ASSEMBLING THE PAST: HISTORY, TRADITION, AND THE FUTURE OF THE RIGHT OF ASSEMBLY

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This Article revisits the long-neglected Assembly Clause of the First Amendment in light of the Supreme Court's recent turn to "history and tradition" as an interpretive methodology. I trace the doctrinal errors that obscured assembly—its narrowing to petition in the late nineteenth century, its absorption into speech through the public forum doctrine, and its displacement by a nontextual right of association. I argue that a tradition-based interpretive methodology offers a possibility for recovering assembly's constitutional significance. Drawing on the work of Marc DeGirolami and H. Jefferson Powell, as well as Alasdair MacIntyre's account of tradition as an embodied, historically extended argument, I show how the Assembly Clause exemplifies a living practice that cuts across ideological divides. Properly understood, assembly reflects not only expressive activity but also the social practices of gathering, dissent, and collective identity that sustain democratic pluralism. The Article concludes that the Court's emphasis on history and tradition, if taken seriously, should restore assembly to its rightful place as a core First Amendment protection.

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INTRODUCTION

"You should be an originalist."

I was at dinner with a prominent scholar of originalism who had invited me to speak to his law school seminar about my book, *Liberty's Refuge: The Forgotten Freedom of Assembly*.[1] The bar felt high: Justice Scalia had spoken to the seminar the previous week.

The problem was that I was not then—and still am not—an originalist. As I wrote in *Liberty's Refuge*, my approach to the constitutional interpretation of the Assembly Clause was neither originalist nor "the kind of interpretive 'dynamism' that supports contemporary social values."[2] Instead, I focused on a number of different interpretive arguments.[3] As I elaborated: "The important issues surrounding the boundaries of group autonomy cannot be addressed through a theoretical lens that forgets legal history or a doctrinal legal lens that ignores political context. Resources within history and political theory can help sharpen the ways in which we explore the meaning of constitutionalism."[4]

Left without a more distinctive interpretive method, I turned to Philip Bobbitt's *Constitutional Fate*.[5] Bobbitt set out six modalities for evaluating constitutional argument: textual, structural, prudential,

1 JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

2 *Id.* at 17.

3 *Id.* at 18 (first citing PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); then citing ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3d ed. 2007) [hereinafter MACINTYRE, AFTER VIRTUE]; and then citing ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988) [hereinafter MACINTYRE, WHOSE JUSTICE?]).

4 *Id.*

5 BOBBITT, *supra* note 3.

historical, precedential, and ethical.[6] On my analysis, text, history, and ethics were most relevant to the right of assembly.[7]

Looking back on *Liberty's Refuge*, I see now I was grasping at a method that lacked a descriptive vocabulary. I was a year out of graduate school and focused at the time more on political theory than constitutional interpretation. Whatever intuitions I had about constitutional interpretive methodology were derivative of my study of political theory, which was itself already somewhat unique due to the combined influence of two of my graduate school mentors, Stanley Hauerwas and Jeff Powell.[8] Hauerwas and Powell both drew heavily from Alasdair MacIntyre; Powell's 1993 book, *The Moral Tradition of American Constitutionalism* (which was based on a dissertation directed by Hauerwas) used MacIntyre to situate constitutional interpretation as a practice-

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6 *Id.* at 3–8, 93. As summarized by Neil Siegel and Robert Cooter:

> *Historical* arguments appeal either to preratification history or to postratification history. *Prudential* or *consequentialist* arguments identify the good or bad social consequences of an interpretation. *Textual* arguments rely on the text of the Constitution and the rules for interpreting texts. *Structural* arguments draw inferences from the theory and structure of government created by the Constitution. *Precedential* arguments offer the existence of previous decisions, either past political practice or past judicial rulings, as justifying a certain outcome in a later case. Finally, [ethical] arguments tell a story about national identity; they tend to take a narrative or historical form and inquire whether a given interpretation is faithful to the meaning or destiny of the country, its deepest cultural commitments, or its national character.

Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 155 (2010).

7 INAZU, *supra* note 1, at 151 ("The *textual* argument begins with the not irrelevant fact that the right of assembly—unlike association—is actually in the text of the Constitution. It also suggests that assembly was never intended to be limited to the purposes of petition."); *id.* at 152 ("Every important social movement in this country began as a collection of 'unofficial' and 'nonpolitical' gatherings. Informal relationships and activities nurtured the nascent groups that eventually produced the greatest political change."); *id.* ("[P]luralism and dissent are among our nation's deepest cultural commitments. Dissenting practices confront an ever-present challenge by the state to domesticate their destabilizing tendencies. Powerful countervailing visions of stability and consensus from mid-twentieth-century pluralism and Rawlsian liberalism have sought to bind our country together at the cost of silencing the margins of dissent. But the groups that have lived in the shadow of the state have never fully acquiesced.").

8 Hauerwas and Powell both advised the dissertation on which *Liberty's Refuge* is based. Hauerwas is a prominent theologian who taught for many years at Duke Divinity School. *See generally* John D. Inazu, *Foreword: Stanley Hauerwas and the Law: Is There Anything to Say?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012, at i (editor's introduction to symposium volume on Theological Argument in Law). Powell is a law professor at Duke who has been an influential critic of early originalist arguments. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (book review).

based tradition.[9] As I noted at the time, Powell was the closest model I had to a methodology for constitutional interpretation.[10]

That was 2012. Since then, both courts and scholars have recognized new forms of constitutional interpretation distinct from the kind of originalism that Justice Scalia and others have long championed.[11] These methodological approaches can loosely be categorized as "traditionalism." Although they have important differences, they share in common: (1) initial consideration of the constitutional text; (2) evaluation of historical evidence of social practices related to that text; and (3) consideration of the duration and consistency of that historical evidence over time. Traditionalism as I conceive it differs from originalism not merely in its emphasis but in its understanding of constitutional meaning and authority: Where originalism grounds meaning in authorial intent or public meaning at enactment, traditionalism sees meaning as unfolding through social practices over time.

This Article argues that the recent emergence of judicial and scholarly accounts of traditionalism offers interpretive resources to reclaim the neglected right of assembly. In fact, recovering the right of assembly is possible under either the Court's understanding of traditionalism or an alternative tradition-based approach that places greater weight on the lived practices of ordinary citizens. Focusing on assembly may also have broader normative appeal than some of the Court's initial applications of traditionalism: The contours of assembly are not about a particular vision of the country or even a particular vision of liberty—they are more akin to procedural protections that allow citizens to argue and attempt to persuade others of their preferred visions of the good.

Part I explores the account of assembly that I set forth in *Liberty's Refuge*. I highlight three mistakes that have contributed to the neglect of this foundational right. The first is the Supreme Court's factual misinterpretation of the Assembly Clause in a late nineteenth-century opinion that led to decades of scholarly confusion and remains uncorrected to this day. The second is the Court's embrace of a speech-based public forum doctrine that neglected the assembly roots of that

9 H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).

10 INAZU, *supra* note 1, at 195 n.38 (noting that Powell's book was "an example of the kind of interpretive approach to which I am sympathetic"). I have been more explicit about the MacIntyrean grounding of my thinking in later work. *See, e.g.*, John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 599 (2015) ("[Our] beliefs and intuitions depend upon tradition-dependent values that cannot be empirically proven or fully justified by forms of rationality external to particular traditions.").

11 *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., new ed. 2018).

doctrine. The third is the Court's mid-twentieth-century recognition of a nontextual right of association, historically and conceptually best rooted in the Assembly Clause but subsequently tied almost exclusively to the Speech Clause. Part II traces the emergence of a tradition-based method of interpretation in scholarship and judicial decisions and then uses this recent focus as an opportunity to revisit and expand upon the traditionalist elements of *Liberty's Refuge*. Part III proposes the Assembly Clause as a case study for traditionalism.

I. THE ARGUMENT OF *LIBERTY'S REFUGE*

Liberty's Refuge offered a comprehensive argument for recovering the long-neglected right of assembly. It was the first book-length consideration of that right in over fifty years.[12] My recounting of the history of assembly in that book and later work drew attention to three mistakes that contributed to its demise.

A. Assembly and Petition

The weakening of the right of assembly began with a factual misreading by the Supreme Court. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[13] A careful consideration of the text reveals some grammatical oddities in the Amendment's final clause: The singular "right" appears to refer to both assembly and petition, but the conjunction "and" suggests otherwise, and the comma after "assemble" seems out of place.[14] The textual sloppiness is likely the result of the constitutional Framers cobbling together various provisions and language suggested by the various states.[15]

The interpretive error that led to a narrower reading of assembly began in the Court's 1876 decision, *United States v. Cruikshank*.[16] In arguing that the First Amendment established a right enforceable only against the federal government, Chief Justice Waite wrote:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing

12 Linda Lumsden's excellent book on women's suffrage provides a partial account of the right of assembly but lacks a detailed constitutional analysis. *See* LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY (1997).

13 U.S. CONST. amend. I.

14 *See* INAZU, *supra* note 1, at 23.

15 *See id.* at 22.

16 United States v. Cruikshank, 92 U.S. 542 (1876).

> else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.[17]

Waite was most likely referencing petition as an *example* of the kind of assembly protected by the First Amendment.[18] But as I observed in *Liberty's Refuge*, his mention came so close to the First Amendment's text that "[r]ead in isolation from his qualifying language, the dictum could erroneously be construed as limiting assembly to the purpose of petitioning Congress for a redress of grievances."[19]

In 1886, Justice Woods in *Presser v. Illinois* interpreted *Cruikshank* as supporting this narrow view of assembly.[20] Justice Woods concluded that the First Amendment protected the right to assemble only if "the purpose of the assembly was to petition the government for a redress of grievances."[21] His assertion clearly misstates both the wording and intent of the First Amendment. But his error was followed in decades of ensuing scholarship.[22]

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17 *Id.* at 552.

18 *Cruikshank* preceded the Court's incorporation of the Assembly Clause through the Fourteenth Amendment. *See* De Jonge v. Oregon, 299 U.S. 353 (1937). The "or" in the quoted passage is a clue that petitioning the federal Congress was one example of a right related to a power or duty of the national government.

19 INAZU, *supra* note 1, at 39. *Cruikshank* infamously limited the scope of federal protection from violence against African Americans in the Reconstruction South. *See* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

20 *See* Presser v. Illinois, 116 U.S. 252, 267 (1886).

21 *Id.*

22 In 1908, a commentator writing in *The Bench and Bar* cited *Cruikshank* in support of his contention that "the right to assemble is merely incidental to the right to petition" and concluded that "the right to assemble except for the purpose of petitioning the government is not expressly guaranteed by . . . the Federal Constitution." *The Right of Assembly*, BENCH & BAR, Apr. 1908, at 7, 9. This incorrect reading of assembly has persisted in more recent scholarship. *See* Peter R. Fisher, Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730, 736 (1960) ("The first case to construe this provision of the first amendment construed freedom of assembly to mean the right to assemble *in order to* petition the government."); CHARLES E. RICE, FREEDOM OF ASSOCIATION 109 (1962) (citing *Cruikshank* for the view that the language in the First Amendment "constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition"); GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 152 (1961) ("It is important to note that the Cruikshank dictum *narrowed* the federal right from that of 'the right to peaceably assemble and petition for redress of grievances' to 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government.'" (emphasis added)); EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 332 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) (citing *Cruikshank* for the view that historically, "the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: 'the right of the people peaceably to assemble' *in order to*

One of the strangest aspects of Justice Woods's mistake and the scholarly embrace of it is that the right of assembly had a clearly established history and tradition by the time of *Presser*. As recounted in Part III, by the end of the nineteenth century, assembly had been championed by political groups, suffragists, abolitionists, and others. Groups operating at local, state, and national levels routinely referenced the importance of assembly for purposes well beyond petitioning the government.

B. Speech and the Public Forum Doctrine

A second historical development that diminished the significance of the right of assembly came in the Supreme Court's recognition of the public forum doctrine.[23] The seeds of the public forum doctrine first appeared in the 1939 decision, *Hague v. Committee for Industrial Organization*.[24] The briefs in that case highlighted the importance of assembly to public gatherings.[25] Justice Roberts's plurality opinion referenced "speech and assembly" and included commentary on the right of assembly.[26] The opinion also famously asserted: "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."[27] After the Court released its *Hague* decision, *The New York Times* celebrated with the headline: "With Right

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'petition the government'"). *Presser* has also been cited as limiting assembly to the purpose of petition. *See* Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 91 (1987) (citing *Presser* for the view that the freedom of assembly is "the exercise by groups of the right to petition for redress of grievances"). The consequences of this misstep continue today. In 2018, a federal court in Minnesota rejected a First Amendment claim after concluding "there is no free-standing right to free assembly." First Lutheran Church v. City of St. Paul, 326 F. Supp. 3d 745, 767 (D. Minn. 2018). Two years later, a federal court in Kentucky addressing an assembly claim raised against a COVID-related restriction concluded that "[c]ourts typically evaluate free speech, assembly and petition claims under the same analysis." Ramsek v. Beshear, 468 F. Supp. 3d 904, 914 (E.D. Ky. 2020). *But see* Chisom v. Roemer, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (noting that the First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

23 For a more detailed analysis from which this section draws, see John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1170–77 (2015).

24 Hague v. Comm. for Indus. Org., 307 U.S. 496, 514–16 (1939).

25 *See* Brief on Behalf of Petitioners at 44–50, *Hague*, 307 U.S. 496 (No. 651); Respondents' Brief at 62–66, *Hague*, 307 U.S. 496 (No. 651).

26 *Hague*, 307 U.S. at 515, 515–16.

27 *Id.* at 515.

of Assembly Reasserted, All 'Four Freedoms' of Constitution Are Well Established."[28]

Regrettably, neither assembly nor the public forum saw much doctrinal clarity in the years that followed. The shift away from *Hague*'s assembly focus began the following term, with the Court's decision in *Thornhill v. Alabama*.[29] *Thornhill* and subsequent cases limited the influence of an assembly-based public forum doctrine.

A generation later, Harry Kalven pushed back on this neglect of assembly, calling attention to Zechariah Chafee's brief in *Hague* that had foregrounded the significance of "the constitutional right of assembly."[30] Kalven worried that the Court's decisions since *Hague* had extended protections to verbal or written speech but disfavored "parades, pickets, and protest[s]."[31] He noted that two of the Court's recent opinions involving civil rights protests in public places "bristled with cautions and with a lack of sympathy for such forms of protest."[32] He insisted:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.[33]

Instead of heeding Kalven's warnings about its neglect of assembly, the Court proceeded to develop its public forum analysis entirely under the free speech right. In a line of cases culminating in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court emphasized time, place, and manner restrictions and the importance of "content neutrality."[34] But these new speech-based categories all but invited government officials to constrain assemblies based on formalistic distinctions and categories. As Robert Post has argued, "*Perry* imposes no first amendment constraints whatever on the government's ability to build

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28 Dean Dinwoodey, *A Fundamental Liberty Upheld in* Hague *Case: With Right of Assembly Reasserted, All 'Four Freedoms' of Constitution Are Well Established*, N.Y. TIMES, June 11, 1939, at E7.

29 *See* Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

30 Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 14.

31 *Id.* at 22, 22–23.

32 *Id.* at 8 (referring to *Cox v. Louisiana*, 379 U.S. 536 (1965), and *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

33 *Id.* at 11–12. Robert Post suggests that "[t]he phrase 'public forum' is traditionally attributed to Harry Kalven's classic 1965 article." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987).

34 *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

discriminatory criteria into the very definition or purpose of the limited public forum . . . ."[35]

C. Assembly and Association

The final oddity embedded in the history of assembly is the Court's 1958 recognition of a nontextual right of association in *NAACP v. Alabama ex rel. Patterson*.[36] As Thomas Emerson has noted, the decision "initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them."[37] But the Court ultimately recognized a "constitutionally protected right of association" implicit in the First Amendment.[38]

NAACP v. Alabama came at the height of two notable political movements in the United States: communism and civil rights.[39] The former had taken center stage with the formation of the House Committee on Un-American Activities (HUAC) in 1938.[40] For the twenty years preceding the Court's decision in *NAACP v. Alabama*, the federal government's pervasive loyalty investigations increasingly intruded upon the associational boundaries of suspected communist sympathizers.[41] In 1947, the Federal Employee Loyalty Program examined "membership in, affiliation with or sympathetic association with" groups deemed "totalitarian, fascist, communist, or subversive" by the Attorney General.[42] The Supreme Court rejected civil rights challenges to these and other inquiries in a series of cases that included *Dennis v. United States*, in which a plurality of the Court concluded that when it came to the Communist Party of the United States of America, "[i]t is

35 Post, *supra* note 33, at 1753. Post argues that "as a practical matter the government remains as free to limit public access to a limited public forum as to a nonpublic forum." *Id.*; *see also* Boos v. Barry, 485 U.S. 312, 316, 321 (1988) (adopting *Perry*'s free speech public forum analysis with no mention of assembly in a challenge to a District of Columbia law that prohibited, among other things, congregating "within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes." (quoting Act of Feb. 15, 1938, ch. 29, 52 Stat. 30)).

36 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

37 Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964). Justice Harlan's opinion noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP*, 357 U.S. at 460.

38 *NAACP*, 357 U.S. at 463.

39 INAZU, *supra* note 1, at 91.

40 *See id.* at 65.

41 *Id.* at 65–66.

42 *Id.* at 66 (quoting Exec. Order No. 9,835, 12 Fed. Reg. 1935, 1938 (Mar. 25, 1947)).

the existence of the conspiracy which creates the danger."[43] On June 17, 1957, in what became known as "Red Monday," the Court released four decisions that finally checked some of the government's heavy-handed investigations.[44]

Meanwhile, the growing civil rights movement encountered fierce resistance from both governmental and private actors in the South. *NAACP v. Alabama* began when the state's attorney general sought to enjoin the NAACP from operating.[45] The state court trial judge not only ruled against the NAACP but also ordered the group to produce its membership list, which would have subjected the group's members to harassment and worse.[46] A unanimous Supreme Court sided with the NAACP in its challenge to the state court's disclosure order.[47] Despite briefing focused on assembly cases, the Court's opinion left unclear the constitutional anchor for its newly recognized right of association.[48]

The cases addressing the right of association that emerged after *NAACP v. Alabama* revealed some of the shortcomings of recognizing a right that had neither a history nor a tradition, to say nothing of a textual anchor.[49] These limitations resulted in a highly malleable constitutional framework that offered few constraints against arbitrary applications, all of which could have been mitigated by a historical understanding of the right of assembly and the values underlying it.[50] And indeed, since its initial recognition of the right of association in 1958, the Supreme Court has created even more doctrinal confusion by splintering that right into cumbersome and theoretically confusing categories of expressive association, intimate association, religious

43 *Id.* at 69 (quoting Dennis v. United States, 341 U.S. 494, 511 (1951)).

44 *Id.* at 72.

45 *Id.* at 79.

46 *See id.*

47 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

48 *See* INAZU, *supra* note 1, at 82.

49 *See generally id.* at 84–93 (discussing subsequent Supreme Court decisions addressing the newly recognized right of association).

50 *See id.* at 96; *see also* Melvin Rishe, Comment, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 317–18 (1966) ("To refer to [freedom of association] as a new freedom would be amiss for it is only a further development of the freedom of assembly so plainly stated in the first amendment. It is a progression in the evolutionary process of the right of assembly."); Emerson, *supra* note 37, at 3 ("[W]hile associational rights are fundamental in the legal structure of a democratic society, their protection through creation in doctrinal form of a general 'right of association' does not carry us very far in the solution of concrete issues. Rather, current problems involving associational rights must be framed and answered in terms of more traditional constitutional doctrines.").

association, and political association.[51] These subcategories leave us with a bewildering number of tests and standards that are both undertheorized and susceptible to wide-ranging interpretation.[52]

II. THE RISE OF TRADITIONALISM IN CONSTITUTIONAL INTERPRETATION

The doctrinal eclipse of the Assembly Clause was not inevitable. It stemmed from a series of judicial misreadings and conceptual substitutions—the erroneous narrowing of assembly to petition, the absorption of assembly into speech, and the invention of a right of association untethered from historical grounding or textual mooring. But those contingent shifts might still be correctable by revisiting assembly through the recent methodological turn to traditionalism. In this next Section, I explore the emergence of traditionalism as a judicial and scholarly interpretive framework, outlining how history and social practice have come to matter in recent decisions, and how a reinvigorated understanding of tradition could provide the resources to reclaim the right of assembly.

A. History, Text, and Tradition at the Supreme Court

The Supreme Court in recent years has begun adopting a "history and tradition" approach to some areas of constitutional interpretation. Its key framing emerged in three 2022 decisions addressing the Second Amendment,[53] the Establishment Clause,[54] and abortion.[55]

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51 *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 2 (2023) (discussing the various categories of association).

52 *See id.* at 2, 13–14. The arbitrariness also unfolds *within* these categories. *Contrast* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (denying constitutional protections for an expressive association that excluded on the basis of gender), *with* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (upholding constitutional protections for an expressive association that excluded on the basis of sexual orientation).

53 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

54 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (emphasizing the importance of "historical practices and understandings" over "abstract, and ahistorical" analysis (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

55 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (Abortion is not a right "deeply rooted in this Nation's history and tradition." *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . . Until the latter part of the 20th century, such a right was entirely unknown in American law." *Id.*).

The first case is *New York State Rifle & Pistol Ass'n v. Bruen*.[56] In holding that a New York licensing statute governing firearms ran afoul of the Second Amendment, the Court ignored its usual tiered scrutiny analysis and instead concluded that the government must "identify an American tradition" that justified the regulation as long as the "plain text" of the constitutional provision "covers" the regulated activity.[57] Justice Kavanaugh's concurrence referred to the majority's approach as a "text, history, and tradition test."[58] Justice Breyer's dissent observed that the Court's approach in *Bruen* was deeply out of step with its tiered scrutiny approach in First Amendment and other cases.[59]

The Court next gestured toward the importance of text, history, and tradition in the Establishment Clause context with its decision in *Kennedy v. Bremerton School District*.[60] Although the majority emphasized the importance of "original meaning and history," its context-specific analysis of a high school football coach's prayer had more to do with the nature and circumstances of the prayer.[61] Justice Sotomayor's dissent worried that the Court was adopting a "'history and tradition' test" for the Establishment Clause.[62]

Finally, in *Dobbs v. Jackson Women's Health Organization*, the majority invoked "the history and tradition that map the essential components of our Nation's concept of ordered liberty."[63] Following the Court's approach in *Bruen*, Justice Alito began by looking to the constitutional text and noting "no express reference to a right to obtain an abortion."[64] After concluding that such a right was "not deeply rooted in the Nation's history and traditions" and emphasizing instead "an unbroken tradition of prohibiting abortion on pain of criminal punishment" prior to 1973,[65] the Court overruled *Roe v. Wade*.[66]

Since *Bruen*, *Kennedy*, and *Dobbs*, the most significant decision applying history and tradition is an application of *Bruen* in the Court's 2024 decision, *United States v. Rahimi*.[67] The case involved a Second

56 *Bruen*, 142 S. Ct. 2111.

57 *Id.* at 2129–30, 2156. For an overview of the Court's tiered scrutiny and balancing approach, see Inazu, *supra* note 51.

58 *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

59 *Id.* at 2176 (Breyer, J., dissenting) ("[B]eyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions.").

60 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

61 *Id.* at 2428 ("An analysis focused on original meaning and history . . . has long represented the rule" in Establishment Clause cases.); *id.* at 2425.

62 *Id.* at 2434 (Sotomayor, J., dissenting).

63 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022).

64 *Id.* at 2245.

65 *Id.* at 2253–54.

66 *Id.* at 2279.

67 United States v. Rahimi, 144 S. Ct. 1889 (2024).

Amendment challenge to 18 U.S.C. § 922(g)(8), which prohibits individuals subject to certain domestic violence restraining orders from possessing firearms or ammunition.[68] Chief Justice Roberts's opinion for the Court upheld the statutory provision and emphasized past restrictions on the right to bear arms.[69] Roberts suggested that some courts had "misunderstood" *Bruen*'s methodology, and he specified that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[70] As evidence of historical regulation, Roberts focused principally on surety laws and "going armed" laws.[71] Five Justices wrote separate concurrences critiquing various aspects of the history and tradition framework set forth in *Bruen*.[72] Justice Barrett emphasized that originalists like her place far less emphasis on "[h]istory (or tradition) that long postdates ratification."[73]

Justice Thomas wrote a lengthy dissent critiquing the Chief Justice's reliance on "principles" underlying a "regulatory tradition" and focusing more narrowly on the absence of historical regulation that justified "the statute at issue."[74] Thomas argued that under *Bruen* the proper question was "whether a single historical law has both a comparable burden and justification as § 922(g)(8), not whether several laws can be cobbled together to qualify."[75]

The Court has also signaled an interest in applying history and tradition to other constitutional provisions. In *Bruen*, for example, Justice Thomas flagged "the freedom of speech in the First Amendment."[76] Professors Clay Calvert and Mary-Rose Papandrea have urged

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68 *Id.* at 1894.

69 *Id.* at 1896–97.

70 *Id.* at 1897–98 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)).

71 *Id.* at 1899–1901. Surety laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond," *id.* at 1900, and "going armed" laws "prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land,'" *id.* at 1901 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148).

72 *Id.* at 1904 (Sotomayor, J., concurring, joined by Kagan, J.); *id.* (Gorsuch, J., concurring); *id.* at 1922 (Kavanaugh, J., concurring); *id.* at 1924 (Barrett, J., concurring); *id.* at 1926 (Jackson, J., concurring).

73 *Id.* at 1924 (Barrett, J., concurring). Justice Barrett notes that while "postenactment history can be an important tool[,] . . . the use of postenactment history requires some justification other than originalism simpliciter." *Id.*; *see also* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1626 (noting that almost all originalists agree that "[t]he linguistic meaning or communicative content of the constitutional text is fixed at the time each provision is framed and ratified").

74 *Rahimi*, 144 S. Ct. at 1898; *id.* at 1930 (Thomas, J., dissenting).

75 *Id.* at 1944 (Thomas, J., dissenting).

76 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

caution in expanding the interpretive methodology in this direction, particularly when applied to foundational free speech doctrine like the actual malice standard established in *New York Times Co. v. Sullivan*.[77]

The Court's methodology for history, text, and tradition is not entirely clear, but it appears to include at least the three factors that I associated with traditionalism at the beginning of this Article: (1) the constitutional text; (2) historical evidence of social practices related to that text; and (3) the duration and consistency of that historical evidence over time. The rift between Chief Justice Roberts and Justice Thomas in *Rahimi* suggests that the key consideration emerging from these factors is not really an evaluation of tradition but rather how tightly analogous historical practices are to current practices. Chief Justice Roberts and Justice Thomas disagree about whether a contemporary law restricting firearms in the context of a domestic abuse restraining order resembles historical firearms restrictions. But the fit and strength of the historical analogy has little to do with the persuasive force of a tradition.

B. Scholarly Accounts

Scholarly accounts proximate to the Court's embrace of history and tradition have focused more squarely on the notion of tradition itself. In an important 2020 article, Professor Marc DeGirolami observed that despite passing references to the relevance of "'custom and tradition' . . . to the meaning of specific constitutional provisions[,] . . . no one has studied what tradition signifies across the Supreme Court's interpretation of the Constitution."[78] DeGirolami contended that traditionalist interpretation is "pervasive, consistent, and recurrent across the Court's constitutional doctrine."[79] He also noted that Justices Gorsuch and Kavanaugh, then relatively new additions to the Court, "have indicated that tradition informs their understanding of constitutional meaning."[80]

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77 *See* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023).

78 Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1124 (2020) (quoting Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1745 (2015)).

79 *Id.*

80 *Id.* at 1124–25. DeGirolami's assessment of Justices Gorsuch and Kavanaugh seems right in light of the decisions that have emerged since he published his article. *See supra* Section II.A (discussing *Bruen*, *Kennedy*, and *Dobbs*). Justice Barrett joined the Court in late 2020 and joined the majority in *Bruen*, *Kennedy*, and *Dobbs*, but she has noted key differences between her originalist commitments and the history and tradition approach. *See, e.g.*, *Rahimi*, 144 S. Ct. at 1924–26 (Barrett, J., concurring).

DeGirolami defined traditionalism as reflecting "political and cultural practices" of some duration that is "a composite of age and continuity."[81] The emphasis on "practices, rather than abstract principles or general tests"[82] is a key interpretive feature that is "given tangible form in a people's lived experience."[83] Traditionalism for DeGirolami is not dispositive; rather, it is "presumptive and may be overcome by other considerations" such as "powerful moral or prudential arguments."[84] One particular constraint on tradition is that it must be "consistent with constitutional text."[85]

DeGirolami also emphasized that traditionalism is especially focused on "distinctively *American* traditions as embodied in *American* practices."[86] He speculated that part of this focus may stem from a desire to privilege democratic politics over more abstract judicial principles.[87] But there may be more going on:

> [T]he emphasis in the Court's doctrine on the distinctively "American" quality of traditionalism—of "our people"— . . . suggests that there may be more than an appeal to democratic politics or institutional dynamics at play. Traditionalists adopt a view of the American nation and its practices as legally salient for constitutional interpretation. They are especially interested in national limits and national histories as defining the relevant traditions.[88]

DeGirolami's traditionalism resisted "hard distinctions between governmental practices and general social practices."[89] At the same time, he suggested that judicial decisions themselves lie outside of traditionalism because they are better understood as precedent when it comes to interpretive methodologies.[90] This general sorting makes some sense, but it obscures the influence of both judicial decisions and

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81 DeGirolami, *supra* note 78, at 1125–26. Although DeGirolami examines the role of tradition across a number of the Court's constitutional categories, his consideration of traditionalism in the First Amendment contexts of speech, free exercise, and establishment is especially relevant to assembly. *See id.* at 1141–49. His focus on establishment, in particular, highlights the importance of the duration of a practice to a traditionalist analysis. *See id.* at 1129–31, 1145–48. For example, he observes that in *Town of Greece v. Galloway*, 572 U.S. 565 (2014), the Court not only relied on an earlier case, *Marsh v. Chambers*, 463 U.S. 783 (1983), but also underscored, with respect to legislative prayer, "both the age of the practice and its continuity," DeGirolami, *supra* at 78, at 1130; *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087–89 (2019) (relying on similar premises).

82 DeGirolami, *supra* note 78, at 1125.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 1176.

87 *Id.* at 1176–77.

88 *Id.* at 1177.

89 *Id.* at 1132.

90 *See id.* at 1125.

governmental practices on social practices. When it comes to assembly, for example, the social practice of public protests is inevitably shaped by laws, regulations, and judicial decisions that set the boundaries of "peaceable" assembly.[91] Moreover, DeGirolami's own account of traditionalism blurs his purported distinction between practices and precedent. He notes, for example, the Court's resistance in *United States v. Stevens* to expanding categories of unprotected speech absent "any long-settled tradition of subjecting that speech to regulation."[92] But *Stevens* and other First Amendment decisions rely on the Court's 1942 decision in *Chaplinsky v. New Hampshire*, which asserted:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[93]

The oft-quoted *Chaplinsky* passage is not self-evidently referring to social practices; it could just as well be referencing precedent. And if that were the case, then the "long-settled tradition" that *Stevens* subsequently invokes[94] would in turn be referring to precedent rather than practices.

It appears, then, that traditionalism and precedent are sometimes closely linked. Rather than carving out judicial decisions as methodologically distinct from the social practices that comprise traditionalism, it is perhaps better to observe their interdependence—and, when applicable, their consistency—with those practices.

C. Synthesizing Traditionalism

As the preceding discussion suggests, my attempt at a persuasive normative argument in *Liberty's Refuge* more closely resembles DeGirolami's account of traditionalism than *Rahimi*'s emphasis on historical analogy. For DeGirolami, post-ratification history matters to constitutional interpretation to the extent that it supports the existence of a social practice. *Rahimi*, in contrast, cares less about the tradition itself. Note that either approach—tradition as social practice or tradition as analogous historical practice—ultimately depends on the strength of the underlying argument. This is unsurprising and

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91 *See* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 49 (2017).

92 DeGirolami, *supra* note 78, at 1142 (quoting United States v. Stevens, 559 U.S. 460, 469 (2010)). The Court in *Stevens* characterized the Government's argument to expand the categories of unprotected speech as "startling and dangerous." *Stevens*, 559 U.S. at 470.

93 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (footnote omitted).

94 *Stevens*, 559 U.S. at 469.

unexceptional: It is what lawyers and judges do all the time. Think of questions like whether a case is bound by precedent, whether an activity is covered by statutory text, or whether a historical example is analogous to a contemporary practice. None of these have fixed, objective answers; all of them depend upon the persuasiveness of normative arguments advanced within a particular set of traditions and institutions.[95]

The scholarly and judicial accounts of traditionalism also differ from both an originalist approach focused principally on the meaning of the text at the time of its initial recognition and a pragmatist approach unconstrained by the text's original meaning. Text matters, but it's not all that matters. For traditionalists, the social practices embodying and asserting the significance of a text also help shape its meaning.

One way to understand this interpretive framework is through the underlying notion of a tradition, which Alasdair MacIntyre defines in *After Virtue* as "an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition."[96] A tradition's core arguments are "embodied in a set of texts which function as the authoritative point of departure for tradition-constituted enquiry and which remain as essential points of reference for enquiry and activity, for argument, debate, and conflict within that tradition."[97] As MacIntyre notes, "when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose."[98]

This element of traditionalism also means that the direction and ends of any given tradition are always contingent—the ongoing argument within any tradition means that direction and ends can change

95 Institutional specificity matters because different institutional actors will require different normative arguments. Consider, for example, the difference between the Supreme Court and a lower court bound by the Supreme Court's precedent.

96 MACINTYRE, AFTER VIRTUE, *supra* note 3, at 222. As Powell notes, MacIntyre assumes "the interdependence of reason and tradition" because "the standards of rational justification themselves emerge from and are part of a history in which they are vindicated by the way in which they transcend the limitations of and provide remedies for the defects of their predecessors within the history of that same tradition." POWELL, *supra* note 9, at 21 (quoting MACINTYRE, WHOSE JUSTICE?, *supra* note 3, at 7). This is a critical MacIntyrean insight: There is no universal form of reason hovering outside of a particular tradition; reason is always situated within and shaped by particular traditions, their participants, and the argumentative practices that unfold within them. In MacIntyre's pithy summary of reason-shaping traditions: "To justify is to narrate how the argument has gone so far." MACINTYRE, WHOSE JUSTICE?, *supra* note 3, at 8.

97 MACINTYRE, WHOSE JUSTICE?, *supra* note 3, at 383.

98 MACINTYRE, AFTER VIRTUE, *supra* note 3, at 222.

course; they can weaken or strengthen; they can even die.[99] In H. Jefferson Powell's words, "it is possible for a tradition's debates to put in question the tradition itself."[100]

Powell was the first legal scholar to connect MacIntyre's account of tradition to constitutional interpretation, and it was his account in *The Moral Tradition of American Constitutionalism* that most shaped my understanding of assembly as a tradition in *Liberty's Refuge*.[101] Writing three decades before the recent scholarly and judicial attention to traditionalism, Powell asserted that "American constitutionalism became at an early stage a tradition of rational enquiry in MacIntyre's terms."[102] Using MacIntyre's example of chess as a baseline comparison, Powell examined the ways in which constitutionalism showed itself to be a social practice, embodied in a set of institutions, and extended over time.[103] Powell also noted one key difference: "The demise of chess as a living tradition would not of necessity be of great consequence to those not involved in it; the death of constitutionalism unavoidably affects the lives of all who live in the United States."[104]

Powell concluded rather bleakly that "[t]he constitutional community now has fractured irreparably."[105] Perhaps at one time American constitutionalism had reflected an ongoing argumentative practice whose participants—and principally the Justices of the Supreme Court—engaged in a shared pursuit of the form of rational inquiry and justification. But on Powell's account, by the 1990s, the Justices had "abandoned any effort at deliberation and consensus,"[106] "[p]articular constitutional positions are defended by an automatic rejection of any argument remotely in tension with them,"[107] and the Court "lurches from decision to decision with no obvious rationale other than the specific substantive preferences of a majority of the justices."[108]

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99 *Id.* at 193–94 ("Practices never have a goal or goals fixed for all time—painting has no such goal nor has physics—but the goals themselves are transmuted by the history of the activity.").

100 POWELL, *supra* note 9, at 31. MacIntyre calls this an "epistemological crisis." MACINTYRE, WHOSE JUSTICE?, *supra* note 3, at 361–62.

101 *See supra* note 10.

102 POWELL, *supra* note 9, at 14.

103 *Id.* at 33–37, 261–62. In *After Virtue*, MacIntyre used chess to illustrate the difference between goods external to a practice (the money or fame that might come from chess excellence) and goods internal to the practice (the mastery, creativity, and excellence that come from learning to play chess at a high level). MACINTYRE, AFTER VIRTUE, *supra* note 3, at 188–91. Internal goods can only be achieved by participating in the practice well, and they are shared by all who value chess as a practice. *Id.*

104 POWELL, *supra* note 9, at 262.

105 *Id.* at 274.

106 *Id.* at 263.

107 *Id.*

108 *Id.* at 277.

If the constitutional community had fractured irreparably by 1993, there's little evidence of its renewal in the ensuing years. But perhaps Powell was a bit too bleak—perhaps there was then, and remains today, more of a shared practice underlying constitutional interpretation. After all, the vast majority of opinions issued by the Supreme Court reflect more consensus than mere ideological divides,[109] and some of the Court's more fractured opinions reflect surprising coalitions and splits that resist easy ideological classifications.[110] For much of its work, though certainly not all of it, the Court arguably maintains a commitment to a shared mode of reasoning.[111] It may be that the participants in the American democratic experiment lack shared ends, but perhaps those participating in the legal system undergirding that experiment still maintain some sort of minimal consensus.

One candidate for what we might call the minimal consensus for a tradition of American constitutionalism in the MacIntyrean sense is a set of judicial commitments to the processes, procedures, and protections necessary to allow the continued existence of an ongoing political community whose members disagree so sharply over substantial commitments and values that they can no longer name a shared end. Without shared ends about ultimate questions of the good, the true,

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109 *See* Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129 (2012) (demonstrating that consensus often arises from case characteristics outweighing ideology rather than purely ideological alignment); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015) (observing that high rates of unanimity challenge theories emphasizing ideological conflict as the engine of decisionmaking); *see also* Trump v. Anderson, 144 S. Ct. 662, 671 (2024) (per curiam) (unanimous ruling striking down state attempts to disqualify federal candidates under Section 3 of the Fourteenth Amendment); Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2392 (2024) (majority opinion by Justice Kagan, joined in full by Chief Justice Roberts and Justices Sotomayor, Kavanaugh, and Barrett; joined in part by Justice Jackson; judgment joined by Justices Thomas and Alito); Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1506 (2025) (8–0 limitation on National Environmental Policy Act review requirements).

110 *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487 (2023) (Chief Justice Roberts, joined by Justices Sotomayor, Kagan, and Jackson; concurrence in part by Justice Kavanaugh) (coalition of conservative and liberal justices upholding Section 2 Voting Rights Act claims, protecting minority voting rights against a redistricting plan); Patel v. Garland, 142 S. Ct. 1614, 1627 (2022) (holding that federal courts lack jurisdiction to review the factual determinations underlying discretionary immigration relief). Justice Barrett delivered the majority opinion, joined by Chief Justice Roberts, Justices Thomas, Alito, and Kavanaugh; Justice Gorsuch dissented, joined by Justices Breyer, Sotomayor, and Kagan. *Id.*

111 The relative agreement may also reflect agenda-setting at the certiorari stage and strategic decisions by litigators. *See, e.g.*, Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 428 (2002) (finding that Justices respond to political and institutional constraints when deciding which cases to grant certiorari); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022).

and the beautiful, a tradition of constitutionalism is unlikely to address persuasively substantive constitutional holdings in areas like abortion and gun control. But that still leaves open the possibility of procedural protections focused on means rather than ends, preserving access to and engagement with a political process that resolves clashes between incommensurable values.[112]

III. ASSEMBLY AS A CASE STUDY FOR TRADITIONALISM

The rich legacy of the Assembly Clause amply supports both the Supreme Court's doctrinal focus on history and tradition and recent scholarly efforts to situate tradition more broadly within concrete practices and activities of political and everyday actors outside the pages of judicial decisions. As importantly, the Court's neglect of assembly in the past sixty years leaves the right without any contemporary doctrinal framework. Unlike the complex contours of the Court's approach to speech and association, assembly today is unconstrained by layers of context-specific and content-specific caselaw.

A. The Tradition of Assembly

The right of assembly reflects a long history of embodied social practices. In the 1790s, the Democratic-Republican Societies were perhaps the first American groups to claim the right of assembly.[113] These early voluntary political societies formed outside of electoral structures and gathered in taverns, meeting halls, and streets.[114] Their practices—feasts, festivals, resolutions, and circulars—represented a model of participatory democracy rooted in continuous, performative political engagement.[115] More broadly, as Tabatha Abu El-Haj has shown, elections and other public celebrations in the early republic "provided opportunities for citizens (ordinary and elite, enfranchised and disenfranchised) to participate in politics."[116] These were not just moments of expression; they embodied a way of life that gave form to the people's

112 Not insignificantly, the efficacy and integrity of the procedural protections would also require unhindered access to basic political activities like voting and campaigning.

113 INAZU, *supra* note 1, at 6; *see* Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1527 (2004).

114 *See* INAZU, *supra* note 1, at 26–29; Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 627 (2012).

115 INAZU, *supra* note 1, at 26–27.

116 Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 554 (2009). Abu El-Haj notes that elections "were typically multiday affairs filled with processions, public meals, drink, and merriment, in which large numbers of enfranchised and disenfranchised Americans participated." *Id.* at 554–55 (footnote omitted).

right to assemble. And the participants in these societies regularly invoked that right in their gatherings.[117]

During the Antebellum Era, Southern lawmakers understood the power of assembly and systematically denied it to enslaved and free African Americans.[118] In the North, female abolitionists and suffragists relied on the practice of the convention—a ritualized, deliberative space with deeply symbolic meaning.[119] These movements demonstrated that the form and structure of gathering—conventions, worship, parades—were central to dissent and identity formation, not merely instrumental to expression.

In the late nineteenth century, local governments began enacting ordinances requiring permits prior to public gatherings.[120] Abu El-Haj notes that state supreme courts largely concluded that "[t]he risks of disorder and of interfering with the rights of passersby were not considered sufficiently serious to justify the ordinances."[121] According to Abu El-Haj, "[t]heir 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."[122]

A wide range of social movements used assembly to challenge the social and economic order during the Progressive Era: striking workers,[123] suffragists in pageants and protests,[124] and African Americans in church-led mobilizations.[125] These assemblies were often as much about embodied solidarity—marching, striking, praying—as about articulate demands. They made visible a pluralistic political will through social rituals. These efforts continued during the Civil Rights Era, and Martin Luther King Jr. repeatedly invoked the right of assembly in his public messages.[126] More recently, the right of assembly has been lived

117 *See* INAZU, *supra* note 1, at 26–27.
118 *Id.* at 30–31.
119 *See id.* at 6, 33.
120 Abu El-Haj, *supra* note 116, at 569.
121 *Id.* at 571.
122 *Id.*
123 *See* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1817–18.
124 *See* INAZU, *supra* note 1, at 45.
125 *Id.* at 45–47.
126 *Id.* at 61.

and asserted by an ideologically broad cross-section of anti-abortion,[127] Black Lives Matter,[128] and COVID-restrictions protestors.[129]

Of course, not all assemblies have served democratic ends. Some violent assemblies have tested the limits of what a pluralistic democracy can tolerate. In the Progressive Era, some labor strikes turned violent, and during the Civil Rights Era some protests similarly threatened life and property.[130] More recently, some Black Lives Matter protests, the 2017 "Unite the Right Rally" in Charlottesville, Virginia, and the January 6 attack on the Capitol have all given way to violence.[131] It is important to name violent assemblies and riots as falling outside the tradition of peaceable assembly. Recovering the Assembly Clause through a tradition-based lens does not mean romanticizing assembly but rather distinguishing the conditions that make it a legitimate expression of democratic dissent rather than a vehicle of coercive intimidation.[132]

Throughout American history, assembly has not simply been a legal claim but a mode of life. Movements claimed the right not just to speak but to be together in particular ways—to march, to meet, to pray, to convene. In fact, the right of assembly as an embodied social practice not only constitutes a tradition but also helps give form to what Charles Taylor calls a "social imaginary"—the way people collectively "imagine their social existence, how they fit together with others . . .

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127 *See* Brief Amicus Curiae of the National Hispanic Christian Leadership Conference et al. in Support of Petitioners at 6, McCullen v. Coakley, 573 U.S. 464 (2014) (No. 12-1168).

128 *See* Brief of Amicus Curiae First Amendment Scholar John D. Inazu in Support of Petitioner at 2, Mckesson v. Doe, 144 S. Ct. 913 (2024) (No. 23-373).

129 *See, e.g.*, Ramsek v. Beshear, 468 F. Supp. 3d 904, 908, 914 (E.D. Ky. 2020); Beahn v. Gayles, 550 F. Supp. 3d 259, 277–79 (D. Md. 2021).

130 Crain & Inazu, *supra* note 123, at 1817–19; *see, e.g.*, *Watts Rebellion (Los Angeles)*, STAN. UNIV., THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/watts-rebellion-los-angeles [https://perma.cc/5T8Z-W9BS] (last visited July 10, 2026).

131 John Inazu, *Incitement, Enthusiasm, and the Dangers of Negligent Protest*, 6 J. FREE SPEECH L. 801, 814–20 (2025).

132 This line between legitimacy and extra-constitutionality is not self-evident and will itself require normative and persuasive argumentation. Scholars, litigators, and judges will have to argue, for example, whether general social and political deference to peaceable assembly is the most plausible account of the history and tradition of assembly, or whether the tradition is better understood as either a history of illegitimate violent assembly or illegitimate state suppression of peaceable assembly. For an example of these kinds of tensions and ambiguities in a different post-*Bruen* context, see Chad Flanders, *Flag* Bruen*-ing:* Texas v. Johnson *in Light of The Supreme Court's 2021–22 Term*, 2022 U. ILL. L. REV. ONLINE 94, 108 (noting that "despite their uniformity and their number, [laws against flag burning] may not really count for all that much in helping us get at the scope of the right of 'freedom of speech'" and suggesting the possibility that "we could even write them off as a result of a kind of hysteria coming in the late 19th century, and surging up again during the 1960s—a lot of people just happened to get caught up in something, and didn't follow the Constitution").

and the deeper normative notions . . . which underlie these expectations."[133] Assemblies—whether abolitionist gatherings, labor strikes, or civil rights marches—do more than express ideas; they enact a shared sense of political agency, moral purpose, and collective identity. In Taylor's terms, these practices are not merely governed by ideas but are "carried in images, stories, [and] legends,"[134] shaping how people understand their place in a democratic order.

Consider Taylor's account of how a protest fits within our existing social imaginary:

> Let's say we organize a demonstration. This means that this act is already in our repertory. We know how to assemble, pick up banners, and march. We know that this is meant to remain within certain bounds, both spatially (don't invade certain spaces), and in the way it impinges on others (this side of a threshold of aggressivity—no violence). We understand the ritual.
>
> The background understanding which makes this act possible for us is complex, but part of what makes sense of it is some picture of ourselves as speaking to others, to which we are related in a certain way—say, compatriots, or the human race. There is a speech act here, addresser and addressees, and some understanding of how they can stand in this relation to each other. There are public spaces; we are already in some kind of conversation with each other. Like all speech acts, it is addressed to a previously spoken word, in the prospect of a to-be-spoken word.
>
> The mode of address says something about the footing we stand on with our addressees. The action is forceful; it is meant to impress, perhaps even to threaten certain consequences if our message is not heard. But it is also meant to persuade; it remains this side of violence. It figures the addressee as one who can be, must be reasoned with.
>
> The immediate sense of what we're doing, getting the message to the government and our fellow citizens that the cuts must stop, say, makes sense in a wider context, in which we see ourselves as standing in a continuing relation with others, in which it is appropriate to address them in this manner, and not say, by humble supplication, or by threats of armed insurrection. We can gesture quickly at all this by saying that this kind of demonstration has its normal place in a stable, ordered, democratic society.[135]

The repeated performance of and claim to assembly over time reinforces a social imaginary in which ordinary people can act publicly together to seek justice, challenge authority, and affirm dignity—a

133 CHARLES TAYLOR, A SECULAR AGE 171 (2007).

134 *Id.* at 172.

135 *Id.* at 173–74 (footnote omitted).

vision that both sustains and is sustained by constitutional protections. These embodied practices resist reduction to abstract rights claims and instead instantiate "the kind of common understanding which enables us to carry out the collective practices which make up our social life."[136] The historical right of assembly is not just a legal entitlement but a lived expression of a democratic imaginary, shaping and being shaped by the moral topography of American public life.

These social practices have shaped the right of assembly and grounded its legal salience. If a tradition-based approach to constitutional interpretation requires tracing how communities have lived those rights, then assembly has an especially strong claim: Embodied in the people even when ignored by the courts, its social practices have persisted even as its doctrinal footprint has diminished.

Martin Krygier has observed that efforts to mine the past are rarely "disinterested forays into legal history,"[137] but instead involve looking into the past to determine what of it can be used "to enable responses to present problems."[138] Critics of various forms of traditionalism have noted its potential to entrench outdated societal norms and overlook evolving understandings of rights.[139] Others have worried that resorting to tradition will limit the recognition of rights for marginalized groups whose historical experiences were marked by exclusion.[140]

These concerns and others like them have been raised in the Court's application of history and tradition to a range of constitutional provisions. But unlike expanding Second Amendment rights or constricting Fourteenth Amendment rights, those looking to revive the Assembly Clause confront a substantial historical record that anchors its lived experience in the diverse groups and causes advanced by the people of this country. Political dissidents, suffragists, religious minorities, anti-abortion protesters, abolitionists, labor organizers, conservative Christians, liberal feminists—all of them have asserted, paraded, protested, and championed the right of assembly. This long and varied

136 *Id.* at 172.

137 Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 248 (1986).

138 *Id.* at 250 (emphasis omitted).

139 *See, e.g.*, Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2023) (arguing that the Court's reliance on historical baselines entrenches past inequalities and reflects judicial value choices rather than neutral constraint).

140 *See, e.g.*, Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946 (2024) (arguing that the "deeply rooted" test obscures normative judgments and risks entrenching exclusionary historical baselines that deny rights recognition to marginalized groups); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022) (explaining that many historical firearms regulations were racially discriminatory and warning that reliance on history and tradition risks entrenching those exclusionary practices).

history substantially mitigates concerns of an overly politicized reinvigoration of that right. To the extent there has been a break with the tradition of assembly, it is a relatively modern break that has not guided much of American politics and law prior to its more recent demise.

Relatedly, the Assembly Clause cuts against Calvert and Papandrea's concern that "a text-first approach might require the Court to overrule cases that recognize rights that are not expressly covered by the First Amendment's text."[141] As noted in Part I, the nontextual right of association reflects an unnecessary and superfluous departure from the textual right of assembly.[142] The constitutional "freedom to engage in association for the advancement of beliefs and ideas"[143] is firmly established in the text, history, and tradition of the Assembly Clause, and the Court's cases on the right of association could—and should—be recharacterized as assembly cases.[144]

B. Recovering the Right of Assembly

Turning to traditionalism is not without controversy and ambiguity.[145] Just like originalism, living constitutionalism, or any other interpretive theory, traditionalism does not fully specify outcomes or ensure "right" answers, which is another way of saying that it can be employed toward specific ends. That no interpretive theory is fully determinate should not be surprising; constitutional decisions are not math problems or physics equations to be solved; they are normative human judgments about complex and contested matters.

Attention to post-ratification social practices also introduces variables and uncertainties. Which practices—and which traditions—count? How do we weigh the scope of one social practice against the duration of another? How do we account for longstanding traditions that have diminished or ended in recent years? These normative inquiries underscore the human judgment underlying any constitutional interpretive methodology. And these normative inquiries are heightened by the culture wars focus of the Supreme Court's initial foray into traditionalism in cases like abortion, gun rights, and religion.

Despite these cautions and limits, the rise of traditionalism in scholarly and judicial accounts means that traditionalism itself will likely be part of the tradition of American constitutionalism for the

141 Calvert & Papandrea, *supra* note 77, at 78.

142 *See supra* Section I.C.

143 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

144 For an example of how to revisit the Court's association cases through the lens of assembly, see INAZU, *supra* note 1, at 150–84.

145 *See, e.g.*, Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1486–87 (2023) ("[L]iving traditionalism is ultimately a tragic enterprise."); Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition,"* 98 S. CAL. L. REV. 1, 3–10 (2024).

foreseeable future. For this reason, constructing persuasive tradition-based arguments will likely be more useful and efficacious than ignoring those arguments altogether. And in this context, the right of assembly fits especially well. In fact, the right of assembly is well-positioned—and long overdue—for a resurgence under an interpretive approach that accounts not only for the importance of constitutional text but also for social practices and social meaning over time. How might this happen?

The first step is for the Court to recognize the significance of the right of assembly as distinct from the rights of speech and association. The most promising sign of this possibility in recent years came in the Court's 2021 decision, *Americans for Prosperity v. Bonta*.[146] The case centered on the permissibility of mandated disclosure of membership lists, an issue encompassed by the right of assembly but more recently linked to the concept of "association" than a protest or other form of collective expression.[147] The Court seemed poised finally to correct its interpretive error in *Presser v. Illinois* that had limited assembly to the purposes of petition,[148] a first step toward recovering a more robust and historically accurate understanding of assembly. During oral argument, Justice Kavanaugh asked the petitioner's lawyer, "Do you agree on the text of the First Amendment that the freedom to peaceably assemble is distinct from the freedom to petition the government for a redress of grievances?"[149] Justice Kagan also referenced an amicus brief asking the Court to consider the implications for the right of assembly.[150] Regrettably, the Court's opinion in *Bonta* failed to acknowledge the importance of assembly or clarify its earlier error in *Presser*. But the attention to assembly at oral argument suggests that some of the justices now recognize *Presser*'s historical error and the connection between assembly and association.[151]

146 Ams. For Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

147 *Id.* at 2379.

148 *See supra* notes 20–22 and accompanying text.

149 Transcript of Oral Argument at 36, *Bonta*, 141 S. Ct. 2373 (No. 19-251). Justice Barrett followed later with a related question about the right of assembly. *Id.* at 39.

150 *Id.* at 61.

151 Justice Thomas's concurrence noted that "[t]he text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously." *Bonta*, 141 S. Ct. at 2390 (Thomas, J., concurring). In a major decision released two weeks before *Bonta*, Justice Barrett made a passing reference to the Court's "nuanced" approach to the right of assembly. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) ("I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.").

Bonta came the year before the Court's history and tradition decisions in *Bruen*, *Kennedy*, and *Dobbs*, and thus appeared on the early side of the Court's exploration of tradition as an interpretive methodology. Looking ahead, a better vehicle to test the suitability of history and tradition as an interpretive methodology for the right of assembly would challenge a government restriction on collective expression in the context of a protest or a denial of generally available funding. Strengthening protections in these settings does not require us to agree on deep questions of identity, belief, or ultimate purpose. But it does require that we find provisional, workable ways to live together amidst our differences. The practices of assembly—protesting, meeting, praying, gathering—are not just expressive acts; they are the civic grammar through which those pluralistic commitments are lived and negotiated. Rooting a constitutional doctrine around these commitments would affirm that constitutional meaning should emerge not only from text and history but also from the durable social practices that instantiate democratic life over time.

This approach has concrete implications for contested areas of First Amendment doctrine. Take, for example, protest restrictions. The doctrinal shift from assembly to speech has permitted increasingly burdensome regulations on protest activity, particularly through the lens of content-neutral time, place, and manner rules. A tradition-based reading of the Assembly Clause could realign the inquiry toward the historic and performative dimensions of collective protest. Rather than asking whether restrictions are merely neutral on their face, courts might consider whether such restrictions impair the socially embedded practices—marches, vigils, rallies—that have long constituted political engagement in American life. This would not render protest immune from regulation, but it would restore the presumption that public protest is a protected and participatory democratic act, not a disruption to be tolerated or suppressed at the government's discretion.

The Assembly Clause also offers a way to rethink access to generally available public benefits. Current doctrine tends to assess whether government restrictions on funding or access to public spaces burden expressive association or religious identity. But these categories can obscure the more fundamental question: Whether a group's ability to gather, organize, and act collectively is being hampered in ways inconsistent with our constitutional tradition. From university student groups to community organizations in public libraries, the enduring tradition of assembly suggests a presumptive right for diverse groups—including unpopular, minoritized, or nonconforming ones—to access shared civic spaces. A revitalized Assembly Clause could prevent bureaucratic gatekeeping that favors ideological conformity and

marginalizes dissenting voices. In this way, assembly is part of a structural commitment to pluralism—not just a right to speak, but a right to show up together.

For litigators, reviving the Assembly Clause begins with claiming its protections. Too many First Amendment challenges bypass the assembly claim altogether, defaulting to speech or association frameworks that lack the historical and textual grounding of assembly. Litigators can shift this pattern by explicitly framing collective action—whether marches, protests, membership meetings, or vigils—as exercises of the right of assembly. In practice, this might come as a secondary claim after arguing first on grounds of speech or association within current doctrine. But given that a majority of Justices currently on the Supreme Court emphasize the importance of constitutional text, litigators should not shy away from asking lower courts to address the existence and meaning of "the right of the people peaceably to assemble."[152]

Contemporary claims should also assert the high protections that used to accompany the right of assembly.[153] Courts may need to develop the precise level of scrutiny over a series of decisions, but they should at a minimum recognize the fundamental importance of assembly as one of the five rights in the First Amendment and the longstanding understanding that peaceable assembly is limited only by "the gravest abuses, endangering paramount interests."[154] This level of elevated protection is a far cry from the weakened protections courts have developed under expressive association and speech-based time, place, and manner restrictions.[155]

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152 U.S. CONST. amend. I.

153 *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule . . . ."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("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."); *see also* Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (Black and Douglas, JJ., concurring) ("[F]reedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right . . . .").

154 Thomas v. Collins, 323 U.S. 516, 530 (1945) (Because of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."). Note, too, that the appropriate level of constitutional scrutiny is conceptually a different question than whether the right of assembly retains constitutional significance under a history and tradition interpretive methodology.

155 *See* Inazu, *supra* note 91 (detailing current weaknesses of constitutional protections against unlawful assembly laws and declarations); Inazu, *supra* note 23, at 1180–82

Arguments for assembly should be supported with evidence of embodied social practices: the historical continuity of the form of gathering, its role in political identity formation, and its connection to dissenting or marginalized viewpoints. Even if trial courts remain slow to recognize assembly on its own terms, building the record and pressing the argument can lay the groundwork for appellate review. In this way, strategic litigation becomes part of the tradition it seeks to vindicate—an ongoing embodied argument about the constitutional goods worth preserving.

CONCLUSION

The right of assembly is neither obsolete nor lost—it is obscured. Obscured by historical error, sloppy jurisprudence, and a failure to prioritize constitutional text. A tradition-based interpretive method offers a path toward restoring the right of assembly to its proper role in American constitutional law and culture, one rooted in the practices of dissent, protest, and political formation that have long defined American life. Properly understood, the Court's turn to history and tradition should lead not to an ossified jurisprudence but to one that honors the longstanding practices of a free people. The Assembly Clause is thus not just compatible with traditionalism—it exemplifies it. The remaining hurdle is not a theoretical or conceptual puzzle but a judicial willingness to take seriously a constitutional right that has been with us since the beginning and, although ignored and diminished in recent caselaw, has never left the people.

(detailing current weaknesses in speech-based time, place, and manner doctrine); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 165–67, 181–97 (2010) (detailing flaws of intimate and expressive association and collecting cases denying associational protections); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (rejecting claim of all-male expressive association to exclude women); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 695 (2010) (characterizing associational burdens on religious group as "textbook viewpoint neutral" under speech-based public forum doctrine); Holder v. Humanitarian L. Project, 561 U.S. 1 (2010) (rejecting speech and association claims by individuals seeking to associate with and advocate on behalf of certain foreign political groups). The lack of meaningful assembly protection is also evident in the Fifth Circuit's recognition of liability akin to "negligent protest" in *Doe v. Mckesson*, 71 F.4th 278, 300, 302 (5th Cir. 2023), prior to an indirect curtailing of that doctrine in light of *Counterman v. Colorado*, 143 S. Ct. 2106 (2023). *See* Ford v. Mckesson, 739 F. Supp. 3d 344, 352–53 (M.D. La. 2024), *rev'd*, 171 F.4th 332 (2026).