Liberty's Refuge The Forgotten Freedom of Assembly

John D. Inazu

Yale University Press books may be purchased in
quantity for educational, business, or promotional use.
For information, please e-mail sales.press@yale.edu
(U.S. office) or sales@yaleup.co.uk (U.K. office).

Set in Baskerville type by IDS Infotech Ltd., Chandigarh, India.
Printed in the United States of America.

Library of Congress Cataloging-in-Publication Data

Inazu, John D.
Library's refuge : the forgotten freedom of assembly / John D. Inazu.
p.cm.
Includes bibliographical references and index.
ISBN 978-0-300-17315-4 (cloth : alk. paper) 1. Assembly, Right of—United States.
2. Freedom of association—United States. I. Title.
KF4778.153 2012
342.7308'54—dc23

2011021414

A catalogue record for this book is available from the British Library.

This paper meets the requirements of
ANSI/NISO Z39.48–1992 (Permanence of Paper).

10 9 8 7 6 5 4 3 2 1

LIBERTY'S REFUGE

For Byrd and Taizo

ACKNOWLEDGMENTS

I am grateful for substantial advice and comments from Jeff Spinner-Halev, Mike Lienesch, Stanley Hauerwas, Jeff Powell, Susan Bickford, Amin Aminfar, Rick Garnett, Guy-Uriel Charles, and James Boyle. I owe a particular note of thanks to Andy Koppelman for his generous engagement with a book with which he has many disagreements. Thanks also to Rob Vischer, Gerald Postema, Jim Skillen, Bob Cochran, Kristen Johnson, Max Eichner, Tabatha Abu El-Haj, Roman Hoyos, Neil Siegel, Nathan Chapman, Bill English, Kim Krawiec, Jed Purdy, Bill Marshall, Larry Helfer, Stuart Benjamin, Jack Knight, Joseph Blocher, Sara Beale, David Lange, Ryan Messmore, Jonathan Mitchell, Ernie Young, Steve Smith, Paul Haagen, Michael Curtis, Dan Blinka, and Jason Mazzone. This book benefited from audiences at the Harvard Graduate Conference in Political Theory and faculty workshops at Duke University School of Law and the University of North Carolina School of Law. Thanks to the library staffs at Duke University School of Law (especially Jennifer Behrens, Molly Brownfield, and Kelly Leong), the University of North Carolina, and Syracuse University. The final stages of this

manuscript benefited from exceptional research assistance from Chase Anderson, Ellie Poole, and Josh Roling.

My completion of this book was made possible through the generous financial support of Dr. and Mrs. Thomas S. Royster during my graduate work at the University of North Carolina and by a number of people at Duke University School of Law and the Program in Public Law, especially Neil Siegel, Liz Gustafson, and David Levi. Chapters 2 and 3 draw heavily from "The Forgotten Freedom of Assembly," *Tulane Law Review* 84 (2010): 565–612, and "The Strange Origins of the Constitutional Right of Association," *Tennessee Law Review* 77 (2010): 485–562. Portions of Chapter 4 are taken from "The Unsettling 'Well-Settled' Law of Freedom of Association," *Connecticut Law Review* 43 (2011): 149–208. I am grateful to the editors for their permission to rely upon these publications. Some of my arguments about intimate and expressive association are summarized in the *Amicus* Brief of Pacific Justice Institute and Christian Service Charities in Support of Petitioner Christian Legal Society in *Christian Legal Society v. Martinez,* No. 08–1371 (February 2010). Thanks to Pete Lepiscopo for his work on that brief.

Mike O'Malley at Yale University Press believed in this manuscript, and Bill Frucht, Piyali Bhattacharya, Ann-Marie Imbornoni, and Otto Bohlmann helped see it through to completion. Thanks also to the three reviewers whose insightful critiques have made this manuscript a better book and its author a better scholar.

Scott Davis, Tod Laursen, Rich Schmalbeck, Scott Silliman, Joel Fleishman, Mike Broadway, Roger Wollman, and Curtis Freeman encouraged me in important ways at earlier stages of my academic training. Allan Poole, Cleve May, Seth Dowland, Evan Gurney, Alex Hartemink, and Greg Mitchell endured many conversations about the arguments contained in this book. Jeff Powell has been a mentor since my days as a law student at Duke—no one has been more influential to my development as a lawyer and a scholar.

I am blessed beyond measure by my wife, Caroline, and our two daughters, Lauren and Hana. My parents, Willie and Sandy Inazu, have modeled life for me in ways that I hope to do for my own children. Caroline's parents, Skip and Melissa Young, have been a consistent presence in our lives (and have also served as faithful babysitters).

This book is dedicated to my grandfathers. In 1945, as the United States Supreme Court issued one of its most important opinions about the freedom of assembly in *Thomas v. Collins,* Byrd Curtis sat captive in a Nazi prisoner-of-war camp and Taizo Inazu stood behind the barbed wire of Tule Lake Relocation Camp. We work out the theory and practice of assembly between the poles of abuse to which they testify.[1]

CONTENTS

CHAPTER 1

OVERVIEW OF THE ARGUMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble,* and to petition the Government for a redress of grievances.

—United States Constitution, Amendment I

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and the New Deal, and the Civil Rights Movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the Second Red Scare of 1950s' McCarthyism. Abraham Lincoln once called "the right of the people peaceably to assemble" part of "the Constitutional substitute for revolution." In 1939, the popular press heralded assembly as one of the "four freedoms" central to the Bill of Rights. Even as late as 1973, John Rawls characterized it as one of the "basic liberties." But in the past thirty years, the freedom of assembly has become little more than a historical footnote in

American law and political theory. Why has assembly so utterly disappeared from our democratic fabric? And, as important, what has been lost with the loss of assembly?[1]

One might, with good reason, think that the right of assembly has been subsumed into the rights of speech and association and that these two rights adequately protect the boundaries of group autonomy. On this account, contemporary free speech doctrine guards the best-known form of assembly—the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration. Meanwhile, the right of association, or, more precisely, the right of *expressive association,* shelters assemblies that extend across time and place—groups like clubs, churches, and civic organizations. In other words, the free speech framework focuses on the message that a group conveys at the moment of its gathering (the words on a placard, the shouts of a protester, the physical presence of a sit-in), while the expressive association framework focuses on the group that enables a message by ensuring that people can "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."[2]

The idea that the rights of speech and association adequately guard the groups that the right of assembly might otherwise have protected is not implausible, and a number of scholars appear to have adopted it. Indeed, most modern constitutional arguments involving questions of group autonomy invoke the right of expressive association. Andrew Koppelman, a well-respected constitutional scholar, has argued that expressive association has come to represent "a well-settled law of freedom of association," an "*ancien regime.*"[3]

I believe that this turn to speech and association to protect the boundaries of group autonomy—and therefore pluralism and dissent—is misguided. The central argument of this book is that something important is lost when we fail to grasp the connection between a group's formation, composition, and existence and its expression. Many group expressions are only intelligible against the lived practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe to them. The political significance of a women's pageant in the 1920s would be lost without knowing why these women gathered. And the creeds and songs

recited by members of groups ranging from Alcoholics Anonymous to the Boy Scouts reflect a way of living that cannot be captured by a text or its utterance at any one event.[4]

The right of expressive association elides this connection between a group's practices and its message. Consider the following examples: a gay social club, a prayer or meditation group, and a college fraternity. Each of these groups conveys a message by its very existence. Each of these groups bears witness to a social practice that, to varying degrees and at various times, disrupts social norms and consensus thinking. Those sound like important First Amendment interests. But none of these groups qualifies as an expressive association—none of these groups is "expressive enough" under current constitutional doctrine.[5]

What is more, even when the right of expressive association does show up, it doesn't offer very rigorous protections, at least when confronted with antidiscrimination norms. Civic organizations, social clubs, and religious student groups have all been found to be expressive associations—and all have been left utterly unprotected by the right of expressive association. The Ninth Circuit recently illustrated this trend—and the logical end of antidiscrimination norms unchecked by principles of group autonomy—in the reasoning underlying its denial of constitutional protections to a high school Bible club that sought to limit its membership to Christians: "States have the constitutional authority to enact legislation prohibiting invidious discrimination. . . . We hold that the requirement that members [of a high school Bible club] possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians . . ., [thus violating] the District's non-discrimination policies." In other words, a Christian group that excludes non-Christians is for that reason invidiously discriminating.[6]

There is another problem with the right of association—it is not actually in the text of the Constitution. This will come as a surprise to some, including dozens of federal judges and their law clerks who have referred to a nonexistent "freedom of association clause" in the First Amendment. Look again at the epigraph to this introductory chapter—there is no such clause. In fact, the right of association was absent from our constitutionalism for most of our nation's history—the Supreme Court first announced it in its 1958 decision *NAACP v. Alabama ex rel. Patterson*.[7]

Of course, any written document requires some level of interpretation, and the Supreme Court has long recognized other rights not in the text of the Constitution, most notably a right to privacy. But unlike privacy, association has an obvious antecedent in the text of the Constitution: the right of assembly. We should not supplant assembly with the invented right of association—or at least the version of that right that the Court has embraced over the past fifty years—without understanding why we have done so and what we have given up in the process.

This book offers assembly as an alternative to the enfeebled right of expressive association. The history of assembly reveals four principles that help us see its contours and its contemporary applications. First, assembly extends not only to groups that further the common good but also to dissident groups that act against the common good. Second, this right extends to a vast array of religious and social groups. Third, just as the freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group's autonomy, composition, and existence. Fourth, assembly is a form of expression—the existence of a group and its selection of members and leaders convey a message. Collectively, these four principles counsel for strong protections for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards.

The judicially recognized right of association advances neither these principles nor the values that underlie them. The shift in the constitutional framework from assembly to association (1) diminished protections for dissenting and destabilizing groups; (2) marginalized political practices of these groups by narrowing the scope of what counts as "political"; and (3) obscured the relationship between the practices and expression of these groups. The forgetting of assembly and the embrace of association thus marked the loss of meaningful protections for the dissenting, political, and expressive group.[8]

While today's cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have been silenced and stilled by the state cuts across political and ideological boundaries. The freedom of assembly once opposed these incursions. As C. Edwin Baker has argued: "The

function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms."[9]

But the social vision of assembly does more than enable meaningful dissent. It provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity. And it facilitates a kind of flourishing that recognizes the good and the beautiful sometimes grow out of the unfamiliar and the mundane. Indeed, almost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity. We lose more than the shared experience of cheese fries and cheap beer when we bowl alone.[10]

Recovering the vision of assembly remains an urgent task. In June 2010, the Court dealt a twofold blow to the principles of group autonomy by relying on attenuated conceptions of the rights of speech and association. In *Holder v. Humanitarian Law Project,* the Court curtailed in the name of national security interests the right of individuals to associate with and advocate on behalf of certain foreign political groups. And in *Christian Legal Society v. Martinez,* the Court relied on a muddied area of free speech doctrine to deny the right of a religious student group to limit its membership to those of its choosing, the right to retain control over its own message—the right to exist.[11]

Holder and *Martinez* hinder the group autonomy upon which democracy depends. As Stephen Carter has argued, "Democracy advances through dissent, difference, and dialogue. The idea that the state should not only create a set of meanings, but try to alter the structure of institutions that do not match it, is ultimately destructive of democracy because it destroys the differences that create the dialectic."[12] Beginning from a very different perspective, William Eskridge arrives at a similar conclusion: "The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others."[13] The Court's doctrinal reliance on the right of association in *Holder* and the right

of speech in *Martinez* ignores the important views that Carter and Eskridge raise.

Holder and *Martinez* are lamentable, but they are unsurprising. They reflect the unprincipled development of the Court's approach to questions of group autonomy over the past fifty years. This book proposes an alternative. It tells a different story about the constitutional protections for groups and argues that we need to reinvigorate these protections. The following pages provide an overview of the next four chapters: (1) the history of the right of assembly; (2) the invention of the right of association in the 1950s and 1960s; (3) the transformation of the right of association in the 1970s and 1980s; and (4) a theory of assembly.

The Right Peaceably to Assemble

There has been some debate as to whether "the right of the people peaceably to assemble, and to petition the government for a redress of grievances" in the First Amendment recognizes a single right to assemble for the purpose of petitioning the government or establishes both an unencumbered right of assembly and a separate right of petition. Contrary to interpretations advanced in some scholarship, the text of the First Amendment and the corresponding debates over the Bill of Rights suggest that the framers understood assembly to encompass more than petition. The first groups to invoke the freedom of assembly also construed it broadly. At the end of the eighteenth century, the Democratic-Republican Societies emerging out of the increasingly partisan divide between Federalists and Republicans repeatedly invoked the right of assembly. During the antebellum era, policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks. Meanwhile, female abolitionists and suffragists in the North organized their efforts around a particular form of assembly, the convention. As Akhil Amar has observed, the nineteenth-century movements of the disenfranchised brought "a different lived experience" to the words of the First Amendment's assembly clause. They were political movements, to be sure, but they embodied and symbolized even larger societal and cultural challenges.[14]

At the end of the nineteenth century, the Supreme Court misconstrued the text of the First Amendment in suggesting that the right of assembly was limited to the purposes of petitioning for a redress of grievances. But while some commentators accepted this narrow interpretation, state courts interpreting parallel state constitutional provisions of assembly articulated far broader protections. This more expansive sense of assembly was also represented in three social movements during the Progressive Era: a revitalized women's movement, a surge in political activity among African Americans, and an increasingly agitated labor movement.

The Supreme Court made the federal right of assembly applicable to the states in its 1937 opinion *De Jonge v. Oregon.* The newly expanded right gained traction in subsequent cases. But these advances proved evanescent, and later cases involving the rights of "speech and assembly" routinely resolved the latter within the framework of the former. Although the right of assembly remained important in several decisions overturning convictions of African Americans who participated in peaceful civil rights demonstrations in the 1960s, courts resolved most cases involving group autonomy without considering assembly. The Supreme Court, in fact, has not addressed an assembly claim in thirty years.[15]

The Right of Association in the National Security Era

Around the time that assembly began falling out of political and legal discourse, the Supreme Court shifted its constitutional focus to a new concept: association. The development of the constitutional right of association—and with it, the disappearance of assembly—in many ways depended upon surrounding contexts. I divide these contexts into two eras. The first, which I call the national security era, began in the late 1940s and lasted until the early 1960s. It formed the background for the Court's initial recognition of the right of association in *NAACP v. Alabama.* The second, which I call the equality era, began in the 1960s and included an important reinterpretation of the right of association in *Roberts v. United States Jaycees.*[16]

Political, jurisprudential, and theoretical factors shaped the right of association in each of these eras. In the national security era, the primary

political factor was the historical coincidence of the Second Red Scare and the Civil Rights Movement. From the late 1940s to the early 1960s, the government's response to the communist threat pitted national security interests against group autonomy. Segregationists in the South capitalized on these tensions by analogizing the unrest stirred by the NAACP to the threats posed by communist organizations; segregationists even charged that communist influences had infiltrated the NAACP. The Supreme Court responded unevenly, suppressing communist groups in the name of order and stability but extending broad protections to civil rights groups.

The jurisprudential factor shaping the right of association involved disagreement on the Court over the constitutional source of that right. This disagreement was most evident when the Court applied the right to limit state (as opposed to federal) law. Justices Frankfurter and Harlan argued that association constrained state action because like other rights, it could be derived from the "liberty" of the Due Process Clause of the Fourteenth Amendment. Justices Black, Douglas, Brennan, and Warren insisted that association was located in some aspect of the First Amendment and argued that it be given the same "preferred position" as other First Amendment rights. On their view, association applied to the states because the Fourteenth Amendment had incorporated the provisions of the First Amendment. These differences encompassed not only the *source* of the constitutional limits on state action but also the *extent* of those limits. For Black, the rights in the First Amendment were "absolute" and could not be restricted by state action. Frankfurter argued instead for a "balancing" that weighed the interests of the government against the liberty of the Fourteenth Amendment. The result of these two perspectives was that the Court was more likely to uphold a state law restricting expressive freedom if it followed the liberty argument and more likely to strike down the law if it followed the incorporation argument.

The theoretical factor influencing the shaping of association was the pluralism popularized by David Truman and Robert Dahl in the 1950s and 1960s. Earlier pluralists had advanced "the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own

free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority." But mid-twentieth-century pluralism merged these insights with currents from Arthur Bentley's "science of politics" and Louis Hartz's "Lockean consensus." The resulting political theory emphasized the balance and consensus among groups rather than the juxtaposition of groups against the state. These assumptions laid the foundation for the freedom of association in two ways. First, they established a normative presumption that groups were valuable to democracy only to the extent that they reinforced and guaranteed democratic premises and, conversely, that groups antithetical to these premises were neither valuable to democracy nor worthy of its protections. Second, because this normative presumption excluded groups beyond the margins of consensus, pluralists saw the possibility of harmony and balance among those groups that remained.[17]

The Transformation of Association in the Equality Era

The second constitutional period of the right of association is the equality era, which began in the mid-1960s. The equality era introduced its own political, jurisprudential, and theoretical factors to the right of association. The primary political factor involved ongoing efforts to attain meaningful civil rights for African Americans. As the Civil Rights Movement gained traction, the focus of activists shifted from protecting their own associational freedom (as represented in cases like *NAACP v. Alabama*) to challenging segregationists' right to exclude African Americans from group membership. Questions over the limits of this right to exclude became increasingly complex when civil rights litigation moved from public accommodations to private groups.

The jurisprudential factor in the equality era involved the right to privacy. Although privacy and association had been linked in some of the Court's earliest cases on the freedom of association, new connections emerged when the Court first recognized a constitutional right to privacy in its 1965 decision *Griswold v. Connecticut*. Because privacy, like association, appeared nowhere in the text of the Constitution, the Court's earlier recognition of the right of association in *NAACP v. Alabama* became an important example of the kind of "penumbral" reasoning underlying