INTERACTIVE CONSTITUTION

First Amendment – Right to Assemble and Petition
Common Interpretation

John Inazu & Burt Neuborne

The “right of the people peaceably to assemble, and to petition the Government for a redress of grievances” protects two distinct rights: assembly and petition. The Clause’s reference to a singular “right” has led some courts and scholars to assume that it protects only the right to assemble in order to petition the government. But the comma after the word “assemble” is residual from earlier drafts that made clearer the Founders’ intention to protect two separate rights. For example, debates in the House of Representatives during the adoption of the Bill of Rights linked “assembly” to the arrest and trial of William Penn for participating in collective religious worship that had nothing to do with petitioning the government.

While neither “assembly” nor “petition” is synonymous with “speech,” the modern Supreme Court treats both as subsumed within an expansive “speech” right, often called “freedom of expression.” Many scholars believe that focusing singularly on an expansive idea of speech undervalues the importance of providing independent protection to the remaining textual First Amendment rights, including assembly and petition, which are designed to serve distinctive ends.

Assembly

Assembly is the only right in the First Amendment that requires more than a lone individual for its exercise. One can speak alone; one cannot assemble alone. Moreover, while some assemblies occur spontaneously, most do not. For this reason, the assembly right extends to preparatory activity leading up to the physical act

of assembling, protections later recognized by the Supreme Court as a distinct "right of association," which does not appear in the text of the First Amendment.

The right of assembly often involves non-verbal communication (including the message conveyed by the very existence of the group). A demonstration, picket-line, or parade conveys more than the words on a placard or the chants of the crowd. Assembly is, moreover, truly "free," since it allows individuals to engage in mass communication powered solely by "sweat equity."

The right to assemble has been a crucial legal and cultural protection for dissenting and unorthodox groups. The Democratic-Republican Societies, suffragists, abolitionists, religious organizations, labor activists, and civil rights groups have all invoked the right to assemble in protest against prevailing norms. When the Supreme Court extended the right of assembly beyond the federal government to the states in its unanimous 1937 decision, *De Jonge v. Oregon*, it recognized that "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."

The right of assembly gained particular prominence in tributes to the Bill of Rights as the United States entered the Second World War. Eminent twentieth-century Americans, including Dorothy Thompson, Zechariah Chafee, Louis Brandeis, John Dewey, Orson Welles, and Eleanor Roosevelt, all emphasized the significance of the assembly right. At a time when civil liberties were at the forefront of public consciousness, assembly figured prominently as one of the original "Four Freedoms" (along with speech, press, and religion). When, however, President Franklin Delano Roosevelt switched to a different grouping of "four freedoms" in an effort to rally support for

American entry into WWII, assembly (and press) dropped out. Neglect of assembly as a freestanding right has continued ever since. In fact, the Supreme Court has not decided a case explicitly on free assembly grounds in over thirty years. But despite its recent state of hibernation, the freedom to assemble peaceably remains integral to what Justice Robert Jackson once called "the right to differ."

Petition

The right to "petition the Government for redress of grievances" is among the oldest in our legal heritage, dating back 800 years to the Magna Carta, and receiving explicit protection in the English Bill of Rights of 1689, long before the American Revolution. Ironically, the modern Supreme Court has all but read the venerable right to petition out of the Bill of Rights, effectively holding that it has been rendered obsolete by an expanding Free Speech Clause. As with assembly, however, the right to petition is not simply an afterthought to the Free Speech Clause.

The right to petition plays an important role in American history. The Declaration of Independence justified the American Revolution by noting that King George III had repeatedly ignored petitions for redress of the colonists' grievances. Legislatures in the Revolutionary period and long into the nineteenth century deemed themselves duty-bound to consider and respond to petitions, which could be filed not only by eligible voters but also by women, slaves, and aliens. John Quincy Adams, after being defeated for a second term as President, was elected to the House of Representatives where he provoked a near riot on the House floor by presenting petitions from slaves seeking their freedom. The House leadership responded by imposing a "gag

rule" limiting petitions, which was repudiated as unconstitutional by the House in 1844.

One of the risks of representative democracy is that elected officials may favor the narrow partisan interests of their most powerful supporters, or choose to advance their own personal interests instead of viewing themselves as faithful agents of their constituents. A robust right to petition is designed to minimize such risks. By being forced to acknowledge and respond to petitions from ordinary persons, officials become better informed and must openly defend their positions, enabling voters to pass a more informed judgment.

The right to petition should be contrasted with the right to instruct. A right of instruction permits a majority of constituents to direct a legislator to vote a particular way, while a right of petition assures merely that government officials must receive arguments from members of the public. The drafters of the Bill of Rights decided not to include a right of instruction in order to encourage legislators to exercise their best judgment about how to vote.

Today, in Congress and in virtually all 50 state legislatures, the right to petition has been reduced to a formality, with petitions routinely entered on the public record absent any obligation to debate the matters raised, or to respond to the petitioners. In a political system where incumbent legislators can make it all but impossible to mount a credible re-election challenge, an energized right to petition might link modern legislators more closely to the entire electorate they are pledged to serve. Some scholars have even argued that the Petition Clause includes an implied duty to acknowledge, debate, or even vote on issues raised by a petition. The precise role of a robust Petition Clause in our twenty-first century democracy

cannot be explored, however, until the Supreme Court frees the Clause from its current subservience to the Free Speech Clause.	

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Matters of Debate

"Beyond Speech and Association"

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One of the most troubling developments in modern First Amendment doctrine is the judicial focus on the free speech right to the exclusion of other rights and the values and purposes that underlie them. This neglect has significant consequences for two aspects of the right of assembly: (1) the right to protest; and (2) the right to associate.

Protest

Most protests are governed what is known as the *public forum doctrine*, which allows government to regulate expressive activity in public spaces through time, place, and manner restrictions. Today's public forum doctrine is linked entirely to the free speech right—the right of assembly is seldom even mentioned in judicial analysis of protest restrictions. And current speech-based public forum analysis upholds restrictions on political protesters, anti-abortion demonstrators, labor picketers, churches, and religious groups.

The focus on speech to the exclusion of assembly is odd, since a protest is often more obviously an assembly than it is speech, and some protests don't include any verbal expression at all.

The origins of the public forum doctrine are closely linked to the right of assembly. As the Court noted in one of its earliest cases that recognized the public forum: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts

between citizens, and discussing public questions." The public forum is a First Amendment doctrine, not a free speech doctrine.

Association

The First Amendment refers to the right of the people "to assemble." That wording suggests a momentary gathering, like a protest or parade. But the verb "assemble" presupposes a noun—an assembly. And while some assemblies occur spontaneously, most do not. People usually need to form a group or association of some kind before they assemble in public. Those formative experiences include building relationships, developing ideas, and forming social bonds—activities that ought to be protected from unwarranted government interference. Just as government can effectively eliminate the free speech right by imposing a prior restraint before speech manifests, it can effectively eliminate the assembly right by restricting a group or association before it assembles in public.

The Supreme Court has attempted to address these other interests by recognizing a "right of association" that does not appear in the text of the Constitution. The Court initially linked this right to the First Amendment rights of speech and assembly. Over time, however, courts and scholars neglected the assembly roots of the right of association and focused increasingly on speech and expression.

The clearest example of the Court's focus on outward expression at the cost of other important values underlying assembly is its recognition of the category of "expressive association" in a 1984 decision, *Roberts v. United States Jaycees*. (The *Jaycees* decision also recognized a separate category of "intimate association," but courts have narrowed eligibility for that constitutional

category to the point that it offers few practical protections.)

The basic idea of expressive association is that a group is eligible for constitutional protection only to the extent that its purposes and activities further some other First Amendment interest, like speech, press, or religion. The Supreme Court has put it this way: "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

In other words, the legal doctrine of expressive association instrumentalizes the associational right—it must be enlisted toward some purportedly more significant end. But as political theorist George Kateb has observed, in the real world, "people find in association a value in itself." Instrumentalizing association toward outwardly expressive ends neglects these other goods.

Expressive association also comes with a troubling corollary: some associations are "non-expressive." This category of non-expressive association obscures the fact that all associative acts have expressive potential: joining, gathering, speaking, and not speaking can all be expressive. It becomes very difficult, if not impossible, to police this line apart from the expressive intent of the members of the group.

Finally, the right of expressive association seems to marginalize the significance of a group's composition, membership, and leadership to its other expressive purposes. As the Supreme Court has asserted on multiple occasions:

There can be no clearer example of an intrusion into the internal structure or affairs of an

association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts v. United States Jaycees (1984).

Yet, in practice, the Court has often failed to honor the implications of this claim. In one of the most disturbing decisions in this area of the law, a 5-4 majority concluded in a 2010 decision, *Christian Legal Society v. Martinez*, that claims of speech and expressive association simply "merge" into free speech analysis. That conclusion implies that the right of association raises no important First Amendment values left unaddressed by the free speech right. So, too, it seems with the Court's treatment of the rights of assembly and petition.

First Amendment – Right to Assemble and Petition
Matter of Debate

"Reading the First Amendment as a Whole"

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The forty-five words of the First Amendment list six necessary ingredients for democratic self-government: the Establishment Clause (freedom from religion); the Free Exercise Clause (freedom of religion); the Free Speech Clause (freedom to speak your mind); the Free Press Clause (freedom to use technology to transmit speech to a larger audience); Freedom of Assembly (freedom to join with others to advance an idea); and the right to Petition Government for Redress of Grievances (freedom to present arguments to the government).

The careful order of the six ideas replicates the life-cycle of a democratic idea: born in a free mind protected by the two Religion Clauses (which are viewed today by the Supreme Court as protecting secular as well as religious conscience); communicated to the public by a free speaker; disseminated to a mass audience by a free press; collectively advanced by freely assembled persons; and presented to the government for adoption pursuant to petition. No other rights-bearing document in our history lists the foundational ideas of conscience, speech, press, assembly and petition in one place, much less in the careful order imposed by the Founders.

Instead of treating each of the First Amendment's six clauses as protecting an essential ingredient of democratic life worthy of independent elaboration, the modern Supreme Court often concentrates solely on the ten words of the Free Speech Clause, demoting the Press, Assembly, and Petition Clauses to specialized forms of speech. The result is an underdeveloped Free Press

Clause, an anemic Free Assembly Clause, and a Petition Clause on life-support.

Press

If the Free Press Clause were viewed, not merely as a colony of the Free Speech Clause, but as a freestanding grant of protection to the process of using technology to disseminate speech to a mass audience, the Supreme Court would be obliged to consider and define the role of a free press in a functioning democracy. At least three things might change. First, the Court might reconsider its refusal to grant members of the press increased access to places – like prisons – that are hidden from public view. Second, the Court might insulate the press from liability for merely transmitting someone else's speech, just like the immunity enjoyed by the telephone company. Finally, the Court might re-consider its decision to treat huge corporate media empires as fully protected speakers, instead it might view them as technological conduits with a duty to provide access to weak voices as well as strong ones.

Assembly

Under current law, the Supreme Court treats exercises of freedom of assembly, like picketing and demonstrating, as free speech that is "brigaded" with action. Thus, while the Supreme Court recognizes the abstract First Amendment right of people to gather together on streets and in parks for meetings, speeches, parades, protest marches, picketing, and demonstrations, it also grants the police broad discretion to regulate public assemblies in the name of preserving public order. Sometimes, the regulations require groups to obtain a permit in advance. Supporters of permit laws argue that they are needed to give the authorities notice of the possible need for a police presence, or to assure that competing groups do not seek to occupy the same space at

the same time, risking violence. Opponents fear that local authorities will abuse the permit process to prevent unpopular persons from acting collectively to support their point of view.

In an effort to minimize possible abuse, the Supreme Court bans permit laws that give local authorities too much discretion about whether to permit an assembly, and requires that valid permit laws be enforced with strict equality. Even if a permit is granted – or is not required – public assemblies remain subject to discretionary regulation by the police in order to minimize the risk of disorder, or interference with the rights of others. The Supreme Court has ruled that it is the job of the police to protect an assembly from a "heckler's veto." Where, however, hostile response threatens to spill over into violence, inevitable pressure exists to shut down the assembly. Pressure also exists to prevent assemblies from inconveniencing non-participants through noise and interference with free passage. Not surprisingly, despite the Court's effort to limit police discretion by requiring equal enforcement of precise regulations, under existing law, free assembly often exists at the mercy of the police. Witness the fate of Occupy Wall Street—an anarchic exercise in Free Assembly that was initially tolerated, but rapidly suppressed when it threatened to inconvenience too many non-participants.

While the tension between free assembly and public order can never be eliminated, recognition that the First Amendment treats free assembly as a fundamental building block for a well-functioning democracy—and not merely as a disfavored form of free speech—might place greater restraints on the power of the police to regulate free assembly. Preserving a vigorous right to assemble freely is particularly important, since marches, picketing and demonstrations provide poor, less well-educated segments of the society

with a potent and inexpensive method of expression that does not require verbal sophistication.

Petition

Under existing law, the Petition for Redress of Grievances Clause is a dead letter. While the Supreme Court has ruled that the Petition Clause adds nothing to a free speech claim, the Founders must have believed that the right to Petition was not the same thing as the right to speak. That's why they put the two ideas in separate clauses.

How might we resuscitate the Petition Clause in the 21st century United States? We might re-invent the Petition Clause as an anti-gridlock device to force the legislature to consider issues that, according to the petitioner, are being swept under the rug. We might require an answer to a formal petition. We might even require a formal vote. In a political system where legislators risk being insulated from their constituents, petitions might trigger the dialogue that knits them closer together. Finally, the Petition Clause may have untapped potential. In 1958, the Supreme Court expanded the literal text of the Free Assembly Clause to protect an analogous but extra-textual Freedom of Association. Most observers applaud this expansion of the Assembly Clause to cover more modern forms of democratic collective action. A similar potential for expansion by analogy exists in the Petition Clause. As we have seen, the six clauses of the First Amendment track the operation of democracy, culminating in the citizen's formal interaction with the government under the Petition Clause. Until now, the idea of Petition has been limited to presenting written arguments to the government. What if petition were expanded to include the ultimate petition to redress grievance – voting – as assembly was expanded to include association? Maybe that's where the elusive constitutional right to vote is

hiding in plain sight, just waiting to be discovered?	