

# THE NEGLECTED RIGHT OF ASSEMBLY

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*This Article considers changes in both our understanding of the constitutional right of peaceable assembly and our regulatory practices with respect to public assemblies. It shows that through the late nineteenth century the state could only interfere with gatherings that actually disturbed the public peace, whereas today the state typically regulates all public assemblies, including those that are both peaceful and not inconvenient, before they occur, through permit requirements. Through this regulatory shift, and judicial approval of it, the substance of the right of peaceable assembly was narrowed. The history recounted in this Article is significant because it provides insight into the democratic and social practices the right was intended to protect—insight that cautions against collapsing the collective right of assembly into the individual right of free expression.*

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## INTRODUCTION

The 2008 election has proved a high-water mark for democratic politics. For the first time in the nation’s history, an African American has been elected president. Moreover, voters turned out in record numbers

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in both the general election and the party primaries, including young, African American and first-time voters.<sup>1</sup>

The right to vote is looking strong, but what of the right to assemble? The Democratic Party's National Convention in Boston in 2004 was a low point for the right of assembly. The City of Boston divided space near the convention center into two areas: one where gatherings and demonstrations would be permitted and one where they would not. In the former, "leafleting and small stationary demonstrations of 20 persons or less" were allowed "without a permit," but "[d]emonstrations of between 21 and 50 people require[d] a permit."<sup>2</sup> The city supplemented this scheme by creating "a designated demonstration zone," a confined area under railroad tracks, defined in some places by a chain link fence and barbed wire.<sup>3</sup> According to the district court reviewing the constitutionality of the plan, "[t]he overall impression created by the [designated demonstration zone]" was "that of an internment camp."<sup>4</sup> Discouragingly for the right of assembly, the federal courts upheld Boston's scheme on appeal.<sup>5</sup>

St. Paul and Denver did not cage demonstrators at the 2008 conventions to the same degree, and Barack Obama accepted the Democratic Party's nomination in an open-air setting before an assembly of nearly eighty thousand.<sup>6</sup> Nevertheless, the cities hosting the conventions relied on the same regulatory and legal framework that led to Boston's 2004 debacle, and the result was a similarly complex division of space and time that ensured protests were undertaken at a safe distance from party delegates. While images of chain link fences and militarized police especially offend civil libertarians, we

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1. See Robert D. Putnam, Op-Ed., *The Rebirth of American Civic Life*, BOSTON GLOBE, Mar. 2, 2008, at 9D ("Primaries and caucuses coast to coast in the last two months have evinced the sharpest increase in civic engagement among American youth in at least a half-century, portending a remarkable revitalization of American democracy."); see also Marc Fisher, *Change Is in the Air, At the Polls*, WASH. POST, Feb. 14, 2008, at B1 (noting that "Obama drew hundreds of thousands of first-time primary voters to the polls [in Virginia and Maryland]"); John Harwood, *For Democrats, a Pivotal Night, but in Which Direction?*, N.Y. TIMES, Mar. 4, 2008, at A18 ("One remarkable feature of Mr. Obama's Iowa and South Carolina victories was that voters younger than 30 turned out as heavily as those 65 and older."); Susan Page, *Enthusiasm Scale Tips in Favor of Democratic Party Voter Turnout, Morale Portend Troubles for GOP*, USA TODAY, Feb. 14, 2008, at 4A (noting that voter turnout in the presidential primaries for both political parties has broken records this year).

2. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 65 (D. Mass.), *aff'd sub nom. Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

3. *Coal. to Protest*, 327 F. Supp. 2d at 66–67.

4. *Id.* at 74.

5. *Bl(a)ck Tea Soc'y*, 378 F.3d at 10.

6. Adam Nagourney & Jeff Zeleny, *Obama Takes Aim at Bush and McCain With a Forceful Call to Change America*, N.Y. TIMES, Aug. 29, 2008, at A1 (noting that Obama was only "the third nominee of a major party in the nation's history to leave the site of his convention to give his acceptance speech" and that this was meant "to permit thousands of his supporters from across the country to hear him speak").

should all be concerned given the history that follows that neither city left room for meaningful assembly—in spite of their good-faith efforts to accommodate demonstrations.

This Article considers the history that has led to our acceptance of extensive legal regulation of public demonstrations. Permit requirements were unheard of through most of the nineteenth century. As late as 1881, Chicago, Denver, Detroit, St. Paul, and San Francisco had no permit requirements for assemblies in their streets.<sup>7</sup> In fact, it was not until July 7, 1914 that New York City adopted a permit requirement for parades and processions in its streets,<sup>8</sup> and as late as 1931 the city did not require permits for street meetings.<sup>9</sup>

Nineteenth-century cities were both congested and capable of regulating through permits. Yet, the law interfered only with public assemblies that became disorderly. Citizens were not required to ask permission prior to exercising their right of assembly, and the government was not considered entitled to regulate in anticipation of possible disorder. Moreover, the state supreme courts that reviewed the first municipal ordinances requiring a permit to lawfully gather on the streets found them void. These courts balked at the suggestion that general permit requirements were reasonable efforts to regulate street gatherings, emphasizing that the ordinances infringed upon important democratic and constitutional traditions of assembling.

Part I describes how cities regulate public assemblies today. The rest of the Article describes the history of regulating public assemblies in the United States. Part II serves as important background by showing that large, spontaneous gatherings on public streets were central to American politics for a century after the Revolution.

More specifically, in Part III I explain the legal regime governing public assembly from the early republic through the mid-nineteenth century. For at

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7. See CHI., ILL., THE MUNICIPAL CODE OF CHICAGO (1881); DENVER, COLO., THE CHARTER AND ORDINANCES OF THE CITY OF DENVER (1881); DETROIT, MICH., THE REVISED ORDINANCES OF THE CITY OF DETROIT (1884); ST. PAUL, MINN., THE MUNICIPAL CODE OF SAINT PAUL (1884); S.F., CAL., GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO (1884). See generally Tabatha Abu El-Haj, *Changing the People: Transformations in American Democracy (1880–1930)* (Sept. 2008) (unpublished Ph.D. dissertation, New York University) (available from ProQuest).

8. N.Y., N.Y., NEW CODE OF ORDINANCES OF THE CITY OF NEW YORK, ch. 24, *Traffic Regulations*, § 38 (1922). The new ordinance prohibited any “procession, parade, or race” that had not obtained a written permit from the police commissioner and required that the application for a permit “be made in writing . . . not less than 36 hours previous to the forming or marching of such procession, parade or race.” *Id.* The ordinance laid out rules to guide the police commissioner and provided exemptions for certain groups, including for “processions or parades which have marched annually upon the streets for more than 10 years, previous to July 7, 1914.” *Id.*

9. See N.Y., N.Y., THE CODE OF ORDINANCES OF NEW YORK (1931).

least a generation after the founding, legal regulation of access to streets for political purposes was limited to responding to actual breaches of order. Government interference with peaceful public gatherings was understood to violate the right of assembly.

Part IV examines the decisions of the first state supreme courts to review municipal ordinances requiring permission from local authorities to assemble in the streets. These courts soundly rejected the suggestion that official permits were a necessary and constitutional means to control the potential disorder of traditional street politics. In Part V, I explain how the U. S. Supreme Court's jurisprudence on the right of assembly was built upon the anomalous decisions of the Massachusetts Supreme Judicial Court—the only state supreme court in the nineteenth century to uphold such ordinances.

In sum, the nineteenth-century right to assemble on the streets without needing to ask permission was replaced in the twentieth century with a right to assemble on the streets, *so long* as one obtains a permit (if that is required), abides by the conditions of the permit issued, *and* is peaceable. Moreover, the definition of "peaceable" was narrowed: Even where no permits are required, an assembly may be dispersed for obstructing, or potentially obstructing, traffic (including pedestrian traffic). The new constitutional understanding did come with an important safeguard: One is entitled not to have permission to assemble on the streets denied arbitrarily, capriciously, or based on viewpoint.

That is, we replaced the notion that the state can only interfere with gatherings that actually disturb the peace or create a public nuisance with a legal regime in which the state regulates all public assemblies, including those that are anticipated to be both peaceful and not inconvenient, in advance through permits. The state's enhanced regulatory oversight, moreover, came with an enhanced ability to shape the practice of public assembly in ways that undermine its meaningfulness for participants and its effectiveness as a check against government.

Both the requirement that citizens must ask for permission prior to assembling for political purposes and the conditions that the government may place on such assemblies can be used to undermine the effectiveness of public assembly as a mechanism to influence and check representative institutions. The very requirement of a permit creates a delay between the event triggering the desire to assemble and the assembling. Moreover, conditions can and have been used to distance assemblies from their target audiences through space and time.

Less appreciated, however, is the way that the very need to ask permission as well as the conditions that can be placed on permits issued undermine the

meaningfulness of political assemblies for participants. Through the former, the people are rendered supplicant. While deprived of an actual (as opposed to virtual) audience, or forced to remain stationary, assemblies become a performatory ritual that bears little resemblance to the people outdoors as the agents and masters of American democracy. The lack of spontaneity and the forced ritualization of contemporary assemblies are symptoms of these tendencies of contemporary regulation.

Courts and academic commentators today fail to appreciate the significance both of the right of assembly itself and of the changes made to it.<sup>10</sup> Major treatises on constitutional and First Amendment law barely mention the right of assembly.<sup>11</sup> When they do, they do not question the Court's decision to consider it a mere facet of free expression.<sup>12</sup> Like the right to petition, with which it was originally paired, the right of assembly protected social and political practices central to democratic government not individual expression.<sup>13</sup> It protected the people and their aspirations for collective public deliberation and action on issues of public importance. It also protected a mechanism to influence and check government in particular circumstances. By emphasizing the political origins and functions of the right of assembly, this Article begins to rectify the errors and omissions in the current understanding of this important right.

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10. The U.S. Supreme Court has tended to consider the right of assembly as simply a facet of the right of free expression. See 5 RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.54(g), at 641 (4th ed. 2008) ("When the government limits the rights of persons to communicate in public, it is most common for courts to examine the governmental action in terms of the freedom of speech rather than the freedom of assembly."); 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 16:3 (3d ed. 1996) (noting that "very often disputes that might have been decided by reference to the rights of assembly, petition, or free association are decided as 'speech' cases" and that cases involving the right to march are usually decided within the "traditional public forums" framework of free speech jurisprudence). First Amendment scholars have thus far largely neglected the right of assembly. The only substantial works on the right of assembly are M. Glenn Abernathy's *The Right of Assembly and Association* and C. Edwin Baker's *Human Liberty and Freedom of Speech*, both published in the 1980s. See M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (1981); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

11. See, e.g., LOUIS FISHER & DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW (7th ed. 2007); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT (2d ed. 2003); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

12. See 5 ROTUNDA & NOWAK, *supra* note 10, §§ 20.53–55 (providing the most substantive discussion of the right of assembly, but making no reference to its political origins and functions). Only two treatises make brief reference to the distinctiveness of the right. See WILLIAM VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 30 (3d ed. 2002) (encouraging students to consider whether the right to peaceable assembly could fruitfully inform analyses of association cases); 2 SMOLLA, *supra* note 10, § 16:3 (devoting a single sentence to the idea that "the elemental right of people to peaceably assemble to demonstrate against the government is the very essence of 'people power' in a democracy").

13. See discussion *infra* pp. 569–72.

## I. CONTEMPORARY REGULATION OF STREET POLITICS

To demonstrate, parade, or make a speech in public in the United States today, a person or organization must generally go (often well in advance) to the local police department, or to some other municipal department, to fill out required paperwork and to obtain a permit from government officials. A survey of twenty American cities reveals that all of them have extensive permit requirements for gatherings on public streets and most have similar requirements for public parks.<sup>14</sup>

Permit applications typically involve questions regarding the exact location and timing of the planned event. They may also include questions regarding associational ties and turnout estimates. Fort Wayne's permit application, for example, requires an applicant to provide his or her name and address, information about the timing and location of the proposed event, and estimates of the number of participants and spectators.<sup>15</sup> It does not ask for turnout estimates or for the purpose or message of the event. By contrast, in New York City, the police department requires an organization to disclose, among other things, whether the "organization [has] filed with the Secretary of State a sworn copy of its constitution and other documents required by Sec. 53, Civil Rights Law" and the date of filing,<sup>16</sup> while the Department of Parks requires one to "[d]escribe in detail activities planned" and to "[l]ist all items to be

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14. The cities in the sample were: Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Detroit, Michigan; Fort Wayne, Indiana; Greensboro, North Carolina; Houston, Texas; Los Angeles, California; Nashville, Tennessee; New York City, New York; Philadelphia, Pennsylvania; Phoenix, Arizona; Portland, Oregon; Rochester, New York; St. Louis, Missouri; San Antonio, Texas; San Diego, California; San Jose, California; Santa Ana, California; and Wichita, Kansas. San Jose has no permit requirement for assemblies in its parks. A permit is only required if sound amplification devices will be used or equipment will be brought into the park. Los Angeles requires permits for assemblies in some but not all of its parks. The data and analysis are on file with the author. The sample included the ten largest American cities in 2005 as well as ten cities selected at random with populations analogous to the ten largest American cities in 1880. My results are consistent with those who have previously tried to determine how extensive permit requirements are in American cities. In 1989, for example, C. Edwin Baker asserted that many cities have ordinances "which, except for a few narrow exemptions, require[] parade permits for virtually any procession or assembly on outdoor public space." BAKER, *supra* note 10, at 142. Baker noted laws in Atlanta, Georgia; Columbus, Ohio; Denver, Colorado; Omaha, Nebraska; and San Antonio, Texas, but presumably was relying more broadly on the eighteen cities that responded to his survey. See *id.* at 322 n.25, 324 n.37. In 1981, Glenn Abernathy used ordinances from Ann Arbor, Michigan; Buffalo, New York; Kenosha, Wisconsin; Los Angeles, California; Neodesha, Kansas; Reading, Pennsylvania; and San Francisco, California to illustrate the variation in contemporary permit requirements. ABERNATHY, *supra* note 10, at 141-43.

15. CITY OF FORT WAYNE, IND., APPLICATION FOR PUBLIC ASSEMBLY, PARADE, NEIGHBORHOOD ASSOCIATION PARADE OR BLOCK PARTY PERMIT, available at <http://www.cityoffortwayne.org/images/stories/Public%20Assembly%20Permit.pdf> (last visited Feb. 8, 2009).

16. NYPD, APPLICATION FOR PARADE PERMIT, available at [http://www.nyc.gov/html/nypd/downloads/pdf/permits/online\\_application\\_for\\_parade\\_permit.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/permits/online_application_for_parade_permit.pdf) (last visited Feb. 8, 2009).

distributed[,]” including “promotional material[s], celebrities, [and] speeches.”<sup>17</sup> Many cities charge fees for using their streets and parks, and sometimes event organizers are required to obtain insurance or otherwise indemnify the city.<sup>18</sup>

All of these requirements undercut the possibility of large, spontaneous gatherings in the streets. In Chicago, a person wishing to organize a parade or public assembly must go to the department of transportation and fill out an application at least fifteen business days prior to the planned event.<sup>19</sup> The application requires disclosure of the applicant’s name, contact information, and

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17. N.Y. CITY DEPT OF PARKS & RECREATION, SPECIAL EVENT PERMIT APPLICATION, *available at* [http://nycgovparks.org/sub\\_permits\\_and\\_applications/images\\_and\\_pdfs/event\\_application\\_form.pdf](http://nycgovparks.org/sub_permits_and_applications/images_and_pdfs/event_application_form.pdf) (last visited Dec. 20, 2008).

18. Fee provisions, and by implication indemnity agreements or liability insurance requirements, are not per se unconstitutional. Fee requirements that merely recoup administrative expenses are constitutional. *See Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (holding that the U.S. Constitution does not prohibit a fee intended to meet the expenses incident to maintaining public order or administering the licensing process); *Sullivan v. City of Augusta*, 511 F.3d 16, 41–42 (1st Cir. 2007), *cert. denied*, 129 S. Ct. 112 (2008) (upholding the imposition of \$2000 in fees and costs as applied to an individual who could not afford them, because an “indigency exception” is not required where ample alternative forums for speech exist); *Nationalist Movement v. City of York*, 481 F.3d 178, 183–84 (3d Cir. 2007) (holding a flat fee constitutional because it was nominal, content neutral, narrowly tailored to recoup administrative costs, provided a waiver for the indigent, and did not permit discretion in setting the application fee); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1140–41 (9th Cir. 2004) (upholding a fee provision that allowed public officials to charge a fee reasonably calculated to reimburse the county for the necessary costs of processing permit applications); *see also CAMP Legal Def. Fund, Inc. v City of Atlanta*, 451 F.3d 1257, 1282 (11th Cir. 2006) (upholding an insurance requirement where its application was limited to events expecting over ten thousand people and where the amount of insurance required did not depend on content but on the size of the event); *Thomas v. Chi. Park Dist.*, 227 F.3d 921, 925 (7th Cir. 2000) (upholding an insurance requirement where rules required officials to calculate the insurance amount based on the size of the event and the nature of the facilities involved), *aff’d on other grounds*, 534 U.S. 316 (2002).

On the other hand, fees for obtaining a permit cannot be correlated to the message of the assembly or be left to the whim of the administrator. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133–34 (1992) (holding a fee provision unconstitutional because “[t]he decision how much to charge . . . is left to the whim of the administrator” and because the fee would “depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content”); *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 680–82 (7th Cir. 2003) (holding that because the provision required police to consider a parade’s message and the response of spectators to that message, it constituted an impermissible content-based restriction); *Transp. Alternatives, Inc. v. City of N.Y.*, 340 F.3d 72, 78 (2d Cir. 2003) (holding unconstitutional a provision under which an official had complete discretion over whether to impose a fee of up to \$25,000 for a noncommercial event); *see also Nationalist Movement*, 481 F.3d at 184–87 (holding unconstitutional a provision requiring applicants to “promise and covenant to bear all costs of policing, cleaning up and restoring the park” and “reimburse the City for any such costs incurred by the City,” because at the city’s whim a speaker could be required to pay for content-related costs); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256–57 (11th Cir. 2004) (holding an indemnification requirement unconstitutional where there were no guidelines as to how it was to be administered).

19. Chi., Ill., Office of Emergency Mgmt. & Comm’n, Application for Permit-Parade Using the Public Way, *available at* [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/parappl.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/parappl.pdf) (last visited Dec. 20, 2008).

the identification of the sponsoring organization as well as the “[p]opular name of [the] event.”<sup>20</sup> One must provide exact details of the location and timeframe of the proposed gathering, as well as a turnout estimate and the basis for that estimate.<sup>21</sup> Finally, the applicant must assume liability for any damage the event causes.<sup>22</sup> Proof of general liability insurance is also required in some instances.<sup>23</sup> All of this requires time.

A handful of cities include limited exceptions to their permit requirements. Greensboro, for instance, includes an exception for gatherings of a purely expressive sort, exempting

[d]emonstrations that do not involve the use of vehicles, animals, fireworks, pyrotechnics or equipment (other than sound equipment), provided that: a. No fee or donation is charged or required as a condition of participation in or attendance at such demonstration; and b. *The special events coordinator is notified at least forty-eight (48) hours in advance of the commencement of the demonstration . . .*<sup>24</sup>

Fort Wayne’s code provides that permits are not required for “[s]pontaneous events occasioned by news or affairs coming into public knowledge within three days of such public assembly,” again so long as written notice is given to the city twenty-four hours in advance.<sup>25</sup> Nashville allows a limited exception from its parade permit requirements for “[p]icketing, marches or processions of any kind which will be conducted entirely upon the sidewalk,” although again if the gathering includes more than twenty people, the chief of police must be notified four days in advance.<sup>26</sup>

These ordinances only partially describe the regulatory world in which we live. Cities also often attach conditions to permits they issue. Typically, this takes the form of rerouting parades, but local officials may shape protests in

20. *Id.*

21. *Id.* at 1–2.

22. *Id.* at 3.

23. *Id.* Like Chicago, Philadelphia has both an insurance and indemnification requirement. CITY OF PHILA. OFFICE OF THE MANAGING DIR., REGULATION GOVERNING PERMITS FOR DEMONSTRATIONS ON CITY PROPERTY §§ 15–16, at 9 (2003), available at [http://www.phila.gov/mdo/pdfs/Permit\\_Policy\\_for\\_De.pdf](http://www.phila.gov/mdo/pdfs/Permit_Policy_for_De.pdf). The former can be waived for financial hardship. *Id.* § 19, at 10.

24. GREENSBORO, N.C., GREENSBORO CITY CODE § 26-249(c)(4) (2005) (emphasis added). A “demonstration” is defined as “any formation, procession or assembly of persons which, for the purpose of expressive activity, is: (1) To assemble or travel in unison on any street in a manner that does not comply with normal or usual traffic regulations or controls; or (2) To gather at a public park or other public area.” *Id.* § 26-247.

25. FORT WAYNE, IND., CODE OF ORDINANCES § 101.03 (1996).

26. NASHVILLE, TENN., CODE OF THE METRO. GOV’T OF NASHVILLE AND DAVIDSON COUNTY, TENN. § 12.56.020–040 (1989). A “parade” is defined as “any march or procession of any kind, in or upon any street, sidewalk, alley or other public place, held for the purpose of expressing First Amendment freedoms.” *Id.* § 12.56.020.



more significant ways. For example, when New York City was asked to permit a demonstration against President George W. Bush's anticipated invasion of Iraq in 2003, it displaced the proposed antiwar protestors to a location at a distance from the United Nations and required the protest to be stationary.<sup>27</sup> To justify these measures, the city invoked security concerns.<sup>28</sup> It claimed that security risks were heightened because the "proposed march [did] not have the discipline of an organized line or march where there is an established, carefully planned and paced sequence throughout the parade route."<sup>29</sup>

Cities can also issue temporary regulations.<sup>30</sup> These regulations usually restrict or prohibit public gatherings in areas near important public events such as political conventions and international conferences.<sup>31</sup> During a recent meeting of NATO leaders, Colorado Springs created a large security perimeter within which it banned public protest.<sup>32</sup> Similarly, St. Paul's rules for the 2008 Republican National Convention created a security zone within which parades and demonstrations were forbidden, while providing a free speech zone about eighty feet from the convention center.<sup>33</sup> Denver placed its demonstration zone approximately two football fields away from the main entrance to the Pepsi Center where the Democratic National Convention was being held.<sup>34</sup> The area was defined by concrete barriers topped with chain link fences on three

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27. *United for Peace & Justice v. City of N.Y.*, 243 F. Supp. 2d 19 (S.D.N.Y.), *aff'd per curiam*, 323 F.3d 175 (2d Cir. 2003).

28. *Id.* at 23.

29. *Id.* at 27 (emphasis added).

30. See, e.g., David Olinger, *Convention-Week Activities to Require Special Permits*, DENVER POST, Mar. 2, 2008, at B2 ("The city of Denver declared Friday that the 2008 Democratic National Convention is an 'extraordinary event' that requires the adoption of special procedures for permits during convention week.").

31. See James J. Knically & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 457, 462-67, 472-75 (2005) (describing how cities use concerns about "security" to insist that major political protests be cordoned off as well as their tactics of control). Knically and Whitehead suggest that these tactics are gaining ground partly because of Presidential Decision Directive 62, initially promulgated by President Clinton, which provides a role for the Secret Service where an event is designated a "National Security Special Event." See *id.* at 470-72. Their claim is that the Secret Service is disseminating such tactics to local police departments for use in nondesignated events as well. See *id.*

32. *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1217 (10th Cir. 2007) (describing the city's security zone, a perimeter establishing a radius around the hotel hosting the NATO conference, as "completely closed to all persons except conference attendees, accredited media, [hotel] employees, individuals residing in the security zone, guests of individuals residing in the security zone, and personnel servicing the [hotel] and the residences within the security zone").

33. See Editorial, *Convention Protesters Have Right to Be Heard*, CHI. SUN-TIMES, Aug. 11, 2008, at 31.

34. See *ACLU of Colo. v. City & County of Denver*, 569 F. Supp. 2d 1142, 1151-60 (D. Colo. 2008) (describing full details of Denver's plan for the Democratic National Convention's demonstration zone).

sides; the side facing the convention center was open to view.<sup>35</sup> Protestors were kept at least 200 feet from delegates walking to the convention site.<sup>36</sup>

These strategies for securing order often result in situations where protesters are barely within sight or earshot of the challenged officials.<sup>37</sup> They also mean that political protests must be planned and negotiated far in advance. Forms to demonstrate during the Republican National Convention in St. Paul (scheduled for September 1–4, 2008) had to be submitted by March 3, 2008 and were required for any gathering of more than twenty-five.<sup>38</sup> The Democratic National Convention was held in late August, but Denver allotted permits for gatherings in its parks the week of March 18, 2008.<sup>39</sup> Temporary regulations of this sort have nonetheless frequently been upheld under current constitutional doctrine.<sup>40</sup>

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35. See *id.* at 1153–57. Protests were also allowed in Denver's parks, so long as necessary permits had been obtained. *Id.* at 1184; see also P. Solomon Banda, *ACLU Ends Challenge to Convention Rules*, PRESS-REGISTER (Mobile, Ala.), Aug. 8, 2008, at A2.

36. *ACLU of Colo.*, 569 F. Supp. 2d at 1156.

37. See *Citizens for Peace in Space*, 477 F.3d at 1218–19 (noting that the location afforded to plaintiffs provided “no direct line of sight” to the conference center and “could barely be seen, if at all, from” where attendees were staying); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004) (noting that the city’s division of the area near the Convention into two separate security zones “left little opportunity for groups wishing to demonstrate to do so within sight and sound of the delegates” to the 2004 Democratic National Convention “and severely curtailed any chance for one-on-one conversation”). In Denver, the American Civil Liberties Union (ACLU) was unable to convince the district court that the places allocated for protests and processions were not within “sight and sound” of the delegates. See *ACLU of Colo.*, 569 F. Supp. 2d at 1180–82. However, it was able to secure the installation of a public address system to ensure that delegates could at least hear protestors. See Banda, *supra* note 35, at A2.

38. See Chris Havens, *Protesting at the RNC? Forms Due March 3: St. Paul Outlines Its Process for Getting Permits for Demonstrations or Large-Group Park Space During the Republican National Convention*, MINNEAPOLIS STAR TRIB., Feb. 23, 2008, at 3B.

39. See Chuck Plunkett & David Olinger, *City Bungles Convention Park Permits*, DENVER POST, Mar. 19, 2008, at A1; see also April M. Washington, *Suit Threat Heats Up; Abortion Foes Seek Permits to Protest; City Still Deciding*, ROCKY MOUNTAIN NEWS (Denver), Nov. 2, 2007, at 5 (noting that Denver began accepting special-event permit applications for the 2008 Democratic National Convention on November 1, 2007). Denver also had two separate permit processes for parades during the convention. See *ACLU of Colo. v. City and County of Denver*, 569 F. Supp. 2d 1142, 1156–59 (D. Colo. 2008).

40. See, e.g., *Citizens for Peace in Space*, 477 F.3d at 1220–25 (upholding Colorado Springs’ security zone as a valid time, place, and manner regulation because the city did not need to use the least intrusive means of achieving its interests); *Bl(a)ck Tea Soc’y*, 378 F.3d at 13–14 (upholding the city’s “designated demonstration zone,” which the lower court characterized as resembling an internment camp); *ACLU of Colo.*, 569 F. Supp. 2d at 1149 (finding that Denver’s restrictions on protests and processions at the 2008 Democratic National Convention did not infringe the plaintiffs’ rights under the First Amendment); see also *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) (upholding as a riot control measure a no-speech zone in Seattle during the 1999 WTO meeting). The ACLU decided not to appeal the district court’s decision to uphold Denver’s fenced-in demonstration zone and end parades a quarter-mile from the convention site. See Banda, *supra* note 35, at A2.

In the lingo of constitutional lawyers, permit requirements and special regulations for public assemblies are mere regulations of the time, place, and manner of speech meant to ensure that city life can continue in an orderly fashion despite political demonstrations, meetings, and parades.<sup>41</sup> Neither are per se infringements of the right of free expression.<sup>42</sup> Under current doctrine, the state cannot prohibit free speech rights in public forums such as parks and streets (unless it can meet a strict scrutiny test),<sup>43</sup> but it can regulate the time, place, and manner of such speech using statutes that give limited discretion to officials,<sup>44</sup> as long as the justification for such regulation is not content based, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication.<sup>45</sup> Maintaining order, preventing traffic jams, and ensuring security are all considered significant governmental interests.

Legal scholars have generally agreed that these regulatory approaches are constitutionally unproblematic even when applied to political activity.<sup>46</sup>

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41. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (upholding the Chicago Park District's permit requirement as a valid time, place, and manner regulation and rejecting the suggestion that as a prior constraint it was subject to the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965)); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding New Hampshire's permit requirement as a valid regulation of the time, place, and manner of public assembly).

42. These cases are all decided as cases involving speech on public property. The right of peaceable assembly is not considered separately.

43. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (explaining the presumption of access to public forums); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (explaining that streets and parks are "quintessential public forums"); see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1749–52 (1986) (summarizing the Court's doctrinal structure established in *Perry*, which distinguishes between public, nonpublic, and limited public forums).

44. See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. at 323 (explaining that the licensing official must not "enjoy[] unduly broad discretion in determining whether to grant or deny a permit"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (striking down an ordinance where the decision to grant or to withhold a permit was "guided only by [the Commission's] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'" and the guarantee of free speech and assembly was "contingent upon the uncontrolled will of an official").

45. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication . . .'" (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

46. Despite the explosion of literature on the First Amendment, legal academics have by and large ignored such requirements. In the last decade, there have been a few articles arguing that courts should heighten the level of scrutiny they apply when considering the types of permits issued by municipalities in the name of security. See, e.g., Knicely & Whitehead, *supra* note 31, at 481–90, 483 (arguing that "the standard time, place, and manner test" applied by lower courts is "legally inappropriate and inadequate to the magnitude of the interference with free speech interests" in recent cases involving radical restructuring of space); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX.

To ensure that city life continues as normal, the U.S. Constitution, it is said, allows cities to require one to obtain a permit prior to assembling and to delineate the conditions of access (time, route, and noise level).

Finally, cities have toed this line in creating policy. Very few cities afford citizens more access to the streets than conferred by the right of assembly, as currently interpreted. The rest of the Article reconstructs the history that has led to our acceptance of such extensive legal regulation of public demonstrations.

## II. STREET POLITICS: THE FIRST HUNDRED YEARS

Large gatherings on public streets were central to the democratic politics that emerged after the founding. To fully understand the regulatory story that follows, a clear picture of the role of such gatherings in politics from the founding through the nineteenth century is necessary.

For the first century of our nation's history, elections—themselves often public celebrations—were part of a different array of political practices, which included public meetings, petitions, local and national festive holidays, even juries and mobs. These practices provided opportunities for citizens (ordinary and elite, enfranchised and disenfranchised) to participate in politics. Many of these opportunities took place in public places, including public streets and squares. Moreover, gatherings were often spontaneous or organized quickly.

Elections, which were frequent events in the early years of the nation, were public holidays.<sup>47</sup> They were typically multiday affairs<sup>48</sup> filled with processions, public meals, drink, and merriment, in which large numbers of

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L. REV. 581, 583, 587–89 (2006) (“not disput[ing] that the state must sometimes control the place of expression” because “[s]pace . . . is a limited resource” but arguing that situations where the state has created places for expression should be subject to more exacting scrutiny). Otherwise, there is no debate in the literature. The last strong argument questioning the constitutionality of a permit requirement was posed nearly twenty years ago. See BAKER, *supra* note 10, at 142–44 (proposing as an alternative a voluntary permit system in which government managerial services would be conditioned on applying for a permit).

47. See JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 47 (1991) (noting that “[v]oters were at the polls several times in each twelve-month period, year in and year out” in the 1840s and after); DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776–1820*, at 184–85 (1997) (explaining that elections were both annual and seasonal events at the turn of the nineteenth century, while reminding us that not all elections were popular elections). Increased frequency and regularity of elections in the new states was a central voting reform instituted with independence. See ROBERT J. DINKIN, *VOTING IN REVOLUTIONARY AMERICA: A STUDY OF ELECTIONS IN THE ORIGINAL THIRTEEN STATES, 1776–1789*, at 4, 90 (1982).

48. See DINKIN, *supra* note 47, at 98; see also John C. Schneider, *Mob Violence and Public Order in the American City, 1830–1896*, at 62 (Aug. 1971) (unpublished Ph.D. dissertation, Univ. of Minn.) (on file with author) (describing an 1834 three-day election in New York City).

enfranchised and disenfranchised Americans participated.<sup>49</sup> When the first Democratic-Republican Governor of Pennsylvania (Thomas McKean) was elected in 1799, there were “huge celebrations . . . all over the state. In Lancaster, 412 people sat at a table with half a ton of meat, much of which was later distributed to hungry spectators.”<sup>50</sup> Sixteen toasts were raised connecting the local election with national politics, and the evening ended with a procession.<sup>51</sup> These descriptions of elections in the early republic are typical and illustrate the centrality of large gatherings of people in public spaces as part of the election festivities—to eat, drink, and parade and by implication to affirm their role as participants in the new nation.<sup>52</sup>

It was not just during elections that the people gathered in streets and other public places. During the 1790s, national holidays such as presidential inaugurations, Washington’s Birthday, and the Fourth of July emerged as opportunities for partisan contest.<sup>53</sup> Processions, speeches, bonfires, public meals, and the drinking of revolutionary toasts were central rituals of this festive politics:

The festivities typically began with a parade or procession in which townsmen would march by trades, militia companies, and other groupings to a church, meeting hall, or public square. There a lengthy program would be held, featuring political and patriotic music (usually including at least one song written for the day), a reading of the Declaration of

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49. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 193–94 (1988) (illustrating this point using the role of women in the festivities on election days); see also WILLIAM D. PIERSEN, *BLACK YANKEES: THE DEVELOPMENT OF AN AFRO-AMERICAN SUBCULTURE IN EIGHTEENTH CENTURY NEW ENGLAND* 117–28 (1988) (discussing the participation of northern black slaves in Negro Election Day, an event sponsored in part by elite white slave holders to coincide with Election Day).

50. WALDSTREICHER, *supra* note 47, at 184.

51. See *id.*

52. See MARY P. RYAN, *CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY* 94–95 (1997) (describing street crowds in the 1830s and 1840s and their relation to election competition); SILBEY, *supra* note 47, at 143 (“Elections were special events [in the 1840s]. Amid the continuous electioneering and political arguments, picnics, drinking, and boisterous celebration went on throughout each polling day.”). For a particularly colorful account of an election dispute in the 1790s in which street politics played a central role, see ALAN TAYLOR, *WILLIAM COOPER’S TOWN: POWER AND PERSUASION ON THE FRONTIER OF THE EARLY AMERICAN REPUBLIC* 166–96 (1995).

53. See SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* 46, 65–66 (1997) (showing that during the 1790s the celebration of Washington’s Birthday and, later, the Fourth of July, were established as public holidays, and how they quickly became sites of partisan contest and opportunities to criticize the governing Federalists); see also WALDSTREICHER, *supra* note 47, at 53–107 (describing street politics during the ratification debates and the relationship of street politics and the press in an evolving nationalism in the 1780s). The political meaning of these public holidays was facilitated by the press’ publication and republication of descriptions of them. See *id.* at 18.

Independence, a prayer or sermon, and an oration by some local political activist. . . . Finally the assembled group would retire to a hotel, tavern, or outdoor space, depending on the prosperity and location of the organizers, for a community banquet.<sup>54</sup>

These rituals were infused with political meaning by the different factions as groups fought to control the meaning of the Revolution.

Festive politics often intertwined organized and spontaneous gatherings on public streets and squares, as is evident in the following lengthy description of Boston's celebration of a French Revolutionary battle in 1793:

At dawn on the cold and wintry morning of Thursday, the twenty-fourth of January, 1793, the people of Boston were awakened by the thunderous roar of an artillery salute fired by a local militia company to signal the beginning of a day of public festivity and rejoicing. On this joyful day there were no classes for *the city's school children*, and under the direction of their teachers they *assembled in their hundreds and paraded through the streets*, after which they were rewarded with cakes on which were impressed the words "Liberty" and "Equality."

*Later that morning a much larger group of adults formed their own procession* behind decorated carriages bearing eight hundred loaves of bread, two hogsheads of punch, and an enormous roasted ox decorated with red, white, and blue ribbons and a gilded sign that read "PEACE OFFERING TO LIBERTY AND EQUALITY." Behind these carriages marched two men holding aloft the French and American flags, *the members of the committee elected by townspeople to organize the day's festivities*, craftsmen and artisans bearing the flags and colors of their trades, a musical band, a dozen white-robed butchers, and several hundred men in well ordered ranks.

*As the procession wound through the streets of Boston, many residents stood and watched it pass and then took up the rear.* They halted three times, to salute with three cheers the home of the French Consul, to pay homage to the stump of the liberty tree, and to conduct a brief ceremony renaming Oliver's Dock as Liberty Square. *The procession ended in the open area around the State House, where the butchers set about carving up the ox, and participants and spectators joined in a great public feast.* While they enjoyed this repast the townspeople were entertained by the band that had provided music for the procession: the musicians

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54. Jeffrey L. Pasley, *The Cheese and the Words: Popular Political Culture and Participatory Democracy in the Early American Republic*, in BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 31, 40 (Jeffrey L. Pasley et al. eds., 2004); accord WALDSTREICHER, *supra* note 47, at 68 (noting that nationalist holidays in large towns in the 1780s were celebrated in "overlapping sets of rituals: the muster of the militia, the procession, an oration; the semipublic tavern gatherings and banquets; and popular revelry, especially at night").

had taken up position in the balcony of the State House, and they now regaled their audience with various tunes, the most popular of which was the French Revolutionary anthem, the “Ça Ira.” At the same time two large balloons were raised from Market Square, one trailing the American flag, the other the motto “Liberty and Equality.”

While this popular feast was taking place *yet another procession began*, starting out from the State House and ending at Faneuil Hall. Led by Lieutenant Governor Adams and French Consul Letombe, this was a gathering of the city’s mercantile and professional elite. When they arrived at Faneuil Hall these men found several allegorical statues of Liberty, Fame, Justice, and Peace, an emblem of the Rights of Man, and a banner proclaiming “LIBERTY & EQUALITY.” Meanwhile, in taverns and halls around the city, militia companies and gatherings of artisans and mechanics held their own celebratory feasts, lauding the day with enthusiastic toasts.<sup>55</sup>

*The final procession of the day was a rather more spontaneous affair.* Following the great civic feast a group of seafarers took possession of the horns of the roasted ox and marched with them to the liberty pole that stood in the newly named Liberty Square. Once there these impoverished men announced their intention of paying to have the horns gilded and mounted atop the liberty pole, in honor of the Boston celebration and the event it commemorated. As darkness fell, hundreds of lamps and candles illuminated both the State House and the home of the French Consul, and on Copps Hill fireworks and a large bonfire lit up the evening sky.<sup>56</sup>

Notice the interplay of organization and spontaneity in this celebration of the possibility that France would become the second democratic nation. Notice also that events of the day prompted new courses of action, which could be immediately manifest. The spontaneous culminating procession of seafarers to the newly renamed Liberty Square is prompted by the meal’s end, the toasts that were made, and the presence of a carcass. Earlier in the day, spectators also

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55. During the 1790s, in particular, public toasts were used to communicate partisan affiliations and positions. “No mere drinking game, political banquet toasts served, and were intended to serve, as informal platforms for the community, party, or faction that held the gathering. Pointed and quite specific political sentiments were expressed, and even the patriotic boilerplate was calibrated to reflect the values of the toasting group.” Pasley, *supra* note 54, at 40. “[S]lates of toasts [were] printed in early national newspapers [and] constituted powerfully partisan manifestoes of political sentiment.” NEWMAN, *supra* note 53, at 93. They “were written well in advance so that the sentiments they expressed could be carefully controlled: custom ordained that nobody would drink to a toast if he disagreed with the sentiment it expressed, so it was vital that the toasts offered were acceptable to all present.” *Id.* at 94; accord WALDSTREICHER, *supra* note 47, at 219–21 (describing the process of revising and adopting public toasts).

56. NEWMAN, *supra* note 53, at 1–2 (emphasis added). For further description see *id.* at 122–25.

spontaneously decided to join the morning procession, following at the rear. Finally, notice that the very choice to celebrate en masse a French victory infused the day's events with political meaning given the prevailing political context in the United States.

Boston's 1793 celebration of the Battle of Valmy was not unique.<sup>57</sup> In fact, "between the ratification of the Federal Constitution and the inauguration of Thomas Jefferson, the streets and public places of the American republic were filled with an extraordinarily diverse array of such feasts, festivals, and parades."<sup>58</sup> The examples are abundant. In Centreville, Maryland, in the midst of the crisis over the Alien and Sedition acts, Republicans gathered "for an open-air celebration, militia . . . maneuvers, and open-air feast" in which they toasted Jefferson and the declaration of independence, thereby taking a jab at the Federalist administration.<sup>59</sup> In Hackensack, New Jersey, people gathered for an open-air feast affirming their sympathies to the French Revolution and by implication their opposition to the Federalist government.<sup>60</sup>

Festive politics, with large gatherings in public, persisted well into the nineteenth century.<sup>61</sup> Susan G. Davis, for example, describes Philadelphia's celebration of the French revolution of July 1830 in terms very similar to the description of Boston's 1793 Valmy celebration.<sup>62</sup> Davis' descriptions of the temperance movement's Fourth of July activities in the late 1830s and early 1840s similarly illustrate the continuing importance of city streets and squares as places for political and social gatherings. Temperance leaders "muster[ed] hundreds, and later thousands, of members into the streets. Organized by

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57. See *id.* at 130 (explaining that despite its grand scale, the celebration "was typical of many hundreds of French Revolutionary civic festivals held in the United States during Washington's presidency").

58. *Id.* at 2.

59. *Id.* at 109.

60. See *id.* at 95–96. Streets and public squares were more likely to be utilized for public meals by those without resources to hire a hall. So "while Boston's elite celebrated Washington's birthday in 1793 with a civic feast at Concert Hall, a mixed race group of mariners, laborers, and artisans held their own celebration in the streets." *Id.* at 65. Streets were also more often used, during this period, by the opposition. Between 1793 and 1801, while "[o]ver three-quarters of the Federalist civic feasts [for the Fourth of July] took place at expensive hotels and inns[,] . . . over half of the oppositional Independence Day feasts were staged in the open air." *Id.* at 89, 220 n.18. These figures are based on a survey of thirty-eight Fourth of July feasts reported in three local Philadelphia newspapers between 1793 and 1801. *Id.* at 220 n.18. Eighteen of the thirty-eight were held outdoors. *Id.*

61. See RYAN, *supra* note 52, at 58–131 (describing the role of public performance and public meetings in defining the public sphere prior to the Civil War). By the 1830s, patriotic holidays were no longer funded by the political parties. They were instead publicly financed. *Id.* at 69.

62. SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 49–51 (1986).



wards and sometimes by blocks, the marchers made parades so vast that they seemed to take over the city.”<sup>63</sup>

By the mid-nineteenth century, workers, poor people, racial minorities, and social movements all used city streets to further their political goals.<sup>64</sup> Street politics was not limited to official holidays. African American communities in New York and Philadelphia, for instance, established in 1808 an annual holiday to mark the anniversary of the abolition of the slave trade in the United States.<sup>65</sup> During these celebrations, “free blacks marched through the central streets to their place of meeting, and sometimes back, ‘with their badges and banners, accompanied with a band of music.’”<sup>66</sup>

Finally, and most significantly, it was not uncommon for a political event to trigger parades and the rituals of popular politics. The ratification of the Constitution in 1788 prompted a procession in Philadelphia organized by Federalist leaders and local manufacturers.<sup>67</sup> In 1813, it was a military victory on the Great Lakes that “gave cause for citywide illuminations and elaborate militia parades.”<sup>68</sup> And, in 1835, advocates of the ten-hour workday quickly organized a general strike in Philadelphia that included parades, demonstrations, and mass meetings.<sup>69</sup> Because there were no procedures for getting an official license to march, “[a] decision to strike, a meeting’s outcome, or a festive

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63. *Id.* at 148. See also *id.* at 147–50, for fuller description of temperance ceremonies.

64. *Id.* at 33 (“The streets enabled workers, poor people, and racial minorities to broadcast messages to large numbers of people, which partly explains the vibrant popularity of parades of all kinds and the variety of autonomously produced mobile performances. The street was shared more equally than any other space.”).

65. WALDSTREICHER, *supra* note 47, at 329.

66. *Id.* at 330. Waldstreicher importantly emphasizes that access to streets, informally, if not legally, was more limited for African Americans. He notes, for example, that “[t]he first recorded black nationalist celebration [which] took place in New York City on July 5, 1800” was postponed by a day “reportedly because the Tammany Society, merchants, and mechanics objected to a black parade on the Fourth.” *Id.* at 328–29.

67. See DAVIS, *supra* note 62, at 66; see also *id.* at 117–25 (describing and analyzing the procession). In 1780, Benedict Arnold’s treason prompted Philadelphians to put together a mocking procession in his honor. *Id.* at 75 (describing the event). Taking to the streets was part of a tradition of popular politics and ritualized drama, one that played a central role in the American Revolution.

68. *Id.* at 66.

69. *Id.* at 135–37 (describing the development of the general strike and the various parades with fife and drum that took place to foster support for the strike). The actions taken by labor in Philadelphia were not unique. “In Albany in 1826, a journeymen carpenters’ society” organized a strike in which “[o]ne hundred and twenty-five to one hundred fifty men assembled opposite newly erected buildings . . . which they doubtless had worked on, ‘thence they traversed the whole city, calling at several workshops, each carrying a piece of a pine sash staff as an emblem of their profession and marching two and two in a peaceable and orderly manner.’ In the afternoon the journeymen reassembled, renewed their resolution, and forwarded a proposal for a shilling-a-day increase.” *Id.* at 133 (quoting ALBANY ARGUS, reprinted in DEMOCRATIC PRESS (Philadelphia), May 16, 1826).

gathering could move quickly from an assembly into a marching line that conveyed a message to coworkers, neighbors, and the city at large.”<sup>70</sup>

Elections and festive politics were not the only political practices that regularly prompted people to assemble in public streets and squares. Two other mechanisms of democratic politics—petitions and public meetings—depended on gatherings of the public.

Petitions required the gathering of signatures.<sup>71</sup> Accordingly, the right of petition and the right of assembly were connected in the minds of the founding generation. The text of the First Amendment pairs them.<sup>72</sup> Constitutional law treatises of that time, and since that time, pair them.<sup>73</sup> The connection is even evident in the social historical record: At “[a] 1786 gathering of citizens in Petersburg [Virginia, the participants] noted that ‘it is the indisputable right of Freemen to assemble at any time in a peaceable and orderly manner to discuss their public grievances, and if necessity shall require, to petition or remonstrate to their Rulers thereon.’”<sup>74</sup>

Public meetings, of course, were held for other political purposes, including arranging festivities for national holidays.<sup>75</sup> By the mid-1830s, they were particularly important in local politics, and newspapers were filled with calls to

70. *Id.* at 33.

71. The most important form of petitioning was the “legislative petition” used to allow a person or group of people to communicate a grievance to the legislature while suggesting a remedy. The legislature was legally obligated, originally under customary constitutional law, to consider a petitioner’s grievance, though not necessarily to agree to the proposed remedy. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 14 (2004) (explaining that among the settled principles of fundamental law, inherited by American revolutionaries, was the right to petition the government); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142, 144 (1986) (noting that legislatures were expected to send petitions to committees for consideration); see also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2199–2203 (1998) (describing this right in the first state constitutions).

72. “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

73. See, e.g., BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 188 (1832) (“For, it cannot be supposed that [the people] have a right to assemble for the purpose of petitioning only, when a short consultation may perhaps be sufficient to convince them, either that [there] is no grievance at all; or, that it is unavoidable; or, that it will remedy itself . . . .”); see also 1 WILLIAM BLACKSTONE, *BLACKSTONE’S COMMENTARIES*, app. at 299–300 (St. George Tucker ed. 1803); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1886–1888 (1833).

74. RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 23 (1979).

75. In 1793, residents of Annapolis “held open public meetings to arrange their [Fourth of July] celebration.” NEWMAN, *supra* note 53, at 93, 221 n.41.

public meetings.<sup>76</sup> In fact, by the 1840s, New York City's papers had begun to include "a regular column headed 'Public Meetings.'"<sup>77</sup>

Public meetings often (though by no means always) took place in public squares.<sup>78</sup> During the national bank controversy in the 1830s, Philadelphians rallied at public meetings, processions, and demonstrations to protest President Andrew Jackson's policies.<sup>79</sup> Outraged at Jackson's removal of federal deposits from the national bank, bank supporters took to the streets: "[T]he business and manufacturing community poured out in mass meetings with processions and speeches in State House Square."<sup>80</sup> On March 20, 1834, "[a] large anti-Jackson gathering [was held] in Independence Square."<sup>81</sup> Although many workers attended, "the demonstration was not a spontaneous outpouring of antiexecutive sentiment. The rally was one of a series of Whig experiments with mass demonstrations, which featured free public banquets."<sup>82</sup>

In sum, large gatherings in streets and public places played a central role in American politics through much of the nineteenth century. Moreover, as we will see, the regulatory regime governing public assemblies and the understanding of the right of peaceable assembly that informed that regulatory regime facilitated assemblies in public places.

### III. GOVERNING THE PUBLIC'S USE OF CITY STREETS AND SQUARES

With this context in mind, we can turn to the regulatory regime governing public assemblies prior to the rise of permits. Until the late nineteenth century, there were no procedures that had to be undertaken to gain access to public spaces. Moreover, once on the streets, one was entitled to remain there unless

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76. As one prominent historian of the public sphere has commented, "New York politics in the 1830s was an endless series of public meetings" regarding firefighting, policing, street improvements, and public health. RYAN, *supra* note 52, at 97.

77. *Id.*

78. See *id.* at 32–37. Not all public meetings took place in streets and parks. Antebellum cities were flooded with "public hall[s], a generic term for a building constructed for the explicit purpose of bringing populations together in units smaller than the civic whole but larger, more formal, and more novel in their social identity than the traditional groupings of church and family." *Id.* at 36. Not all groups had access to these halls: Some borrowed, while some turned to the streets. *Id.* at 36–37.

79. See DAVIS, *supra* note 62, at 130 (describing activities of Jackson's supporters).

80. *Id.*

81. *Id.* at 131.

82. *Id.* For another example from the same period see RYAN, *supra* note 52, at 94–95 ("After the adoption of the resolutions a motion was carried that the meeting adjourn to the street in front of the Hall and form a procession with their antimonopoly Banners, Flags, etc., which was accordingly carried—and some thousands of the meeting bearing torches, candles, etc., marched up the Bowery cheering their Democratic citizens on the way." (citation omitted) (describing the October 1835 procession of Loco-Foco in New York City)).

one breached the peace. This degree of access was reinforced by understandings of the right of peaceable assembly.

When the people gathered in public spaces, they were not required by law to have prior permission. “With some exceptions . . . local governments up through the Age of Jackson made few attempts to control public speaking. . . . [L]aws prohibiting or requiring permits for open-air speaking . . . were rare.”<sup>83</sup>

Instead, legal regulation of gatherings on public streets and squares was limited to the criminal law. The law could intervene only after an assembly had gathered if through its behavior it could be charged with unlawful assembly, riot, or breach of the peace. One of the first courts to consider the constitutionality of permit requirements described the traditional regulatory framework as follows: “It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes.”<sup>84</sup>

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83. John W. Wertheimer, *Free-Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* 136 (Jan. 1992) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (emphasis added). The exceptions discussed include an 1810 New York City ordinance prohibiting public worship of certain kinds absent prior permission from city officials, *id.* at 139 n.23, and an 1858 New Orleans ordinance forbidding public addresses by “colored person[s]” absent “written permission from the Mayor,” *id.* at 143. For additional evidence see *supra* notes 7–9 and accompanying text.

84. *In re Frazee*, 30 N.W. 72, 75 (Mich. 1886). It is not clear whether any street gatherings were charged, or successfully prosecuted, for creating a public nuisance. In *State v. Baldwin*, the North Carolina Supreme Court refused to find an indictment for nuisance where a group assembled loudly at a public meeting house shouting profanities and disrupting a singing school, because “[t]o render an act indictable as a nuisance, it is necessary that it should be an offense so inconvenient and troublesome, as to annoy the whole community.” 18 N.C. (1 Dev. & Bat.) 201, 201–02 (N.C. 1835). By contrast, in *Barker v. Commonwealth*, the Pennsylvania Supreme Court held that a crowd could be indicted for a common nuisance because “[t]he streets are common highways, designed for the use of the public in passing and repassing . . . . No one has a right to obstruct a public street by collecting therein a large assemblage of men and boys, for the purpose of addressing them in ‘violent, loud, and indecent language.’” 19 Pa. 412, 412–13 (1852). *Barker*, however, was subsequently significantly limited. See *Fairbanks v. Kerr*, 70 Pa. 86, 91–92 (1872) (“But it cannot be conceded . . . that making a speech in the street is *ipso facto* and *per se* a public nuisance. The indictment against Barker was for obstructing the streets of Pittsburg, through crowds collected by means of violent, loud, and indecent language addressed to those passing by . . . . A street may not be used, in strictness of law, for public speaking: even preaching or public worship . . . but it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. Such a stringent interpretation of the case of Barker is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary.”). What is clear is that, as of 1873, Grand Rapids, Michigan (the city whose ordinances were being reviewed in *Frazee*) had on the books several prohibitions of gatherings in public that could be considered *per se* nuisances, the earliest of which was passed in 1857. See GRAND RAPIDS, MICH., ORDINANCES OF THE CITY OF GRAND RAPIDS COMPILED IN 1873, at 103–04, 147–52 (1873).

The workings of this regulatory regime were sometimes made explicit in state criminal codes. In 1881, Maine provided:

When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously, or tumultuously assembled in any town, it shall be the duty of each of the municipal officers, constable, and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as they can safely go, and in the name of the State, command them immediately and peaceably to disperse; and if they do not obey, such magistrates and officers shall command the assistance of all persons present in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse, or to assist as aforesaid, shall be deemed one of such unlawful assembly, and punished . . . .<sup>85</sup>

The city of Portland had a virtually identical provision within its ordinances.<sup>86</sup> Neither the state nor the city required a permit for public assemblies or required the undertaking of any other procedure prior to assembling.<sup>87</sup>

The practical implications of this regulatory regime are evident in the following description of Philadelphia's 1795 Independence Day Celebration. Amidst calls to boycott the official parade, "Philadelphia's citizens organized their own counter-procession."<sup>88</sup> The parade "was organized and populated by ordinary citizens rather than organized militia groups, and it coalesced around an effigy of John Jay, who was represented as selling 'American liberty and independence' for 'British gold.'"<sup>89</sup> This counter-procession represented a challenge to the governing Federalist administration's foreign policy.

The description of the procession is critical. "The procession was silent, with wagon wheels muffled and participants seldom talking, *giving local officials no excuse to break up the event . . .*"<sup>90</sup> As it happened, the procession nearly did descend into violence when "an elite volunteer militia company attempted to break [it] up."<sup>91</sup> "[A]fter driving off the militia[,] the march continued through the major streets of Philadelphia and on to Kensington, where the participants burned the effigy 'amid the acclamations of hundreds of citizens.'"<sup>92</sup> One of

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85. PORTLAND, ME., THE CHARTER AND ORDINANCES OF THE CITY OF PORTLAND TOGETHER WITH ACTS OF THE LEGISLATURE, RELATING TO THE CITY, AND TO MUN. MATTERS 421 (1881).

86. *Id.* at 423.

87. *See id.* at 55–57. The 1881 charter for Portland gave local officials authority to restrict the access of "horses, carriages or other vehicles" to city streets on days of public celebration. *Id.* at 38.

88. NEWMAN, *supra* note 53, at 98–99.

89. *Id.* at 99.

90. *Id.* (emphasis added).

91. *Id.*

92. *Id.*

its defenders proclaimed afterward that “[n]ever was a procession *more peaceably conducted*’ . . . .”<sup>93</sup>

While there is no doubt that the procession’s participants feared official abuses of discretion and thus went to great lengths (including being silent and muffling the noise of the wagon wheels) to avoid giving Federalist officials an excuse to disperse them, the description makes equally clear that they knew what it took to avoid repression because the central tenet of the pre-permit regulatory regime was clear. One was entitled to be on the streets, in a place of one’s choosing, for however long one wished, as long as one did not breach the peace. This regulatory regime preserved a space for autonomous collective action on the part of the people or a faction of them. Note also that burning an effigy, given traditions of the time, would not have been construed as itself a breach of the peace.

Understandings of the right of assembly reinforced this degree of access. Unfortunately, a fair amount of detective work is required to uncover the principled nature of this regulatory regime. There is very little evidence from which to give a robust account of the original meaning of the First Amendment right of peaceable assembly. Furthermore, it was not until the twentieth century that the Supreme Court held that the First Amendment’s guarantees applied to the states through the Fourteenth Amendment.<sup>94</sup> As such, there is very little early case law. Sources elaborating the right in state constitutions are similarly limited. With these caveats in mind, let us begin.

The existence of a right of peaceable assembly was not controversial at the founding because it “was a traditional right of English freemen.”<sup>95</sup> It was included virtually without comment in the First Amendment. Indeed, “in the first United States Congress a discussion of the proposed Bill of Rights amendment [regarding assembly] was declared beneath the dignity of the members.”<sup>96</sup>

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93. *Id.* (emphasis added).

94. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); *see also De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (holding that the right of assembly is a fundamental liberty covered by the Fourteenth Amendment).

95. LEON WHIPPLE, *OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES* 101 (1927); *cf.* *Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley J., dissenting) (“The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation’s history.”). *See generally* 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*1–12 (explaining the English origins of the various rights contained in the states’ bills of rights).

96. WHIPPLE, *supra* note 95, at 101.

The right was understood primarily to protect a democratic practice. Madison's first list of proposed amendments "separated the clause for the rights of assembly, consultation, and petition from the clause containing the free expression guarantees of speech and the press"<sup>97</sup>—that is, separating the collective rights from the individual ones.

As previously mentioned, there are no early Supreme Court decisions to shed additional light on the original understanding of this right. It was not until 1875 that the Supreme Court issued a major decision interpreting the right of assembly.<sup>98</sup> Its account of the right is not illuminative:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. . . . It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution.<sup>99</sup>

More importantly, because the Court took the opportunity to hold that the First Amendment only protected "the right of the people to assemble for lawful purposes . . . against encroachment by Congress,"<sup>100</sup> it had very little influence on the practices of municipalities with respect to public gatherings.

Accordingly, to understand how the right of peaceable assembly informed regulation of street politics in the nineteenth century, we must turn to state sources. Here too, information is limited. The right of assembly has been the subject of little commentary.<sup>101</sup> Classic nineteenth-century legal treatises on American constitutional law offer at most cursory explanations.<sup>102</sup>

The one early American treatise author to discuss the right of assembly in some depth emphasizes that this right was intended to protect the possibility of a deliberative process on matters of public concern:

The right includes not only a right to assemble in order to petition for a removal of grievances, but also a right to assemble for the purpose of deliberating upon public measures. For, it cannot be supposed that they

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97. Higginson, *supra* note 71, at 155–56 (quoting 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026 (1971)).

98. See WHIPPLE, *supra* note 95, at 102 (noting that the first major Supreme Court case to address the right was *United States v. Cruikshank* issued in 1875); accord 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* § 326, at 671 (Henry St. George Tucker ed., 1899) ("The last clause, in reference to the right of the people peaceably to assemble and to petition the government, etc., has not been the subject of adjudication.").

99. *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1875).

100. *Id.* at 552.

101. Accord *CIO v. Hague*, 25 F. Supp. 127, 137 (D.N.J. 1938) (lamenting the "paucity of material on free assembly" especially as compared to the vast literature on free speech).

102. See, e.g., 1 BLACKSTONE, *supra* note 73; 2 KENT, *supra* note 95, at \*1–37 (including no discussion of the right of assembly at all); see also 3 STORY, *supra* note 73.

have a right to assemble for the purpose of petitioning only, when a short consultation may perhaps be sufficient to convince them, either that there is no grievance at all; or, that it is unavoidable; or, that it will remedy itself . . . .<sup>103</sup>

That is, the right of assembly was meant to enable forums for collective consideration of government action—forums for the formation, reconsideration, and consolidation of preferences, not just their expression.

The only early nineteenth-century source that provides insight into the constitutional limits on regulating public assemblies is an 1844 article in the *American Law Magazine*.<sup>104</sup> Primarily an account of the common law with respect to riot, rout, and unlawful assembly, the article includes an extensive exposition of the constitutional right of assembly as secured by the federal and state constitutions.<sup>105</sup>

It explains that “[t]he right of the people to assemble peaceably for the purpose of considering and discussing the measures of government, is an axiom of political liberty as sacred in Great Britain as here.”<sup>106</sup> The substance of the right, the author contends, is captured “distinctly and forcibly” by the following charge made by an English judge to a grand jury in 1839:

[The] right [of assembly, the people of Great Britain] always have had, and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason. Therefore let them meet, if they will in open day, peaceably and quietly, and *they would do wisely when they meet to do so under the sanction of those who are the constituted authorities of the country*.[.] To meet under irresponsible presidency is a dangerous thing; *nevertheless if, when they do meet under that irresponsible presidency, they conduct themselves with peace, tranquility, and order, they will perhaps lose their time but nothing else.* They will not put other people into alarm, terror, and consternation, they will probably in the end come to the conclusion that they have acted foolishly; but the constitution of this country does not (God be thanked) punish persons who, meaning to do

103. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN 187–88* (Boston, Marsh, Kapen & Lyon 1852).

104. While the author (and as such the pedigree) of the article is unknown, it was relied upon by an important nineteenth-century criminal law treatise. See FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 722 (2d ed. 1852).

105. *Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 351 (1844). The author explains he is leaving aside statutory enactments to focus on the common law.

106. *Id.* at 353.



that which is right in a peaceable and orderly manner, are only in error in the views which they have taken on some subject of political interest.<sup>107</sup>

In other words, in England, the right of assembly was understood to protect anyone (even the foolish) as long as “they conduct[ed] themselves with peace, tranquility, and order,”<sup>108</sup> but it was also considered “wise[ ]” to meet “under the sanction of . . . constituted authorities”<sup>109</sup>—a requirement that was not strictly necessary.

The American author offers only one caveat to this account of the right, and it is a critical one for our purposes: Permission and sanction by public authorities is not necessary in the United States. In America, he explains:

[T]he constituted authorities will naturally have less jealousy of public meetings than is displayed in baron Alderson’s charge. . . . [T]he circumstance of the presidency and approbation of the constituted authorities will not be suffered to have any considerable weight. Their assent and approbation will be implied for every assemblage of people for a lawful object.<sup>110</sup>

With this account of the right of assembly, the article proceeds to its main topic, concluding that “[t]he common law then, on the subject of unlawful assemblies, with their consequences, routs and riots, may be considered as unaffected materially by our several constitutional provisions or the nature of our republican institutions.”<sup>111</sup>

The author makes a few additional claims about what would constitute permissible regulation of public gatherings. Importantly, he explains that authorities do not need to wait until there is an actual outbreak of violence (a riot or rout) to take preventative action.<sup>112</sup> Rather, “the most energetic

107. *Id.* (emphasis added) (internal quotation marks omitted) (citing a charge by Baron Alderson to the grand jury delivered at the Monmouth summer assizes in 1839 regarding the Newport riots).

108. *Id.*

109. *Id.*

110. *Id.* at 354.

111. *Id.* at 353–54. This is because gatherings “which look to violence and not to reason and the influence of a strong expression of public opinion, do not fall within the protection of the constitutional guarantees.” *Id.* at 357.

112. *Id.* at 360 (“It is evidently of the highest importance to the public peace to have it recognized and established, that that interference need not wait for any actual outbreak or movement of the assembly sufficient to constitute an actual rout or riot.”); accord FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 528 (Phila., James Kay, Jun. and Brother 1846) (“An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing, calling for an interference in order to the preservation of the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot.”); Edmund H. Bennett, *Public Meetings and Public Order*, 4 L.Q. REV. 257, 262 (1888) (“An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing calling for interference in order to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot.” (citation omitted)).

preventative measures” would be justified “if reasonable grounds exist for apprehending a disturbance.”<sup>113</sup> Authorities could act when the crowd could be indicted for unlawful assembly—that is, when “rational and firm men” would consider the assembly “likely to produce danger to the tranquility and peace of the neighbourhood.”<sup>114</sup> Once that threshold had been crossed, “the streets may be barricaded in the neighbourhood where violence is feared,” and “gatherings of people in open places [may be] forbidden.”<sup>115</sup> Such “temporary inconveniences and the restraint of the exercise of rights . . . such as that of a free and unimpeded passage along the public streets, may well be borne without murmuring, considering the necessity . . . .”<sup>116</sup>

Late nineteenth-century treatises agree. In 1885, Anna Laurens Dawes, in her treatise on federal constitutional law, notes:

Most of the States have laws of their own by which riotous assemblies can be dispersed. The proper officer orders such a crowd to go to their homes quietly, and if they do not comply, they remain at their own risk. It is then their own fault if they are driven away by guns and bayonets. *But it must be evident (on account of this constitutional provision) that it is not a peaceable assembly, before any such course can be adopted.*<sup>117</sup>

In 1899, another treatise makes the same point: “[T]he right of the people peaceably to assemble and to petition the government, etc., . . . does not prevent interference with the riotous assemblages of the people; where there is no riotous conduct the government cannot interfere.”<sup>118</sup>

None of these authorities suggest that the exercise of the right of assembly might constitutionally be predicated on obtaining permission from authorities. In fact, the 1844 *American Law Magazine* article suggests that, while this may have been wise in England, in the United States such permission is assumed

113. *Riots, Routs, and Unlawful Assemblies*, *supra* note 105, at 364.

114. *Id.* at 354. *See generally id.* at 354–57. Leon Whipple’s account of the federal right in the 1920s is consistent: “What did the guarantee [of free assembly] mean in 1791? It meant the protection of orderly public gatherings to discuss political and religious matters, especially the conduct of government, its officers and laws, or even its fundamental form. . . . The Founders felt that no meeting should be challenged unless for some overt act, the actual breaking of a law.” WHIPPLE, *supra* note 95, at 103. “Nor was there any desire as there is to-day to judge of dangers to the public peace by the ‘tendency’ of the meeting or some possible effect upon the hearers. The peace to be preserved was the actual present public order.” *Id.* at 104 (emphasis added).

115. *Riots, Routs, and Unlawful Assemblies*, *supra* note 105, at 364.

116. *Id.*

117. ANNA LAURENS DAWES, *HOW WE ARE GOVERNED: AN EXPLANATION OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 309 (1885) (emphasis added); *accord* James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 1, 4, 18 (1931) (discussing the crime of unlawful assembly as a recognition of the limits to the right of assembly).

118. 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* § 326 (Henry St. George Tucker ed., 1899) (emphasis added).

and thus not required: The “approbation of the constituted authorities will not be suffered to have any considerable weight” to the question whether an assembly is lawful.<sup>119</sup> This would in fact be consistent with attitudes toward prior restraints in the parallel right of freedom of the press.

Finally, it is clear that the right of assembly included a right to gather on public streets.<sup>120</sup> None of these authors explicitly says “the people have a right to gather on the public streets,” but this is because it went without saying. As detailed earlier, the people had always gathered on public streets for political purposes.

This is not to say that liberal access was without critics. In Philadelphia, demand for more control over public places was nearly constant. Davis observes:

[H]ostility to large gatherings of working people was . . . strong, perhaps having roots in memories of the Revolution. . . . Ignoring the democratic heritage preserved in the people’s right to assemble, some fearful commentators suggested that public gatherings be banned altogether.<sup>121</sup>

In 1846, authorities managed to “impose[ ] spatial boundaries on parades” during a strike by weavers.<sup>122</sup> Notwithstanding these efforts, access to public space in Philadelphia remained unencumbered by permit requirements until after the Civil War.<sup>123</sup>

#### IV. STATE SUPREME COURTS REVIEWING THE FIRST PERMIT REQUIREMENTS FOR PUBLIC ASSEMBLIES

By the late nineteenth century, cities began to increase their regulatory controls over public space and to pass ordinances requiring those wishing to gather in public to obtain permission in advance.<sup>124</sup> These ordinances

119. *Riots, Routs, and Unlawful Assemblies*, *supra* note 105, at 354.

120. This aspect of the substance of the right is uncontroversial. In 1939, the U.S. Supreme Court recognized that the right includes the right to assembly in public streets, declaring that “streets and parks . . . [from] time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague v. CIO*, 307 U.S. 496, 515–16 (1939).

121. DAVIS, *supra* note 62, at 35.

122. *Id.* at 142.

123. *Id.* at 168 (“Philadelphia began requiring parade and demonstration permits after the late 1870s.”).

124. Permit requirements were rare in 1881. By 1930, however, permits were frequently required in the largest American cities for parades, gatherings, and speeches in public streets and parks. Preliminary research into why such ordinances were passed suggests that repression (initially of the Salvation Army) rather than managerial needs drove reform. See Abu El-Haj, *supra* note 7, at *passim*; see also DAVIS, *supra* note 62, at 168 (suggesting that “[f]ear of strikes, gatherings, and mass meetings prompted some cities to legislate limits on public meetings and assemblies,” and that “[m]ayors were given the prerogative of banning assemblies during civil emergencies”).

were challenged in state courts, and the decisions of these courts are particularly revealing.

All but one of the first state supreme courts asked to review ordinances that required advance permission to gather in public places found them void.<sup>125</sup> Only the Supreme Judicial Court of Massachusetts held otherwise.<sup>126</sup>

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125. Compare *City of Chi. v. Trotter*, 26 N.E. 359 (Ill. 1891), *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888), *In re Frazee*, 30 N.W. 72 (Mich. 1886), and *In re Garrabad v. Dering*, 54 N.W. 1104 (Wis. 1893), with *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892); see also *Rich v. City of Naperville*, 42 Ill. App. 222 (App. Ct. 1891). Glenn Abernathy reached a similar, though not identical, conclusion based on his review of the cases. He found that “[t]he various state courts involved, excepting Massachusetts, held that parading peaceably and lawfully was a fundamental right of Americans and could not be abridged by the municipal requirement of a permit.” ABERNATHY, *supra* note 10, at 93. We differ, however, because he asserts that the courts differentiated between parades and public meetings in the streets. See *id.* at 90. Courts were protective of street parades but not of street meetings. This, he speculates, was either because a parade is simply multiple exercises of an individual’s right to travel or, more likely, because acceptable groups engage in the former but not the latter. *Id.* at 90–91. Abernathy’s read of the cases, in this regard, is unpersuasive for three reasons. First, as he concedes, the principled distinction is flimsy; second, the Salvation Army was not acceptable at the time; and third, the alleged difference disappears when one organizes the cases in relation to the Supreme Court’s perceived adoption of Massachusetts’s position in *Davis v. Massachusetts*, 167 U.S. 43 (1897).

Putting Massachusetts aside then, the state court cases that voided municipal efforts to regulate street parades are pre-*Davis*, while the cases Abernathy cites upholding permit requirements for public meetings are post-*Davis*. Compare ABERNATHY, *supra* note 10, at 93, with *id.* at 64–71. Moreover, the latter generally cite to the Supreme Court’s decision in *Davis*, suggesting it was the Supreme Court’s perceived sanction of permit requirements that explains those courts’ rulings on ordinances governing public assemblies. See, e.g., *Love v. Phalen*, 87 N.W. 785, 787–88 (Mich. 1901) (quoting the Supreme Court’s decision in *Davis* at length before upholding an ordinance requiring a permit prior to giving a public address in public places and, thus, implicitly overruling *In re Frazee*); *Coughlin v. Chi. Park Dist.*, 4 N.E.2d 1, 7–9 (Ill. 1936) (relying foremost on *Davis* to uphold the park department’s denial of a permit to hold a lecture on political economy challenged, inter alia, on free speech grounds); *People ex rel. Doyle v. Atwell*, 133 N.E. 364, 365–66 (N.Y. 1921) (relying on *Davis* to support the proposition that “[i]t is too well settled . . . that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit . . . to require discussion”); cf. William E. Lee, *Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing*, 13 WM. & MARY BILL RTS. J. 1219, 1235 (2005) (“By devaluing open-air speech and stressing the proprietary powers of the government, *Davis* set the tone for a generation of opinions that were plainly hostile to the idea that streets were appropriate to use for expressive activities.”).

Other authors have argued that state courts simply were not particularly protective or concerned about the exercise of police powers to curb expression through assemblies. E.g., Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 14, 28 (Bill F. Chamberlin & Charlene J. Brown eds., 1982) (“The willingness of courts to sanction the use of the state’s police power to protect the general welfare was just as apparent in cases dealing with . . . more unorthodox methods of spreading information such as unauthorized parades in the public streets . . . [and] speaking in public parks on unpopular subjects . . .”). Blanchard, and the others who have taken this view, have either focused on state court cases decided after *Davis*, or have failed to distinguish between the attitudes of state courts to uses of streets closely tied to politics (assemblies, meetings, and parades) as compared to other expressive uses (drumming or music).

These decisions show that late nineteenth-century courts generally balked when faced with the kinds of ordinances that we take for granted as constitutional exercises of the police power. Their skepticism was driven, in part, by the recognition that these ordinances broke from American political and regulatory traditions that comported with their understanding of the right of assembly.<sup>127</sup> The risks of disorder and of interfering with the rights of passersby were not considered sufficiently serious to justify the ordinances. These courts were not without a notion of time, place, and manner regulation. In passing, two of them explicitly entertained the idea that some kind of time, place, and manner regulation of street processions might be necessary and constitutionally permissible.<sup>128</sup> What they adamantly did *not* believe was that the ordinances they were reviewing—which required advance permission across the board—fit that bill.

To understand these decisions, one must carefully lay out their procedural and substantive postures. The central issue to be decided in these cases was whether municipalities legitimately had the power to regulate the conduct involved.<sup>129</sup> The cases all involved prosecutions in which the defendants argued their prosecution or detention had been unlawful because the ordinance requiring permission prior to gathering in a public place was invalid.<sup>130</sup> But the central claim was not that the ordinance violated their individual state or federal right to peaceable assembly.<sup>131</sup> Rather, the ordinances were challenged as unlawful exercises of municipal power.

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126. See *Abrahams*, 30 N.E. at 79; accord *ABERNATHY*, *supra* note 10, at 92 (explaining that the Massachusetts high court was an outlier on this issue). Among appellate courts, I have found only one during this period that upheld an ordinance requiring a permit for a meeting, speech, or parade on a public street or in a public park. See *City of Bloomington v. Richardson*, 38 Ill. App. 60 (App. Ct. 1890).

127. Until incorporation, the inherited English right of peaceable assembly was primarily secured for Americans by the states under their constitutions.

128. See *Anderson*, 19 P. at 723 (“It might be proper, on account of the peculiar conditions of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night-time, or that the police department should have some previous notice . . .”); *In re Frazee*, 30 N.W. at 76 (“Instances might also be suggested of the propriety of suspending noisy demonstrations at particular times or places, or where they would disturb public assemblies . . . . It would not be wise to attempt any definition in advance of those things.”).

129. See *Lee*, *supra* note 125, at 1227 (“The decisions of the Michigan, Kansas, and Illinois courts relied primarily upon municipal powers analysis.”).

130. E.g., *Trotter*, 26 N.E. at 359 (“This suit is a prosecution by the city against John Trotter, the appellee, for a violation of said section of said ordinance. The question at issue is the validity or invalidity of the ordinance.”); *Anderson*, 19 P. at 720.

131. The choice not to litigate in terms of a state constitutional right of assembly was not unusual for this period. See Richard T. Pfohl, Note, *Hague v. CIO and the Roots of Public Forum Doctrine: Translating Limits of Powers Into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533, 543 (1993) (explaining that in nineteenth-century state court cases considering the lawfulness of “local ordinances

*Anderson v. City of Wellington*<sup>132</sup> illustrates how courts at the time understood this legal question and the analysis it required. This case involved a member of the Salvation Army who was prosecuted for violating an ordinance that made it unlawful to parade in any public street without first getting written permission from the mayor.<sup>133</sup> The legal issue was whether the ordinance was lawful.<sup>134</sup> The court explained that the lawfulness of the ordinance depended on (1) whether the city council had been expressly or by necessary implication vested with the power to pass the ordinance, and (2) whether the ordinance was “reasonable, not inconsistent with the laws of the state, not repugnant to fundamental rights, . . . not . . . oppressive . . . . partial or unfair. . . . [and not in] contraven[ment of] common right.”<sup>135</sup>

*In re Frazee*,<sup>136</sup> the first of these cases decided in 1886, arose as a petition for “*habeas corpus* to determine on the legality of [Frazee’s] detention” by the city of Grand Rapids, Michigan.<sup>137</sup> Frazee had been detained for violating an ordinance requiring prior permission from city officials to march through the city streets.<sup>138</sup> He argued that the ordinance was void “as an unreasonable and unlawful interference with the streets” by the municipality.<sup>139</sup> He objected that the ordinance conferred unlimited discretion<sup>140</sup> and was “outside of any inference or grant of authority in the charter.”<sup>141</sup> Viewing the central issue as one of

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directly regulating . . . speech, [or] . . . forums for speech such as parks and roads,” the “issue was not whether the individual had a right to speak, but rather whether local municipalities had the legitimate power . . . to regulate the conduct involved”); *cf.* Blanchard, *supra* note 125, at 39–40 (explaining that state court decisions engaging with and developing the contours of freedom of speech and press generally “were argued on other grounds in the state courts”). First Amendment challenges were not made because its protections did not apply against the states at the time.

132. 19 P. 720 (Kan. 1888).

133. *Id.*

134. *Id.*

135. *Id.* at 721 (emphasis added).

136. 30 N.W. 72 (Mich. 1886).

137. *Id.* at 72.

138. *Id.* at 73. The ordinance provided in full:

No person or persons, association or organizations, shall march, parade, ride, or drive, in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subject to the forgoing provisions of this section; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or chief or police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use.

*Id.*

139. *Id.*

140. *Id.* at 73–74.

141. *Id.* at 74.

municipal powers, the bulk of the Michigan Supreme Court's decision was devoted to explaining why the ordinance did not fall within the powers expressly conferred by the charter.<sup>142</sup> It rejected, among other things, the suggestion that the power "to prevent . . . riots, disturbances, and disorderly assemblages" or the power "to control, prescribe, and regulate the manner in which highways, streets, avenues, lanes alleys, public grounds, and spaces within said city shall be used" authorized passage of the ordinance.<sup>143</sup>

In doing so, the *Frazer* court placed great emphasis on the fact that political parades and public assemblies were "customary, from time immemorial, in all free countries"—a fundamental right inherited from England.<sup>144</sup> It declared:

It has been customary, from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them.<sup>145</sup>

While the Michigan Supreme Court acknowledged that processions create a risk of disorder, it explained that such risks could be addressed when they actually arose, as they always had been:

[Processions] are . . . capable of perversion to bad uses, and, when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assemblies may for a while be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity. During all this period of public history, cities have existed, and had powers of local administration. *But it has never been supposed that they needed, or ought*

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142. *Id.*

143. *Id.*

144. *Id.* at 75.

145. *Id.*

*to possess, any repressive power over these movements which was not subservient and subsidiary to the general legal scheme of government.*<sup>146</sup>

More explicitly, it stated: “It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes.”<sup>147</sup> The ordinance was, therefore, void because “[w]hatever regulation is made must operate uniformly, under the same conditions” and “must fix the conditions [of proceeding] expressly and intelligibly, and not leave them to the caprice of any one,”<sup>148</sup> but also “because it suppresses what is in general perfectly lawful.”<sup>149</sup>

Illinois courts took a similar view. The following passage from an 1899 decision of the intermediate appellate court in *Trotter v. City of Chicago* illustrates, once more, how traditions of street politics, with their constitutional valence, shaped nineteenth-century judges’ initial attitudes toward municipal efforts to require permits for assemblies on the streets:

Processions and parades through the streets are not nuisances, and have never been so considered. True, a procession may become disorderly or riotous, and degenerate into a mob, or a parade may be so conducted . . . as to invite a breach of the peace, or to render itself a nuisance, but this would be under exceptional circumstances, and the individuals so disporting themselves would be subject to punishment, and are thus under the restraint of law.

Under a popular government like ours, the law allows great latitude to public demonstrations, whether religious, political or social, and it is against the genius of our institutions to resort to repressive measures which have a tendency to encroach on the fundamental rights of individuals or of the general public.<sup>150</sup>

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146. *Id.* (emphasis added).

147. *Id.*

148. *Id.* at 75–76; see also *id.* at 76 (explaining that if unbridled discretion “were allowed in the case of processions, it would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ”).

149. *Id.* at 76.

150. *Trotter v. City of Chi.*, 33 Ill. App. 206, 208 (App. Ct. 1889), *aff’d* *City of Chi. v. Trotter*, 26 N.E. 359 (Ill. 1891). *Trotter* had been prosecuted for violating the city’s proviso “[t]hat no parades or processions shall be allowed upon the streets of the city, nor shall any open-air meetings be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall first be obtained from the police department.” 26 N.E. at 359. His defense was that the ordinance was invalid, and the question for the court was whether the city’s charter powers “authorize and sustain the enactment under consideration.” *Id.*

A similar sentiment is reflected in the following passage written by a different appellate judge in Illinois:

Ever since the landing of the Pilgrims from the Mayflower the right to assemble and worship according to the dictates of one’s conscience, and the right to parade in a peaceable



The Illinois Supreme Court affirmed, agreeing that the ordinance was *not* a lawful exercise of the city's power to suppress either nuisances or unlawful assemblies. The notion that the right of assembly guarantees the right to peaceable assembly was critical to its decision:

Citizen's have the constitutional right 'of pursuing their own happiness;' and on suitable occasions, and for lawful purposes, and in a peaceable manner they may gather together in street parades and processions, if they so desire, provided they do not disturb or threaten the public peace or substantially interfere with the rights of others.<sup>151</sup>

The municipal ordinance was an unlawful exercise of power because it inverted these presumptions: "There is no authority . . . in the municipal corporation to suppress such demonstrations of all kinds, at all times, and under all circumstances."<sup>152</sup> Only demonstrations that "disturb or threaten the public peace or substantially interfere with the rights of others" could be considered unlawful.<sup>153</sup>

The point to be drawn from these cases is that late nineteenth-century courts balked when faced with the kinds of ordinances that we take for granted as constitutional. They were not impressed by the risk of disorder or the inconvenience to passersby. Instead, they emphasized that the genius of our free and democratic institutions is that they allow great latitude when the people demonstrate in the street for political, religious, and social purposes. On the rare occasions that such gatherings degenerated into a mob or an actual nuisance, authorities could invoke the criminal law as was customary.

Consider the contained outrage at the requirement of advance permission expressed by the Supreme Court of Kansas in the previously mentioned 1888 case of *Anderson v. City of Wellington*:

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manner and for a lawful purpose, have been fostered and regarded as among the fundamental rights of a free people. The spirit of our free institutions allows great latitude in public parades and demonstrations, whether religious or political, and if they do not threaten the public peace, or substantially interfere with the rights of others, every measure repressing them, whether by legislative enactment, or municipal ordinance, is an encroachment upon fundamental and constitutional rights.

*Rich v. City of Naperville*, 42 Ill. App. 222, 223–24 (App. Ct. 1891). The ordinance being reviewed provided, in relevant part:

It shall be unlawful for any person or persons, society or club, or association of any kind, to parade any of the streets of the city of Naperville, with any flag or flags, banners or transparencies, drums, horns or other musical instruments without first having secured the permission of the city council so to do.

*Id.* at 223 (citation omitted).

151. *Trotter*, 26 N.E. at 359.

152. *Id.*

153. *Id.*

This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together with their party banners, and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-School children cannot assemble at some central point in the city, and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in their march by the written consent of his honor, the mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets, under any circumstances, without permission.<sup>154</sup>

The court understood that “[t]he ordinance [was] framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community,”<sup>155</sup> but would not accept this justification:

A crowd of people is one of the most ordinary incidents of every-day life in any city of considerable size in this country. . . . [I]t is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate.<sup>156</sup>

The court’s disbelief explicitly invoked the right of public assembly as a limit on the city’s power:

We do not believe that the legislative grant of power to the city council, as enumerated in the sections above cited, can be so construed as to authorize the city council to take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land,—to form their processions and parade the streets with banners, music, songs, and shouts. It is an abridgement of the rights of the people.<sup>157</sup>

Holding that the city’s charter did not confer the power to pass the parading ordinance, the Kansas Supreme Court declared:

The right of the people in this state, by organization to cooperate in a common effort, and by a public demonstration or parade to influence

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154. 19 P. 720, 721 (Kan. 1888).

155. *Id.* at 721.

156. *Id.*

157. *Id.* at 721–22. The use of “privilege” admittedly makes the passage a bit ambiguous, but in light of the statement that “[i]t is an abridgment of the rights of the people,” and the next paragraph (quoted in the text below), it cannot be read to suggest a lack of entitlement.

public opinion and impress their strength upon the public mind, and to march upon the public streets of the cities of the states with the usual accompaniments of bands, banners, transparencies, glee clubs, and all the accessories of public meetings, is too firmly established, and has been too often exercised to be now questioned . . . .<sup>158</sup>

The justices of the Kansas Supreme Court, as we have seen, were not alone in their concern that these ordinances were at odds with the practices of political parties and other civic groups and with a regulatory tradition that kicked in through the criminal law only when public assemblies created disorder. Nor were they alone in articulating that these democratic and governance traditions stemmed from a particular understanding of the right of assembly.

Before moving on, it is worth noting that these state courts evidenced no similar skepticism when they were asked to approve regulations of streets that did not directly implicate their understanding of the right of assembly. In particular, when late nineteenth-century state courts were asked to rule on municipal ordinances requiring permits to play musical instruments on the streets, they almost uniformly upheld them.<sup>159</sup>

To the twentieth-century legal mind, these outcomes are hard to reconcile because we see all of these cases as about an individual's right of free expression, which includes both the right to march and the right to express oneself musically. But within the worldview of these nineteenth-century judges, music, while part of American traditions of democratic politics, was not constitutive of any constitutional right. This is made clear in the following passage from *In re Flaherty* in which the parade cases are distinguished:

The cases cited [by the Petitioner] all deal with ordinances regulating the right of the people to have processions or parades in the streets; and it is this right that is discussed, although the accompaniment of music is mentioned in some of the ordinances. . . . *But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority.*<sup>160</sup>

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158. *Id.* at 722. Ultimately, the court held that the ordinance “[was] not a reasonable regulation” because it “vest[ed] the power arbitrarily in the mayor to grant or refuse permission to any association of persons, combined for legal and meritorious purposes to parade the streets with music,” even as “[t]he use of musical instruments . . . [is] not specially objectionable.” *Id.* at 723.

159. See, e.g., *City of Wilkes-Barre v. Garabed*, 11 Pa. Super. 355 (1899) (in a decision from which two judges dissented); *People v. Garabed*, 45 N.Y.S. 827 (Suffolk County Ct. 1897), *rev'd*, 49 N.Y.S. 1141 (1898); *In re Flaherty*, 38 P. 981, 983–84 (Cal. 1895). But see *In re Gribben*, 47 P. 1074 (Okla. 1897) (holding that Oklahoma City was without power—express, implied, or essential to further the purposes of the municipal corporation—to pass an ordinance that prohibited drumming and music on the city streets or sidewalks to the extent that it annoyed or disturbed others).

160. 38 P. at 983–84 (emphasis added).

Therefore, “[t]here is no need of discussing the general power and right of a city to prohibit such noises on the streets as those made by the beating of drums.”<sup>161</sup>

Let me summarize the history thus far. For the first hundred years of the nation’s existence, the practice of democratic politics depended on regular and unfettered access to public spaces as forums for collective action. During this period, the law did little to regulate such usages in advance. Legal regulation was limited to intervening following a breach of the peace. This regulatory approach had a constitutional dimension. An Englishmen’s right of public assembly, as adopted by Americans, was understood to extend to the peaceable. Thus, the government was considered justified in restricting public assemblies only when they created public disorder, because only then were the assemblies no longer within the protection of the constitutional right. Finally, the courts that reviewed the first municipal ordinances requiring advance permission to assemble in the streets struck them down. These state courts had constitutional concerns about the potential for political abuse under these ordinances,<sup>162</sup> but they did not end the analysis there. Rather, they emphasized that these ordinances infringed upon important democratic practices and constitutional traditions.

The modern conception of the right of assembly differs significantly. Today, there is a right to assemble in public streets, parks, and other “traditional public forum[s],”<sup>163</sup> as long as one obtains permission from officials (if that is

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161. *Id.* at 982.

162. The *Trotter* court, for example, complained that by conferring unbridled discretion, the ordinance “leaves it to the discretion or caprice of the superintendent of police . . . to dictate that the members of one political party, or of one religious denomination, or of one civic society, may, and the members of another political party, religious denomination or civic society may not, have such parades or processions.” *Trotter*, 26 N.E. at 360. Similarly, the Michigan Supreme Court objected that the ordinance “would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ.” *In re Frazee*, 30 N.W. 72, 76 (Mich. 1886).

163. It is actually more precise to say that the state cannot prohibit all First Amendment activities in a public forum unless it can show that the ban is narrowly tailored to serve a compelling governmental interest, and that the right to assemble on the streets is an activity protected by the First Amendment. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (explaining that in a public forum “an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest”); *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983) (explaining that streets and parks are “quintessential public forums”); *Hague v. CIO*, 307 U.S. 496, 515–16 (1939) (declaring that the use of “streets and parks . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens”); see also Post, *supra* note 43, at 1749–52 (summarizing the Court’s doctrinal structure, established in *Perry*, which distinguishes between public, nonpublic, and limited public forums).

required),<sup>164</sup> confines oneself to the terms of the issued permit, and does not breach the peace. There are important constitutional limits on ordinances that require such permits. Specifically, the language must not confer undue discretion on the licensing official,<sup>165</sup> and both the requirement of a permit and any specific conditions on the assemblage must meet an intermediate scrutiny test, at least in theory.<sup>166</sup>

In other words, we have replaced the notion that the state can only interfere with gatherings when they disturb the peace, with a legal regime in which the state is permitted to regulate in advance (by confining to certain spaces or times) assemblages that are both peaceful and not inconvenient.<sup>167</sup> We have come a long way from the idea in the 1844 *American Law Magazine* article that government officials could only create barriers to contain those gatherings that had reached the threshold of an unlawful assembly.

## V. FEDERAL PRECEDENT DERIVED FROM MASSACHUSETTS

How we got to this modern conception of the right to assembly is a complicated story, one important and underexamined facet of which is that the U.S. Supreme Court's approach to analyzing permit requirements for assemblies in public places was shaped by the only nineteenth-century state

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164. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

165. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002) (explaining that the licensing official must not “enjoy[] unduly broad discretion in determining whether to grant or deny a permit”). This limit was implied by the nineteenth-century state court decisions discussed.

166. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication . . . .’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))). In practice, however, where excessive discretion is not an issue, federal appellate courts are only likely to strike down a permit requirement on the ground that it is not narrowly tailored to meet the government’s stated interest in maintaining order if it would apply to as few as two or three people. See, e.g., *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006); *Cox v. City of Charleston*, 416 F.3d 281, 286 (4th Cir. 2005); *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994) (noting its concern that the ordinance would apply to groups of six to eight). Often, the ordinances struck down have additional problems, such as unjustifiably long notice requirements. Note also that the government, in theory, may impose content-based regulations but only if it can show that the regulation is narrowly tailored to serve a compelling governmental interest. *Boos v. Barry*, 485 U.S. 312 (1988) (striking down the District of Columbia’s complete ban on displays within 500 feet of embassies if they tended to bring a foreign government into “public disrepute,” because it was not narrowly tailored to address the alleged governmental interest).

167. This is true even if the intermediate scrutiny test is applied in an exacting way. Cf. *Cox*, 312 U.S. at 576.

supreme court to uphold such requirements.<sup>168</sup> Our current doctrine flows out of the Court's initial willingness to accept the Massachusetts Supreme Judicial Court's approach.

The lawfulness of requiring advance permission to assemble on public property first came to the attention of the highest Massachusetts court in 1886 in *Commonwealth v. Davis (Davis I)*, a case involving a preacher William F. Davis.<sup>169</sup> Davis was convicted by a jury for delivering a sermon on the Boston Common without permission.<sup>170</sup> He argued on appeal that the ordinance was unreasonable and invalid.<sup>171</sup> His primary legal argument was that the law had not been properly passed because, among other things, it had not been recorded as required.<sup>172</sup> He also asserted a constitutional claim to the effect that the ordinance contravened the state constitution as well as fundamental law because it restricted a Christian's right to worship in public.<sup>173</sup> Jesus and his disciples, he argued, had always preached in public, and the Boston Common too had always been used for public preaching.<sup>174</sup>

The court rejected his contentions, holding that the ordinance was passed pursuant to the government's "power to make all . . . needful and salutary . . . ordinances" insofar as it "[was] not inconsistent with the laws of this commonwealth."<sup>175</sup> It declared further: "Its purpose is to promote the public peace, and to protect the public grounds from injury, and it is calculated to effect these ends *without violating the just rights of any citizens.*"<sup>176</sup>

In 1892, the Massachusetts Supreme Judicial Court faced the issue again. This time the right of assembly was clearly invoked. Henry Abrahams, the

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168. *City of Chariton v. Fitzsimmons*, 54 N.W. 146 (Iowa 1893), is not to the contrary. It upheld a municipal ordinance that outlined circumstances under which congregations, parades, and the making of noise on city streets and sidewalks would be *prohibited* and under which the mayor and city marshal would have the duty to order persons involved to disperse. *Id.* at 147. Moreover, the court emphasized that since the ordinance was enacted pursuant to the municipalities power to disperse riots and unlawful assemblages, it covered only those parades and crowds that "cause[] a public annoyance." *Id.* In the end, what the court primarily rejected was the defendants' claim that the ordinance was unreasonable because "the offense is made to depend upon the whim or caprice of the mayor or city marshal." *Id.* In its view, the defendants were protected from arbitrary power because the city had to prove the gravamen of the charge—that is, that the crowd had caused an unreasonable disturbance or public annoyance. *Id.*

169. 4 N.E. 577 (Mass. 1886).

170. *Id.* at 577.

171. *Id.* at 578.

172. Defendant's Brief at 1–9, *Commonwealth v. Davis*, 4 N.E. 577 (Mass. 1886) (No. 6-37), reprinted in WM. F. DAVIS, *CHRISTIAN LIBERTIES IN BOSTON*, app. at 19–58 (Chelsea, Mass., Wm. F. Davis 1887).

173. *Id.* at 32–41, 58.

174. *Id.* at 49–50.

175. 4 N.E. at 578 (quotation omitted).

176. *Id.* (emphasis added).

secretary of the Central Labor Union, requested a permit from the park commissioners to hold a public meeting in a Boston park.<sup>177</sup> The subject of the meeting was to be “the right of citizens to assemble peaceably to consult concerning the public good, and to debate social questions.”<sup>178</sup> Permission was denied, and on the morning of the meeting, Abrahams was “requested by a duly authorized park police officer not to make an oration in said park.”<sup>179</sup> He did so anyway before a few people.<sup>180</sup> Abrahams was subsequently arrested for violating park rules, both because he lacked prior authorization and because he had refused to obey an order of a park police officer.<sup>181</sup>

Abrahams argued that the park rules conferred unfettered discretion on the park commission and conflicted with the Massachusetts Bill of Rights, which provides “that the people have a right in an orderly and peaceable manner to assemble to consult upon the public good.”<sup>182</sup>

The court disagreed:

We see nothing in these rules inconsistent with article 19 of the bill of rights of this commonwealth, which declares that “the people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good . . . .” The defendant admits that the people would not have the right to assemble for the purposes specified in the public streets, and might not have such right in the public garden or on the common, because such an assembly would or might be inconsistent with the public uses for which these places are held. The same reasons apply to any particular park. The parks of Boston are designed for the use of the public generally; and whether the use of any park or a part of any park can be temporarily set aside for the use of any portion of the public is for the park commissioners to decide, in the exercise of a wise discretion.<sup>183</sup>

Unlike the other state supreme courts we have encountered, the Massachusetts court made no reference to American traditions of public assembly or their regulation.

In 1894, the Massachusetts Supreme Judicial Court engaged for a third time with this issue in *Commonwealth v. Davis (Davis II)*.<sup>184</sup> The facts of *Davis*

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177. *Commonwealth v. Abrahams*, 156 Mass. 57, 58 (1892) (background published by Massachusetts Reporter).

178. *Id.*

179. *Id.*

180. *See id.*

181. *See id.*

182. *Id.* at 59.

183. *Commonwealth v. Abrahams*, 30 N.E. 79, 79 (Mass. 1892).

184. 39 N.E. 113 (Mass. 1895).

*II* were straightforward. On June 10, 1894, William F. Davis gave another public sermon on the Boston Common, and again he did so without obtaining a permit.<sup>185</sup> He was convicted of violating the newest version of the ordinance.<sup>186</sup>

The Massachusetts Supreme Judicial Court considered the constitutionality and lawfulness of the city's ordinance settled. Writing for the court, Justice Oliver Wendell Holmes began his opinion by stating that "[t]he only question raised by these exceptions which was not decided in the former case of *Davis I* is one concerning the construction of the present ordinance,"<sup>187</sup> namely, whether "the words 'no person shall . . . make any public address'" prohibits public preaching.<sup>188</sup> "That such an ordinance is constitutional is implied by the former decision, and does not appear to us open to doubt."<sup>189</sup> Just as a police officer does not have a constitutional right to engage in political activity and remain a police officer, so too there is no constitutional right to speech or assembly on the Boston Common.<sup>190</sup> Justice Holmes then included his now famous passage:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.<sup>191</sup>

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185. Wertheimer, *supra* note 83, at 170–71.

186. The ordinance now provided: "[N]o person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor." Brief of Defendant in Error at 3–4, *Davis v. Massachusetts*, 167 U.S. 43 (1897) (No. 229) (internal quotation omitted) (reproducing the ordinance and summarizing the procedural history).

187. *Davis II*, 39 N.E. at 113 (citation omitted).

188. *Id.* An earlier incarnation of the ordinance had specified "no person shall deliver a sermon, lecture, address, or discourse," and Davis argued that the revision to exclude the term "sermon" was significant. The court disagreed finding "the omission of the superfluous words in the last revision was only a matter of style and the abridgement properly sought for in codification." *Id.*

189. *Id.* The court also summarily rejected Davis' contention that the ordinance was unconstitutionally "directed . . . against free preaching of the gospel in public places" for lack of evidence. *Id.*

190. See *id.* (citing *McAuliffe v. New Bedford*, 29 N.E. 517 (Mass. 1892) (involving the dismissal of a police officer for cause on grounds of political activity)).

191. *Id.* This passage is often interpreted to mean that since the Boston Common was the property of the city of Boston, it could forbid or regulate speech on it just as the owner of a private house may forbid speech in his house. Interestingly, however, the case on which the court relied regarding the power of the city over the Common actually questioned the nature of Boston's ownership of the Common, at the same time that it recognized the city's power to regulate the use of Common by the public. See *Lincoln v. City of Boston*, 20 N.E. 329, 330 (Mass. 1889) ("The city is alleged to own the common. But it appears by statutes and decisions, of which we are bound to take notice, that its rights, even at common law, hardly extend beyond a technical title, without the usual incidents of title . . .").



What should be clear is the anomalous nature of the approach of the Massachusetts Supreme Judicial Court. Not once in the three cases discussed were American traditions of public assemblies or street parades mentioned. There were no references to the Masons or the Grand Army of the Republic even though Boston shared this same history, as we have seen. There was also no mention of the fact that traditionally the law interfered only in response to a breach of the peace, and no effort was made to articulate the substance of the right of assembly.

Nonetheless, Massachusetts' views have powerfully influenced federal precedent because *Davis II* was reviewed by the U.S. Supreme Court.<sup>192</sup> In an opinion by Justice White in *Davis III*, the Court affirmed.

Justice White explained that *Davis* was mistaken in his assumption that he had a right "to use the common of the city of Boston free from legislative or municipal control or regulation."<sup>193</sup> No record evidence supports *Davis*' contention that the "Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city" including for "the preaching of the gospel . . . from time immemorial to a recent period."<sup>194</sup> On the contrary, both a legislative act that lumped the Common with other public properties "and the ordinance passed . . . show an assumption by the State of control over the common in question."<sup>195</sup> The Massachusetts Supreme Judicial Court "in affirming [*Davis*'] conviction, placed its conclusion upon the express ground that the common was absolutely under the control of the legislature."<sup>196</sup> "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement on the rights of a member of the public than for the owner of a private house to forbid it in his house."<sup>197</sup> Moreover, because the city had an absolute right to exclude public preaching on the Common, it followed that it could determine the circumstances under which access was permitted.<sup>198</sup>

The right under discussion was, as should be clear, a property right. *Davis III* was decided twenty-eight years before the Supreme Court held that the First Amendment applied to the states,<sup>199</sup> so the Court had to accept the determination of the Massachusetts Supreme Judicial Court

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192. See *Davis v. Massachusetts (Davis III)*, 167 U.S. 43 (1897).

193. *Id.* at 46.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 47 (quoting *Davis II*, 39 N.E. at 113).

198. *Id.* at 48.

199. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

that the ordinance did not infringe Davis' rights of speech, assembly, or worship as secured by the state's constitution.

*Davis III* has been severely undermined by subsequent Supreme Court decisions. Yet, it continues to exert enormous influence on contemporary precedent. In 1939, the Supreme Court in *Hague v. CIO*<sup>200</sup> affirmed that the use of "streets and parks . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."<sup>201</sup> In doing so, it implicitly rejected *Davis III*'s assertion that the government could ban speech in public streets and parks. *Hague v. CIO* did not, however, revisit *Davis III* on the question of permits. Instead of reconsidering whether general permit requirements were constitutionally justifiable once it was no longer true that the government could prohibit speech and assembly on its property, it focused on the particular ordinance at issue. That ordinance, it said, was unconstitutional because it allowed for unfettered discretion on the part of the licensing official.<sup>202</sup> The Court apparently assumed that permit requirements were not in themselves constitutionally problematic.

In 1941, when *Cox v. New Hampshire*<sup>203</sup> squarely presented the Court with the question whether the government could predicate the lawfulness of an assembly on obtaining advance permission, the Court readily held that such permit requirements were constitutional.<sup>204</sup> The government, it said, is permitted to regulate through mandatory permit requirements the "time, place and

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200. 307 U.S. 496 (1939).

201. *Id.* at 515-16.

202. *Id.* at 516. Mayor Hague was blatant about his contempt for the unionizing activities of the CIO. See *Hague v. CIO*, 101 F.2d 774, 779 (3d Cir. 1939). For a detailed account of Mayor Hague's civil rights record generally, as well as in relation to the CIO, see Abraham J. Isserman, *CIO v. Hague: The Battle of Jersey City*, 36 GUILD PRAC. 14 (1979).

203. 312 U.S. 569 (1941).

204. *Id.* at 576. The case arose out of an "information march" undertaken by approximately eighty-eight Jehovah's Witnesses. *Id.* at 572. The eighty-eight were divided into groups of fifteen to twenty, each of which marched single file through neighborhoods carrying placards. *Id.* "The marchers" were found to have "interfered with the normal sidewalk travel, but no technical breach of the peace occurred." *Id.* at 573 (quoting the state court's recital of the facts in *State v. Cox*, 16 A.2d 508, 511 (N.H. 1940)). Sixty-eight of them were charged and convicted for violating a state statute that prohibited parading upon the public streets without a special permit. *Id.* at 570-71. Five appealed their convictions arguing that the statute deprived them, among other things, of their rights of freedom of assembly. *Id.* at 571. No permit had been requested, and there was no record evidence of official discrimination. *Id.* at 573, 577. The New Hampshire Supreme Court upheld the convictions in relation to both the state and federal constitution. *State v. Cox*, 16 A.2d at 517. In doing so, it held that the statute had incorporated the standards set forth in *Hague v. CIO*, namely, "that the licensing authority act reasonably in granting or denying licenses and with reference to the object of public order on the public ways." *Id.* at 513. Thus, it was valid under the federal constitution because, as interpreted, it "leave[s] no play or room for the exercise of a too wide discretion." *Id.* at 516.

manner” of parades “in relation to the other proper uses of the streets.”<sup>205</sup> *Cox v. New Hampshire* involved no allegations of viewpoint discrimination.<sup>206</sup>

In 1953, the Court was invited explicitly to overrule *Davis III* in a case involving an ordinance that prohibited making political or religious addresses in any of Pawtucket, Rhode Island’s public parks. It never reached the issue. Instead, it held that “as construed and applied” the ordinance only affected the church services of certain denominations and, therefore, was unconstitutional on the ground that the state was “preferring one religion over another.”<sup>207</sup>

The Court’s doctrine with respect to the constitutionality of permit requirements for public assembly has evolved since the 1950s. Concerns about unfettered discretion no longer monopolize the Court’s analysis. Over time, *Hague v. CIO* has been interpreted as establishing the public forum doctrine, a doctrine that has been significantly elaborated since 1983.<sup>208</sup> The time, place, and manner doctrine has also evolved over time.<sup>209</sup> Despite the fact that courts frequently undertake elaborate analyses to comply with the various multipronged tests required by these doctrines, in practice, as we have seen, they have very little bite in cases involving the regulation of public assemblies. Moreover, courts rarely analyze the issues with reference to the particular constitutional values associated with public assemblies.

Put differently, while cases involving these related doctrines frequently rehearse the words of Justice Roberts in *Hague v. CIO* that streets from “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,”<sup>210</sup> substantively, they all take as undisputed the correctness of the view that permit requirements are constitutionally permissible within certain parameters. This I would suggest is because the true history referenced by Justice Roberts has been heretofore unknown. As a result, assembly cases are framed as cases involving free expression and analyzed within a doctrinal framework developed to address all aspects of the individual right of free expression.

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205. *Cox*, 312 U.S. at 576.

206. *Id.* at 577.

207. *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953).

208. See Post, *supra* note 43, at 1721 (explaining that *Hague v. CIO* is considered the origin of the public forum doctrine, an exception to the general principle that the government is entitled to regulate speech on its own property). The term “public forum” is actually from an article by Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. The case has been interpreted to imply that the public has “a kind of First-Amendment easement,” when it comes to public streets and parks and that this easement is a limit on the type of regulation that is constitutionally permissible. *Id.* at 13.

209. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

210. *Hague v. CIO*, 307 U.S. at 515–16.

We have been left with a mere reference to traditions of American street politics and little knowledge of the original understanding of the right of assembly. The founding generation's conception of the right as an important and robust political tool has been forgotten, whereas the anomalous view of the Massachusetts Supreme Judicial Court continues to influence contemporary understanding.<sup>211</sup>

### CONCLUSION

For at least a generation after the founding, American politics relied heavily on open access to public streets and squares. Political assemblages were considered ordinary uses of public places, and one was not required to obtain permission from local authorities prior to engaging in street politics. Legal regulation was limited to responding to breaches of the peace. The prevailing understanding of the right of assembly reinforced this regulatory minimalism. While the reasons for instituting what has become our regulatory approach remain unclear, we do know that as late as the 1880s many large American cities lacked permit requirements and that the first state supreme courts to review permit requirements for public assemblies struck them down.

This nineteenth-century history stands in sharp contrast to contemporary practices with respect to gatherings on public streets and in public parks. Today the state regulates virtually all assemblies, including those that are peaceful and minimally inconvenient.<sup>212</sup> To demonstrate, parade, or make a speech in public, individuals and organizations must often obtain a permit from government officials well in advance. In fact, even where permits are not required assemblies may be dispersed for actual and anticipated obstructions of traffic, including pedestrian traffic.

This regulatory shift, and judicial approval of it, amounts to a narrowing of the substance of the right of peaceable assembly. The nineteenth-century right was one of assembly without needing to ask permission and of going forth without restriction unless and until one breached the one condition of access,

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211. For a persuasive argument that the Supreme Court's decision in *Davis III* emerged as the backdrop against which all cases involving the permissibility of prohibiting or abridging speech and assembly on government property are considered see Post, *supra* note 43, at 1722–47 (discussing *Davis III*'s influence on the development of the Court's doctrine concerning government regulation of speech on its property).

212. Cf. Randy Furst, *Protesters Dispute St. Paul Police in Court; General Threats of Possible Violence Not Linked to an Antiwar March Can't Be Used to Deny the Preferred Route, Court Filings Say*, MINNEAPOLIS STAR TRIB., June 28, 2008, at 1B (noting that authorities were relying on web postings advocating civil disobedience to justify changes made to a requested permit even as they acknowledged that the websites were not affiliated with the coalition requesting the permit to march).

namely that one be peaceable. Today, by contrast, we have a right to assemble on the streets, *so long as* we obtain permission from officials (if that is required), abide by the terms of the permit issued, *and* are peaceable. Moreover, the definition of peaceable has been narrowed: An assembly may be dispersed for actually or potentially obstructing traffic (including pedestrian traffic), even where no permit is required.

Aside from the above, the history presented is itself significant. First, it indicates that this narrowing was largely unconsidered and has gone largely unnoticed. Second, and more importantly, it gives us insight into the social and political practices that the right of peaceable assembly was meant to protect as well as the value of them. Specifically, it suggests that the right is meant foremost to protect an avenue of democratic politics. It protects both the people's ability to influence and check government and a space for the formation, reconsideration, and consolidation of political preferences and, by implication, for the formation of an autonomous people.

Thus, we should be extremely wary of complacency in the face of government regulation of public assemblies. In fact, there is good reason to think that current regulatory choices are undermining the meaningfulness of public assemblies for participants as well as their effectiveness as a mechanism to influence and check government. Since the former harm is likely to be the less appreciated, it is worthy of particular comment.

The very need to ask permission renders the people supplicant in the democratic process while the conditions that can be placed on permits issued can turn participation in a public gathering into nothing more than a symbolic performance, an imprecise measure of preferences. Denver prided itself on establishing a Designated Parade Route available on each day of the convention without a permit, and St. Paul approved a large antiwar march for a location closer to the Republican National Convention's site than any city since 2000.<sup>213</sup> Still, both cities separated protestors and delegates through careful time management. Denver's parade route was only available between 11 a.m. and 2:30 p.m., at least a full hour before delegates would begin activities at the convention.<sup>214</sup> Similarly, St. Paul denied the Coalition to March on the

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213. See *Coalition to March on the RNC & Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1021 (D. Minn. 2008) (noting that the district court was unaware of any march during the Republican and Democratic national conventions in 2000 and 2004 "that passed within sight and sound of the conventions' sites"); see also Martha T. Moore, *Convention Cities Brace for Political Protests; Dispute Over St. Paul Route in Court Today*, U.S.A. TODAY, July 9, 2008, at 4A (quoting St. Paul's city attorney as saying, "This (route) takes you within the shadow of the Xcel Center. That's really not happened before").

214. See *ACLU of Colo. v. City & County of Denver*, 569 F. Supp. 2d 1142, 1156 (D. Colo. 2008); see also Felisa Cardona, *Protester-Access Suit Widened, The ACLU Calls Limits on Parade Proximity and*

RNC and Stop the War's request for a permit to march starting at 2 p.m. on the first day of the Republican convention, offering it instead a permit that required it to clear the streets near the convention well in advance of the arrival of Republican delegates.<sup>215</sup>

It is equally worrisome that when New York City's refusal to permit a march past the United Nations was upheld as a reasonable regulation of the manner of speech, the trial judge accepted the city's explanation for its security concerns.<sup>216</sup> What the city offered, and what the court accepted, as an explanation for why the proposed march was an unusual security risk was the plaintiff's changing estimates as to the number of expected protestors, the mere three weeks notice, and the fact that the "proposed march [did] not have the discipline of an organized line or march where there is an established, carefully planned and paced sequence throughout the parade route."<sup>217</sup> That is, the court accepted the city's desire for predictability despite the fact that this was a mass demonstration opposing an imminent war.<sup>218</sup> These seemingly managerial choices ritualize street politics in ways that minimize its significance and meaningfulness for participants.

We seem to have forgotten that the right of assembly, like the right to petition, was originally considered central to securing democratic responsiveness and active democratic citizens. We now view it instead as simply another facet of the individual's right of free expression, focusing almost exclusively on the question of whether the group's message will be heard.

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*Leafleting Too Strict*, DENVER POST, July 1, 2008, at B-01 ("Denver and federal officials won't allow groups that plan to demonstrate during the Democratic National Convention to conduct nearby parades at the same time delegates are entering the Pepsi Center and won't let them close enough to hand leaflets to delegates from the fenced protest zone."). This aspect of the city's regulations was not challenged in court.

215. See *Coalition to March on the RNC & Stop the War*, 557 F. Supp. 2d at 1018 (upholding the changes as a valid restriction on the time, place, and manner of speech); see also Tom Pope, *Demonstration Permits Frustrate Groups: Political Parties Keeping Advocates Far Away From Conventions*, NONPROFIT TIMES, Aug. 1, 2008, at 1 (explaining that the city's permit for an antiwar march was intended to ensure that the march ended prior to the delegates' arrival); John C. Ensslin, *Protest Parade Route Not Yet Set; If St. Paul Is Any Gauge, City Likely to Face Challenge*, ROCKY MOUNTAIN NEWS, May 16, 2008, at 6 (noting that "the time frame set by police for the march ensures that the Republican Party has the entire evening's spotlight to itself").

216. *United for Peace & Justice v. City of N.Y.*, 243 F. Supp. 2d 19, 30–31 (S.D.N.Y.), *aff'd*, 323 F.3d 175 (2nd Cir. 2003).

217. *Id.* at 27 (citation omitted).

218. Perhaps in recognition of this, the Second Circuit, when it affirmed, "caution[ed] that, while short notice, lack of detail, administrative convenience and costs are always relevant considerations in the fact-specific inquiry required in all cases of this sort, these factors are not talismanic justifications for the denial of parade permits." *United for Peace & Justice*, 323 F.3d at 178 (holding that the District Court had not abused its discretion in denying preliminary injunctive relief).

Essentially, this Article argues that the right of assembly should not be collapsed into the right of free expression. It should not be forgotten that when Madison first proposed the bill of rights amendments in 1789, he separated the collective rights of assembly and petition from those of speech and press.<sup>219</sup> The right of assembly protects collective action—political and social. It protects the people and their aspirations for collective public deliberation on issues of public importance. It protects “[t]he right of the people” to have “a public demonstration or parade to influence public opinion and impress their strength upon the public mind, and to march upon the public streets of the cities.”<sup>220</sup> Freedom of speech, by contrast, protects individuality. It protects the individual’s right as a democratic citizen to challenge political and social institutions. Both clearly have important political uses in a democratic society, but this shared political function has obscured essential distinctions in the traditions and fundamental purposes underlying the two rights.

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219. Higginson, *supra* note 71, at 155–56.

220. *Anderson v. City of Wellington*, 19 P. 719, 722 (Kan. 1888).