This book has traced the history of the constitutional protections accorded to groups, beginning with the freedom of assembly in the Bill of Rights and culminating with what I have characterized as a weak right of association that emerged in the middle of the twentieth century and was refashioned a generation later. I have argued that American constitutionalism—as embodied by the people of this country even if not always in the opinions of the Supreme Court—has always recognized the importance of the dissenting, political, and expressive group. The modern right of association, in contrast, has lost sight of these attributes by drawing upon shifting justifications during its development over the past fifty years: first a pluralism that emphasized consensus and stability, then the penumbras of the First Amendment that linked association to privacy, and, most recently, a tenuous hierarchy of intimate and expressive association. This highly malleable doctrine arbitrarily extends constitutional protections to some groups and denies them to others, thus weakening group autonomy—and threatening liberty.

The right of assembly protects the members of a group based not upon their principles or politics but by virtue of their coming together in a way of
life. The kinds of unpopular, renegade, and even dangerous gatherings that have sought refuge in that right remind us of the importance of resisting all but the rarest of encroachments upon an assembled people. This caution is obscured in the shifting theoretical and jurisprudential justifications of association, which have too easily permitted incursions into group autonomy.

One eminently practical way to challenge the weakened right of association is to raise the freedom of assembly as an independent constitutional claim in First Amendment litigation. Although it is possible that courts would conclude that assembly is an antiquated precursor to the right of association, it would be odd for a judicially constructed right completely to subsume a right enumerated in the text of the Constitution. Moreover, the Court’s previous decisions maintain an ambiguous link between assembly and association that falls short of equating the two concepts. On the other hand, if courts were to reaffirm the continued importance of the freedom of assembly, then they would need to explain its doctrinal framework and outline the relationship of assembly to other First Amendment freedoms.

The normative claims asserted in this book are not without consequences. They reintroduce a weighing of constitutional values that some would prefer remain suppressed. They strengthen protections for groups that you and I don’t like. But they also strengthen protections for groups that we care about, against a state-enforced majoritarianism whose threat we might not recognize. As Justice Black once wrote: “I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate, or sooner or later they will be denied to the ideas we cherish.”

We ought to remember that “challenges to existing values and decisions to embody and express dissident values are precisely the choices and activities that cannot be properly evaluated by summations of existing preferences” and that “the constitutional right of assembly ought to protect activities that are unreasonable from the perspective of the existing order.” By losing touch with our past recognition of the freedom of assembly and the groups that have embodied it, we risk embracing too easily an attenuated right of association that cedes to the state the authority over what kinds of groups are acceptable in the democratic experiment. Democracy and stability may be easier in the short term, but in forgetting the freedom of assembly, we forget the kind of politics that has brought us this far.