"DANGEROUS TO THE LIBERTIES OF A FREE PEOPLE": SECRET SOCIETIES AND THE RIGHT TO ASSEMBLE

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Americans in the eighteenth and nineteenth centuries often feared that secret assembly threatened republican government. Oath-bound secret societies were allegedly elitist cabals that would establish an *imperium in imperio* oppressive to ordinary citizens. Yet despite this hostility, many early Americans also insisted that freedom of assembly included the right to gather anonymously. According to this view, laws could not prohibit or excessively burden secrecy. This article, therefore, examines the discourse around secret societies both at America's founding and at the time the Fourteenth Amendment was ratified. It demonstrates that—although there were voices on both sides of the debate—the weight of the evidence indicates that the First Amendment's Assembly Clause originally protected the right to assemble in secret.

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Introduction

In the fall of 1875, a convention met in Raleigh, North Carolina, intending to gut the state's 1868 Reconstruction constitution.[1] The convention's Democratic majority would have preferred to repeal the 1868 constitution altogether, written, as it was, by Black freedmen and Northern carpetbaggers and approved as a condition of the state's readmission to Congress. But elections had returned a 61–60 partisan split, so legislation forced the delegates to swear to amend the 1868 constitution, not abolish it.[2] The delegates proposed thirty amendments—ratified the next year—which shifted power from local courts and county governments (often controlled by Blacks) to the securely Democratic General Assembly.[3]

Two amendments, side by side in the final document, targeted the endemic political violence of the Reconstruction era by cutting back on individual rights that dated to North Carolina's original 1776 constitution. First, the delegates added a sentence to the pre-existing right to bear arms stating that "Nothing herein con-

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[1] N.C. Const. Convention, Journal of the Constitutional Convention of the State of North Carolina, Held in 1875, at 2–3 (Josiah Turner ed., 1875); *see also* Mark L. Bradley, Blue-coats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina 181, 184, 260–61 (2009).

[2] Ronnie W. Faulkner, *Convention of 1875*, *in* Encyclopedia of North Carolina (William S. Powell ed., 2006), https://www.ncpedia.org/government/convention-1875; John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1777 (1992). Additionally, parts of the 1868 document, such as its *ad valorem* taxation provision, were declared unamendable. *Id.* at 1781–82.

[3] Orth, *supra* note 2, at 1782–84, 1793–94; Faulkner, *supra* note 2. The amendments also segregated schools and banned interracial marriage. Orth, *supra* note 2, at 1784. Albion Tourgée—a Republican leader at both the 1868 and 1875 conventions who later served as Homer Plessy's attorney—sought to use the 1868 Constitution to establish self-governing townships in North Carolina based on the New England model. *See* Sandra M. Gustafson, *Democracy and Discussion: Albion Tourgée on Race and the Town Meeting Ideal*, 5 J. Nineteenth-Century Americanists 389, 390–91 (2017). The 1875 amendments ended this reform. *Id.*

tained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."[4] Second, the state's assembly clause now read "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret political societies are dangerous to the liberties of a free people, and should not be tolerated."[5]

A present-day reader might assume that these additions were designed to quash the Ku Klux Klan. The opposite was true.[6] During the 1860s and 1870s, North Carolina Democrats repeatedly denounced Republican secret societies such as the Heroes of America and the Union League, which formed to sabotage the Confederate war effort, defend freedmen, and mobilize Republican voters.[7] After the war, these

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[4] *Compare* N.C. CONST. of 1876, art. I, § 24, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2824 (Francis Newton Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] ("A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; . . . Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."), *with* N.C. CONST. of 1868, art. I, § 24, *in* 5 STATE CONSTITUTIONS, *supra*, at 2802 ("A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."), *and* N.C. CONST. of 1776, art. XVII, *in* 5 STATE CONSTITUTIONS, *supra*, at 2788 ("the people have a right to bear arms, for the defence of the State").

[5] *Compare* N.C. CONST. of 1876, art. I, § 25, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 2824 ("The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret political societies are dangerous to the liberties of a free people, and should not be tolerated."), *with* N.C. CONST. of 1868, art. I, § 25, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 2802 ("The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances."), *and* N.C. CONST. of 1776, art. XVIII, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 2788 (same).

[6] The amendments instead aimed to curtail Black assembly and rights. To do so, Rufus Barringer (a Republican) introduced the arms provision while W. M. Kerr (a Republican) and Josiah Turner (a Democrat) advanced the secret society provision. N.C. CONST. CONVENTION, *supra* note 1, at 82, 129–30, 192.

[7] *See* STEVEN E. NASH, RECONSTRUCTION'S RAGGED EDGE: THE POLITICS OF POSTWAR LIFE IN THE SOUTHERN MOUNTAINS 68–69, 142–44 (2016) (noting that such groups had largely died out by 1875); William T. Auman, *Heroes of America*, *in* ENCYCLOPEDIA OF NORTH CAROLINA (William S.

groups shifted from paramilitary activity to political organization, and they met in public when they could.[8] Nonetheless, white southerners feared and hated them.[9] For instance, one ex-Confederate politician maintained that the Republicans "operat[ed] chiefly through secret political societies . . . particularly among the blacks" although there was "no justification, at this time, for *any secret* political organization," violent or non-violent.[10] For many Democrats, rumors about the threat of Republican secret societies made both Klan terrorism and the denial of Black assembly rights necessary.[11]

North Carolina's 1875 convention, then, rewrote individual rights protections predating the federal Constitution in order to crush the Republican political apparatus. Most delegates plainly agreed with Justice Taney's infamous words that the South would never have consented to constitutions—federal or state—if they had known Blacks would be "recognized as citizens" with the same rights "to hold public meetings upon political affairs, and to keep and carry arms wherever they went,"

Powell ed., 2006), https://www.ncpedia.org/heroes-america. William W. Holden, the state's Reconstruction governor, secretly coordinated with these societies even before Appomattox. NASH, *supra*, at 21–22. Holden later maintained that he ended his affiliation with the Union League in 1865 and insisted the league—unlike the Klan—was non-violent, which was not always accurate. 2 W. W. HOLDEN, MEMOIRS OF W. W. HOLDEN 78–79, 139 (1911).

[8] Eric Foner, *Black Reconstruction Leaders at the Grass Roots*, *in* BLACK LEADERS OF THE NINETEENTH CENTURY 219, 221 (Leon Litwack & August Meier eds., 1991) (observing that "virtually every black voter in the South" joined one of these leagues, which generally met "in a black church or school, or at the home of some prominent black individual"); *see also* NASH, *supra* note 7, at 142–44 (stating these "secret" groups often met in public and sometimes had public membership lists).

[9] Secret societies—whether political such as the Union League or the Knights of the Golden Circle or fraternal such as the Prince Hall Freemasons or the Odd Fellows—were feared in the North and South, across the political spectrum, although the real power of these societies was slight. *See generally* FRANK L. KLEMENT, DARK LANTERNS: SECRET POLITICAL SOCIETIES, CONSPIRACIES, AND TREASON TRIALS IN THE CIVIL WAR (1989); *see also Ex parte* Milligan, 71 U.S. 2, 130 (1866) ("resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws"); Johnson v. Jones, 44 Ill. 142, 149–50 (1867); McCormick v. Humphrey, 27 Ind. 144, 145 (1866).

[10] BRADLEY, *supra* note 1, at 150 (emphasis in original) (quoting an 1867 letter by Gov. Jonathan Worth: Holden's political rival). Democratic politicians often declared they also opposed white supremacist societies like the Klan, although this was likely a disingenuous attempt to fake evenhandedness. *See* GORDAN B. MCKINNEY, ZEB VANCE: NORTH CAROLINA'S CIVIL WAR GOVERNOR AND GILDED AGE POLITICAL LEADER 224–25, 287–88 (2004).

[11] *See* NASH, *supra* note 7, at 142; BRADLEY, *supra* note 1, at 149.

for how could southern leaders "have been so forgetful or regardless of their own safety"?[12] Yet, by rewriting their constitution, the North Carolina delegates showed how they—like Taney—understood the older 1776 text. After all, North Carolina had passed a statute criminalizing "any oath-bound secret political or military organization" almost a decade earlier.[13] There was no reason to amend the state constitution—unless the delegates thought this pre-existing statute was constitutionally suspect. Evidently, the North Carolina convention believed that the original assembly clause included the right to form anonymous political organizations with secret meetings, and that the original arms provision included the right of these groups to carry weapons in self-defense.[14] Hence, they revised.

The U.S. Supreme Court has recognized a First Amendment right to anonymous assembly—that is, a right to gather clandestinely or in disguise and a related associational right to join non-violent groups that keep their memberships secret—

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[12] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417, 421 (1857) (citing southern laws restricting the assembly rights of free and enslaved Blacks).

[13] THE NORTH CAROLINA CRIMINAL CODE AND DIGEST 458 (Samuel J. Pemberton & Thomas J. Jerome eds., 1892). North Carolina criminalized secret political societies in 1868 (when the Republicans controlled the legislature and were warring against the Klan) but then expanded this law in 1871, once the Democrats acquired a majority. Both parties sought to destroy secret societies but with different societies in view. *See id.* at 458–59 (making it a misdemeanor to join any oath-bound secret organization, to use any "signs or grip or passwords, or any disguise" in connection with such societies, or "secretly assemble" with others "for the purpose of compassing or furthering any political object"). A version of this statute governs today. N.C. GEN. STAT. § 14-10 (1994).

[14] *Cf.* Presser v. Illinois, 116 U.S. 252, 267–68 (1886) (holding states can "control and regulate the organization, drilling, and parading of military bodies" as part of their power "to disperse assemblages organized for sedition and treason, and . . . suppress armed mobs bent on riot and rapine"). *But see* D.C. v. Heller, 554 U.S. 570, 621 (2008) (characterizing the Court's 1886 *Presser* decision as allowing "the prohibition of private paramilitary organizations").

since the 1940s.[15] Although there is no per se anonymity right, disclosure requirements must survive exacting scrutiny.[16] Thus, for instance, states can impose an "identification requirement" on professional fundraisers, but "[s]o long as no more is involved than exercise of the rights of free speech and free assembly," even small restraints such as mandatory identification are "petty tyrannies."[17] According to the Court, laws hindering anonymity "interfere with freedom of assembly" and are "of the same order" as laws forcing Jews or Socialists to "wear identifying armbands."[18] Oath-bound secret societies such as the Klan are an exception. If oath-bound societies are notorious for "acts of unlawful intimidation and violence," the state can then compel disclosure.[19] Under contemporary doctrine, North Caro-

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[15] *See, e.g.*, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387–88 (2021) (invalidating a law requiring charities to disclose major donors because "[e]very demand that might chill association therefore fails exacting scrutiny," including disclosure requirements "indiscriminately sweeping up the information of [people] with reason to remain anonymous"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 454, 462 (1958) (overturning a court order requiring a non-profit to supply its membership list because "compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective [] restraint on freedom of association"); Thomas v. Collins, 323 U.S. 516, 525, 539–40 (1945) (invalidating a law requiring union organizers to register with the state before addressing a gathering of workers because "[l]awful public assemblies . . . are not instruments of harm which require previous identification of the speakers").

[16] *See* Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 N.Y.U. J. L. & LIBERTY 160, 164–65, 200 (2015).

[17] *Thomas*, 323 U.S. at 540, 543 (contrasting conspiracies and fundraising efforts with "mere participation in a peaceable assembly"); *see also* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 60, 173 (2012) (depicting *Thomas* as "the high point" of the Court's assembly jurisprudence).

[18] *NAACP*, 357 U.S. at 462 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)); *see also Douds*, 339 U.S. at 402 ("[I]ndirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature."); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 81–83.

[19] *NAACP*, 357 U.S. at 465 (recharacterizing the holding of the earlier *Bryant* decision); *see also* Communist Party of U.S. v. Subversive Activities Control Board, 367 U.S. 1, 97, 101 (1961) (upholding disclosure requirements for "associations" such as the Communists and the Klan that are "a threat to public safety"); *Douds*, 339 U.S. at 429–30 (Jackson, J., concurring) (allowing limits on the Communist Party—unlike the Republican Party or Socialist Party—because Communists combine

lina's "secret societies" statute is facially unconstitutional but might be valid if narrowed to apply to violent societies alone—that is, to cover societies that habitually refuse to assemble peaceably.[20]

Despite pronouncements in support of anonymous assembly, over the last forty years, the Supreme Court has seldom mentioned the Assembly Clause.[21] The Court has been content to decide group membership cases on freedom of association grounds instead.[22] In contrast, scholarship on the Assembly Clause abounds. But scholars often understand the Clause primarily as a protection for republican self-governance through public face-to-face gatherings.[23] For many interpreters, the

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assembly with "terrorism" and "the techniques of a secret cabal—false names, forged passports, code messages, clandestine meetings"). *But see* N.Y. *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 71–72, 75 (1928) (concluding that "to be and remain a member of a secret, oath-bound association" is not a privilege of United States citizenship, without stating if this is true only of violent groups); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 51, 84.

[20] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also* Barron v. Kolenda, 203 N.E.3d 1125, 1136 (Mass. 2023) ("'Peaceable and orderly' is not the same as 'respectful and courteous.'"); Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 167–69 (2013) (noting that founding era dictionaries defined "peaceably" as "without tumult," "without disturbance," "opposite to war or strife," and "quietly"); Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 MO. L. REV. 961, 967, 971 (2015).

[21] The last case resting on the Assembly Clause was *NAACP v. Claiborne Hardware Co.* (1982), which defended the right of a civil rights organization to boycott, although that boycott caused vandalism and violent intimidation. 458 U.S. 886, 888, 911–12 (1982); Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1655, 1737 (2021); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 7, 191 n.15.

[22] *See, e.g.*, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021) (holding that "freedom of association" is implicit in the First Amendment's five freedoms); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659, 661 (2000) (overturning a law that burdened "associational rights that enjoy First Amendment protection" because "free speech and assembly should be guaranteed" against "the occasional tyrannies of governing majorities") (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (recognizing "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion").

[23] *See, e.g.*, Bowie, *supra* note 21, at 1656, 1658–59 ("[A]ssembly clauses were designed to protect a constitutional right of self-government."); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 578 (2009) (interpreting the assembly right as enshrining "regular and

history of colonial Massachusetts and the tradition of New England town meetings supplies essential context for understanding freedom of assembly.[24] As long as the models for assembly are Congregationalists electing their town's fence viewer or the Boston mob burning the king's effigy around the Liberty Tree, secret meetings will seem superfluous.[25] But a different model will convey a different scope and purpose. For Union Leaguers gathering in fields at night and teaching special handshakes and passwords to initiated members for their own safety, secret assembly was vital.[26]

This Article, therefore, examines secret assembly both at America's founding and at the time of the incorporation of the Assembly Clause through the Fourteenth Amendment. It demonstrates that the Supreme Court's key precedents on secret assembly were, for the most part, correctly decided. "The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate

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unfettered access to public spaces as forums for collective action"); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 647, 730 (2002) ("Freedom of association at its core is a political right, a right of self-governance.").

[24] For such models, see, for instance, Bowie, *supra* note 21, at 1663, 1665; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 336–37 (1990). For accounts pushing against this focus on town meetings, see, for instance, Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1112–13 (2016); Baylen J. Linnekin, "*Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 603, 605 (2012).

[25] *See, e.g.*, Doe v. Reed, 561 U.S. 186, 223 (2010) (Scalia, J., concurring) (upholding a disclosure requirement because "when the people [in early America] exercised legislative power directly, they did so not anonymously, but openly in town hall meetings"); Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 121 P.3d 671, 678, 681 (Or. Ct. App. 2005) (defining "assembly" as "a town-based, political body that deliberated over 'instructions' to representatives in eighteenth- and nineteenth-century America"); Mazzone, *supra* note 23, at 763 (arguing the *Dale* decision was incorrectly decided because "[a]ssociations that are inclusive—that look more like town hall meetings—better serve popular sovereignty."). For eighteenth-century protest rituals, see, for instance, Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1060, 1065 (2009); El-Haj, *The Neglected Right*, *supra* note 23, at 555–58.

[26] *See* Foner, *supra* note 8, at 221 (noting that Black and white Union Leaguers met "if necessary, secretly in woods or fields" and used "secret passwords and colorful initiation rites"); *see also* THE NORTH CAROLINA CRIMINAL CODE AND DIGEST, *supra* note 13, at 468–69 (condemning "oath-bound secret political or military organization[s]" which employed "signs or grip or passwords, or any disguise.").

anonymously," as one Justice recently concluded.[27] Without the power to gather in secret, American dissenters cannot defend themselves from the despotic power of mass society.[28] As the North Carolina delegates in 1875 understood, breaking the Republican Party meant prohibiting secret assembly. Liberty sometimes must go masked.

I. ASSEMBLY AND ASSOCIATION: A CLARIFICATION

Assembly is not association. But some commentators equate the two. Dozens of opinions by federal judges, for instance, have referred to the First Amendment's "Association Clause," meaning the Assembly Clause.[29] And legal scholarship has often argued that the extratextual right to association derives, or ought to derive, solely from the Assembly Clause or that courts should stop using the associational right and decide group membership cases on the Assembly Clause directly.[30] These

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[27] *Americans for Prosperity*, 141 S. Ct. at 2390 (Thomas, J., concurring); *see also* Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1085, 1090 (1961).

[28] *Cf.* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous [political speech] is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."); Talley v. California, 362 U.S. 60, 64 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable . . . particularly where a group espouses dissident beliefs.").

[29] *See, e.g.*, Holzemer v. City of Memphis, 621 F.3d 512, 528 (6th Cir. 2010) (characterizing Supreme Court precedent on "the First Amendment's Free Speech, Petition, and Association clauses"); Swanson v. City of Bruce, 105 F. App'x 540, 542 (5th Cir. 2004) ("the law of the Supreme Court and this circuit do not recognize" the plaintiff's claim "as one protected under the freedom of association clause"); Phillips v. Bowen, 278 F.3d 103, 111 (2d Cir. 2002) (declining to follow another circuit's interpretation of "the association clause of the First Amendment"); Boyle v. Cnty. of Allegheny, 139 F.3d 386, 395 (3d Cir. 1998) (noting that firing a government employee because of political affiliation "violates the freedom of association clause of the First Amendment"); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 3, 189 n.7.

[30] *See, e.g.*, Michael W. McConnell, *Freedom of Association: Campus Religious Groups*, 97 WASH. U. L. REV. 1641, 1642–44, 1652 (2020); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980, 982 (2011); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 4–5; Mazzone, *supra* note 23, at 647, 742, 763.

doctrinal shifts are possible only if freedom of association collapses into free assembly. Some legal historians, however, have pushed back against this perspective, maintaining that eighteenth-century Americans often differentiated association from assembly.[31] This historical debate may not matter doctrinally because the Supreme Court's foundational precedents never based association on the Assembly Clause alone. Under current doctrine, secret assembly and anonymous association are related but separate.[32]

The earliest Supreme Court opinions connecting association and assembly simply named the two as part of longer lists of constitutional freedoms.[33] For instance, *NAACP v. Alabama* (1958) located the "freedom to engage in association for the advancement of beliefs and ideas" in "the close nexus between the freedoms of speech and assembly," because the "[e]ffective advocacy of both public and private points of view, particularly controversial ones" is impossible without "group association."[34] The *NAACP* decision cited cases on a variety of "particular constitutional rights," including speech, press, and assembly, to show that the Court had

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[31] *See*, *e.g.*, Bowie, *supra* note 21, at 1656, 1658–59, 1661 (contending that "state and federal assembly clauses were designed to protect a constitutional right of self-government" through "the town meetings and provincial assemblies by which the colonists had long legislated," rather than "merely to defend the act of *assembling*," because "the right to assemble . . . was also a claim to govern"); James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 171 (1999) ("The Federalists did not confound freedom of assembly with freedom of association, unlike many modern theorists.").

[32] Many free association decisions never mention the Assembly Clause. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018); Obergefell v. Hodges, 576 U.S. 644, 667 (2015); McCutcheon v. FEC, 572 U.S. 185, 203–04 (2014); Buckley v. Valeo, 424 U.S. 1, 64, 71 (1976).

[33] *See, e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 452 (1950) (Black, J., dissenting) (rejecting guilt "solely from association" because the First Amendment forbids "penalizing political belief, speech, press, assembly, or party affiliation"); Whitney v. California, 274 U.S. 357, 371 (1927) (listing "the rights of free speech, assembly, and association"); Bhagwat, *Associational Speech*, *supra* note 30, at 984–85 (stressing that, before 1958, Supreme Court cases "treat[ed] the rights of free speech, assembly, and association as distinct but coequal . . . without clearly distinguishing" between these "cognate rights"); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 50, 213 n.15.

[34] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (incorporating freedom of association through "the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); *see also* N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 13 (1988) ("The ability and the opportunity to combine with others to advance one's views is a

already implicitly recognized free association.[35] A few years later, the Court characterized *NAACP* as "involv[ing] more than the 'right of assembly.'"[36] Rather, *NAACP* held "that freedom of association was a peripheral First Amendment right" because "the First Amendment has a penumbra where privacy is protected from governmental intrusion[s]" such as mandatory disclosure, which constitute "a substantial restraint" on the Amendment's five explicit liberties.[37]

Likewise, the Court in *Roberts v. U.S. Jaycees* (1984) emphasized that the Constitution safeguards "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[38] Many First Amendment activities cannot be individual, at least in a world of limited resources. Christian worship, for instance, may be impossible without seminaries to train pastors, councils to write creeds, monastic orders to run pilgrimage shrines, and so forth. Before a mass protest, a planning committee often must arrange speakers, permits, security, banners, sound equipment, and janitors. A national newspaper needs a board of directors to raise funds, gather subscribers, and hire a team of editors and reporters. Hence,

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powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.")

[35] *NAACP*, 357 U.S. at 461–62.

[36] Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965) (citing *NAACP* as the premier authority for the idea that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"); *see also* Warden v. Hayden, 387 U.S. 294 (1967) (Douglas, J., dissenting) (citing *NAACP* for the proposition that "[t]he First Amendment also has a penumbra, for while it protects only 'speech' and 'press' it also protects related rights such as the right of association").

[37] *Griswold*, 381 U.S. at 483; INAZU, LIBERTY'S REFUGE, *supra* note 17, at 125–26 (describing how Douglas' penumbral vision enabled him "to protect secret or intimate actions" through freedom of association).

[38] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984); *see also id.* at 639 (O'Connor, J., concurring) (agreeing with the defendant's characterization that an action is a "protected expressive activit[y]" and thus "indisputably comes within the right of association" if it pursues "the specific ends of speech, writing, belief, and assembly for redress of grievances"); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 132–34.

"freedom of association of this kind [i]s an indispensable means of preserving other individual liberties."[39]

Justice Brennan, writing for the *Jaycees* majority, noted that groupings formed for the purpose of First Amendment activities "could be called . . . expressive association[s]" as a short-hand.[40] But despite the ubiquity of "expressive association" in lower court decisions today, Brennan later largely avoided this label and preferred to refer simply to associations engaged in "First Amendment freedoms."[41] Brennan may have hesitated in fear that "expression association" would be misinterpreted.

"First Amendment association" would have been a better name. After all, under the reasoning of *NAACP* and *Jaycees*, an association is sacrosanct when it enables one of the five First Amendment liberties and thus falls in that liberty's penumbra—even if the association is not itself expressive and does not promote expressive activity.[42] Moreover, "expressive" in Supreme Court doctrine is a term of art, cov-

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[39] *Jaycees*, 468 U.S. at 618; *see also* Healy v. James, 408 U.S. 169, 181 (1972) ("the right of individuals to associate to further their personal beliefs . . . has long been held to be implicit in the freedoms of speech, assembly, and petition"); Bhagwat, *Associational Speech*, *supra* note 30, at 998–99 (on the role that speech, the press, assembly, and association play in facilitating each other).

[40] *Jaycees*, 468 U.S. at 617–18 (distinguishing "two distinct senses" of associations: those defending due process liberty interests and those defending First Amendment freedoms).

[41] Brennan spoke of "expressive association" only three times in the opinion and "intimate association" just once. *Id.* at 617–18, 622, 626. The Court used the phrase "expressive association" sparingly but increasingly over the fifteen years after the *Jaycees* decision. *See, e.g.*, City of Dallas v. Stanglin, 490 U.S. 19, 24–25 (1989). But any hesitancy about the label disappeared by the turn of the millennium. *See generally* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[42] Commentators now agree that the First Amendment contains five freedoms—that is, that the Assembly Clause and Petition Clause are two separate rights with different origins, drafting histories, doctrinal developments, and justifications. *See, e.g.*, Bhagwat, *Democratic First Amendment*, *supra* note 24, at 1105; INAZU, LIBERTY'S REFUGE, *supra* note 17, at 22–24. In the past, some argued that the First Amendment instead had a single right to assemble for the sake of petitioning. *See, e.g.*, Mazzone, *supra* note 23, at 713. This dispute emerged already in the nineteenth century. *Compare* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 267, 269 (1880) (emphasizing that "[t]wo rights . . . protected by this [single] provision" for the "right to petition is not coextensive with the right to assemble"), *and* BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 188 (1832) ("it cannot be supposed that they have a right to

ering activities that are not messages in the ordinary sense. First Amendment associations may be "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," not just public communication.[43] Simply limiting membership to select people can be a form of private expression.[44]

Only three of the First Amendment liberties (speech, press, and petition) always communicate to a public audience. The Free Exercise Clause, for example, shields the right of Americans to pray alone in private, even though private prayer expresses nothing outwardly when no other human ever learns that such secret prayer occurred.[45] An organization established to give out prayer shawls to wear during private devotions would be an "expressive association" under the definition in *Jaycees* without any need for external communication, just because it works for "the purpose of engaging in those activities protected by" free exercise.[46]

Likewise, those skeptical of a right to associate anonymously might insist that secret gatherings are not expressive; allegedly, secret societies communicate little or nothing to anyone excluded from their assemblies, because these societies seek

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assemble for the purpose of petitioning only"), *with* Presser v. Illinois, 116 U.S. 252, 267 (1886) (mischaracterizing the earlier *Cruikshank* opinion as holding that "the right peaceably to assemble was not protected . . . unless the purpose of the assembly was to petition the government for a redress of grievances").

[43] *Jaycees*, 468 U.S. at 622–23 (listing "attempt[s] to require disclosure of the fact of membership in a group seeking anonymity" as an example of unconstitutional infringement on association).

[44] *See Dale*, 530 U.S. at 648, 650 (stating that any group "engag[ing] in some form of expression" comes within the ambit of "the First Amendment's expressive associational right," even if that group is not an advocacy organization and solely uses "private" "form[s] of expression"); *Christian Legal*, 561 U.S. at 725 (Alito, J., dissenting) (characterizing *Dale* as holding that "limiting membership to persons whose admission does not significantly interfere with the group's ability to convey its views" is a "form of expression" that qualifies a group as "expressive association").

[45] *Cf.* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2417, 2431 (2022) (stating that the First Amendment protects people "praying quietly over their lunch"); *id.* at 2441 (Sotomayor, J., dissenting) (agreeing that "an individual's ability to engage in private prayer" is protected, although disputing the facts at issue).

[46] *See Jaycees*, 468 U.S. at 618; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes."); *cf.* FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 89–90, 277 (J. B. Lippincott & Co. 1859) (1853) (arguing that "the primordial right" of "free communion" between friends and tribes—rather than expressiveness—was the unifying link between the five First Amendment liberties).

to hide their gatherings, their membership, and sometimes even their existence. But if the right to assembly protects clandestine gatherings, then the right to association protects institutions such as the Union League or Freemasons, which habitually meet secretly.[47] Additionally, secret assemblies express a great deal internally between members of the group.[48] Anonymous associations are expressive associations.

Under current doctrine, the associational right depends upon a penumbral vision of the Constitution. There are five different rights of expressive association: rights to associate for the sake of speech, for the sake of religious exercise, for the sake of the press, for the sake of petition, and for the sake of assembling. Each liberty needs its own broader associations to ensure that the freedom itself can operate. Joining a mailing list or donating money to some large ideological non-profit is not in-person, face-to-face assembly.[49] But then, purchasing condoms in a public marketplace is not marital privacy either.[50] These associations are constitutionally necessary because of what they enable, not what they are.

This Article concentrates on reconstructing eighteenth- and nineteenth-century understandings of secret assembly, rather than evaluating the scope and logical coherence of regnant doctrine. But its historical analysis indicates that the Court's assembly precedents are largely correct. The founders linked—but did not equate—gathering in a group with joining a permanent organization. The First

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[47] The right to secret physical assembly, however, would not entail a right to anonymity for groups that never meet in-person (or, perhaps today, online). Protection for non-gathering anonymous associations stems from other provisions in the First Amendment. *Cf.* Natelson, *supra* note 16, at 164–65, 198 (suggesting that the Free Press Clause contains a right for authors to associate with printers and editors anonymously).

[48] *See* INAZU, LIBERTY'S REFUGE, *supra* note 17, at 161, 247 n.18 (arguing that "the gathering of a secret society would not have an outward expressiveness" but its very "act of gathering" is communicative and presupposes "an audience in the government actor restricting the act" of assembling).

[49] *Cf.* McConnell v. FEC, 540 U.S. 93, 254 (2003) (Scalia, J., concurring) ("restrictions on the expenditure of money for speech are equivalent to restrictions on speech"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech.").

[50] *See* Griswold v. Connecticut, 381 U.S. 479, 480–81, 485 (1965) (noting that defendants worked for an organization that charged fees to supply contraception and physical exams).

Amendment contains both a robust right to assemble physically and a separate, but shallower, associational right deriving from all five freedoms.

II. Assembly Rights at America's Founding

A. The Birth of Free Assembly

New England town meetings hold a central place in the American imaginary.[51] From the ratification era forward, the town meeting has supplied the foremost example of direct democracy in America: a centuries-old demonstration that ordinary people are capable of self-governance and that fears of Athenian-style mobocracy are baseless.[52] Scholarship on the Assembly Clause regularly links the origins of free assembly in America to New England town meetings and the history of Massachusetts in particular.[53] Some American founders drew the same connection.[54] According to John Adams, for example, New Englanders "acquired from their infancy the habit of discussing, of deliberating, and of judging of public affairs" from their "right to assemble . . . in their town halls, there to deliberate upon the public affairs of the town." This habit was a "principal source[] of that prudence in council

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[51] For a history of town meetings, see, for instance, Paula Cossart, Andrea Felicetti & James Kloppenberg, *Introduction: The New England Town Meeting: A Founding Myth of American Democracy*, 15(2) J. PUB. DELIBERATION art. 1 (2019); FRANK M. BRYAN, REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS (2010); JOSEPH F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION (1999).

[52] For such fears, see, for instance, THE FEDERALIST No. 6, at 22 (Alexander Hamilton) (Terence Ball ed., 2003) ("Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities?"); THE FEDERALIST No. 55, at 270 (Alexander Hamilton) ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."); THE FEDERALIST No. 58, at 286 (James Madison) (warning of "the infirmities incident to collective meetings of the people" where "[i]gnorance will be the dupe of cunning; and passion the slave of sophistry").

[53] *See, e.g.*, Bowie, *supra* note 21, at 1663, 1665; Pope, *Republican Moments*, *supra* note 24, at 336–37.

[54] *See, e.g.*, 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 119–20 (1789) (describing New England town meetings and similar bodies in other colonies "[i]n order to understand the mode by which this flame [of colonial protest] was spread" and the "advantages derived from these meetings, by uniting the whole body of the people in the measures taken to oppose" British tyranny, for "[i]t is perhaps impossible for human wisdom, to contrive any system" better suited to preserve liberty than these colonial assemblies).

and that military valor and ability, which have produced the American Revolution."[55]

Town meetings were deliberative bodies in which all free white adult males could participate in-person in writing laws, electing officials, and petitioning the state and federal government.[56] Each town also held the power of instruction—that is, the corporate right to command its representative as its agent in the state legislature to vote a certain way (not merely a right to inform or advise).[57] Instructions were controversial elsewhere in Britain and America but normal in New England.[58]

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[55] John Adams, *To the Abbé de Mably* (1782), *in* 5 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 495–96 (Charles Francis Adams ed., 1851) (describing how towns elected officers, managed roads and poor relief, and sent instructions to their representatives in the legislature, and asserting, inaccurately, that "other colonies" outside New England "adopt[ed] more or less the same institutions").

[56] For the powers and procedures of town meetings, see BRIAN P. JANISKEE, LOCAL GOVERNMENT IN EARLY AMERICA: THE COLONIAL EXPERIENCE AND LESSONS FROM THE FOUNDERS 19–23 (2010).

[57] *See, e.g.*, Margaret E. Monsell, *"Stars in the Constellation of the Commonwealth": Massachusetts Towns and the Constitutional Right of Instruction*, 29 NEW ENG. L. REV. 285, 291 (1995); Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 368, 364–66 (1991); Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. REV. 1331, 1333–34 (2009); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 189–91 (1998).

[58] Edmund Burke, for example, denounced instructions as "things utterly unknown to the laws of this land" for members of Parliament must seek "the general good" of the country rather than follow the "local purposes" and "local prejudices" of "the local constituent." Edmund Burke, *Speech to the Electors of Bristol*, *in* 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 14–15 (John West 1807) (1803) ("Parliament is not a *congress* of ambassadors from different and hostile interests . . .; . . .but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole . . . ."); *see also* WOOD, *supra* note 57, at 174–75 (noting that Burke's position was linked to the British idea of virtual representation—an idea that America's founders rejected); *cf.* Debates in the Convention of the Commonwealth of Massachusetts Convention Debates (1788), *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 91 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (speech of Theophilus Parsons) (arguing that the power of the states over congressmen must be limited lest representatives "lose all ideas of the general good, and will dwindle to a servile agent, attempting to serve local and partial benefits by cabal and intrigue").

Towns acted in public, as embodiments of popular sovereignty.[59] A secret or anonymous town meeting is an oxymoron.

Yet despite the fame of the town meeting in the eighteenth century, the First Amendment did not embrace freedom of assembly with towns primarily in view. Indeed, the ratification debates indicate that, if anything, the Assembly Clause was a conscious repudiation of this older town meeting tradition.[60] The right to assemble, after all, was not an ancient liberty. Unlike many protections in the U.S. Constitution—for example, due process or the right to petition—assembly appears in neither the Magna Carta, nor the 1689 English Bill of Rights, nor even the Virginia Declaration of Rights.[61] Free assembly was not deeply rooted in eighteenth-century culture and traditions.[62] In both England and the American colonies, statutes often restricted the ability of citizens to gather peaceably.[63]

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[59] *See* Mazzone, *supra* note 23, at 763 ("[I]n idealized form, a town hall meeting involves the assembly of a cross-section of the community. Inclusion is what gives the town hall meeting its claim to popular sovereignty.").

[60] *Cf.* United States v. Richardson, 418 U.S. 166, 179 (1974) (rejecting the idea that "the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government"); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) ("The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.").

[61] *See* Bhagwat, *Democratic First Amendment*, *supra* note 24, at 1105, 1110; Pope, *Republican Moments*, *supra* note 24, at 330.

[62] Duncan v. Jones [1936] 1 KB 218, 222 (Hewart C.J.) ("English law does not recognize any special right of public meeting for political or other purposes."); *see also* Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1547 (2004) (describing Pitt the Younger's extirpation of pro-French political societies); Michael Lobban, *From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820*, 10 OXFORD J. LEGAL STUD. 307, 310, 335 (1990) (describing seditious assembly prosecutions in eighteenth- and nineteenth-century England); Robin Handley, *Public Order, Petitioning and Freedom of Assembly*, 7 J. LEGAL HIST. 123, 123, 128 (1986) ("freedom of assembly was probably not conceived until the latter part of the eighteenth century"); James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 1, 7 (1931) (tracing English laws against unlawful assembly from the fourteenth century forward).

[63] *See, e.g.*, Seditious Meetings Act 1795, 36 Geo. 3 c.8 (Eng.) (empowering officials to forcibly disperse, after a proclamation, "Meetings, of any Description of Person, exceeding the Number of fifty Persons . . . [meeting] for the Purpose or on the Pretext of considering of or preparing any Petition, Complaint, Remonstrance, Declaration, or other Address" if they gather without prior notice

Freedom of assembly, instead, arose rapidly in America during the colonial protests of the 1760s and 1770s; state legislatures, informal gatherings, town meetings, processions, and political societies all played a role in these protests.[64] Colonials often planned boycotts of British goods, for instance, over food at a local tavern.[65] British officials objected that such meetings were unlawful conspiracies and sought to suppress even formal gatherings like town meetings and colonial legislatures.[66] In response, Americans insisted, without much evidence, that free assembly was a right of Englishmen.[67]

The Intolerable Acts of 1774—passed after the Boston Tea Party—not only abrogated Massachusetts' charter and closed the port of Boston but also prevented

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to the government); Riot Act 1714, 1 Geo. 1 c.5 (Eng.) (making it a felony if "twelve or more [people], being unlawfully, riotously, and tumultuously assembled together" fail to disperse within "the space of one hour" after a proclamation was read by the proper official); Conventicle Act 1664, 16 Car. 2 c.2 (Eng.) (banning attendance "at any Assembly Conventicle or Meeting under colour or pretence of any Exercise of Religion" other than of the Church of England where "five persons or more assembled together"); FRANCIS FANE, REPORTS ON THE LAWS OF CONNECTICUT 141, 159 (Charles M. Andrews ed., 1915) (making it illegal for young people to meet together on the street, in a tavern, or elsewhere on the Sabbath or any fast day); Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1, 25–26, 47 (2002).

[64] *See* Bowie, *supra* note 21, at 1659–60, 1669–71; *see also* Thomas Linzey & Daniel E. Brannen Jr., *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENV'T. L. & POL'Y 1, 13–17 (2017); Pope, *Republican Moments*, *supra* note 24, at 330–35.

[65] *See* Linnekin, *supra* note 24, at 604–06.

[66] Bowie, *supra* note 21, at 1666–67. The infamous governor, Edmund Andros, briefly prevented town meetings in the 1680s, but sustained attempts to prohibit meetings only arose after the French and Indian War. *Id.*

[67] *See, e.g.*, *Phileleutherus*, PA. J. SUPP., Feb. 6, 1766, *quoted in* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776, at 72 (1991) (arguing that "it can be no breach of the laws of nature nor of our country for people to assemble together peaceably" to demand that the courts permit suits against abusive customs officials); Thomas Hutchinson, *Letter to Lord Hillsborough*, Oct. 20, 1769, *quoted in* Pope, *Republican Moments*, *supra* note 24, at 332 (warning that "associations and assemblies pretending to be legal and constitutional and assuming powers which belong only to the established authority prove more fatal to this authority than mobs riots and the most tumultuous disorder").

town meetings "without the leave of the governor . . . in writing, expressing the special business of the said meeting," with the exception of an annual meeting "for the choice of selectmen, constables and other officers."[68] According to Parliament, "great abuse has been made of the power of calling such meetings," which often met "for other purposes" than elections, "treat[ed] upon matters of the most general concern," and "pass[ed] many dangerous and unwarrantable resolves."[69] All such popular gatherings were now a threat to royal authority.

When the First Continental Congress illegally met in Philadelphia later that year, the delegates issued a "Declaration and Resolves," formally avowing, among other things, a right to assemble.[70] The Congress insisted that Americans had "by the immutable laws of nature, [and] the principles of the English Constitution . . . a right peaceably to assemble, consider of their grievances, and petition the King."[71] Because such "assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate . . . all prosecutions, prohibitory proclamations, and commitments for [assembling], are illegal."[72] With these

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[68] Massachusetts Government Act 1774, 14 Geo. 3 c.45 (Eng.), *in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 789 (1814) (ending the power of town meetings to pass by-laws, instruct representatives, or directly manage local affairs); *see also* Bowie, *supra* note 21, at 1686–89.

[69] Massachusetts Government Act, *supra* note 68, at 789.

[70] *See* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 14–15 (2018); *see also* Bowie, *supra* note 21, at 1692–94. Many texts, going back to the seventeenth century, had pledged freedom of *religious* assembly, but a right to secular assembly was novel. *See, e.g.*, John Locke, *The Fundamental Constitutions of Carolina* §§ 97, 100, 102–03, 108, *in* LOCKE: POLITICAL ESSAYS 178–80 (Mark Goldie ed., 2004) (guaranteeing protection to "any religious assembly" if it held to a few basic doctrines and mandating "[n]o person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government or governors or of state matters").

[71] EXTRACTS FROM THE VOTES AND PROCEEDINGS OF THE AMERICAN CONTINENTAL CONGRESS, HELD AT PHILADELPHIA ON THE FIFTH OF SEPTEMBER 1774, at 2–3 (1774) (decrying the Intolerable Acts as "unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights").

[72] *Id.* The phrase "prohibitory proclamations" seemingly targeted not only laws abolishing legislatures and town meetings but also riot acts that forced crowds to scatter soon after the reading of a proclamation. *Cf.* Pope, *Republican Moments*, *supra* note 24, at 333–35 (noting that multiple colonies passed riot acts in the 1760s); El-Haj, *Defining Peaceably*, *supra* note 20, at 971, 973.

words, the American colonists as a whole—not just New Englanders—committed themselves to freedom of assembly.

B. Modeling Colonial Assembly

Although Americans in the 1770s and 1780s accepted a right to assemble, they quarreled about its scope. South Carolina's first constitution, for instance, restricts this freedom to religious gatherings only.[73] One influential version of the right might be termed the "New England model." In this model, freedom of assembly defends the ability of citizens to gather in legal corporations with authority over specific places in order to govern local affairs and choose officials. Many early Americans believed that open and public deliberative bodies representing the entire population of a location were the only proper political gathering in that area.[74] The New England model focused on assemblies analogous to town meetings. Temporary informal gatherings—let alone secret oath-bound clubs—received little protection.

Consider, for instance, the response to Shays' Rebellion in 1786. Although the Shaysites eventually turned violent, the movement originated in a series of county conventions of Massachusetts farmers who gathered to debate government reforms and forward petitions to Boston.[75] County conventions were not enduring corpo-

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[73] S.C. CONST. of 1778, art. XXXVIII, *in* 3 STATE CONSTITUTIONS, *supra* note 4, at 3257 ("No person shall disturb or molest any religious assembly . . . [but] No person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State.").

[74] *See* Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 136, 169–71.

[75] *See, e.g.,* Robert A. Gross, *A Yankee Rebellion? The Regulators, New England, and the New Nation*, 82 NEW ENG. Q. 112, 120, 130 (2009) (relating how movements like the Shaysites and the North Carolina Regulators "escalated from peaceful petitions to assaults on court officials to armed conflict"); LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 6–7, 51, 81 (2003); Rachel R. Parker, *Shays' Rebellion: An Episode in American State-Making*, 34 SOCIO. PERSPS. 95, 100, 102 (1991).

rations like towns were, and they lacked a recognized process for instructing legislators.[76] Therefore, some American leaders argued that county conventions went beyond the state constitution.[77]

At the height of Shays' Rebellion, for example, Samuel Adams convinced the Massachusetts legislature to pass a riot act, empowering officers to arrest, wound, or even kill members of any "unlawful[]" or "tumultuous" gathering of thirty or more persons (or of twelve or more persons if armed) if they failed to disperse after an hour.[78] According to Adams, informal assemblies were necessary under monarchies, but once republican government was established, "self-created conventions or societies of men" became "useless" or even a threat which "bring[s] legislatures to contempt and dissolution."[79] Similarly, the first historian of the Rebellion, Federalist judge George Richards Minot, insisted that the assembly clause of Massachusetts' constitution "extended only to town meetings which are known to the

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[76] *See* Robert W. T. Martin, *A 'Peaceable and Orderly Manner': Town Meetings and Other Popular Assemblies in the American Founding*, 15(2) J. PUB. DELIBERATION art. 7, at 3–4 (2019). In the eighteenth century, Massachusetts had a bicameral legislature, with each town electing a member of the lower house but the inhabitants of larger counties electing senators. No county-wide body existed to instruct senators in the way towns instructed representatives. *See* Monsell, *supra* note 57, at 296–97, 307; Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 30, 33 (1999) (noting that in colonies that lacked town meetings, instructions from county assemblies occasionally occurred); *see also* MASS. CONST. of 1780, pt. I, art. XIX, *in* 3 STATE CONSTITUTIONS, *supra* note 4, at 1892 ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.").

[77] Martin, *A 'Peaceable and Orderly Manner*,' *supra* note 76, at 4–5; Pope, *Republican Moments*, *supra* note 24, at 338–40; Bowie, *supra* note 21, at 1712 (noting that the governor of New Hampshire declared that free assembly was limited to town meetings).

[78] Act of Oct. 28, 1786, *in* 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 346–47 (1807) (punishing those convicted with land forfeiture, whipping, and a year in prison and indemnifying officials if any violence or death occurred when the assembly was dispersed forcibly). Adams advised Gov. Bowdoin during the Rebellion and wrote the "Proclamation of Rebellion" condemning the Shaysites. *See* William Pencak, *Samuel Adams and Shays's Rebellion*, 62 NEW ENG. Q. 63, 64, 72 (1989) (quoting Adams' statement that "in monarchies the crime of treason and rebellion may admit of being pardoned or lightly punished, but the man who dares rebel against the laws of a republic ought to suffer death").

[79] Pencak, *supra* note 78, at 66 (quoting Samuel Adams' April 30, 1784 letter to Noah Webster).

laws," so that county conventions unconstitutionally "divide[s] the sovereign power of the people."[80]

Both the Shaysites themselves and some of their opponents criticized this conception of free assembly as wrongheaded and even tyrannical.[81] One newspaper article, for instance, scoffed that when "our [Massachusetts] Constitution" guaranteed assembly, "the implication is plain that all aggrieved may assemble—may petition and remonstrate," whether "such meetings shall be by two's or three's, towns, counties, states, or the whole United States assembled in one body."[82] Yet the New England model patriots of the highest pedigree as well.

Early state constitutions, moreover, often used language suggesting a New England model for assembly. Before 1791, the constitutions of five states—Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont—guaranteed a right to non-religious assembly, in almost identical wording.[83] For example, Ver-

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[80] GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS IN THE YEAR 1786 AND THE REBELLION CONSEQUENT THEREON 25 (1788).

[81] *See, e.g.*, Letter from James Warren to John Adams (May 18, 1787), *in* 19 THE ADAMS PAPERS 77 (2016) ("[O]ur old Friend [Samuel Adams] however is rechosen tho' he seems to have forsaken all his old principles, & professions & to have become the most arbitrary & despotic Man in the Commonwealth."); Bowie, *supra* note 21, at 1709–12 (discussing disagreements about the scope of free assembly during Shays' Rebellion).

[82] Jotham the Third, Letter to the Editor, MASS. GAZETTE, June 22, 1784, at 1, *quoted in* Bowie, *supra* note 21, at 1709–10; *see also* WOOD, *supra* note 57, at 325–27 (discussing the rising opposition to clubs and self-created bodies).

[83] *See, e.g.*, PA. CONST. of 1776, amend. XVI, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 3084 ("the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance"); N.C. CONST. of 1776, art. XVIII, *in* 4 STATE CONSTITUTIONS, *supra* note 4, at 2788 ("the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances"); MASS. CONST. of 1780, pt. I, art. XIX, *in* 3 STATE CONSTITUTIONS, *supra* note 4, at 1892 ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."); N.H. CONST. of 1784, pt. I, art. I, § XXXII, *in* 4 STATE CONSTITUTIONS, *supra* note 4, at 2457 ("The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give

mont's 1777 constitution declares that "the people have a right to assemble together, to consult for their common good—to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance."[84] The practices of New England town meetings obviously shaped these constitutions. Not only were a majority of the states with pre-1791 assembly clauses located in New England, but Samuel and John Adams also played a role in the drafting of Pennsylvania's constitution: the earliest to include an assembly clause.[85]

In their language, all these provisions expect a government structure in which the inhabitants of each district meet to elect state legislators who act as agents for that district and receive instructions from that district—a government of town meetings. Thus, the assembled people discuss "their common good," "instruct their representatives," and write petitions and remonstrances about their shared "grievances."[86] As one scholar has stressed, Pennsylvania's clause "betrays the in-

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instructions to their representatives; and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.").

[84] VT. CONST. of 1777, ch. I, § XVIII, *in* 6 STATE CONSTITUTIONS, *supra* note 4, at 3741; *see also* VT. CONST. of 1786, ch. I, § XXII, *in* 6 STATE CONSTITUTIONS, *supra* note 4, at 3754 (same). Noah Webster distinguishes remonstrances from petitions by stating that—although the two were often submitted together—the former supplies "reasons against a measure, either public or private" while the latter "contain[s] a supplication" asking for "some favor, grant, right or mercy" "for the removal or prevention of some evil or inconvenience." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (comparing the definitions of "remonstrance" and "petition"); *see also* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "petition" as a "formal written request or supplication . . . for some favour, right, or mercy, or in respect of a particular cause" and "remonstrance" as a "formal statement of grievances or similar matters of public importance, presented to a governing body"). That is, a remonstrance debates a general proposal, while a petition seeks a remedy for a specific harm.

[85] *See* Bowie, *supra* note 21, at 1698–1702 (describing the Adamses' role). All New England states that ratified a pre-1791 constitution included an assembly clause; Connecticut and Rhode Island did not create a constitution until the nineteenth century. Outside New England, only Pennsylvania and North Carolina ratified a non-religious assembly clause prior to 1791. *See* Brod, s*upra* note 20, at 177. The Articles of Confederation also never mentions freedom of assembly. Jarrett & Mund, *supra* note 62, at 10.

[86] VT. CONST. of 1777, ch. I, § XVIII, *in* 6 STATE CONSTITUTIONS, *supra* note 4, at 3741; *see also id.*, ch. I, § IX, *in* 6 STATE CONSTITUTIONS, *supra* note 4, at 3740–41 ("nor are the people bound by any law, but such as they have, in like manner, assented to, for their common good," although a

fluence of [Samuel] Adams or someone else from New England, because Pennsylvania had no similar tradition of assembling in town meetings to instruct representatives."[87] Indeed, when Pennsylvania wrote a new constitution in 1790, it removed the right to instruct from its assembly provision, probably because politicians had realized that "instruction" language did not fit with the state's actual institutions.[88]

As discussed below, the First Amendment dispensed with the distinctive terminology of these state clauses—common good, instruct, remonstrance, and so forth.[89] Nevertheless, long after 1791, state assembly clauses normally borrowed the language of these earlier state constitutions, rather than the wording of the First

citizen may assent by "his own consent, or that of his legal representatives"); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 22 (noting that the use of "their" recognized "the common good of the people who assemble rather than the common good of the state" and "signaled that the interests of the people assembled need not align with the interests of those in power").

[87] Bowie, *supra* note 21, at 1702 (observing that instructions started appearing in Pennsylvania after 1774 "when Dickinson's committee of correspondence in Philadelphia imitated the Boston town meeting").

[88] *Compare* PA. CONST. of 1790, art. IX, § 20, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 3101 ("[T]he citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.") *with* PA. CONST. of 1776, amend. XVI, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 3084 ("[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.").

[89] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); Cook v. Gralike, 531 U.S. 510, 521, 524 (2001) (holding the First and Tenth Amendments do not confer "a right to give legally binding, i.e., nonadvisory, instructions" to members of Congress); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 22–24.

Amendment.[90] Only five of the forty-seven assembly provisions currently appearing in state constitutions resemble the First Amendment more than they do these older texts.[91]

Consequently, courts have struggled to interpret how the right to instruct functions within present-day governments, which differ greatly from the eighteenth century's.[92] Vermont's Supreme Court, for instance, has held that instruction is an "individual right to inform one's representatives," not a "collective right" to command a schoolboard to act a certain way through "a town-meeting vote."[93] A North Carolina court, likewise, read the eighteenth-century sources as only authorizing a right "to teach" or "advise" legislators—not a right "to tell someone they *must* do something" nor even to meaningfully participate by receiving advanced notice of proposed bills.[94] As historical analysis, these cases are dubious. Yet they reveal how unwilling judges are to force modern officials to submit to the antiquated practices of New England towns.

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[90] *See, e.g.*, KY. CONST. of 1792, art. XII, § 22, *in* 3 STATE CONSTITUTIONS, *supra* note 4, at 1275 ("the citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance"); TENN. CONST. of 1796, art. XI, § 22, *in* 6 STATE CONSTITUTIONS, *supra* note 4, at 3423 ("the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance"); OHIO CONST. of 1802, art. VIII, § 19, *in* 5 CONSTITUTIONS, *supra* note 4, at 2910 ("the people have a right to assemble together in a peaceable manner to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances").

[91] Bowie, *supra* note 21, at 1727, 1733.

[92] *See, e.g.*, Howard Jarvis Taxpayers Ass'n v. Padilla, 363 P.3d 628, 647–48 (Cal. 2016) (concluding that the instruction right justifies the use of advisory ballot measures); McCall v. Legis. Assembly, 634 P.2d 223, 233–34 (Or. 1981) (discussing how instructions operate despite historical "changes bearing on the nature of legislative representation"); *In re* Apportionment L. Senate Joint Resolution No. 1303, 263 So. 2d 797, 807 (Fla. 1972) (observing citizens have a right to instruct "any and all representatives, whether his own or not").

[93] Skiff v. S. Burlington Sch. Dist., 201 A.3d 969, 972, 977 (Vt. 2018).

[94] Common Cause v. Forest, 838 S.E.2d 668, 673–74 (N.C. Ct. App. 2020).

C. Ratifying the Assembly Clause

The New England model of assembly, with its focus on town meetings, shaped early state provisions on assembly. The framers of the First Amendment, however, did not repeat this understanding. They quietly repudiated it.

As far as the extant records show, freedom of assembly was not a concern of the Federal Constitutional Convention of 1787. Yet once the Constitution was forwarded to the states, Anti-Federalists repeatedly criticized the document for lacking a bill of rights protecting liberties such as free assembly.[95] At the Virginia ratifying convention, for instance, Patrick Henry—former delegate to the First Continental Congress and a leading Anti-Federalist—read from his state's bill of rights before warning Virginians that under the proposed Constitution, they could not "recall our delegated powers, and punish our servants for abusing the trust" when federal officials became "tyrants."[96] Without rights, "[y]our arms, wherewith you could defend yourselves, are gone," and even "a few neighbors cannot assemble without the risk of being shot by a hired soldiery, the engines of despotism" once a federal riot act is passed.[97] A week later, Henry worried that the Constitution's Militia Clause was itself a riot act.[98] England, at least, only used "civil force . . . to quell

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[95] *See, e.g.*, Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *in* 1 THE COMPLETE ANTI-FEDERALIST 116–17 (Herbert J. Storing ed., 1981) (because "the most express declarations and reservations are necessary to protect the just rights and liberty of Mankind from the silent powerful and ever active conspiracy of those who govern," the Constitution must include a "Bill of Rights, clearly and precisely stating the principles upon which this Social Compact is founded" such as "[t]hat the right of the people to assemble peaceably for the purpose of petitioning the Legislature shall not be prevented"); Samuel Bryan, *Centinel II*, PHILA. FREEMAN'S J., Oct. 24, 1787, *in* 1 THE COMPLETE ANTI-FEDERALIST, *supra*, at 152–53 (disapproving that "there is no declaration" of rights such as "the right of the people to assemble peaceably for the purpose of consulting about public matters, and petitioning or remonstrating to the federal legislation"); Melancthon Smith, *Federal Farmer VI*, N.Y. J., Dec. 25, 1787, *in* 1 THE COMPLETE ANTI-FEDERALIST, *supra*, at 262 (listing "unalienable or fundamental rights" such as "a right to assemble in an orderly manner, and petition the government for a redress of wrongs"); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 56 (2010).

[96] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 51.

[97] *Id.* ("[W]e should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! . . . You read of a riot act in a country which is called one of the freest. . . . We may see such an act in America.").

[98] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411–12 ("A law may be made that, if twelve men assemble, if they do not disperse, they may be fired upon. I think it is so

riots."[99] In contrast, military force would be used in America at the whim of a Congress that can "execute the laws of the Union" and "determine whether it be a riot or not" without being "restrained by a bill of rights" or "the common law."[100]

James Madison answered Henry by claiming that the federal government could never approve a riot act, because it lacked the enumerated power to do so.[101] But Madison also defended the Militia Clause by observing that "[t]here might be riots, to oppose the execution of the laws" which "d[o] not come within the legal definition of an insurrection" and that "the civil power might not be sufficient to quell."[102] In light of this justification, Henry had reason to fear. Congress would not need to pass a civil riot act, if it could muster the militia whenever an assembly supposedly became a riot.[103] And if the militia could merely "execute the laws of the

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in England. Does not this part of the paper bear a strong aspect [of such an act]?"); *see also* U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

[99] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411.

[100] *Id.* at 411–12; *see also* Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 163 (speech of Patrick Henry) (stating that Americans have no need for an act "to prevent riots, routs, and unlawful assemblies" because American gatherings practice "strict subordination to the laws" so there are no "instances in which licentiousness trampled on the laws").

[101] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 414 ("[T]he gentleman [Henry] is remarkable in introducing the riot act of Great Britain. That act has no connection, or analogy, to any regulation of the militia; nor is there anything in the Constitution to warrant the general government to make such an act."); *see also id.* at 416 (stating that the states retained the power to "make use of [the militia] to suppress insurrections, quell riots, &c.").

[102] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 410.

[103] In 1792, Congress passed the First Militia Act, which borrowed features from earlier riot acts. Militia Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (1792) (authorizing the President to use force to destroy "combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals" whenever "the laws of the United States shall be opposed or the execution thereof obstructed" as long as the President first "by proclamation, command[s] such insurgents to disperse and retire peaceably to their respective abodes within a limited time"); *see also* F. E. Guerra-Pujol, *Domestic Constitutional Violence*, 41 U. ARK. LITTLE ROCK L. REV. 211, 222–24 (2019) (stressing that the 1792 Act permitted the President to call forth the militia, even without any invasion or insurrection, if the execution of the laws was impeded).

Union"—without any invasion or insurrection—then federal soldiers could perform everyday policing and fire upon groups that resisted.[104] In such a government, who could assemble safely?

Shortly before the Virginia convention, George Mason—Patrick Henry's close ally—circulated a master proposal for a bill of rights to prominent Anti-Federalists across the country.[105] Mason's proposed assembly clause stayed close to the language in state constitutions, even reproducing the right to instruct representatives.[106] In the end, four states—Virginia, New York, North Carolina, and Rhode Island—submitted, as part of their ratifications, recommended amendments based on Mason's assembly clause to Congress.[107] As late as 1788, then, the model of the New England town meeting still dominated constitutional discussions.

The break came in June 1789, when James Madison presented the first Congress with amendments that would become the Bill of Rights. Madison proposed an assembly clause diverging from the New England model; it read only "[t]he peo-

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[104] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411–12 (speech of Patrick Henry) (criticizing the "execute the [l]aws" language because the wording demonstrates that "this is to be a government of force. . . . they are to make militia laws for this state"). Henry predicted that militias would be called out to enable excisemen to search houses and collect revenue. *Id.* at 412.

[105] *See* Bhagwat, *Democratic First Amendment*, *supra* note 24, at 1100, 1104 (observing that Mason's document was "copied . . . almost verbatim" by James Madison in his 1789 proposal to Congress).

[106] Letter from George Mason to John Lamb Edmund Randolph (June 9, 1788), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 42–43 (Gaspare J. Saladino & John P. Kaminski eds., 1995) ("That the People have a Right peaceably to assembly together to consult for their common Good, or to instruct their Representatives, and that every Freeman has a Right to petition or apply to the Legislature for Redress of Greivances [*sic*]."). Mason's clause is closest to the language in North Carolina's constitution. *See* N.C. CONST. of 1776, art. XVIII, *in* 4 STATE CONSTITUTIONS, *supra* note 4, at 2788.

[107] Convention of Virginia: Ratification (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 658–59; State of New York: Ratifications (1788), *in* 1 ELLIOT'S DEBATES, *supra* note 58, at 328; Convention of North Carolina: Declaration of Rights (1788), *in* 4 ELLIOT'S DEBATES, *supra* note 58, at 242, 244; Rhode Island: Ratification (1790), *in* 1 ELLIOT'S DEBATES, *supra* note 58, at 335. Multiple states ratified the 1788 constitution alongside other proposed amendments, but only these four recommended adding an assembly provision. *See, e.g.*, MAIER, RATIFICATION, *supra* note 95, at 245–46, 397–98, 423; INAZU, LIBERTY'S REFUGE, *supra* note 17, at 22; Bowie, *supra* note 21, at 1715–17.

ple shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."[108] The right of instruction was missing.[109] Madison never explained this deletion, but he surely appreciated, as a recent scholar has noted, that "adding a right to instruct . . . [to] the First Amendment only made sense if the right to assemble referred to New England town meetings and the assemblies modeled after them."[110] Instruction rights had played no role in the dispute between Madison and Henry about assembly and the riot act at the Virginia convention the year before. The two men had a Virginia context in mind, so they quarreled about small informal gatherings, rather than about local governing bodies.[111]

During the 1789 House debates, a few representatives—all anti-administration members who would become Democratic-Republicans—sought to reinsert the right to instruct.[112] "Many parts of this country have been in the practice of instruct-

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[108] James Madison, *Amendments Offered in Congress* (June 8, 1789), *in* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 223, 266 (2006).

[109] Madison's original text spoke of "petitions" and "remonstrances" but not "addresses." Before the floor debates in July, the House committee combined the Assembly Clause with the Free Speech Clause and removed "remonstrances" so that only "petition" survived of the three types of documents named in state assembly clauses. *See* Bowie, *supra* note 21, at 1717, 1722 (narrating how the House committee altered the text to "the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."); *see also* MAIER, RATIFICATION, *supra* note 95, at 280–81, 312, 449, 453.

[110] Bowie, *supra* note 21, at 1721.

[111] *See* Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411–12 (speech of Patrick Henry) ("A law may be made, that if twelve men assemble, if they do not disperse, they may be fired upon. . . . [A]n excise man will demand leave to enter your cellar or house, by virtue of his office, by virtue of his office; perhaps he may call on the militia to enable him to go.").

[112] *See, e.g.*, 1 ANNALS OF CONG. 760–61 (1789) (statement of Thomas Tucker) (calling instruction "the most material part" of the assembly right"); *id.* at 765 (statement of Elbridge Gerry) (supporting non-binding instructions as expressions of popular sovereignty); *id.* at 774 (statement of Aedanus Burke) (noting that many state constitutions protect a right to instruct).

ing," one congressman emphasized, for "[i]nstruction and representation in a republic" are "inseparably connected."[113] The House disagreed.[114] Most representatives rejected the proposal because they thought that congressmen must act for the general welfare, rather than obey the private interests of constituents.[115] But several also reasoned that a right to instruct only fit polities where local assemblies elected the representative for that location—polities with something like town meetings.[116] One congressman wondered who "the people" assembling to instruct would be: "a township or a district, or . . . the State Legislatures" as a whole for "[i]n some States the representatives are chosen by district . . . in other States, each representative is chosen by the whole people."[117] The Assembly Clause was broader than a right to hold a specific type of political gathering.[118]

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[113] 1 ANNALS OF CONG. 762, 772 (1789) (statement of John Page) ("to refuse [the people] the power of instructing their agents, appears to me to deny them a right," for instruction is "strictly compatible with the spirit and the nature of the Government").

[114] Terranova, *supra* note 57, at 1346–47 (noting that the instruction right lost 41 to 10 in the House and 14 to 2 in the Senate, because even many anti-administration congressmen voted against it); Kobach, *supra* note 76, at 67–69.

[115] This was Madison's argument—presumably why he omitted instruction from his original proposal. 1 ANNALS OF CONG. 766–67 (1789) (statement of James Madison); *see also id.* at 761–62 (statement of Thomas Hartley) ("the principle of representation is distinct from an agency"); *id.* at 764 (statement of Roger Sherman); *id.* at 764 (statement of James Jackson); Terranova, *supra* note 57, at 1346–47 (noting opponents feared instruction would bring "the same excessive localism that had plagued New England towns"); *cf.* WOOD, *supra* note 57, at 194–95 (describing criticisms of the factionalism that instructions caused).

[116] *See, e.g.*, 1 ANNALS OF CONG. 768 (1789) (statement of Michael Stone) ("a power [to instruct] is not to be found in any part of the earth except among the Swiss cantons"); *id.* at 772 (statement of Fisher Ames) (worrying that "[t]hose States which had selected their members by districts would have no right to give them instructions").

[117] *Id.* at 770–71 (statement of Samuel Livermore) ("instructions would hold better in England than here, because the boroughs and corporations might have an interest to pursue totally immaterial to the rest of the kingdom").

[118] *Cf.* Kobach, *supra* note 76, at 62, 74–75 (noting that state legislatures prior to the Seventeenth Amendment often instructed senators, but instructions to representatives did not occur, as no district-wide assembly analogous to a town meeting existed to instruct them). In 1789, six of the thirteen states elected their representatives at-large, rather than by district. Terranova, *supra* note 57, at 1347 n.104. All the congressmen who were known to have favored an instruction right came from states that elected by district, such as Massachusetts, Virginia, and South Carolina. *Id.*

A month later, the Senate went further, removing "consult for their common good" from the clause, although this language was standard in state constitutions and proposed amendments.[119] The motive for this change was not recorded, but some senator must have strongly urged it, for a motion to strike these words was voted down on September 3 but then successfully reintroduced a week later.[120] Perhaps the Senate agreed with Representative Elbridge Gerry, who insisted that "the right to consult for the common good" was "for nothing" if the people "could not [also] consult" for other purposes, as the unsanctioned county conventions had during Shays' Rebellion.[121] Gerry disliked "common good" language because it implied something like the New England model—that only open assemblies were protected. But the Senate may have acted for other reasons, such as a concern that the phrase "their common good" seemed awkward once language about instructing "their representatives" was gone.

Regardless, the final terminology of the federal Assembly Clause differed starkly from all older state provisions.[122] The drafters had considered adopting these older wordings and intentionally rejected them. Instead of a narrow New England model for assembly, they used generalized language that made space for a variety of bodies, gatherers, levels of formality, and purposes. That made space even for assembling in secret.

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[119] Bowie, *supra* note 21, at 1721.

[120] *See* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 70–71, 77 (1820) (proceedings of Sept. 3, 1789, Sept 4, 1789, and Sept. 9, 1789). Although House debates were public, the Senate met behind closed doors for its first six years, so no record of its debates exist. *See* Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates, 1789–1802*, 12 J.S. HIST. 223, 223–24 (1946).

[121] 1 ANNALS OF CONG. 760–61 (1789) (statement of Elbridge Gerry) (admitting that the Shaysites "abused" the right but insisting "that abuse ought not to operate as an argument against the use"); *see also* Bowie, *supra* note 21, at 1718–20 (noting that key opponents of the Assembly Clause were former anti-Shaysites).

[122] For instance, compare U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") with Convention of Virginia: Ratification (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 658–59; State of New York: Ratifications (1788), *in* 1 ELLIOT'S DEBATES, *supra* note 58, at 328 ("[T]he people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives, and that every person has a right to petition or apply to the legislature for redress of grievances.").

III. Republican Governance and Secret Assembly

A. Secret Assembly at the Dawn of the Republic

Soon after ratification, a few commentators began acknowledging that the Assembly Clause shielded secret assembly. Consider, for instance, St. George Tucker's annotated edition of Blackstone's *Commentaries on the Laws of England*.[123] Tucker was not only a Virginia judge and legal scholar but also younger brother to Thomas Tucker: the representative who unsuccessfully moved to insert a right to instruct into the First Amendment.[124] As a result, St. George Tucker preferred assembly provisions that included instruction, for they speak "in terms more consonant with the nature of our representative democracy," in "the language of a free people, asserting their rights."[125] The First Amendment, in contrast, "savours of that stile of condescension, in which favours are supposed to be granted" rather than demanded as due.[126] Although Tucker admitted his brother's motion failed, he insisted—even under the Assembly Clause as actually ratified—that every member of the House remains "strictly the delegate of those by whom he is chosen, and bound by their

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[123] For Tucker, see generally David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 272 (2008); Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

[124] *See* 1 ANNALS OF CONG. 760–61 (1789) (statement of Thomas Tucker); *see also* Hardy, *supra* note 123, at 272, 277 (noting that St. George Tucker corresponded with his brother and with his good friend Rep. John Page throughout the First Congress). The House members who spoke most in favor of the Assembly Clause when Madison proposed it—Gerry, Page, and Tucker—were also the ones who most advocated adding a right to instruct. *See* 1 ANNALS OF CONG. at 759–62 (1789).

[125] 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 299 (1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES] (praising the unsuccessful amendment proposed by Virginia's ratifying convention).

[126] *Id.* at 299; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1886–88 (1833) (calling Tucker's criticism of the Assembly Clause "overstrained" and describing the right to assemble as one of "the privileges of freemen" which is "unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure"); *cf.* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 35, 349 (1868) (stating that "the right freely to assemble to consult of the common good" is one of "the general principles of republican government").

instructions" as this principal-agent relationship is an inescapable corollary of "the maxim . . . that all power is derived from the people."[127]

Tucker, thus, disliked the First Amendment and wanted, instead, an assembly provision that enshrined the New England model—exactly what the first Congress refused to pass. Nevertheless, Tucker did not interpret the Assembly Clause as a narrow protection for local governing bodies analogous to town meetings.[128] Instead, he maintained that the Clause guaranteed "peaceable assemblies by [the people], for any purposes whatsoever, and in any number, whenever they may see occasion."[129] A federal riot act, for instance, was unconstitutional.[130] For, unlike Parliament, Congress could not "direct[] the mode of petitioning parliament" or pass acts "for prohibiting riots: and for suppressing assemblies of free-masons, &c. [which] are so many ways for preventing public meetings of the people to deliberate

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[127] 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 125, at 193 (categorizing any government without an instruction right as an "aristocracy" rather than "a popular government"); *see also id.* at 29 (depicting each "public functionary" as "the trustee, and agent of the people," lest there be "a substitution of aristocracy, for a representative democracy").

[128] Other treatise authors agreed. *See, e.g.*, COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, *supra* note 42, at 268 (arguing that "the right to assemble is preserved to all the people, and not merely to the electors, or to any other class" and prevents "intermeddl[ing]" with "[s]ocial meetings and industrial meetings" as well as with political gatherings).

[129] 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 125, at 316.

[130] For instance, Tucker reproduced Blackstone's discussion of the British crimes of unlawful assembly and tumultuous petitioning, before quoting the First Amendment, to question if these crimes survive in America. 5 *id.* at 145–48. Tucker also argued that, "in America," "the bare circumstance" of an assembly gathering openly armed cannot "create[] a *presumption* of warlike force" thereby allowing the assembly to be lawfully suppressed—although this presumption was normal in England—both because of the Bill of Rights and because "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket." *Id.* at app. at 19, 27–28. Tucker cited a jury instruction from Justice Samuel Chase in support of this position. *See* Case of Fries, 9 F. Cas. 924, 930–31 (C.C.D. Pa. 1800) ("The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace officers, should be insulted or resisted."). Not all treatise authors agreed a federal riot act was unconstitutional. *See, e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120 (1825) (because "history shows how those meetings and petitions have been abused," therefore "the usual remedies of the law are retained, if the right [to assemble] is illegally exercised").

upon their public, or national concerns."[131] According to Tucker, then, the impetus for the Assembly Clause was not the Intolerable Acts but rather colonial riot acts.

Riot acts—that is, laws that empowered magistrates to forcibly disperse unlawful or tumultuous gatherings if they did not scatter on their own soon after the reading of a prohibitory proclamation—were common both in colonial America and among the states in the 1780s.[132] Although riot acts theoretically only combated unlawful or tumultuous assemblies, British officials had often interpreted such language broadly and used these laws to subdue any protest.[133] For instance, when the Sons of Liberty met on November 30, 1773, British troops read the riot act to break them up. Samuel Adams responded with a twenty-minute speech attacking the act and insisting "that a free and sensible people . . . had a Right to meet together to consult for their Safety" if the meeting was "regular and orderly."[134] Similarly, in 1771, a newly passed riot act enabled Governor William Tryon to overpower the

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[131] *See* 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 125, at 315–16; *see also id.* at 357 (stressing that it is "the province of the judiciary" to review the constitutionality of legislation, such as "a law . . . passed by congress" abridging "the right of the people to assemble peaceably"); Barenblatt v. United States, 360 U.S. 109, 143, 150 n.20 (1959) (Black, J., dissenting) (citing this passage and the history of Anti-Masonry to interpret the Assembly Clause).

[132] *See, e.g.*, Riot Act 1714, 1 Geo. 1 c.5 (Eng.); Pope, *Republican Moments*, *supra* note 24, at 339 (listing states that passed riot acts in response to the Shaysites); El-Haj, *Defining Peaceably*, *supra* note 20, at 971, 973.

[133] *See, e.g.*, WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 158 (3d ed. 1739) (arguing—contrary to "the common Opinion"—that "any Meeting whatsoever of great Numbers of People" should be prosecutable as an "unlawful Assembly" because such "endanger Publick Peace," "raise Fears and Jealousies," and "no one can foresee what may be the Event of such an Assembly"). Early Americans, in contrast, pushed for narrow construal. *See, e.g.*, James Wilson, *Lectures on Law*, *in* 3 THE WORKS OF THE HONOURABLE JAMES WILSON 79, 130–31 (1804) (distinguishing "unlawful assembly to the terrour of the citizens" from nonviolent action); 5 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 125, at app. 19, 27–28; John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 10–13 (2017) (discussing how Americans usually followed Blackstone's—not Hawkins's—definition of unlawful assembly, so that this crime meant gathering with the intent to commit unlawful violence).

[134] L. F. S. Upton, *Proceedings of Ye Body Respecting the Tea*, 22 WM. & MARY Q. 287, 293 (1965).

North Carolina Regulator Movement.[135] Given this history, many Americans distrusted such laws—hence James Madison's struggle to persuade the Virginia ratifying convention that riot acts were not an enumerated power.[136]

Tucker, then, reasonably interpreted the Assembly Clause as a ban on federal riot acts.[137] His comments about laws "for suppressing assemblies of free-masons, &c." is stranger. Eighteenth-century Britain and America were filled with secret gatherings.[138] The Sons of Liberty, for instance, arose in 1765 as a secret society, with a private communication network, hidden membership, and even disguises, before evolving into a more public association over the next decade.[139] Likewise,

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[135] *See* Abby Chandler, *"Unawed by the Laws of Their Country": Local and Imperial Legitimacy in North Carolina's Regulator Rebellion*, 93 N.C. HIST. REV. 119, 141–44 (2016); Pope, *Republican Moments*, *supra* note 24, at 334; MAIER, RATIFICATION, *supra* note 95, at 405–06.

[136] *See, e.g.*, Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411–12 (speech of Patrick Henry); *id.* at 414 (speech of James Madison).

[137] Current Supreme Court doctrine allows riot acts only in narrow circumstances. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 n.4 (1969) ("Statutes affecting the right of assembly . . . must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . . ."); *see also* Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L. J. 581, 635–37 (2014) (reconciling *Brandenburg* with the Court's earlier holding in *Bryant*); Inazu, *Unlawful Assembly*, *supra* note 133, at 35–36.

[138] Arguably, the 1787 constitutional convention was an oath-bound secret assembly: delegates debated behind locked doors and swore to keep proceedings confidential. *See, e.g.,* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 346 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (speech of George Mason) (warning that Americans would never accept Congress meeting as "a conclave, transacting their business secret from the eye of the public"); 2 FARRAND'S RECORDS, *supra*, at 18 (speech of William Paterson) (advising that the rule of secrecy be rescinded); Chesa Boudin, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2158, 2163 (2011).

[139] *See, e.g.*, BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA 117–18, 141–45 (2010); MAIER, FROM RESISTANCE TO REVOLUTION, *supra* note 67, at 7, 58, 89–90. The Sons of Liberty were only the most famous of the extralegal societies, backcountry conventions, paramilitaries, and private clubs that met during the 1760s and 1770s. *See* Thomas W. Ramsbey, *The Sons of Liberty: The Early Inter-Colonial Organization*, 17 INT'L REV. MOD. SOCIO. 313, 320–22, 329 (1987) (presenting the Sons as one of the "innumerable revolutionary secret societies"); *see also* WOOD, *supra* note 57, at 320–21.

Freemasonry grew popular partly because of its hidden membership and rituals.[140] Masonic lodges in America were often politically active, both before and after independence.[141] Yet their commitment to republicanism and a vaguely Protestant Christianity kept them from developing partisan connections with the Federalists or the Democratic-Republicans, which would have tainted them in the eyes of half the country.[142]

The first English statutes targeting the Freemasons and comparable secret societies only appeared in the mid-1790s: before Tucker wrote but after the First Amendment's ratification, so the framers did not have these laws in view.[143] The most important statute prohibited societies which required members "to take any oath," kept "the names of the members . . . secret from the society at large," "used secret sign[s]," or selected "officers, in a secret manner," treating them as "unlawful combinations and confederacies, highly dangerous to the peace."[144] But this law

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[140] *See generally* DAVID G. HACKETT, THAT RELIGION IN WHICH ALL MEN AGREE: FREEMASONRY IN AMERICAN CULTURE (2014); STEVEN C. BULLOCK, REVOLUTIONARY BROTHERHOOD: FREEMASONRY AND THE TRANSFORMATION OF THE AMERICAN SOCIAL ORDER, 1730–1840 (1996).

[141] HACKETT, *supra* note 140, at 55–68; BULLOCK, *supra* note 140, at 222–29.

[142] *Address to the President of the United States*, GAZETTE OF THE U.S., Dec. 7, 1798, at 2 ("A fundamental principle among Masons, in their private assemblies, is, not to introduce the subject of politicks . . . . Let not the tongue of slander say, that *Masons* are *capable* of faction."); John Adams, *Answer: To the Members of the Grand Lodge of Free Masons in Vermont*, GAZETTE OF THE U.S., Dec. 7, 1798, at 2 (warning that the Freemasons will be dangerous if they turn to a partisan end "that wonderful power of enabling and compelling all men . . . to keep a secret" and communicating by secret "marks or signs"); *see also* Mazzone, *supra* note 23, at 739, 741–42, 763–64 (contrasting the more inclusive Freemasons with the selective Democratic-Republican Societies).

[143] *See, e.g.*, Unlawful Oaths Act 1797, 37 Geo. 3 c.123 (Eng.) (forbidding "the administering or taking of any Oath or Engagement, purporting or intended to bind the Person . . . to be of any Association, Society, or Confederacy, formed for any [seditious] Purpose; or to obey the Orders or Commands of any Committee or Body of Men not lawfully constituted"). Although passed against mutineers and worker's friendly societies, the act was quickly applied against Freemasons. *See* FREDERICK BURWICK, BRITISH DRAMA OF THE INDUSTRIAL REVOLUTION 87–88 (2015); JOHN V. ORTH, COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721–1906, at 76, 112–14 (1991); Robin Handley, *Public Order, Petitioning and Freedom of Assembly*, 7 J. LEGAL HIST. 123, 127–28 (1986).

[144] Unlawful Societies Act 1799, 39 Geo. 3 c.79 (Eng.).

contained a grandfather clause allowing pre-existing "Lodges of Free Masons" to continue if they supplied a list of their members to the government.[145]

In America at the same time, rumors that the Bavarian Illuminati—a secret offshoot from the Freemasons—were plotting revolutions across Europe contributed to the passage of the Alien and Sedition Acts.[146] The Federalist-dominated Congress—fearing "secret machinations against the government" by "unlawful combinations" such as the Illuminati—passed these acts to criminalize, among other things, any "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination."[147] The line between riot acts and secret societies bans could blur. Already in the 1780s, for example, riot acts sometimes criminalized administering and taking oaths to join a secret society.[148] As a result, Tucker alluded

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[145] *Id.* Masonic lodges were slow to incorporate in the United States, partly out of fear that the states—like England—would require disclosures. Kevin Butterfield, Unbound by Law: Association and Autonomy in the Early American Republic 340–42 (Jan. 2010) (Ph.D. dissertation, Washington Univ. in St. Louis).

[146] *See, e.g.*, Timothy Dwight, *The Duty of Americans, at the Present Crisis* (1798), *in* 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 1374 (Ellis Sandoz ed., 1991) [hereinafter SERMONS] (relating how "the order of Illuminati" seized upon the "secresy, solemnity, mysticism, and correspondence of Masonry" to attempt "the overthrow of religion, government, and human society civil and domestic"); BRYAN WATERMAN, REPUBLIC OF INTELLECT: THE FRIENDLY CLUB OF NEW YORK CITY AND THE MAKING OF AMERICAN LITERATURE 30, 53, 71–72, 77 (2007) (noting how "rights of assembly [were] a topic of continual debate," beyond "the Bavarian Illuminati scare"); A. M. Froomkin, *Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 852–53 (1995); VERNON STAUFFER, NEW ENGLAND AND THE BAVARIAN ILLUMINATI 117–18, 235, 263 (1918); Butterfield, *supra* note 145, at 128–30.

[147] Sedition Act, § 1, 1 Stat. 596 (1798) (expired 1801); *see also* Alien Act, § 1, 1 Stat. 571 (1798) (expired 1800); *see also* 3 STORY, *supra* note 126, §§ 1288–89 (1833) (stating that many "with great earnestness" thought the Sedition Act unconstitutional but stressing that the law "was defended with equal masculine vigour" as a valid exercise of "the right and duty in the government of self-preservation"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (noting "broad consensus that the [Sedition] Act . . . was inconsistent with the First Amendment").

[148] *See* Christopher M. Roberts, *From the State of Emergency to the Rule of Law: The Evolution of Repressive Legality in the Nineteenth Century British Empire*, 20 CHI. J. INT'L L. 1, 11–14 n.29 (2019) (describing laws aimed at Irish "Whiteboys," secret agrarian organizations that protected tenants against absentee English landlords); *see also* Lobban, *supra* note 62, at 335, 340 (noting that riot acts allowed suppression of tumultuous crowds, even when they did not qualify as unlawful societies).

to both types of laws when he interpreted the Assembly Clause to protect the Freemasons and other secret societies.

Outside of Tucker's treatise, the most important defense of secret assembly occurred as part of larger debates about the legitimacy of partisan clubs. A variety of partisan oath-bound fraternities emerged in the early republic.[149] Controversially, over forty Democratic-Republican societies met regularly across the nation between 1793 and 1795 to deliberate and adopt political resolutions, criticize the Federalist administration, and celebrate the spread of republicanism in America and France.[150] Although local societies differed, many were private political clubs, which restricted meetings to elected members, kept membership lists hidden, and modeled themselves on earlier groups such as the Sons of Liberty and the Jacobins.[151] Clubs met at least monthly, usually at night behind closed doors in a tavern or public building, and the largest could have as many as three hundred members.[152]

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[149] For instance, the (Federalist) Washington Benevolent Societies, which formed before the War of 1812. *See* Butterfield, *supra* note 145, at 153–60 (describing these societies' secret meetings and procedures to initiate members and discipline them for disobedience). Similarly, the Society of the Cincinnati was often denounced for its aristocratic trappings and secrecy—although the society avoided mandatory oaths and rituals to differentiate itself from European chivalric orders. *See* MARKUS HÜNEMÖRDER, THE SOCIETY OF THE CINCINNATI: CONSPIRACY AND DISTRUST IN EARLY AMERICA 19–21, 105 (2006).

[150] For these clubs, see, for instance, INAZU, LIBERTY'S REFUGE, *supra* note 17, at 26–29; Butterfield, *supra* note 145, at 124–28; Mazzone, *supra* note 23, at 734–38; Martin, *A 'Peaceable and Orderly Manner*,' *supra* note 76, at 9–15.

[151] *See, e.g.*, DAVID MCCULLOUGH, JOHN ADAMS 445 (2001) (calling these societies "secret political clubs verging on vigilante groups," a depiction that exaggerates but captures John Adams' perspective on the clubs); Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, Circa 1793–1795*, 58 WM. & MARY Q. 615, 621, 632–34 (2001) (noting that newly-elected members often swore or signed the society's constitution as an initiatory ritual); Judah Adelson, *The Vermont Democratic-Republican Societies and the French Revolution*, 32 VERMONT HIST. 3, 5, 11–12 (1964) (providing examples of membership oaths); Chesney, *supra* note 62, at 1537–38, 1571–72.

[152] ROBERT W. T. MARTIN, GOVERNMENT BY DISSENT: PROTEST, RESISTANCE, AND RADICAL DEMOCRATIC THOUGHT IN THE EARLY AMERICAN REPUBLIC 86–88, 99–101 (2013); *see also* Linnekin, *supra* note 24, at 626–27.

The constitutions and resolutions of Democratic-Republican societies repeatedly insisted that the right to assemble authorized their gatherings.[153] A 1794 resolution from a North Carolina club, for instance, proclaimed that "it is the unalienable right of a free and independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern."[154] Likewise, the constitution of a Vermont club declared that "meetings of any part of the people, for the purpose of discussing with freedom, moderation, and a due degree of respect to the governing powers, all political questions . . . will never be termed illegal, but by the national enemies to the true spirit of Republicanism, and the equal rights of Man."[155] For Federalist observers, however, familiar with the New England model for assembly, private political clubs violated the spirit of the Constitution. Only the people's elected representatives in the various local and national legislatures—not self-appointed groups—could speak for the people and deliberate on policy.[156]

George Washington, for example, decried these clubs, exclaiming that nothing can be "more absurd—more arrogant—or more pernicious to the peace of Society, than for self created bodies, forming themselves into *permanent* Censors, & under the shade of Night in a conclave . . . form[ing] their will into Laws for the government of the whole," instead of deferring to legislators.[157] According to Washington, the people had a constitutional right "to meet occasionally, to petition for, or remonstrate against, any Act of the Legislature" but they could not assemble as a "self

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[153] *See* Chesney, *supra* note 62, at 1550–51 (quoting such documents).

[154] INAZU, LIBERTY'S REFUGE, *supra* note 17, at 26.

[155] Adelson, *supra* note 151, at 9.

[156] *See* Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 171 ("The Federalists did not confound freedom of assembly with freedom of association, unlike many modern theorists" for they usually believed "that the right of assembly applied to public meetings, not private political clubs"—that is, to "traditional 'town hall' meetings . . . open to all members" of a given area, not to "exclusive" interest groups).

[157] Letter from George Washington to Burges Ball (Sept. 25, 1794), *in* 16 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 722–23 (David R. Hoth & Carol S. Ebel eds., 2011) (emphasis in original) (contrasting such groups with "the Representatives of the people, chosen for the express purpose, & bringing with them from the different parts of the Union the sense of their Constituents").

created, *permanent* body."[158] Likewise, Noah Webster warned that "[i]f that system of creating a popular interest extraneous from the legislature . . . that system of raising a multitude of isolated private clubs over the nation as its guardians—should spread thro the country, we may bid adieu to our Constitution."[159] An anonymous Federalist writer contended that—contrary to the clubs' resolutions—the Assembly Clause never "countenances, much less acknowledges" that "bodies of men, detached from the body of the people . . . assembling in nocturnal meetings" have the right to "*set themselves* up as umpires between the people and the government."[160] Far from viewing Democratic-Republican clubs as constitutionally protected, many Federalists called for them to be arrested.[161]

As these examples reveal, the secrecy of Democratic-Republican societies—that they met in private, under oath, with doors closed, and even at night—horrified Federalists almost as much as their self-creation.[162] Federalists fantasized that

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[158] *Id.* at 723–24 (emphasis in original); *see also* Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 164; Chesney, *supra* note 62, at 1553–54.

[159] Letter from Noah Webster to Theodore Sedgwick (Jan. 2, 1795), *in* LETTERS OF NOAH WEBSTER 124–25 (Harry R. Warfel ed., 1953). Strikingly, Webster expressed this position in a letter to Theodore Sedgwick: the representative who most opposed adding the Assembly Clause to the Constitution. For Sedgwick, see Bowie, *supra* note 21, at 1718–20. *Cf.* Noah Webster, *The Revolution in France* (1794), *in* 2 SERMONS, *supra* note 146, at 1277–79 (fearing "private societies of men, who are self-created, unknown to the laws of the country, private in their proceedings, and perhaps violent in their passions" will have "all effects of tyranny" and secretly "establish an aristocracy" in a way the Freemasons avoided on principle).

[160] E.F., *Desultory Remarks on Democratic Clubs*, GAZETTE OF THE U.S., July 21, 1794, at 2.

[161] *See, e.g.*, *A Friend to Republican Freedom*, GAZETTE OF THE U.S., Apr. 10, 1794, at 2 (complaining that Democratic-Republican societies are "self-created, daring and impudent usurpers" who lack "any legal authority to assemble themselves together" and should be "subjects of criminal prosecutions"); David Osgood, *The Wonderful Works of God Are to be Remembered* (1794), *in* 2 SERMONS, *supra* note 146, at 1233 (urging "the controling power of the laws of the country" to "demolish" all "private political associations"); Webster, *The Revolution in France*, *in* 2 SERMONS, *supra* note 146, at 1280 (quoting Osgood's sermon approvingly).

[162] *See, e.g.*, *For the Columbian Centinel*, COLUMBIAN CENTINEL, Sept 27, 1794, at 1, *quoted in* Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 138–39 ("a band of midnight Robbers . . . would appear less criminal and dangerous, before any tribunal, than the Clubs; for the former will have robbed the community only of its wealth; but the latter destroy also its peace, its safety and happiness"); *Deodatus II*, COLUMBIAN CENTINEL, Sept 27, 1794, at 1–2, *quoted in* Martin, *Repression*, *supra* note 31, at 155–56 (decrying the societies as "dark cabals in the cities" that "rendered null and void" the votes of the people and insisting that "[i]f the citizens think

these clubs would become a nocturnal council: a hidden parallel aristocratic government puppeteering elected officials.[163] Many writers who opposed the clubs in 1794 would embrace, at least partially, conspiracy theories about the Bavarian Illuminati a few years later.[164]

Hostility to the Democratic-Republican societies peaked in the summer of 1794, in the aftermath of the Whiskey Rebellion: an armed resistance to the excise tax on whiskey that arose throughout the western counties of Pennsylvania.[165] At the Virginia ratifying convention, Patrick Henry had prophesied that a federal riot act based on the Militia Clause would one day be used to enforce tax laws.[166] Henry was right: President Washington drew on the First Militia Act of 1792—a statute adapted from older riot acts—to quash the whiskey rebels.[167]

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proper to meet and consult, what better club can be desired than a town meeting, where all is day light, and the law has regulated the proceedings in such a manner as to secure to every man his fair and equal privilege").

[163] *Cf.* George Klosko, *The Nocturnal Council in Plato's* Laws, 36 POL. STUD. 74 (1988).

[164] Federalists who participated in the Illuminati scare of 1798 included Noah Webster, David Tappan, John Adams, and even George Washington. *See, e.g.*, Letter from George Washington *to Reverend G. W. Snyder* (Oct. 24, 1798), FOUNDERS ONLINE, NAT'L ARCHIVES, https://perma.cc/Y7DU-4SAW (defending "the Lodges of Free Masons in this Country" from charges that they "propagate[d] the diabolical tenets of the [Illuminati and Jacobins]" but suggesting that "the Democratic Societies in the United States, may have had these objects" of spreading these wicked doctrines); Chesney, *supra* note 62, at 1547.

[165] Although the whiskey rebels roughed up revenue collectors, they primarily used nonviolent means such as marches, county conventions, and gatherings to erect liberty poles until the federal government's military response pushed the rebels into fighting. *See, e.g.*, Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 896–98 (2006); Cynthia L. Krom & Stephanie Krom, *The Whiskey Tax of 1791 and the Consequent Insurrection: "A Wicked and Happy Tumult,"* 40 ACCOUNTING HISTORIANS J. 91, 106–09 (2013); THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 3, 188–89, 209–11 (1988).

[166] Convention of Virginia (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 58, at 411–12 ("Who are to determine whether it be a riot or not? . . . Suppose an excise man will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go.").

[167] Militia Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (1792). State riot acts were also employed against the whiskey rebels. *See, e.g.*, Respublica v. Montgomery, 1 Yeates 419, 419, 422 (Pa. 1795) (describing how local magistrates read a riot act before pulling guns on the "rioters," who were only erecting a liberty pole); Pennsylvania v. Morrison, 1 Addison 274, 274 (Pa. 1795) ("The act of raising a pole in the street is itself unlawful, independent of any other ill intention."); Saul Cornell, "*To*

A few Pennsylvania clubs had supported the rebels, although most Democratic-Republican societies opposed them.[168] Nonetheless, President Washington concluded that Democratic-Republican clubs threatened the new nation and decided to use his annual address to Congress in November to press for their destruction.[169] According to Washington's speech, "certain self-created societies," "combinations of men, who, careless of consequences . . . have disseminated, from an ignorance or perversion of facts, suspicions, jealousies, and accusations, of the whole Government," encouraged Pennsylvanians to defy the excise with "symptoms of riot and violence."[170] Washington never stated what new law he wanted, but he stressed that "the [current] militia laws have exhibited such striking defects" and prayed that "the Supreme Ruler of Nation . . . enable us, at all times, to root out internal sedition."[171] Washington likely thought his prestige and rebuke of the societies would delegitimize them and lead to a ban.[172]

Congress, however, disappointed him. The House of Representatives debated for nearly a week before publishing an ambiguous reply to Washington's speech that avoided mentioning the Democratic-Republican societies.[173] A few Federalists

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Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech, 84 FORDHAM L. REV. 915, 926–28 (2015) (noting disagreements about whether raising a pole was riotous or protected assembly).

[168] *See, e.g.*, 4 ANNALS OF CONG. 909 (1794) (speech of Gabriel Christie) (emphasizing how many Democratic-Republican club members marched to battle against the whiskey rebels); Chesney, *supra* note 62, at 1554, 1557; Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 148–49; SLAUGHTER, *supra* note 165, at 161–165, 221.

[169] Chesney, *supra* note 62, at 1528, 1560–62.

[170] 4 ANNALS OF CONG. 788, 791 (1796) (speech of George Washington). A Senate resolution, a few days later, concurred that the rebellion was "increased by the proceedings of certain self-created societies . . . founded in political error." 4 ANNALS OF CONG. 794 (1794).

[171] 4 ANNALS OF CONG. 791–92 (1794) (speech of George Washington). A few months later, Congress passed the Militia Act of 1795, which removed many checks on the President's power that existed in the first Militia Act. *See* Guerra-Pujol, *supra* note 103, at 222–24 (listing differences between the two acts).

[172] *See* Chesney, *supra* note 62, at 1560–61; SLAUGHTER, supra note 165, at 220–21.

[173] 4 ANNALS OF CONG. 914–15 (1974) (voting to eliminate reference to "self-created societies" from the resolution and condemn only "combinations of men"—that is, the whiskey rebels themselves, rather than the clubs); *see also* 4 ANNALS OF CONG. 943–44 (1794).

favored censuring or even outlawing the clubs.[174] For instance, Theodore Sedgwick—the Massachusetts representative who years earlier had opposed including free assembly in the First Amendment—scoffed "would any one compare a regular town meeting where deliberations were cool and unruffled, to these societies, to the nocturnal meetings of individuals . . . where they shut their doors, pass votes in secret, and admit no members into their societies, but those of their own choosing?"[175] For Sedgwick, only assemblies fitting the New England model were worth protecting.

The Federalists, however, were the minority in the House. The Democratic-Republican majority defended the clubs as an exercise of the constitutional freedom of assembly.[176] They argued that even formally denouncing—let alone banning—such societies was beyond Congress' power. According to James Madison, for example, "institutions [such as the clubs] confessedly not illegal" cannot be "subjects of Legislative censure," because for Congress to "animadvert on the abuse of reserved rights" like speech and assembly "will be a severe punishment": indeed, an

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[174] *See, e.g.*, 4 ANNALS OF CONG. 922 (1794) (speech of Fisher Ames) (asserting that no one denies "[t]he right to form political clubs" but stressing that "abuse of the right" can be punished because "Town meetings are authorized by law, yet they may be called for seditious or treasonable purposes"); Chesney, *supra* note 62, at 1563–64. Early legal treatises on constitutional law often discussed abuses of the right to assemble. *See, e.g.*, JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 4–5 (1887); OLIVER, *supra* note 42, at 191–95.

[175] 4 ANNALS OF CONG. 902 (1794) (speech of Theodore Sedgwick) (noting "he did not mean . . . to say that [these societies] were illegal" but maintaining the question was not legality but rather their "mischievous[ness]"); *see also* Bowie, *supra* note 21, at 1718–20; *cf.* 1 ANNALS OF CONG. 759 (1789) (statement of Theodore Sedgwick) (opposing the Assembly Clause because "the right of assembling" is redundant and "trifling . . . minutiae" as long as freedom of speech is secure).

[176] *See, e.g.*, 4 ANNALS OF CONG. 941 (1794) (speech of Thomas Carnes) (insisting formal censure "would prevent the freedom of speech" so that "the people of America shall not have leave to assemble and speak their mind"); *id.* at 917–18 (speech of William Giles) (stating Congress is not "authorized by the Constitution" to "assum[e] the office of censorship"); *id.* at 900 (speech of William Giles) (arguing that the Baptists, the philosophical society, the Order of Cincinnati and so forth are all "self-created societies" so Congress cannot censure the clubs without endangering those too); Chesney, *supra* note 62, at 1566–72 (discussing the public debate on the legitimacy of the societies that occurred in newspapers in 1795).

unconstitutional "vote of attainder."[177] And during the House deliberations and after, even many Federalists admitted that citizens had the right to meet in private political societies, while still insisting such clubs were bad policy and censurable.[178]

Therefore, only a few years after ratification, leaders of the founding generation consciously debated the constitutionality of secret political societies. As this dispute progressed, most rejected the New England model and recognized that the First Amendment protected assembling in secret.

B. Secret Assembly in the Reconstruction Era

In the early republic, then, the scope of the Assembly Clause was controversial. Some prominent Americans construed the Clause as only protecting political gatherings that were public, open, and representative of a locality: gatherings analogous to town meetings. Other figures, however, viewed the Clause as a broad safeguard for all meetings—both political and social, both open and anonymous. At least two different original public meanings circulated, although only the second meaning harmonizes with current Supreme Court precedent.

This dispute, moreover, had not resolved by 1868. It had expanded. In the early republic, for instance, Masonic lodges were an acceptable form of secret assembly because the Freemasons were believed to be a solely fraternal society that—unlike the Democratic-Republican clubs or the Bavarian Illuminati—avoided partisanship on principle.[179] In the 1820s, in contrast, the Anti-Masonic movement, committed to the legal suppression of the Freemasons, emerged across America, partly

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[177] 4 ANNALS OF CONG. 934–35 (1794) (speech of James Madison) ("these societies . . . will stand or fall by the public opinion" as "censorial power is in the people over the Government, and not in the Government over the people").

[178] *See, e.g.*, *id.* at 899 (speech of Thomas Fitzsimons) (stating that "self-created societies" are "institutions, not strictly unlawful" yet opposed to "good order and true liberty"); *id.* at 920 (speech of Elias Boudinot) (admitting that "it was impossible to punish" the clubs but distinguishing censure from punishment); Martin, *When Repression Is Democratic and Constitutional*, *supra* note 31, at 172 (quoting Tammany Soc'y, *To the People of the United States Approving of the Conduct of the President of the United States*, Jan. 21, 1795, N.Y. J.) ("We claim it the unquestionable right of citizens, to associate . . . [but] exercise of this right, in a free and happy country like this, resembles the sport of firebrands; it is phrenzy.").

[179] *See, e.g.*, Letter from George Washington to Reverend G. W. Snyder, *supra* note 164 (distinguishing the Freemasons from the Illuminati); Mazzone, *supra* note 23, at 741–42, 763–64 (suggesting why hostility towards groups like Democratic-Republican societies did not apply to the Freemasons).

because the Freemasons were no longer viewed as dogmatically non-political.[180] An Anti-Masonic sermon from 1829, for instance, urged hearers to investigate "the bloody deeds," "crimes," and "works done in secret" that the Freemasons had perpetrated, even as the pastor promised that "[t]he right which free citizens have to assemble, to inquire, and to debate upon whatever concerns their interest in this land of liberty, is not to be called into question."[181] As long as the Freemasons were just fraternal, they were tolerated. But secret political organizations were dangerous.[182]

Indeed, North Carolina was not the only nineteenth-century state that sought to revise its constitution to ban secret societies.[183] In 1894, the newly-elected Republican majority of the New York legislature called a convention to draft the state's fourth constitution: still in effect today in heavily amended form.[184] One of the two versions of the assembly clause debated at the convention contained language declaring that "secret societies, associations or combinations illegally interfering with the business or occupation of private individuals or corporations, by force of numbers and violence, should be suppressed."[185] Floor deliberations show

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[180] *See, e.g.*, HACKETT, *supra* note 140, at 111–20; BULLOCK, *supra* note 140, at 277–301; Butterfield, *supra* note 145, at 340–60.

[181] Daniel Dow, *An Able Argument for Free Inquiry*, Sept. 11, 1929, *in* LEBBEUS ARMSTRONG, SERMONS AND ADDRESSES ON SECRET SOCIETIES: FOURTEEN PAMPHLETS IN ONE VOLUME 12–14 (1882) ("The inquiry should be made under a solemn sense of the judgment day approaching. All may rest assured, that if there be any works done in secret, they will then be brought to light."); *cf. Ephesians* 5:12.

[182] Illustrative of this is the fact that members of secret societies like the Know Nothings or the Freemasons were sometimes struck during voir dire, out of fear of conspiratorial influence. *See, e.g.*, People v. Reyes, 5 Cal. 347, 348 (1855); People v. Jewett, 3 Wend. 314, 320 (N.Y. 1829) (opinion of Savage, C.J.).

[183] *See* N.C. CONST. of 1876, art. I, § 25, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 2824 ("[S]ecret political societies are dangerous to the liberties of a free people, and should not be tolerated.").

[184] *See, e.g.*, Peter J. Galie & Christopher Bopst, *Constitutional "Stuff": House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1388, 1402, 1412 (2014); W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 320–22 (1954).

[185] 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1099–1101 (William H. Steele ed., 1900) [hereinafter REVISED RECORD] ("The people of this State have a right to assemble together to consult for their common good, or to instruct their representatives, and to apply to the legislature for the redress of grievances. But, secret societies, associations

that this proposal targeted monopolies, trusts, and secret labor unions.[186] In the end, the convention settled instead on a more customary clause that lacked this language.[187] New York's Republican leaders were close allies of corporate interests, which probably explains the failure of the "secret societies" proposal.[188] Nonetheless, many New York legislators—like their counterparts in North Carolina—saw secret associations as a threat to "a free people" while recognizing that the state's pre-existing assembly clause guaranteed secret assembly.[189]

Hostility towards secret societies arguably peaked during the Civil War and Reconstruction era. As discussed, secret armed orders arose across the North and South, with Black and white members, and these groups were rumored to be larger

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or combinations illegally interfering with the business or occupation of private individuals or corporations, by force of numbers and violence, should be suppressed.").

[186] The floor debate on September 20, 1894—the day before the "secret societies" provision was introduced—had concentrated on anticompetitive "conspiracy and secret combinations." 4 REVISED RECORD, *supra* note 185, at 1067–78. Early unions, such as the Knights of Labor, sometimes began as secret fraternities. Jason Kaufman, *Rise and Fall of a Nation of Joiners: The Knights of Labor Revisited*, 31 J. INTERDISC. HIST. 552, 557, 564–67 (2001); *see also* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1813–15 (2015) (on nineteenth-century courts' use of unlawful assembly statutes against unions); Butterfield, *supra* note 145, at 375–76.

[187] *See* N.Y. CONST. of 1894, art. I, § 9, *in* 5 STATE CONSTITUTIONS, *supra* note 4, at 2696 ("No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof; . . . and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."); *see also* 4 REVISED RECORD, *supra* note 185, at 1131, 1169.

[188] Joseph H. Choate and Elihu Root—perhaps the two most important Republican leaders—were corporate lawyers who hoped the 1894 constitution would break the power of Tammany Hall. *See, e.g.*, William H. Manz, "*Tammany Hall Had a Right to Expect Proper Consideration*": *The Judicial Nomination Controversy of 1898*, 81 N.Y. STATE BAR J. 10, 12, 19–20 (2009) (describing how Tammany politicians attacked Choate, Root, and the New York Bar Association as "partisan trust lawyers"); L. Michael Allsep, Jr., New Forms for Dominance: How a Corporate Lawyer Created the American Military Establishment 107, 148–51 (2008) (Ph.D. dissertation, Univ. of North Carolina) ("There really were no corporate lawyers in New York until men like Joseph Choate and Elihu Root invented the practice."). Tammany Hall started as a secret society but had largely shed this aspect by the 1890s. *See, e.g.*, J. W. PHELPS, SECRET SOCIETIES: ANCIENT AND MODERN 177–78 (1873) (describing Tammany as "virtually a secret society" which "imitated from Masonry" and "was very unscrupulously political" although it "pretended to be benevolent and charitable").

[189] 4 REVISED RECORD, *supra* note 185, at 1068, 1074 (speech of William P. Burr) ("[T]rusts threaten the welfare of the republic to-day. They have grown superior to the law. . . . Monopolies cannot long exist among a free people.").

and more powerful than they were in truth.[190] Moreover, by 1860, all southern states had statutes restricting religious and secular gatherings of Blacks—free or enslaved—which often occurred at night or in secret.[191] Although laws against clandestine Black meetings existed prior to ratification, they spread wider and grew harsher in the 1830s, after the failed slave rebellions of Denmark Vesey and Nat Turner.[192] South Carolina, for instance, declared all "[a]ssemblies of slaves, free negroes, mulattoes, and mestizos" to be "an *unlawful meeting*" if they met "in a confined or secret place" or "before the rising of the sun, or after the going down of the same."[193] Magistrates had a duty to disperse such meetings even if it required them "to enter into such confined places," "to break doors," or to use violence against free persons.[194] Louisiana, likewise, forbade free Blacks from creating "any corporations" "organized . . . for religious purposes or secret associations," because—

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[190] For these groups, see, for instance, MARK A. LAUSE, A SECRET SOCIETY HISTORY OF THE CIVIL WAR (2011).

[191] *See, e.g.*, Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237 (2007); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1134–36 (1994).

[192] *See* May, *supra* note 191, at 238–40 (quoting examples of laws before and after Turner's rebellion). On the role of secret assemblies in these uprisings, see, for instance, DAVID ROBERTSON, DENMARK VESEY: THE BURIED STORY OF AMERICA'S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT 58–59, 66 (2009); KENNETH S. GREENBERG, NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY 175–76 (2004). Earlier laws sometimes protected categories of Black assembly. *See, e.g.*, Locke, *The Fundamental Constitutions of Carolina* §§ 98–99, *in* LOCKE: POLITICAL ESSAYS, *supra* note 70, at 179–80 (declaring that slaves could enter "what church or profession any of them shall think best & thereof be as fully members as any freeman"); State v. Boozer, 36 S.C.L. 21, 24–26 (S.C. Ct. App. 1850) (punishing a slave patrol for forcibly dispersing a slave assembly that was lawful under a 1740 statute).

[193] GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 60, 65 (2d ed., 1856). Virginia, similarly, prohibited "[a]ll meetings" of Blacks and mixed-race persons "in the night, under any pretext whatsoever," including Christian worship. *Id.* at 65–66; *cf.* Waters v. State, 1 Gill 302, 309 (Md. 1843) (asserting that the "free negroes in the State" are "a vicious or dangerous population," so laws "guard even their religious assemblages with peculiar watchfulness").

[194] STROUD, *supra* note 193, at 60, 65 (clarifying that such assembly was unlawful even if white people were also present, but magistrates could only whip the free or enslaved Blacks for assembling,

according to Louisiana's highest court—"the African race are strangers to our constitution" and "such assemblage" is "an evil which requires correction."[195]

Abolitionists, and later Republicans, condemned these laws as violating freedom of assembly and religion.[196] One influential remonstrance, for instance, lamented that "[s]tatute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition."[197] The remonstrance referred to violence against Black churches and political meetings, such as the 1866 New Orleans massacre, as proof of the need for federal intervention.[198] Moreover, nineteenth-century courts recognized that freedom of assembly entailed a right to exclude or even forcibly

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not their white co-gatherers); *see also* May, *supra* note 191, at 246–47 (describing how South Carolina courts narrowly construed this law, out of concern for the free exercise rights of white co-religionists).

[195] Afr. Methodist Episcopal Church v. City of New Orleans, 15 La. Ann. 441, 442–43 (1860) (upholding a city ordinance preventing worship and seizing church property); *Actes Passes par la Troisieme Legislature de L'etat de la Louisiana* 179 (G. E. Weisse ed., 1850); *see also* INAZU, LIBERTY'S REFUGE, *supra* note 17, at 31–33; *cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (declaring that free and enslaved Blacks are "beings of an inferior order" with "no rights which the white man was bound to respect").

[196] *See, e.g.*, INAZU, LIBERTY'S REFUGE, *supra* note 17, at 32, 36 (quoting various documents, such as a tract by Theodore Dwight Weld, which called these laws "'the right of peaceably assembling' violently wrested"); Lash, *supra* note 191, at 1136–37, 1154; *cf.* Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), *in* UNCOLLECTED LETTERS OF ABRAHAM LINCOLN 127 (Gilbert A. Tracy ed., 1917) ("[N]o loop hole [is] left for nullification, and none for secession,—because the right of peaceable assembly and of petition and by article Fifth of the Constitution, the right of amendment, is the Constitutional substitute for revolution. Here is our *Magna Carta* not *wrested* by Barons from King John, but the free gift of states to the nation . . . .").

[197] *The Appeal of the Southern Loyalists Convention* (1866), *in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 268–69 (Kurt T. Lash ed., 2021) (noting these statutes "deprive[] citizens of the other States of their privileges and immunities"). During the debate on the Fourteenth Amendment, congressmen presented petitions from citizens asking the government to safeguard assembly and other rights. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 31–91 (2013).

[198] *The Appeal of the Southern Loyalists Convention*, *in* THE RECONSTRUCTION AMENDMENTS, *supra* note 197, at 269.

remove people who were not part of the group.[199] For instance, at the height of Reconstruction, one racist South Carolina judge charged a jury in a murder trial that Black members of "the Union League had a right to assemble" and to keep out people who attempt "to intrude upon their deliberations," as long as such "secret societies" did not "resist the operation of law."[200] Citizens could assemble freely, even at night and in selective secret organizations.

Ironically, Justice Taney, in his *Dred Scott* decision, agreed. For Taney, bigoted state laws were evidence that free Black and mixed-race inhabitants could not be "fellow-citizens" with the right "to go where they pleased at every hour of the day or night without molestation" and "to hold public meetings upon political affairs."[201] Taney viewed secret assembly as one of "the privileges and immunities of citizens," so he could only refuse such assembling to Blacks by denying them citizenship altogether.[202] Taney and the abolitionists concurred about the scope of the

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[199] *See, e.g.*, State *ex rel.* Poulson v. Grand Lodge of Mo. I.O.O.F., 8 Mo. App. 148, 156 (1879) ("[I]t is, in like manner, competent for the Odd Fellows to determine who is an Odd Fellow; and these are questions into which the courts of this country have always refused to enter . . . . To deny to [a society] the power of discerning who constitute its members, is to deny the existence of such a society."); Wall v. Lee, 34 N.Y. 141, 146 (1865) ("The guaranty of the Constitution of the United States of . . . the rights of the people peaceably to assemble and petition for a redress of grievances, would be but an idle mockery if meetings convened for such purposes can be invaded and disturbed with impunity."); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 40–44.

[200] H.R., EXEC. DOC. NO. 1, MESSAGE OF THE PRESIDENT OF THE UNITED STATES AND ACCOMPANYING DOCUMENTS, TO THE TWO HOUSE OF CONGRESS AT THE COMMENCEMENT OF THE THIRD SESSION OF THE FORTIETH CONGRESS 409, 410 (1868) (charge of Dawkins, J.) (admitting that there is "no doubt that the Union League had a right to assemble. Any number of individuals may meet together, and if they are in a private house . . . no individual has a right to intrude upon their deliberations."). The judge gave this charge in a case about a fight between ten Union Leaguers and drunk members of a white debating club which led to the death of a white youth. *See id.* at 411–12.

[201] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417, 421 (1857) (citing "the laws of the States" such as a D.C. charter provision that "restrain[ed] and prohibit[ed] the nightly and other disorderly meetings" of Blacks); *see also* THE SLAVERY CODE OF THE DISTRICT OF COLUMBIA, TOGETHER WITH NOTES AND JUDICIAL DECISIONS EXPLANATORY OF THE SAME 84 (1862) ("All secret or private meetings or assemblages whatsoever, and all meetings for religious worship beyond the house of ten o'clock at night, of free negroes, mulattoes or slaves . . . [are] unlawful.").

[202] *See Dred Scott*, 60 U.S. (19 How.) at 416–17; *cf.* Aldridge v. Commonwealth, 4 Va. 447, 449 (Va. Gen. Ct. 1824) (stating that "the [Virginia] Bill of Rights . . . never was contemplated, or con-

right to assemble, just not about who deserved this right. After the Civil War, both the majority and the dissenters in the *Slaughter-House Cases* (1872) interpreted the Fourteenth Amendment as overturning Taney's opinion.[203] Indeed, the majority held that freedom of assembly was one of the few rights of national citizenship that the Amendment incorporated against the states.[204]

The Supreme Court confronted the problem of secret meetings in *United States v. Cruikshank* (1875). On Easter Sunday, April 13, 1873, a paramilitary force of several hundred Confederate veterans and secret society members attacked a Republican militia (largely freedmen) which had gathered at a courthouse in Colfax, Louisiana to protest the fraudulent results of the 1872 congressional election.[205] After hours of fighting, the Republicans surrendered, and some of the victors proceeded to murder over forty disarmed Black captives.[206] This conflict was one of many battles between white supremacist societies and Black self-defense groups, such as the Union League, that occurred during Reconstruction.[207] Societies on both sides were

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sidered, to extend to the whole population of the State"—that is, to free Blacks—because "our Statute Book" is filled with laws limiting Black rights, "many of which are inconsistent with the letter and spirit of the Constitution").

[203] *See* Slaughter-House Cases, 83 U.S. 36, 73 (1872) (stating that the Amendment "overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States"); *id.* at 94–95 (Field, J., dissenting) (agreeing on this).

[204] The majority implied that the Privileges or Immunities Clause only incorporated a protection for gatherings that sought to petition Congress or otherwise consult about national affairs. *See id.* at 79 (listing "[t]he right peaceably assemble and petition for redress of grievances" as one example of a "privilege of a citizen of the United States" that "owe their existence to the Federal government, its National character, its Constitution, or its laws"); *id.* at 118–19 (Bradley, J., dissenting) (insisting that "the right peaceably to assemble for the discussion of public measures" is a "right[] of all persons, whether citizens or not").

[205] *See, e.g.*, CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 79, 90–93 (2008) (observing that many non-combatants, especially Black women and children, were also present); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 95–97 (2007); INAZU, LIBERTY'S REFUGE, *supra* note 17, at 37–40.

[206] James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the Constitutional Canon*, 49 HARV. C.R. -C.L. L. REV. 385, 387–88, 407 (2014); KEITH, *supra* note 205, at xiii, 109; LANE, *supra* note 205, at 106–07, 266.

[207] Pope, *Snubbed Landmark*, *supra* note 206, at 387, 392, 413–14, 426 (noting that elections in the 1870s often depended more on "paramilitary battles" than on vote results); LANE, *supra* note

usually nominally secret—although often public in practice—conducting fraternal rituals, swearing loyalty oaths, and meeting masked or at night.[208] Such self-defense groups grew so important that a Baptist minister at the end of the nineteenth century wrote a novel imagining the formation of a Black shadow state dedicated to ending segregation and establishing a Black national homeland.[209]

A year after the Colfax massacre, three of the murderers were tried and convicted of "feloniously band[ing] or conspir[ing] together" to deprive "citizens of the United States" of "the free exercise and enjoyment of . . . the right peaceably to assemble themselves together" along with other rights.[210] Yet Justice Joseph P. Bradley—sitting as a circuit judge—released the defendants, for he believed Congress lacked power under the Fourteenth Amendment to punish ordinary crimes by private individuals that incidentally interfered with rights.[211] According to Bradley, if, for example, "a combination should be formed" with the express intent of expelling "a citizen of African descent" from a farm he had legally leased, Congress

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205, at 74, 136 (describing raids by Republican posses on the houses of prominent white supremacists); *see also* United States v. Butler, 25 F. Cas. 213 (C.C.D. S.C. 1877) (narrating the events of several political murders in South Carolina leading up to the 1876 elections).

[208] MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH: POLITICS AND AGRICULTURAL CHANGE DURING RECONSTRUCTION 2–3, 114–15, 201, 242 (1989) (describing the secret rituals of the Union League); Pope, *Snubbed Landmark*, *supra* note 206, at 397–401, 413, 436–437 & n.322 (discussing how white paramilitaries became increasingly public and non-secret after the *Cruikshank* decision); KEITH, *supra* note 205, at 56, 58, 85, 146; LANE, *supra* note 205, at 3, 39, 46.

[209] *See* SUTTON E. GRIGGS, IMPERIUM IN IMPERIO (1899).

[210] United States v. Cruikshank, 25 F. Cas. 707, 708 (C.C.D. La. 1874); *see also* Enforcement Act of 1870, § 6, 16 Stat. 140 (1870) (making it a crime if "two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States").

[211] *Cruikshank*, 25 F. Cas. at 714 ("Does this [First Amendment] disaffirmance of the power of congress to prevent the assembling of the people amount to an affirmative power to punish individuals for disturbing assemblies? This would be a strange inference. That is the prerogative of the states."). Bradley also held that some charges were void for vagueness and that others failed to plead all necessary elements. *See id.* at 715.

could act.[212] "The war of race" after all, "whether carried on in a guerrilla of predatory form, or by private combinations, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States."[213] But because "ordinary felonious or criminal" acts are not within federal jurisdiction, prosecutors must prove the element of racial intent.[214] As a result, the federal government could ban armed secret societies—white or Black—only under narrow circumstances.

On appeal, the Supreme Court unanimously affirmed Bradley's decision, although its reasoning differed.[215] According to the Court, the "right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution," for it is "one of the attributes of citizenship under a free government" and "is found wherever civilization exists."[216] Thus, the First Amendment's "right" (as incorporated through the Privileges or Immunities Clause) cannot refer to the entirety of freedom of assembly, but only to a narrower "right on the part of its citizens to meet peaceably for consultation in respect to public affairs," "to assemble for the purpose of petitioning Congress," or to gather "for any thing else connected with the powers or the duties of the national government."[217] A meeting

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[212] *Id.* at 712.

[213] *Id.* at 714.

[214] *Id.*; *see also* Pope, *Snubbed Landmark*, *supra* note 206, at 431–32 (discussing the difficulty courts had understanding and proving this intent requirement); Charge to Grand Jury, 30 F. Cas. 1005, 1006–07 (C.C. W.D. Tenn. 1875) (regretting that "there exists nowhere, in either government, state or national" strength to punish "conspiracies and combinations . . . [which] include large portions of the constabulary, the magistracy, and the jurors"). Bradley concluded that the Fifteenth Amendment—unlike the Fourteenth—empowered Congress to shield voting rights from "violence, and combinations" even without racial intent. *See Cruikshank*, 25 F. Cas. at 713.

[215] United States v. Cruikshank, 92 U.S. 542 (1875). All nine justices agreed in result, but Nathan Clifford—the sole Democratic appointee on the court—found the charges void for vagueness and rejected the majority's constitutional holding. *Id.* at 566–67, 569 (Clifford, J., concurring).

[216] *Id.* at 551 (opinion of the court); *cf.* Union Pac. R.R. Co. v. United States, 99 U.S. 700, 763–64 (1878) (Field, J., dissenting) (contending that Congress could not have passed laws prohibiting free assembly even apart from the First Amendment, for such laws are impossible in a government of limited powers).

[217] *Cruikshank*, 92 U.S. at 552. The Court's logic implies that Congress could have stopped states from interfering with assemblies—including those without a national purpose—even before the Fourteenth Amendment was ratified. After all, the right to assemble predated the 1788 Constitution, and the "very idea of a government, republican in form, implies" this freedom. *Id.* at 551–52. If so,

to lobby a federal agency or raise money for a presidential campaign would fall within this right to national assembly; a social gathering or a town meeting addressing local politics would not.[218] The indictment in *Cruikshank* only required the prosecution to prove that the defendants conspired "to prevent a meeting for any lawful purpose," rather than to thwart "a meeting for such a [national] purpose."[219] Therefore—even though the facts showed that the murdered Blacks had met to protest a corrupt congressional election, a national purpose—the Supreme Court insisted that it had to throw out the improperly pled assembly charge.[220]

The *Cruikshank* decision had an immediate and horrific impact on Black assembly across the South. With prosecution now unlikely, white supremacist terrorism crushed Black self-defense groups within a few years.[221] Yet, the holding of the

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then Congress could protect free assembly under its duty to "guarantee to every State in this Union a Republican Form of Government." *See* U.S. CONST., art. IV, § 4.

[218] The Court later overturned *Cruikshank*'s narrow scope. *See* De Jonge v. Oregon, 299 U.S. 353, 364–65 (1937) (incorporating the full right of "peaceable assembly for [any] lawful discussion" against the states). A generation after *Cruikshank*, John Marshall Harlan—dissenting in a case about a state law that forced private schools to segregate against their will—argued that "the freedom secured by . . . the Constitution" was broad and included the right of "all citizens, without regard to race" to "appear in an assemblage of citizens convened to consider questions of a public or political nature," "to sit together in a house of worship or at a communion table," and to hold "voluntary meeting[s] for innocent purposes." Berea College v. Kentucky, 211 U.S. 45, 68–69 (1908) (Harlan, J., dissenting); *cf.* Poyer v. Vill. of Des Plaines, 18 Ill. App. 225, 230 (1885) (stating that the state constitution guaranteed "the right to assemble for open air amusement" such as "leap frog," "lawn tennis," "public picnic[s]," "open air dance," and other "healthful recreations and innocent amusements").

[219] *Cruikshank*, 92 U.S. at 553; *see also De Jonge*, 299 U.S. at 364 (overturning this part of *Cruikshank*). Earlier lower court cases had required much less to prove this charge. *See, e.g.*, United States v. Blackburn, 24 F. Cas. 1158, 1158 (C.C. W.D. Mo. 1874) (allowing conspiracy to deprive freedmen of rights to be proven by circumstantial evidence "such as [defendants] going together, in disguise, in the night-time"); United States v. Hall, 26 F. Cas. 79, 80, 82 (C.C.S.D. Ala. 1871) (holding that the Assembly Clause is entirely incorporated against the states).

[220] *Cruikshank*, 92 U.S. at 553–59. The majority dismissed the non-assembly counts on other grounds, such as the state action doctrine. *Id.*

[221] McDonald v. City of Chicago, 561 U.S. 742, 855–56 (2010) (Thomas, J., concurring) ("*Cruikshank* is not a precedent entitled to any respect," but "the consequences of *Cruikshank* warrant mention" because after it "militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens"); *see also* Pope,

case took a broad view of secret assembly. The majority opinion assumed that Blacks had the right to gather clandestinely and to form secret political organizations such as the Union League, as long as those groups had national goals. Whether an assembly was public or clandestine, open or limited to those who knew a password or special handshake, played no role in the court's reasoning. All that mattered was whether "the purpose [of the assembly] had any reference to the national government."[222]

Conclusion

Historical evidence, then, demonstrates that, both at the time of ratification of the First Amendment and at the time of its incorporation through the Fourteenth Amendment, many American observers believed that free assembly entailed a right to secrecy—that is, a right to form selective groups that excluded non-members and to gather anonymously, covertly, behind closed doors, or in disguise. But evidence also reveals that, during both the Founding and Reconstruction, some Americans viewed secret assembly as a threat to republican government and interpreted the Assembly Clause as only safeguarding open, public gatherings similar to town meetings. Both of these public meanings are historically possible.[223] But only one can be the original public meaning, and only one can fit American political culture and Supreme Court precedents as they have developed over the past two hundred years.[224]

Snubbed Landmark, *supra* note 206, at 412–15 (describing how white supremacist secret societies began operating with impunity after *Cruikshank*); LANE, *supra* note 205, at 217, 243–44.

[222] Twining v. N.J., 211 U.S. 78, 96–97 (1908) (characterizing precedent as stating that the Constitution secured the right to assemble only for meetings with a national purpose); *see also* Presser v. Illinois, 116 U.S. 252, 267 (1886) (claiming the assembly was protected only if "the purpose of the assembly was to petition the [national] government for a redress of grievances"); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 759 (1884) (Field, J., concurring) (listing "the right to peaceably assemble and petition" as one of "the privileges and immunities of citizens of the United States as distinguished from citizens of the states").

[223] *See* Mike Rappaport, *An Important Difference Between Historians and Originalist Law Professors*, L. & LIBERTY (Oct. 11, 2018), https://perma.cc/W8SG-BBVA ("[T]he originalist is not looking for 'what the past tells us about a matter.' The originalist is looking for the original meaning."); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 222 (1993) ("The question is not whether original intent or any other form of forensic history is a meaningful historical exercise. The question should be whether it is a meaningful judicial exercise.").

[224] Bhagwat, *Democratic First Amendment*, *supra* note 24, at 1123 (observing that "in the very early American Republic, two very different models of citizenship in a representative democracy

From its origins, moreover, the Assembly Clause prohibited more than just laws barring private meetings. Statutes excessively burdening secrecy were also void. Thus, St. George Tucker implied Congress could not force the Freemasons to turn over their membership list.[225] Abolitionists and Republicans decried southern laws that limited Black gatherings to daytime or demanded a white person be present.[226] James Madison and many congressmen believed that the government could not censure secret political societies—let alone ban their meetings.[227] And, in the nineteenth century, the Wisconsin Supreme Court held that it is "entirely un-American, and in conflict with the principles of our institutions" to compel "a lodge of Odd Fellows or Masons" to seek permission from a local official before "march[ing] in procession on the streets" because "[t]he people do not hold rights as important and well settled as the right to assemble . . . subject to the power of any public officer to interdict or prevent them."[228] Freedom of assembly defended secret gatherings from prohibitions and burdensome regulations alike.

Yet secret assembly is costly. Anonymity can strengthen American patriots like the Sons of Liberty, the Democratic-Republican societies, or the Union League. But

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coexisted," a Federalist and a Republican model, but "the Supreme Court, as well as essentially all scholars, have obviously adopted the Republican model," a choice "entirely justified as a matter of history and common sense"); *see also* Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387–88 (2021); NAACP v. *ex rel.* Patterson, 357 U.S. 449, 454, 462 (1958); Thomas v. Collins, 323 U.S. 516, 525, 539–40 (1945).

[225] 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 125, at 315–16 ("nor will the constitution permit any prohibition . . . of peaceable assemblies" such as acts "for prohibiting riots: and for suppressing assemblies of free-masons"); *see also* Unlawful Societies Act 1799, 39 Geo. 3 c.79 (Eng.).

[226] *See, e.g.*, STROUD, *supra* note 193, at 60, 65–66.

[227] 4 ANNALS OF CONG. 934–35 (1794) (speech of James Madison).

[228] *In re* Garrabad, 54 N.W. 1104, 1107–08 (Wis. 1893); *see also* Anderson v. City of Wellington, 19 P. 719, 721–23 (Kan. 1888) (holding that it "is not a reasonable regulation" to require that "Masonic and Odd Fellows organizations," the "Grand Army of the Republic," and even "Sunday-School children" obtain "the written consent of some municipal officer" before assembling and marching or "to vest the power arbitrarily in [a local official] to grant or refuse permission," for such a law abridges the "right of the people in this state"); El-Haj, *The Neglected Right*, *supra* note 23, at 569–78 (discussing the rise of permit requirements for public assembling in the twentieth century); *cf.* Poulos v. N.H., 345 U.S. 395, 426 (1953) (Douglas, J., dissenting) ("There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment.").

it can also create private tyrannies and nocturnal cabals, as groups like the Knights of the Golden Circle, the Ku Klux Klan, or the (largely imaginary) Bavarian Illuminati demonstrate.[229] Secret assembly can be dangerous to the liberties of a free people.[230] But the American people have decided that this danger is worth the risk.

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[229] The Assembly Clause allows laws against violent secret societies, which partly addresses the threat of these sorts of groups. *See, e.g.*, N.Y. *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 73, 75 (1928) (concluding that the Klan can be treated differently from other "associations having oath-bound membership, such as labor unions, the Masonic fraternity, the Independent Order of Odd Fellows, the Grand Army of the Republic, and the Knights of Columbus" because the Klan habitually employs "the secrecy surrounding its purposes" as "a cloak for acts and conduct inimical to personal rights," and "to strike terror in the minds of the people"); *NAACP*, 357 U.S. at 465.

[230] *Cf.* Healy v. James, 408 U.S. 169, 188 (1972) (citations omitted) ("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").