This book has recounted the histories of the rights of assembly and association in American constitutionalism and suggested that the shift from assembly to association has weakened protections for dissenting, political, and expressive groups. The historical narrative closed with two of the most recent casualties of this shift: the Chi Iota fraternity at the College of Staten Island and the Christian Legal Society at Hastings College of the Law. These cases illustrate that we have failed to ground protections for group autonomy in an intellectually honest constitutional framework and have relied instead on artificial distinctions and unexamined premises. Because these shortcomings are unlikely to be remedied by applying the doctrine that has evolved around the right of association in cases like *NAACP v. Alabama, Griswold v. Connecticut,* and *Roberts v. United States Jaycees,* we need to look past association and recover assembly.

We can illustrate the contemporary plausibility of assembly by examining how it fits within our tradition of constitutional interpretation. Philip Bobbitt has suggested that we can evaluate constitutional argument through six “modalities”: historical, prudential, textual, structural, precedent, and ethical. Neil Siegel and Robert Cooter have summarized Bobbitt’s modalities:
Historical arguments appeal either to preratification history or to postratification history. Prudential or consequentialist arguments identify the good or bad social consequences of an interpretation. Textual arguments rely on the text of the Constitution and the rules for interpreting texts. Structural arguments draw inferences from the theory and structure of government created by the Constitution. Precedential arguments offer the existence of previous decisions, either past political practice or past judicial rulings, as justifying a certain outcome in a later case. Finally, ethical arguments tell a story about national identity; they tend to take a narrative or historical form and inquire whether a given interpretation is faithful to the meaning or destiny of the country, its deepest cultural commitments, or its national character.

As Siegel and Cooter have observed, “Interpretations of the Constitution often invoke multiple forms of constitutional authority to support the same conclusions.”

The story of the right of assembly recounted thus far in this book enlists each of Bobbitt’s modalities in arguing for the place of assembly in our constitutional tradition. The textual argument begins with the not irrelevant fact that the right of assembly—unlike association—is actually in the text of the Constitution. It also suggests that assembly was never intended to be limited to the purposes of petition.

The structural argument emerges in Chapter 2 but comes more fully to light in the discussion of pluralist interpretations of Madison and Tocqueville in Chapter 3. Assemblies function in our democratic structure to challenge and limit the reach of the state. They extend beyond the formal boundaries of political parties to disrupt the polity with “factions for the rest of us” that offer a check against majoritarian standards and the attempt of government to control dissent.

The prudential argument recognizes that assembly, like all rights, is inevitably constrained. Peter de Marneffe’s observation about the freedom of association extends as well to the right of assembly: “Some may think of rights as ‘absolute,’ believing that to say that there is a right to some liberty is to say that the government may not interfere with this liberty for any reason. But if this is how rights are understood, there are virtually no rights to liberty—because for virtually every liberty there will be some morally sufficient reason for the government to interfere with it.” But the prudential argument also advocates patience and restraint whenever
possible—we don’t know what we are destroying or precluding when we stifle the existence of groups, and we often have no way of knowing whether the harms outweigh the benefits.

This latter prudential argument relates closely to the historical argument. Every important social movement in this country began as a collection of “unofficial” and “nonpolitical” gatherings. Informal relationships and activities nurtured the nascent groups that eventually produced the greatest political change. Like the prudential argument, the precedential argument cuts in both directions. On the one hand, there is now an established body of case law on the right of association. But I have argued that the doctrinal framework purportedly holding that case law together is highly problematic. A more coherent and equally important body of case law on the right of assembly precedes the relatively new rights of intimate and expressive association.

Finally, the ethical argument recognizes that pluralism and dissent are among our nation’s deepest cultural commitments. Dissenting practices confront an ever-present challenge by the state to domesticate their destabilizing tendencies. Powerful countervailing visions of stability and consensus from mid-twentieth-century pluralism and Rawlsian liberalism have sought to bind our country together at the cost of silencing the margins of dissent. But the groups that have lived in the shadow of the state have never fully acquiesced.

The story of assembly thus embodies each of Bobbitt’s modalities. It reveals four principles that help us see the contours of this right and its contemporary applications:

- Assembly includes dissident groups that act against the common good.
- Assembly extends beyond political groups to religious and social groups of all kinds.
- Just as the freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group’s autonomy, composition, and existence.
- Assembly is itself expression—the existence of a group and its selection of members and leaders are themselves forms of expression.
These four principles favor strong protections for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards. But the principles extracted from Chapter 2’s historical narrative do not stand alone, for even more can be said about the prudential, historical, and ethical arguments supporting the right of assembly. That is the goal of the first part of this chapter. It situates assembly in the political theory of Sheldon Wolin, whose work can be read as a counternarrative to the consensus arguments of Robert Dahl and John Rawls. Wolin’s refusal to accept the state’s claims to legitimacy lays a theoretical foundation for the dissenting, political, and expressive assembly.

After developing this political theory, I turn to another dimension of the historical argument. Here I confront Andrew Koppelman’s recent book, A Right to Discriminate? Koppelman relies heavily on historical argument to support his approach to group autonomy. I argue that the history is more complicated and less dispositive than he suggests. The final two sections of this chapter tease out the implications of constitutional interpretation. I first offer a definition of assembly as a plausible resource for contemporary constitutional argument and explain why a contextual approach to the boundaries of assembly improves upon existing alternatives. I then apply theory to practice by sketching the “missing dissent” in Roberts v. United States Jaycees.

A Political Theory of Assembly

Sheldon Wolin first published Politics and Vision, his monumental history of political thought, in 1960, at the height of mid-twentieth-century liberalism and only two years after the Supreme Court’s initial recognition of the right of association in NAACP v. Alabama. He concluded his book with a critique entitled “The Age of Organization and the Sublimation of Politics.” In that chapter, he expressed a wariness toward the “group theory of politics” that ignored “the sublimation of the political into forms of association which earlier thought had believed to be non-political.” Wolin’s prescient critique focused on the migration of power from state to corporation. But writing before the turbulent decades of the 1960s and 1970s and the pluralist critiques of Connelly, Lowi, and
McConnell, he neglected to highlight the benefits of decentralizing power and politics: the possibility of reclaiming a form of the “political” by groups that exist apart from both the state and the corporations that came to serve as its proxies.5

Wolin’s second (expanded) edition of Politics and Vision appeared in 2004, after the Civil Rights Movement, the work of John Rawls, and the rise of multiculturalism. In his later work, Wolin recognized not only the dispersion of power to the corporation and the subsequent alliance of corporation and state but also liberalism’s continued suppression of difference in an attempt to perpetuate the appearance of stability. Reflecting upon the years following the initial appearance of Politics and Vision, Wolin wrote: “The sixties caught liberal theorists by surprise, in part owing to a complacency encouraged by a seemingly wide public consensus based upon liberal beliefs and confirmed in the discourse of consensus popular among social scientists and analytic philosophers.” But liberal political thought perpetuated its consensus narrative in spite of the political events that surrounded it, and by the end of the 1970s, the remnants of a New Deal liberalism that once critiqued the status quo were largely engulfed by a liberalism that thrived upon the status quo.6

For Wolin, nothing epitomized this change more than Rawls’s Theory of Justice, which represented “a liberalism being transformed from a critical theory into a legitimizing theory.” Part of this legitimization rested on ensuring stability at all costs. In Wolin’s assessment, A Theory of Justice introduced “proceduralist politics, politics constrained within and firmly constrained by agendas designed beforehand to assure what Rawls regarded as rational outcomes, [which] emerge[d] as the liberal alternative to the threat of destabilization implicitly attributed to participatory politics where structure and agenda are exposed to the vagaries of democratic decision-making.” Wolin suggests that “when Rawls submits that A Theory of Justice was bound to be challenged by other comprehensive doctrines, he reveals what is really at stake, not the comprehensiveness of doctrines but the threat of conflict.” By the time he wrote Political Liberalism, Rawls had come to realize that his earlier work had not sufficiently accounted for comprehensive doctrines that would rival the claims of liberalism. Rawls resolved the threat of “unreasonable comprehensive doctrines” with a “political” conception of justice that Wolin aptly
surmised “would prove closer in spirit to a Rousseauian regime of public virtue and of a civil religion with reasonableness as its dogma.” For Wolin, Rawls’s answer means: “The reasonable can fairly be said to be the ideology of a liberal society more haunted by the specter of disagreement than by the conflicts of interest that republican theorists from Harrington to Madison had emphasized. Those who disagree with what is officially pronounced to be reasonable can be dismissed as unreason-
able.” These “repressive elements in Rawls’s liberalism . . . reflect an aversion to social conflict that is in keeping with his elevation of stability, cooperation, and unity as the fundamental values.”7

Wolin has elsewhere reflected upon the problems of consensus liberalism by distinguishing between “diversity” and “difference.” As he argues, “although both ‘difference’ and ‘diversity’ refer to dissimilarity and unlikeness, there are some subtle distinctions between them.” Liberal pluralism “is more comfortable with diversity than it is with difference,” and difference raises “conceptual and practical” tensions with “pluralist democracy.” Wolin maintains that difference, unlike diversity, “possesses a certain inner coherence that may indicate the presence of a hard core of nonnegotiability, some element that is too intimately connected with identity to allow for easy compromise.” This kind of difference, which I have argued is best protected by the right of assembly, is precisely that which Dahl and Rawls seek to deny. It explains the appeal to consensus theorists of a right of association that depoliticizes and disembodies expression in order to neutralize dissent.8

The right of association is in some ways just a bit player in a larger narrative of consensus liberalism that celebrates diversity even as it marginalizes difference. Wolin observes:

From Roger Williams’s Bloody Tenent (1644) to John Calhoun’s Disquisition, Margaret Fuller’s Woman in the Nineteenth Century, Booker Washington’s Up from Slavery and the Autobiography of Malcolm X, discursive representations of difference have appeared but until recently have had little effect on the main conceptual vocabulary or thematic structure of the theoretical literature of American politics. Instead, from Madison’s Tenth Federalist to the writings of Mary Follett, Charles Beard, Arthur Bentley, David Truman, and Robert Dahl, those modes of difference mostly disappeared or were reduced to the status of interests. The result: on one side, themes of
separation, dismemberment, disunion, exploitation, exclusion, and revenge and, on the other, themes extolling American pluralism as the distinctive American political achievement and the main reason for the unrivaled stability of American society and its political system.

To Wolin’s second list we can add Rawls, who by the time of the second edition of *Politics and Vision* has become for Wolin the paradigmatic thinker of liberalism’s suppression of difference. Part of Rawls’s genius was his ability to refashion the consensus narrative of mid-twentieth-century pluralism with greater philosophical sophistication. Part of Wolin’s genius was to recognize the ways in which Rawls, no less than his pluralist predecessors, masked liberalism’s consensus tendencies. Against Rawls and the pluralists, Wolin hints at a way of conceiving politics and difference that is less stable but more democratic. The rest of this section builds on Wolin’s insights to give shape to the dissenting, political, and expressive assembly.

Wolin’s challenge to the consensus narratives of pluralism and Rawlsian liberalism points toward the dissenting assembly. While not every assembly dissents, the groups that shape the boundaries of autonomy are those that reject consensus norms. We can see why this is the case when we realize that groups conforming to consensus norms have little reason to invoke a claim to group autonomy. Assembly—like speech, or the press, or religion—is most relevant when its exercise is challenged by the state.

The previous two chapters demonstrated how this dissenting characteristic has been marginalized in the bounded consensus accompanying the turn to association. That consensus excluded communist groups during the national security era and segregationist groups during the equality era. Few of us would care if the limits of group autonomy ended with communists and segregationists. But the norms underlying consensus are more pervasive, and they reach deep into the internal practices of many groups. For example, a number of contemporary political theorists support imposing consensus norms on illiberal groups, arguing that the state is justified in reshaping or even eliminating illiberal practices through methods ranging from compulsory education to direct intervention. Nancy Rosenblum has suggested that these kinds of arguments “all
aim at congruence between the internal life and practices of voluntary groups and the public culture of liberal democracy.” This “logic of congruence” requires “that not only political institutions and public accommodations but also voluntary social groups function as mini-liberal democracies, with a view toward cultivating and sustaining self-respect.” Rosenblum recognizes that under the logic of congruence, all associations are vulnerable to “the social preferences of the party in power.” The dissenting assembly resists these consensus moves.¹⁰

The political assembly embodies a kind of politics distinct from the politics of the state. In fact, as Stephen Carter has argued, the meanings that groups “discover and assign to the world may be radically distinct from those that are assigned by the political sovereign.” Wolin suggests that these kinds of groups represent a “political mode of existence” in which “the political is remembered and recreated.” He points to “the recurrent experience of constituting political societies and political practices, beginning with colonial times and extending through the Revolution and beyond to the westward migrations where new settlements and towns were founded by the hundreds; the movement to abolish slavery and the abortive effort at reconstructing American life on the basis of racial equality; the Populist and agrarian revolts of the 19th century; the struggle for autonomous trade unions and for women’s rights; the civil rights movement of the ’60s and the anti-war, anti-nuclear, and ecological movements of recent decades.” These “restorative moments” of the political assembly resist the boundaries that the liberal state would impose. Groups that have resisted the “age of organization” and maintained an existence apart from the structures of the now expanded state rightly claim a form of political existence. Consensus liberalism’s denial of that politics reprises monist state theory and claims an exclusive right to pronounce the “real” account of what it means to live together in a shared polity. The political assembly resists this conclusion.¹¹

Consensus liberalism’s attempt to depoliticize private groups also extends to forms of rationality, most famously in Rawls’s concept of public reason. Chapter 4 briefly explored Rawls’s influence on legal thought around the time of the changes to the right of association in Roberts. One of the fundamental problems with Rawlsian public reason is its imposition of normative constraints on discourse and rationality.
These constraints create a tension between the institutions that compose the “basic structure” of society, on the one hand, and Rawls’s purported recognition of the freedom of association in “private society,” on the other. Feminist theorists have famously called attention to this ambiguity with respect to the family. It also exists with other kinds of groups. As Rosenblum observes, “One possibility is that associational life is part of the ‘basic structure’ of a well-ordered society, whose organization and norms must conform to principles of justice because their effects on defining men’s rights and duties and influencing their life-prospects ‘are so profound and present from the start.’” But “except for serfdom and slavery Rawls does not identify arrangements that must be prohibited as a condition for the morality of association.” Accordingly, Rosenblum argues that “we can conclude that associations do not fail in serving their formative moral purposes by being incongruent with the public norms of liberal democracy, or by being insufficiently complex and comprehensive to move members in the direction of appreciation for principles of justice.” Rather, “the morality of association provides a pluralist background culture, much of it incongruent with liberal democracy.”

Rawls appears to accept the incongruous nature of some associations and allow a certain degree of group autonomy, writing, for example, that “the principles of political justice do not apply to the internal life of a church, nor is it desirable, or consistent with liberty or conscience or freedom of association, that they should.” But he maintains an ambiguity that ultimately undermines group autonomy. The problem becomes evident when a court is asked to adjudicate a clash between the right of association and another of the primary goods. Because Rawls requires public reason from “the discourse of judges in their decisions, and especially of the judges of a supreme court,” there is every indication that the dispute will have to be resolved on the basis of public reason.

Rawls believes that the “idea of public reason is fully compatible with many forms of nonpublic reason” that “belong to the internal life of the many associations in civil society”—many forms of nonpublic reason, but not all, and therein lies the rub. Sometimes the practices underlying a claim to freedom of association cannot be translated into public reason. As Chandran Kukathas observes:
Important though debate may be, it is not always an adequate substitute for demonstration through practice. This is all the more so when the subject of dispute is how one should live. Not all people are capable of articulating their reasons for thinking their way of life is better—or even just better for some. (Nor, for that matter are all capable of articulating their reasons for regarding some influences as malign or corrupting.) Indeed, they may not be aware of many of the advantages (though also, of course, disadvantages) of their practices simply because these are side effects which have not much to do with why they prefer to stick to their ways. Nonetheless, in being able to live a particular way of life they may be quite capable of demonstrating (intentionally or not) its merits. Some need to practise in order to preach.

The political assembly facilitates “practicing in order to preach.” It embraces what Robert Cover called the “radical message of the first amendment,” which recognizes that “an interdependent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.”

We can illustrate the danger inherent in the kind of public reason that ignores the insights offered by Kukathas and Cover. Suppose that a single-gender private group benefits its members but damages the self-respect of those whom it excludes. Resolving this conflict requires choosing one basic good over another. Rawls may seem agnostic about the outcome of this clash because he recognizes the value of both goods. But suppose the reasons that the men or women have for desiring exclusivity derive from tradition-dependent beliefs and values that neither accord with nor subscribe to Rawlsian public reason. We might consider several such possibilities: an emotive explanation (“we feel better when we gather exclusively as men or women”), an expressive explanation (“we believe that our homogenous gathering best expresses to the world our fundamental beliefs”), or a theological explanation (“we gather exclusively based on our understanding of God’s command to us”). By imposing the constraint of public reason, Rawls precludes the judge or judges resolving the dispute from relying on these arguments.

The only remaining arguments that satisfy public reason are tautological claims about the importance of freedom of association for its own sake—or a derivative claim of the importance of emotion, expression, or
religion—and these will surely fail against the countervailing claim of
damaged self-respect, which is “perhaps the most important primary
good,” and can easily be articulated in terms of public reason. But the
analysis that leads to this conclusion proceeds within an artificially
constrained discourse. There is nothing inherent in a procedural scheme
of justice that requires either public reason or the outcome it generates.
And despite Rawls’s aspiration to reach agreement through discussion,
decisions based upon public reason will ultimately be enforced by the
coercive and violent imposition of the law.\textsuperscript{15}

It is important to recognize the implications of Rawls’s public reason
constraint even when they aren’t immediately triggered. For example, a
group that is unable to articulate a public reason defense of its practices
may nevertheless flourish under a Rawlsian scheme as long as the group
is unchallenged. But that group’s freedom is contingent on the absence of
a public reason challenge. When it encounters a constraint justified in
terms acceptable to public reason, the group must either modify its prac
tices or cease to exist unless it can offer a defense grounded in public
reason. The political assembly that recognizes competing politics and
political vocabularies resists the Rawlsian claim of public reason and the
coercive consequences that flow from it.

The \textit{expressive assembly} insists upon the various meanings of a group and
its gathering even when they aren’t evident to an outsider. Just as “politi-
cal philosophy constitutes a form of ‘seeing’ political phenomena” and
“the way in which the phenomena will be visualized depends in large
measure on where the viewer ‘stands,’” so too the meaning assigned to
an act or expression is often varied and perspectival. The Supreme
Court’s category of expressive association obscures these multivalent
aspects of expression. The previous chapter claimed that the purported
distinction between expressive and nonexpressive association fails to
recognize that: (1) all associations have expressive potential; (2) meaning is
dynamic; and (3) meaning is subject to more than one interpretation.
This chapter elaborates upon these claims.\textsuperscript{16}

The first problem with the idea of nonexpressive association is that
every association—and every associational act—has expressive potential.
Communicative possibility exists in joining, excluding, gathering,
proclaiming, engaging, or not engaging. Once a relational association is
stipulated between two or more people, any act by those people—when consciously undertaken as members of the association—has expressive potential reflective of that association.\textsuperscript{17}

To illustrate why the category of expressive association fails to encompass the broader understanding of meaning suggested here, consider a gay social club. Suppose that the club has twenty members—placing it well outside the currently recognized contours of an intimate association. Suppose further that the club’s members engage in no verbal or written expression directed outside their gatherings but make no effort to conceal their membership from their friends, colleagues, and acquaintances who aren’t part of the club. There is no way that the members of this club are engaging in “a right to associate for the purpose of engaging in those activities protected by the First Amendment.” And yet their act of gathering clearly conveys an expressive message.\textsuperscript{18}

The second problem with the reasoning underlying expressive association is that meaning is dynamic. The messages, creeds, practices, and even central purposes of associations change over time. Justice Souter ignores this reality when he argues in his dissent in \textit{Boy Scouts of America v. Dale} that “no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way.” That standard demands too much. What would it mean for a group to advocate a “clear position” “over time” in “an unequivocal way”?\textsuperscript{19}

The final problem with expressive association is that meaning is subject to more than one interpretive gloss. Acknowledging the subjective interpretation of meaning exposes a related problem inherent in the expressive association doctrine: Who decides what counts as the message of the group? Erwin Chemerinsky and Catherine Fisk have criticized the Supreme Court in \textit{Dale} for unduly deferring to a group’s leadership for its views about the group’s expressive message. But there isn’t a readily apparent alternative that more “justly” or more “accurately” captures the group’s expressive meaning. For example, it isn’t obvious that a majority of the group’s members should be recognized as having the authoritative interpretation of the group’s meaning, particularly for hierarchically structured groups.\textsuperscript{20}

The challenges to determining a group’s meaning get even thornier. Consider three different characterizations that Chemerinsky and Fisk offer about the purposes of the Boy Scouts: (i) a “significant number of
current and former scouts . . . reasonably believed that scouting was, and should be, about camping”; (2) all members of the Boy Scouts understand that “the Boy Scouts is for boys” and “all presumably believe that same sex experiences offer valuable developmental opportunities for children”; and (3) “[we suspect that the] Boy Scouts of America is understood [by its members] to be about honesty, self-reliance, service, leadership, and camping.” These descriptions are not interchangeable. They assign different purposes to the Boy Scouts (camping versus gender-based activities versus camping plus other things), they attribute those purposes to different subsets of the association (a significant number of current and former scouts versus all members versus members), and they attach varying degrees of certainty to the asserted meaning (the belief was “reasonable” versus all members “presumably believed” versus the belief is something that Chemerinsky and Fisk “suspect”). All of these variations and their varying rhetorical emphases spring from the description of a single group in a single law review article. It is not hard to see how the interpretive dilemmas multiply when assertions of purpose and meaning are expanded ever further. The expressive assembly recognizes that multivalent meaning is inherent in a group’s expression and cautions that interpretations imposed by outsiders on the group may be epistemologically biased or constrained.21

The Neglected History of Assembly

The political theory that I explored in the preceding section gives shape to the dissenting, political, and expressive assembly that resists the state’s push for consensus and control. This vision of assembly didn’t simply spring forth from the imaginations of political theorists—it is also evident in our nation’s history. Yet much of this history has been neglected. Consider, for example, Andrew Koppelman’s recent book, A Right to Discriminate? In it Koppelman offers one of the most compelling arguments to limit group autonomy for the sake of antidiscrimination law. But he relies upon an incomplete historical account.

Koppelman’s opening chapter of A Right to Discriminate? is entitled “Origins of the Right to Exclude.” Here is a summary of his historical narrative:
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(1) Prior to the Civil War, common law recognized that “every business that held itself out as open to serve the public arguably had a legal obligation to serve anyone who sought service.”

(2) After “legal rights were for the first time extended to African Americans” following the Civil War, some state courts “held for the first time that most businesses had no common-law duty to serve the public,” and some state legislatures “specifically abrogated that duty,” both doing so in an effort to allow white businesses to refuse service to black customers.

(3) In the late nineteenth century, many states enacted laws banning racial discrimination in public accommodations.

(4) During the Progressive Era, the Court “created rights to resist the state’s power to force private associations to conform to a government-imposed norm.”

(5) In the mid-twentieth century, the Court rejected claims that all-white labor unions and political parties could exclude blacks.

(6) The Court’s 1953 decision in Terry v. Adams rejected a similar claim by a private group that ran a racially exclusive primary whose winner “invariably went on to win the general election.” The Court “understood that the ‘private’ nature of the association masked a degree of power that could have an enormous influence on substantive constitutional rights” and “the Court would not deem an association private if it held so much substantive power.”

(7) The Court’s 1958 decision in NAACP v. Alabama recognized a “new understanding of freedom of association” that derived from the freedom of speech.

(8) The Court’s 1976 decision in Runyon v. McCrary “summarily rejected” the argument that its new freedom of association included a right to exclude.

(9) In revisiting the “right to exclude based on free speech” eight years later in Roberts v. United States Jaycees, the Court concluded “much more sympathetically” that the right “sometimes entails a right to exclude unwanted members,” but the Court also “imposed doctrinal limits upon the right it had thus created,” including a requirement that “the association must establish the nature of its expressive practice and demonstrate just how changes in its
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membership will undermine that practice,” which the Jaycees failed to do.

Sixteen years later, the Court’s decision in *Boy Scouts of America v. Dale* disrupted the “well-settled” law from *Roberts* and “warped the law of free association.”

Koppelman’s narrative highlights some of the tensions underlying the collision of group autonomy and antidiscrimination law. In my view, he makes several missteps: (1) he links *NAACP v. Alabama* too closely to the right of speech; (2) he neglects the Court’s struggle to address segregationist arguments for group autonomy; and (3) he places too much confidence in the “well-settled” nature of the doctrine announced in *Roberts*. Taken in isolation, these challenges to Koppelman’s historical narrative might amount to little more than minor quibbles. But their significance grows when we consider another dimension of his narrative: what it leaves out.

Here is a different history to complement Koppelman’s account:

(1) Prior to the founding, William Penn and Roger Williams ensured that dissenting religious groups could exercise their freedom in opposition to majoritarian norms in the political antecedents to four of the thirteen colonies: Pennsylvania, Delaware, New Jersey, and Rhode Island.

(2) In 1791, the framers of the Bill of Rights recognized the continued importance of dissenting groups in guaranteeing the rights of assembly and the free exercise of religion in the First Amendment. Every state constitution also included a right of assembly.

(3) Throughout our nation’s history, political, religious, and social groups have dissented from majoritarian and consensus standards, often claiming the protections of the right of assembly. State courts have repeatedly enforced state constitutional provisions protecting assembly (with the glaring exception of claims of assembly by free and slave blacks).

(4) The Court’s 1937 decision in *De Jonge v. Oregon* incorporated the federal right of assembly against the states. Over the next few years, the vital link between assembly and democracy was reinforced in popular rhetoric (including tributes to assembly as one of the

5. The Court’s 1958 decision in *NAACP v. Alabama* recognized for the first time a constitutional right of association, relying heavily on past decisions pertaining to the right of assembly.

6. The Court struggled to define the contours of its new right when it extended its protections to the NAACP but denied them to communist groups.

7. The Civil Rights Act of 1964, the Court’s 1968 decision in *Jones v. Alfred H. Mayer*, and other changes to the legal landscape made clear that principles of group autonomy did not justify race-based discrimination in places of public accommodation or in relation to the sale or lease of real property.

8. The Court struggled to limit a segregationist right to exclude beyond these contexts, eventually concluding in *Runyon v. McCrary* that it did not extend to whites excluding blacks in private schools.

9. Eight years later in *Roberts v. United States Jaycees*, the Court split the right of association into intimate and expressive components.

10. Aside from the Court’s 2000 decision in *Boy Scouts of America v. Dale*, the freedom of association has offered almost no check against the reach of antidiscrimination law into private groups.

The preceding narrative is, of course, a condensed and oversimplified version of the story that I told in Chapters 2 through 4. But it reveals a more central tension between group autonomy and antidiscrimination norms than Koppelman’s account suggests. What are we to make of this tension? Let’s first set out two areas of agreement between Koppelman’s historical narrative and mine. First, Congress and the Supreme Court have made clear that claims to group autonomy do not permit race-based discrimination in places of public accommodation. Second, *Runyon v. McCrary* is an important decision that addresses the tension between group autonomy and antidiscrimination law and sides decisively against racial discrimination in the context of private schools. These areas of agreement gesture toward some limits on group autonomy. But the narratives also suggest some important differences. For example, while
Koppelman joins most contemporary First Amendment scholars in linking the judicially recognized right of association to the First Amendment’s free speech right, the more plausible historical and jurisprudential interpretation locates the antecedents of constitutional association at least as much in the right of assembly as in the right of speech. The link between assembly and association is evident in the Court’s opinion in *NAACP v. Alabama*, it is embraced by Justices Black and Douglas in *Bates*, and it is the considered view of First Amendment scholars writing contemporaneously with the appearance of the right of association. Once we complicate Koppelman’s history with long-standing notions of assembly that protect dissenting groups from majoritarian norms, resolving the question of a “right to exclude” becomes much more challenging.

**A Definition of Assembly**

The previous section offered a different history to complement Koppelman’s account. It is a history of constitutional text and case law, social movements, and political rhetoric. In many ways, that history displays the theory of the dissenting, public, and expressive assembly that I set forth earlier in this chapter. And I would suggest that it points us toward a definition of assembly that we might embrace today:

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

Although I do not mean to suggest that these words or their meaning have existed unchanged throughout our nation’s history, the understanding of assembly as a presumptive right to form and participate in peaceable, noncommercial groups has long been ingrained in our constitutionalism. This section describes in greater detail the definitional constraints. The next section addresses the contextual analysis.

The constraint of *peaceability* is found in the text of the First Amendment, which protects “the right of the people peaceably to assemble.” The limitation suggests that while the right of assembly
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protects the formation, composition, expression, and gathering of a group, it does not justify anarchy by group. Indeed, throughout our nation’s history, the right of assembly has developed alongside the law of “unlawful assembly.” Criminal conspiracies, violent uprisings, and even most forms of civil disobedience have not been sheltered by the right of assembly. In most cases, laws that constrain a group’s actions in furthering the state’s compelling interest in peaceability will not be inhibited by assembly. Of course, a constraint of peaceability could be manipulated to eliminate any meaningful protections for group autonomy. A similar danger once threatened our free speech jurisprudence and prompted the Court to protect advocacy short of “imminent lawless action” in that area of the law. An understanding of the peaceability constraint on assembly ought to operate with a similar deference.\(^7\)

The second definitional limit on assembly restricts its protections to noncommercial groups. Unlike peaceability, that constraint is not found in the text of the First Amendment. But our constitutional, social, and economic history offers broad support for it today—few people endorse a general right of a commercial entity to discriminate in the hiring of its employees or in the customers it serves. Employment law presumes that a commercial entity has no right to discriminate unless it can justify that the discrimination is warranted as a “bona fide occupational qualification.” Discrimination on the basis of race, gender, or sexual orientation by commercial groups against customers is even less common. These concessions to antidiscrimination norms in the commercial sector reflect political compromises that reorient but do not eliminate the underlying values clash between equality and autonomy. Their political salience and moral force depends in some ways upon maintaining a workable distinction between commercial and noncommercial.\(^8\)

The general presumption that commercial groups should be given less autonomy than noncommercial groups encompasses historical understandings of the meaning of “public accommodation” but also extends to other commercial entities. Today these limits require some clarification: groups like the Jaycees and the Boy Scouts are not places of public accommodation. The classification of groups as places of public accommodation is a legal fiction employed by some state courts in recent years, to which the Supreme Court has twice deferred. In **Roberts**, the Supreme
Court endorsed the Minnesota Supreme Court’s conclusion that the Jaycees’s local chapters were places of public accommodation within the meaning of Minnesota’s antidiscrimination statute, noting that “this expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.” And in Dale, the Court accepted the New Jersey Supreme Court’s conclusion that the Boy Scouts was a place of public accommodation under New Jersey’s antidiscrimination statute despite noting that the New Jersey court “applied its public accommodations law to a private entity without even attempting to tie the term ‘place’ to a physical location.” The Court’s acceptance of these state court contortions collapses any meaningful distinction between public and private and undercuts the moral force behind public accommodations laws.

I do not mean to suggest that recovering a commonsense understanding of “public accommodation” will resolve the difficulty of drawing lines between commercial and noncommercial groups. We will inevitably be left with a distinction that sometimes falls short and sometimes overreaches. The contextual analysis that I propose in the next section offers a partial mitigation of the former by limiting the constitutional protections for certain noncommercial groups. The problem of overreaching (which denies protection to commercial but noncoercive groups) is also troublesome, but few contemporary scholars have attempted to resolve that problem, and I do not do so here. My claim here is only that we can improve upon the current use of “public accommodation,” perhaps by moving in the direction of a threshold of “predominantly commercial” or “commercial beyond a reasonable doubt” as a proxy for groups that lie beyond the boundaries of civil society. Neither the Boy Scouts nor the Jaycees approach that threshold.

Toward a Contextual Analysis

The constraints on assembly that I offered in the preceding sections are in some ways quite limiting, excluding from the protections of assembly
nonpeaceable and commercial groups. But they also leave unaddressed a
diverse set of private groups—cheerful, civic, and orderly groups and
contankerous, subversive, and chaotic groups alike. Under the theory of
assembly that I am suggesting, the constitutional protections for these
groups hinge on whether they satisfy the rebuttable presumption that I
have suggested: whether there is a compelling reason for thinking that the
justifications for protecting assembly do not apply (as when a group pros-
pers under monopolistic or near-monopolistic conditions). And in almost
all cases, the protections of assembly should prevail. In a moment, I will
have more to say about this claim. But first I want to explore the short-
comings of two alternatives: (1) the neoliberal proposal; and (2) the
message-based proposal.

Neoliberal arguments typically posit a bright-line distinction between
commercial and noncommercial groups that fully protects the latter,
following a path proposed in Justice O'Connor's concurrence in Roberts v.
United States Jaycees. For example, Michael McConnell, the lead counsel
for the Boy Scouts in Boy Scouts of America v. Dale and the Christian Legal
Society in Christian Legal Society v. Martinez, recently argued on behalf of
the Christian Legal Society that “all noncommercial expressive associa-
tions, regardless of their beliefs, have a constitutionally protected right to
control the content of their speech by excluding those who do not share
their essential purposes and beliefs from voting and leadership roles.”

Koppelman has grouped a diverse group of scholars under the neoliberal label; in addition to McConnell, he mentions David Bernstein, Dale Carpenter, Richard Epstein, John McGinnis, Michael Paulsen, Nancy Rosenblum, and Seana Shiffrin. He argues that these neoliberal defenders of group autonomy offer “only slightly modified versions of old, discredited libertarian objections to the existence of any antidiscrimination law at all.” Koppelman contends that the neoliberal argument “overgeneralizes from what is often the case to a claim about what is always the case. Regulation of markets is indeed unnecessary and counterproductive. Except sometimes. The neoliberarians claim that the ‘sometimes’ does not happen all that often, but this is merely a hunch. It is dangerous for such hunches to become the basis of judge-made law, particularly constitutional law that is immune to legislative reconsideration in light of experience.” The neoliberal hunch would indeed be
dangerous to incorporate into a categorical constitutional distinction. It fails to account for the realities of private power. In that regard, Koppelman properly resists a bright-line divide between commercial and noncommercial groups that exempts the latter from any constitutional scrutiny. But resorting to judicial inquiry is not always problematic when a contextual analysis is the best approach that we have.\(^3\)

Koppelman’s alternative to the neolibertarian approach is the message-based approach established in Roberts. In his words, “If an association is organized to express a viewpoint, then constitutional difficulties are raised by a statute that requires it to accept unwanted members if that requirement would impair its ability to convey its message.” I have already offered a number of objections to the framework of expressive association that houses this message-based approach. Its categories are unprincipled and its applications arbitrary. What, then, are its benefits? Koppelman recognizes, as have a number of scholars, that the message-based approach of expressive association means that “a group that is stridently prejudiced will receive more protection than one that is quieter about its views” because the overtly prejudiced group can link the attempted enforcement of antidiscrimination law to its core expressive purposes. This explains, for example, why nobody seriously questions the right of the Ku Klux Klan to exclude African Americans from its membership. Koppelman sees this result as “desirable,” because “discrimination is not so cheap as it was before, and a group will have to decide whether discrimination is worth the added cost.” He believes that “this pressure serves state interests of the highest order and does not prevent groups with strongly held discriminatory ideas from uniting and disseminating them.”\(^3\)

There are at least three problems with Koppelman’s reasoning. First, it hasn’t worked in practice. As Roberts itself illustrates, even when courts have concluded that a group is an expressive association—in other words, that its purposes are intrinsically tied to its First Amendment expressive rights—antidiscrimination law has generally prevailed. Koppelman acknowledges as much. He notes that while Roberts introduced a “balancing test” when “interference with membership . . . demonstrably interferes with expressive practice,” as a practical matter “free association claims unrelated to viewpoint discrimination always lost in the Supreme Court under this standard.” Dale proved to be an exception, but the
Court reconfirmed Koppelman’s diagnosis in *Martinez*, a case which assumed that the religious student group was an expressive association.\textsuperscript{33}

The second problem with Koppelman’s embrace of the message-based approach of expressive association is that it permits the state to decide what belongs at the core of a group’s expression. There is an important difference between widespread public perception of a group’s discriminatory character and an official pronouncement by the state that discrimination is central to the group’s core expression. Koppelman at times seems to recognize this difference. He notes that “it is unseemly, and potentially abusive, for courts to tell organizations—particularly organizations with dissenting political views—what their positions are.” Yet imposing an “added cost” on groups that discriminate in their membership to ensure that they are perceived as “stridently prejudiced” is just this kind of move. Moreover, in today’s networked and media-saturated world (in which groups with overtly discriminatory policies are readily exposed), it isn’t clear that Koppelman’s requirement would significantly alter the current landscape.\textsuperscript{34}

The third problem with Koppelman’s proposal is that every group that challenged antidiscrimination law would presumably meet the threshold of an expressive association once the litigation and attendant media coverage commenced. As Koppelman notes, “In the course of litigation—and certainly once the case was over—the Scouts became so associated with discrimination against gays that they now almost certainly could satisfy the *Roberts* test.” If Koppelman’s diagnosis of the Scouts is correct, then expressive association challenges to antidiscrimination law would likely generate a peculiar feedback loop in which any litigant serious enough to file suit could on that basis alone generate enough public attention to qualify as an expressive association. But if that were true—and if Koppelman is serious about granting those groups constitutional protections—then the judicial inquiry would morph from resolving a “case or controversy” to a kind of administrative advisory opinion. Viewed less charitably, it would amount to little more than a financially cumbersome “registration requirement” that required discriminatory groups to litigate their status as discriminatory expressive associations to receive constitutional protections. If Koppelman’s ultimate objective is to create a financial disincentive of this kind, he would be better off arguing
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for either a direct tax or a loss of tax-exempt status for discriminatory groups, both of which would be more efficient alternatives to litigation (although whether these alternatives would be constitutionally defensible is a separate matter).35

In my view, we are better off with a contextual analysis that allows courts to examine how power operates on the ground. This approach would ask courts to evaluate challenges to the exercise of the right of assembly in the specific contexts in which those assemblies exist. Sometimes, but rarely, the power exerted by peaceable, noncommercial assemblies will overreach to such an extent that the right would give way to the interests of the state. In the first chapter of this book, I offered two examples of when this rare occurrence might warrant an incursion into the right of assembly: (1) the historical example of the Jaybird Association in Terry v. Adams; and (2) the thought experiment of membership in a Christian student group providing exclusive access to elite legal jobs in Christian Legal Society v. Martinez. When courts are unable to offer a convincing account of this overreaching of private power—supported with factual rigor rather than aspirational values—they should defer to the values of assembly that I have advocated throughout the book.

Koppelman at times gestures toward the kind of contextual analysis that I commend. He highlights the importance of resolving empirical questions in a given case and concludes his book with the warning that “efforts to produce more general rules produce astounding pathologies.” In fact, when Koppelman shifts from defending the message-based approach to describing the quasi-public and quasi-monopolistic nature of the Boy Scouts, he raises precisely the kinds of questions that I believe ought to be addressed in challenges to the boundaries of the right of assembly.36

The importance of the fact-specific contextual analysis that I am advocating is illustrated by Amy Gutmann’s attempt to limit the implications of Roberts. Gutmann suggests that a “small exclusive country club, whose activities consist of golf, tennis, swimming, and socializing, is private in a way that the Jaycees is not.” But that argument depends on the location of the club and the supply and demand for the goods it offers. In some small towns, the country club may be the social hub in which networking occurs, deals are brokered, and careers are made or broken. Or the club
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may offer a good not elsewhere available—for example, if it were the only or perhaps simply the “best” option for golf in the area. In these circumstances, the club may be far more “public” than the St. Paul and Minneapolis Jaycees. Its exercise of private power may well cause it to lose the protections of assembly, but that conclusion requires assessing the underlying facts and circumstances.37

Some will no doubt disagree with my normative argument for assembly if it sacrifices antidiscrimination objectives in the ways that I have suggested. The challenge to those who reject the vision set forth in this book is for them to articulate an alternative that captures both normative aspirations and jurisprudential integrity. The current framework of intimate and expressive association does neither. It has failed us badly. On the issue of gay rights so divisive in our culture today, it leads to decisions like Boy Scouts of America v. Dale and Christian Legal Society v. Martinez that avoid the hard question at the root of the controversies that underlie them—whether we are willing to permit difference at the cost of equality. The neolibertarian and message-based proposals fare no better.

The Missing Roberts Dissent

Having sketched a political and constitutional theory of assembly, I conclude this chapter with an illustration of how we might apply it: a hypothetical dissent in Roberts premised on the right of assembly. Importantly, this thought experiment is written in a particular genre. It is not intended as a summary of the arguments of this book or a balanced consideration of the issues inherent in questions of group autonomy. As with many judicial dissents, it is provocative and argumentative in its attempts to weave together different modalities of constitutional interpretation. Because it responds to Justice Brennan’s majority opinion and Justice O’Connor’s concurrence, it is in some ways situated by those texts. And yet it is also a creative work, an attempt to envision a different constitutional outcome and, indeed, a different constitutional vision.

I have anachronistically attributed the Roberts dissent to Justice Rutledge, who wrote the majority opinion in Thomas v. Collins. That opinion, discussed in Chapter 2, marks the high point of the Court’s recognition of the right of assembly. As Aviam Soifer has suggested,
Rutledge’s “dynamic, relational language” emphasized that the right of assembly was “broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements.” Soifer argues that the principles articulated in *Thomas* “starkly contrast with the instrumental focus of more recent freedom of association decisions,” a contrast evident in the dissent premised on the right of assembly that follows.38

**SUPREME COURT OF THE UNITED STATES**

No. 83–724

ROBERTS, ACTING COMMISSIONER,
MINNESOTA DEPARTMENT OF HUMAN RIGHTS
ET AL. v. UNITED STATES JAYCEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 3, 1984]

JUSTICE RUTLEDGE, dissenting.

The women’s soccer team at the University of North Carolina has won the past three national championships, a dominance reminiscent of the UCLA men’s basketball team a decade ago and unmatched anywhere else in amateur athletics today. Since 1950, the LPGA has hosted a women’s professional golf tour and now includes nationally televised tournaments and millions of dollars in annual prize money. Music has thrived (or perhaps suffered, depending on one’s perspective) with all-male groups like the Beatles and the Righteous Brothers, and all-female groups like the Pointer Sisters and the Bangles. All-black choirs perform gospel music, and the Mormon Tabernacle Choir consists of, well, Mormons. The Talmudical Institute of Upstate New York, the Holy Trinity Orthodox Seminary (Russian Orthodox), and Morehouse College admit only men to their programs; Barnard College,
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Bryn Mawr College, and Wellesley College admit only women. During the women’s movement in the early twentieth century, women organized around women-only banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes. Gay bars and gay political associations have flourished by limiting their membership to homosexuals. Sometimes discrimination is a good thing.

Of course, discrimination also has its costs. Those excluded—the Salt Lake atheist with perfect pitch, the male golfer with limited swing velocity but machinelike precision—are denied opportunities, privileges, and relationships they might otherwise have had. They may be harmed economically, socially, and psychologically. When groups exclude on the basis of characteristics like race, gender, or sexual orientation, the psychological harm of exclusion may also extend well beyond those who have actually sought acceptance to others who share their characteristics. For all of these reasons, there is much to be said for an antidiscrimination norm and the value of equality that underlies it. But our constitutionalism also recognizes values other than equality, including a meaningful pluralism that permits diverse groups to flourish within our polity. That liberty finds refuge in the freedom of assembly.

Respondent United States Jaycees is a nonprofit group that desires to exclude women from its membership. However much I may disagree with the Jaycees’s principles and practices, they fall within the boundaries of peaceable assembly, see U.S. Const., Amend. I. The majority’s decision to resolve this case under a different standard fails to account for the role of assembly in our constitutional framework and jeopardizes the tradition of dissent and free expression long recognized in this country.

I.

The right of peaceable assembly guards “not solely religious or political” causes but also “secular causes,” great and small.
Thomas v. Collins. Although its “most pristine and classic form” may manifest in a physical gathering such as a protest or strike, Edwards v. South Carolina, our decisions have never limited assembly to protests and demonstrations. To the contrary, we have expressly relied on the right of assembly to invalidate convictions for participating in meetings (De Jonge v. Oregon), organizing local chapters of a national group (Herndon v. Lowry), and speaking publicly without a proper license (Thomas v. Collins). We noted in NAACP v. Alabama that our decision in American Communications Association v. Douds referred to “the varied forms of governmental action which might interfere with freedom of assembly” and concluded that “compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.”

As Justice Douglas once observed:

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.

Gibson v. Florida Legislative Investigation Committee (Douglas, J., concurring).

The right of assembly “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.” De Jonge v. Oregon. Indeed, as we announced in West Virginia v. Barnette:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press,
freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

See also Bates v. City of Little Rock ("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."). In Justice Brandeis’s well-known words:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.


II.

The majority fails to recognize the importance of protecting even those dissenting practices out of step with mainstream values. As we noted in Gilmore v. Montgomery, “the freedom to associate applies to the beliefs we share, and to those we consider reprehensible” and “tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.” In that same decision, we quoted approvingly Justice Douglas’s assertion that “the associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They
also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.” *Gilmore v. Montgomery* (quoting *Moose Lodge No. 107 v. Irvis* (Douglas, J., dissenting)).

Our nation has long protected dissenting groups with the right of assembly. These groups often expressed views antithetical and even threatening to those who held political power. They included the Democratic-Republican Societies of the late eighteenth century, suffragists and abolitionists of the antebellum era, and groups advocating on behalf of labor, women, and racial minorities in the twentieth century. We have not always been so vigilant in our protection of civil liberties, and our fear-driven denials of the right of assembly mark some of the low points of our constitutional history. *See, e.g., Dennis v. United States* (upholding convictions of leaders of the Communist Party for their organizing and advocacy).

Notwithstanding our notable failures in cases like *Dennis*, we have usually sought to extend the right of assembly to favored and disfavored groups alike. Over the past few decades, we have carved out an important limitation on the protections of assembly in cases involving discrimination on the basis of race. Most of these cases involved places of public accommodation as that term is defined in the Civil Rights Act of 1964. *See, e.g., Heart of Atlanta Motel v. United States* (motel), *Katz v. United States* (restaurant), *Daniel v. Paul* (amusement park). We have never endorsed the legal fiction advanced by the Minnesota Supreme Court that a private group like the Jaycees is a place of public accommodation.

In a separate line of cases arising out of the civil rights era, we construed a Reconstruction era statute, the Civil Rights Act of 1866, to bar racial discrimination in the sale or lease of private property. In *Jones v. Alfred H. Mayer*, we reasoned that the 1866 Act reached these private transactions because “the exclusion of Negroes from white communities” reflected “the badges and incidents of slavery.” We extended the reach of *Jones* to
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membership in a community park and playground in Sullivan v. Little Hunting Park and a private swimming pool in Tillman v. Wheaton-Haven Recreation Association. Jones, Sullivan, and Tillman all involved sales or leases related to real property covered under the Fair Housing Act of 1968. Justice Harlan dissented in Sullivan because he thought that relying on the Civil Rights Act of 1866 rather than a straightforward application of the Fair Housing Act required a “vague and open-ended” construction that risked “grave constitutional issues should [the former] be extended too far into some types of private discrimination.” Today’s decision confirms the wisdom of his warning.

The majority cites Tillman, Sullivan, and Daniel to support its contention that “the local chapters of the Jaycees are large and basically unselective groups.” Ante, 630. The constitutional infirmity of the groups in these cases wasn’t that they employed a single membership criterion. It was that the criterion was: (1) race; (2) used by whites to exclude blacks; (3) in membership groups closely tied to housing (in Tillman and Sullivan) or created as an obvious sham (in Daniel); and (4) in the midst of the Civil Rights Era. The constitutional rationale underlying these cases wasn’t that unselective groups lacked an intimacy worthy of constitutional protection but that: (1) their lack of selectivity factored against qualifying them under the public club exception to the public accommodations laws of the Civil Rights Act of 1964; and (2) “the exclusion of Negroes from white communities” reflected “the badges and incidents of slavery.” The majority makes no attempt to explain how these rationales justify denying constitutional protections to the Jaycees.

The majority also cites our decision in Runyon v. McCrary, which construed another provision of the Civil Rights Act of 1866 to bar racial discrimination by “private, commercially operated, nonsectarian schools.” Justice Stewart’s opinion in Runyon quoted with approval the Fourth Circuit’s conclusion that “there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.” That
claim is unpersuasive. Equally implausible is the majority’s suggestion that “the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” Ante, 626. Ten years ago, the First Circuit made a more commonsense observation about the message conveyed by a group’s very existence in upholding the associational rights of a gay student group: “beyond the specific communications at [its] events is the basic ‘message’ [Gay Students Organization] seeks to convey—that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.” Gay Students Organization of the University of New Hampshire v. Bonner (1st Cir. 1974).

III.

The majority’s category of “intimate association” builds upon a decontextualized understanding of privacy that artificially elevates certain groups to a special protected status. Its implicit distinction between intimate and nonintimate associations is unconvincing: all of the values, benefits, and attributes that the majority assigns to intimate associations are equally applicable to many if not most nonintimate associations. In my view, we should avoid creating a distinction of such constitutional significance where one is unwarranted.

The regrettable consequence of creating an unnecessary right of intimate association is that it jettisons those groups that fail to meet its arbitrary contours to a lower level of constitutional protection. In the majority’s words, “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which [intimate or expressive association] is at stake in a given case.” Ante, 618. Indeed, the majority’s restriction of intimate associations to those “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and
seclusion from others in critical aspects of the relationship,” ante, 620, would exclude most if not all of the groups that the right of assembly has protected throughout our nation’s history.

IV.

The majority’s category of “expressive association” improperly construes the Jaycees as a means of expression and ignores that both its membership and its acts of gathering are forms of expression. Justice O’Connor’s concurrence makes a similar error in dismissing the expressive aspects of the Jaycees.

We noted in *NAACP v. Alabama* that the “close nexus between the freedoms of speech and assembly” demonstrates that “effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” The very existence of the Jaycees is a form of expression, and the forced inclusion of unwanted members unquestionably alters the content of that expression. As we stated in *Griswold v. Connecticut*, the related right of association “includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.” As Justice Douglas once noted, “joining is a method of expression.” *Lathrop v. Donahue* (Douglas, J., dissenting).

We observed in *Thomas v. Collins*:

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.

The reasoning expressed in *Thomas* is similar to our prior restraint doctrine for free speech. We recognize in that area of the law that preventing a message altogether by restraining a
speaker is as anathema to free speech as punishing the message after the fact—it may send a “chilling effect” that discourages the speaker from even attempting to convey a message. The same is true with actions taken to constrain an assembly before its expression is manifest.

Justice O'Connor’s concurrence today rightly notes that “protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.” Ante, 633. And despite its disregard for the consequences to the Jaycees, the majority also recognizes the voice-altering nature of its decision:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Ante, 623. In a critical comment reflecting the significance of what is at stake today, the majority acknowledges that: “according protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” Ante, 622.

Justice O’Connor’s concurrence proposes an alternative assessment based on the commercial nature of a group. She concludes that the Jaycees is “first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management” and that “Minnesota’s attempt to regulate the membership of the Jaycees chapters operating in that State presents a relatively easy case for application of the expressive-commercial dichotomy.” Ante, 639.

I disagree with my colleague’s conclusion on the record before us. As Judge Arnold wrote in the opinion below:
The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological.

*United States Jaycees v. McClure* (8th Cir. 1983).

Justice O’Connor’s classification of the Jaycees is illustrative of the dangers that arise when a court imposes its own interpretation of the meaning and purposes of a group or its practices. The record establishes that the Jaycees, like many similarly situated groups, has many purposes and activities. Each of its members will embrace certain values and activities more than others, and to some the Jaycees may well be first and foremost a commercial organization. But we cannot state with any certainty that the overall purposes, values, and activities of the Jaycees are primarily commercial in nature. The Jaycees is not a for-profit business incorporated for the purposes of generating revenue. It is a private group.

V.

In my view, the proper standard for determining the limits of group autonomy is through the right of assembly. We observed in *Thomas v. Collins* that because of the “preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment,” only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” As we set forth in that opinion:

Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community’s relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the
line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.

_Id._ at 531–32.

The Jaycees is a peaceable, noncommercial assembly that presents no “grave and impending public danger.” Nor is this a case where the record evidences any compelling abuse of private power. The Jaycees is not the Jaybird Association. _See Terry v. Adams._

VI.

This case involves the clash of two fundamental values: equality and autonomy. On the one hand, the Jaycees’s membership requirements are inherently discriminatory and inconsistent with liberal ideals of equality. On the other hand, the group depends upon this discrimination for its very existence. We are left with a choice between two constitutional visions: a radical sameness that destroys dissenting traditions or the destabilizing difference of a meaningful pluralism. Honoring one ideal sacrifices the other.

The minimal constraints of peaceable assembly leave us with racists, bigots, and ideologues. They also leave us with difference. Peaceable assembly forces us to confront more honestly questions of what it means to live among dissenting, political, and expressive groups.

Because the Jaycees is a peaceable noncommercial assembly and is otherwise entitled under our precedent to protect its autonomy and message in the ways it deems desirable, I respectfully dissent.