigate an alleged communist influence on the NAACP. As part of its inquiry, the legislative investigation committee subpoenaed the membership list of the organization’s Miami branch. Theodore Gibson, the custodian of the list, refused to produce it, asserting that doing so would violate the associational rights of members of the NAACP. He did, however, volunteer to answer questions based on his personal knowledge, and when the committee provided him with the names and pictures of fourteen individuals, he testified that they were not to his knowledge members of the NAACP. The committee nonetheless cited Gibson for contempt for his failure to produce the records, and he was fined $1,200 and sentenced to six months’ imprisonment. The Florida Supreme Court upheld his conviction, and Gibson appealed to the United States Supreme Court.\(^6\)
At the conference following oral argument, Warren protested that affirming *Gibson* would mean overruling *NAACP v. Alabama* because even under a balancing theory the state had shown “no adequate interest.” But Harlan viewed the investigation as “a bona fide inquiry into Communism” rather than “a plot to destroy [the] NAACP.” The justices voted to uphold the conviction, and it appeared that the government’s national security interests would prevail over the NAACP’s right of association. Frankfurter, the senior justice in the majority, assigned the opinion to Harlan.⁵¹

Five months later, before Harlan had circulated a draft of his opinion, Whittaker retired from the Court, and the case (now deadlocked at 4–4) was held over for reargument. Then Frankfurter suffered a stroke and left the Court. When *Gibson* was reargued the following term, Byron White had replaced Whittaker, and Arthur Goldberg had succeeded Frankfurter. Goldberg provided the fifth vote for the NAACP. He wrote the majority opinion, distinguishing the case from earlier legislative investigation cases because Gibson had not been asked about his own associations with the Communist Party. Samuel Walker suggests that “*Gibson* was the clearest indication of the extent to which the Court granted to the NAACP the protections it had refused to extend to the Communists.”⁶⁰

Black and Douglas wrote separate concurrences. In Black’s view, “the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular.” Douglas’s concurrence posited three arguments for rooting association in the First Amendment. He first advanced the incorporation argument, describing “the authority of a State to investigate people, their ideas, their activities,” and asserted that “by virtue of the Fourteenth Amendment the State is now subject to the same restrictions in making the investigation as the First Amendment places on the Federal Government.” Douglas took direct aim at Harlan in a footnote: “Some have believed that these restraints as applied to the States through the Due Process Clause of the Fourteenth Amendment are less restrictive on them than they are on the Federal Government. That is the view of my Brother Harlan. . . . But that view has not prevailed. The Court has indeed applied the same First Amendment requirements to the States as
to the Federal Government.” Douglas then highlighted the right of assembly:

Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment, which provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people, peaceably to assemble, and to petition the government for a redress of grievances.” “Peaceably to assemble” as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. Historically the right to assemble was secondary to the right to petition, the latter being the primary right. But today, as the Court stated in De Jonge v. Oregon, “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” Assembly, like speech, is indeed essential 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. The holding of meetings for peaceable political action cannot be proscribed. A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.

Finally, Douglas revisited the “bundle of rights” language that had appeared in his *Louisiana v. NAACP* opinion and his *SACB* dissent. He connected this bundle to a “right of privacy”: “The right of association has become a part of the bundle of rights protected by the First Amendment, and the need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves. Unpopular groups like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.” According to Douglas, then, the right of association was: (1) derivative of the First Amendment right of assembly; (2) “part of the bundle of rights protected by the First Amendment”; and (3) related to “the right of privacy implicit in the First Amendment.”
As the Court proceeded in its attempts to ground the new right of association, scholars produced a stream of historical and doctrinal analyses. Book-length treatments included Glenn Abernathy’s *Right of Assembly and Association*, Charles Rice’s *Freedom of Association*, and David Fellman’s *Constitutional Right of Association*. These works attempted to narrate a history of association absent from nearly two centuries of American constitutional law. Fellman, for example, suggested that “however ill-defined they may be, the rights of association have a definite place in American constitutional law.” Rice argued that “the right to associate for the advancement of ideas ha[d] been recognized implicitly in the past, and it ha[d] underlain important decisions which have been formally ascribed to the application of other freedoms.” Carl Beck’s *Contempt of Congress* took the most creative route, referring to a nonexistent “freedom of political affiliation [clause] of the First Amendment.”

Abernathy provided the most comprehensive account of association. He had first speculated about a right of association in a 1953 article published in the *South Carolina Law Quarterly*. Quoting extensively from Tocqueville and Arthur Schlesinger, Abernathy had suggested that the importance of freedom of association in a democratic society “cannot be overestimated.” Noting that the Supreme Court had at that time yet to recognize a right of association, he argued that it was nonetheless “a right cognate to those of free speech and free assembly.” Abernathy expressed concern that Congress’s anticommunist legislation and the Court’s *Adler* decision hindered Americans from joining all but the most “ultra-acceptable” associations. He decried “shotgun legislation which endangers the whole institution of voluntary association” and argued for a “broad freedom to associate.” But Abernathy’s principal concern for group autonomy had little to do with protecting unpopular or dissenting groups like the Communist Party. Rather, in his instrumental view, “[associations] serve as a training ground for group participation, organization and management of people and programs, and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and
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legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems."65

Abernathy’s book-length treatment eight years later underscored the themes of his earlier article: “Experience in various associations is virtually a guarantee of respect for the majority view. It does not necessarily lead to complete acceptance of the majority will, but it does lead usually to a sufficient respect for that will to enable the group to act in concert once a decision has been made. This acquiescence in the decisions of the majority, based in large part on experience in associations of various types, is an important explanation of the fact that Americans can close ranks and function as a strongly united nation after an election which is preceded by almost violent contests between the two major political parties.” This characterization contained two implicit assumptions, neither of which is inherent in the nature of groups. The first was that a kind of bounded consensus across groups ensured stability in the midst of disagreement. The second was that the internal practices of associations mirrored majoritarian democratic practices.66

Abernathy intimated that NAACP v. Alabama had relied expressly on the right of assembly. He argued that the decision had placed the right of association within an “expanded meaning” of the right of assembly, and that association was “clearly a right cognate to the right of assembly.” The right of assembly “need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall. It can justifiably be extended to include as well those persons who are joined together through organizational affiliation.” Abernathy also noted an additional constraint imposed by the right of association:

It must be noted that NAACP v. Alabama does not clearly extend the First Amendment protection to all lawful affiliations or organizations. What Justice Harlan discusses is the association “for the advancement of beliefs and ideas.” Clearly a vast number of existing associations would fall within this description, but it is questionable whether the characterization would fit the purely social club, the garden club, or perhaps even some kinds of trade or professional unions. No such distinction has been drawn in the cases squarely involving freedom of assembly questions. The latter cases emphasize that the right extends to any lawful assembly, without a specific requirement that there be an intention to advance beliefs and ideas.
In observing the limitation in scope, Abernathy had detected an important distinction in Harlan’s opinion between assembly and association. He quickly brushed it aside: “The practical effect, of course, may be unimportant, since fairly obviously the Court would be inclined to scrutinize restrictions on social clubs less closely than those on organizations identifying themselves more intimately with the political process.” But the real danger is greater than Abernathy surmised; it becomes apparent when we consider who decides whether an organization exists “for the advancement of beliefs or ideas” or is involved “intimately with the political process.” The Court would reveal the extent of this danger a generation later in its creation of intimate association and expressive association and the subjective interpretations that they required. As Abernathy noted, these constraints are absent in the right of assembly.67

It is not entirely surprising that scholarly treatment of the right of association reflected the Court’s own lack of clarity. Writing in 1964, Thomas Emerson observed that “the constitutional source of ‘the right of association,’ the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth,” and that “the various justices have differed among themselves on all these matters.” Emerson warned that “a general ‘right of association’ does not carry us very far in the solution of concrete issues” and “current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines.” But because the right of association was in large part a right without a constitutional history, its contours were more likely to be shaped by the intellectual context in which it emerged than by “traditional constitutional doctrines.”63

Pluralist Political Theory

The preceding sections of this chapter addressed two contextual factors that contributed to the constitutional framework for the right of association: (1) a political factor (the conflation of anticommunist sentiment and the rise of the Civil Rights Movement); and (2) a jurisprudential factor (the infighting on the Court over the proper way to ground the right of association and the relationship between association and assembly). This section introduces a theoretical factor: the pluralist political theory of the
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mid-twentieth century. Pluralist assumptions popularized by David Truman and Robert Dahl exacerbated the political and jurisprudential factors affecting the right of association and helped the new right gain traction in legal and political discourse.

The pluralist tradition that began in the early twentieth century changed the way in which American political thought conceived of the relationship between groups and the state. Unlike some of its British antecedents, American pluralism advanced its own insistent claim that politics relocated among groups achieved a harmonious balance within a broad consensus that supported American democracy. The balance assumption sprang from the pluralist need to attribute the relative stability in democratic society to something other than centralized state power. The consensus assumption perpetuated an exaggerated claim of homogeneity in American history and culture that downplayed fundamental differences between groups. These two assumptions were present in early American pluralists like Arthur Bentley, and they became even more pronounced in postwar pluralists like Truman and Dahl.

Truman and Dahl invoked familiar authorities to support their assumptions of balance and consensus: Tocqueville’s *Democracy in America* and Madison’s *Federalist* No. 10. But their interpretive efforts misread Madison and decontextualized Tocqueville. With Madison, they converted a negatively construed “faction” into an inherently valuable and implicitly benign “interest.” With Tocqueville, they extrapolated a theory derived from the harmony of interests observed in a homogenous segment of the population in preindustrial America to the diversity of interests existing in an increasingly fractured industrialized society. Perhaps most ironically, the pluralist adaptations of Madison and Tocqueville jettisoned both theorists’ warnings about the tyranny of the majority. By presupposing conformity to basic majoritarian conceptions of democracy as a predicate to associational autonomy, pluralists reopened the door to state control and endorsed the very danger against which Madison and Tocqueville had hedged. These pluralist views—and their consequences—set the theoretical context for the constitutional right of association that emerged in the 1950s and 1960s.

The pluralist thought that captured American political science in the mid-twentieth century began with theorists who challenged the modern
state’s claim to sovereignty, which had gained prominence in German idealism and entered American political thought through Francis Lieber. While Lieber and others had placed the locus of power and politics in the state, early pluralists looked instead at the groups that constituted society. The pluralist argument ran contrary not only to German idealism but also to classical liberalism, which in its own way assumed the primacy of the state. The critique of state-centered theory meant that the state “began to lose ground as an account of political reality.” But pluralists weren’t anarchists, and without Leviathan, they needed something else to account for the relative peace that they observed in American society. They concluded that in the absence of state coercion (the existence of which they downplayed), stability came from a balancing of interests and power among the various groups that made up the political life of society.\footnote{71}

The pluralist view of balanced power began with Arthur Bentley’s *Process of Government*, which provided one of the earliest systematic attempts to challenge state-centered theory. Bentley’s “group basis of politics” focused on interests expressed through group activity. He described “the push and resistance between groups” as “pressure” and suggested that “the balance of the group pressures is the existing state of society.” For Bentley, groups formed the fundamental ontology of politics: “When the groups are adequately stated, everything is stated.” Despite its frontal attack on state sovereignty, *The Process of Government* received scant attention in its first printing in 1908. It would, in fact, take a generation before political scientists embraced it for its theory and methodology. But in the intervening years, the monist account of state sovereignty suffered a further setback when German idealism fell out of favor after the First World War.\footnote{72}

The alternative theory of politics that emerged in American political thought arrived through the British pluralist Harold Laski. Laski challenged the assumption that the state absorbed all individual loyalties within a community. In Herbert Deane’s words, Laski’s early political writings were a “constant polemic” against “the conception that the state is to political theory what the Absolute is to metaphysics, that it is mysteriously One above all other human groupings, and that, because of its superior position and higher purpose, it is entitled to the undivided
allegiance of each of its citizens.” Laski asserted that “the state is only one among many forms of human associations,” and he advocated decentralized power in which individuals increasingly turned to private groups to meet their interests and needs. He believed the transfer of governmental functions to private entities divided political power. During the early 1920s, Laski repeatedly “turned to pluralism as both a ‘realistic’ account of politics and as the basis of a new democratic theory.”

While Laski and other British pluralists posited a polarized relationship between groups and the state, American pluralism took a more benevolent form that gained wide acceptance in the 1930s through “mutually reinforcing empirical studies of group activity and accounts of the new image of democracy which were contrasted with totalitarianism.” By the end of the 1930s, “liberalism in political science largely meant pluralism, and pluralism was both a descriptive and a normative thesis.” Pendleton Herring’s 1940 book *The Politics of Democracy* claimed that “along with party integration and governmental accountability, political rationality was to be found in the conflict and adjustment between interest groups.” This meant that “democracy was not a matter of theology and creeds, but the practice of tolerance and compromise.” The pluralist notion of balance extended from political to economic descriptions with John Kenneth Galbraith’s ideas of “countervailing power” and “counterpressures.” Meanwhile, David Riesman argued that power was distributed among “veto groups” that displayed a “necessary mutual tolerance” and “mirror[ed] each other in their style of political action, including their interest in public relations and their emphasis on internal harmony of feelings.” Godfrey Hodgson later recalled the fusion of balance and stability that permeated the pluralist era, observing that “the businessman and the unskilled laborer, the writer and the housewife, Harvard University and the Strategic Air Command, International Business Machines and the labor movement, all had their parts to play in one harmonious political, intellectual, and economic system.”

In 1951, David Truman’s *Governmental Process* described “the vast multiplication of interests and organized groups in recent decades” whose activities “imply controversy and conflict, the essence of politics.” Truman asserted that “the behaviors that constitute the process of government cannot be adequately understood apart from the groups.”
These interests balanced each other: multiple memberships in “potential groups” collectively formed a “balance wheel” in politics. Truman argued that “without the notion of multiple memberships in potential groups it is literally impossible to account for the existence of a viable polity such as that in the United States or to develop a coherent conception of the political process.”

The most important theorist of postwar pluralism was Robert Dahl. Although he drew upon early pluralists like Laski, his outlook was defined by the “behavioral approach” that manifested “a strong sense of dissatisfaction with the achievements of conventional political science, particularly through historical, philosophical, and the descriptive-institutional approaches.” With Dahl’s influence, “the mid-1960s marked the apotheosis of pluralism as the substance of the vision of both domestic and comparative politics accepted by behavioralism, and it was embedded in most of the conceptual schemes for political analysis.” Over time, Dahl muted some of his more strident assertions, but his initial claims shaped a generation of political science scholarship.

Dahl sought to describe how power was exercised in political decision making. He started with the premise that the United States was a “polyarchy,” by which he meant a “mixture of elite rule and democracy.” Against the “ruling-elite model” advanced by sociologists like C. Wright Mills, Dahl argued that power was diffused among a wide range of groups. Democracy was a “government by minorities.” Avigail Eisenberg explains the conclusions that flow from this premise: “The direction that public policy follows depends on the nature of the coalition of minorities that dominates the policy-making scene at any given instant. The groups’ reliance on each other creates an informal system of checks and balances in which no group is able to dominate the others. There is no chance for a minority to dominate a coalition because other minorities within the coalition will defect. Similarly, majorities are unable to pose a threat, since they are comprised of small groups, any of which may defect from the coalition if the policy direction changes.” Paradoxically, then, the lack of widespread agreement produced a stability that prevented discord. For Dahl, the American political system reflected “a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace.”
Dahl’s most explicit endorsement of pluralism is found in his 1967 text *Pluralist Democracy in the United States*: “Multiple centers of power, none of which is or can be wholly sovereign,” represented “the fundamental axiom in the theory and practice of American pluralism,” which meant that “because one center of power is set against another, power itself will be tamed, civilized, controlled, and limited to decent human purposes, while coercion, the most evil form of power, will be reduced to a minimum.” Dahl recognized that in polyarchies “a great many questions of policy are placed in the hands of private, semipublic, and local governmental organizations such as churches, families, business firms, trade unions, towns, cities, provinces, and the like.” But his list left curiously ambiguous which entities were “private” and which were “semipublic.” Further, Dahl seemed unduly sanguine in his assessment that “whenever a group of people believe that they are adversely affected by national policies or are about to be, they generally have extensive opportunities for presenting their case and for negotiations that may produce a more acceptable alternative.” Like earlier pluralists, Dahl generally failed to account for the kinds of public power now dissipated among private groups. Thus, for example, he contended that most conflict between groups would be resolved not by coercion but by “peaceful adjustment.”

Some of Dahl’s claims about the “extensive opportunities” for negotiations and prospects for “peaceful adjustment” seemed terribly at odds with events unfolding in American society, like civil rights sit-ins, campus activism, and antiwar protests. But as John Gunnell writes, the behavioralism popularized by Dahl meant that “at the very historical moment that events such as [these] were taking place, political science research seemed to ignore these matters in favor of the study of such things as voting.” The pluralist narrative that power dispersed among groups led to a balanced equilibrium resonated with the statistically driven methods that had entered the discipline of political science. Pluralists, like some of their quantitative heirs in political science today, believed that by identifying the proper data and methodology, politics could be reduced to a system of solvable equations. Because equations balanced and followed logical patterns, then so must the forms of power that pluralists observed in groups.

Even more pronounced than the pluralist gloss on balance was its assumed consensus of democratic beliefs and values. The beginnings of
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this consensus narrative emerged in the era of industrialization. The economic focus of progressive reforms of the early twentieth century had led to “a belief in the capacity of American abundance to smooth over questions of class and power by creating a nation of consumers.” In Alan Brinkley’s assessment, liberal reformers were confident “that their new consumer-oriented approach to political economy had freed them at last from the need to reform capitalist institutions and from the pressure to redistribute wealth and economic power.”

The pluralist consensus can be traced to Bentley, who asserted that all struggles between groups proceeded within a “habit background.” These constraints limited “the technique of the struggle” employed by groups such that “when the struggle proceeds too harshly at any point there will become insistent in the society a group more powerful than either of those involved which tends to suppress the extreme and annoying methods of the groups in the primary struggle.” These background assumptions had a tremendous normalizing effect: “It is within the embrace of these great lines of activity that the smaller struggles proceed, and the very word struggle has meaning only with reference to its limitations.” As Myron Hale concluded: “Bentley’s science of politics ended in a science of control within a closed system.”

Although Bentley’s early hints at a consensus narrative were only later adopted by postwar pluralists, the idea of consensus was in the air elsewhere in American political thought. Writing in 1939, John Dewey concluded that American culture had produced “a basic consensus and community of beliefs.” Fourteen years later, Daniel Boorstin echoed Dewey in heralding the national consensus of liberal values as part of the “genius of American politics.” The growing consensus was also buttressed by historians like Louis Hartz, whose 1955 book The Liberal Tradition in America argued that the “moral unanimity” of Americans stemmed from a “nationalist articulation of Locke” that had been the only significant intellectual influence upon the American founders. While earlier historians like Charles Beard had focused on tensions arising from class distinctions, mid-twentieth-century scholarship heralded “the consensus, rather than the conflict, between Americans.” By the late 1950s, the liberal endorsement of a welfare and labor system predicated
on a fundamental belief in the capitalist state prompted Daniel Bell to declare the “end of ideology.”

Against this background, Truman’s Governmental Process called attention to “potential” groups that reflected “those interests or expectations that are so widely held in the society and are so reflected in the behavior of almost all citizens that they are, so to speak, taken for granted.” These “widely held but unorganized interests” constituted the “rules of the game.” And the rules of the game enforced by unorganized interests constrained the practices of organized interests. In other words, a sufficiently homogenous background consensus shared by all citizens not only sustained the public order—which, for Truman, included “reinforcing widely accepted norms of ‘public morality’”—but also bounded the extent to which groups diverged from that shared consensus. Broad compliance was critical because “the existence of the state, of the polity, depends on widespread, frequent recognition and conformity to the claims of these unorganized interests and on activity condemning marked deviations from them.” The rules of the game give politics a “sense of justice,” and violating them “normally will weaken a group’s cohesion, reduce its status in the community, and expose it to the claims of other groups.”

But Truman also recognized that his balance wheel would encounter friction based on differences in group experiences, frames of reference, and “rationalizations.” To illustrate how the normative effects of a group on its members could lead to beliefs outside the mainstream, Truman posited the example of military training: “A group of professional military officers, recruited at an early age, trained outside of civilian institutions, and practising the profession of arms in comparative isolation from other segments of the society, easily may develop the characteristics of a caste. Such a group not only will generate its own peculiar interests but also may arrive at interpretations of the ‘rules of the game’ that are at great variance with those held by most of the civilian population. In such a case multiple membership in other organized groups is slight and that in potential widespread groups is unlikely.” For Truman, this unattended divergence from the rules of the game threatened the health of democracy, and he saw it advancing within groups far less innocuous than the United States military. Communist organizations provided one example
of worrisome groups falling outside the consensus. The rising Civil Rights Movement in the South provided another example: “The emergence in the disadvantaged classes of groups that reflect materially different interpretations of the widespread interests may encourage conflict and at the same time provide an inadequate basis for peaceful settlement. The appearance of groups representing Negroes, especially in the South, groups whose interpretations of the ‘rules of the game’ are divergent from those of the previously organized and privileged segments of the community, are a case in point.”

Truman believed that widespread divergence could be mitigated because the rules of the game could be “acquired by most individuals in their early experiences in the family, in the public schools (probably less effectively in the private and parochial schools), and in similar institutionalized groups that are also expected to conform in some measure to the ‘democratic mold.’” He didn’t expressly acknowledge it, but the imposition of a “democratic mold” collapsed pluralism into a position similar to the state-centered idealism that pluralism had originally challenged: lurking behind a seemingly benign agreement of values was the normative (and coercive) association of the state. As Earl Latham suggested in 1952, the state is the “custodian of the consensus” and “helps to formulate and to promote normative goals, as well as to police the agreed rules.” Reflecting the degree to which pluralism had diverged from its initial antistatist claims, Latham added that “in the exercise of its normative functions,” the state “may even require the abolition of groups or a radical revision of their internal structure.”

Dahl, like Hartz, Bell, and Truman, located American politics within a broad consensus: “Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members. Without such a consensus no democratic system would long survive the endless irritations and frustrations of elections and party competition. With such a consensus the disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement.” For Dahl, this consensus was not a normative aspiration but an empirical fact. Under his influence, methodological assumptions set the
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rules of debate over what counted as politics and scholarship on politics, and in this way behavioralists enforced their own normative consensus on political thought. The dominance of research paradigms buttressed normative claims, and consensus about methodology uncritically reinforced consensus about substance.86

Dahl argued that the pluralist consensus included “a belief in democracy as the best form of government, in the desirability of rights and procedures insuring a goodly measure of majority rule and minority freedom, and in a wide but not necessarily comprehensive electorate.” Writing in 1961, he asserted: “To reject the democratic creed is in effect to refuse to be an American. As a nation we have taken great pains to insure that few citizens will ever want to do anything so rash, so preposterous—in fact, so wholly un-American.” Dahl also believed that the “ideological convergence reflecting a wide acceptance by Americans of their institutions” made it “extraordinarily difficult (and, up to now, impossible) to gain a big public following for a movement that openly seeks comprehensive, radical, or revolutionary changes in a large number of American institutions.” As a result, Dahl argued that “radical movements” had been wholly ineffective in American politics: “Throughout the history of the United States, political life has been almost completely blanketed by parties, movements, programs, proposals, opinions, ideas, and an ideology directed toward a large mass of convergent ‘moderate’ voters. The history of radical movements, whether of right or left, and of antisystem parties, as they are sometimes called, is a record of unrelieved failure to win control over the government.” But as long as groups operated within the boundaries of consensus, Dahl believed that the American political system provided “a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision.”87

The consensus assumption of pluralism laid the foundation for the freedom of association in two ways. First, it established an implicit expectation that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises and, conversely, that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because the consensus excluded groups beyond the margins of acceptability, the pluralist gloss on the
groups that remained within its boundaries was unqualifiedly positive. Groups were not only fundamental to American politics, they created harmony and balance through reasoned and appropriately constrained disagreement.

The idea that groups were valuable to democracy only to the extent that they supported democracy was bereft of either authority or tradition in American political thought. And because pluralists were attempting to define themselves in opposition to the oppressive tendencies they observed in European politics, they needed to appeal to the American context to substantiate their views. On the subject of groups and associations, Madison and Tocqueville were the obvious candidates. Madison had argued in *Federalist* No. 10 that one of the most important advantages of “a well constructed union” was its “tendency to break and control the violence of faction.” The “latent causes of faction” were “sown in the nature of man.” As Madison elaborated: “A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for preeminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.” Factions, by Madison’s definition, were adverse “to the permanent and aggregate interests of the community.”

Pluralists looking back at Madison through the lens of the presumed consensus of mid-twentieth-century America read his negative connotations out of the *Federalist*. Truman suggested that Madison’s factions “carry with them none of the overtones of corruption and selfishness associated with modern political groups.” Theodore Lowi charged that Truman’s reasoning turned Madison on his head:

Note, for example, the contrast between the traditional and the modern definition of the group: Madison in *Federalist* 10 defined the group (“faction”) as “a number of citizens, whether amounting to a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, adverse to the right of other citizens, or to the
permanent and aggregate interests of the community.” Modern political science usage took that definition and cut the quotation just before the emphasized part. In such a manner, pluralist theory became the handmaiden of interest-group liberalism, and interest-group liberalism became the handmaiden of modern American positive national statehood.89

Unlike Truman, Dahl recognized Madison’s belief “that a faction will produce tyranny if unrestrained by external checks.” But Dahl misread Madison’s apprehension to pertain solely to “majority factions.” Although nothing in Madison’s account assigned an inherently positive value to divided interests, Dahl contended that “no political group has ever admitted to being hostile to” the “permanent and aggregate interests of the community.” Rather, the “numerous, extended, and diverse” minority interests were part of “the restraints on the effectiveness of majorities imposed by the facts of a pluralistic society.” These varied interests operated within a broad consensus and posed no inherent danger to democracy. Dahl thought that Madison had underestimated “the importance of the inherent social checks and balances existing in every pluralistic society” that came through these interests and had not appreciated “the role of social indoctrination and habituation in creating attitudes, habits, and even personality types requisite to a given political system.”90

Lance Banning has argued that the “pluralist misreading” of Federalist No. 10 attained its “widest influence” through Dahl. The “cruder forms” of this misreading suggested “that Madison delighted in the clash of special interests and identified the outcome of such clashes with the public good.” Quoting Daniel Walker Howe, Banning notes that “‘faction’ was not a value-free concept for Publius; a faction was by definition evil.” Madison biographer Ralph Ketcham also dissents “from the view that sees Madison, especially in his tenth Federalist Paper, as validating modern conflict-of-interest politics.” By disregarding the dangers inherent in minority factions, pluralism transformed Madison’s faction into a domesticated group whose interests were broadly aligned with those of the modern liberal state.91

Unlike Madison, Tocqueville drew no negative conclusions about “voluntary associations.” He instead “subverted” Madison’s analysis of
factions and “regarded associations as a valuable way of connecting people by overcoming some effects of individualism.” Tocqueville’s optimism stemmed in part from his idealized view of associations in America: “In America the citizens who form the minority associate, in order, in the first place, to show their numerical strength, and so to diminish the moral authority of the majority; and, in the second place, to stimulate competition, and to discover those arguments which are most fitted to act upon the majority; for they always entertain hopes of drawing over their opponents to their own side, and of afterward disposing of the supreme power in their name. Political associations in the United States are therefore peaceable in their intentions, and strictly legal in the means which they employ; and they assert with perfect truth that they only aim at success by lawful expedients.” In other words, Tocqueville presupposed that associations in America would never seriously threaten the stability of government in America. He elaborated, tellingly, that “in a country like the United States, in which the differences of opinion are mere differences of hue, the right of association may remain unrestrained without evil consequences.”

Dahl believed that Tocqueville was “struck by the degree of political, social, and economic equality among Americans” and had “made this observation the very kernel of his famous analysis of American democracy.” Dahl maintained, based on his reading of Tocqueville, that “Americans almost unanimously agree on a number of general propositions about democracy.” Writing in 1961, he contended: “Throughout the country then the political stratum has seen to it that new citizens, young and old, have been properly trained in ‘American’ principles and beliefs. Everywhere, too, the pupils have been highly motivated to talk, look and believe as Americans should. The result was as astonishing an act of voluntary political and cultural assimilation and speedy elimination of regional, ethnic, and cultural dissimilarities as history can provide. The extent to which Americans agree today on key propositions about democracy is a measure of the almost unbelievable success of this deliberate attempt to create a seemingly uncoerced nation-wide consensus.” Importantly, Dahl recognized that Tocqueville had written in a preindustrial era different from the current landscape: “The America that Tocqueville saw . . . was the America of Andrew Jackson. It was an
agrarian democracy, remarkably close to the ideal often articulated by Jefferson. Commerce, finance, and industry erupted into this agrarian society in a gigantic explosion. By the time the [nineteenth] century approached its last decade, . . . the America of Tocqueville had already passed away.” But Dahl insisted that despite the growing inequality of resources following these changes, a “universal creed of democracy and equality” persisted in mid-twentieth-century America.93

The pluralist appropriation of Tocqueville’s account of associations overlooked two complications. The first was that Tocqueville’s case study of America in the 1830s had focused on an extraordinarily homogenous population, thus giving him an excessively sanguine view of harmony amidst difference. Rogers Smith has noted that Tocqueville and later accounts that draw upon him

center on relationships among a minority of Americans—white men, largely of northern European ancestry—analyzed in terms of categories derived from the hierarchy of political and economic status such men held in Europe: monarchs and aristocrats, financial and commercialburgers, farmers, industrial and rural laborers, indigents. Because most European observers and most white American men regarded these categories as politically basic, it is understandable that from America’s inception they thought that the most striking fact about the new nation was the absence of one specific type of fixed, ascriptive hierarchy. There was no hereditary monarchy or nobility native to British America itself, and the Revolution rejected both the authority of the British king and aristocracy and the creation of any new American substitutes. Those genuinely momentous features of American political life made the United States appear remarkably egalitarian in comparison to Europe.

But as Smith observes, the “relative egalitarianism that prevailed among white men” left unaddressed immense inequities pertaining to gender, race, culture, religion, and sexual orientation. When associations expanded to these interests—as they increasingly did by the mid-twentieth century—differences of opinion were no longer merely differences of hue, and Tocqueville’s theory lost its descriptive purchase. Pluralists to a large degree failed to recognize Tocqueville’s limits and as a result adopted an understanding of balance and consensus that excluded
significant classes of people from their description of the political process. As Grant McConnell argued in 1966, “farm migrant workers, Negroes, and the urban poor have not been included in the system of ‘pluralist’ representation so celebrated in recent years.” He insisted that “however much these groups may be regarded as ‘potential interest groups,’ the important fact is that political organization for their protection within the pluralist framework can scarcely be said to exist.”

The second problem with relying on Tocqueville to buttress pluralist accounts of mid-twentieth-century America was the shifting boundary between public and private in the years since *Democracy in America*. Tocqueville had assumed a political order bifurcated between a relatively limited government—which exercised law, authority, and coercion—and a larger private sphere that consisted of nongovernmental social and economic relations. The theoretical impetus for this split came from a Lockean liberalism whose “most distinctive feature” was “its insistence that government should be limited so as to free individuals to undertake private as well as public pursuits of happiness, even if this option erodes public spiritedness in practice.” Locke’s separation of public and private created a sphere autonomous from government control. But it also tacitly granted greater political legitimacy to the public realm, a realm that soon became synonymous with the state.

This conceptual framework was not especially problematic when the right of assembly had entered the American constitutional scheme through the First Amendment. In 1791, the state was relatively limited in scope and left a broad nonpublic realm free from coercive regulation. Although the extent to which early American citizens viewed this nonpublic domain as “private” is difficult to pinpoint, they clearly believed it fell outside of the relatively limited realm controlled by government. Yet groups that assembled outside the sanction of government were nonetheless “public” in the sense of being visible to others and “political” in the sense of demonstrating and advocating an alternative way of life. The Democratic-Republican Societies gathered and feasted and paraded, suffragist groups held conventions and marches, and abolitionists rallied citizens to awareness and action.

This early American understanding of public and private for the most part endured at the time of Tocqueville’s visit to the United States.
Tocqueville believed that citizens in a Jacksonian democracy conceived of a narrow public realm confined to governmental functions: “In the American republics the activity of the central Government never as yet has been extended beyond a limited number of objects sufficiently prominent to call forth its attention.” Tocqueville saw associations as necessary to maintaining democratic order through civic virtue because he viewed the nongovernmental sphere as more determinative in shaping the lives and values of citizens than the more narrowly defined “government.”

The difficulty in the pluralist adaptation of Tocqueville’s framework was that the reach of “government” or “public” in mid-twentieth-century America was far greater than Tocqueville had ever conceived. The growth of the market economy had initially reinforced Lockean understandings of public and private. But unprecedented advances in industrialization and bureaucracy that produced quasi-public corporations eventually rendered simplistic dualisms obsolete. Early twentieth-century legal thinkers began to question the assumption that “private law could be neutral and apolitical” amid “a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.” Legal realists characterized “the distinction in classical liberalism between private and public law as arbitrary, demonstrating that all private transactions involved the state and that all law was, in an important sense, public law.” Following these realist premises, New Deal reformers invaded the private realm with an expanded administrative state. The New Deal assumed that “the instruments of government provided the means for conscious inducement of social change” and established “an indeterminable but expanding political sphere.” The Supreme Court mounted a short-lived resistance to this ideology in the mid-1930s, and a decade later the Court embraced the new liberalism.

At the same time that the government was expanding its reach into previously private domains, corporations, universities, and unions grew in number and size and increasingly assumed quasi-governmental functions. In Henry Kariel’s description, “organizational giants such as General Motors, the Teamsters Union, the Farm Bureau, and the American Medical Association . . . emerged as full-fledged political regimes” and blurred “the formerly useful distinction between the public and the private.” Even as the pluralist critique of state-centered theory redirected
the study of politics toward the group, “the discovery that precious little in human life is immune to bureaucratization . . . dispelled some of the magic of the group.” The giant private bureaucracies were not akin to “that wonderful and wholly legitimate conglomeration of little groups which visitors from abroad [had] traditionally identified with Americanism.” They were rather “a newer set of large-scale organizational power blocs” that had come to “comprise most of the public order and occupy much of the public mind.” Dewey suggested an “eclipse of the public” had created “many publics.”

Tocqueville had seen only one public, and its normative influence had been overshadowed by the private groups that he observed. By the middle of the twentieth century, that was no longer the case. The conception of “public” had moved in two directions. First, the increased role of government as welfare provider and the emergence of the modern administrative state had expanded the government’s public realm into previously private domains. Second, the power of large private organizations increasingly extended beyond the boundaries of those organizations. Lost in this mix was a subtle transformation in the understanding of the “political,” which pluralist thought confined to those “interests” and “pressure groups” directly engaged with governmental processes. That characterization was doubly problematic: it kept hidden private groups that exerted economic coercion but at the same time depoliticized private groups that were neither governmental nor economic. Truman and Dahl recognized the changing roles of public and private, but they largely embraced the New Deal expansion as a favorable dissipation of public power without fully recognizing its consequences.

Critics soon exposed the pluralist oversights. In 1966, Grant McConnell’s *Private Power and American Democracy* challenged the “comfortable assumption that interest groups will balance each other in their struggles and produce policies of moderation.” McConnell questioned the pluralist assumption that “private associations” were, in fact, private. He argued that the facile distinction between “public” and “private” had “been seriously blurred in recent years.” McConnell suggested that the infusion of quasi-public authority into private associations could not be ignored: “When, under the guise of serving an ideal of democracy as the
self-government of small units, the coercive power of public authority is
given to these groups, their internal government becomes a matter of
serious concern.”

McConnell also challenged the pluralist balance assumption “that
private associations are mutually countervailing,” which he viewed as “a
modern gloss on the argument of Madison and his colleagues in the
Federalist Papers.” The pluralist account suggested that “by opposing each
other, private associations supposedly check any overly greedy attempts by
particular associations to extend their power,” such that “in the large
community democracy is insured.” McConnell responded that in practice,
“private associations tend to be jealous of rivals.” These associations “seek
to prevent the rise of competitors in the fields they have marked as their
own” and “often, when such rivals do exist, there is bitter conflict between
them, conflict that has as its object the destruction of one or the other.”

Other challenges to pluralist arguments came from Michael Rogin,
Theodore Lowi, and William Connolly. Rogin argued that the pluralist
theory of group politics had reintroduced “social cohesion in a constitu-
tional, industrial society.” This underlying “social consensus plays an
overwhelming role in the pluralist vision” and had “define[d] out of exist-
ence any conflict between groups and the public interest.” Lowi
contended that Dahl’s conception “relie[d] on an extremely narrow defi-
nition of coercion, giving one to believe that coercion is not involved if
physical force is absent” and “depend[ed] on an incredibly broad and
idealized notion of what is peaceful about peaceful adjustment.” Lowi
charged that ignoring these complexities meant that “interest group liber-
alism” helped create “the sense that power need not be power at all,
control need not be control, and government need not be coercive.”
Connolly similarly asserted that pluralists like Dahl had disregarded
“notable discontinuities” between the conditions of postwar American
society and the “basic preconditions to the successful operation of
pluralist politics” that Tocqueville had stipulated. For example, Connolly
suggested that “the emergence of the large-scale, hierarchical organiza-
tion has significantly altered the character of the voluntary association”
since the time of Tocqueville’s writing.

As the critics intimated, because pluralist theory of the 1950s assumed
the status quo of an enlarged public sphere, its endorsement of group
sovereignty was really epiphenomenal to a further legitimization of the public welfare function of the state and the increasingly bureaucratized corporations and universities that mimicked state functions and organization. The blending and overlap of public and private fundamentally altered the political arrangements about which Tocqueville and Madison had theorized. Contrary to some pluralist beliefs, power didn’t disappear or dissipate; it just became less visible.

The Tyranny of the Majority

Madison and Tocqueville held different views about the inherent goodness of groups, but both theorists turned to groups as a check against majority rule. Madison thought that majorities could be “unjust and interested” and sacrifice to their “ruling passion or interest both the public good and the rights of other citizens.” He relied on factions to ensure that a majority would be “unable to concert and carry into effect schemes of oppression.” Tocqueville warned similarly of the “tyranny of the majority.” He contended that the majority “often has despotic tastes and instincts,” and he called the “ omnipotence of the majority” the “greatest danger for American Republics.” As Sheldon Wolin suggests, by the second volume of *Democracy in America*, Tocqueville had moved away from concern over an explicitly legislative imposition of majority will to a more nuanced form of cultural hegemony. Wolin surmises that for Tocqueville “the danger was not that a legislative majority might ride roughshod over minority rights but a strange lack of opposition to the dominant set of values—and this despite an unprecedented degree of liberty and fully guaranteed rights of expression. He insisted that there was no country in which there was less intellectual independence and freedom of discussion than in America. His explanation was that in a democracy the majority combined physical, moral, and legal authority. Democracy’s vaunted inclusiveness did not extend to the critic who espoused unorthodox views; he would eventually feel the whole weight of the community against him.” Madison and Tocqueville implicitly recognized that the capacity for groups to exist detached from and even antithetical to the will of the majority in some ways reflected a destabilizing freedom. Mid-twentieth-century pluralism never acquiesced in this description, but it is exactly
right: group autonomy presupposes the risk of volatile disagreement rather than stability to the democratic experiment.\textsuperscript{154}

The risks that Madison and Toqueville identified went largely unacknowledged by the pluralist political thought that pervaded the background in which the constitutional freedom of association emerged. The pluralist consensus assumption established boundaries within which measured disagreement could unfold but through which dissenting voices were marginalized or silenced. The pluralist balance assumption asserted a harmonious stability between those associations that remained within the consensus boundaries. Together, consensus and balance depoliticized political dissidents and disguised political power. The result provided an explanation for a stable democratic polity, but it was a skewed explanation. Pluralists exalted associational autonomy largely because the associations accepted by the consensus neither threatened democratic stability nor diverged from democratic values.

The influences of pluralism weren’t confined to academic political science—its currents were also reflected in the larger social milieu of the lawyers and judges who shaped the right of association. As Ronald Kahn has argued, “legal theory and education in the 1950s had within them a deep program of social control whose objective was supporting the consensus about polity and law that they believed existed.” Certain dimensions of the “legal process” school also drew upon “an assumed social consensus about the acceptability of the American legal system” and upon “pluralism’s emphasis on the importance of interest-group jostling.” More broadly, as Richard Posner has emphasized, “the remarkable political consensus of the late 1950s and early 1960s” meant that “it was natural to think of law not in political but in technical terms.”\textsuperscript{155}

Nor were Supreme Court justices immune from these influences. Goldberg referred to the “stabilizing influence of the law” and law as “a balance wheel.” Frankfurter and Harlan both had strong ties to the legal process theorists, and Frankfurter and the pluralist Laski were close friends. In a 1948 concurrence, Frankfurter quoted from one of Laski’s articles, noting that “the right of association, like any other right carried to its extreme, encounters limiting principles.” Harlan’s 1963 address to the American Bar Association revealed pluralist assumptions of balance
and consensus lurking beneath his federalism: “What other political system could have afforded so much scope to the varied interests and aspirations of a dynamic people representing such divergencies of ethnic and cultural backgrounds, and at the same time unified them into a nation blessed with material and spiritual resources unparalleled in history?” Brennan, at odds with Harlan on so many issues, seemed to converge with his pluralist assumptions. In a 1964 address to the Conference of Chief Justices, Brennan stressed “the basic consensus we share, rather than our superficial disagreements.” He elaborated: “In but two decades, since the end of World War II, the world and this Nation have witnessed a remarkable transformation. The unity of the human family is becoming more distinct on the horizon of human events. . . . Our political, industrial, agricultural and cultural differences cannot stop the process which is making us a more united nation.” The justices who shaped the right of association may not have often cited the pluralists, but at the very time the Court was developing the right of association, the intellectual influence lurked nearby.

The next chapter explores the transformation of the right of association during the equality era, including the Court’s important decision in Roberts v. United States Jaycees. That transformation further weakened group autonomy and deepened the chasm between the contemporary freedom of association and the historical right of assembly. But what has not been fully recognized about the current vulnerability of group autonomy is that it traces back in part to the factors influencing the original recognition of the right of association—and the Court’s departure from the freedom of assembly—just over fifty years ago. The three factors that shaped the right of association in NAACP v. Alabama and subsequent cases in the 1960s in many ways paved the way for the transformation that occurred in Roberts. First, the largely unquestioned pluralist consensus that gave the Court its baseline for acceptable forms of association in the late 1950s and early 1960s opened the door for the egalitarianism that emerged in the 1970s and placed certain discriminatory associations beyond its contours. Second, the Court’s disparate treatment of communist and civil rights associations in the 1950s and 1960s carved a path for later cases like Roberts to deny associational protections to certain kinds of
groups even in the absence of any imminent threat to democratic security or stability. And finally, the early jurisprudential arguments over the constitutional source of association facilitated Brennan’s later distinction between a right of expressive association connected to the First Amendment and a right of intimate association tied to personal liberty. These developments have left group autonomy—and liberty—more vulnerable to the tyranny of the majority.